

JAN 16 2015

DEPARTMENT OF  
WATER RESOURCES

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

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF THE FOURTH  
MITIGATION PLAN FILED BY IDAHO  
GROUND WATER APPROPRIATORS FOR  
THE DISTRIBUTION OF WATER TO  
WATER RIGHT NOS. 36-02551 & 35-  
07694 IN THE NAME OF RANGEN, INC.

Docket No. CM-MP-2014-006

**IGWA's Petition to Amend  
Order Approving Fourth  
Mitigation Plan, or, in the  
Alternative, Temporarily Stay  
Curtailment; and Request for  
Expedited Decision**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Director pursuant to IDAPA 37.01.01.780 to amend the *Order Approving IGWA's Fourth Mitigation Plan* issued October 29, 2014, or, in the alternative, temporarily stay curtailment under the *Order Granting Rangen's Motion to Determine Morris Credit; Second Amended Curtailment Order* issued November 21, 2014. This petition is supported by the *Affidavit of Robert Hardgrove* filed herewith.

**PETITION TO AMEND ORDER APPROVING IGWA'S  
FOURTH MITIGATION PLAN**

The Second Amended Curtailment Order requires IGWA to deliver 5.5 cfs to Rangen from January 19 to March 31, 2015. From April 1, 2015, to March 31, 2016, IGWA's mitigation obligation is 5.2 cfs.

**IGWA's Petition to Amend Order Approving IGWA's Fourth Mitigation Plan, or, in the Alternative, Temporarily Stay Curtailment; and Request for Expedited Decision – 1**

Since the approval of IGWA's Fourth Mitigation Plan on October 29th, IGWA has made every effort to have the Magic Spring Project completed by the January 19 deadline. All permanent components of the Project are on schedule to be completed by that date except for the steel pipe that transports water from Magic Springs up the adjacent talas slope and cliff. Consequently, while the steel pipe is being completed, HDPE pipe will be used to transport water this short distance.

The *Order Approving IGWA's Fourth Mitigation Plan* states that any temporary pipe used in the Magic Springs Project must be new pipe.<sup>1</sup> This requirement was imposed in response to Rangen's concern that using used pipe from a dairy or farm may introduce chemicals or other contaminants into Rangen's fish hatchery.<sup>2</sup>

As explained in the *Affidavit of Robert Hardgrove* filed herewith, the temporary pipe is used pipe, but is equivalent to new pipe. It was previously used to transport groundwater from wells to water trucks. It has not been used for irrigation or in other process where chemicals may be introduced. Further, unlike the steel irrigation pipe that Rangen was concerned with, the nature of HDPE pipe is such that any particles within the pipe can be easily flushed out. The pipe will be flushed before connecting it to the permanent pipe on the top of the rim above Magic Springs. Finally, the Districts have secured insurance to protect against damage to Rangen in the unlikely event it occurs.

Therefore, IGWA respectfully requests that the *Order Approving IGWA's Fourth Mitigation Plan* be amended to allow the use of used temporary pipe as long as it has not previously been used to transport chemicals or other contaminants.

### **ALTERNATIVE REQUEST FOR TEMPORARY STAY**

If IDWR refuses to allow the use of the temporary pipe that is presently in place, IGWA requests a temporary stay of curtailment to enable new temporary pipe to be procured and installed, or to enable the permanent steel pipe to be completed.

IDWR has explicit legal authority to stay its curtailment orders. The Idaho Administrative Procedures Act states that any agency "may grant, or the reviewing court may order, a stay upon appropriate terms."<sup>3</sup> IDWR

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<sup>1</sup> *Order Approving IGWA's Fourth Mitigation Plan*, p. 21.

<sup>2</sup> *Id.* at 18, ¶63.

<sup>3</sup> Idaho Code § 67-5274.

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>4</sup> And Rule 84(m) of the Idaho Rules of Civil Procedure reaffirms that “an agency may grant ... a stay upon appropriate terms.”

If the Director refuses to allow use of the temporary pipe discussed above, he should temporarily stay curtailment because (1) IGWA has made every effort to complete the Magic Springs project by the January 19th deadline; (2) curtailment will cause severe and irreparable harm; (3) Rangen will not be harmed by a stay; (4) a stay is equitable; and (5) a stay is in the public interest.

**1. IGWA has made every effort to meet the January 19th deadline.**

As explained in the Affidavit of Robert Hardgrove, every effort has been made to complete the Magic Springs project and deliver mitigation water to Rangen by January 19th. The Project has been a monumental undertaking at an extreme expense.

