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**BEFORE DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02551 & 36-07694

(RANGEN, INC.)

Docket No. CM-DC-2011-004

**IGWA'S REPLY TO RANGEN'S
RESPONSE IN OPPOSITION TO
IGWA'S MOTION TO CONTINUE**

Idaho Ground Water Appropriators, Inc. (IGWA) submits the following brief in reply to *Rangen, Inc.'s Response in Opposition to IGWA's Motion to Continue Hearing and Request for Expedited Decision* dated September 27, 2013 (referred to herein as *Rangen's Response*).

IGWA's motion to continue has nothing to do with preventing the Director from ordering curtailment in 2013. (*Cf. Rangen's Response* at 18.) It has everything to do with ensuring that the Director's decision is fully informed.

IGWA agrees with Rangen that the Director advised both parties early on that "Rangen's Delivery Call would not be heard using ESPAM2 until the new model was complete." (*Rangen's Response* at 2.) The problem is that while the computer code by which ESPAM 2.0 operates has been finished, the documentation explaining the code has not.

A pivotal issue in this case is whether the Director will maintain the timeline used in prior delivery calls. That decision depends, at least in part, on the reliability of the Model as it applies to Rangen. The Director must therefore be presented with evidence explaining the limitations of the Model. Such evidence cannot be fully developed without complete documentation of the assumptions in the computer code by which the Model operates.

The Model is a collection of data processing and computational codes. The code that computes groundwater flow behavior is well-documented by the United States Geological Survey (USGS). What is not well-documented are code modules that do various kinds of input data processing. Some of these modules are the product of non-IDWR and non-IWRRRI members of the Eastern Snake Hydraulic Modeling Committee (ESHMC or Committee). Members of the Committee have had an opportunity to review and comment on draft documentation of parts of the code prepared by IDWR and IWRRRI personnel, but have not had an opportunity to review documentation of code prepared by non-IDWR/IWRRRI personnel.

Rangen's position is that the Director should evaluate the reliability of the Model without accounting for assumptions in parts of the Model code prepared by non-IDWR/IWRRRI personnel. To support this argument, Rangen relies on the lack of a "documentation" task in the punch list or Gantt chart prepared by the IDWR. (*Rangen's Response* at 4, citing punch list and Gantt chart at *Brody Aff.* Ex. 3.) Rangen assumes that this means there was as a tacit agreement by the parties that the Director would evaluate the reliability of ESPAM 2.0 before it is fully documented. That is simply not correct.

The punch list and Gantt chart outline the process for completing the computer code used in ESPAM 2.0. (*Brody Aff.* Ex. 3.) The process involved assembling data, calibration, validation, uncertainty, and comparison with ESPAM 1.1. *Id.* IGWA assumed that documentation of all of the resulting computer code was an implicit part in the process. ESPAM 1.1 contains complete documentation, and there is nothing in the punch list or Gantt chart stating that ESPAM 2.0 would not likewise be documented, nor is IGWA aware of Rangen ever contending that ESPAM 2.0 should not contain the same type of documentation as ESPAM 1.1. Perhaps IGWA should have asked that a deadline be set for Model documentation. Perhaps Rangen should have made a record of its apparent expectation that Model documentation is unnecessary. Right or wrong, neither occurred. And given that ESPAM 1.1 is fully documented, and had been for some time prior to the first hearing involving its use, the assumption that documentation would likewise be completed for ESPAM 2.0 is reasonable.

Rangen thinks it is significant that "neither Brendecke nor IGWA objected to the issuance of the Committee's statement that the Director should begin using ESPAM2." (*Rangen's Response* at 6.) This, however, is easily explained. Dr. Brendecke agreed that development of the ESPAM 2.0 computer code has reached the point that it could be put into operation by the Direc-

tor. That does not mean that documentation of the code did not need to be completed before the Director would undertake to evaluate the level of uncertainty in the Model for the purposes of making a curtailment decision. Dr. Brendecke assumed documentation was being done by those persons writing the code, and that it would be produced well in advance of the October 10 expert report deadline.

Rangen also contends that because Dr. Brendecke has been actively involved in the ESHMC he is an “insider” and should already know all of the assumptions in the Model code. (*Rangen’s Response* at 5.) This statement is only partly true. Dr. Brendecke has been actively involved on the Committee, he understands how the Model functions, and he understands some limitations of and assumptions within the Model. However, he did not write any of the computer code for ESPAM 2.0 and he cannot fully evaluate the undocumented assumptions that have been made by those who did. This evaluation requires review of documentation explaining their code.

