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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 the fourth mitigation plan filed by the Idaho ground water appropriators for the distribution of water to water right nos. 36-02551 & 35-07694 in the name of Rangen, Inc.

“Magic Springs Project”

Docket No. CM-MP-2014-006

**IGWA’s Post Hearing Brief**

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting through counsel, for and on behalf of its members and non-member participants in mitigation activities, submits this post-hearing brief as authorized by the Hearing Officer at request of Protestant Rangen, Inc. (“Rangen”) at the close of the hearing in this matter October 8, 2014.

Because IGWA presented evidence meeting its burden of proof for approval of the Fourth Mitigation Plan (“Magic Springs Project” or “Plan”), and Rangen presented virtually no contrary evidence, and the Director indicated at the conclusion of the hearing he was inclined to approve the Plan, this brief will not address every aspect of rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), but will instead focus on the issues disputed by Rangen.

**PROCEDURAL BACKGROUND**

On January 29, 2014, the Director issued the *Final Order Regarding Rangen Inc.’s Petition for Delivery Call: Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”).<sup>1</sup> The Curtailment Order provides that holders of junior-priority groundwater rights may avoid curtailment if they participate in a

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<sup>1</sup> Exhibit 1018.

mitigation plan that provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.”<sup>2</sup> The Order explains that mitigation “may be phased-in over not more than a five year period pursuant to CM Rule 40 as follows: 3.4 cfs 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.”<sup>3</sup>

On April 14, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan, Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* that granted IGWA 3.0 cfs of mitigation credit for the period from April 1, 2014 through March 31, 2015, approving proposals number one (aquifer enhancement activities) and proposal number two (delivery of Morris Curren Tunnel water).<sup>4</sup> The 3.0 cfs credit was 0.4 cfs less than the first year mitigation obligation of 3.4 cfs for the period April 1, 2014 through March 31, 2015.<sup>5</sup>

On June 20, 2014, the Director issued an *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* that conditionally approved IGWA’s Second Mitigation Plan (“Tucker Springs Project”) as “an acceptable mitigation plan as it provides replacement water of sufficient quantity, quality and temperature in the time needed by Rangen.”<sup>6</sup> This Order further states that “failure to provide water by January 19, 2015, to Rangen will result in curtailment of water rights junior or equal to August 12, 1973, unless another mitigation plan has been approved and is providing water to Rangen at its time of need.”<sup>7</sup>

The order approving the Tucker Springs Project required approval of an Application for Transfer of Water Right to pipe water from Tucker Springs to Rangen. The potential for injury to downstream water users, as well as concerns over impacts to aquatic species, resulted in multiple protests to the transfer, creating hurdles that will require a significant amount of time to resolve, and thereby creating a risk the groundwater users would be unable to meet the January 19th or even April 1st deadlines for providing mitigation.

In contrast, the Magic Springs Project does not affect downstream water users or impact aquatic species, enabling it to be completed sooner than the Tucker Springs Project.

## APPLICABLE LAW

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<sup>2</sup> *Curtailment Order* at 42.

<sup>3</sup> *Id.*

<sup>4</sup> Exhibit 1020.

<sup>5</sup> Exhibit 1020, p. 20-21.

<sup>6</sup> Exhibit 1021, p. 18.

<sup>7</sup> Exhibit 1021, p. 18.

CM Rule 43.03 establishes the factors that “may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights.” These factors need not be reiterated or discussed in detail as the Director is well familiar with them and recently applied them in the order in approving the Tucker Springs Project. As stated in that order,

to satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the Curtailment Order; (2) the components of the proposed mitigation plan can be implemented to timely provide mitigation water as required by the Curtailment Order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.<sup>8</sup>

## **THE MAGIC SPRINGS PROJECT SHOULD BE PROMPTLY APPROVED**

### **1. Magic Springs Project.**

Under the Plan, IGWA will secure by lease or purchase the right to pump up to 10.0 cfs of first use water from SeaPac of Idaho, Inc (“SeaPac”) at its Magic Springs facility under water right no.’s 36-7072 and 36-8356 to be pumped to the head of Billingsley Creek to satisfy the mitigation obligation imposed by the Curtailment Order.<sup>9</sup> Only Rangen and McKenzie have protested the Plan.<sup>10</sup>

Pursuant to the Letter of Intent with SeaPac (“SeaPac LOI”),<sup>11</sup> IGWA has secured the ability to divert up to 10.0 cfs of first use water from Magic Springs for delivery to Rangen.<sup>12</sup> In return, IGWA will secure ownership or control of Aqualife water rights by long-term lease or purchase from the Idaho Water Resource Board (“IWRB”), which will be made available to SeaPac in exchange for the Magic Springs water.

