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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
APPLICATION FOR PERMIT NO. 36-
17002 IN THE NAME OF RANGEN,
INC.**

**RANGEN'S BRIEF IN SUPPORT
OF EXCEPTIONS TO
PRELIMINARY ORDER**

COMES NOW the Protestant/Applicant, Rangen, Inc. ("Rangen"), by and through its attorneys, Fritz X. Haemmerle, of Haemmerle Law, P.L.L.C., Justin May of May, Browning and May, P.L.L.C., and Robyn M. Brody of Brody Law Office, PLLC, and hereby files exceptions to the Preliminary Order Issuing Permit issued by Hearing Officer James Cefalo in Permit No. 36-17002 ("Permit"), dated January 2, 2015 (hereinafter "*Order*").

I. OVERVIEW

On September 17, 2014, the Idaho Department of Water Resources (“Department”) held a hearing on the GWD Application at issue. The Department was scheduled to hold a hearing on Rangen’s Permit Application immediately following the close of evidence in the Ground Water Districts’ (“GWDs”) case on Permit Application 36-16976, but prior to doing so, the GWDs stipulated and agreed that Rangen’s Permit Application meets the criteria of Idaho Code Section 42-203(a) and should be issued.

The parties agreed to submit a Closing Brief addressing whether the GWD Application should be granted and whether the permit issued to Rangen should contain subordination language (the parties agreed that this was the only issue that needed to be decided by the Department).

II. ISSUES PRESENTED

1. Whether the Hearing Officer had the authority to apply a subordination condition (Condition 7) to the Permit.
2. Whether Condition 8 is necessary or proper.
3. Whether the Hearing Officer correctly determined that Rangen's other water rights, 36-15501, 36-2551 and 36-7694, had a source limited to the Martin Curren Tunnel, and whether the same water rights authorized diversion from the bridge diversion or the Rangen Box, or the talus slope.

III. ARGUMENT

A. THE HEARING OFFICER ERRED IN SUBORDINATING THE PERMIT.

Rangen contests the subordination clause placed on the Permit. *Order*, p. 8 (Condition 7). The constitutional and statutory law in Idaho is that users are entitled to water “first in time, first in right.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). IDAHO CONS., XV, art 3 and 4. The subordination language eviscerates “first

in time, first in right” principles, and deprives Rangen of the full opportunity to appropriate water as is allowed by the Idaho Constitution.

The Hearing Officer justified the insertion of the subordination language based on past precedent involving hydropower rights. *Order*, p. 6. The Hearing Officer’s reliance on this precedent is misplaced. There exists specific statutory authority for the Department to subordinate rights for power purposes under Idaho Code Section 42-203B. There is no similar statutory authority for the Department to subordinate non-consumptive use permits.

The Legislature’s limited authority to subordinate rights for power purposes is likely derived from the language of the Idaho Constitution. Article XV, Section 3, reads as follows:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

IDAHO CONS. ART XV, § 3. (Emphasis added).

Section 3 arguably appears to authorize the State to deviate from “first in time” principles with respect to water for “power purposes.” There is no similar language for any other purpose. The lack of any specific authority suggests that the State has no authority to

subordinate permits, unless, of course, the applicant is willing to accept the subordination language. In this case, Rangen is not willing to accept the subordination provision.

The Hearing Officer used the vague “local public interest” doctrine as justification for the subordination provision. Idaho Code Section 42-202B defines the “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Here, the Hearing Officer rejected the City of Gooding’s claim of the local public interest. However, without elaboration, the Hearing Officer concluded:

It is not in the public interest to allow large non-consumptive water rights to restrict development within a basin. . . . Because the springs forming the headwaters of Billingsley Creek (the source of water for the proposed permit) have been found to be hydrologically connected to the Eastern Snake Plain Aquifer, if Permit 36-17002 were issued without the proposed subordination condition, it could result in a permanent restriction on ground water development across a large portion of eastern Idaho. **It is not in the public interest to allow large non-consumptive use of water to restrict water development across a significant portion of the state.**

Order, p. 5-6. (Emphasis added).

Contrary to the Department's Constitutional obligation to allow entities of this State to “appropriate the unappropriated water so the State. . . . and that the “priority of appropriation shall give the better right as between those using the water,” the Hearing Officer made an illegal judgment call that the right to develop ground water permits in the ESPA is more important than the development of other non-consumptive water rights. To “protect development” of these ground water rights, the Hearing Officer essentially stated that junior groundwater development should occur without the threat of senior non-consumptive water rights. This decision is contrary to the Idaho Constitution and can in no way be supported by the “local public interest” doctrine.

