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Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
FOR DELIVERY CALL OF RANGEN,
INC.'S WATER RIGHT NOS. 36-02551
& 36-07694

(RANGEN, INC.)

Docket No. CM-DC-2011-004

**RANGEN, INC.'S RESPONSE IN
OPPOSITION TO IGWA'S
PETITION TO STAY
CURTAILMENT**

COMES NOW, Rangen, Inc. ("Petitioner" or "Rangen"), by and through its attorneys, and hereby submits the following response in opposition to *IGWA's Petition to Stay Curtailment, and Request for Expedited Decision*, filed by the Idaho Ground Water Appropriators, Inc. (IGWA) on February 11, 2014.

I. BACKGROUND

1) Rangen filed its most recent *Petition for Delivery Call* more than two years ago on December 13, 2011.

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2) At that time Rangen was suffering a shortage of water at its Research Hatchery. This shortage is ongoing and pre-dates Rangen's first Delivery Call in 2003.

3) After 16 days of hearing testimony and extensive briefing by all parties, the Director entered his decision on Rangen's Petition on January 29, 2014.

4) The Director concluded that pumping by junior ground water users has materially injured Rangen. The Director also concluded that Rangen is diverting and using water efficiently, without waste and in a manner consistent with the goal of reasonable use. The material injury suffered by Rangen is ongoing and cumulative.

5) Based upon the finding of material injury, the Director ordered curtailment of water rights within Water District 130 bearing priority dates junior to July 13, 1962. The Director's curtailment order requires holders of those consumptive ground water rights to refrain from diverting ground water under those rights beginning March 14, 2014. The Director phased in curtailment and recognized that the parties could propose mitigation plans.

6) On February 11, 2014 IGWA filed *IGWA'S Petition to Stay Curtailment, and Request for Expedited Decision*. The primary basis for the request is the perceived unfairness of curtailing shortly before an irrigation season.

7) Rangen anticipated that some variant of this argument would eventually be raised. Nearly two years ago Rangen asked that junior-priority groundwater pumpers be issued notices of possible curtailment so that they could be prepared in the event a curtailment order was issued just prior to the beginning of the irrigation season (at the time the request was made, the Director anticipated issuing a final order on Rangen's call by April 1, 2013). *See Transcript of May 24, 2012 Hearing* ("Transcript") attached as *Exhibit 3 to Affidavit of J. Justin May in Opposition to Idaho Cities' Petition for Limited Intervention and in Opposition to IGWA's Petition to Stay*

Curtailment ("May Affidavit"). The Director advised counsel for IGWA that it had the responsibility of notifying its members ahead of a formal hearing of the possibility of curtailment. The Director stated:

My inclination is that we place that burden upon [counsel for IGWA]. She's representing those folks, the groundwater users and they should, I guess, have the ability to anticipate the possibility of curtailment. As we go through I'm not sure I want to be issuing a notice ahead of some decision. I think that's a little difficult. When the notices were issued I think they were issued after Carl Dreyer's [sic] initial orders, and so it was based on an order that had been issued, an evaluation of where we were at from the standpoint of storage in the system or, you know, what was predicted as a water year, and those were sent out as a result. But I think we're premature.

Transcript, p. 44, lines 10-22 (emphasis added).

IGWA unequivocally rejected the Director's determination:

Ms. McHugh: *Just for the record, we aren't planning to send out any notices.*

Mr. Haemmerle: You've got a lot of confidence. That's good.

Ms. McHugh: I'll represent the IGWA ground water appropriators and the board, but we're not going to send out notices to individual groundwater users.

Transcript, p. 44, line 23 – p. 45, line 4. After this exchange, the Director commented that everyone needed to be prepared for the possibility of an April 1st curtailment order. *See Transcript, p. 45, lines 5-13.*

8) On September 26, 2012, IGWA filed a *Motion to Continue Hearing and Request for Expedited Decision* seeking to delay the hearing date in this matter from January 28, 2013 to March 11, 2013. Rangen opposed that motion arguing that:

IGWA is looking for any way to delay the hearing of this matter because even a slight delay will probably mean that curtailment will not be ordered in 2013 even if Rangen prevails on its material injury claim. The Director has made it clear that April 1 is the "drop dead" date for ordering curtailment and that he must have time to issue a decision before that date or curtailment will not be ordered.

Response in Opposition to IGWA's Motion to Continue Hearing and Request for Expedited Decision, p. 18.

9) Following the discovery of the so-called Mud Lake error in October 2012, the Director issued an Order suspending the hearing in this matter “until further notice.” In that Order the Director stated:

The Director must use the best available science, and at the same time must also protect senior-priority rights by enforcing an order finding material injury. **Therefore, the parties should be fully aware that if material injury is found, the order finding material injury will be enforced, regardless of the time of year in which it is issued.**

Order Suspending Hearing and Setting Status Conference, p. 2 (emphasis added).

II. LEGAL STANDARD

Once the Director makes a determination of material injury, Rule 40 of the Conjunctive Management Rules dictates that the Director shall either: 1) “Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users who rights are included within the district, . . .” or 2) Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01. To lessen the economic impact the Director may, in specified circumstances, phase in the curtailment over a period up to 5 years. *Id.*

As the Idaho Supreme Court recently held in *In the Matter of Distribution of Water to Various Water Rights*, ___ Idaho ___, ___ P.3d ___ (2013 Opinion No. 134), “[t]he Conjunctive Management Rules require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan.” In that case the Director of the Department of Water Resources allowed out-of-priority diversions pursuant to “replacement water plans,” which were not subject to the procedural requirements of a mitigation plan. “The Director reasoned that approval as a mitigation plan would require curtailment of junior ground water users without a hearing because they could not formulate a mitigation plan until they knew how much water

would be owed to the [senior water user].” *Id.* The District Court determined that “replacement water plans permitted the rules governing mitigation plans to be circumvented.” The Supreme Court “affirm[ed] the district court’s holding that the Director abused his discretion by failing to comply with the procedural framework applicable to mitigation plans when he approved replacement water plans.” *Id.*

