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*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE 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 Second Petition to Stay  
Curtailment, and Request for  
Expedited Decision**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Director pursuant to IDAPA 37.01.01.780 to stay implementation of the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* (“Curtailment Order”) entered January 29, 2014, and the *Notice of Violation and Cease and Desist Order* (“Cease & Desist Order”) entered January 31, 2014, until the judiciary completes its review of the Curtailment Order in *IGWA v. IDWR*, Gooding County Case No. CV-2014-179, and *Rangen v. IDWR*, Twin Falls County Case No. CV-2014-1338.

As explained below, Rangen will receive far more water if the Orders are stayed than if they are enforced; issues of first impression warrant judicial review before the Orders take effect; and staying the Orders will afford the IDWR an opportunity to rule on IGWA’s application for permit no. 36-16976, as well as its Second Mitigation Plan to deliver water from Tucker Springs, both of which are capable of meeting the full 9.1 cfs mitigation obligation on a permanent basis.

## LEGAL STANDARD

The IDWR has explicit legal authority to stay the Curtailment Order and the Cease & Desist Order during the appeals process. The Idaho Administrative Procedures Act states that any agency “may grant, or the reviewing court may order, a stay upon appropriate terms.” IDWR Rules of Procedure similarly state: “Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final.”<sup>1</sup> And Rule 84(m) of the Idaho Rules of Civil Procedure reaffirms that “an agency may grant ... a stay upon appropriate terms.”

While neither the Idaho Code nor the Idaho Rules of Civil Procedure elaborate on what “appropriate terms” are for a stay, petitions for stay are generally decided based on principles of equity.<sup>2</sup> The following factors are often considered:

- (1) the likelihood the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.<sup>3</sup>

## ARGUMENT

As explained below, the Director should stay implementation of the Curtailment Order and the Cease & Desist Order because (1) critical issues of first impression warrant judicial review before the Orders take effect; (2) curtailed groundwater users will be severely and irreparably harmed absent a stay; (3) Rangen will not be harmed, but will actually benefit, from a stay; and (4) granting a stay is in the public interest.

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<sup>1</sup> IDAPA 37.01.01.780.

<sup>2</sup> *Haley v. Clinton*, 123 Idaho 707, 709 (Ct. App. 1993); *see also McHan v. McHan*, 59 Idaho 41, 46 (1938) (“Where it appears necessary to preserve the *status quo* to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers. It is entirely possible that the refusal to grant a stay would injuriously affect appellant, and it likewise is apparent that granting such a stay will not be seriously injurious to respondent.”).

<sup>3</sup> *Michigan Coalition of radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also Utah Power & Light Co. v. Idaho Pub. Utils. Comm’n*, 107 Idaho 47, 50 (1984) (Stay justified when there is irreparable loss to moving party); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435-1436 (9th Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); 5 Am.Jur.2d *Appellate Review* § 470 (“Standards for granting stay”).

## **1. Critical issues of first impression warrant judicial review before the Orders take effect.**

The petition for judicial review filed by IGWA raises significant issues, some of which are issues of first impression in Idaho. Among them are:

- A. Whether the Curren Tunnel should be administered as a groundwater source since it meets the statutory definition of a groundwater well under the Idaho Ground Water Act?
- B. Whether the Curtailment Order permits excessive waste and hoarding of Idaho's water resources by curtailing beneficial use of water even if less than 1% of the curtailed water will accrue to Rangen after 50 years?
- C. Whether an uncertainty factor must be applied to the predictions generated by Eastern Snake Plain Aquifer Model (ESPAM) version 2.1, as was done in all prior conjunctive management cases using ESPAM version 1.1?<sup>4</sup>

While there may be room to debate the likelihood of the judiciary reversing the IDWR on these issues, there is no question that a reversal may reduce or even eliminate the curtailment of groundwater rights. It would be a travesty to curtail groundwater rights, causing farmers, dairies, and others to go out of business, only to have the judiciary subsequently rule that the curtailment was unjustified to begin with. This very real possibility weighs heavily in favor of staying the Curtailment Order and the Cease & Desist Order.

## **2. Curtailment will cause severe and irreparable harm.**

The livelihoods of farmers, dairies, and many other businesses are dependent upon water. Curtailment will devastate not only the holders of the curtailed water rights, but also numerous other Magic Valley businesses who depend upon agricultural production for their survival. If curtailment is implemented, loans will go into default, jobs will be lost, cities will be unable to provide services, businesses will close, and land will be foreclosed on. The harm that will be devastating, irreparable, and likely unmatched in the history of the state.

