

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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

**CM-MP-2014-003
CM-DC-2011-004**

**ORDER APPROVING IGWA'S
SECOND MITIGATION PLAN;
ORDER LIFTING STAY ISSUED
APRIL 28, 2014; SECOND AMENDED
CURTAILMENT ORDER**

**IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02551 AND 36-07694 (RANGEN, INC.)**

PROCEDURAL BACKGROUND

On January 29, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). The Curtailment Order recognizes that holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to Rangen.” *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs 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.” *Id.*

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Department *IGWA’s Mitigation Plan and Request for Hearing* (“First Mitigation Plan”) to avoid curtailment imposed by the Curtailment Order. The First Mitigation Plan proposed nine possible mitigation activities for junior-priority ground water pumpers to satisfy mitigation obligations.

On February 12, 2014, IGWA filed *IGWA’s Petition to Stay Curtailment, and Request for Expedited Decision*. On February 21, 2014, the Director issued an *Order Granting IGWA’s Petition to Stay Curtailment* which stayed enforcement of the Curtailment Order for members of

IGWA and the non-member participants in IGWA’s First Mitigation Plan until a decision was issued for the First Mitigation Plan.

On March 17-19, 2014, the Director conducted a hearing for the First Mitigation Plan at the Department’s state office in Boise, Idaho. On April 11, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (“First Mitigation Plan Order”). In the First Mitigation Plan Order, the Director approved two of the nine proposed components of the First Mitigation Plan: (1) credit for current and ongoing mitigation activities, and (2) delivery of water directly to Rangen, Inc. (“Rangen”) from the Curren Tunnel that would have been delivered in priority pursuant to irrigation water rights held by Howard “Butch” Morris (“Morris”), but will not be diverted because surface water is being delivered to Morris through the Sandy Pipeline (“Morris exchange water”). The Director rejected the other seven components of the First Mitigation Plan. The Director recognized 1.2 cfs of mitigation credit for current and ongoing activities (interchangeably referred to as “aquifer enhancement activities”), and also recognized 1.8 cfs of mitigation credit for delivery of the Morris exchange water to Rangen. The Director recognized a total mitigation credit of 3.0 cfs, 0.4 cfs short of the 3.4 cfs mitigation required for the time period from April 1, 2014, to April 1, 2015. Because the 0.4 cfs mitigation deficiency must be satisfied by curtailment of junior water rights, the Director ordered curtailment of ground water rights bearing priority dates junior or equal to July 1, 1983, during the 2014 irrigation season. *First Mitigation Plan Order* at 21.

On March 10, 2014, during the pendency of the First Mitigation Plan proceeding, IGWA filed *IGWA’s Second Mitigation Plan and Request for Hearing* (“Second Mitigation Plan”) with the Department in response to the Curtailment Order. The Department published notice of the Second Mitigation Plan and the following five entities protested:

Protestant	Represented by:
Rangen, Inc.	Fritz X. Haemmerle, Justin May, and Robyn Brody, Attorneys at Law
Buckeye Farms, Inc.	John Simpson, Attorney at Law
Big Bend Irrigation & Mining Company, Ltd.	Almer Huntley, President
Salmon Falls Land & Livestock Company	Michael Henslee, Vice-President
Big Bend Trout, Inc.	Leo Ray, President

The Second Mitigation Plan proposes delivery of up to 9.1 cfs of water from Tucker Springs, a tributary to Riley Creek, through a 1.3 mile pipeline to the fish research and propagation facility owned by Rangen (“Rangen Facility”). *Second Mitigation Plan* at 2.

On April 17, 2014, IGWA filed *IGWA’s Second Petition to Stay Curtailment, and Request for Expedited Decision* (“Second Petition”). The Second Petition asked the Director to “stay implementation of the [Curtailment Order], . . . until the judiciary completes its review of the Curtailment Order in *IGWA v. IDWR*, Gooding County Case No. CV-2014-179, and *Rangen v. IDWR*, Twin Falls County Case No. CV-2014-1338.” *Second Petition* at 1.

On April 28, 2014, the Director issued an *Order Granting IGWA's Second Petition to Stay Curtailment* stating the Director will revisit the stay at the time a decision on IGWA's Second Mitigation Plan is issued.

On June 4-5, 2014, the Director conducted a hearing for the Second Mitigation Plan.

APPLICABLE LAW

Conjunctive Management Rule 43.03 ("Rule 43.03") establishes the following factors that "may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights":

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.
- e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.043.03(a-o). A proposed mitigation plan must contain information that allows the Director to evaluate these factors. IDAPA 37.03.11.043.01(d).

While Rule 43.03 lists factors that “may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights,” factors 43.03(a) through 43.03(c) are necessary components of mitigation plans that call for the direct delivery of mitigation water. A junior water right holder seeking to directly deliver mitigation water bears the burden of proving that (a) the “delivery, storage and use of water pursuant to the mitigation

plan is in compliance with Idaho law,” (b) “the mitigation plan will provide replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source,” and (c) “the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage.” IDAPA 37.03.11.043.03(a-c) These three inquiries are threshold factors against which IGWA’s mitigation plan proposal must be measured.

To satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the curtailment order; (2) the components of the proposed mitigation plan can be implemented to timely provide mitigation water as required by the curtailment order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.

ANALYSIS

This decision approves IGWA’s Second Mitigation Plan. In approving the Second Mitigation Plan, the Director considered the components of the First Mitigation Plan in determining whether water would be provided in the senior water right holder’s time of need.

Rule 43 of the Conjunctive Management Rules is silent about how two mitigation plans should interact, particularly where a final order of the Director has previously approved one mitigation plan, and the consideration of a second mitigation plan might affect the implementation of the already approved mitigation plan.

When the Director considered the First Mitigation Plan, credit for delivery of the Morris exchange water could have been quantified by three possible alternative computations:

1. Full mitigation credit could have been recognized only for the irrigation season when Morris exchange water is delivered to Rangen. A curtailment date could have been established at the end of the irrigation season, but if IGWA did not contribute additional water during the nonirrigation season to mitigate for non-irrigation season depletions to spring flows caused by irrigation season diversions of ground water, IGWA would never fully mitigate for its depletions with the Morris exchange water. This alternative would result in a recurring annual evasion of the ground water users’ obligation to supply mitigation water to the senior water right holder.
2. There could have been a determination that no mitigation credit for delivery of the Morris exchange water would be recognized because the First Mitigation Plan would not deliver the full 3.4 cfs for the entire year. Refusal to recognize any mitigation credit for delivery of the Morris exchange water to Rangen would result in full curtailment and a windfall to Rangen because it would have received both the Morris exchange water and the benefits of curtailment.

3. The benefits of providing the Morris exchange water to Rangen could be spread through a time period longer than the irrigation season. This is the alternative adopted in the First Mitigation Plan Order. The benefits of delivering Morris exchange water to Rangen were extended for an entire 365 days because the ground water users did not present any other acceptable mitigation that would have addressed the mitigation deficiency. The spreading of the mitigation credit for the Morris exchange water over 365 days:
 - a. Recognized that IGWA delivered water to Rangen, and that Rangen derived value from the water delivered.
 - b. Delivered water to Rangen in the most critical time of need.
 - c. Established a deficiency in the annual, required mitigation water, resulting in an amended order of curtailment and the filing of subsequent mitigation plans to address the deficiency.

The Director was required to rule on the First Mitigation Plan without considering the merits of any subsequent mitigation plans. In the First Mitigation Plan Order, the Director recognized the annual benefits of transient aquifer enhancement activities (1.2 cfs). The extension of benefits of the Morris exchange water to Rangen through the entire year (April 1, 2014 through March 31, 2015) established the annual expectation of direct delivery of water to Rangen (2.2 cfs) and quantified for the full year the direct delivery of the Morris exchange water to Rangen (1.8 cfs). The Director's adoption of the third alternative described above provided IGWA the opportunity to minimize the number of individuals curtailed absent a second mitigation plan to address the 0.4 cfs shortfall.

In the Second Mitigation Plan hearing, IGWA established April 1, 2015, as the target date for completion of the diversion and delivery works for piping water from Tucker Springs to the Rangen Facility, although IGWA's expert engineer testified that water could possibly be delivered as soon as January 2015. Delivery of Tucker Springs water on April 1, 2015, will not result in the delivery of the required 0.4 cfs deficiency to Rangen during the 2014 time of need. In trying to dovetail the First Mitigation Plan into the Second Mitigation Plan, there are three alternatives:

1. Approve the Second Mitigation Plan anticipating completion on April 1, 2015, but, because the deficiency for 2014 is not addressed, lift the stay issued April 28, 2014, and require immediate curtailment until construction of the Tucker Springs pipeline is complete and water can be delivered to Rangen.
2. Continue to stay the Curtailment Order's first year staged implementation value of 3.4 cfs based on an expectation of the entire mitigation obligation of 9.1 cfs being delivered from Tucker Springs on or after April 1, 2015. The adoption of this alternative would abandon the linkage of staged implementation values to the modeled benefit to Rangen of full curtailment of water rights. While Rule 43 does not require justification for the staged mitigation implementation values adopted by the Director, linkage to the modeled benefits factually justifies the phase-in values.
3. Because there is an expectation of additional water being delivered to Rangen by the Second Mitigation Plan, (a) recalculate the period of time the Morris exchange water is recognized as mitigation to equal the number of days that the water will provide full

mitigation to Rangen, and (b) require curtailment or additional mitigation from IGWA under the Second Mitigation Plan after the time full mitigation under the First Mitigation Plan expires.

The Director adopts this last alternative in coordination with the First Mitigation Plan because it:

- a. Recognizes IGWA delivered water to Rangen, and Rangen derived value from the water delivered.
- b. Delivers water to Rangen in the most critical time of need.
- c. Addresses the immediate 0.4 cfs shortfall from the First Mitigation Plan and establishes a time certain when additional mitigation must be provided by IGWA pursuant to the Second Mitigation Plan or subsequent mitigation plan.