IGWA’s present motion seeks a stay of the Director’s Order to allow out-of-priority diversion for the entire 2014 irrigation season without the approval of a mitigation plan. The basis cited for this request is IDAPA 37.01.01.780, which provides generally that “[a]ny party or person affected by an order may petition the agency to stay any order, whether interlocutory or final.” In the context of a petition for review, Idaho Code § 67-5274 similarly provides that “[t]he agency may grant, or the reviewing court may order, a stay upon appropriate terms.” I.C. § 67-5274. This language provides little, or no, guidance as to what might be the appropriate terms for a stay that would be consistent with the Conjunctive Management Rules.

III. ARGUMENT

The effect of the stay sought by IGWA would be to allow out-of-priority diversions for an entire irrigation season without a properly approved mitigation plan in violation of the Conjunctive Management Rules. The year-long stay requested by IGWA is not warranted by the circumstances of this case. Such a stay would allow IGWA to circumvent the rules and procedures for the approval of mitigation plans, be inconsistent with the Conjunctive Management Rules, and would be inconsistent with the Director’s previously recognized obligation to protect senior priority rights. IGWA has provided no compelling reason or justification for the Director to reverse his prior statement of intent to enforce an order finding material injury “regardless of the time of year in which it is issued.”

A. No further hearing is required prior to curtailment.

IGWA’s reliance upon Judge Melanson’s decision in the *Clear Springs Foods, Inc. v. Blue Lakes Trout Farm, Inc.* delivery call case is misplaced. The procedural history of that case

is significantly different. As IGWA acknowledges, the Director has already held an extensive hearing in this matter and made a determination that Rangen is being materially injured by junior ground water pumping. IGWA has not provided any authority suggesting that there is a due process right to a further hearing on mitigation before the order finding material injury may be enforced. Indeed the Idaho Supreme Court's decision in the Surface Water Coalition delivery call case indicates that allowing out-of-priority diversions following a determination of material injury would violate the Conjunctive Management Rules.

B. Whether IGWA will be able to get a mitigation plan approved is not relevant to the enforcement of the Director's Order finding material injury.

Whether one or more of the junior priority ground water users will be able to get a mitigation plan approved is not relevant to whether the Director's Order finding material injury should be enforced. The Conjunctive Management Rules provide the exclusive procedure for evaluating and approving mitigation plans. See *In the Matter of Distribution of Water to Various Water Rights*, ___ Idaho ___, ___ P.3d ___ (2013 Opinion No. 134). Out-of-priority diversions can only be permitted pursuant to a properly enacted mitigation plan. *Id.*

There is simply no way for anyone to evaluate the potential for approval of the mitigation plan that has been submitted by IGWA at this time. The mitigation plan as submitted is simply a list of conceptual, not necessarily feasible, components that might be considered for a mitigation plan. The description of these conceptual ideas is vague and many have been thoroughly evaluated and rejected in the past.

C. Rangen continues to be materially injured by junior-priority ground water pumping.

As the Director found following the extensive hearing conducted in this matter, Rangen is being materially injured by junior ground water pumping. Rangen's injury is long standing and continuing. Rangen has no doubt that planning for curtailment will be difficult for some junior ground water pumpers. Rangen has extensive experience planning for, and coping with,

shortages of water. The impact of curtailment on junior priority water rights, however, is not a basis to avoid enforcement of the Director's Order finding material injury.

IGWA's arguments on the relative impacts of curtailment, equity and the public interest are primarily hyperbole without any support in the record. However, despite the fact that there is no legal basis to grant a stay based upon such rhetoric, a couple of IGWA's statements warrant comment.

IGWA claims that:

Had the Curtailment Order been issued well in advance of the 2014 irrigation season, mitigation could have been provided, or curtailment could have been prepared for, without creating the dire circumstance farmers, businesses, and cities now find themselves in.

IGWA's Petition, at p. 4. Further, "[t]he potential for 157,000 acres to be curtailed on short notice was inconceivable." *Id.* at p. 5. If it is true that IGWA and its members were surprised by the Director's decision, this is shocking. IGWA has known since at least 2003, when Rangen first made a delivery call, that Rangen was short of water. IGWA's expert witnesses have participated in the development and refinement of the ground water model used by the Director to determine the amount of acres to be curtailed since that development began. IGWA's attorneys received the Department's Staff Report, deposed the Department's staff, and participated in 16 days of testimony during the hearing on this matter. During the May 24, 2012 hearing, the Director advised counsel for IGWA that it had the responsibility of notifying its members ahead of a formal hearing of the possibility of curtailment. IGWA unequivocally rejected the Director's suggestion and indicated that they are not going to send out notices to individual groundwater users. After this exchange, the Director commented that everyone needed to be prepared for the possibility of an April 1st curtailment order. In the 2012 *Order Suspending Hearing and Setting Status Conference*, the Director stated "[t]he parties should be fully aware that if material injury is found, the order finding material injury will be enforced,

regardless of the time of year in which it is issued.” IGWA may disagree with the Director’s conclusions, but the Order finding material injury in this case cannot reasonably have been a surprise to anyone.

IV. CONCLUSION

The granting of a stay in these circumstances would be inconsistent with the Conjunctive Management Rules and inconsistent with the Director’s obligation to protect senior water rights. Rangen respectfully requests that IGWA’s Petition to Stay Curtailment be denied.

DATED this 19th day of February, 2014.

MAY, BROWNING & MAY

By


J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 19th day of February, 2014 he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

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