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<sup>4</sup> *Petition for Judicial Review*, Gooding County Case No. CV-2014-179 (March 28, 2014).

### **3. Rangen will not be harmed, but will actually benefit, from a stay.**

Perhaps the most compelling reason for staying the Orders is that it will provide far more water to Rangen than curtailment will. Curtailment of 157,000 acres is predicted provide 9.1 cfs to Rangen at steady-state, after more than 50 years. In the first year of curtailment, only 3.4 cfs is predicted to accrue to Rangen. Accordingly, the Curtailment Order provides for phased-in mitigation, requiring groundwater users to provide 3.4 cfs in mitigation the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.

On April 11, 2014, the IDWR approved IGWA's first mitigation plan in part, providing an immediate 3.0 cfs<sup>5</sup> mitigation credit for groundwater recharge, conversions, dry-ups, and the Sandy Pipe exchange.<sup>6</sup> These mitigation actions are already in place and will be implemented even if the Curtailment Order is stayed. Because the 3.0 cfs credit is 0.4 cfs short of the full 3.4 cfs mitigation obligation, the IDWR has ordered the curtailment of all groundwater rights in the Magic Valley with priority dates junior to July 1, 1983, beginning May 5, 2014. These rights supply water to 25,000 acres of irrigated farmland as well as cities, dairies, and other businesses.

The additional 0.4 cfs that Rangen will receive if the Curtailment Order and the Cease & Desist Order are not stayed is a fraction of the amount of water it will receive if they are stayed. Since the Curtailment Order rules that Rangen does not have a valid water right from Billingsley Creek, the IDWR issued the Cease & Desist Order which prohibits Rangen from diverting any water from Billingsley Creek. Most of the water that is available for use in Rangen's fish hatchery comes from Billingsley Creek. As Exhibits 2291 and 3656 shown, the total flow available to Rangen has fluctuated between approximately 12 and 20 cfs in recent years.<sup>7</sup> The flow from the Curren Tunnel accounts for nearly all of this volatility, fluctuating between roughly 1 and 9 cfs. The rest of the water comes from Billingsley Creek which provides a steady year-round flow of 10-12 cfs.

If the Curtailment Order and the Cease & Desist Order are stayed, Rangen will be able to utilize 10-12 cfs from Billingsley Creek. Without a

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<sup>5</sup> Butch Morris has verbally informed IGWA that he will not use any water from the Curren Tunnel, resulting in a 3.0 cfs mitigation credit as set forth on page 21 of the Order. A letter will soon be submitted by Mr. Morris to the IDWR to confirm this.

<sup>6</sup> *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, IDWR Docket No. CM-MP-2014-001 (April 11, 2014).

<sup>7</sup> Exhibits 2291 and 3656 are attached hereto as Appendix A.

stay, Rangen will be barred from using that water, receiving instead 0.4 cfs from curtailment.

Since there will be no harm to Rangen from a stay, but instead a significant benefit, a stay should be granted.

#### **4. Granting a stay is in the public interest.**

For the reasons stated above, few would argue that the magnitude of the pending curtailment rises to the level of a public crisis. Given Idaho's heavily agriculture-dependent economy, the effects of curtailment will undoubtedly ripple throughout Idaho's economy.

If the judiciary reverses the Curtailment Order, the damage from curtailment will have been done. Even if the judiciary does not reverse the Curtailment Order, by the time the appeals process concludes IGWA will have in place a long-term solution to meet the full 9.1 cfs mitigation obligation. As the Director is aware, IGWA has a pending application to use up to 12 cfs from Billingsley Creek for mitigation purposes. If the IDWR approves this mitigation proposal, it will permanently meet the full 9.1 cfs mitigation obligation. If the IDWR denies it, IGWA's pending Second Mitigation Plan proposes to deliver 9.1 cfs to Rangen from Tucker Springs. This proposal is currently being engineered and is expected to be approved since the IDWR has approved pump-based mitigation systems previously.

While curtailment can be avoided long-term by either of these options, the damage of a short-term curtailment will have already been done. The public interest weighs overwhelmingly against short-term curtailment, particularly since it would provide less water to Rangen than would a stay of the Curtailment Order and the Cease & Desist Order.

### **CONCLUSION**

The Curtailment Order and the Cease & Desist Order should be stayed during judicial review because a stay will (1) provide more water to Rangen than enforcing the Orders, (2) avoid severe and irreparable harm to the curtailed groundwater users and the economies of the Magic Valley and the State of Idaho, (3) allow judicial review of critical issues of first impression, avoiding mistaken curtailment, and (4) serve the public interest.

