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INTROGEN THERAPEUTICS INC

Form 10-KT/A

March 26, 2002

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UNITED STATES SECURITIES AND EXCHANGE  
COMMISSION  
Washington, D.C. 20549

FORM 10-K/A  
Amendment No. 1 to

[X] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d)  
OF THE SECURITIES EXCHANGE ACT OF 1934

FOR THE TRANSITION PERIOD FROM JULY 1, 2001 TO DECEMBER 31, 2001.

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COMMISSION FILE NUMBER: 000-21291  
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INTROGEN THERAPEUTICS, INC.  
(Exact name of registrant as specified in its charter)

|  |  |
|--|--|
| DELAWARE<br>(State or other jurisdiction of<br>incorporation or organization)                | 74-2704230<br>(I.R.S. Employer<br>Identification Number) |
| 301 CONGRESS AVENUE, SUITE 1850<br>AUSTIN, TEXAS<br>(Address of principal executive offices) | 78701<br>(Zip Code)                                      |

(512) 708-9310  
(Registrant's telephone number, including area code)

Securities Registered Pursuant to Section 12(b) of the Act: NONE

Securities Registered Pursuant to Section 12(g) of the Act: COMMON STOCK, \$0.001  
PAR VALUE

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes [X] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any

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amendment to this Form 10-K. [ ]

The aggregate market value of the voting stock (common stock) held by non-affiliates of the Registrant, as of December 31, 2001, was approximately \$57.4 million based upon the last sale price reported on the Nasdaq National Market for December 31, 2001. For purposes of this disclosure, shares of common stock held by persons who hold more than 5% of the outstanding shares of common stock and shares held by executive officers and directors of the Registrant have been excluded because such persons may be deemed to be affiliates. This determination is not necessarily conclusive.

As of December 31, 2001, the Registrant had 21,446,363 shares of common stock, \$0.001 par value, issued and outstanding.

### DOCUMENTS INCORPORATED BY REFERENCE

Certain information required by Items 10, 11, 12 and 13 of Form 10-K is incorporated by reference to the Registrant's proxy statement ("2002 Proxy Statement") for the 2002 Annual Stockholders' Meeting, which will be filed with the Securities and Exchange Commission within 120 days after the close of the Registrant's fiscal year ended December 31, 2001.

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### EXPLANATORY NOTE

This Form 10-K/A is being filed as Amendment No. 1 to the Form 10-K of Introgen Therapeutics, Inc. ("Introgen") filed with the Securities and Exchange Commission on March 20, 2002 ("Form 10-K") for the purpose of amending Item 9 of Part II and Item 14 of Part IV of Introgen's Form 10-K.

1

### PART I

No changes.

### PART II

#### ITEM 9. CHANGES IN AND DISAGREEMENTS WITH ACCOUNTANTS ON ACCOUNTING AND FINANCIAL DISCLOSURE

On March 6, 2002, we dismissed Arthur Andersen LLP as our independent public accountants, effective upon completion of Arthur Andersen LLP's services in connection with the filing of this Annual Report on Form 10-K for the six-month transition period ended December 31, 2001.

Arthur Andersen LLP's reports on our financial statements for each of the years ended June 30, 2000 and 2001 and for the six-month transition period ended December 31, 2001 did not contain an adverse opinion or a disclaimer of opinion, and were not qualified or modified as to uncertainty, audit scope or accounting principles.

The decision to change independent public accountants was recommended by the Audit Committee of our Board of Directors and was approved by our Board of Directors.

During each of the two years ended June 30, 2000 and 2001, the six-month transition period ended December 31, 2001, and through March 20, 2002, there

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were no disagreements with Arthur Andersen LLP on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedures, which disagreements, if not resolved to the satisfaction of Arthur Andersen LLP, would have caused it to make reference to the subject matter of the disagreement in connection with its report.

During each of the two years ended June 30, 2000 and 2001, the six-month transition period ended December 31, 2001, and through March 20, 2002, Arthur Andersen LLP did not advise us of any "reportable events" as described in Item 304(a)(1)(v) of Regulation S-K under the Securities Act of 1933, as amended.

On March 6, 2002, we engaged Ernst & Young LLP as our principal accountants to audit our financial statements.