IGWA has secured a Letter of Intent from IWRB to secure Aqualife water by lease or purchase (“IWRB LOI”).<sup>13</sup> Pursuant to the IWRB LOI, IGWA and the

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<sup>8</sup> Exhibit 1021, p. 4.

<sup>9</sup> Exhibit 1000.

<sup>10</sup> Exhibits 1006, 1007.

<sup>11</sup> Exhibit 1003.

<sup>12</sup> The SeaPac LOI also gives IGWA the right to access all discharge water from SeaPac’s Magic Springs hatchery, which IGWA may pump through a separate pipe to provide additional mitigation water to Billingsley Creek and/or Riley Creek via the Curren Ditch. This will be the subject of a separate mitigation plan filing.

<sup>13</sup> Exhibit 1002.

IWRB have agreed in principle to all terms of a 30-year lease of Aqualife.<sup>14</sup> A permanent agreement between IGWA and SeaPac for the use of Aqualife is in progress and is expected to be finalized as soon as the Plan has been approved.<sup>15</sup>

SeaPac's Magic Springs' water rights 36-7072 and 36-8356<sup>16</sup> authorize the diversion of 148.2 cfs, and Gary Marquardt testified actual flows from Magic Springs are consistently in the range of 80 cfs, with little seasonal fluctuation. Thus, there is ample water to implement the Plan.

IGWA has filed a Transfer Application to change the place of use of a 10.0 cfs portion of SeaPac's water rights from its Magic Springs hatchery to Rangen's Billingsley Creek hatchery.<sup>17</sup> There are no protests to the pending Transfer Application, other than by Rangen. Rangen's protest is for the sole purpose of delaying the implementation of the Plan as it has no downstream water rights affected by the transfer and no legitimate basis to object.

## **2. Engineering Design.**

SPF Water Engineering completed as of September 26, 2014, 60 percent of the engineering design necessary to construct the Magic Springs Project.<sup>18</sup> SPF is continuing to 100 percent completion as expeditiously as possible, including preparing bid material and making arrangements with multiple contractors to proceed with construction of the project and implementation of the Plan. All of this is being accomplished without waiting for the expected order approving the Plan, as time is of the essence.

### **a. Spring Intake Design.**

Engineering design includes two alternative intake locations identified as the "IJ" and "ABC" diversions.<sup>19</sup> The IJ diversion is preferred by SeaPac and is more economical to construct. Because Rangen objected to neither, the IJ diversion is selected for final design and should be approved.

### **b. Pump Station Design.**

The pump station design includes three line-shaft turbine pumps installed in an enclosed, lockable structure. Two pumps will be primary pumps and the third will be a redundant pump to serve as a backup should a pump fail or need to be taken

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<sup>14</sup> L. Carlquist Testimony, Tr. p. 115.

<sup>15</sup> L. Carlquist Testimony, Tr. p. 120; G. Marquardt Testimony, Tr. p. 217.

<sup>16</sup> Exhibits 1004, 1005.

<sup>17</sup> Exhibit 1001.

<sup>18</sup> Exhibit 1009.

<sup>19</sup> Exhibit 1009, p. 13; B. Hardgrove Testimony, Tr. p. 140-141; G. Marquardt Testimony, Tr. pp. 217-218.

out of service for maintenance.<sup>20</sup> Each pump will be equipped with a 200 horse power motor.<sup>21</sup> The pumps will be controlled by variable frequency drives, which will automatically adjust pump speed to deliver a constant flow to Rangen without manual adjustments.<sup>22</sup>

Sufficient power is available from Idaho Power to run the pumps.<sup>23</sup> A back-up generator to protect against utility power outages will be installed and driven by a diesel motor that will automatically start when there is an electrical supply outage.<sup>24</sup>

