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
(208) 395-0011 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

Attorneys for IGWA

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 PRETRIAL BRIEF**

Idaho Ground Water Appropriators, Inc. (IGWA) submits this pretrial brief pursuant to the *Fifth Amended Scheduling Order* entered March 20, 2013.

INTRODUCTION

Between the Director's experience with prior delivery calls, and the arguments made at the summary judgment hearing, the Director is aware of the major issues in this case. Therefore, IGWA will not endeavor here to provide an exhaustive review of the law and facts at issue. However, IGWA believes it would be helpful to address the burdens of proof and standards of evidence that apply to the decisions the Director is required to make in response to Rangen's delivery call. While this necessitates some discussion of legal issues, the focus of this brief is on the burdens of proof and standards of evidence that govern the Director's application of the Rules for Conjunctive Management of Surface and Ground Water Sources (CM Rules).[1]

ARGUMENT

In the conjunctive management context, curtailment of junior rights is an extreme

[1] The CM Rules are found at IDAPA 37.03.11. Citations to the Rules in this brief are identified CM Rule number as opposed to IDAPA number.

remedy. Groundwater exists in a very different hydrologic environment than surface water. It cannot be shepherded from one water user to another through rivers, canals, and ditches. Usually only a very small portion of a curtailed groundwater right will accrue to the senior, it may take decades to arrive, and it may arrive at a time when the senior has no need for it. This is why the CM Rules exist.

The CM Rules were developed in an effort to adapt to the groundwater environment two sometimes competing constitutional edicts: on one hand, the doctrine that "first in time is first in right;" on the other, the right to appropriate the unappropriated water of this state. Idaho Const., art. 15, § 3. This will be explained in further detail in IGWA's post-trial brief. Suffice it to say that in the conjunctive management context, curtailment by priority often counteracts "[t]he policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources," *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)), since exponentially more groundwater must be curtailed than may be put to beneficial use by the senior.

The CM Rules reconcile this tension by prescribing a very judicious approach to conjunctive water administration. Before undertaking curtailment, the Director must evaluate the amount of water available from the source (CM Rule 42.01.a), the effort and expense of the senior to divert water from the source (CM Rule 42.01.b), the extent to which junior pumping affects the supply of water available to the senior (CM Rule 42.01.c), whether the senior legitimately needs additional water to accomplish its beneficial use (CM Rules 42.01.d and 42.01.e), whether the senior has been measuring its water appropriately (CM Rule 42.01.f), whether the senior can meet its water needs without resorting to curtailment by improving its diversion and conveyance facilities (CM Rules 42.01.g and 42.01.g), and whether the senior's means of diversion is reasonable and whether or to what extent curtailment will result in waste of the resource (CM Rules 42 and 20.03).

The Idaho Supreme Court has touched on the burdens of proof and standards of evidence that apply in conjunctive management, but has not clearly delineated how they apply to each of the foregoing decisions. As set forth below, the "burden of proof" is comprised of both a "burden of production" and a "burden of persuasion." These burdens fall sometimes on Rangen and sometimes on junior water users. In addition, the standard of evidence for material injury is "clear and convincing," whereas the standard for reasonable use is either "reasonableness" or

"preponderance of the evidence."

I. BURDEN OF PROOF.

The burden of proof is comprised of two components: 1) burden of production, and 2) burden of persuasion. *Cowan v. Bd. of Comm'rs*, 143 Idaho 501, 515 (Idaho 2006); 2 Am Jur 2d Administrative Law § 355. As a general rule, the burden of proof rests with the party that pleads the affirmative on the issue. 29 Am Jur 2d Evidence § 174. In other words, "the party that would be unsuccessful if no evidence were introduced on either side." *Id.* In applying this rule, courts have stated that the burden of proof falls "upon the party seeking a change in the status quo, or upon the party that asserts the claim." *Id.* Another general rule for guiding the allocation of the burden of proof is that "the burden rests on the party with peculiar knowledge of the facts and circumstances." 2 Am Jur 2d Administrative Law § 355.

A. Burden of Production.

The burden of production is commonly called the "burden of going forward with evidence" or simply the "burden of going forward." The "burden of production tells a court which party must come forward with evidence to support a particular proposition." 29 Am Jur 2d Evidence § 171. The burden of production is sometimes referred to as making out a prima facie case. *Id.* If the party with the initial burden of proof does not establish a prima facie case, the opposing party does not have to rebut the prima facie case or "otherwise show the *negative* of the issue." 2 Am Jur 2d Administrative Law § 355 (emphasis added). A determination of whether a party has carried its burden of production is manifest in the context of a motion for a directed verdict. 29 Am Jur 2d Evidence § 171. If opposing counsel were to bring a motion for a directed verdict after a party rests, the determination of whether such motion should be granted or denied turns on the issue of whether the resting party has met its burden of production.

As a general rule "the burden of going forward with the evidence on an issue generally rests upon the party having the burden of proof on that issue." *Williams v. Administrator of Nat'l Aeronautics & Space Admin.*, 59 C.C.P.A. 1329, 1341 (C.C.P.A. 1972). However, the burden of production does not always rest with the party having the burden of proof. As mentioned previously, if one party has peculiar knowledge of the facts regarding an issue, that party has the burden of production as to that issue. *Pace v. Hymas*, 111 Idaho 581 (1986). In *Pace*, the Idaho Supreme Court pointed out the intrinsic fairness of this rule: "where evidence necessary to establish a fact lies peculiarly within the knowledge and competence of one of the parties,

principles of fairness require that party to bear the burden of going forward with evidence on the issue." *Id.* at 585. Of particular relevance to this case, this rule was applied and explained in the context of evaluating a water permit application in *Shokal v. Dunn*, 109 Idaho 330, 339 (Idaho 1985). The court stated that the "burden of production lies with the party that has knowledge peculiar to himself," and provided the following example as to how this rule should apply:

> For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.

As more fully explained below, this common sense rule of evidence is applicable to the facts and circumstances of Rangen's delivery call, and should guide the Director in correctly placing the burden of production on Rangen to make a prima facie showing of material injury, reasonable means of diversion and conveyance, and reasonable use of the resource.

B. Burden of Persuasion.

Unlike the burden of production, the burden of persuasion always remains with the party upon whom it initially falls. The burden of persuasion is "the obligation of a party to introduce evidence that persuades the factfinder, to a requisite degree of belief, that a particular proposition of fact is true." 29 Am Jur 2d Evidence § 171. Thus, the burden of persuasion is twofold: 1) pleading and proving facts necessary to prevail on a particular issue, and 2) proving such facts to the requisite standard of proof. *Id.*

C. Standard of Evidence.

The standard of evidence is the measuring stick by which the Director determines whether a given burden has been met. It is "[t]he degree or level of proof demanded in a specific case, such as 'beyond a reasonable doubt' or 'by a preponderance of the evidence." Black's Law Dictionary, 2d Pocket Ed. At 661 (2001). The standard of proof is an integral part of the burden of persuasion, because it defines the degree of belief the Director must have that a particular proposition is true.

D. Presumptions.

A presumption is "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Black's Law Dictionary, 2nd Pocket

Ed. at 549 (2001). A presumption is said to "guide the trial judge in locating the burden of production at a particular time." 29 Am Jur 2d Evidence § 172. Idaho Rule of Evidence 301 governs presumptions in civil actions and provides:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

"Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant." *McCray v. Rosenkrance (in Re Srba Case No. 39576)*, 135 Idaho 509, 514 (2001) (quoting *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736 (1997)).

II. APPLICATION TO RANGEN.

The Idaho Supreme Court made two clear rulings concerning presumptions in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862 (2007) ("*AFRD2*"). First, the court held there is no presumption of material injury. *Id.* at 877 (the Court reversed the district court ruling that "when a junior diverts or withdraws water in times of water shortage, it is presumed that there is injury to a senior.") Second, the Court held there is a presumption "that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* at 878. Read together, this means the Director must presume the senior has the right to divert water at the maximum rate of diversion under its decree so long as the water is needed, but the Director is not to presume that the senior actually needs its full decreed rate of diversion 24-7-365 to accomplish its beneficial use.

