

# COPY

Robyn M. Brody (ISB No. 5678)  
Brody Law Office, PLLC  
P.O. Box 554  
Rupert, ID 83350  
Telephone: (208) 434-2778  
Facsimile: (208) 434-2780  
robynbrody@hotmail.com

J. Justin May (ISB No. 5818)  
May, Browning & May, PLLC  
1419 W. Washington  
Boise, Idaho 83702  
Telephone: (208) 429-0905  
Facsimile: (208) 342-7278  
jmay@maybrowning.com

Fritz X. Haemmerle (ISB No. 3862)  
Haemmerle & Haemmerle, PLLC  
P.O. Box 1800  
Hailey, ID 83333  
Telephone: (208) 578-0520  
Facsimile: (208) 578-0564  
fxh@haemlaw.com

*Attorneys for Rangen, Inc.*

District Court - SFBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
JUN 27 2014	
By _____	Clerk
_____	Deputy Clerk

**DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

RANGEN, INC.,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF  
WATER RESOURCES and GARY  
SPACKMAN, in his capacity as Director  
of the Idaho Department of Water  
Resources,

Respondents.

IDAHO GROUND WATER  
APPROPRIATORS, INC., FREMONT  
MADISON IRRIGATION DISTRICT,  
A&B IRRIGATION DISTRICT, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY,

**Case No. CV-2014-1338**

(Consolidated Gooding County Case  
No. CV-2014-179)

**RANGEN, INC.'S RESPONSE IN  
OPPOSITION TO MOTION TO  
AUGMENT RECORD**

TWIN FALLS CANAL COMPANY, AND  
THE CITY OF POCA TELLO,

Intervenors.

COMES NOW Rangen, Inc. (“Rangen”), through its attorneys, and submits the following Response in Opposition to Motion to Augment Record.

## I. INTRODUCTION

Idaho Ground Water Appropriators, Inc. (“IGWA”) has filed a Motion to Augment Record requesting that it be allowed to include an Affidavit of Charles M. Brendecke in the record to support its position that the trim line used by IDWR in evaluating Rangen’s call will enable a single water user like Rangen to “command” the aquifer through the curtailment of hundreds of thousands of acres. IGWA’s Motion to should be denied because: (1) IGWA’s argument is an attempt to end-run the Idaho Supreme Court’s ruling in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011) that economic harm evidence should not be considered when evaluating a delivery call; (2) the evidence is not material; (3) there is no justification for IGWA’s failure to submit the evidence at the time of the hearing; and (4) a remand would be required because the evidence as presented is potentially misleading and Rangen was precluded from presenting evidence of the Hagerman water shortage because of IGWA’s objection. A remand would result in an unjustifiable delay of this proceeding. As such, Rangen respectfully requests that IGWA’s Motion be denied.

## II. STANDARD OF REVIEW

At the Court’s discretion, I.R.C.P. 84(1) permits augmentation of the record by the District Court “[w]here statute provides for the district court itself to take additional evidence”, or “[w]here statute provides for the district court to remand the matter for the agency to take

further evidence.” Idaho Code § 67-5276 is the statute that controls the taking of additional evidence in connection with appeals under the Idaho Administrative Procedures Act. Section 67-5276 reads as follows:

**67-5276. Additional Evidence.** – (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional fact-finding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

I.C. § 67-5276.

Interpreting this provision, the Idaho Supreme Court has held that augmentation may be allowed provided the moving party shows: 1) the additional evidence is material, relates to the validity of the agency action; and 2) there were good reasons for failure to present it in the proceeding before the agency; or 3) there were alleged irregularities in procedure before the agency. *Folks v. Moscow School District No. 281.*, 129 Idaho 833, 933 P.2d 642 (1997). The decision of the trial court in admitting new evidence will not be overturned absent an abuse of discretion. *Bower v. Bingham County*, 140 Idaho 512, 96 P.3d 613 (2004). IGWA has not made an adequate showing under I.C. § 67-5276, and, thus, its Motion should be denied.

### III. ARGUMENT

#### A. **IGWA’s Argument is an Improper Attempt to Make an End-Run Around the Idaho Supreme Court’s Clear Springs Decision Prohibiting Consideration of Economic Impact.**

The Idaho Supreme Court unequivocally held in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011) that: “*A delivery call cannot be denied on the ground that*

*curtailment of junior appropriators would result in substantial economic harm.”* 150 Idaho at 803, 252 P.3d at 84 (emphasis added). The Court explained that:

The reference to full economic development of underground water resources [as used in I.C. § 42-226] does not mean that the groundwater appropriator who is producing the greater economic benefit or would suffer the greater economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators.

