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DISTRICT COURT  
TWIN FALLS CO., IDAHO  
FILED

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**DISTRICT COURT OF THE STATE OF IDAHO  
FIFTH JUDICIAL DISTRICT  
TWIN FALLS COUNTY**

<p>RANGEN, INC, an Idaho corporation,  Petitioner,  vs.  IDAHO DEPARTMENT OF RESOURCES, and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources,  Respondent.</p>	<p>Case No. <u>CV-15-237</u></p> <p><b>IGWA's Motion to Stay Curtailment Order</b></p>
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Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Court pursuant to Idaho Code § 67-5274 and Idaho Rule of Civil Procedure 84(m) to stay implementation of the *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* ("Second Amended Curtailment Order") issued by the Idaho Department of Water Resources (IDWR) on November 21, 2014,<sup>1</sup> until IGWA completes construction of its Magic Springs

<sup>1</sup> Second Amended Curtailment Order (Ex. A to Budge Aff.).

mitigation project. This motion is supported by the affidavits of Thomas J. Budge, Robert Hardgrove, and Charles M. Brendecke filed herewith.

### **BACKGROUND & PROCEDURAL HISTORY**

Rangen, Inc. (Rangen) filed a Petition for Delivery Call with IDWR on December 13, 2011, for water right nos. 36-2551 and 36-7694 which are appurtenant to Rangen's fish hatchery in the Thousand Springs area near Hagerman, Idaho. These water rights have as their source the Martin-Curren Tunnel (a/k/a Curren Tunnel). The Curren Tunnel is a horizontal tunnel dug into a basalt cliff above Rangen's fish hatchery to access groundwater from the Eastern Snake Plain Aquifer (ESPA). Rangen's delivery call sought to curtail all use of groundwater from the ESPA so that more water would infiltrate and discharge from the Curren Tunnel.

An evidentiary hearing was held by IDWR from May 1 to May 16, 2013. On January 29, 2014, IDWR issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* ("Curtailment Order"), which imposed a permanent mitigation obligation on IGWA of 9.1 cubic feet per second (cfs).<sup>2</sup> The Curtailment Order includes a mitigation schedule that allows junior groundwater users to avoid curtailment during the first year by providing 3.4 cfs of mitigation (the same amount of water Rangen would get from curtailment).

The Curtailment Order has been amended twice, the most recent being the Second Amended Curtailment Order issued on November 21, 2014. For the purpose of this motion, two rulings in the Curtailment Order, which are perpetuated in the Second Amended Curtailment Order, are particularly significant.

First, it orders curtailment of all groundwater diversions from the ESPA under water rights junior to July 13, 1962, from points of diversion located

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<sup>2</sup> Curtailment Order p. 42 (Ex. B to Budge Aff.).

west of the Great Rift.<sup>3</sup> The Great Rift is between American Falls and Rupert. Thus, the curtailment essentially covers the Magic Valley, eliminating the use of water to dozens of cities, dairies, food producers, and other businesses, as well as 157,000 acres of cropland.<sup>4</sup> As mentioned, the curtailment of these water rights is projected to increase the supply of water to Rangen by 9.1 cfs once steady-state condition is reached (after more than 50 years of curtailment).<sup>5</sup>

Second, the Curtailment Order ruled that Rangen's water rights are limited to water that discharges from the Curren Tunnel.<sup>6</sup> Accordingly, two days after the Curtailment Order was issued, IDWR issued a *Notice of Violation and Cease and Desist Order* ("Cease & Desist Order") that would have prohibit Rangen from diverting water from Billingsley Creek, had it been enforced.<sup>7</sup> On February 21, 2014, IDWR issued a *Consent Order and Agreement* allowing Rangen to use water from Billingsley Creek without a water right. This provided Rangen with 10-12 cfs of water – far more than groundwater users are currently required to provide as mitigation.

On February 12, 2014, IGWA filed its first mitigation plan with IDWR in attempt to avoid curtailment by delivering water to Rangen from different sources. The same day, IGWA filed a petition to stay the Curtailment Order until a decision was entered on IGWA's mitigation plan. On February 21, 2014, IDWR stayed the Curtailment Order until it issued a decision on the mitigation plan.<sup>8</sup>

On April 11, 2014, IDWR approved IGWA's mitigation plan in part, granting mitigation credit of 3.0 cfs for mitigation activities that IGWA had

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<sup>3</sup> *Id.* at 28.

<sup>4</sup> *Id.*; see also *Id.* at 42.

<sup>5</sup> *Id.* at 28.

<sup>6</sup> *Id.* at 32-33.

<sup>7</sup> Ex. C to Budge Aff.

<sup>8</sup> Exs. D & E to Budge Aff.

already in place, such as groundwater recharge and conversions of farmland from groundwater to surface water irrigation.<sup>9</sup> Because IDWR granted only 3.0 cfs in immediate mitigation credit, IGWA still needed to mitigate an additional 0.4 cfs.

On April 17, 2014, IGWA filed a *Second Petition to Stay Curtailment, and Expedite Decision* with IDWR, asking the Director of IDWR to stay implementation of the Curtailment Order, and the Director granted the motion on April 28, 2014.<sup>10</sup> On June 20, 2014 the Director issued an *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order*, which lifted the stay.<sup>11</sup> This order also adjusted the mitigation credit from the Morris Exchange Agreement, part of the first mitigation plan, in order to mitigate the full 3.4 cfs through January 18, 2015, at which time IGWA would be required to have other mitigation in place.<sup>12</sup>

On October 29, 2014, IDWR approved IGWA's Fourth Mitigation Plan, known as the Magic Springs Project.<sup>13</sup> This project proposed to pump up to 10 cfs from Magic Springs a distance of roughly two miles to the Rangen fish hatchery. Completing the project required a lease or purchase of 10.0 cfs of water right nos. 36-7072 and 36-8356 owned by SeaPac of Idaho (SeaPac); long-term lease or purchase from the Idaho Water Resource Board (IWRB) of water right nos. 36-40114, 36-2734, 36-15476, 36-2414, and 36-2338 to make available to SeaPac; design, construction, operation, and maintenance of the water intake and collection facilities, pump station, and pipeline to transport water from SeaPac's Magic Springs fish hatchery to the head of the Rangen hatchery on Billingsley Creek; acquisition of easements

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<sup>9</sup> Ex. F to Budge Aff.

<sup>10</sup> See *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* p. 1 (Ex. G to Budge Aff.).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 17-18.

<sup>13</sup> Ex. H to Budge Aff.

for the water intake and collection facilities, pump station, pipeline, construction access, and other necessary components; and approval of a transfer application to change the place of use from SeaPac to Rangen.<sup>14</sup>

To successfully meet the January 19, 2015 curtailment deadline, the Magic Spring Project required extraordinary efforts. Robert Hardgrove, the lead engineer, explained that these efforts included “additional staffing, hiring multiple contractors to construct different parts of the project, paying premiums to expedite materials and construction, financial incentives in contracts completion by January 19, 2015, and working holidays, weekends, and extended hours.”<sup>15</sup> In sum, this project has been constructed as fast as possible, at significant expense.

The most difficult component of the project involves installing a steel pipe used to transport water from the pump station at Magic Springs to the top of a cliff adjacent to Magic Springs. Photographs of this remarkable component are attached to the Affidavit of Robert Hardgrove. This is the only component that could not be completed by the January 19th deadline. It is expected to be finished on or before February 7, 2015.<sup>16</sup>

As a temporary solution, the engineers fused together an HDPE pipe to transport water to the top of the cliff until the permanent steel pipe is complete. On January 16, 2015, with the temporary pipe nearly completed and ready to pump water, the Magic Springs Project was on track to finish on time. However, it was discovered that the supplier of the pipe provided used pipe while the IDWR required new pipe so as to avoid contaminating the Rangen fish hatchery. This same day, IGWA filed a motion to allow it to use the used pipe, or, alternatively, to temporarily stay curtailment.<sup>17</sup> IGWA explained that the old pipe was equivalent to new pipe since it had been used

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<sup>14</sup> *Id.* at 3-4.

<sup>15</sup> Hardgrove Aff. ¶ 5.

<sup>16</sup> *Id.* ¶ 13.

