

ORIGINAL

Randall C. Budge, ISB #1949
Candice M. McHugh, ISB #5908
Thomas J. Budge, ISB #7465
RACINE OLSON NYE
BUDGE & BAILEY, CHARTERED
101 S. Capitol Blvd., Suite 300
Boise, Idaho 83702
Telephone: (208) 395-0011
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

Attorneys for Idaho Ground Water Appropriators, Inc.

RECEIVED
JAN 28 2013
DEPARTMENT OF
WATER RESOURCES

**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 RESPONSE TO RANGEN'S
MOTION FOR PROTECTIVE ORDER
RE: OTHER FACILITIES**

Idaho Ground Water Appropriators, Inc. (IGWA) respectfully submits this response to *Rangen, Inc.'s Motion for Protective Order re: Other Facilities ("Rangen's Motion")* dated January 21, 2013. This response is filed pursuant to rules 532, 565, and 600 of the Rules of Procedure of the Department of Water Resources.

SUMMARY OF IGWA'S RESPONSE

Rangen's request of a protective order is predicated on a mistaken assertion that the documents sought by IGWA are not relevant or reasonably calculated to lead to the discovery of relevant evidence. Rangen contends that depletion to the water supply automatically equates to material injury, and that IGWA has no right to inquire into how Rangen actually uses water. This argument is incompatible with the CM Rules and the Idaho Constitution and has already been rejected by the Idaho Department of Water Resources (IDWR) and the Idaho Supreme Court. The Director should deny *Rangen's Motion* because IGWA is entitled to inquire into how Rangen actually uses water, and because the subject discovery requests seek information related to the use of water at the Rangen Hatchery.

ARGUMENT

A protective order is an extraordinary action that is warranted only where “justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” I.R.C.P. 26(C). In light of the critical role discovery plays in unveiling the truth, protective orders are rare, normally limited to circumstances where there is a compelling need to protect the information from public exposure.

Rangen’s Motion contends that a protective order is necessary because, “None of the information or documents requested by IGWA has anything to do with the issues to be decided in this case nor is the information reasonably calculated to lead to admissible evidence.” (*Rangen’s Motion* at 7, ¶ 14.) Rangen states, “The bottom line is that Rangen’s past use of other facilities is not relevant to any of the issues to be decided by the Director and is not reasonably calculated to lead to the discovery of admissible information.” *Id.* ¶15.

Rangen’s position is predicated on its mistaken assumption that depletion to the water supply automatically equates to injury, and that IGWA has no right to inquire into how Rangen actually uses water. As explained below, the documents requested by IGWA are necessary to enable IGWA to obtain an accurate understanding of how Rangen uses water, whether or to what extent its ability to produce fish or perform research has actually been impaired by reduced water flows (as opposed to discontinued use of other facilities), and whether Rangen legitimately needs additional water to accomplish its beneficial use.

I. Decreased water flow does not by itself demonstrate material injury.

The CM Rules do not permit curtailment of junior-priority groundwater rights until the Director determines that the senior water user is suffering “material injury.” CM Rule 40.01. Rangen contends that depletion to the water supply is by itself sufficient to prove material injury, as evident by the following statement:

None of the information or documents requested by IGWA has anything to do with the issues to be decided in this case nor is the information reasonably calculated to lead to admissible evidence. By conducting extensive discovery concerning Rangen’s historical fish production and research, IGWA appears to be positioning itself to make the argument that showing a decrease in water flow is not enough to show material injury.

(*Rangen’s Motion* at 7-8.) This statement clearly exposes Rangen’s position that depletion to the

water supply is alone sufficient to prove material injury, and that information about fish production in research “has nothing to do with the issues to be decided in this case.”

Rangen’s argument that depletion equals injury ignores the plain language of the CM Rules and has already been specifically considered and rejected by the Idaho Supreme Court—in a case that Rangen was a party: *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011).

The CM Rules measure material injury by the impact to the senior’s actual beneficial use of water, not simply by the impact to the available water supply. They define “material injury” as “impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho law, as set forth in Rule 42.” CM Rule 10.14 (emphasis added). The phrase “exercise of a water right” refers to the *use* of water. A water right is not a possessory right; it is a right to use water owned by the people of the state. *Coulsen v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24 (1924). The Idaho Constitution states, “Priority of appropriation shall give the better right as between those using the water.” Idaho Const. Art. XV, § 3 (emphasis added). Idaho Code § 42-104 reads, “The appropriation must be for some useful and beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.”