150 Idaho at 802, 252 P.3d at 83.

IGWA has steadfastly refused to recognize the Supreme Court’s ruling. IGWA hired John Church, an economist, to testify in this matter concerning the economic impact of curtailment. When IGWA disclosed Church as a witness, Rangen filed a Motion in Limine to Exclude his anticipated testimony. (R., pp. 368-428). The Director granted Rangen’s Motion in part, but ruled that Church could testify to other economic matters such as costs associated with various diversions. (R., pp. 611-15). After the Director’s ruling, IGWA disclosed Church’s report. As expected, Church’s report concerned the economic impact of curtailment. Rangen had to file a Motion to Strike Portions of John S. Church Report and to Enforce Order Partially Granting Motion in Limine. (R., pp. 2161-2175). The Director granted Rangen’s Motion in part. (R., pp. 2492-97).

The Affidavit of Charles Brendecke that IGWA seeks to place in the record is intended to show the magnitude of curtailment in terms of acres. While no dollars are discussed in the affidavit, the essence of IGWA’s argument based on the affidavit is that there will be great economic harm because of the number of acres that are idled through curtailment. There is no substantive difference between Church’s economic impact testimony that IGWA attempted to introduce prior to the hearing and the evidence they now seek to admit. The impact of curtailment on a junior user is not a consideration under the prior appropriation doctrine

embodied in Idaho's constitution and case law. As such, the affidavit should not be allowed in the record and IGWA's Motion to Augment should be denied.

**B. The Evidence IGWA Seeks to Admit is Immaterial.**

IDWR has filed a Response in Opposition to IGWA's Motion to Augment. Rangen joins IDWR in those arguments.

**C. There is No Justification for IGWA's Failure to Introduce the Evidence at the Time of the Hearing.**

Rangen joins IDWR in its argument that there is no justification for IGWA's failure to introduce the evidence at the time of the hearing.

**D. A Remand Will Be Necessary and Will Unjustifiably and Unjustly Delay this Proceeding.**

IDWR correctly pointed out in its Response that if the Court were to grant IGWA's Motion to Augment, the Court must remand this matter for further factual findings by the Department. Rangen will not repeat IDWR's legal arguments here, but, in terms of factual matters there are three important points. First, the information in Table 1 attached to Brendecke's Affidavit is misleading. It is misleading in at least two ways. Brendecke seems to be suggesting that each of the calls set forth in Table 1 would result in additional acres being curtailed in the amount specified in the third column. This is not the case. The third column only sets forth the numbers of acre based solely upon the priority date of the particular calling water right if the call were considered in isolation. In fact, each of the numbers in this column is cumulative of all acres listed below. For instance, the Rangen Call is listed in the middle of the table with a priority date of 7/13/1962 and 155,000 acres. This does not mean that an additional 155,000 acres would be curtailed. These 155,000 acres would likely encompass all of the acres listed below Rangen Call for the Aquarius Aquaculture, Ark Fisheries, Inc. and LynClif Farms Calls. In other words, these calls would not result in additional

acres curtailed, but rather, the curtailment as a result of the Rangen Call would provide additional water to satisfy other senior water rights in the Hagerman Valley and throughout the ESPA that are short of water due to junior ground water pumping. *See* the Affidavit of Charles E. Brockway submitted contemporaneously herewith.

The Brendecke Affidavit is also misleading because it assumes with no analysis that it would be necessary to curtail all junior water rights to satisfy each of the calls. This also is not the case. For instance, the Billingley Creek Ranch Call attached to Brendecke's Affidavit indicates three water rights that are short a combined 9.36 cfs of water. These water rights are diverted from springs tributary to Billingsley Creek downstream of the Rangen Research Hatchery. Curtailment under the Rangen Call would result in enhancement of the springs applicable to the Billingsley Creek Ranch water supply similar to the water arriving in the Curren Tunnel. The ground water model predicts an additional approximately 14 cfs of water at the head of Billingsley Creek as a result of Rangen's Call, it is almost certain (although the model has not been run specifically for a Billingsley Creek Ranch Call), that the spring flows providing water under the Billingsley Creek Ranch Call would also be satisfied by curtailment under the Rangen Call. Rangen should be allowed to explore this misleading affidavit through cross-examination and/or their own experts.

Another problem with Brendecke's Affidavit is that it does not show that the imposition of the trim line will enable a single surface water user to "command" the aquifer as IGWA asserts. To the contrary, Brendecke's Affidavit demonstrates that there are other Hagerman surface water users who are short of water and have been short of water for decades and will benefit from curtailment. Curtailment will not benefit only Rangen -- it will benefit the entire Thousand Springs area. Rangen attempted to introduce this evidence at the hearing of this matter and IGWA objected. The Director sustained IGWA's objection and Rangen was not allowed to put on evidence of the Hagerman

water shortage and how others would benefit from curtailment. The following exchange took place during the testimony of Frank Erwin, the watermaster for Water District 36A:

Q. Do you have an estimate of how many Billingsley Creek users, water users, there are downstream of the Rangen Research Hatchery?

A. Would that be referenced by the number of water rights?

Q. Sure. Let's try that.

A. Let's say approximately 400.

Q. And are there any fish hatcheries downstream of Rangen?

A. Yes, there is.

Q. Can you – I bet you can. Can you start maybe up at Rangen and tell me what they are as they go down Billingsley Creek toward the river?

