



179. This motion is supported by the Affidavit of Thomas J. Budge filed herewith.

### **BACKGROUND & PROCEDURAL HISTORY**

Rangen, Inc. (Rangen) filed a Petition for Delivery Call with the IDWR on December 13, 2011, for water right nos. 36-2551 and 36-7694 which are appurtenant to Rangen's fish hatchery in the Thousand Springs area near Hagerman, Idaho. These water rights have as their source the Martin-Curren Tunnel (a/k/a Curren Tunnel). The Curren Tunnel is a horizontal tunnel dug into a basalt cliff above Rangen's fish hatchery to access groundwater from the Eastern Snake Plain Aquifer (ESPA). Rangen's delivery call sought to curtail all use of groundwater from the ESPA so that more water would infiltrate and discharge from the Curren Tunnel.

An evidentiary hearing was held by the IDWR from May 1 to May 16, 2013. On January 29, 2014, the IDWR issued the Curtailment Order. For the purpose of this motion, two rulings in the Curtailment Order are particularly significant.

First, it orders curtailment of all groundwater diversions from the ESPA under water rights junior to July 13, 1962, from points of diversion located west of the Great Rift.<sup>1</sup> The Great Rift is between American Falls and Rupert. Thus, the curtailment essentially covers the Magic Valley, eliminating the use of water to dozens of cities, dairies, food producers, and other businesses, as well as 157,000 acres of cropland.<sup>2</sup> The curtailment of these water rights is projected to increase the supply of water to Rangen by 9.1 cubic feet per second (cfs) once steady-state condition is reached (after more than 50 years of curtailment).<sup>3</sup>

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<sup>1</sup> Curtailment Order p. 28 (Ex. A to Budge Aff.).

<sup>2</sup> *Id.*; see also *Id.* at 42.

<sup>3</sup> *Id.* at 28.

Second, the Curtailment Order rules that Rangen's water rights are confined to water that discharges from the Curren Tunnel, and that Rangen does not have a valid right to divert water from Billingsley Creek.<sup>4</sup> Accordingly, two days after issuing the Curtailment Order, the IDWR issued a *Notice of Violation and Cease and Desist Order* ("Cease & Desist Order") that prohibits Rangen from diverting water from Billingsley Creek.<sup>5</sup> If implemented, the Cease & Desist Order will deprive Rangen of 10-12 cfs which is the majority of its available water supply.

On February 12, 2014, IGWA filed a mitigation plan with the IDWR in attempt to avoid curtailment by delivering water to Rangen from different sources. The same day IGWA filed a petition to stay the Curtailment Order until a decision was entered on IGWA's mitigation plan. On February 21, 2014, the IDWR stayed both the Curtailment Order and the Cease & Desist Order.<sup>6</sup> This allowed groundwater pumping to continue, and allowed Rangen to continue using 10-12 cfs from Billingsley Creek, thereby maintaining the status quo.

On March 28, 2014, IGWA filed its Petition for Judicial Review with this Court, appealing the Curtailment Order.

On April 11, 2014, the IDWR approved IGWA's mitigation plan in part, granting immediate mitigation credit of 3.0 cfs for mitigation activities that are already in place, such as groundwater recharge and conversions of farmland from groundwater to surface water irrigation.<sup>7</sup> A number of other mitigation actions are in process that are capable of meeting the full 9.1 cfs mitigation obligation, but they will take significant time and expense to implement.

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<sup>4</sup> *Id.* at 32-33.

<sup>5</sup> Ex. B to Budge Aff.

<sup>6</sup> Exs. C & D to Budge Aff.

<sup>7</sup> Ex. E to Budge Aff.

The Curtailment Order includes a mitigation schedule that allows junior groundwater users to avoid curtailment during the first year by providing 3.4 cfs of mitigation (the same amount of water Rangen would get from curtailment). Because the IDWR granted only 3.0 cfs in immediate mitigation credit, leaving a shortfall of 0.4 cfs, the IDWR recently ordered the curtailment of all groundwater rights in the Magic Valley with priority dates junior to July 1, 1983, beginning May 5, 2014. These rights supply water to 25,000 acres of irrigated farmland as well as cities, dairies, and other businesses.<sup>8</sup>

On April 17, 2014, IGWA filed a *Second Petition to Stay Curtailment, and Expedite Decision* with the IDWR, asking the Director of the IDWR to stay implementation of the Curtailment Order, which will also effectively stay the Cease & Desist Order, until this court completes its review of the Curtailment Order. The IDWR has not yet ruled on this petition. This motion is filed as a backup in case the IDWR refuses to stay the Curtailment Order. Given the proximity of the curtailment date (May 5, 2014), IGWA felt it prudent to file this motion now so that a hearing could be scheduled before curtailment is implemented. If the IDWR grants a stay, this petition can be dismissed.