Accordingly, the Idaho Supreme Court has long held that a senior water user is limited to the amount of water actually necessary to accomplish his or her beneficial use. For instance, in *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207 (1926), the Court stated, “It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.” The Court has also explained more than once that the amount actually necessary assumes the senior is using water efficiently: “No person is entitled to use more water than good husbandry requires.” *Id.*; *see also Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44 (1915), (“A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used.”) There is a long list of Idaho Supreme Court decisions containing similar statements.

Consistent with the constitution, statutes, and court rulings cited above, CM Rule 42 contains a list of factors the Director should consider when determining whether the senior water is “suffering material injury and using water efficiently and without waste.” The factors go beyond depletion to the water supply. They instruct the Director to consider “[t]he amount of water being

diverted and used compared to the water rights.” CM Rule 42.01.e (emphasis added). They also instruct him to determine whether the senior’s water needs could be met without resorting to curtailment by using water more efficiently, implementing reasonable conservation practices, or changing its means of diversion. (CM Rules 42.01.g and 42.01.h.) Under the CM Rules, it is not enough to show only that the senior is receiving less than the maximum rate of diversion authorized under his or her water right. There must be evidence that the senior actually needs additional water to accomplish his or her beneficial use, and that those needs cannot be met with reasonable improvements to the senior diversion or delivery system. Rangen’s insistence that depletion to the water supply alone proves material injury is mistaken.

II. Knowing how Woods Farm Ponds and Decker Springs Ponds affected the operation of the Rangen Hatchery is relevant to determine how much water is currently needed to meet fish production and/or research needs at the Hatchery.

Analyzing how Rangen actually uses water, and how much water is needed to accomplish its beneficial use, is not as easy as analyzing water needs of farmers. IGWA can rely on its own irrigator members and readily available U.S.D.A. Farm Service Agency records to determine water needs of farmers. In contrast, Rangen holds most of the cards needed to evaluate water needs at its fish hatchery, particularly given Rangen’s use of water for research purposes.

When the Idaho Supreme Court ruled in *A&B Irrigation District v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012), that certain defenses must be proved by clear and convincing evidence, IGWA feared that it would give seniors an unfair advantage in delivery call cases. Since senior water users typically hold much of the information needed to defend against alleged material injury, juniors are at the mercy of seniors to produce such information. IGWA feared that seniors would produce the bare minimum facts needed to make a *prima facie* showing of injury, and then make it as difficult as possible for juniors to discover enough information to rebut that by clear and convincing evidence. IGWA’s fears have been borne out in this case.

Despite the large number of documents produced by Rangen, it is shocking how little Rangen purportedly knows about its own operation. There are volumes of research records, and yet no documents to verify that alleged research desires could not be accomplished due to low water flows. This has forced IGWA to have to piece together records produced by Rangen in order to reconstruct how the Rangen Hatchery operates. This has been no small task.

One thing that is clear from the information produced by Rangen to date is that more wa-

ter does not necessarily mean that Rangen can use it to raise more fish or conduct more research; Rangen operates its facility for research and conservation purposes as opposed to commercial production. (See, e.g., *Rogers Expert Report* at 7; see also *Brockway Expert Report* at 6.) For IGWA to demonstrate that Rangen needs less than the maximum rate of diversion authorized by its partial decrees, or that Rangen's water needs can be met by implementing efficiencies or using alternate means of diversion, IGWA needs to understand how Rangen has used water in the past, how it has utilized other facilities in conjunction with the Rangen Research Facility, and how and why Rangen ceased using those facilities and changed its use of water at the Rangen Research Facility. The discovery requests that Rangen complains of seek this information.

The challenge of reconstructing Rangen's operations has been aggravated by a pattern of producing relevant documents months late. IGWA recognizes that there can be challenges locating documents for large businesses, and IGWA appreciates the efforts of Rangen's counsel to provide these. Nonetheless, Rangen's inability to corral relevant documents in a timely manner has presented challenges to IGWA in developing its case. In fact, additional documents were just disclosed this past week that contain details about Rangen's operation, including flows to certain parts of Rangen's facilities, that would have saved IGWA's experts tens of hours trying to make sense of piecemeal documents.

Rangen complains that producing the documents requested by IGWA will be expensive, noting that it has already spent a few thousand dollars scanning documents and retrieving data from old floppy disks. This expense, it must be noted, is the result of Rangen's own antiquated and unorganized record-keeping. It is noteworthy that when Rangen made its first delivery call Director Dreher informed it by letter dated October 17, 2003, a copy of which is attached as *Exhibit A* for reference, that the IDWR would need information about how Rangen actually uses water to determine whether Rangen was suffering material injury or using water reasonably. Although Rangen has had more than eight years to organize its records and documents to support its claims of material injury, it has chosen not to and has instead chosen to incur costs of copying and dumping thousands of pages of documents on IGWA, without tying the documents to any specific discovery requests, and is now complaining about the costs of its efforts. The expense to IGWA of reviewing, trying to make sense of, and analyzing these records has far exceeded the expense to Rangen of scanning the same.