FINDINGS OF FACT

Rangen's Existing System

1. The Rangen Facility is located in the Thousands Springs area near Hagerman, Idaho. Attachment A is a schematic diagram of the Rangen Facility. The Rangen Facility is situated below a canyon rim at the headwaters of Billingsley Creek.

2. Immediately east of the Rangen Facility, water emanates from numerous springs on the talus slopes just below the canyon rim. Water also emanates from the Curren Tunnel. The tunnel is a large, excavated conduit constructed high on the canyon rim and extends approximately 300 feet into the canyon wall.

3. A concrete collection box located near the mouth of the Curren Tunnel collects water for delivery to Rangen and holders of early priority irrigation water rights via pipelines. The concrete box is commonly referred to as the "Farmers' Box."

4. Further down the talus slope is a second concrete water collection box with an open top, commonly referred to as the "Rangen Box." Rangen rediverts the water from the Farmers' box through two plastic pipes down to the Rangen Box. Water is then delivered from the Rangen Box via a steel pipe to the small raceways. The water diverted by Rangen can then be routed from the small raceways down through the large and CTR raceways at the Rangen Facility. Water can also be spilled out the side of the Rangen Box and returned to the talus slope.

5. In the early 1980's, Rangen built a six-inch white PVC pipeline to divert water from inside the Curren Tunnel and deliver the water to the hatch house and greenhouse buildings. The water is used in the hatch house and/or greenhouse and then can be discharged either back into Billingsley Creek or discharged directly into the small raceways and used in the large and CTR raceways.

Tucker Springs Diversion Proposal

6. Tucker Springs are a series of springs that derive water from the Eastern Snake Plain Aquifer (“ESPA”). Tucker Springs are located approximately two miles southwest of the Rangen Facility. Tucker Springs are tributary to Riley Creek, a short spring fed stream which flows in a northwesterly direction towards the Idaho Department of Fish and Game (“Fish & Game”) Hagerman State Hatchery before turning south and flowing to the Snake River.

7. Tucker Springs are divided into an Upper Tucker Springs complex and a Lower Tucker Springs complex. IGWA’s Second Mitigation Plan proposes to pump up to 9.1 cfs of Fish & Game water right no. 36-2055 from the Upper Tucker Springs complex and deliver the Tucker Springs water via a pipeline to the Rangen Facility located at the head of Billingsley Creek. Water right no. 36-2055 authorizes the diversion of 64 cfs for fish propagation purposes from Upper Tucker Springs and Riley Creek and bears a priority date of September 16, 1947. North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District filed an application for water right transfer on behalf of Fish & Game proposing to change the place of use. Ex. 1109.

8. Exhibit 1138 is an aerial photograph of the Upper Tucker Springs complex, and is attached as Attachment B. Within the Upper Tucker Springs complex is an upper pool and a lower pool. Both the upper and lower pools of the Upper Tucker Springs complex are depicted on Attachment B.

9. The location of diversion head works for several water rights are depicted on Attachment B. Idaho Power Company, the Big Bend Irrigation & Mining Company (“Big Bend Ditch”), Salmon Falls Land & Livestock Company (“Salmon Falls”), Fish & Game, and others divert water out of the upper pool. Ex. 1125 at 25, 27, 35. Fish & Game also diverts water out of the lower pool. Fish & Game delivers water from both its points of diversion to a state-run fish rearing facility known as the Hagerman State Hatchery.

10. Protestant Big Bend Trout, Inc. (“Big Bend Trout”), according to its protest, leases water from Big Bend Ditch. The president of Big Bend Trout, Leo Ray, also holds a water right that authorizes diversion of water from the upper pool. Ex. 1125 at 35.

11. Protestant Buckeye Farms, Inc. (“Buckeye”), does not divert water directly from the Upper Tucker Springs complex, but relies on flows from Tucker Springs to satisfy its water rights authorizing diversion from Riley Creek downstream from the Hagerman State Hatchery. Ex. 1125 at 31.

12. In addition to diverting water from the upper pool, protestant Salmon Falls holds a water right authorizing the diversion of water from Riley Creek downstream from the Hagerman State Hatchery. Ex. 1125 at 27, 31.

13. Fish & Game diverts water from the lower pool (of the Upper Tucker Springs complex) through four buried perforated collection pipes and a surface water intake at a collection box. Chapman, Tr. Vol. II, pp. 322, 356. The perforated pipes were placed in the lower pool and covered with rock. The exact depth and location of the pipes was not established at the hearing. The four pipes collect water and deliver it to a collection box located at the south end of the lower pool at a remote location from the upper pool. *Id.* at 323. The four perforated pipes extend from the collection box through the lower pool back toward the upper pool. *Id.*

14. Prior to placement of the perforated water collection pipes, the lower pool may have been a body of water exposed continually to the atmosphere. The rocks over the pipes now cover the water surface for much of the year. *Id.* at 331-32. At times, however, the water level in the pool rises above the top of the covering rocks, creating a shallow, open water pool. *Id.*

15. Some of the water in the open water lower pool not captured by the perforated pipes flows through a surface intake in the Fish & Game collection box. As a result, during high flows of Tucker Springs, the collection box collects both surface and subsurface water from Tucker Springs. *Id.* at 356.

