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
Telephone: (208) 395-0011
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

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

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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 MOTION TO CONTINUE HEARING AND REQUEST FOR EXPEDITED DECISION**

Idaho Ground Water Appropriators, Inc. (IGWA) hereby moves the Director to continue the administrative hearing in this matter set to begin on January 28, 2013. This motion is supported by the affidavits of Charles Brendecke and Thomas J. Budge filed herewith.

ANALYSIS

The hearing on this matter must be continued for two reasons. First, the documentation supporting the Eastern Snake Plain Aquifer Model (ESPAM or Model) is still incomplete, leaving insufficient time for IGWA's expert to properly analyze and render an opinion on the application of the Model and its limitations by the October 10, 2012, expert report deadline. Second, Rangen has failed to timely produce large numbers of documents, leaving insufficient time for IGWA's aquaculture expert to render an opinion on Rangen's claimed injury by the October 10, 2012, expert report deadline.

A. The Model is not yet complete.

At the heart of this delivery call proceeding is how the Director's application of version 2.0 of the Model will differ from the prior version. Under the prior version (ESPAM 1.1), the Director found Rangen's delivery call to be futile. Rangen's renewed Petition for Delivery Call

contends that version 2.0 justifies an undoing of the Director's futile call ruling. (Petition for Delivery Call at 4-6.) While Rangen filed its Petition in December of 2011, no hearing was scheduled until it appeared that version 2.0 of the Model was nearly complete.

The hearing schedule was set in June of 2012. The Model was not complete at that time, but the parties anticipated that the Model would be completed soon and in time for their experts to have a fair and adequate opportunity to analyze the finalized Model and render opinions concerning its application to Rangen. That expectation has not been met. While the Eastern Snake Plain Hydrologic Modeling Committee (ESHMC) notified the Director in July of 2012 that he could begin using version 2.0 of the Model, the documentation that supports the Model and explains the assumptions used in the version 2 of the Model were, and still are, incomplete.

IGWA requested information from the IDWR beginning in May of 2012 and has sent a series of follow-up requests and emails since that time, expecting that complete Model documentation would be provided well in advance of the October 10, 2012, deadline for opening expert reports. As of this writing, documentation supporting ESPAM 2.0 exists only as a series of design memoranda and redlined drafts which have been made available for review in piecemeal fashion. Parts of the documentation have not been written at all, and IDWR's modeler, Dr. Allan Wylie, recently notified IGWA's expert, Dr. Brendecke, that he does not know when they will be completed. (Brendecke Aff. at ¶10.)

Among the missing information is documentation of computer code modules (MKMOD, On-Farm Algorithm) that are being written by non-IDWR contributors including Rangen's expert. Because these modules control fundamental water inputs to the Model, they are central to the calculation of net aquifer recharge, and factor critically into the evaluation of impacts to the aquifer from changes in surface and groundwater use. In addition, various post-development analyses of the Model, such as predictive uncertainty analyses, have yet to be made available in complete and documented form. The lack of completed documentation hinders critical review of those analyses, as foundational assumptions and detailed results are available, if at all, only by parsing PowerPoint presentations, disparate memoranda or complex model input and output files. The lack of documentation renders it difficult if not impossible to unambiguously interpret or rigorously evaluate the analysis and render reliable expert opinions. (Brendecke Aff. at ¶¶ 15 &16.) Without complete documentation, the parties' experts are forced to make assumptions that may be incorrect and render Model runs invalid, affecting the credibility and usability of their

reports and opinions. IGWA's expert witness on matters involving the Model, Dr. Brendecke, is not comfortable making those assumptions and rendering an opinion until the documentation supporting the Model is completed and accepted by the IDWR.

