

Randall C. Budge, ISB No. 1949
Thomas J. Budge, ISB No. 7465
RACINE OLSON NYE BUDGE & BAILEY, CHARTERED
201 E. Center St. / P. O. Box 1391
Pocatello, Idaho 83204-1391
Phone: (208) 232-6101
Fax: (208) 232-6109
rcb@racinelaw.net
tjb@racinelaw.net

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

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION OF WATER TO WATER RIGHTS HELD BY RANGEN, INC., WATER RIGHT NOS. 36-134B, 36-135A, AND 36-15501

Docket No. CM-DC-2014-004

IGWA's Brief Opposing Rangen's Motion for Summary Judgment

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this brief pursuant to the *Scheduling Order and Order Continuing Status Conference* issued August 26, 2014, in opposition to *Rangen, Inc.'s Motion for Summary Judgment* ("Rangen's Motion") filed September 26, 2014.

INTRODUCTION

Rangen's Motion seeks an order curtailing all groundwater rights that divert water from the Eastern Snake Plain Aquifer (ESPA) under water rights junior to Rangen's 1884, 1908, and 1957 water rights. The 1884 and 1908 priority dates are early enough to curtail essentially every groundwater right from the ESPA.

Rangen says an evidentiary hearing is not needed because, it contends, all issues of fact and law have been decided in the Court's previous decisions in response to Rangen's 2011 Delivery Call. Rangen acknowledges its water rights are limited to water that emanates from the mouth of the Curren Tunnel, but contends the flow from the Tunnel is insufficient to satisfy even its 1884 right. Rangen also contends the Director's material inju-

ry determination from the 2011 delivery call hearing is conclusive as to Rangen's present claim of material injury.

As explained below, Rangen's Motion should be denied. First, Rangen may not exaggerate its purported water shortage by pro rating the water supply available to Curren Tunnel water rights. Second, there is no reliable evidence that Rangen's 1884, 1908, and 1957 water rights are actually short of water. Rangen's 2014 delivery call should be dismissed until Rangen presents reliable data demonstrating it is not receiving the full rate of diversion authorized under its 1884, 1908, and 1957. Third, even if Rangen was not receiving the full rate of diversion, there are material issues of fact as to whether it is suffering material injury. Fourth, any material injury suffered by Rangen is fully mitigated by Rangen's use of Billingsley Creek water.

ARGUMENT

1. Rangen cannot exaggerate its purported water shortage by pro rating the amount of water discharging from the Curren Tunnel.

Rangen's Motion contends the flow from the Curren Tunnel dropped to 1.41 cfs on June 4, 2014.¹ This is sufficient to fill Rangen's 1884 (0.09 cfs) and 1908 (0.05 cfs) water rights, and nearly sufficient to fill its 1957 (1.46 cfs) water right. Collectively, these rights authorize 1.6 cfs. Thus, the 1.41 cfs measurement on June 4th indicates the 1957 right is 0.19 cfs short of its full authorized rate of diversion.

However, Rangen contends, without citing any legal authority, that the 1.41 cfs measurement must be prorated among all 1884 water rights from the Curren Tunnel, most of which do not use any water from the Tunnel because groundwater users are delivering them water from other sources.

The amount of water Rangen actually receives is the only relevant fact in determining whether its water rights are not receiving the full decreed rate of diversion. Thus, even if the June 4th water measurement was reliable, the only Rangen water right not receiving its full decreed rate of diversion is the 1957 right.

Therefore, the Director should dismiss Rangen's Motion with respect to its 1884 and 1904 water rights.

¹ Rangen's Memo in Support of Motion for Summ. J. at 5, ¶ 8.

2. There is no reliable evidence Rangen's 1957 water right is not receiving its full decreed rate of diversion.

Under the priority system, a senior water user is not permitted to curtail juniors if the senior is receiving the full rate of diversion authorized under its water right license or decree. Accordingly, Idaho law requires every water user to

construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal ditch, well head or pipeline from the stream, well or other source of public water.²

Rangen has not installed or maintained a measuring device to measure the amount of water it diverts from the Curren Tunnel, instead relying on a measuring installed by IDWR inside the Tunnel. The IDWR device, however, has been in disrepair since October of 2013, resulting in unreliable measurements since that time. Attached hereto as *Exhibit A* is the first page of the IDWR measurement data on which Rangen bases its delivery call, which contains the following disclaimer: "the 2008 data and 2011 data and post 10/16/2013 have been graded as poor due to equipment problems" and "the 2011 and post 10/16/13 data were generated by replicating Box Canyon Spring data with a reduced amplitude and fitting the data to the flow measurements made on site." Thus, the 1.41 cfs measurement on which Rangen relies is not based on a reliable measurement of water in the Curren Tunnel.