During each of the two years ended June 30, 2000 and 2001, the six-month transition period ended December 31, 2001, and through March 6, 2002, we did not consult Ernst & Young LLP on any matters described in Items 304(a)(2)(i) or 304(a)(2)(ii) of Regulation S-K.

### PART III

No changes.

### PART IV

#### ITEM 14. EXHIBITS, FINANCIAL STATEMENT SCHEDULES AND REPORTS ON FORM 8-K

##### 3. EXHIBITS

###### (A) EXHIBITS

| EXHIBIT<br>NUMBER<br>----- |    | DESCRIPTION OF DOCUMENT<br>-----   |
|----------------------------|----|--|
| 3.1(a)                     | -- | Certificate of Incorporation as currently in effect                            |
| 3.1(b)                     | -- | Amendment to Certificate of Incorporation, effective as of December 21, 2001   |
| 3.2(4)                     | -- | Bylaws of Introgen as currently in effect                                      |
| 4.1(2)                     | -- | Specimen Common Stock Certificate  |
| 4.2(5)                     | -- | Certificate of Designations of Series A Non-Voting Convertible Preferred Stock |

2

| EXHIBIT<br>NUMBER<br>----- |    | DESCRIPTION OF DOCUMENT<br>-----  |
|----------------------------|----|---|
| 10.1(1)                    | -- | Form of Indemnification Agreement between Introgen and each of its directors and officers |
| 10.2(1)                    | -- | 1995 Stock Plan and form of stock option agreement thereunder                             |
| 10.3(3)                    | -- | 2000 Stock Option Plan and forms of stock option agreements thereunder                    |
| 10.4(3)                    | -- | 2000 Employee Stock Purchase Plan and forms of agreements                                 |

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|              |    |   |
|--------------|----|---|
|              |    | thereunder  |
| 10.5(1)      | -- | Form of Series C Preferred Stock Purchase Agreement among Introgen and certain investors  |
| 10.6(1)      | -- | Registration Rights Agreement, dated October 31, 1997   |
| 10.7(a)(1)   | -- | Assignment of Leases, dated November 23, 1998, by TMX Realty Corporation and Riverway Bank, and other related agreements  |
| 10.7(b)(1)   | -- | Lease Agreement, dated June 7, 1996, by and between Introgen and Plaza del Oro Business Center  |
| 10.7(c)(2)   | -- | Amendment No. 1 to Lease Agreement, effective as of May 9, 1997   |
| 10.7(d)(2)   | -- | Amendment No. 2 to Lease Agreement, effective as of July 31, 1998   |
| 10.7(e)(2)   | -- | Amendment No. 3 to Lease Agreement, effective as of June 29, 2000   |
| 10.8(a)+(1)  | -- | Patent and Technology License Agreement, effective as of July 20, 1994, by and between the Board of Regents of The University of Texas System, M.D. Anderson Cancer Center and Introgen |
| 10.8(b)+(1)  | -- | Amendment No. 1 to Patent License Agreement, effective as of September 1, 1996  |
| 10.9+(3)     | -- | Sponsored Research Agreement for Clinical Study, No. CS 93-27, dated February 11, 1993, between Introgen and M.D. Anderson, as amended  |
| 10.10        | -- | [RESERVED]  |
| 10.11+(3)    | -- | Sponsored Research Agreement No. SR 93-04, dated February 11, 1993 between M.D. Anderson and Introgen, as amended   |
| 10.12        | -- | [RESERVED]  |
| 10.13+(3)    | -- | Sponsored Research Agreement No. SR 96-004 between Introgen and M.D. Anderson, dated January 17, 1996   |
| 10.14        | -- | [RESERVED]  |
| 10.15+(3)    | -- | License Agreement, dated March 29, 1996 between Introgen and SKCC   |
| 10.16(1)     | -- | Consulting Agreement between Introgen and Jack A. Roth, M.D., effective as of October 1, 1994   |
| 10.17(1)     | -- | Consulting Agreement between EJ Financial Enterprises, Inc. and Introgen, effective as of July 1, 1994  |
| 10.18(a)(1)  | -- | Employment Agreement dated as of August 1, 1996 between Introgen and David G. Nance   |
| 10.18(b)(1)  | -- | Amendment No. 1 to Employment Agreement, effective as of August 1, 1998   |
| 10.18(c)(1)  | -- | Amendment No. 2 to Employment Agreement, effective as of February 15, 2000  |
| 10.19(1)     | -- | Service Agreement, effective as of July 1, 1994, between Introgen and Domecq Technologies, Inc.   |
| 10.20(a)+(1) | -- | Collaboration Agreement (p53 Products), effective as of October 7, 1994, between Introgen and RPR, as amended   |
| 10.20(b)+(3) | -- | Addendum No. 1 to Collaboration Agreement (p53 Products), dated January 23, 1996, between Introgen and RPR  |
| 10.20(c)+(1) | -- | 1997 Agreement Memorandum, effective as of July 22, 1997, between Introgen and RPR  |
| 10.20(d)+(3) | -- | Letter Agreement, dated April 19, 1999, from Introgen to RPR regarding manufacturing process for ADVEXIN gene therapy   |
| 10.21(a)+(1) | -- | Collaboration Agreement (K-ras Products), effective as of October 7, 1994, between Introgen and RPR, as amended   |

