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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE
APPLICATION FOR TRANSFER OF
WATER RIGHT NO. 36-7072
(TRANSFER APPLICATION #79560) IN
THE NAME OF IGWA FOR NORTH
SNAKE GWD, MAGIC VALLEY GWD,
SOUTHWEST IRRIGATION DISTRICT
ON BEHALF OF THE OWNER, SEAPAC
OF IDAHO, INC.

**RANGEN, INC.'S RESPONSE TO
STAFF MEMORANDUM**

Rangen, Inc., by and through its attorneys, submits the following Response Brief to the Staff Memorandum, dated January 27, 2015, drafted by Jennifer Sukow.

I. SUMMARY

The Staff Memorandum does not change any of the arguments made by Rangen, Inc. ("Rangen") in its Closing Brief on the Transfer Application filed by the Ground Water Districts

(“GWDs”). The purpose of this response to the Staff Memorandum is to highlight those arguments previously made in Rangen’s Brief.

II. ARGUMENT

A. Enlargement.

One of the key issues is whether this Transfer constitutes an enlargement. Rangen argued that the transfer does consisted an enlargement for several reasons, and one of those reasons being that water delivered to Billingsley Creek does not make its way back to the Snake River. Therefore, the non-consumptive use of the right is entirely changed to a consumptive water right.

The GWDs argued that there is very little consumption in Billingsley Creek, relying solely on that amount of water which evaporates in Billingsley Creek. The GWDs failed to address all the other forms of “consumption” defined under Idaho Code § 42-202B(1). Under that Section, “consumptive use” is defined as follows: “‘Consumptive use’ means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” By only looking at the evaporation of water in Billingsley Creek, Ms. Sigstedt did not even perform a correct analysis of “consumptive use” under Idaho law. As such, her testimony should be disregarded.

Ms. Sukow, in her Staff Memorandum evaluated the issue of consumption in Billingsley Creek. She concluded:

Because of the complexity of water distribution in Water District 36A, it is difficult to determine what percentage of the 10 cfs will reach the Snake River during the irrigation season if diversion and consumptive use by downstream uses are not prevented. Some will discharge to the Snake River as either surface or subsurface flow, and the impact to the Snake River will be less than 10 cfs. A very conservative approach would be to assume a maximum impact of 10 cfs. A less

conservative approach would be to assume a reasonable value for efficiency of the delivery and irrigation systems to estimate an impact.

Staff Memorandum, p. 2.

The GWDs failed to show how much of the 10 cfs of water would make it back to the Snake River because it did not do a full analysis under Section 42-202B(1). No other evidence exists showing that any water would make its way back to the Snake River. For all these reason, the Director should conclude that the transfer would result in an enlargement. Because of the enlargement, the application should be denied as enlargements cannot be mitigated.

B. Injury.

1. The type of mitigation proposed by the GWDs has been previously rejected by the Department.

Ms. Sukow assumes that yearly aquifer activates of the GWDs would mitigate for any injury caused by the 10 cfs not making its way back to the Snake River. This type of analysis should be rejected based of past decisions of the Department.

For example, *In The Matter of Application to Appropriate Water No. 27-12155 in the Name of the City of Shelley Final Order*, dated November 25, 2009, then Interim Director Spackman addressed the City of Shelley's permit to divert ground water. The permit was objected to by various surface water users on the basis that the "diversion of ground water by Shelley will deplete surface flows in the Snake River." In response, Shelley cited to its participation in a Ground Water District as proof of its mitigation for the injury.

In response to this assertion, the Director noted as follows:

9. Finally, the standard of review is different for determining injury in a delivery call compared to reduction of the quantity of water under existing water rights. In the analysis for the reduction of the quantity of water under existing water rights, the Department must review the impact to each individual water right to

determine whether the quantity of water will be reduced by the diversion and the use proposed by the new application. The Department does not look at the total package of storage water and natural flow water rights held by a protestant and recognize that reductions in water under existing natural flow rights can be made up by storage releases. As a corollary, the Department cannot review, on an annual basis, factors such as “reasonable carryover” and “in-season demand.” **The applicant must show the proposed use will not reduce the quantity of water under existing rights at the time the application is considered by the Department.**

Shelley Order, p. 12. (Emphasis added).

The past mitigation activities cited by Ms. Sukow in her Staff Memorandum are activities which may, or may not, occur. At the very least, these activities must be reviewed on an annual basis to determine whether mitigation was adequate. In *Shelley*, the Director rejected this form of mitigation because the proposed mitigation fails to show that the proposed use will not reduce the quantity of water under exiting water rights at the time the application is considered by the Department. This analysis is consistent with the *Report on IDWR Staff Memorandum on a Technical Review of Expert Witness Reports and Testimony Relative to Water Right Transfer No. 79560 as Part of Mitigation Plan #4 by North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District*, Rangen’s expert report and narrative, dated February 10, 2015, (“Brockway Report”), which reads:

Even though the historical and current aquifer enhancement activities do not mitigate for spring declines or increased consumptive use from the proposed transfer, the unreliability of future aquifer enhancements should be cause to scrutinize any future claims for mitigation plans and transfers as proposed in these proceedings.

Brockway Report, p. 9.

Here, the mitigation depends on predicted and possible activities of the GWDs in calculating the mitigation benefits. These benefits require an annual review and is not the kind of mitigation which can be determined at the time the application is filed.

2. The Staff Memorandum fails to consider the depletive effect of continued ground water pumping when calculating the credits which should be given to the GWDs.

Ms. Sukow determined that the benefits to the Snake River flows from IGWA aquifer enhancement from conversions, CREP, and managed recharge exceeds the impact of the diversion of 10 cfs of Magic Springs water to Rangen.

Brockway, in his Report, determined that Ms. Sukow failed to consider:

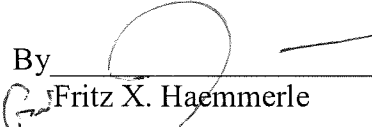
the negative impact on spring flows and Snake River reach-gain that has occurred from historical and current junior ground water pumping. . . This analysis shows that, at steady state, the beneficial impact on all springs in the ESPAM2.1 model total to 56.43 cfs not including the general head boundaries in the ESPAM2.1 model. Table 1 also shows that the historical decrease in the total spring flow due to junior pumping is 315.67 cfs at steady state, again not including the general head boundary cells. The benefit from IGWA aquifer enhancement is therefore 259.24 cfs less than the historical decrease in flow of springs due to junior ground water pumping.

Brockway Report, pp. 6 & 7.

The entire reason the GWDs are engaging in recharge, CREP and conversions is to off-set for the depletive effects of their ground water pumping. Consideration should be given to the depletive effect of ground water pumping in relation to any credit. To be sure, the GWDs do not get the benefit of starting at “0” when they propose any credit for transfers such as this.

DATED This 10th day of February, 2015.

HAEMMERLE LAW, P.L.L.C.

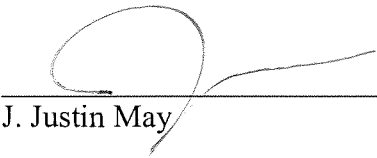
By 
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 10th day of February, 2015, I caused a true and correct copy of the foregoing document to be served using the method indicated upon the following:

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Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov emmi.blades@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☒
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North Snake Ground Water District Lyn Carlquist, Chairman	Hand Delivery ☐ U.S. Mail ☐

c/o Joyce Moreno, Secretary 152 East Main Street Jerome, ID 83338 nsgwd@safelink.net	Facsimile ☐ Federal Express ☐ E-Mail ☒
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