As much as Rangen may be frustrated the IDWR measuring device is not generating reliable data, it is not IDWR's duty to measure Rangen's water. If Rangen wishes to curtail junior users, it has a duty to produce reliable water measurements establishing it is not receiving its full decreed rate of diversion.

Therefore, IGWA respectfully asks the Director to deny Rangen's Motion and dismiss its delivery call until such time that Rangen produces reliable measurements of the water it receives from the Curren Tunnel. If the Director denies Rangen's Motion on this basis, he need not address the arguments made below.

² Idaho Code § 42-701.

3. There are genuine issues of material fact concerning Rangen's allegation of material injury.

Rangen's Motion and its supporting brief contain no facts to support its allegation of material injury. Instead, Rangen contends the Director's finding of material injury in the 2011 delivery call case should be adopted wholesale in this case.³ However, all material injury evidence presented in that case was based on Rangen's use of water from Billingsley Creek, which Rangen does not have a valid water right for. The determination of material injury in this case must be based on the effect of a water shortage if Rangen's actual water use were limited to flows from the Curren Tunnel. This raises unique factual issues that were not decided in the prior case.

Rangen has not alleged facts to support its claim of injury under the circumstances of this case; thus, it has not made a *prima facie* showing sufficient to support a finding of material injury on summary judgment.

Therefore, if the Director refuses to deny Rangen's Motion for the reasons stated above, he should deny it due to the existence of genuine issues of material fact concerning the issue of material injury.

4. Rangen's use of Billingsley Creek water without a water right fully mitigates its alleged injury.

Lastly, even if Rangen were suffering material injury, the Director has allowed Rangen to use 10-12 cfs of water from Billingsley Creek without a water right. This more than mitigates for the 0.19 cfs shortfall Rangen contends exists.


CONCLUSION

IGWA respectfully asks the Director to deny Rangen's Motion because (1) Rangen's purported shortage to its 1884 and 1908 water rights is not supported by evidence in the record, (2) its purported shortage to its 1957 water right is based on unreliable measurement data that does not justify curtailment of junior rights, (3) there are material issues of fact as to whether it is suffering material injury, and (4) any material injury suffered by Rangen is fully mitigated by Rangen's use of Billingsley Creek water.

³ Rangen's Memo in Support of Motion for Summ. J. at 7, ¶ 18.

RESPECTFULLY SUBMITTED October 13th, 2014.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
Randall C. Budge
T.J. Budge
Attorneys for IGWA

CERTIFICATE OF MAILING

I certify that on this 13th day of October, 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, Idaho 83720-0098 Deborah.Gibson@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Garrick Baxter Idaho Department of Water Resources P. O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Robyn M. Brody Brody Law Office, PLLC P. O. Box 554 Rupert, Idaho 83350 robynbrody@hotmail.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail

<p>Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC P. O. Box 1800 Hailey, Idaho 83333 fxh@haemlaw.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail</p>
<p>J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, Idaho 83702 jmay@maybrowning.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail</p>
<p>Sarah Klahn Mitra Pemberton White Jankowski, LLP 511 16th St., Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>A. Dean Tranmer City of Pocatello P. O. Box 4169 Pocatello, Idaho 83201 dtranmer@pocatello.us</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>Robert E. Williams Williams Meservy & Lothspeich P. O. Box 168 Jerome, Idaho 83338 rewilliams@cableone.net</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>Candice McHugh Chris M. Bromley McHugh Bromley 380 South 4th Street, Suite 103 Boise, Idaho 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>

Jerry R. Rigby
Hyrum Erickson
Robert H. Wood
Rigby, Andrus & Rigby, Chartered
25 North Second East
Rexburg, Idaho 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