The Hearing Officer has taken the impermissible position which arbitrarily and capriciously creates two separate classes of water users: (1) non-consumptive use water users, who do not obtain the benefit of the prior appropriation doctrine; and (2) consumptive water users, who do obtain the benefit of the prior appropriation doctrine. Essentially, the Hearing Officer concluded that the development of groundwater rights is more important than the development of fish propagation rights. In that there is no protected or better class of users for water purposes other than domestic uses under Art. XV, Section 3, of the Idaho Constitution, the Hearing Officer created a more favored class of water users by subordinating this Permit. This distinction violates Rangen's right to Equal Protection under the Idaho and Federal Constitutions. *See e.g., Anderson v. Spalding*, 137 Idaho 509, 50 P.3d 1004 (2002).¹

When water rights are issued, there must be respect for the ultimate water law principle ("first in time, first in right"), unless the Department is given authority to subordinate the rights. In this case, there is no authority for the Department to subordinate this type of Application. The Hearing Officer's decision to subordinate Rangen's Permit constitutes an *ultra vires* act without support of the Idaho Constitution, statutes or rules promulgated by the Department. The decision to subordinate is wholly arbitrary and

¹ The rights of appropriators are guaranteed, and with the exception of domestic and power rights, all purposes are treated equal, under Art. XV, Section 3, of the Idaho Constitution. The creation of favored classes of water users is directly contrary to the fact that all classes of water users under the Idaho Constitution are to be treated equal. Because the Constitution creates equal classes of water users and, thus, is the ultimate expression of the Fundamental law in the State of Idaho, the Hearing Officer's creation of favored classes would likely be evaluated under a strict scrutiny test, as opposed to a rational basis test. However, even under a rational basis test, the Hearing Officer's creation of different classes with different Constitutional Protections would amount to the government "treating differently persons who are in all relevant respects alike."

capricious, was done without any lawful authority and constitutes a violation of the Idaho Constitution and laws of the State of Idaho.

B. WHETHER CONDITION 8 IS NECESSARY OR PROPER.

The Hearing Officer included Condition 8, which reads as follows: “This right is for the use of trust water and is subject to review 5 years after the issuance of the permit to determine availability of water and to re-evaluate the public interest.” The “public interest” under trust water does not apply to this permit.

Whether or not a right is subject to the “public trust, for the purpose of trust water rights, is covered by Idaho Code Section 42-203C(1), which reads as follows:

If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B , Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A , Idaho Code, and **whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production** that is defined by agreement pursuant to subsection (5) of section 42-203B , Idaho Code, **and, if so, whether the proposed reduction is in the public interest.**

(Emphasis added).

Section 42-203C(1) has a two-part test. That test is whether: (1) the proposed use “would significantly reduce the amount of trust water available to the holder of the water right used for power production”; **and if so** (2) “whether the proposed reduction is in the public interest.” In this case, there is no evidence that the Rangen Permit would reduce any “power production” right. Therefore, the “public interest” analysis is not applicable or appropriate under Section 42-203C(1). Since no “public interest” analysis was appropriate when the Permit was issued by the Hearing Officer, there is no need, and it would be

inappropriate, to reevaluate the “public interest” at any time after the Permit is issued or perfected.

For these reasons, Rangen requests the removal of Condition 8.

C. THE HEARING OFFICER INCORRECTLY DETERMINED THE SOURCE AND POINT OF DIVERSION OF RANGEN’S OTHER WATER RIGHTS, 36-15501, 36-2551 AND 36-7694.

Rangen disputes the findings of the Hearing Officer as to whether Rangen is entitled to divert from “Billingsley Creek or springs tributary to Billingsley Creek, or whether the three rights identify the Rangen bridge diversion or the Rangen Box as authorized points of diversion.” *See e.g.*, Findings of Fact 6 and 10. Rangen objects to these findings based on Rangen's current appeal of these same issues previously determined by the Director in the *Final Order Regarding Rangen, Inc. 's Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*, in Case No. CM-DC-2011-004 and now on appeal to the Idaho Supreme Court in Consolidated Case Nos. CV-2014-1338 & CV-2014-179, Idaho Supreme Court Docket No. 42772-2015. To preserve Rangen’s arguments in these cases, Rangen disagrees with the Hearing Officer’s conclusions and requests that these findings be eliminated because they are unnecessary to the issuance of the permit.

IV. CONCLUSION

For the foregoing reasons, Rangen’s Application should be GRANTED:

1. Without the Subordination condition, Condition 7.
2. Without Condition 8;
3. Any findings made regarding the source or diversion for water rights 36-15501, 36-2551 and 36-7694 should be eliminated.

DATED this 16 day of January, 2015


FRITZ X. HAEMMERLE
Attorney for Rangen, Inc.

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 16 day of January, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by the method indicated:

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