The problem of incomplete Model documentation is compounded by the fact that part of the data necessary to complete the documentation is believed to be held by Rangen's own expert witness, Jim Brannon. The development of ESPAM 2.0 differed from version 1.1 in that the IDWR took a more collaborative approach, utilizing non-IDWR and non-IWWRI personnel to create computer code and draft supporting documentation. The Model cannot be completed until Mr. Brannon documents his analysis and reconstruction of historical flows for the Rangen facility that were used as a model calibration target and completes the documentation of the computer code modules he contributed to the modeling effort. This input data is critical to curtailment simulation results, a thorough analysis of the Model's application to this delivery call, and the futile call analysis. Further, the possession by Rangen's expert of data needed to enable a complete and competent review of the Model handicaps and prejudices IGWA and the other parties whose experts are on unequal footing.

While the Director has relatively broad discretion in admitting, considering, and evaluating evidence, he is bound by constitutional and statutory requirements and must not abuse his discretion. Idaho Code § 67-5279. Given that constitutional due process protections apply to water delivery calls, *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815 (2012), it would arguably be unconstitutional and an abuse of discretion for the Director to make a curtailment decision, and to require junior water users to submit expert reports, based on a Model for which the supporting documentation, some of which is being produced by interested third parties, is incomplete and has not been reviewed and approved by the IDWR, particularly since it appears that with concerted effort the Model documentation can be completed, reviewed, and approved by the IDWR in a matter of weeks, thereby ensuring that the parties are operating from the same documentation and assumptions.

B. Rangen has not timely produced documents.

One very challenging aspect of a delivery call proceeding under the Rules of Conjunctive Management of Surface and Ground Water Sources (CM Rules) is that the senior water user often has sole possession of information that the junior needs to defend against the senior's allegation of material injury. This challenge is compounded by the fact that standards of evidence favor

the senior. The result is an inherent incentive for the senior to withhold information that would aid in the junior's defense of the call.

Counteracting this incentive, the IDWR has adopted wholesale the rules of discovery set forth in the Idaho Rules of Civil Procedure. IDAPA 37.01.01.520.02. These tried and true rules entitle parties to discover not only relevant evidence, but also any information "reasonably calculated to lead to the discovery of admissible evidence." I.R.C.P. 26(b)(1). Parties must produce all such information upon request, even if it is harmful to their case. To ensure compliance, the rules require that sanctions be imposed against parties who fail to timely produce documents or answer interrogatories. I.R.C.P. 37(a).

In this case Rangen has failed to timely produce thousands of pages of documents, further necessitating continuation of the hearing schedule.

IGWA served its first set of written discovery requests upon Rangen on May 23, 2012. Rangen's responses consisted mostly of objections; not one document was produced. Counsel for IGWA contacted counsel for Rangen requesting that a time and date be established for the inspection and copying of the documents responsive to discovery. A follow-up letter was sent on August 6, 2012, specifically detailing the deficiencies in Rangen's responses. (Budge Aff. Ex. 4) On or about August 8, 2012, counsel for Rangen indicated that a third party had been hired to scan documents, and that the files would be provided in Portable Document Format (.pdf) for review. (Budge Aff. ¶ 6.) Rangen's counsel indicated that scanning and production to IGWA would likely be completed by August 15, 2012. *Id.* With depositions of Rangen's fact witnesses scheduled for September 10-12, 2012, it was imperative that IGWA have adequate time to review Rangen's documents in advance so that the witnesses could be questioned about them.

On August 21, 2012, IGWA's counsel—still having received no documents—contacted Rangen's counsel to inquire about the supplemental discovery responses. (Budge Aff. Ex. 5.) Shortly thereafter Rangen produced a compact disc containing some 1,600 pages of documents. (Budge Aff. ¶ 7.) On September 1, 2012, Rangen produced a second compact disc containing roughly 200 more documents, which appear to have been scanned a week earlier on August 23, 2012. (Budge Aff. ¶ 8.) A week after that Rangen began uploading to a file-sharing website more than 6,000 additional pages of documents. (Budge Aff. ¶ 9.) This began one business day before the depositions of Rangen's witnesses were scheduled to start, and continued after the depositions began, providing insufficient time for IGWA's counsel to review the documents and be

able to question Rangen's witnesses about them at their depositions. These documents were produced more than two months after they were due under Idaho Rules of Civil Procedure. They contained some, but not all, of the documents IGWA requested in its original discovery requests made in May.