### **LEGAL STANDARD**

The Idaho Administrative Act provides that upon the filing of a petition for judicial review, the “reviewing court may order[] a stay [of the enforcement of the agency action] upon appropriate terms.”<sup>9</sup> Idaho Rule of Civil Procedure 84(m) also provides that the “reviewing court may order[] a stay upon appropriate terms.”

Neither the statute or rule provides guidance on what terms are appropriate for the granting of a stay, and there is no reported Idaho case that

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<sup>8</sup> *Id.*

<sup>9</sup> Idaho Code § 67-5274.

defines “appropriate terms.” However, in *Haley v. Clinton* the Idaho Court of Appeals held that a stay is appropriate “when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending.”<sup>10</sup> In *McHan v. McHan*, the Idaho Supreme Court explained that “where it appears necessary to preserve the *status quo* to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers.”<sup>11</sup> The *McHan* decision further elaborated that a stay is appropriate when “[i]t is entirely possible that the refusal to grant a stay would injuriously affect appellant and it likewise is apparent that granting such a stay will not be seriously injurious to respondent.”<sup>12</sup>

Other factors that are often considered in determining whether to grant a motion to stay are the following:

- (1) the likelihood the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.<sup>13</sup>

## **ARGUMENT**

As explained below, the Court should stay implementation of the Curtailment Order because (1) critical issues of first impression warrant judicial review before the Orders take effect; (2) curtailed groundwater users will be severely and irreparably harmed absent a stay; (3) Rangen will not

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<sup>10</sup> 123 Idaho 707, 709 (Ct. App. 1993).

<sup>11</sup> 59 Idaho 41, 46 (1938).

<sup>12</sup> *Id.*

<sup>13</sup> *Michigan Coalition of radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n*, 107 Idaho 47, 50 (1984) (Stay justified when there is irreparable loss to moving party); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435-1436 (9<sup>th</sup> Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); 5 Am.Jur.2d *Appellate Review* § 470 (“Standards for granting stay”).

be harmed, but will actually benefit, from a stay; and (4) granting a stay is in the public interest.

### **1. Critical issues of first impression warrant judicial review before the Orders take effect.**

The petition for judicial review filed by IGWA raises significant issues, some of which are issues of first impression in Idaho. Among them are:

- A. Whether the Curren Tunnel should be administered as a groundwater source since it meets the statutory definition of a groundwater well under the Idaho Ground Water Act?
- B. Whether the Curtailment Order permits excessive waste and hoarding of Idaho's water resources by curtailing beneficial use of water even if less than 1% of the curtailed water will accrue to Rangen after 50 years?
- C. Whether an uncertainty factor must be applied to the predictions generated by Eastern Snake Plain Aquifer Model (ESPAM) version 2.1, as was done in all prior conjunctive management cases using ESPAM version 1.1?<sup>14</sup>

While there may be room to debate the likelihood of IGWA prevailing on these issues, there is no question that a reversal may reduce or even eliminate the curtailment of groundwater rights. It would be a travesty for the IDWR to curtail groundwater rights, causing farmers, dairies, and others to go out of business, only to have the judiciary rule that the curtailment was unjustified to begin with. This very real possibility weighs heavily in favor of staying the Curtailment Order.

### **2. Curtailment will cause severe and irreparable harm.**

The livelihoods of farmers, dairies, and many other businesses are dependent upon water. Curtailment will devastate not only the holders of the curtailed water rights, but also numerous other Magic Valley business-

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<sup>14</sup> *Petition for Judicial Review*(March 28, 2014).

es who depend upon agricultural production for their survival. If curtailment is implemented, loans will go into default, jobs will be lost, cities will be unable to provide services, businesses will close, and land will be foreclosed on. The harm will be devastating and irreparable.

### **3. Rangen will not be harmed, but will actually benefit, from a stay.**

Perhaps the most compelling reason for staying the Curtailment Order is that it will provide far more water to Rangen than curtailment will. Curtailment of 157,000 acres is predicted to provide 9.1 cfs to Rangen at steady-state. In the first year of curtailment, only 3.4 cfs is predicted to accrue to Rangen. Accordingly, the Curtailment Order provides for phased-in mitigation, requiring groundwater users to provide 3.4 cfs in mitigation the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.<sup>15</sup>

On April 11, 2014, the IDWR approved IGWA's first mitigation plan in part, providing an immediate 3.0 cfs mitigation credit for groundwater recharge, conversions, dry-ups, and the Sandy Pipe exchange.<sup>16</sup> These mitigation actions are already in place and will be implemented even if the Curtailment Order is stayed. Because the 3.0 cfs credit is 0.4 cfs short of the full 3.4 cfs mitigation obligation, the IDWR has ordered the curtailment of all groundwater rights in the Magic Valley with priority dates junior to July 1, 1983, beginning May 5, 2014.

