Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 - phone
(208) 232-6109 - fax
rcb@racinelaw.net
tjb@racinelaw.net

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 Response to Rangen's Petition for Reconsideration and Clarification**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby responds to *Rangen, Inc's, Motion for Reconsideration and Clarification* (referred to herein as the "Rangen Motion") dated February 12, 2014, as follows:

Response to Rangen Request No. 1.

Rangen asks the Director to "[f]ind as a matter of law that Rangen's decreed source 'Martin-Curren Tunnel' encompasses the entire spring complex that forms the headwaters of Billingsley Creek."[1] Rangen claims "[t]he term 'Martin-Curren Tunnel' is the name in local common usage for the water that comes from the mouth of the tunnel itself and the entire spring complex that forms the headwaters of Billingsley Creek."[2]

Rangen has been making this same argument since before the hearing, and dedicated 12 pages of its post-hearing brief to it.[3] It is inconceivable that the Director has not already given it thorough consideration, which he rejected, as set forth in conclusion of law 16:

> Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging

[1] Rangen's Response p. 1.

[2] *Id.* at 2.

[3] Rangen, Inc's Closing Brief pp. 10-22.

> from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Tunnel in that 10-acre-tract.[4]

It is clear from this conclusion that the Director found the term "Martin-Curren Tunnel" to refer to the man-made tunnel above the Rangen fish hatchery, and not Billingsley Creek, springs, irrigation return flow, or any other water Rangen may have measured at the Lodge Dam.

The Rangen Motion adds nothing to the debate. It cites no additional evidence in the record beyond what Rangen on in its post-hearing brief, and it relies on the same law Rangen cited in its post-hearing brief. Consequently, there is nothing IGWA can say here that will add to the arguments made in IGWA's post-hearing response brief concerning this issue.[5]

For the reasons set forth in IGWA's post-hearing response brief, the Director's conclusion that "Martin-Curren Tunnel" refers to the man-made tunnel excavated into the ESPA above the Rangen fish hatchery is well-grounded in law and fact, and should not be disturbed.

Response to Rangen Request No. 2.

Rangen asks the Director to "[f]ind as a matter of law that Rangen's Partial Decrees allow the diversion of the springs that form the headwaters of Billingsley Creek."[6] To support this argument, Rangen asserts that "the Director did not consider IDAPA 37.03.01.060.05.d, the rule that governs how points of diversion are claimed in the SRBA, as that rule existed at the time Rangen's Partial Decrees were entered."[7] This is surprising, since Rangen quoted this very IDAPA rule in its post-hearing brief to support the same argument it is making here.[8]

In any case, Rangen appears to be asking the Director to adopt a truly incredible interpretation of IDAPA 37.03.01.060.05.d. That rule provides that the location of a point of diversion should be described "to the nearest (10) acre tract." As far as IGWA can tell, Rangen is asking the Director to interpret this to mean that the legal description identifying the location of a point of diversion is not the 10 acre tract in which the diversion structure is located, but that the decree describes an adjacent 10 acre tract of land. Under this interpretation, a water user or watermaster could not find a point of diversion by visiting the 10 acre tract described in the water right decree; rather, after reaching the decreed location, they would need to look north, east, south, and west for an adjacent 10 acre tract that may house the diversion structure. This is absurd.

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[4] Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 (Jan. 29, 2014) ("Final Order") p. 32, CL 16.

[5] *See* IGWA's Post-Hearing Resp. Br. pp. 13-17.

[6] Rangen's Motion p. 2.

[7] *Id.*

[8] Rangen, Inc.'s Closing Br. p. 24.

In the context of describing the location of a point of diversion, the IDWR has always used the term "nearest" to refer to the tract within which the diversion structure is located. Indeed, this is the only logical interpretation. Therefore, conclusion of law no. 16, quoted above, should not be disturbed.

Response to Rangen Request No. 3.

Rangen asks the Director to "[f]ind as a matter of law that IGWA and Pocatello have not demonstrated efficient use of water without waste."[9] According to Rangen, "There is no evidence in the record to support Conclusion 59 that '... the junior-priority water right holders are using water efficiently and without waste.'"[10] This assertion is mistaken. Lynn Carlquist, President of North Snake Ground Water District, testified that it costs an average of $160.00 per acre to operate and maintain his wells.[11] Similarly, Tim Deeg, President of IGWA, testified that the cost to pump, maintain, and operate his wells is about $200.00 per acre.[12] This testimony is representative of all groundwater users, for whom pumping costs provide an inherent, substantial incentive to not divert any more water than is needed to raise the crop being irrigated. ESPAM 2.1 reflects the efficiency of groundwater irrigators by attributing substantially less water put to beneficial use than their water rights allow.