Rangen finally argues that documentation of the Model will not provide any material information. (*Rangen’s Response* at 6.) This, of course, is speculation until documentation is produced, and it highlights the real conundrum of incomplete documentation. It is no secret that Rangen’s objective is to do away with the trimline. (*See, e.g., Brody Aff.* Ex. 1 at 3.) Nor is it a secret that whether the Director does that depends in part on his evaluation of the degree of reliability of the predictions generated by ESPAM 2.0. (*See, e.g., Brody Aff.* Ex. 2 at 4.) If Rangen can prevent IGWA from scrutinizing the assumptions in the code used in the Model, it eliminates a potential source of Model uncertainty, bolstering Rangen’s position in this case.

This concern is compounded by the fact that, unlike ESPAM 1.1 where the code-writing and documentation were done in-house by the IDWR, parts of the code and documentation for ESPAM 2.0 have been or are in the process of being done by non-IDWR and non-IWRRRI personnel. IGWA does not oppose participation by third parties in the development ESPAM 2.0, but their participation makes it important that the code be documented and approved by the IDWR before the Model is subjected to the scrutiny that arises in the context of a delivery call.

The Director recognized this important responsibility early on, advising Rangen’s counsel in January of 2012 that “version 2.0 is a department product,” that “participants in the modeling committee are advisors, they’re helpful, they have not developed the model itself,” and that “it’s incumbent upon the department when it’s a department product to say, We’re ready to roll this out, and then to be proactive in doing so.” (*Brody Aff.* Ex. 1 at 2.) The Director further ex-

plained, “I also don’t intend to float a model out there that may be inaccurate, that may produce results that change obligations or rights of various parties in litigation that we find are in error and I whipsaw the parties back and forth. And I’m not willing to do that.” *Id.*

IGWA agrees that in hindsight it may have been prudent to ask that a deadline be imposed for the completion of Model documentation. By no means, however, was that omission part of some clandestine effort to delay completion of the Model. As mentioned above, IGWA made a reasonable assumption that ESPAM 2.0 would be fully documented just as ESPAM 1.1 was. Rangen has put on evidence that Jim Brannon is also not at fault for the incomplete documentation, and IGWA accepts Mr. Brannon’s affidavit at face value. (*Rangen’s Response* at 8-9.) IGWA’s belief that Mr. Brannon had a role in completing documentation for MDMOD is based on Dr. Brendecke’s recollection that at the last ESHMC meeting Dave Colvin (another Rangen expert who sits on the Committee) agreed to convey to Mr. Brannon an assignment to complete documentation for MKMOD. Perhaps there was a miscommunication, perhaps not.

Regardless of the cause, the simple fact is that documentation of ESPAM 2.0 is not complete. The decision for the Director is not who is at fault for the delay in completing documentation, but whether his evaluation of ESPAM 2.0 should be informed by complete documentation. For the reasons above, it must. It is IGWA’s belief that premature application of the Model will violate due process and qualify as an abuse of discretion.

Whatever relevance there may be to Rangen’s prediction that curtailment will be ordered, and concern that it be ordered in 2013, it is far outweighed by the need to ensure due process is met and the Director’s evaluation of Model uncertainty is fully informed. The Director offered to allow Rangen to proceed expeditiously to a hearing under ESPAM 1.1, but Rangen chose to wait until ESPAM 2.0 is complete. (*See Brody Aff.* Ex. 1 at 3.) A short continuation of the hearing is needed to see that through.

IGWA’s motion to continue requests only enough time for Model documentation to be completed, reviewed by the IDWR, and submitted to the parties for review by their experts. The proposed schedule will move the hearing by only 6 weeks—a very minor extension considering that development of ESPAM 2.0 has been a multi-year project. Forcing a premature decision on ESPAM 2.0 in order to accommodate a hurried desire for curtailment would be, as the saying goes, the tail wagging the dog.

The short extension of the hearing schedule proposed by IGWA should also provide suf-

efficient opportunity to review Rangen's research notebooks which is scheduled to take place at Rangen's facility on October 8, 2012, and to take additional depositions as needed.

Therefore, IGWA asks the Director to continue the hearing schedule as proposed at the conclusion of IGWA's motion to continue.

DATED this 3rd day of October, 2012.

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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of October 2012, the foregoing document was served on the following persons in the manner indicated:

**Document served: IGWA's Reply to Rangen's Response in
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