16. Fish & Game's diversion of water from the lower pool does not affect the supply of water to water right holders diverting water from the upper pool. Hardgrove, Tr. Vol. I, p. 195.

17. IGWA executed a letter of intent with Fish & Game providing that Fish & Game will lease to IGWA 10 cfs of its Tucker Springs water rights as needed to meet IGWA's mitigation obligation to Rangen. Ex. 1106 at 1. The agreement is contingent upon (a) IGWA securing an order from IDWR approving a mitigation plan providing for the delivery of 10 cfs from Fish & Game's Tucker Springs water rights to satisfy the mitigation obligation to Rangen; (b) IGWA securing an order from IDWR approving the transfer of the point of diversion and place of use of the 10 cfs to the Rangen facility; (c) IGWA proceeding to implement the plan. *Id.* at 2. In return, Fish & Game will acquire title to a second fish hatchery and IGWA agrees to pay the costs to upgrade the second fish hatchery. *Id.*

18. Currently, Fish & Game diverts over 40 cfs from the lower pool. Since January of 2010, the flows have not dropped below 40 cfs. Ex. 1111 Fig. 4, p. 10. This is well above the flow needed to supply the required 10 cfs.

Engineering Design

19. Engineers for IGWA have completed sixty percent of the engineering design necessary to construct the Tucker Springs project. Ex. 1111 at 4. The engineering design calls for the construction of a second collection box in the lower pool near the Fish & Game collection box. *Id.* at 8. A pumping station will be constructed to pump water

through a buried pipeline to the head of the Rangen Facility. *Id.* at 4. The buried pipeline will be approximately 1.8 miles long. *Id.* IGWA's engineers prepared sixty percent design drawings showing the spring collection box, pump station, pipeline alignment, and tie-in to the Rangen Facility pipeline. Hardgrove, Tr. Vol. I, pp. 147-48.

Spring Intake Design

20. The new collection box will be located just upgradient from the existing Fish & Game collection box. Hardgrove, Tr. Vol. I, p. 165; Ex. 1111 at 9-10. A precast collection box with bar grate and metal cover will be installed. A twenty-four inch diameter gravity pipeline will delivery water from the collection box to a wet well that will house the pumping station. Ex. 1111 at 23.

Pumping Station Design

21. Three line-shaft turbine pumps will be installed in the pumping station. Ex. 1111 at 11. Two of the pumps will be primary pumps and the third will be a redundant pump to serve as a backup should a pump fail or need to be taken out of service for maintenance. Hardgrove, Tr. Vol. I. p. 171. The pump station is designed to deliver a maximum flow of 10 cfs at 243 feet of total dynamic head with two pumps in operation. Each pump will be equipped with a 200 hp motor. Ex. 1111 at 11. The pumps will be controlled by variable frequency drives, which will automatically adjust pump speed to deliver a constant flow to Rangen without manual adjustments. Hardgrove, Tr. Vol. I. p. 173. Electronic control equipment will remotely monitor and control pump operation, auto-restart the pumps if they should power down, and automatically start the third pump if one of the other pumps turns off. *Id.* at 171,176; Ex. 1111 at 11-12.

22. The pumps will be driven with electric motors. Idaho Power Company has a three-phase distribution line that runs adjacent to the proposed pump station location. Idaho Power Company informed IGWA that no upgrades are needed to the line and that the distribution line can adequately supply electricity to the proposed nominal 400-hp pump station. Ex. 1111 at 12.

23. IGWA will install a back-up generator to protect against transmission line electricity outages. The backup electrical generator will be driven by diesel motor that will automatically start when there is an electrical supply outage. Hardgrove,Tr. Vol. I, p. 175. The generator will automatically start within seconds of a power outage. *Id.* While the pumps will need to be slowly ramped up to prevent surging in the pipeline, the full pumping capacity can be restored within two and three minutes. *Id.* Fish can live in a raceway pool for ten to thirty minutes without resumption of flows in the raceway pool. Rogers, Tr. Vol. II, p. 283.

24. The backup diesel run generators and redundant pumps for pumping water proposed by IGWA would adhere to construction requirements for backup mechanics for water pumps and electrical motors used by municipal water systems, semiconductor

facilities, and hospitals. Hardgrove, Tr. Vol. I, p. 176. IGWA obtained confirmation that there are several insurance companies with liability policies that would provide for aquaculture production losses in the event of system failure. Ex. 1113.