The irony is that Rangen has no such incentive, since the Curren Tunnel diverts water from the ESPA by gravity flow. And it shows. Were Rangen required to spend money to withdraw groundwater from the ESPA or utilize its available water supply more efficiently, as IGWA's members do, we would know how much water Rangen truly needs to perform research and meet its Idaho Power contract. It's terribly unfortunate that Rangen's actions of raising far fewer fish than it is capable of with its current water supply (Rangen could raise 61,000 more fish annually with its current water supply simply by ordering eggs more often)[13] does not speak louder than its words ("if we had more water we would raise more fish").

Regardless, the testimony of Lynn Carlquist and Tim Deeg, speaking as representatives of their respective Ground Water Districts and IGWA, provides adequate evidence to support the Director's finding that juniors are using water efficiently and without waste. Rangen certainly offered no compelling evidence to the contrary. Therefore, conclusion of law 59 should not be disturbed.

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[9] Rangen Motion p. 3.

[10] *Id.*

[11] Carlquist, Tr. pp. 1676:19-22, 1710:7-16

[12] Deeg, Tr. pp. 1747:16-1748:6, 1753:21-1754:4, 1763:10-16, 1765:5-22.

[13] Rogers, Tr. pp. 1825:14-1826:6, 1833:14-22

Response to Rangen Request No. 4.

Rangen asks the Director to "[o]mit conclusions 42 through 46 (references to 10 percent trimline) because they are not necessary to the Director's opinion."[14] Rangen argues that "[s]ince there was no objective quantification of any error in ESPAM 2.1, the reference to ESPAM 1.1 and the 10 percent trimline is not necessary or relevant."[15]

The notion that any discussion of ESPAM 1.1 and the 10 percent trimline is irrelevant is astonishing. The only reason Rangen was permitted to pursue another delivery call is because ESPAM was updated from version 1.1 to version 2.1, and the Director determined that this afforded Rangen an opportunity to challenge the 10 percent trimline Director Dreher had adopted under ESPAM 1.1. Accordingly, the Director certainly must explain the basis for any deviation from Director Dreher's prior futile call ruling in the Rangen case. Conclusions of law 42-46 appear to aim to do that by reciting how the trimline was implemented in the Blue Lakes and Clear Springs cases. There is nothing inappropriate about this.

In that vein, however, the Final Order contains a glaring omission in that it fails to mention the effect of the 10 percent trimline applied by Director Dreher in response to Rangen's delivery call. As mentioned in IGWA's Petition for Reconsideration, when Director Dreher applied a 10 percent trimline to Rangen it exposed 735 acres to curtailment. The Final Order does not mention this, but instead focuses on the effect of the trimlines applied in the Blue Lakes and Clear Springs cases which pertained to different springs, different reaches, and produced far different results than the 10 percent trimline applied previously to the Rangen call.

Instead of removing any discussion of ESPAM 1.1 and the 10 percent trimline from the Final Order, the Director should give the full picture by explaining in the effect of the 10 percent trimline applied previously in the Rangen case (735 acres exposed to curtailment), and the leap from curtailment of 735 acres under Director Dreher's order to curtailment of 157,000 acres under the Final Order.

Response to Rangen Request Nos. 5 and 6.

Rangen contends that conclusions of law 21 and 22 and finding of fact 51 are not supported by substantial evidence in the record.[16] These conclusions relate to errors in Rangen's water measurement practices that resulted in under-reporting of actual flows. Rangen's assertion that there is no evidence to support these findings and conclusions is surprising. There were days of testimony and extensive documentation of the basis for Greg Sullivan's calculations. Further, conclusion 21 cites to findings of fact 50 and 101 which in turn cite to evidence in the record. Finding of fact 51 also cites to the location in the record where Sullivan derived an

[14] Rangen Motion p. 3.

[15] *Id.*

[16] Rangen Motion p. 4.

average weir coefficient of 3.62.[17] This evidence need not be undisputed, only substantial, which it certainly is. These rulings need not be disturbed.

Response to Rangen Request No. 7.

IGWA does not object to this request.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: _____ February 24, 2014
Randall C. Budge Date
T.J. Budge

[17] *See* R. Vol. 4, pp. 1438-1439.

CERTIFICATE OF MAILING

I certify that on this 24th day of February, 2014, the foregoing document was served on the following persons in the manner indicated.

Signature of person mailing form

Director Gary Spackman Idaho Department of Water Resources P.O. 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 Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
Robyn M. Brody Brody Law Office, PLLC P.O. Box 554 Rupert, ID 83350 robynbrody@hotmail.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC P.O. 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 P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail
C. Thomas Arkoosh Arkoosh Law Offices P.O. Box 2900 Boise, ID 83702 tom.arkoosh@arkoosh.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 P.O. Box 248 Burley, ID 83318 wkf@pmt.org	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail