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OCT 10 2014
DEPT OF WATER RESOURCES
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OCT 14 2014
Department of Water Resources
Eastern Region

Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE
APPLICATION FOR PERMIT NOS.
36-16976 & 36-17002

RANGEN, INC.'S CLOSING BRIEF

COMES NOW the Protestant/Applicant, Rangen, Inc. ("Rangen"), by and through its attorneys, Fritz X. Haemmerle, of Haemmerle & Haemmerle, P.L.L.C., Justin May of May, Browning and May, P.L.L.C., and Robyn M. Brody of Brody Law Office, P.L.L.C., and hereby submits the following Closing Brief on the Application for Permit No. 36-16976 filed by the Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground

Water District, and North Snake Ground Water District (hereinafter these entities are collectively referred to as the “Ground Water Districts” or “GWDs” and their application is referred to as “GWD Application”) and Rangen’s Application for Permit No. 36-17002.

I. OVERVIEW

On September 17, 2014, the Idaho Department of Water Resources (“Department”) held a hearing on the GWD Application. The Department was scheduled to hold a hearing on Rangen’s Permit Application immediately following the close of evidence in the Ground Water Districts’ case, 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).

As explained below, the Department should deny the GWD Application because: (1) the Application is speculative; and (2) the Application is incomplete and no priority date can be established. The Department should also issue Rangen’s Permit without any subordination language.

The bottom line of this case is that the GWDs filed the Application without any ordered mitigation responsibility to Rangen. In fact, five of the applicants still do not have any mitigation obligation to Rangen. The GWDs do not intend to perfect the right for which they have filed, and they do not have the means of perfecting it. Instead, the

GWDs simply intend to assign their Application to Rangen so that Rangen can involuntarily perfect the water right on behalf of the GWDs.

The GWDs intend to force Rangen to use its own facility, with its own overhead, permits and resources, to perfect a water right on behalf of the GWDs. This is the same water that Rangen has been diverting and using since 1962 with full knowledge of the Department. The GWDs intend to perfect their water right without actually engaging in any act to put the water to beneficial use, or even pay Rangen for its efforts to perfect the water right. The precedent set by the GWDs' Application would cause monumental problems for the Department by allowing users to engage in overt speculation in the development of Idaho's water resources.

The GWDs Application is nothing more than clever lawyering to disguise an illegal water grab. This so-called "mitigation plan" does not add a single drop of water to Billingsley Creek to actually compensate for the material injury caused by junior-priority ground water pumping in the Eastern Snake Plain Aquifer ("ESPA"). As such, the GWD Application should be denied.

II. UNCONTESTED FACTS

1. Seven different GWDs filed Application for Permit No. 36-16976 on April 30, 2013. (Exh. 1000).

2. The Application included two purposes of use: fish propagation and mitigation. (Exh. 1004). As for "fish propagation," the GWDs testified they have no intent to raise fish with the water they seek to appropriate. (Tr. p. 75, l. 12-18).

3. As for "mitigation," the GWDs filed their Application in April, 2013. At the time the GWD Application was filed, the GWDs had no ordered "mitigation"

responsibility towards Rangen, or anyone else on Billingsley Creek. Two of the GWDs, the North Snake and Magic Valley GWDS did not have a mitigation obligation towards Rangen or anyone else until January 29, 2014, when the Director issued his Order on Rangen's Delivery Call. (Tr. p. 65, l. 19-24). The remaining five GWDs that filed the GWD Application still do not have a mitigation obligation towards Rangen, or any mitigation towards anyone else. (Tr. p. 66, p. 12-14).

4. The Application stated a place of use (POU) and point of diversion (POD) entirely located on Rangen, Inc.'s real property. (Exh. 1004)

5. The Ground Water Districts do not have the consent or authority to perfect the water they seek to appropriate using Rangen's property. (Exh. 1006).