<sup>17</sup> Ex. I to Budge Aff.

to transport groundwater from wells to water trucks, and that curtailment of dairies and cities until the Magic Springs project is complete will not increase the supply of water Rangen receives from the Curren Tunnel by any measurable amount by the time the project is complete. Nonetheless, on January 17, 2015, IDWR denied the motion, ordering curtailment to occur for two to three weeks until the project is finished.<sup>18</sup>

It should be noted that while the used temporary pipe could be replaced with a new temporary pipe in roughly one week's time, IGWA does not believe this a reasonably safe or prudent solution. When the temporary pipe was initially proposed, IGWA anticipated it would need to transport only 0.5 cfs. By the time IDWR approved IGWA's Fourth Mitigation Plan, IDWR increased the mitigation obligation from January 15th through March 31st to 2.2 cfs. Then, on November 21, 2014, when the Magic Springs Project was well under way, IDWR issued the Second Amended Curtailment Order which increased the obligation to 5.5 cfs. This required larger temporary pipe, significantly increasing the weight of water in the pipe, and adding stress to its connection to the permanent pipe at the top of the cliff. IGWA reluctantly accepted this risk in an effort to meet the January 19th deadline.

Now, because IGWA has not been allowed to use the temporary pipe that is presently installed, IGWA will be required to pump even more than 5.5 cfs through the pipe to make up for the shortfall. The amount is expected to increase further still because of this Court's elimination of the Great Rift trim line. For the reasons explained in the Affidavit of Robert Hardgrove, IGWA is no longer comfortable with temporary and less reliable pipe because of the increased risk of damage to the piping system and to workers on site. Consequently, IGWA has decided to push forward with the permanent pipe only, with an anticipated date of completion of February 7, 2015.

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<sup>18</sup> Ex. J. to Budge Aff.

## LEGAL STANDARD

The Idaho Administrative Act provides that upon the filing of a petition for judicial review, the “reviewing court may order[ ] a stay [of the enforcement of the agency action] upon appropriate terms.”<sup>19</sup> Idaho Rule of Civil Procedure 84(m) also provides that the “reviewing court may order[ ] a stay upon appropriate terms.”

Neither the statute nor the rule provides guidance on what terms are appropriate for the granting of a stay, and there is no reported Idaho case that defines “appropriate terms.” However, in *Haley v. Clinton* the Idaho Court of Appeals held that a stay is appropriate “when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending.”<sup>20</sup> In *McHan v. McHan*, the Idaho Supreme Court explained that “where it appears necessary to preserve the *status quo* to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers.”<sup>21</sup> The *McHan* decision further elaborated that a stay is appropriate when “[i]t is entirely possible that the refusal to grant a stay would injuriously affect appellant and it likewise is apparent that granting such a stay will not be seriously injurious to respondent.”<sup>22</sup>

Other factors that are often considered in determining whether to grant a motion to stay are the following:

- (1) the likelihood the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others

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<sup>19</sup> Idaho Code § 67-5274.

<sup>20</sup> 123 Idaho 707, 709 (Ct. App. 1993).

<sup>21</sup> 59 Idaho 41, 46 (1938).

<sup>22</sup> *Id.*

will be harmed if the court grants the stay; and (4) the public interest in granting the stay.<sup>23</sup>

## ARGUMENT

As explained below, the Court should stay implementation of the Second Amended Curtailment Order because (1) the Director unreasonably denied IGWA's motion to stay (2) curtailed groundwater users will be severely and irreparably harmed absent a stay; (3) Rangen will not be harmed by, but will actually benefit from, a stay; and (4) granting a stay is in the public interest.

### 1. The Director unreasonably denied IGWA's motion to stay.

An agency decision to grant or deny a stay is one of discretion.<sup>24</sup> A reviewing court cannot affirm agency action that is "arbitrary, capricious, or an abuse of discretion."<sup>25</sup> An agency abuses its discretion when its "actions are arbitrary, capricious or unreasonable."<sup>26</sup>

Here, IDWR abused its discretion because it unreasonably denied IGWA's motion for a stay. IGWA has undergone monumental efforts and expenses to meet the January 19th deadline and timely deliver mitigation water to Rangen. Even a brief curtailment yet will cause irreparable harm to dairies, stockyards, and commercial and industrial businesses. Conversely, granting a short stay will not materially injure Rangen since a curtailment will have little effect on the flow of water from the Curren Tunnel, as explained in the Affidavit of Charles M. Brendecke.

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<sup>23</sup> *Michigan Coalition of radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); see also *Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n*, 107 Idaho 47, 50 (1984) (Stay justified when there is irreparable loss to moving party); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435-1436 (9th Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); 5 Am. Jur.2d *Appellate Review* § 470 ("Standards for granting stay").

<sup>24</sup> *Platz v. State (In re Platz)*, 154 Idaho 960, 969 (Idaho Ct. App. 2013); see *Bank of Idaho v. Nesselth*, 104 Idaho 842, 846 (Idaho 1983).

