

Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
tjb@racinelaw.net

Attorneys for Idaho Ground Water Appropriators, Inc.

**DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
GOODING COUNTY**

IDAHO GROUND WATER APPRO-
PRIATORS, INC.,

Petitioner,

vs.

RANGEN, INC.,

Cross-Petitioner.

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV-2014-179

(Consolidated with Twin Falls
County Case No. CV-2014-1338)

Motion to Augment Record

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER
RIGHT NOS. 36-02551 & 36-07694
(RANGEN, INC.), IDWR DOCKET
NO. CM-DC-2011-004

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this motion to augment the record pursuant to Rule 84(l) of the Idaho Rules of Civil Procedure, Idaho Code § 67-5276, and the *Procedural Order Governing Judicial Review of Final Order of Direc-*

tor of Idaho Department of Water Resources entered by this Court on March 28, 2014.

BACKGROUND AND PROCEDURAL HISTORY

On March 28, 2014, IGWA filed its Petition for Judicial Review of the Idaho Department of Water Resources' (IDWR) January 29, 2014, *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* ("Curtailment Order"). On April 30, 2014, the IDWR lodged the agency record pursuant to Idaho Rule of Civil Procedure 84.¹ After reviewing objections from the parties, the final agency record was settled by the IDWR on May 27, 2014.²

LEGAL STANDARD

Idaho Rule of Civil Procedure 84(e) states that judicial review "shall be based upon the record created before the agency," but that "the district court may take additional evidence itself upon judicial review," and may "order the taking of additional evidence upon its own motion or motion of any party to the judicial review." Idaho Rule of Civil Procedure 84(l) provides that "any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court, within twenty-one (21) days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure for augmentation of the record in appeals to the Supreme Court."

Petitions for judicial review from actions taken by the IDWR are governed by the Idaho Administrative Procedures Act,³ which sets for the criteria for taking additional evidence, as follows:

¹ *Notice of Lodging Consolidated Agency Record and Transcript with the Agency*, filed April 30, 2014.

² *Notice of Lodging the Consolidated Agency Record and Transcript with the District Court*, filed May 27, 2014.

³ IDAPA 37.01.01.740

(1) [If] it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there was good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding;

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.⁴

ARGUMENT

IGWA respectfully moves the Court to augment the record with the Affidavit of Charles M. Brendecke (“Brendecke Affidavit”) filed herewith. Attached to the Brendecke Affidavit are copies of four outstanding delivery calls from water users in the Hagerman, Idaho, area who, as a result of the Curtailment Order, are now in a position to curtail all junior-priority groundwater use within the “Great Rift trim line” adopted for the first time in the Curtailment Order. Also attached to the Brendecke Affidavit is the following table (“Table 1”) summarizing the number of groundwater irrigated acres exposed to curtailment from these calls:

⁴ Idaho Code § 67-5276.

Table 1: Impacted Acreage for Pending Water Delivery Calls within the Great Rift Trimline

<i>Total GW Irrigated Acres</i>		<i>325,000</i>
Pending Call	Priority Date	Irrigated Acres Impacted¹
Billingsley Creek Ranch	5/1/1933	325,000
Billingsley Creek Ranch	3/19/1959	195,000
Billingsley Creek Ranch	1/18/1961	170,000
Rangen	13/07/1962	155,000
Aquarius Aquaculture	11/6/1969	120,000
Aquarius Aquaculture	2/18/1971	110,000
Ark Fisheries, Inc.	2/14/1973	100,000
LynClif Farms	10/24/1979	35,000

¹Impacted acreage is rounded to the nearest 5,000 as there are about 3,000 acres scattered throughout the trimline that are not readily linked to a water right or priority date

²Note curtailed acreage was estimated using GIS so there will be slight differences compared to acreage as determined using ESPAM tools (i.e. final Rangen Order determined 157,000 acres curtailed for the 13/07/1962 priority)

Table 1 should be added to the record because “there was good reasons for failure to present it in the proceeding before the agency.”⁵ As explained in the Brendecke Affidavit, the IDWR had never before applied a trim line at the Great Rift until it did so in the Curtailment Order. Since the Great Rift trim line had not been developed or utilized previously, IGWA was not in a position to evaluate the implications of the Great Rift trim line and put into evidence a table similar to Table 1 at the hearing.