**REQUEST FOR EXPEDITED DECISION**

Curtailment is scheduled to begin May 5, 2014. If the IDWR does not grant this motion, IGWA must file a similar motion with the Idaho judiciary asking it to stay the Curtailment Order and the Cease & Desist Order, which must be heard and decided prior to May 5, 2014. Therefore, IGWA requests an expedited decision on this motion by April 23<sup>rd</sup> if at all possible.

RACINE OLSON NYE BUDGE  
& BAILEY, CHARTERED

By:  April 17, 2014  
Randy Budge Date  
T.J. Budge  
*Attorneys for IGWA*

## CERTIFICATE OF MAILING

I certify that on this 17<sup>th</sup> day of April, 2014, the foregoing document was served on the following persons in the manner indicated.



Signature of person serving document

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# **Appendix A**

**Exhibits 2291 & 3656**

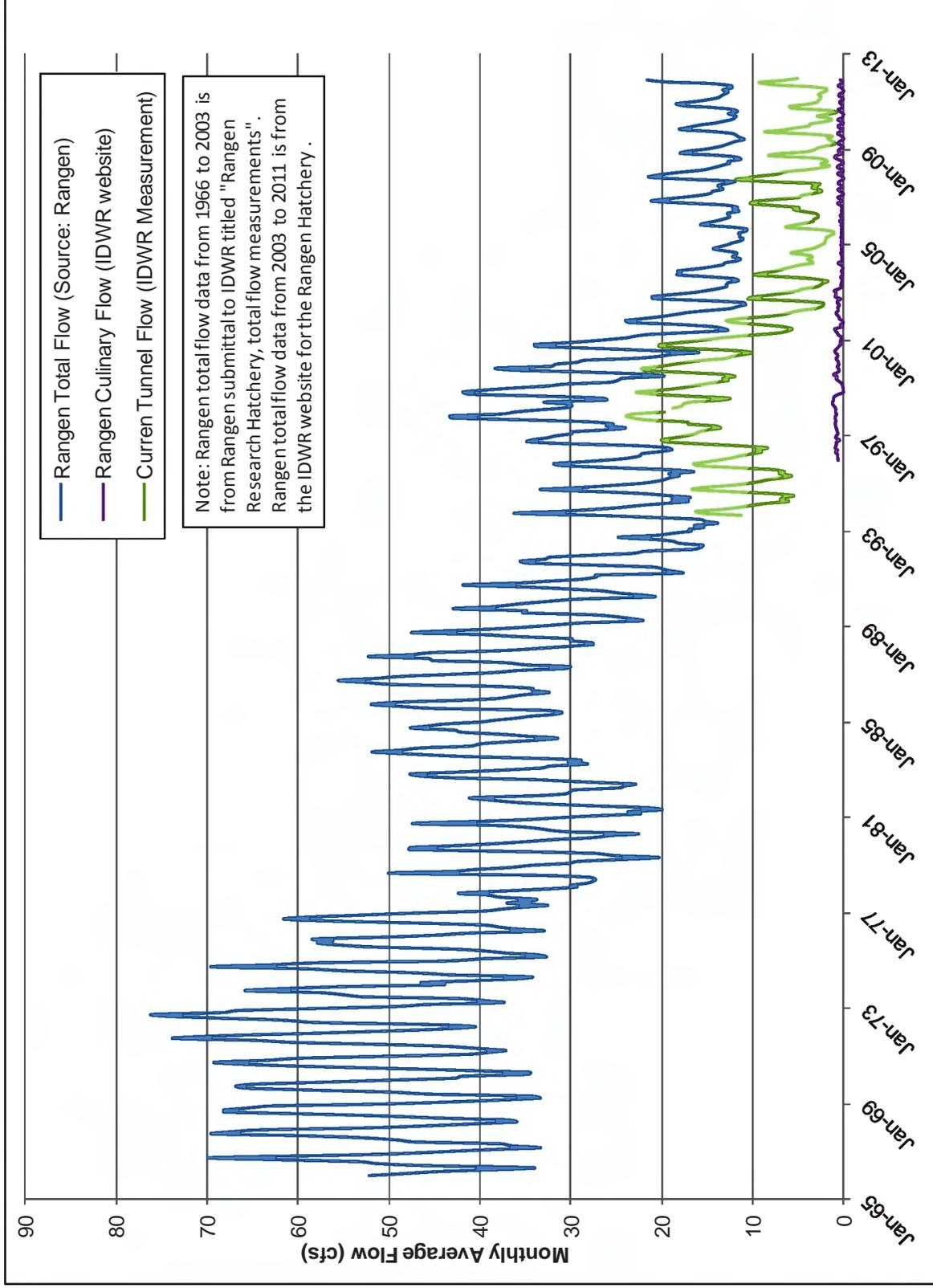
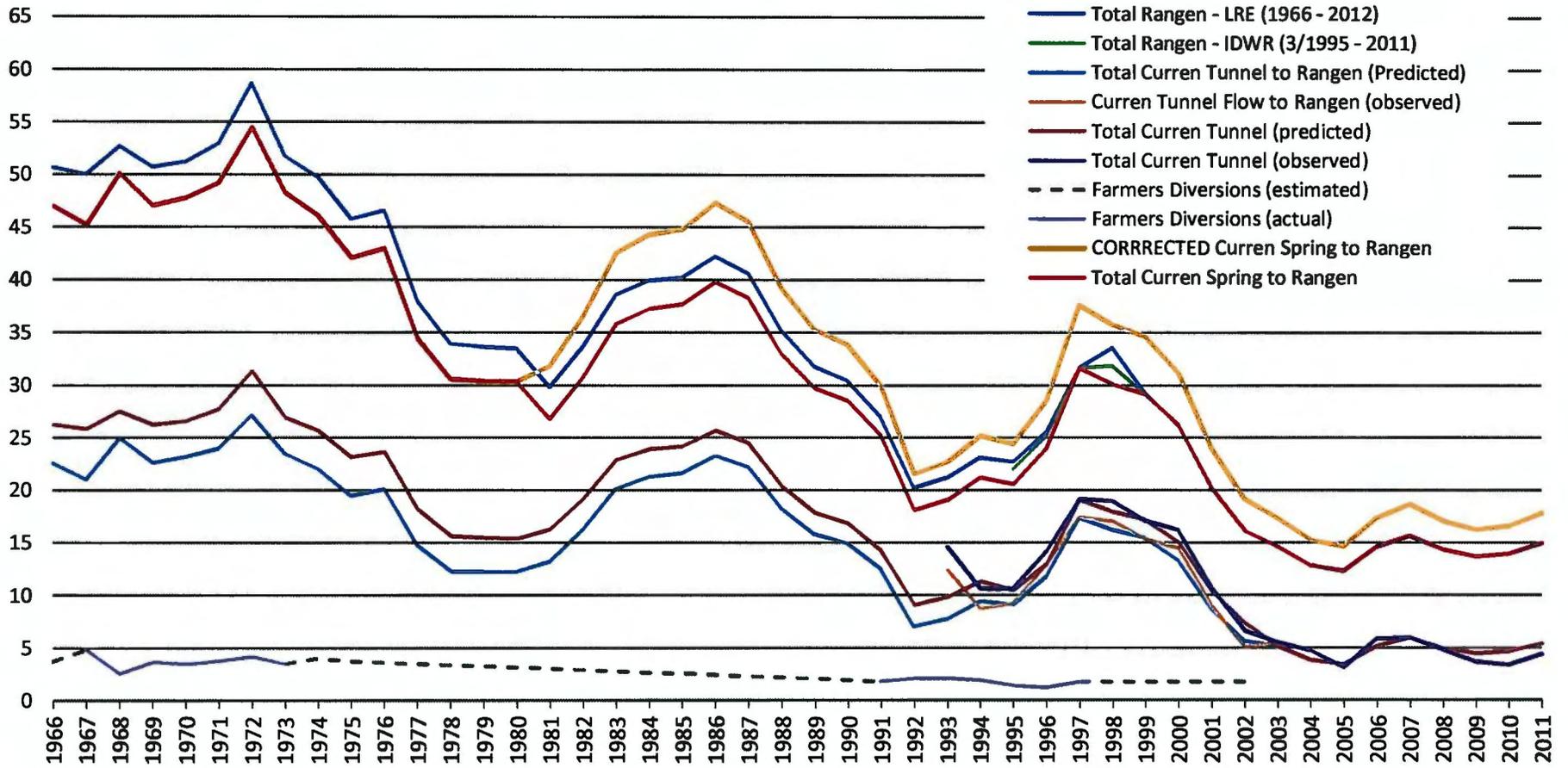


Figure 3.8: Historical Flows at Rangen Facility

**Figure 2-5c**

**Annual Average Flow  
Rangen Hatchery  
1966 - 2012  
Values in CFS**



**Source:** Annual averages of monthly average flows presented in Figure 2-5b.  
Annual average Total Current Spring Flow to Rangen computed as the Total Current Spring after diversions to farmers.