A. There are actually two different groups or two different points of diversion for the water for the fish hatcheries. Do you want the fish hatcheries that specifically on Billingsley Creek or the fish hatcheries that are on tributaries or springs that flow into Billingsley Creek?

Q. Let's go Billingsley Creek.

A. Billingsley Creek.

Q. Yeah?

A. The next hatchery down from the Rangen facility would be the -- I refer to it as the old Idaho Trout facility. Right now it belongs to the Idaho State Building Authority and is in control of the Idaho State parks.

The next facility would be the Fisheries Development, which is owned by Kay Hardee. The next facility down would be Ted Talbott. And on the opposite side of the creek would be Dale Boyer and then below Ted Talbott's facility is Peter Sturdivant's facility.

Q. And are those facilities to the best of your knowledge short of water?

Ms. McHugh: Objection. Relevance.

The Hearing Officer: Ms. Brody

Ms. Brody: Well, one of the issues is that the call doesn't accrue to – that not enough of the water that would come – that would be curtailed as a result of this would accrue to Rangen and that other people don't benefit and I think this goes directly to that issue. Other people benefit if there's curtailment as well.

The Hearing Officer: You're referring back to the testimony about 99 – well, actually --

Ms. Brody: The argument.

The Hearing Officer: I'll sustain the objection.

(Tr., p. 232, l. 9 – p. 234, l. 8). It would be unjust to allow IGWA to augment the record with evidence that Rangen was precluded from refuting because of IGWA's objection.

Finally, Rangen made this delivery call in December 2011. A two week trial was held in May 2013. A decision was issued in January 29, 2014 – more than two years after Rangen made the call. There is a stay in place that precludes the administration of Rangen's water rights. The Martin-Curren Tunnel flow is presently 1.33 cfs and Rangen has rights for over 76 cfs. Augmenting the record at this late date and remanding back to IDWR for further factual findings would result in an unjustifiable and unjust delay.

#### IV. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that IGWA's Motion to Augment be denied.

DATED this 27th day of June, 2014.

MAY, BROWNING & MAY

By



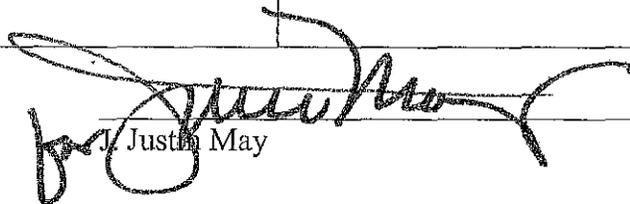
Justin May

### CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 27th day of June, 2014 she caused a true and correct copy of the foregoing document to be served upon the following by the method indicated:

<p><b>Original:</b>                  Director Gary Spackman                  IDAHO DEPARTMENT OF WATER                  RESOURCES                  P.O. Box 83720                  Boise, ID 83720-0098                  deborah.gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/>                  U.S. Mail <input checked="" type="checkbox"/>                  Facsimile <input type="checkbox"/>                  Federal Express <input type="checkbox"/>                  E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter                  Emmi L. Blades                  IDAHO DEPARTMENT OF WATER                  RESOURCES                  P.O. Box 83720                  Boise, Idaho 83720-0098                  garrick.baxter@idwr.idaho.gov                  emmi.blades@idwr.idaho.gov                  kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/>                  U.S. Mail <input type="checkbox"/>                  Facsimile <input type="checkbox"/>                  Federal Express <input type="checkbox"/>                  E-Mail <input checked="" type="checkbox"/></p>
<p>Randall C. Budge                  Thomas J. Budge                  RACINE, OLSON, NYE, BUDGE &amp; BAILEY,                  CHARTERED                  P.O. Box 1391                  101 South Capitol Blvd, Ste 300                  Boise, ID 83704-1391                  Fax: 208-433-0167                  rcb@racinelaw.net                  tjb@racinelaw.net                  bjh@racinelaw.net</p>	<p>Hand Delivery <input type="checkbox"/>                  U.S. Mail <input type="checkbox"/>                  Facsimile <input type="checkbox"/>                  Federal Express <input type="checkbox"/>                  E-Mail <input checked="" type="checkbox"/></p>
<p>Sarah Klahn                  Mitra Pemberton                  WHITE &amp; JANKOWSKI                  Kittredge Building,                  511 16th Street, Suite 500                  Denver, CO 80202                  sarahk@white-jankowski.com                  mitrap@white-jankowski.com</p>	<p>Hand Delivery <input type="checkbox"/>                  U.S. Mail <input type="checkbox"/>                  Facsimile <input type="checkbox"/>                  Federal Express <input type="checkbox"/>                  E-Mail <input checked="" type="checkbox"/></p>
<p>Dean Tranmer                  CITY OF POCATELLO                  P.O. Box 4169</p>	<p>Hand Delivery <input type="checkbox"/>                  U.S. Mail <input type="checkbox"/>                  Facsimile <input type="checkbox"/></p>

Pocatello, ID 83201 dtranmer@pocatello.us	Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, L.L.P. 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 Facsimile: (208) 735-2444 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
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	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>

  
Justin May