The data in Table 1 is relevant to this Court’s review of the Curtailment Order because it bears directly on issue 5.2 in IGWA’s Petition for Judicial Review:

- 5.2 Whether the IDWR erred by curtailing beneficial water use where less than 1% of the curtailed water is predicted to accrue to Rangen after 50 years of curtailment.

When the Director of the IDWR responds to a delivery call under the IDWR’s Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), he “shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground

⁵ Idaho Code § 67-5276(1)(a).

waters as described in Rule 42.”⁶ The “reasonable use” inquiry takes into consideration the longstanding rule that “[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.”⁷

Prior to issuing the Curtailment Order, the IDWR used a “10 percent trim line” for delivery calls filed under the CM Rules, meaning a junior groundwater right would not be curtailed unless the ESPA Model predicts at least 10 percent of the water could have been used by the junior will accrue to the senior water user. Applied to the Rangen delivery call, this exposed 735 acres to curtailment.⁸

The Curtailment Order marks a massive departure from the IDWR’s prior practice of assigning a level of uncertainty to ESPA Model predictions and restricting the zone of curtailment to account for Model uncertainty and reasonable use of water. This change expanded the zone of curtailment under the Rangen delivery call from 735 acres located relatively close to Rangen, to 157,000 acres spread across the entire Magic Valley.

When this Court considers whether the Great Rift trim line is in keeping with the doctrine of reasonable water use, and the companion prohibition against hoarding water, it is appropriate to consider not only the effect of the Great Rift trim line on the Rangen delivery call (157,000 acres curtailed under a 1962 curtailment date), but also its implications for other delivery calls from senior surface water users situated similar to Rangen.

Since the IDWR issued the Curtailment Order on January 29, 2014, three delivery calls have been filed by other senior water users (Aquarius, ARK Fisheries, LynClif Farms) in the Hagerman area. There is also an outstanding delivery call filed previously by Billingsley Creek Ranch. Table 1

⁶ IDAPA 37.03.11.040.03.

⁷ IDAPA 37.03.11.020.03.

⁸ CITE ORDER, excerpt attached hereto as *Appendix A*.

shows the approximate number of acres that will be curtailed within the Great Rift trim line when the Director processes these calls. Of particular note is the Billingsley Creek Ranch delivery call which will curtail almost every groundwater right in the Magic Valley.

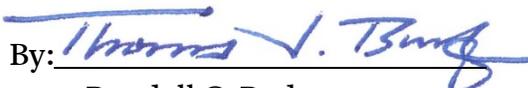
CONCLUSION

The significance of this Court's review of the Curtailment Order and the precedent it sets cannot be understated. The Brendecke Affidavit and attachments provide valuable context. These materials could not realistically be presented at the hearing before the IDWR because the IDWR had not yet developed or applied the Great Rift Trim line.

Therefore, IGWA respectfully asks the Court to augment the agency record with the Brendecke Affidavit and its attachments pursuant to Idaho Code § 67-5276, and, if the court deems it appropriate, allow the IDWR to revise its decision in light of this evidence if the Director is so inclined.

DATED June 17, 2014.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: 

Randall C. Budge
Thomas J. Budge

CERTIFICATE OF MAILING

I certify that on this 17th day of June, 2014, the foregoing document was served on the following persons in the manner indicated.



Signature of person serving document

Clerk of the Court SRBA DEPUTY CLERK 253 3 rd 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 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Robyn M. Brody BRODY LAW OFFICE, PLLC P.O. Box 554 Rupert, ID 83350 robynbrody@hotmail.com	<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 fxh@haemlaw.com	<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 jmay@maybrowning.com	<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 16th St., Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</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 dtranmer@pocatello.us</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 & SIMPSON 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com</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 wkf@pmt.org</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 & RIGBY 25 N. 2nd East Rexburg, ID 83440 jrigby@rex-law.com</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>