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DEPARTMENT OF
WATER RESOURCES

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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 LITTLE SKY
 FARMS' 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 Little Sky Farms' Petition for Stay of Curtailment and Determination of Proportionate Share of Mitigation Costs.

I. INTRODUCTION AND BACKGROUND

It appears that a dispute has arisen between North Snake Groundwater District ("NSGWD") and Little Sky Farms ("Little Sky"). In accordance with the directive set forth in

the Director's *Order Granting IGWA's Petition to Stay Curtailment* dated February 21, 2014 in this matter, Little Sky has contacted NSGWD to become a non-member participant in the mitigation plans filed by IGWA. It appears from the Petition that Little Sky and NSGWD have not been able to come to terms concerning the amount of money to be paid by Little Sky to become a non-member participant. Little Sky has filed a Petition in this matter seeking a determination of the amount it must pay to become a non-member participant. Rangen is interested in Little Sky's Petition to the extent that Little Sky seeks an order from the Director staying curtailment while Little Sky's Petition is pending. Rangen contends that no stay should be granted, but if it is, it should be on the same terms and conditions as any stay granted to IGWA, and if Little Sky fails to become a non-member participant in NSGWD after a determination of the amount owed, then any stay granted should be lifted until such time as Little Sky files its own mitigation plan.

II. ARGUMENT

1. Rangen has objected to the various petitions and motions to stay curtailment filed by IGWA. See, e.g., *Rangen, Inc.'s Response in Opposition to IGWA's Petition to Stay Curtailment*; *Rangen, Inc.'s Response in Opposition to IGWA's Second Petition to Stay Curtailment*.

2. Rangen contends the Director has a mandatory duty to administer water rights under the prior appropriation doctrine and should not stay administration unless and until there is a properly enacted mitigation plan. Section 42-602 of the Idaho Code states in relevant part: "The director of the Idaho Department of water resources *shall* distribute water in water districts in accordance with the prior appropriation doctrine." I.C. § 42-602 (emphasis added). It is well understood that under the prior appropriate doctrine, "[a]s between appropriators, the first in time

is first in right.” See I.C. § 42-106. Conjunctive Management Rule 40 makes it clear that once the Director determines that a party is being materially injured by junior-priority water use, 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 (emphasis added). To lessen the economic impact the Director may, in specified circumstances, phase in the curtailment over a period up to 5 years. *Id.* The Idaho Supreme Court recently held that the “[t]he Conjunctive Management Rules require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan.” *In the Matter of Distribution of Water to Various Water Rights*, ___ Idaho ___, ___ P.3d ___(2013 Opinion No. 134) (emphasis added).

3. Little Sky is not a member of IGWA or any of IGWA’s groundwater districts. See *Petition*, ¶ 2.

4. Little Sky has not participated in any mitigation efforts undertaken by IGWA or its groundwater districts, including the mitigation efforts for which IGWA and NSGWD received credit in March 2014. See *Petition*, ¶ 11.

5. Even though the Director entered the phased-in curtailment order on January 29, 2014, IGWA has failed to satisfy its first-year delivery obligation. See *Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* entered May 16, 2014 showing that IGWA has been granted credit of 3.0 cfs against its 3.4 cfs obligation during the first year.

6. Little Sky is seeking a stay until such time as its dispute with NSGWD is either decided by the Director or it is resolved. See Prayer for Relief in *Petition*. No one can predict when the dispute will be decided or resolved. This means that the stay Little Sky seeks could actually extend beyond the stay granted to IGWA. In the meantime, Rangen will continue to be injured while curtailment is stayed and the mitigation obligation is not satisfied. Rangen's right to have its water administered in accordance with the prior appropriation doctrine should not be put on hold because of a dispute between NSGWD and a non-member participant.

7. Similarly, there is no assurance that even after a decision is made by the Director regarding Little Sky's proportionate share of mitigation costs that it will actually pay those costs and become a non-member participant.

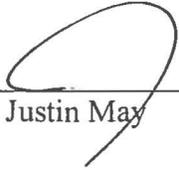
III. CONCLUSION

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 under the prior appropriation doctrine. As such, Rangen respectfully requests that Little Sky's Petition for Stay of Curtailment be denied.

In the event the Petition is granted over Rangen's objection, it should be granted only upon the same terms and conditions of any stay granted to IGWA members (i.e., if the stay granted to IGWA is lifted then any stay issued in favor of Little Sky should also be lifted) and the stay should also be lifted immediately if Little Sky fails to become a non-member participant after the Director's determination of Little Sky's proportionate share of mitigation costs.

DATED this 10 day of June, 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 10 day of June, 2014 he caused a true and correct copy of the foregoing document to be served upon the following:

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