Tom Rogers' testimony from the Tucker Springs Project was admitted into evidence by stipulation. In that proceeding, Mr. Rogers explained it is not uncommon for fish hatcheries to rely upon pumped water, with eight Fish & Game hatcheries either partially or fully using pumps to supply water to their raceways.<sup>25</sup> Mr. Rogers reviewed the engineering work for this Plan and explained it is a reasonably reliable and suitable means for delivering water to the Rangen hatchery for fish propagation.<sup>26</sup>

### **c. Pipeline Design and Alignment.**

The pipeline will consist of approximately 360 feet of above-grade insulated steel pipe from the pump station to the rim above Magic Springs, and approximately 8,000 feet of buried HDPE pipe from the rim above Magic Springs to the Rangen facility.<sup>27</sup> SPF Water Engineering studied two possible alignments for the pipeline.<sup>28</sup> IGWA's preferred alignment travels through property owned by SeaPac, North Side Canal Company, Mitchell, Hagerman Highway District, Morris and Candy. IGWA has access through the SeaPac property pursuant to the SeaPac LOI, signed Option Agreements with Morris, Candy and Mitchell,<sup>29</sup> and verbal approval from Northside Canal Company which is in the process of being reduced to writing.<sup>30</sup> Hagerman Highway District has also approved the installation within their right of way.<sup>31</sup>

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<sup>20</sup> B. Hardgrove Testimony, Tr. p. 153-154; Exhibit 1009, p. 14.

<sup>21</sup> Exhibit 1009, p. 18.

<sup>22</sup> B. Hardgrove Testimony, Tr. p. 154; Exhibit 1009, pp. 15, 18.

<sup>23</sup> Exhibit 1009, pp. 15, 18.

<sup>24</sup> B. Hardgrove Testimony, Tr. p. 154; Exhibit 1009, pp. 15, 18.

<sup>25</sup> Exhibit 1035, Rogers, Tr. Pr. Volume II, p. 274.

<sup>26</sup> Ex. 1029.

<sup>27</sup> B. Hardgrove Testimony, Tr. pp. 155-156; Exhibit 1009, p. 16.

<sup>28</sup> Exhibits 1010, 1011.

<sup>29</sup> Exhibits 1012, 1013, 1034.

<sup>30</sup> B. Hardgrove Testimony, Tr. pp. 145-146.

<sup>31</sup> Exhibit 1014.

#### **d. Tie-In to Rangen's Delivery System.**

The engineering plans provide for a connection of the buried pipe from Magic Springs directly into Rangen's pipeline between the Small Raceway at Rangen's hatchery.<sup>32</sup> Rangen has raised no issues with the tie-in and has been invited to participate in final design.

### **3. Project Schedule.**

The Magic Springs Project schedule is set forth in Figure 5 of the SPF 60% Engineering Report.<sup>33</sup> Design Engineer Bob Hardgrove testified that the permanent project can be completed by April 1, 2015.<sup>34</sup>

The June 20, 2014 Order recognizes that the Morris exchange water provides full mitigation to Rangen for all of the junior priority ground water right holders IGWA represents until January 18, 2015. The permanent project will be operational to provide mitigation for junior irrigation ground water depletions when they resume at the beginning of the 2015 irrigation season. However, a multitude of economically essential junior city, dairy and other non-irrigation water users will need to continue to divert ground water between January 19 and April 1, 2015. To fully mitigate for their depletions during this period, the Plan provides for the delivery of 0.5 cfs of direct flow from Magic Springs to Rangen via temporary pumping and piping facilities as described in Part 4 of the 60% Engineering Report.<sup>35</sup> This quantity is more than adequate to fully mitigate for these essential water uses during this period.

The work to install the interim mitigation facilities will be contracted out to an entity with experience and knowledge to perform the job reliably, not something cobbled together with used farm equipment.

Joy Kinyon testified that Rangen will use the 0.5 cfs to raise fish so long as the water is of suitable quality for that purpose.<sup>36</sup> The temporary pipe will be above-grade, but Hardgrove testified the water temperature will not rise during January to March timeframe because air temperature is below the water temperature. While this testimony was undisputed, it can easily be corroborated by taking judicial notice of Hagerman average air temperatures in January through March which are below the 59 degree temperature of Magic Springs water.<sup>37</sup> Fifty to 60 degree water

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<sup>32</sup> Exhibit 1009, p. 19.