25. It is not uncommon for fish hatcheries to rely upon pumped water. Eight Fish & Game hatcheries either partially or fully use pumps to supply water to their raceways. Rogers, Tr. Vol. II, p. 274. Tom Rogers, a fish hatchery expert for IGWA and former Fish & Game supervisor, testified that one of the fish hatcheries he oversaw was the Sawtooth fish hatchery. Because the hatchery is in a remote location, it frequently lost power. *Id.* at 278. He testified that, when the power would go out, the generator would automatically start and the pumps would start up again. *Id.* He also testified that, when pumps at Fish & Game fish hatcheries fail, spare pumps or another well would replace the lost water. In his twenty-four years of working with state fish hatcheries, Rogers did not recall a loss of fish due to pump failure. *Id.* at 280. Rogers testified that the design of the proposed Tucker Springs pumping plant equals or exceeds design requirements of the Fish & Game hatcheries. *Id.* at 282. Rogers testified that pumps are now a common way to deliver water to fish hatcheries in Idaho and throughout the United States. *Id.* at 283.

Pipeline Design and Alignment

26. The pipeline will be HDPE, or high-density polyethylene piping, and will be buried for the entire length between Tucker Springs and the Rangen Facility. Hardgrove, Tr. Vol. I, p. 172, 178. A minimum of 3 feet of cover will be placed over the pipe. *Id.* at 178. Figure 5 of Exhibit 1111 shows the typical trench detail. IGWA studied two possible alignments for the pipeline. Ex. 1111 at 6. The two alignments were evaluated based on construction feasibility, Hagerman Highway District input, existing infrastructure, and topography. *Id.* IGWA's preferred alignment for the pipeline travels through property owned by Fish & Game, Morris, and Walter and Margaret Candy ("Candy"). Ex. 1111 at 8. IGWA executed option agreements with Morris and Candy to purchase easements for the construction/placement of a pipeline through their property to deliver Tucker Springs water to the Rangen Facility. Ex. 1107 & 1108. As part of the letter of intent, Fish & Game have agreed to grant IGWA an easement for the pipeline. Ex. 1106 at 2.

Other Authorizations for Pipeline

27. IGWA presented the proposed pipe alignment plan to the Hagerman Highway District at a highway district board meeting. Ex. 1111 at 8. The highway district granted preliminary approval on May 14, 2014, to allow the pipe to be installed in its right of way. *Id.* at 91. If the Second Mitigation Plan is approved, IGWA will seek final approval. *Id.* at 8.

Tie-in to Rangen's Delivery System

28. The engineering plans propose connection of the buried pipeline from Tucker Springs directly into Rangen's fourteen-inch diameter steel pipe that is physically located on the Rangen Facility between Rangen's small raceway and Rangen's hatchery house. Hardgrove, Tr. Vol. I, p. 178. Figure 6 of Exhibit 1111 shows the tie-in detail. The Tucker Springs water will be used in Rangen's small raceways, or if not needed, will back up into the fourteen-inch steel pipe, into the Rangen Box, and spill out of the Rangen Box onto the talus slope and into Billingsley Creek. *Id.* at 179. The proposed pipeline that will deliver Tucker Springs water will only cross approximately 150 lineal feet of Rangen's property to tie into Rangen's fourteen- inch delivery pipe. Ex. 1111 at 14.

Project Schedule

29. Figure 7 of Exhibit 1111 is IGWA's project schedule. IGWA's design engineer testified that the project can be completed by April 1, 2015. Hardgrove, Tr. Vol. I, p. 181. He testified that the bulk of construction would be wrapped up and water could possibly be delivered in January 2015, but certain areas would need to be revegetated so the project would not be officially complete until April. *Id.* at 182, 214. IGWA's schedule does not take into account the time for processing IGWA's transfer application or any other required permits.

Project Permits and Transfer Approval

30. Rangen raised concerns regarding IGWA's ability to obtain the required permits and authorizations for the project, specifically a 404 Permit and an approved transfer application.

31. IGWA's design engineer testified it is possible that the project would need a 404 permit to build the new intake box in the lower pool. Hardgrove, Tr. Vol. I, p. 188. He testified that, if there are no "hurdles," a 404 permit can usually be approved in 45 to 60 days. *Id.* Identification of threatened or endangered species could extend the time for permitting. *Id.* When asked whether a forty-five to sixty day timeframe for a permit would affect the completion date, he testified that there is "some lag" in the schedule for permitting, and the project could be completed by April 1, 2015. *Id.* at 181, 189. A 404 permit would not delay construction of the pipeline itself but would only affect construction of the spring intake. Hardgrove, Tr. Vol. I, p. 240. He also testified that if 404 permitting becomes "too onerous" a potential option is to tie into Fish and Game's existing pipeline versus installing a new intake structure. *Id.*

32. Rangen and other protestants argue that IGWA's transfer application cannot be approved because the transfer will result in injury to other water users on Tucker Springs and Riley Creek. Big Bend Ditch diverts only from the upper pool. Hardgrove, Tr. Vol. I, p. 195. A gravity based diversion out of the lower pool will not affect the water rights that divert from the upper pool. *Id.* at 196-97; Erwin, Tr. Vol. II,

p. 406. Big Bend Trout diverts water from Lower Tucker Springs, not Upper Tucker Springs. Hardgrove, Tr. Vol. I, p. 192. A diversion from the lower pool of Upper Tucker Springs will not affect the Lower Tucker Springs. Hardgrove, Tr. Vol. I, p. 196-97. If IGWA is able to mitigate any potential injury to Protestant Buckeye, the Buckeye mitigation would likely mitigate injury to all other rights on Riley Creek. Erwin, Tr. Vol. II, p. 415. IGWA and Buckeye are currently discussing possible actions to mitigate any potential injury to Buckeye's water rights. Hardgrove, Tr. Vol. I, p. 190. During the hearing, IGWA and Buckeye stipulated that the Second Mitigation Plan will reduce flows available to Buckeye and that the reductions would need to be mitigated prior to development of the plan, if approved. Simpson, Tr. Vol. II, p. 371. IGWA is still analyzing potential impacts of the transfer on Salmon Falls. Hardgrove, Tr. Vol. I, p. 197. However, IGWA testified it plans to mitigate for any shortage it creates in Riley Creek. Carlquist, Tr. Vol. I, p. 139.

33. Questions were raised at the hearing about the total maximum daily load ("TMDL") for the Hagerman State Hatchery. Reducing the flow through the hatchery would affect the hatchery's ability to comply with its TMDL if production remained the same, but it is anticipated that production would be reduced at the Hagerman State Hatchery and offset at another hatchery. Chapman, Tr. Vol. II, p. 335, 358.

Water Quality Issues

34. Rangen raised water quality concerns in three general areas: (a) water temperature, (b) water chemistry, and (c) pathogens carried by water.

Water Temperature

35. The temperature of Tucker Springs water is very close to the temperature of water flowing from the Curren Tunnel. Ex. 1111, Table 2 at 5. The temperature of Tucker Springs water is suitable for rearing trout in the Rangen Facility. Rogers, Tr. Vol. II, p. 299. Delivery of Tucker Springs water to the Rangen Facility is predicted to raise the water temperature by 0.22 degrees Fahrenheit. Ex. 1111 at 85. The buried pipeline will maintain the temperature of Tucker Springs water delivered to the Rangen Facility within an acceptable range.

Water Chemistry

36. IGWA evaluated existing water quality data received from Fish & Game for the Tucker Springs water source. Ex. 1111 at 4. IGWA also gathered and analyzed limited water quality field data. *Id.* IGWA gathered data about dissolved oxygen in the water, electrical conductivity of the water, and acidity, or pH, of the water.

37. Dissolved oxygen in the Tucker Springs water was 8.0 mg/L and 89% of saturation, which was slightly lower than the 8.3 – 8.6 mg/L and 93 - 96% saturation in the Curren Tunnel water delivered to the Rangen Facility. Ex. 1111, Table 1 at 2. The oxygen saturation levels of Curren Tunnel water likely increased with exposure to the

atmosphere and perhaps aeration from falling water. The difference in oxygen saturation is not a significant factor. The acceptable range of dissolved oxygen for trout is 6.5 to 9 [mg/L]. Rogers, Tr. Vol. II, p. 290.

38. When water is aerated under pressure, the gases in the water can exceed normal saturation levels. The water can become “supersaturated” with atmospheric gases. Supersaturation of nitrogen in water results in the explosion of the gas in the fish as the pressure changes, resulting in a form of “the bends” in fish. Chapman, Tr. Vol. II, p. 333-34. Supersaturation of nitrogen in fish waters can cause serious injury to or death of fish.

39. Pumps created additional pressure in water. Unintentional introduction of air into pressurized water can cause supersaturation. Fish & Game employee Joe Chapman testified about supersaturation of nitrogen in the pipeline delivering Tucker Springs water to the Hagerman State Hatchery. Chapman, Tr. Vol. II, p. 333-34. The supersaturation was caused by a faulty air relief valve that introduced air into the water under pressure. The faulty valve was repaired/replaced, eliminating the problem of supersaturation. *Id.* at 333.

40. The closed water delivery system proposed by IGWA will help prevent air from becoming entrained in the system and causing supersaturation. Hardgrove, Tr. Vol. I, 236. Should supersaturation become an issue, it can be addressed with degassing aeration structures. *Id.* at 258.

41. The pH of Tucker Springs water is very similar to the pH of Curren Tunnel water. Ex. 1111, Table 1 at 2. Small differences will not affect the ability of Rangen to raise fish with Tucker Springs water. Rogers, Tr. Vol. II, p. 288.

Pathology

42. Most hatcheries experience disease and the Fish & Game Hagerman State Hatchery is no exception. Chapman, Tr. Vol. II, p. 359; Rogers, Tr. Vol. II, p. 295. Disease is a normal part of hatchery operations and it is normal practice of hatchery management to treat for diseases. *Id.* Both the Hagerman State Hatchery and the Rangen hatchery have experienced disease. Rogers, Tr. Vol. II, p. 296-97. Fish in the Hagerman State Hatchery suffer from several pathological maladies that have not been detected or have been controlled in the Rangen Facility. An example of one of these fish diseases is proliferative kidney disease (“PKD”). The carrier of PKD is a water-borne parasite that is hosted by bryozoans and then transmitted in the water to the fish. Ramsey, Tr. Vol. II, p. 465-66.

43. Fish & Game has not been able to identify the specific source of PKD in its large raceways or specifically link the disease to the Tucker Springs water source. Chapman, Tr. Vol. II, p. 363. However, circumstantial evidence suggests the parasite that causes PKD could live in the lower pool at Upper Tucker Springs. Fish & Game has treated the lower pool area to kill bryozoans (the intermediate host for the parasite that

causes PKD). Chapman, Tr. Vol. II, p. 348. Fish & Game believes PKD can be remedied through modification of the spring headbox and disinfection of the pipeline supplying water to the Hagerman State Hatchery. *Id.* at 345. Covering springs to limit access by animals can also help limit transmission of disease in general. *Id.* at 353, 356.

44. The common source of water for Upper Tucker Springs and water from the Curren Tunnel is the ESPA. Curren Tunnel water is exposed to birds, land mammals, and other aquatic life in both the Farmer's Box and the Rangen Box. Upper Tucker Springs water is exposed to birds, land mammals, and other aquatic life in the lower pool. Standing water in the lower pool collected by the Fish & Game collection box could be a source of pathogens. Standing water is not a risk at Rangen's Curren Tunnel water collection works. Locating the collection box close to the spring source would reduce the risk of contamination. Ramsey, Tr. Vol. II, p. 507.

Morris Exchange Water From First Mitigation Plan

45. As discussed in the analysis section above, in light of this Second Mitigation Plan, the Director will recalculate how the Morris exchange water is averaged.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994, (“CM Rules”). The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

3. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director.

4. CM Rule 43.02 states that the Director shall consider the mitigation plan under the procedural provisions of Idaho Code § 42-222. Idaho Code § 42-222 provides that approval may be granted “in whole, or in part, or upon conditions” provided no other water rights are injured.

5. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights.

6. The Director concludes that IGWA’s Second Mitigation Plan is an acceptable mitigation plan under the CM Rules and approves the plan. The plan is legal and will provide the quantity of water required by the Curtailment Order. The plan adequately describes the actions that will be taken by IGWA to mitigate material injury to Rangen by pumping water from Tucker Springs to the Rangen Facility for the beneficial purpose of fish propagation. As described below, the approval of the plan is conditional. Nevertheless, the plan, if implemented in tandem with the First Mitigation Plan, will provide water, of sufficient quantity to Rangen “at the time and place required by the senior-priority water right . . .” CM Rule 43.03.b. The proposal has been geographically located and engineered and necessary agreement or option contracts have been executed or have been initiated.

7. The protestants argue that the Second Mitigation Plan should be rejected because the required administrative transfer to change the place of use of Fish & Game’s water right cannot be approved. They argue that, because the transfer would cause injury to other water users who divert from Tucker Springs and from Riley Creek, the transfer will be rejected. The Director will not prejudge the application for transfer in the contested case proceeding but must consider whether there is something in the application that would prevent it from being approved. Extensive testimony was presented about the potential for the transfer to cause injury. The plan will not injure water users diverting from the upper pool nor water users from Lower Tucker Springs. Testimony of IGWA’s witnesses recognizes that IGWA must address the injury to water users diverting from Riley Creek and that IGWA is in negotiations with Buckeye, the entity with the water rights most likely to be affected by the transfer. The Director concludes it is possible for IGWA to adequately address the question of injury to other water users in the transfer proceeding. The Director concludes the Second Mitigation Plan should be approved conditioned upon the approval of the transfer application.

8. Rangen also argues that the Second Mitigation Plan should be rejected because the Tucker Springs water may introduce new diseases into the Rangen Facility that were previously not there. Most hatcheries experience disease. It is a normal part of hatchery operations and it is normal practice of hatchery management to treat for diseases. Both the Hagerman State Hatchery and the Rangen Facility have experienced disease. The disease Rangen expressed the most concern about was PKD. While some fish in the Hagerman State Hatchery have been found to have PKD, it has not been detected in the Rangen Facility. It is not clear that the lower pool is the source of PKD at the Hagerman State Hatchery. Regardless of the source, IGWA should initiate preventive measures to address PKD, such as treating the lower

pool to kill the intermediate host, disinfecting pipelines that may contain PKD or the intermediate host, and covering the spring area.

9. Furthermore, the location and depth of the collection box can also help address Rangen's concern regarding transmission of disease. The risk of disease will be reduced by moving the collection box closer to the spring source. IGWA, in its final design plans, shall move the collection box closer to the spring source in addition to the actions required in Conclusion of Law 8. For decades, Rangen has effectively managed disease at its fish rearing facility. By taking the above precautions, there is a reasonable expectation that Rangen can continue to manage disease at its facility while receiving Tucker Springs water.