These presumptions reflect the reality of what IDWR does in licensing water rights, and what the SRBA court did in inventorying water rights. In both cases, the "rate of diversion" element defines the maximum rate at which water may be diverted, and the "period of use" element defines the maximum permissible timeframe in which water may be diverted. Neither the IDWR nor the SRBA attempt to evaluate how often the maximum rate of diversion has historically been available from the source, or how often the water right holder actually needs and uses the full rate of diversion to accomplish their beneficial use. Indeed, few if any Idaho water users actually need their maximum authorized rate of diversion 24-7 during the entire

period of use. For example, farmers rarely divert water during the entire season of use, and they often divert less than the maximum authorized rate of diversion. In fact, Idaho law encourages efficient use of water, and protects water rights from forfeiture when the maximum rate is not diverted for an extended period of time due to conservation practices. Idaho Code § 42-223(9).

Accordingly, when responding to a delivery call the Director is not to question the senior's right to divert water at the maximum rate stated on its paper water rights, but he is not to presume the senior needs to divert the maximum decreed rate at all times, or that the senior is automatically injured anytime he receives less than the maximum decreed rate. Rather, the Director has a duty under the CM Rules to determine how much water the senior reasonably needs to accomplish his or her current beneficial use, and whether those needs can be met without resorting to curtailment by having the senior improve his diversion or conveyance facilities or undertaking other water use efficiencies.

This leads to the question of who bears the burden of proof as to material injury under CM Rule 42, and reasonable use of water under CM Rules 42 and 20.03. As to material injury, the Idaho Supreme Court held in *In re Delivery Call of A&B Irrigation District*, 284 P.3d 225, 249 (2012), that junior users bear the ultimate burden of proving no material injury by clear and convincing evidence.

That said, the fact that juniors bear the ultimate burden of proof does not mean the senior does not have a burden of production to make a prima facie showing of material injury. The rules governing burdens of proof, the language of the CM Rules, and the Idaho Supreme Court decision in *AFRD2* uniformly require the senior to come forward with evidence to make a prima facie showing of material injury before the junior's burden of persuasion arises.

The senior is the party "pleading the affirmative on the issue" of material injury, so the senior necessarily bears the burden of production on that issue. 29 Am Jur 2d Evidence § 174. The senior must also bear the burden of production because the senior is "the party with peculiar knowledge of the facts and circumstances" on the issue. 2 Am Jur 2d Administrative Law § 355; see also *Pace*, 111 Idaho 581. Were juniors required to prove no injury before the senior first explains the basis for its claim of injury, they would be improperly put in the position of proving a negative. *Id.* As explained above, the Idaho Supreme Court recognized in *Shokal* that a senior fish farmer is often the only person in possession of the information needed for the Director to make a correct and well-supported decision on issues related to material injury. 109 Idaho at 399.

As the Director will see at the hearing, the complexity and the concealment of information about how Rangen uses water well illustrates that the senior is often the only person in possession of the information needed to make a material injury determination, and that the senior must therefore bear the initial burden of making a prima facie showing of material injury.

The CM Rules and Idaho Code § 42-237b also anticipate that the senior would need to make an initial showing of material injury. Section 42-237b requires the senior to "make a written statement under oath of such claim to the director of the department of water resources" that includes a "detailed and concise statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected." And CM Rule 40 authorizes curtailment only after "a finding by the Director as provided in Rule 42 that material injury is occurring." The Director's independent duty to determine material injury, even if no junior is in a position to contest the delivery call, further necessitates the senior bearing the initial burden of making a prima facie showing of material injury.

Finally, the Idaho Supreme Court has recognized that the senior is in the best position of supporting its claim of material injury. In *AFRD2*, the Court confirmed that the juniors' burden of raising a defense to a delivery call does not arise until *after* material injury is established: "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." 143 Idaho at 878 (emphasis added).

So, with regard to material injury, Rangen has the initial burden of production to make a prima facie showing that it is suffering material injury as the result of junior groundwater pumping. Once that burden is met, IGWA and/or other juniors then bear the ultimate burden of persuasion to rebut the assertion of material injury by clear and convincing evidence. *In re Delivery Call of A&B Irrigation District*, 284 P.3d at 249.