<sup>33</sup> Exhibit 1009, p. 17.

<sup>34</sup> B. Hardgrove Testimony, Tr. pp. 147, 160.

<sup>35</sup> Exhibit 1009, p. 4.

<sup>36</sup> Tr., pp. 252-253.

<sup>37</sup> <http://www.weather.com/weather/wxclimatology/monthly/83332>

<http://www.usclimatedata.com/climate.php?location=USID0102>

is suitable for raising trout; thus, the cooling of water that may occur will not be problematic for Rangen. Further, any risk of failure during this short-term delivery can be sufficiently mitigated by available liability insurance as confirmed by Lynn Carlquist.<sup>38</sup>

#### **4. Excess Mitigation as a Supplement or Alternative to Interim Mitigation.**

The Plan addresses the Director's concern about the adequacy of the proposed interim mitigation to fully mitigate for junior ground water use beginning on January 19, 2015, by providing Rangen with excess mitigation once the permanent pipe is operational.

Due to the large seasonal fluctuation in discharge from the Curren Tunnel, with peak flows during the winter and low flows during the summer, delivering excess mitigation water to Rangen during the summer will be more beneficial to Rangen's fish rearing operation than delivering mitigation for a short period from January through March. Fish stocking decisions are based on the lowest seasonal flow, as explained in prior proceedings and confirmed in this matter by Gary Marquardt<sup>39</sup> and Joy Kinyon.<sup>40</sup> Delivering excess water during Rangen's low flow period will have a stabilizing effect on its water supply, enabling Rangen to produce more fish. In contrast, delivering water from January to March will not materially increase Rangen fish rearing capacity. Mr. Kinyon admitted on cross-examination that Rangen would not change its hatchery operations based on a temporary delivery of water from January to March.<sup>41</sup>

Delivering excess mitigation water once the permanent delivery system is operational is an appropriate supplement or alternative to mitigation that will be provided through the temporary delivery system.

Moreover, completion of the permanent system enables IGWA to deliver more water to Rangen than is required under the Curtailment Order, providing a net gain to Rangen. As explained below under "IGWA's Path Forward," if the Director will approve excess mitigation as a supplement or alternative to interim mitigation, IGWA will provide more water to Rangen than is required by the Curtailment Order. Rangen cannot in good faith dispute that it will be better off as a result of this.

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<http://www.average-temperature.com/temps/ID/Hagerman>

<sup>38</sup> Ex. 1016.

<sup>39</sup> G. Marquardt Testimony, Tr. pp. 220-221.

<sup>40</sup> J. Kenyon Testimony, Tr. pp. 244-245.

<sup>41</sup> J. Kenyon Testimony, Tr. pp. 241.

By providing interim and/or excess mitigation, the Plan fully mitigates any actual injury to Rangen's water rights and to its operations. Moreover, the Plan is just and equitable under the circumstances. In the Curtailment Order, the Director found that Rangen does not have a valid right to divert water from Billingsley Creek, yet Rangen has been permitted to use that water to provide the bulk of its water supply. Meanwhile, groundwater users have been required to provide mitigation or be curtailed.

These mitigation proceedings demonstrate that finding and delivering water to Rangen is a complex endeavor – one that Rangen has fought at every turn. Allusions that IGWA has been dilatory in its mitigation efforts fail to acknowledge this complexity, or the tremendous amount of time and money IGWA's members have expended, and will yet have to expend in the effort.

In light of IGWA's efforts, the comprehensive manner in which the Plan mitigate injury to Rangen, and the enormous economic and social impacts of the proposed curtailment on January 19th, the Director should accord junior groundwater users the same equity consideration in implementing mitigation that he has accorded to allow Rangen to use water from Billingsley Creek without a water right. The Plan should be approved.