The additional 0.4 cfs that Rangen will receive if the Curtailment Order is not stayed is a fraction of the 10-12 cfs of water Rangen will receive if it is stayed. As mentioned above, the Curtailment Order rules that Rangen does not have a valid water right from Billingsley Creek, depriving Rangen of 10-12 cfs of water (Rangen has petitioned for judicial review of this rul-

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<sup>15</sup> Curtailment Order p. 42 (Ex. A to Budge Aff.)

<sup>16</sup> Ex. E to Budge Aff.

ing).<sup>17</sup> Since staying the Curtailment Order will allow Rangen to continue to divert 10-12 cfs from Billingsley Creek during the judicial review process, Rangen will not be harmed, but will instead substantially benefit, if the Curtailment Order is stayed during the appeal.

#### **4. A stay is in the public's interest.**

The magnitude of the pending curtailment rises to the level of a public crisis. Given Idaho's heavily agriculture-dependent economy, the effects of curtailment will undoubtedly ripple throughout Idaho's economy.

Staying the Curtailment Order will provide the time needed for IGWA to put in place a long-term solution to meet the full 9.1 cfs mitigation obligation. IGWA has a pending water right application to use up to 12 cfs from Billingsley Creek for mitigation purposes, which, if granted, will meet the full 9.1 cfs mitigation obligation.<sup>18</sup> In addition, IGWA has a pending Second Mitigation Plan that proposes to deliver 9.1 cfs to Rangen from Tucker Springs, also meeting the full mitigation obligation.<sup>19</sup> This proposal is currently being engineered and is expected to be approved since the IDWR has approved pump-based mitigation systems previously.

While curtailment can be avoided long-term by either of these options, the damage of a short-term curtailment will have already been done. The public interest weighs overwhelmingly against short-term curtailment, particularly since it would provide less water to Rangen than would a stay of the Curtailment Order.

### **CONCLUSION**

The Curtailment Order should be stayed during judicial review because a stay will (1) provide more water to Rangen than enforcing the Orders, (2) avoid severe and irreparable harm to the curtailed groundwater

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<sup>17</sup> See Exhibits 2291 and 3656 (Ex. F to Budge Aff.)

<sup>18</sup> Ex. G to Budge Aff.

<sup>19</sup> Ex. H to Budge Aff.

users and the economies of the Magic Valley and the State of Idaho, (3) allow judicial review of critical issues of first impression, avoiding mistaken curtailment, and (4) serve the public interest.

DATED April 25, 2014.

RACINE OLSON NYE BUDGE  
& BAILEY, CHARTERED

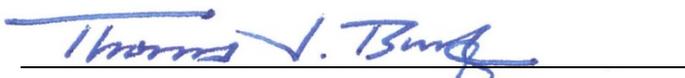
By: 

Randall C. Budge

Thomas J. Budge

## CERTIFICATE OF MAILING

I certify that on this 25th day of April, 2014, the foregoing document was served on the following persons in the manner indicated.

  
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 Signature of person serving document

<b>Original to:</b> Clerk of the Court SRBA DEPUTY CLERK 253 3 <sup>rd</sup> Ave. North PO Box 2707 Twin Falls, ID 83303-2707	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile - 208-736-2121 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email
Deputy Attorney General Garrick L. Baxter IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 Fax: 208-287-6700 <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:kimi.white@idwr.idaho.gov">kimi.white@idwr.idaho.gov</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Robyn M. Brody BRODY LAW OFFICE, PLLC P.O. Box 554 Rupert, ID 83350 <a href="mailto:robynbrody@hotmail.com">robynbrody@hotmail.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Fritz X. Haemmerle HAEMMERLE & HAEMMERLE, PLLC P.O. Box 1800 Hailey, ID 83333 <a href="mailto:fxh@haemlaw.com">fxh@haemlaw.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
J. Justin May MAY, BROWNING & MAY, PLLC 1419 West Washington Boise, ID 83702 <a href="mailto:jmay@maybrowning.com">jmay@maybrowning.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

<p>Sarah Klahn  Mitra Pemberton  WHITE JANKOWSKI, LLP  511 16<sup>th</sup> St., Suite 500  Denver, Colorado 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> Email</p>
<p>Dean Tranmer  CITY OF POCATELLO  P.O. Box 4169  Pocatello, ID 83201  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> Email</p>
<p>John K. Simpson  Travis L. Thompson  Paul L. Arrington  BARKER ROSHOLT &amp; SIMPSON  195 River Vista Place, Suite 204  Twin Falls, ID 83301-3029  <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> Email</p>
<p>Jerry Rigby  RIGBY ANDRUS &amp; RIGBY  25 N. 2<sup>nd</sup> East  Rexburg, ID 83440  <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> Email</p>