**2. Curtailment will cause severe and irreparable harm.**

A curtailment at this time of year (non-irrigation season) will primarily affect dairies, stockyards, and commercial and industrial businesses. Curtailment, even if it endures for only a short time, will cause irreparable damage as there will be no water for the livestock and no water to operate the businesses.

**3. Granting a brief stay will not materially harm Rangen.**

Granting a brief stay will maintain the status quo. The water rights that would be curtailed have little effect on the flow of water from the Curren Tunnel, and the effect of curtailing these rights will not be realized any time soon. Further, Rangen’s willingness to stipulate to the Coalition of Cities’ Second Mitigation Plan demonstrates that obtaining such a small amount of water this year is not critical to its operation.

If the stay is granted, IGWA can deliver additional mitigation water to Rangen when the Magic Springs Project is operating to make up for the stay. IGWA anticipates that a stay for 7 days will be required to procure and install new HDPE pipe. The permanent steel pipe up the cliff is expected to be completed in 3 weeks. The following table demonstrates the additional water IGWA would be obligated to deliver to Rangen through

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<sup>4</sup> IDAPA 37.01.01.780.

March 31st if a stay were granted for 7 days or 21 days. The Magic Springs Project will be capable of delivering these amounts upon completion.

	<b>Current</b>	<b>7 day</b>	<b>21 day</b>
start	1/19/2015	1/26/2015	2/9/2015
end	3/31/2015	3/31/2015	3/31/2015
days	71	64	50
cfs/day	5.50	6.10	7.81
cfs x days	390.5	390.5	390.5

#### **4. A stay is equitable.**

Perhaps the most persuasive equitable consideration is that Rangen has been permitted to use roughly 10 cfs of water from Billingsley Creek without a water right for nearly a year. In addition to curtailing junior-priority groundwater rights, the Curtailment Order issued January 29, 2014, ruled that Rangen's water rights are limited to water emitting from the Curren Tunnel.<sup>5</sup> Two days later IDWR issued a *Notice of Violation and Cease and Desist Order*, ordering Rangen to stop diverting water from Billingsley Creek beginning February 24, 2014.<sup>6</sup> Thus, the Curtailment Order curtailed both Rangen and junior groundwater users.

However, on February 21, 2014, IDWR agreed to allow Rangen to continue using Billingsley Creek water without a water right.<sup>7</sup> Thus, Rangen has had the benefit of roughly 10 cfs of water from Billingsley Creek without a water right.<sup>8</sup>

Given Rangen's use of 10 cfs without a water right for nearly a year, the fact the Magic Springs Project will be able to pump all the water that is currently due to Rangen plus any water backlog that has been created by the stay, it is equitable to grant junior groundwater a few days to complete the Magic Springs project.

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<sup>5</sup> *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*, IDWR Docket No. CM-DC-2011-004 (Jan. 29, 2014) p. 33 ¶18.

<sup>6</sup> *Notice of Violation and Cease and Desist Order*, In the Matter of the Diversion of Water Without a Valid Right from Billingsley Creek by Rangen, Inc. (Jan. 31, 2014).

<sup>7</sup> *Consent Order and Agreement*, In the Matter of the Diversion of Water Without a Valid Right from Billingsley Creek by Rangen, Inc. (Mar. 7, 2014).

<sup>8</sup> See Exhibit 2291, IDWR Docket No. CM-DC-2011-004.

## **5. A stay is in the public interest**

Even one dairy has its water shut off, it will have a reverberating effect on other businesses that intersect with it. Consequently, it is in the public interest that dairies, stockyards, and businesses are permitted to continue to pump the water that is necessary for their survival for the short period that the stay would be effective.

## **CONCLUSION**

For the reasons stated above, IGWA requests amendment of the *Order Approving IGWA's Fourth Mitigation Plan* to allow the use of temporary pipe as long as it has not previously been used to transport chemicals or other contaminants. Alternatively, IGWA requests a temporary stay of curtailment until new HDPE pipe can be procured and installed or the permanent steel pipe is completed.

## **REQUEST FOR EXPEDITED DECISION**

IGWA is scheduled to begin providing water to Rangen using the temporary HDPE pipe no later than January 19, 2015. Therefore, IGWA requests an expedited decision on this motion.

RESPECTFULLY SUBMITTED this 16th day of January, 2015.

RACINE OLSON NYE BUDGE  
& BAILEY, CHARTERED

By



T.J. Budge  
*Attorneys for IGWA*



### CERTIFICATE OF MAILING

I certify that on this 16th day of January, 2015, the foregoing document was served on the following persons in the manner indicated.



signature of person mailing form

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