## **5. Transfer Approval and Project Permits.**

IGWA's Transfer Application to move the place of use of water from Magic Springs to the head of Billingsley Creek has been filed and is pending approval.<sup>42</sup> Rangen is the only protestant and has no basis to do so as it owns no water rights affected by the transfer. As Magic Springs discharges directly into the Snake River and there are no intervening water rights and no other protestants, it is certain that the Transfer Application will be approved. As testified to by watermaster Frank Erwin in his deposition, the only known downstream water right that conceivably could be impacted by evaporation and delivery losses pertaining to the water transferred to Billingsley Creek would be Idaho Power's downstream water right at the Murphy Gage. Idaho Power did not object obviously because its' water is fully subordinated pursuant to the Swan Falls Agreement.<sup>43</sup> Anticipated arguments by Rangen that other water rights are somehow injured by the Plan and Transfer Application are without merit and nothing more than a continuation of its efforts to obstruct and delay every mitigation effort in a thinly veiled strategy to exhort an exorbitant buyout.

Bob Hardgrove testified the project requires no other known permits other than routine building permits is uncontroverted.

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<sup>42</sup> Exhibit 1001.

<sup>43</sup> Exhibit 2013, Frank C. Erwin Deposition, p. 41.

## **6. Water Quality.**

The temperature and quality of Magic Springs water is essentially identical to the water flowing from the Curren Tunnel.<sup>44</sup> Rangen's discovery responses admit the temperature and quality of the water at Magic Springs is virtually the same.<sup>45</sup> The Testimony of SeaPac's Manager Gary Marquardt that the water at the Magic Springs' points of intake are as good as or better than what Rangen has and entirely suitable to raise Rainbow Trout is uncontroverted by Rangen.<sup>46</sup> No evidence or concerns were presented regarding any water quality issues at the Magic Springs' intakes. As such, no specific or unique bio-security protections or degassing aeration structures should be imposed, other than those already contained in the 60% engineering design.

## **7. Rangen Acceptance Date.**

Consistent with the Director's *Final Order Concerning the Over the Rim Mitigation Plan dated March 18, 2011*<sup>47</sup> and *Order Approving IGWA's Second Mitigation Plan dated June 20, 2014*,<sup>48</sup> Rangen should be required to state in writing: (1) whether it will accept the water delivered through the Magic Springs pipeline; and, (2) whether it will allow construction on its land related to the placement and delivery of the pipe. If rejected, IGWA's mitigation obligation should be suspended.

In the past, the Director has provided 21 days to make this statement. Under the circumstances, this should be shortened to not more than 7 days for several reasons. First, Rangen simply doesn't need 21 days to make the decision, as it now well knows of this requirement based on these prior orders. Second, Rangen already made the decision with respect to the Tucker Springs Project, waiting until the very last day to give the Notice of Acceptance, consistent with its delay tactics. Third, at the conclusion of the hearing, the Director indicated he was inclined to approve the Plan, giving Rangen ample time to make its decision by the time the order is entered. Fourth, with the January 19, 2015 curtailment deadline looming, time is of the essence.

## **IGWA'S PATH FORWARD**

IGWA's affected members, North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District, have instructed SPF Wa-

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<sup>44</sup> Exhibit 1009, p. 3.

<sup>45</sup> Exhibit 1032, Answer to Interrogatory No.'s 4, 5.

<sup>46</sup> G. Marquardt Testimony, Tr. pp. 217-218.

<sup>47</sup> Exhibit 1019.

<sup>48</sup> Exhibit 1021.

ter Engineering to continue all engineering work to 100 percent completion, to acquire all necessary easements, and to let bids and enter construction contracts to complete the Magic Springs Project as soon as possible. The first load of over 800 feet of pipe has already been delivered and is on the ground.<sup>49</sup> Work is going full speed forward to complete the design, construct the project, and make it operational as soon as possible, no later than April 1, 2015.

If the Director does not approve the Plan's proposal for a temporary pump and pipeline system to deliver water by the January 19, 2015, deadline, IGWA will have no choice but to abandon that effort and apply all efforts to completing the permanent delivery system as soon as possible.

If the Director rejects the temporary pipe, the Idaho dairy industry and nearly every city in the Magic Valley will be placed in the impossible position of having their wells shut off for roughly two months until the permanent pipe is completed. Should the Director reject the temporary pipe, IGWA asks him to unilaterally exercise his legal authority to stay the Curtailment Order until the permanent pipe is operational.

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>50</sup> And Rule 84(m) of the Idaho Rules of Civil Procedure reaffirms "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>51</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>52</sup>

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<sup>49</sup> Exhibit 1031.