10. Rangen also argues the Second Mitigation Plan will likely require permits and other approvals which may delay the project and prevent water from being supplied to Rangen this year. Permitting issues would not necessarily delay construction as there is "some lag" in the schedule presented by IGWA. Hardgrove, Tr. Vol. I, p. 181. Furthermore, while agencies may require time for review and analysis of applications for permit, this is not in itself a reason for rejecting the plan.

11. The Director concludes that IGWA's Second Mitigation Plan satisfies the necessary standard of temperature, water chemistry, reliability, and biosecurity. The temperature variance between the water at Tucker Springs and the Rangen Facility is not significant. The pipeline delivering water to the Rangen Facility will be buried, insulating the water in the pipeline from significant change in temperature. The dissolved oxygen levels measured at Tucker Springs and the Rangen Facility are similar. Should the dissolved oxygen levels become an issue once the system is constructed and operating, IGWA will be required to install an aeration system to oxygenate the water. Similarly, should it appear that gas supersaturation is an issue once the system is constructed and operating, IGWA will be required to address the issue.

12. The redundancy built into the pumping and power system are the same type and design as those used by municipalities and hospitals and are of sufficient protection to justify approval of the plan. The system is designed to be as secure as any existing hatchery facility and provides adequate protection.

13. Given Rangen's opposition to the Second Mitigation Plan, IGWA is entitled to know prior to starting construction whether Rangen will refuse the replacement water. While the engineering plans submitted by IGWA at the proceeding were not final, the engineering plans are of sufficient quality to allow Rangen to evaluate the proposal. Within twenty-one days from the date of this order, Rangen must state, in writing, whether it will accept the water delivered through the Tucker Springs Pipeline.

14. The flow rate of water that must be delivered by the Morris exchange water to provide full mitigation is 3.4 cfs minus 1.2 cfs (mitigation credit for ongoing aquifer enhancement activities), resulting in a remainder mitigation requirement of 2.2 cfs. The First Mitigation Plan Order credited the Morris exchange water with providing an average flow of 3.5 cfs for 184 days, or a total volume of 644 24-hour second feet (3.5 cfs x 184 days). This volume

will provide an average rate of 2.2 cfs for 293 days (3.5 cfs x 184 days/2.2 cfs). Two hundred ninety three days from April 1, 2014, is January 18, 2015, a Sunday. Monday, January 19, 2015, is the first working day that the Morris exchange water could not provide full mitigation.

15. On January 19, 2015, the Morris water will no longer supply 2.2 cfs to Rangen. On January 19, 2015, the Director must curtail water rights as if the Morris water is and was not provided. The curtailment priority date is August 12, 1973.

ORDER

Based upon and consistent with the foregoing, the Director hereby orders as follows:

IT IS ORDERED that the Second Mitigation Plan is conditionally approved. The plan, when paired with the First Mitigation Plan, is an acceptable mitigation plan as it provides replacement water of sufficient quantity, quality, and temperature in the time needed by Rangen. IGWA shall initiate preventive measures to address PKD, such as treating the lower pool to kill the intermediate host, disinfecting pipelines that may contain PKD or the intermediate host, and covering the spring area. In completing its design plan for the collection box, IGWA shall also design the box to divert water at a location closer to the spring source to limit potential exposure to disease.

IT IS FURTHER ORDERED that within twenty-one (21) days from the date of this order, Rangen must state, in writing, whether it will accept the water delivered through the Tucker Springs Pipeline. Rangen must submit its written acceptance/rejection to the Department and IGWA. The written acceptance/rejection must state whether Rangen will accept the Tucker Springs water and whether Rangen will allow construction on its land related to placement of the delivery pipe. If the plan is rejected by Rangen or Rangen refuses to allow construction in accordance with an approved plan, IGWA's mitigation obligation is suspended.

IT IS FURTHER ORDERED that, because the Director determines in this order that the Morris exchange water will provide mitigation up to January 19, 2015, the stay issued April 28, 2014, is lifted.

IT IS FURTHER ORDERED that the Tucker Springs project must deliver water to Rangen no later than January 19, 2015. Failure to provide water by January 19, 2015, to Rangen will result in curtailment of water rights junior or equal to August 12, 1973, unless another mitigation plan has been approved and is providing water to Rangen at its time of need. If IGWA fails to satisfy this obligation, at 12:01 a.m. on or before January 19, 2015, users of ground water holding consumptive water rights bearing priority dates junior to August 12, 1973, listed in Attachment C to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de*

de minimis domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that the watermasters for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, are directed to issue written notices to the holders of the consumptive ground water rights listed in Attachment C to this order. The water rights on the list bear priority dates equal or junior to August 12, 1973. The written notices are to advise the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 20th day of June, 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2014, the above and foregoing document was served on the following by providing a copy of the *Order Approving IGWA's Second Mitigation Plan* in the manner(s) selected:

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Deborah Gibson
Administrative Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.
- (8) The provisions of this section do not preclude an agency from taking immediate

action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.