Not included were records of Rangen's research activities. Rangen executives testified at their depositions that decreased water flows had impaired Rangen's ability to conduct research. (Budge Aff. Exs. 1-2.) Rangen's aquaculture research scientist testified that Rangen keeps detailed notebooks of its research, none of which had been produced. (Budge Aff. Ex. 3.) Since IGWA's initial discovery requests included a request that Rangen produce "each and every document that tends to support or discredit your claim of material injury," IGWA asked Rangen to produce its research notebooks. (Budge Aff. ¶ 10.) IGWA followed up with written reminders on September 17 and 25, 2012, that the research documents must be provided. (Budge Aff. Ex. 6.) Rangen did not produce any of these documents until September 25, 2012, at which time it notified IGWA that Rangen's research records are voluminous and will require an on-site visit to Rangen to review the records. (Budge Aff. ¶ 12.)

Because Rangen did not produce some 6,000 pages of documents until the depositions of its witnesses, did not produce other documents until now, and has yet to produce others still, additional depositions will be required once IGWA and its experts are able to review the documents that were not produced timely.

CONCLUSION

IGWA understands Rangen's interest in prosecuting this action in a timely manner. It is critical, however, that IGWA have fair access to the evidence needed to defend against Rangen's allegation of material injury, in a timeframe that enables meaningful review and analysis, so that the Director's determination of material injury under CM Rule 42 is based on actual evidence of Rangen's water use and not a factually unsupported and legally incorrect assumption that depletion to the water supply automatically equals injury.

Similarly, the Director's review of version 2.0 of the Model, and determination of how it will be applied in this delivery call and others, must be done right, based on completed Model documentation and reliable expert review, and not rushed prematurely. As the Idaho Supreme Court has held, "It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts." *American Falls*

Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 875 (2007). The due process rights of junior-priority groundwater users, who are at risk of having their very livelihoods extinguished, require as much.

Therefore, IGWA proposes that the remainder of the schedule be revised as follows:

	Current Schedule	**Proposed Schedule**
Model documentation completed		October 31, 2012
Opening expert reports due	October 10, 2012	November 30, 2012
Dispositive motions deadline	October 31, 2012	January 4, 2013
Rebuttal expert reports	November 21, 2012	January 4, 2013
Expert depositions	November 26-30, 2012	January 7-11, 2013
Dispositive motion response briefs due		January 18, 2013
Dispositive motion reply briefs due		January 24, 2013
Hearing on dispositive motions	December 4, 2012	January 31, 2013
IDWR staff memo due	December 14, 2012	January 31, 2013
IDWR staff depositions	January 2-4, 2013	February 6-8, 2013
Witness and exhibits lists exchanged	January 11, 2013	February 15, 2013
Responses to staff memo	January 18, 2013	February 22, 2013
Pre-hearing briefs due	January 21, 2013	March 4, 2013
Pre-hearing conference	January 21, 2013	March 4, 2013
Hearing begins	January 28, 2013	March 11, 2013

REQUEST FOR EXPEDITED DECISION

Since this motion directly impacts the opening expert report deadline which is currently October 10, 2012, IGWA respectfully asks that an expedited decision be issued on this motion no later than October 5, 2012.

DATED this 26th day of September, 2012.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
THOMAS J. BUDGE
Attorneys for IGWA

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of September 2012, the foregoing document was served on the following persons in the manner indicated:

Document served: **IGWA's Motion to Continue Hearing and Request for Expedited Decision**

Becky Harvey
Signature of person mailing form

Original and one copy:
Director, Gary Spackman
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098
Deborah.Gibson@idwr.idaho.gov

- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

Garrick Baxter
Chris Bromley
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
rbrody@cableone.net
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 Capitol Law Group PO Box 32 Gooding, ID 83330 tarkoosh@capitollawgroup.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