<sup>50</sup> IDAPA 37.01.01.780.

<sup>51</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>52</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);

These factors all weigh heavily in favor of a stay.

First, there is an appeal pending that may result in the Curtailment Order being set aside.

Second, the dairies and cities will be irreparably harmed in extreme ways if a stay isn't granted.

Third, granting a stay will *benefit* Rangen, and harm nobody. As mentioned above, it is more beneficial to Rangen to have excess mitigation during the low flow summer months. In addition, IGWA offers to enlarge the benefit to Rangen by delivering 1 cfs more mitigation water than is required under the Curtailment Order for the period April 1, 2015-March 31, 2016. Whereas the Order requires the delivery of 5.2 cfs during that period, IGWA will deliver 6.2 cfs, resulting in a substantial net gain to Rangen. To demonstrate, the delivery of 2.2 cfs from January 19, 2015, to March 31, 2015, will provide 309.8 acre-feet to Rangen,<sup>53</sup> whereas an additional 1 cfs from April 1, 2015, to March 31, 2016, will provide 724 acre-feet.<sup>54</sup>

Finally, there is extraordinary public interest in granting the stay, which will unnecessary and harmful uncertainty for the dairy industry, cities, and other business in the Magic Valley.

Should the Director refuse to grant a stay at this time, IGWA implores the Director to not conclusively rule out the proposition. Absent discovering some alternative short-term mitigation solutions for the January to March time frame, which seems unlikely, IGWA will have no choice but to file a subsequent motion for stay near the end of the year, supported by a construction progress report and anticipated completion date. Still, IGWA requests a stay now to avoid debilitating uncertainty and harm for all owners of non-irrigation rights in the Magic Valley.

## CONCLUSION

For the reasons stated above, IGWA respectfully asks the Director to enter an order as follows:

- (A) Approving the Fourth Mitigation Plan – Magic Springs Project as an acceptable mitigation plan which provides replacement water of sufficient quality, quantity and temperature in the time needed by Rangen.
- (B) Requiring Rangen to state, within 7 days from the date of the order, whether it will accept water delivered through the Magic Springs pipeline and whether it will allow construction on its land related to the placement of the delivery pipe. Rangen must submit its written acceptance/rejection to the

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*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”).

<sup>53</sup> 2.2 cfs x 71 days x 1.9835 acre-feet/day = 309.8 acre-feet.

<sup>54</sup> 1 cfs x 365 days x 1.9835 acre-feet/day = 724 acre-feet

Department and IGWA. If Rangen does not timely reject or accept the Plan or Rangen refuses to allow construction in accordance with an approved Plan, IGWA's mitigation obligation should be suspended.

- (C) Encouraging Rangen to cooperate and provide input on final engineering design, instructing the Districts to provide 100 percent engineering design to IDWR and Rangen upon completion, and allowing seven days for IDWR or Rangen to object to final engineering. If no objection is filed, the final engineering will be deemed accepted.
- (D) Approving IGWA's temporary pump and pipeline proposal to deliver 0.5 cfs or whatever amount the Department determines is required by the January 19, 2015, deadline to mitigate for depletions by junior non-irrigation water rights of the Districts' members within the Great Rift trimline to satisfy the mitigation obligation to Rangen and avoid curtailment, and to provide the notice required under (C) above concerning the temporary pipe.
- (E) An alternative to (D) above, stay the curtailment presently scheduled to begin January 19, 2015, in exchange for IGWA delivering 6.2 cfs of mitigation to Rangen from April 1, 2015, to March 31, 2016.
- (F) The approval order should be conditioned on IGWA's Letters of Intent with SeaPac and IWRB should be reduced to final agreements.
- (G) The approval order should also be conditioned upon IGWA approval of the pending Transfer Application; or, a lease of Magic Springs' water through the Water Bank.

RESPECTFULLY SUBMITTED October 15, 2014.

Racine Olson Nye Budge  
& Bailey, Chartered

By:   
Randall C. Budge  
T.J. Budge

October 15, 2014  
Date

**CERTIFICATE OF MAILING**

I certify that on this 15<sup>th</sup> day of October, 2014, the foregoing document was served on the following persons in the manner indicated.

*Randall C. Bridge*

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Signature of person mailing form

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