<sup>25</sup> I.C. § 67-5279(3)(e).

<sup>26</sup> *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91 (Idaho 2007).

Moreover, a stay is equitable in that Rangen has been permitted to use roughly 10 cfs of water from Billingsley Creek without a water right for nearly a year, and the Project will pump all the water that is currently due Rangen plus any water backlog accruing during a stay. Lastly, a stay is in the public interest because if even one dairy farmer is shut off, this will have a reverberating effect on other intersecting businesses.

Even in light of these considerations, which IGWA presented to IDWR, IDWR did not address these considerations but merely stated that IGWA has known of the deadline for several months, and based on this sole factor, it denied the motion for a stay. This action demonstrates an unreasonable disregard for the circumstances surrounding IGWA's mitigation efforts; it is arbitrary action that amounts to an abuse of discretion.

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

People's livelihoods, cows, and many businesses are dependent upon water. Curtailment will devastate not only the holders of the curtailed water rights but also numerous other Magic Valley businesses who depend upon dairy production for their survival. The harm will be devastating and irreparable.

## **3. Rangen will not be harmed by a stay.**

In contrast, staying the Second Amended Curtailment Order will benefit Rangen by providing more water to Rangen than curtailment will.

The Curtailment Order provides for phased-in mitigation, requiring groundwater users to provide 3.4 cfs in mitigation the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.<sup>27</sup> Once the Magic Springs pipe is completed, IGWA can not only deliver water to make up for the delay, but it can deliver more water to Rangen than is otherwise required.

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<sup>27</sup> Curtailment Order p. 42 (Ex. A to Budge Aff.)

Thus, a stay benefits both Rangen and IGWA, whereas proceeding with curtailment only harms both parties.

It is also significant that Rangen has been permitted to use 10-12 cfs from Billingsley Creek for nearly a year without a water right. The Curtailment Order imposed two curtailments: it curtailed junior groundwater pumping, but it also curtailed Rangen's use of Billingsley Creek. Yet, only one of those curtailments has been enforced. While IGWA has labored to identify, develop, and implement mitigation plans to avoid curtailment, facing opposition from Rangen at every turn, Rangen has had uninhibited use of two to three times more water than IGWA owes in mitigation. This greatly adds to the equity of allowing IGWA three weeks to complete the Magic Springs project.

#### **4. A stay is in the public's interest.**

The magnitude of the pending curtailment rises to the level of a public crisis. Given Idaho's heavily agriculture-dependent economy, the effects of curtailment will undoubtedly ripple throughout Idaho's economy.

Staying the Second Amended Curtailment Order for a mere two to three weeks will provide IGWA the time needed to finish the Magic Springs Project, which will definitely resolve Rangen's water needs by providing the mechanism to meet the full mitigation obligation imposed by the Curtailment Order.

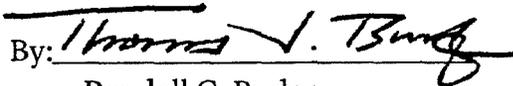
While curtailment can be avoided long-term by staying the curtailment for a mere three weeks, the damage of a short-term curtailment will have already been done. Thus, the public interest weighs overwhelmingly against short-term curtailment, particularly since it would provide less water to Rangen than would a stay of the Curtailment Order.

## CONCLUSION

The Curtailment Order should be stayed for a short period until the Magic Springs project is complete because (1) the Director unreasonably denied IGWA's motion for a stay, (2) a stay will provide more water to Rangen than enforcing the Orders, (3) a stay will avoid severe and irreparable harm to the curtailed groundwater users and the economies of the Magic Valley and the State of Idaho, and (4) a stay will serve the public interest. For these reasons, IGWA respectfully asks this Court to stay the curtailment until February 7, 2015, at which time IGWA will be able to provide Rangen 5.5 cfs of water and whatever additional amount necessary to compensate for this three-week delay.

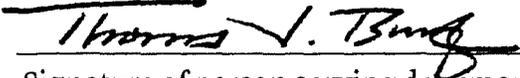
DATED January 20, 2015.

RACINE OLSON NYE BUDGE  
& BAILEY, CHARTERED

By:   
Randall C. Budge  
Thomas J. Budge

## CERTIFICATE OF MAILING

I certify that on this 20th day of January, 2015, the foregoing document was served on the following persons in the manner indicated.

  
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 Signature of person serving document

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