In contrast, the heightened clear and convincing standard of evidence does not apply to decisions involving reasonable use of water and administration of the resource. These issues do not call into question the senior's water right decree, but are instead predicated on the "policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs Foods, Inc.*, 150 Idaho at 808. As the Idaho Supreme Court held in *AFRD2*, "reasonableness is not an element of a water right; thus, evaluation of whether a

diversion is reasonable in the administration context should not be deemed a re-adjudication." 143 Idaho at 877.

Since reasonableness is not an element of an SRBA decree, these questions are subject to traditional burdens of proof. As explained above, the burden of proof rests with the party that pleads the affirmative on the issue, meaning "the party that would be unsuccessful if no evidence were introduced on either side." 29 Am Jur 2d Evidence § 174. In other words, it the burden of proof falls "upon the party seeking a change in the status quo, or upon the party that asserts the claim." *Id.* Another general rule is that "the burden rests on the party with peculiar knowledge of the facts and circumstances." 2 Am Jur 2d Administrative Law § 355. These rules uniformly place the burden of proof on Rangen with respect to issues of reasonable use.

This is consistent with *Shokal* where the Court held that the applicant bears the burden of proof to establish that the proposed action by the IDWR is consistent with the public interest. 109 Idaho at 339. While *Shokal* involved an application to appropriate water, and Rangen involves a petition to curtail water use, both trigger the Director's duty to administer the resource in a manner that protects all interests to the use of water. *See* Idaho Code § 42-101. Thus, the burden of establishing that Rangen's means of diversion and conveyance are reasonable and that curtailment is consistent with "[t]he policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources," *Clear Springs Foods, Inc.*, 150 Idaho at 808, should rest with Rangen, just as the burden of establishing that a new appropriation was not contrary to the public interested rested with the applicant in *Shokal*.

The Director's reasonable use determinations are matters of discretion to be based on the preponderance of the evidence. The general rule in civil actions is that "the burden of proof is by a preponderance of the evidence, which means more probable than not." *Bourgeois v. Murphy,* 119 Idaho 611, 622 (1991). "[T]he preponderance of the evidence standard [is] generally applied in administrative hearings." *N. Frontiers v. State ex re. Cade*, 129 Idaho 437, 439 (Ct. App. 1996) (citing 2 Am. Jur. 2d Administrative Law § 363 (1994)).

CONCLUSION

In applying the CM Rules, it is important that the Director recognize they exist because of the unique characteristics of the interaction of groundwater with other groundwater or surface water rights, and the fact that exponentially more groundwater must be curtailed than will actually benefit the calling senior. In light of the "policy of the law of this State [] to secure the

maximum use and benefit, and least wasteful use, of its water resources," *Clear Springs Foods, Inc.*, 150 Idaho at 808, the CM Rules justify curtailment in the conjunctive management context only after the Director is convinced that (i) junior groundwater pumping is materially impairing Rangen's aquaculture use, (ii) Rangen's water needs, if any, cannot be met by improving its diversion or conveyance facilities, and (iii) curtailment will not unreasonably interfere with the constitutional right to appropriate unappropriated water. With respect to the first issue, Rangen must make a prima facie showing that it is being injured by junior groundwater pumping, but once that burden is met, junior users have the ultimate burden of proving no injury by clear and convincing evidence. In contrast, Rangen has the burden of both production and persuasion to show that its diversion and conveyance facilities are reasonable, and that—in the event the Director finds material injury to Rangen—curtailment does not impede the constitutional right to appropriate unappropriated water or run afoul of other state law policies governing the full and optimum use of the states' underground water resources. These issues are not subject to the heightened clear and convincing standard, but are matters of discretion that must be based on the preponderance of the evidence in the record.

RESPECTFULLY SUBMITTED this 22nd day of April, 2013.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 

RANDALL C. BUDGE
CANDICE M. MCHUGH
THOMAS J. BUDGE
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, I caused to be served a true and correct copy of **IGWA's Pretrial Brief** upon the following in the manner indicated:

Signature of person serving 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 Kimi.white@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 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 LAW OFFICES PO Box 2900 Boise, ID 83701 Tom.arkoosh@arkoosh.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