6. The GWDs have taken no steps or taken any "action" to gain possessory use of Rangen's property. The GWDs did file a Notice of Eminent Domain ("Notice"), but the Notice does not indicate that the GWDs seek to gain access to raise fish at Rangen's Research Hatchery to perfect their Application. (Exh. 1014).

7. The GWD Application was executed by "Thomas J. Budge, Attorney." At the time the Application was filed, there was no Power of Attorney or corporate resolution giving Mr. Budge the authority to execute the Application on behalf of the GWDs. (*See*, Exh. 1000, 1004). No addresses for the Applicant GWDs were listed on the Application. (*Id.*)

8. The Water Master submitted a letter recommending denial of the GWD Application. (Exh. 2042).

9. The parties stipulated that Rangen's Application satisfies the requirements of I.C. § 42-203A(5). (Tr. p. 262, l. 1-7; p. 263, l. 21-24). Rangen amended its quantity

to 21.8 cubic feet per second (“cfs”) during the hearing to reflect highest quantity of water that was measured at the Rangen facility during a five-year look back period from the date of filling. (Exh. 2017).

10. The GWDs’ Application does not add any new water to Billingsley Creek. (Tr. p. 213, l. 13-17).

III. ARGUMENT (GWD Application 36-16976)

A. THE GWD APPLICATION IS SPECULATIVE AND VOID.

1. The Ground Water Districts may not file an Application without ownership of the POD or POU.

The GWD Application designates a POU and POD that are wholly located on Rangen’s property. Because the GWDs do not own the POU or POD designated in their Application, their Application is speculative, and, therefore, void.

The long-standing rule in Idaho and most every other jurisdiction with respect to perfecting a water right on property not owned by the water user is as follows:

It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.

Lemmon v. Hardy, 95 Idaho 778, 780, 519 P.2d 1168 (1974), citing *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931). See also, *Joyce Livestock v. U.S.A.*, 144 Idaho 1, 18, 156 P.3d 502, (2007); *Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348 (1984).

Under this rule, the Court in *Lemmon* held that the “[l]ack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place for use thereof.” *Id.* at 781.

(Emphasis added). To the extent an application is filed without a possessory right in the place of use, the application is void.

Accordingly, the GWD Application should be denied.

2. The GWDs have not taken any necessary steps to gain access to Rangen's property.

As indicated in Section A(1), *infra*, the GWDs have no possessory right in the POU or POD, which are both located entirely on Rangen's property. For this reason alone, the Application is speculative and void on its face.

The Application is also speculative because it fails to satisfy the good faith requirements of IDAPA 37.03.08.040.05.e, which reads as follows:

i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary **for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest.** Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.

IDAPA 37.03.08.040.05.e. (Emphasis added).

Again, the POD and POU for the Application are located on Rangen's property. The Application can be perfected only by raising fish in Rangen's facility. In this case, no "action" has been taken to gain access, or to take, Rangen's facility to raise fish. The GWDs' Notice of Eminent Domain sent to Rangen in August 2014 is not any type of "action" showing the GWDs have actually taken any step towards obtaining an interest in Rangen's property.

The Notice is defective because there is nothing in it advising Rangen that the GWDs intend to gain a possessory interest (i.e. fee title interest) in Rangen's Research Hatchery to raise fish in order to perfect their Application. The absence of this type of notification makes sense because Lynn Carlquist, the Board member who testified on behalf of all of the GWDs, testified that they have no intention of raising fish:

Q. There's two purposes of use for the eminent domain contained in that document, as you can see; correct?

A. Yes

Q. Neither one of those involves the perfecting of the water on Rangen's property; correct?

A. Well, I think they show how we would use that water on Rangen's property.

Q. Okay. You don't intend to place your own people, own employees, on the property to raise fish, do you

A. Not at this time, no.

Q. Okay. And certainly there's nothing in your notice or eminent domain that indicates that that's what you're going to do?

A. To raise fish or to what?

Q. Right. To raise fish –

A. No

Q. On Rangen's property.

A. No.

Q. To actually operate, physically invade our property to raise fish; correct?

A. No.

(Tr. p. 81-82).

Even if the GWDs had sought a possessory interest in Rangen's facility, the

GWDs are also not prepared to raise fish. Rangen owns a NPDES Permit, a CAFO Permit, and a Department of Agriculture Permit authorizing them to operate the Research Hatchery. (Exh. 2020). The GWDs have no such permits.

Most importantly, there is also no legal authority for the GWDs to actually condemn Rangen's property to raise fish. The GWDs have narrow eminent domain powers. The Board of a Ground Water District can only:

. . . exercise the power of eminent domain in the manner provided by law for the condemnation of private property for *easements, rights of way, and other rights of access* of to property necessary to the exercise of the mitigation powers herein granted, both within and without the district.

I.C. § 42-5224 (13). (Emphasis added).¹ Section 42-5224 expressly and unequivocally limits Ground Water Districts' eminent domain powers to situations where they are obtaining easements, rights of way or other rights of access. It does not grant the Districts the power to condemn and take fee title possession of property (i.e., take Rangen's Research Hatchery to raise fish).

Even if the GWD did have the type of eminent domain authority to condemn Rangen's property, the Districts have not provided the type of financial information

¹ Idaho's condemnation statutes specify the three distinct property interests which may be obtained by eminent domain. These three interests are as follows:

7-702. ESTATES SUBJECT TO TAKING. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.
2. An easement, when taken for any other use.
3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

necessary to prove they have the means to condemn. Section 42-205A(5)(d) of the Idaho Code requires an applicant to show that it has the “financial resources with which to complete the work involved.” IDAPA 37.03.08.040.05.f specifies all the types of information which are required under Section 42-203A(5).²

In this case, the GWDs failed to provide the necessary information. The only “financial” information provided is that “[c]onsistent with past actions, the Ground Water Districts have the necessary financial resources to develop the Application.” (Exh. 1046). This information would be required to show the costs and means by which the GWDs would successfully complete an eminent domain proceeding and how the GWDs would satisfy the good faith requirements in filing their Application.

The lack of any “action” to gain access, the lack of intent to raise fish, the lack of permits to actually raise fish, and the lack of legal authority to gain possession of the Research Hatchery, is all evidence that the GWD Application was filed in bad faith and for speculative purposes.

For all these reasons, the GWD Application should be denied in its entirety.

3. The “mitigation” use was speculative at the time the Application was filed.

The GWD Application was filed with a “mitigation” purpose of use. However, at the time the Application was filed (April 2013), there was no ordered mitigation obligation owed by the GWDs. In fact, five of the applicants were determined not to

² The type of information required under Subsection F is as follows: “i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed. ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications.”

have a mitigation obligation to Rangen. (Tr. p. 65, l. 4). Therefore, there was no water upon which the Districts could possibly have filed for under an Application for Permit specifying “mitigation” as a purpose of use at the time the GWD Application was filed.

Where no valid water right is possible, it can be concluded that the application is filed for speculative purposes, not for development of a water right. *Lemmon v. Hardy*, *supra*, at p. 780. Permits for speculative purposes may not be granted, and are void on their face. *Id.*; I.C. § 42-203A(5).

As such, the Department should deny the GWD Application.

4. The entire Application is speculative because none of the GWDs intend to apply any water to a beneficial use.

The Application is also speculative and void under Department rules. Under IDAPA 37.03.08.045.01.b, “[s]peculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use . . . “ (Emphasis added).

In this case, the GWDs testified that they do not intend to perfect the Application by applying water to the beneficial uses specified under the Application. Lynn Carlquist testified as follows:

Q. Now, I take it when you filed this in April of 2013 you had absolutely no intent to raise fish on Rangen’s property?

A. That was not our intent at the time, no.

Q. And today you have no intent of raising fish in Rangen’s property; correct?

A. That’s correct.

(Tr. p. 75, l. 12-18), *see also*, Section A(2), *infra*.

Rather, the Districts’ intent is to assign the permit to Rangen and force Rangen to

perfect the water on their behalf. (Tr. p. 75, l. 23-25; p. 76, l. 2-3). To perfect the Application, the GWD's intend to use Rangen's facility, its permits and staff to perfect the Application wholly located on Rangen's own property. (Tr. p. 72-79). Without the intention to actually apply the water to a beneficial use, the Application is speculative and void.

Idaho Courts have not ruled on whether an Applicant can obtain a permit when it does not intend to apply the water to a beneficial use. However, Colorado and most every prior appropriation jurisdiction have long-standing rules with respect to whether permits can be issued when the Applicant does not have the intent to apply the water to a beneficial use.

For example, in *Colorado River Water Conservation District v. Vidler Tunnel Water Company*, 594 P.2d 566 (Colo. 1979), a seminal case on the definition of speculative permits, the Colorado Supreme Court, citing Constitutional principles nearly identical to Idaho's Water Constitutional Provisions, held that Applications for Conditional Decrees (Application to Appropriate Water), must: (1) have the intent to appropriate the water and an overt act manifesting such intent; and (2) its intent is not based on a speculative sale or transfer of the water to be appropriated.

The *Vidler* court established what has become known as the "anti-speculation doctrine."

Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would as a practical matter discourage those who have need and use for the water

from developing it. **Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains.** Twenty-five years ago this Court emphatically rejected the "claim that mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire right guaranteed them by our Constitution."

Id. at 569. (Emphasis added). The "anti-speculation doctrine" announced in *Vidler* has been adopted by many other jurisdictions. *See e.g., Bacher v. State Engineer of Nevada*, 146 P.3d 793, 799 (Nev. 2006). The doctrine "addresses the situation in which the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does." *Id.* at 799, citing *Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164, 173 n.11 (Colo. 1988).³

Just like Colorado, the Idaho Constitution guarantees the right to appropriate, not speculate, on the development of water resources. IDAHO CONS., Art. XV. Under the Idaho Constitution and the specific definition of "speculation" set forth in IDAPA 37.03.08.045.01.b, the GWDs' Application is speculative because the GWDs have no intent to appropriate the water, and they have no agreement with anyone to develop the water right on their behalf.

5. Mitigation is not an allowable purpose of use.

This is a novel and unique Application. This is the first water right filed for "mitigation." Most "mitigation" purposes are created when a user leaves a part of some other use (i.e., irrigation) behind to address an injury of the use of a particular and

³ "This doctrine precludes speculative water right acquisitions without a showing of beneficial use. Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence. Thus, we agree with this limitation on an applicant's showing of third-party need and adopt the anti-speculation doctrine's formal relationship requirement for Nevada." *Id.* at 146 P.3d 799.

identified water right. For example, in a transfer, a user may be required to leave a component of the original water right in the system as mitigation to address for an injury to a given water right.

Another example is when water rights in a particular ditch system are forfeited or abandoned within the ditch system. The conveyance loss of the right forfeited or abandoned in the ditch is left behind to properly convey the remaining rights in the ditch system. *See e.g.*, 37-22630 (Hiawatha Canal Water Decreed for Conveyance Loss).

The common component of all these “mitigation” uses is that the use is tied to a particular water right and an identified injury. In this case, the mitigation use is not tied to any particular use or injury. The mitigation use, as claimed by the GWDs, can float at any given time depending on whether any ground water right or user in the seven different GWDs have a current “mitigation” responsibility. Again, in this case, five of the GWDs do not currently have any current mitigation responsibility.

To the extent this particular “mitigation” use can float to different water rights and users in the different GWDs, the right is entirely speculative. A user should not be able to claim a water right and hold it for a “rainy day.”

Furthermore, the word “mitigation” does not describe how a water right will be used in any manner that would allow the evaluation of the Section 42-203A(5) factors. In order to evaluate the Application, more information is necessary. The additional information is how the right would actually be used. The GWD Application does not specify a particular use.

In order to evaluate the GWD Application, another use, “fish propagation,” had to be assumed with, and added to, the “mitigation” use. The entire evaluation by the

GWDs' experts assumed the "mitigation" use was, in fact, for "fish propagation." Scott King admitted this fact:

Q. Okay. Is it your opinion, then, all's they have to do is obtain unappropriated water under a permit and do nothing else and it's perfected?

A. No.

Q. Then how is this water right perfected?

A. The water right's perfected by using it for beneficial use within the facility.

Q. Okay. And you understand -- that's clear that's your testimony, that's how this water right gets perfected?

A. That's my understanding of how this water right would be perfected, yes.

Q. All right. So someone's got to file a proof of beneficial use that says the water right is in fact used within the facility for a beneficial purpose, which is, I take it, fish propagation?

A. Correct.

(Tr. p. 233-34).

The fact that the "mitigation" use is evaluated with respect to the "fish propagation" use is also reflected in the GWDs' Application. The POU description for both uses in Section 4 of the Application is the same, and all the uses occur within Rangen's Research Hatchery. (Exh. 1001). If "fish propagation" is the underlying use tied to the "mitigation" use, then the use, as previously stated, is speculative because the GWD's never had the intent of raising fish to perfect the use.

B. UNDER THE RULES OF THE DEPARTMENT, THE APPLICATION MUST NOT BE ACCEPTED BECAUSE IT IS INCOMPLETE.

The Districts' Application cannot be accepted because it is incomplete. The Application is not complete because there is no evidence that the Application was executed properly. IDAPA 37.03.08.035.01.d provides that all applications for a water

right:

shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. **No priority will be established by an incomplete application.**

IDAPA 37.03.08.035.01.d (Emphasis added).

Along with being returned, an incomplete application is not entitled to a priority date. A priority date is only established when an application “is received in complete form.” IDAPA 37.03.08.035.02.b.; *Lemmon v. Hardy, supra*, at p. 781.

One of the requirements for a complete application is a duly authorized signature on the Application. In pertinent part, IDAPA 37.03.08.035.03.b requires:

i. The name and post office address of the applicant shall be listed. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any.

* * *

xii. The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signatory has authority to sign the application. An application in more than one (1) name shall be signed by each applicant unless the names are joined by “or” or “and/or.”

xiii. Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application. The signatory’s title shall be shown with the signature.

* * *

xiv. Applications may be signed by a person having a current “power of attorney” authorized by the applicant. A copy of the “power of attorney” shall be included with the application.

IDAPA 37.03.08.035.03.b (Emphasis added).

Here, the Application was signed by “Thomas J Budge, Attorney.” There is no indication from the face of the Application as to whom Mr. Budge represented. He does not indicate specifically which, if any, of the Districts he was signing for. Furthermore, none of the addresses of the Applicants are included. At the time of filing, there was no “evidence” of any authority. To date, no evidence of authority at the time of the filing of the Application has been submitted to the Department.

During the hearing, the Districts admitted Corporate Resolutions for the North Snake and Magic Valley Ground Water Districts, but no Corporate Resolutions were admitted showing authority for the other five Ground Water Districts. The Resolutions were dated September, 2014. (Exh. 1076, 1077). Likewise, the Districts submitted Powers of Attorney for the Magic Valley and North Snake Ground Water Districts, but no Powers of Attorney were admitted from the other five Ground Water Districts. The Powers of attorney were dated in May, 2014. (Exh. 1073, 1074).

Because no authority has been filed for all the Applicant GWDs, the Application is not complete and no permit can be granted and no priority date can be established. Again, if an application is not complete, the application may not be accepted and must be returned to the applicant. *Lemmon v. Hardy*, supra, at p. 781; IDAPA 37.03.08.035.01.d and 03.b. If the Department does not return the Application, the Applicants still cannot receive any priority date because the Application is not complete even at this late date.

Evidence of Mr. Budge’s authority to file the Application is not a mere formality. It is essential that agents working on behalf of their principals have express

authority to act. This is particularly true with respect to public entities. In this case, Mr. Carlquist's testimony, on behalf of the North Snake Ground Water District, was anything but clear when it came to whether the Board of Directors ever authorized Mr. Budge to file the Application at issue prior to its filing. At best, Mr. Carlquist's testimony establishes that he had telephone "conferences" with fellow board members where they discussed filing the application and that they said yes to get the Application filed. (Tr., p. 61, ll. 14-23). Mr. Carlquist admitted that a meeting of the Board was never convened to consider the filing of the Application. (*See id.*)

A Ground Water District can only act through its Board of Directors. One of the specific powers of the Board of Directors is to "appropriate. . . water within the state. I.C. § 42-5224(8). The Board of Directors can only act through regular monthly meetings or special meetings. *See* I.C. § 42-5223(3). The Board has to give 72-hour advance notice of special meetings and all meetings are public. *See id.* Public agencies, like the GWDs, cannot make decisions during private telephone calls with each other. Public agencies can only make decisions in public during regularly convened monthly meetings or special meetings after proper notice and publication of an agenda. "If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with [Idaho's Open Meeting Law] such action shall be null and void." I.C. § 67-2347.

Because the Board of Directors did not consider the filing of the Application at a properly convened Board Meeting, the Application is null and void and should be denied by the Department.

IV. ARGUMENT (Rangen Application 36-17002)

The parties who appeared at the hearing stipulated that Rangen satisfied, as a matter of fact, all the requirements under I.C. § 42-203A(5) for its Application. (Tr. p. 262, l. 1-7; p. 263, l. 21-24).⁴

The only issue is whether the Department may subordinate the non-consumptive uses in the Application to other consumptive uses. (*Id.*) There is no authority for the Department to subordinate the non-consumptive uses in the Application to consumptive uses. There is no statutory authority to subordinate the rights. There is also no authority to subordinate under the conditions that may be placed on a water right. *See*, IDAPA 37.03.08.050. The GWDs simply wish for a subordination provision that will insulate their ground water pumping use from any meaningful administration, just like they currently enjoy today.

V. CONCLUSION

The GWD Application should be **DENIED** because:

1. The GWDs may not file an Application without ownership of the POD or POU.
2. The GWDs have not taken any necessary steps to gain access to Rangen's property.
3. The "mitigation" use was speculative at the time the Application was filed.
4. The entire Application is speculative because none of the GWDs intend to apply any water to a beneficial use.

⁴ The GWDs' Expert Report of Scott King corroborates the factual basis of Rangen's Application. The only exception Mr. King took was with respect to quantity. This is before Rangen amended its Application to reflect a quantity of 21.8 cfs. Under this quantity, Mr. King substantiates Rangen's Application because he found historic measurements dating back to 1995 of between 9.3 to 44 cfs. (Exh. 1016).

5. Mitigation is not an allowable purpose of use.
6. Under the Rules of the Department, the GWD Application must not be accepted because it is incomplete as it was not properly executed..

Rangen's Application should be **GRANTED** because the parties stipulated that it met the requirements of Idaho Code Section 42-203A(5), and the Application should not contain any subordination clause because there is no statutory authority, or authority under any rule, to subordinate the non-consumptive uses to all consumptive uses.

DATED this 10 day of October, 2014.


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 10th day of October, 2014 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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Randall C. Budge Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 101 South Capitol Blvd, Ste 300 Boise, ID 83704-1391 Fax: 208-433-0167 rcb@racinelaw.ne tjb@racinelaw.net	Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Federal Express ☐ E-Mail ☒
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