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| NUMBER<br>----- | DESCRIPTION OF DOCUMENT<br>-----  |
|-----------------|---|
| 10.21(b)(1)     | -- Amendment No. 1 to Collaboration Agreement (K-ras Products), effective as of September 27, 1995, between Introgen and RPR  |
| 10.22+(3)       | -- Collaborative Research and Development Agreement dated October 30, 1998 between Introgen, RPR and NCI  |
| 10.23+(1)       | -- Non-Exclusive License Agreement, effective as of April 16, 1997, by Introgen and Iowa Research Foundation  |
| 10.24+(3)       | -- Option Agreement, effective as of June 1, 1998, by Introgen and Imperial Cancer Research Technology Limited ("ICRT")   |
| 10.25+(3)       | -- Option Agreement, effective as of January 1, 1999, by Introgen and ICRT  |
| 10.26+(3)       | -- Exclusive License Agreement, effective as of July 19, 1999, by Introgen and Corixa Corporation   |
| 10.27(a)        | -- [RESERVED]   |
| 10.27(b)(1)     | -- Letter dated January 28, 2000, from Introgen to LXR Biotechnology ("LXR"), notifying LXR of its exercise of its option   |
| 10.27(c)+(2)    | -- Exclusive License Agreement, effective as of May 16, 2000, by and between Introgen and LXR   |
| 10.28+(3)       | -- Administrative Services and Management Agreement, effective as of January 1, 1999, by and between Introgen and Gendux, Inc.                                      |
| 10.29+(3)       | -- Research and Development Agreement, effective as of January 1, 1999, by and between Introgen and Gendux, Inc.  |
| 10.30+(3)       | -- Delivery Technology License Agreement, effective as of January 1, 1999, by and between Introgen and Gendux, Inc.   |
| 10.31+(3)       | -- Target Gene License Agreement, effective as of January 1, 1999, by and between Introgen and Gendux, Inc.   |
| 10.32+(1)       | -- Non-Exclusive License Agreement, effective as of August 17, 1998, by and between Introgen and National Institutes of Health                                      |
| 10.33           | -- [RESERVED]   |
| 10.34(2)        | -- Master Lease Agreement, effective as of August 4, 1999, by and between Introgen and Finova Capital Corporation   |
| 10.35(2)        | -- Construction Loan Agreement, effective as of July 24, 2000, by and between Introgen and Compass Bank   |
| 10.36+(5)       | -- Restated p53 and K-ras Agreement, effective as of June 30, 2001, by and among Introgen, Aventis Pharmaceuticals Inc. ("API") and Aventis Pharma S.A. ("Aventis") |
| 10.37(5)        | -- P53 Assignment Agreement, effective as of June 30, 2001, by and among Introgen, API and Aventis  |
| 10.38(5)        | -- K-ras Assignment Agreement, effective as of June 30, 2001, by and among Introgen, API and Aventis  |
| 10.39(5)        | -- Registration Rights Agreement, effective as of June 30, 2001, by and among Introgen, API and RPR   |
| 10.40(5)        | -- Voting Agreement, effective as of June 30, 2001, by and among Introgen, API and RPR  |
| 10.41++         | -- Master Services Agreement, effective as of July 9, 2001, between Introgen and PPD Development, LLC   |
| 21.1(1)         | -- List of subsidiaries of Introgen   |
| 23.1            | -- Consent of Arthur Andersen LLP, independent public accountants   |
| 24.1            | -- Power of Attorney (See page 48)  |
| 99.1            | -- Letter re: Arthur Andersen LLP Representations   |

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- (1) Incorporated by reference to the same-numbered exhibit filed with Introgen's Registration Statement on Form S-1 (No. 333-30582) filed with the Securities and Exchange Commission on February 17, 2000.
- (2) Incorporated by reference to the same-numbered exhibit filed with Amendment No. 2 to Introgen's Registration Statement on Form S-1 (No. 333-30582) filed with the Securities and Exchange Commission on September 8, 2000.
- (3) Incorporated by reference to the same-numbered exhibit filed with Amendment No. 3 to Introgen's Registration Statement on Form S-1 (No. 333-30582) filed with the Securities and Exchange Commission on October 4, 2000.
- (4) Incorporated by reference to the same-numbered exhibit filed with Introgen's Quarterly Report on Form 10-Q, for the quarter ended December 31, 2000, (File No. 000-21291), filed with the Securities and Exchange Commission on February 14, 2001.
- (5) Incorporated by reference to the same-numbered exhibit filed with Introgen's Annual Report on Form 10-K for the fiscal year ended June 30, 2001 (File No. 000-21291), filed with the Securities and Exchange Commission on September 19, 2001.

+ Confidential treatment has been granted for portions of this exhibit.

++ Confidential treatment has been requested for portions of this exhibit.

(C) EXHIBITS

See Item 14(3) above.

5

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the Registrant has duly caused this Amendment No. 1 on Form 10-K/A to be signed on its behalf by the undersigned thereunto duly authorized in the City of Austin, Texas, this March 26, 2002.

INTROGEN THERAPEUTICS, INC.

By: /s/ DAVID G. NANCE

-----  
David G. Nance  
President, Chief Executive Officer  
and Director  
(Principal Executive Officer)

By: /s/ JAMES W. ALBRECHT, JR.

-----  
James W. Albrecht, Jr.  
Chief Financial Officer  
(Principal Financial and Accounting  
Officer)

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, this Amendment No. 1 on Form 10-K/A has been signed on behalf of the Registrant by the following persons in the capacities and on the dates indicated:

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| SIGNATURE<br>-----   | TITLE<br>-----   | DATE<br>----- |
|--|--|---------------|
| /s/ DAVID G. NANCE<br>-----<br>(David G. Nance)                              | President, Chief Executive<br>Officer, and Director (Principal<br>Executive Officer) | March 2       |
| /s/ JAMES W. ALBRECHT, JR.<br>-----<br>(James W. Albrecht, Jr.)              | Chief Financial Officer (Principal<br>Financial and Accounting Officer)              | March 2       |
| */s/ JOHN N. KAPOOR, PH.D.<br>-----<br>(John N. Kapoor, Ph.D.)               | Chairman of the Board and Director   | March 2       |
| */s/ WILLIAM H. CUNNINGHAM, PH.D.<br>-----<br>(William H. Cunningham, Ph.D.) | Director   | March 2       |
| */s/ CHARLES E. LONG<br>-----<br>(Charles E. Long)                           | Director   | March 2       |
| */s/ MAHENDRA G. SHAH, PH.D.<br>-----<br>(Mahendra G. Shah, Ph.D.)           | Director   | March 2       |
| */s/ ELISE T. WANG<br>-----<br>(Elise T. Wang)                               | Director   | March 2       |
| *By: /s/ DAVID G. NANCE<br>-----<br>(David G. Nance)<br>Attorney-in-Fact     |  |               |

6

EXHIBIT INDEX

| EXHIBIT<br>NUMBER<br>----- | DESCRIPTION OF DOCUMENT<br>-----   |
|----------------------------|--|
| 10.41+ --                  | Master Services Agreement, effective as of July 9, 2001,<br>between Introgen and PPD Develop-<br>ment, LLC |
| 23.1* --                   | Consent of Arthur Andersen LLP, independent public<br>accountants  |

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\* Previously filed.

+ Confidential treatment has been requested for portions of this exhibit.