IGWA's experts have done a remarkable job of weeding through thousands of pages of

documents and reconstructing Rangen's aquaculture operation, only to discover unexplainable imports and exports of fish. This suggests that Rangen was operating other facilities in conjunction with the Rangen Research Hatchery in order to improve production capacity.


IGWA discovered, through its own request to the Idaho Department of Agriculture, that Rangen at one time owned or operated Wood Farm Ponds and Decker Springs Farm Ponds, demonstrating this is a real possibility. McHugh Aff. ¶ 3. In IGWA's *First Discovery Requests*, IGWA asked Rangen to "Identify all agencies to whom water quality or quantity data from the Rangen facility are reported to, and the method and frequency of such reports." Yet, Rangen failed to disclose the Department of Agriculture. Ex. B Aff. of McHugh. Mr. Kinyon in his affidavit states "It is my understanding that 'Decker Springs' are the source of the water for the Woods fish propagation facility." Kinyon Aff at ¶ 4. Yet, Exhibit C to the Aff. of McHugh is a December 16, 1993 letter from Rangen to the Department of Agriculture that treats the two facilities as separate: "NPDES applications for Woods Farm Ponds and Decker Springs Farm Ponds for your review." In order for IGWA to understand whether Rangen's use of water at the Rangen Hatchery has been impacted by reduced water flows it is important for IGWA to understand how Rangen's decision to stop using the Woods Farm Ponds and Decker Springs Farm Ponds impacted Rangen's fish production and/or research activities. From the data, it seems that Rangen's decision to stop using these facilities may explain its reduced fish production and research and its decision to enter into the Idaho Power contract rather than does reduced water flow from the Curren Tunnel as Rangen alleges.

IGWA has a right to understand how Woods Farm Ponds and Decker Springs Farm Ponds were utilized in conjunction with the Rangen Research Hatchery. Whatever cost it has been and may be to Rangen to produce such information, there has been and will continue to be far more cost to IGWA and its members if it is prohibited from making sense of how Rangen needs and uses water. IGWA would not incur the expense of analyzing additional documents if it did not believe it was important to do so.

Therefore, IGWA asks the Director to deny *Rangen's Motion*. Alternatively, IGWA will withdraw its discovery requests, if Rangen is precluded from presenting any evidence of its use of water at the Rangen Hatchery that occurred prior to 2003, when Rangen stopped using these other facilities.

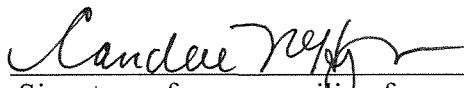
DATED this 28th day of January, 2013.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 
RANDALL C. BUDGE
CANDICE M. McHUGH
THOMAS J. BUDGE
Attorneys for IGWA

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of January 2013, **IGWA'S Response to Rangen's Motion for Protective Order re: Other Facilities**, was served by U.S. Mail postage prepaid to the following persons in the manner indicated:



Signature of person mailing form

Original:

Director, Gary Spackman
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098
Attn: Deborah Gibson
Deborah.Gibson@idwr.idaho.gov

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Garrick Baxter, Deputy Attorney General
Chris Bromley, Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Robyn M. Brody
Brody Law Office, PLLC
PO Box 554
Rupert, ID 83350
rbrody@cableone.net
robynbrody@hotmail.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Fritz X. Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333
fxh@haemlaw.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

J. Justin May
May, Browning & May, PLLC
1419 West Washington
Boise, ID 83702
jmay@maybrowning.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Sarah Klahn
Mitra Pemberton
WHITE JANKOWSKI, LLP
511 16th St., Suite 500
Denver, Colorado 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

Dean Tranmer
City of Pocatello
PO Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

C. Thomas Arkoosh
ARKOOSH EIGUREN LLC
PO Box 2900
Boise, ID 83701
tom.arkoosh@aelawlobby.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

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

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

W. Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, ID 83318
wkf@pmt.org

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

Jerry R. Rigby
Hyrum Erickson
Robert H. Wood
Rigby, Andrus & Rigby, Chartered
25 North Second East
Rexburg, ID 83440
jrigby@rex-law.com
herickson@rex-law.com
rwood@rex-law.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail