

RECEIVED

AUG 28 2012

DEPARTMENT OF
WATER RESOURCES

*Rec'd by email
8/24/12*

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Buckeye Farms, Inc.

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

IN THE MATTER OF DISTRIBUTION OF)	BUCKEYE FARMS, INC.'S
WATER TO WATER RIGHT NOS. 36-02551)	REPLY IN SUPPORT OF
36-07694)	PETITION FOR LIMITED
)	INTERVENTION
(RANGEN, INC.))	
)	
)	
)	

COMES NOW, Buckeye Farms, Inc. ("Buckeye"), by and through its undersigned attorneys of record, and submit this *Reply* in support of its petition for limited intervention. Buckeye seeks to intervene in these proceedings for the limited purpose of addressing the application of the Eastern Snake Plain Aquifer Model 2.0 ("ESPAM 2.0").

REPLY

The Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") (hereinafter collectively referred to as "Ground Water Users") oppose Buckeye's limited intervention in this case. The Ground Water Users allege Buckeye only has a generalized in this case, that Rangen and the SWC adequately represents its interests, and that its petition is untimely. Each of these arguments fails and is addressed separately below.

I. Buckeye Has a Direct and Substantial Interest in Proper Application of ESPAM 2.0 in Conjunctive Administration.

IDWR Rule of Procedure 353 states a presiding officer will grant intervention if the petitioner shows “direct and substantial interest in any part of the subject matter of a proceeding . . .” IDAPA 37.01.01.353. Like the SWC and any other injured senior water right holder, Buckeye has a direct and substantial interest in proper implementation of the new ESPA model (ESPAM 2.0) in conjunctive administration. Recently, the Director ordered that IDWR “will utilize ESPAM version 2.0” for purposes of the Rangen delivery call, and that “any and all issues associated with ESPAM version 2.0 and the Department’s use of ESPAM version 2.0 will be addressed during the course of the January 28, 2013 hearing.” *See Order Re: Eastern Snake Plain Aquifer Model and the Rangen, Inc. Delivery Call*. How IDWR implements ESPAM version 2.0 for surface water rights in the Hagerman Valley directly affects Buckeye, and not just on the springs source in the Curran Tunnel. Since this is the first delivery call proceeding to address ESPAM 2.0, Buckeye has a direct and substantial interest in this part of the proceeding.

Contrary to Pocatello’s position, the Director has already acknowledged that “any future conjunctive administration calls will likely use ESPAM 2.0 and that these proceedings will likely become precedent for future proceedings.” *Order Granting SWC’s Petition for Limited Intervention* at 2. Accordingly, Buckeye’s limited intervention will not “expand” the scope of this proceeding. Moreover, contrary to Pocatello’s contrived theory, there is no condition that Buckeye must have a pending delivery call in order to qualify to have an interest in this proceeding. As such, there is no basis to exclude Buckeye from the development of a full record on the application of ESPAM 2.0 and its use in conjunctive administration, particularly how it affects surface water sources in the Hagerman Valley.

II. Rangen and the SWC Do Not Adequately Represent Buckeye's Interests.

IGWA wrongly alleges that Buckeye's interest "is no different than the interests of Rangen or the SWC."¹ *IGWA Opposition* at 1. Rangen and the SWC do not adequately represent Buckeye's interests in this case. Buckeye is a distinct corporation that diverts water from various sources in the Hagerman Valley. Although Rangen and the SWC also hold senior surface water rights, those entities do not represent the unique and individual interests of Buckeye, including its "separate and distinct property rights." *See e.g., City of Pocatello's Petition to be Designated as Respondent or Alternatively to Intervene* (May 21, 2012).

Moreover, Rangen and the SWC have no authority to represent Buckeye's position on the development and implementation of ESPAM 2.0 for purposes of conjunctive administration. How the model is interpreted and applied is subject to the individual parties' positions. Just as Pocatello, and now Fremont-Madison Irrigation District, claim individual interests that are not adequately represented by IGWA, so too does Buckeye as it relates to Rangen and the SWC.

III. Buckeye's Petition is Timely, Alternatively the Issue is Moot.

In the *Order Granting SWC's Petition for Limited Intervention*, the Director stated that the SWC's petition was not timely. *Order* at 2. The Director justified this conclusion on the theory that the SWC did not file its petition prior to the first prehearing conference for scheduled for January 19, 2012. *See id.* The pre-hearing conference has been continued several times in 2012. Accordingly, any petitions filed prior to the final pre-hearing conference comply with the standard under IDWR's Rules. *See* IDAPA 37.01.01.352. Moreover, there is no prejudice to any party as to the timing of Buckeye's petition as the hearing schedule is progressing as ordered, and Buckeye's limited intervention will not broaden the scope of the proceedings.

¹ If IGWA's reasoning is correct, then the same argument applies to Pocatello and Fremont-Madison Irrigation District with respect to their interests vis-à-vis IGWA.

Alternatively, if Buckeye's petition is similarly deemed untimely, the issue is moot. After all, the Director granted the SWC's petition, despite the claimed late filing, and Buckeye's petition was only filed a few weeks after the SWC's. Again, since there is no prejudice by the timing of Buckeye's filing, the issue is moot.

CONCLUSION

Buckeye has a direct and substantial interest in the proper application of ESPAM 2.0 in conjunctive administration. Since IDWR's use of, and "all issues associated with ESPAM 2.0" as it relates to conjunctive administration is already at issue in the Rangen delivery call case, Buckeye's petition should be granted. Since Buckeye's participation will not broaden the issues before the Hearing Officer, Buckeye should be permitted to intervene in these proceedings.

DATED THIS 24th day of August, 2012.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson

Travis L. Thompson

Paul L. Arrington

Attorneys for Buckeye Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2012, the above and foregoing document was served on the following via email and first class mail, postage prepaid:

Gary Spackman, Director
Idaho Department of Water Resources
322 E. Front Street
Boise, ID 83720-0098
gary.spackman@idwr.idaho.gov
deborah.gibson@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

J. Justin May
MAY BROWNING
1419 W. Washington
Boise, ID 83702
jmay@maybrowning.com

Robyn Brody
BRODY LAW OFFICE
P.O. Box 554
Rupert, ID 83350
rbrody@cableone.net
robynbrody@hotmail.com

Fritz Haemmerle
HAEMMERLE & HAEMMERLE
P.O. Box 1800
Hailey, ID 83333
fxh@haemlaw.com

Randy Budge
Candice McHugh
T.J. Budge
RACINE OLSON
P.O. Box 1391
Pocatello, ID 83204-1391
rbc@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

Sarah Klahn
Mitra Pemberton
Ryland Hutchins
WHITE & JANKOWSKI
511 16th St., Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com
rylandh@white-jankowski.com

C. Tom Arkoosh
Capitol Law Group PLLC
P.O. Box 2598
Boise, ID 83702
tarkoosh@capitolawgroup.net

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


Travis L. Thompson