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

RANGEN, INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN
in his official capacity as Director of
the Idaho Department of Water Re-
sources.

Respondent,

vs.

IDAHO GROUND WATER APPRO-
PRIATORS, INC., FREMONT-
MADISON IRRIGATION DISTRICT,
A&B IRRIGATION DISTRICT,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT NO. 2, MINIDOKA IRRI-
GATION DISTRICT, NORTH SIDE
CANAL COMPANY, TWIN FALLS
CANAL COMPANY, and CITY OF
POCATELLO.

Intervenors.

Case No. CV-2014-1338
(Consolidated Gooding County
Case No. CV-2014-179)

**IGWA's Response to
Rangen's Opening Brief**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
RESPONSE	4
A. The name “Martin-Curren Tunnel” refers to the man-made tunnel above Rangen, not Billingsley Creek.	4
1. There is no latent ambiguity in the name “Martin-Curren Tunnel.”	5
2. If a latent ambiguity exists, extrinsic evidence demonstrates that “Martin-Curren Tunnel” refers to the tunnel specifically.	8
3. Rangen’s measurement of water from other sources does not change the meaning of Martin-Curren Tunnel.	10
B. Rangen cannot divert water from sources or points of diversion that are not included in its water right decrees.	11
C. Rangen’s quasi-estoppel claim is barred.	13
D. The Director’s adoption of Sullivan’s regression analysis is a reasonable exercise of discretion, based on substantial evidence. .	15
E. The determination that junior users are using water efficiently and without waste is supported by substantial evidence.....	16
F. There is substantial evidence that the Great Rift affects groundwater flow, and it was not abuse of discretion for the Director to account for that, but the Great Rift trim line still results in unreasonable hoarding of the ESPA by Rangen.	17
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

A& B Irrigation Dist. v. Spackman, 155 Idaho 640, 650 (2013)..... 1

Boise City v. Wilkinson, 16 Idaho 150, 176, 102 P. 148, 157 (1909) 14

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 816-17 (2011) 17

In re Delivery Call of A& B Irrigation Dist., 153 Idaho 500, 515, 284 P.3d
224, 240 (2012) 15

Knipe Land Co. v. Robertson, 151 Idaho 449, 455 (2011)..... 5

Sagewillow v. Idaho Dep’t of Water Res., 138 Idaho 831, 845 (2003) 14

Snoderly v. Bower, 30 Idaho 484, 487 (1917) 5

SRBA Subcase Nos. 36-2708 & 36-7218 (Fifth Jud. Dist., Twin Falls
County) (August 15, 2000) 12

Williams v. Idaho Potato Starch Co., 73 Idaho 13 (1952) 5

Rules

IDAPA 37.03.01..... 7, 13

RESPONSE

A. The name “Martin-Curren Tunnel” refers to the man-made tunnel above Rangen, not Billingsley Creek.

Rangen’s water rights list “Martin-Curren Tunnel” as the source of water.¹ The tunnel is a “large, excavated conduit constructed high on the canyon rim and extends approximately 300 feet into the canyon wall.”² Since it is the only source listed on Rangen’s water rights, the Director ruled that Rangen is authorized to divert “only water discharging from the Curren Tunnel.”³

Rangen disputes this, arguing that the name Martin-Curren Tunnel refers collectively to the tunnel, Billingsley Creek, and natural springs at the head of Billingsley Creek.⁴ Rangen’s obvious objective is to obtain authorization to divert water from Billingsley Creek at the “Bridge Dam” even though Rangen’s water rights do not identify Billingsley Creek as a source or include a point of diversion for the Bridge Dam.

As explained below, the Director properly found that the name “Martin-Curren Tunnel” unambiguously refers to the man-made tunnel specifically, and not Billingsley Creek. There is no latent ambiguity as Rangen contends, yet even if there was, the plain meaning of the word “tunnel,” IDWR Adjudication Rules, and common usage all demonstrate that “Martin-Curren Tunnel” refers to the tunnel specifically. Therefore, the Director’s ruling that Rangen’s water rights authorize the diversion of water discharging from the Curren Tunnel only should not be set aside.⁵

¹ Final Order at 5 (R. Vol. 21 p. 4162).

² Final Order at 5 ¶ 16 (R. Vol. 21 p. 4161).

³ Final Order at 33, ¶18 (R. Vol. 21 p. 4190 ¶ 18).

⁴ Rangen Opening Br. at 8-19.

⁵ Final Order at 33, ¶18 (R. Vol. 21 p. 4190 ¶ 18).

1. There is no latent ambiguity in the name “Martin-Curren Tunnel.”

Rangen does not dispute that the name “Martin-Curren Tunnel” is unambiguous on its face. Instead, Rangen cites the seldom-used concept of latent ambiguities to ask this Court to interpret the name in a manner that contradicts its plain meaning. Rangen made this same argument to the Director,⁶ which he rejected.⁷

Rangen acknowledges that proving a purported latent ambiguity is a two-step process, yet Rangen skips the first step altogether. The first step is “to show that the latent ambiguity actually existed.”⁸ This requires showing that the instrument “loses [] clarity when applied to the facts as they exist.”⁹ Only after crossing this hurdle can evidence be considered “to explain what was intended by the ambiguous statement.”¹⁰

Rangen declares that “evidence in this case demonstrates that the term ‘Martin-Curren Tunnel’ constitutes a latent ambiguity,”¹¹ yet does not explain how the term loses clarity when applied to the facts. Rangen cites *Williams v. Idaho Potato Starch Co.*, but this decision does not support Rangen’s latent ambiguity argument.¹² In *Williams*, the term “ten inch pump” was deemed ambiguous because there are multiple types of ten inch pumps that might properly apply, necessitating a review of extrinsic evidence to determine which type of pump the parties contemplated.¹³ In contrast, there is only one tunnel that supplies water to Rangen.

⁶ Rangen Closing Br. at 11-22 (R. Vol. 19 pp. 3908-3919).

⁷ Final Order at 33 ¶ 18 (R. Vol. 21 p. 4190).

⁸ Rangen Opening Br. at 9 (quoting *Snoderly v. Bower*, 30 Idaho 484, 487 (1917)).

⁹ Rangen Opening Br. at 8 (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455 (2011)).

¹⁰ Rangen Opening Br. at 9 (quoting *Snoderly*, 30 Idaho at 487).

¹¹ Rangen Opening Br. at 11.

¹² Rangen Opening Br. at 10-11 (citing *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13 (1952)).

¹³ *Williams*, 73 Idaho at 20.

The Martin-Curren Tunnel is a well-known geologic feature, and there was no confusion by the witnesses in this case as to what the name refers to. Rangen employees, IDWR employees, and experts hired by both parties all used it to refer to the man-made tunnel specifically. None used it to refer to Billingsley Creek or the springs at the head of the Creek. Rather, witnesses called Billingsley Creek by its name, and used terms like “talus springs” and “lower springs” to refer to the springs at the head of Billingsley Creek. Rangen’s experts acknowledged the Tunnel and the springs as different water sources, explaining: “Water delivered to the Research Hatchery is supplied by the Curren Tunnel and spring water issuing from the talus slope beneath the tunnel.”¹⁴ In fact, the Tunnel and lower springs have distinct flow characteristics, with the Tunnel being more responsive to declining groundwater levels than the lower springs.¹⁵

It is actually Rangen’s theory—that the name “Martin-Curren Tunnel” refers to the tunnel, springs, and Billingsley Creek collectively—that creates confusion. Rangen’s water rights are not the only rights that have “Martin-Curren Tunnel” as the source. There are nine others, all of which receive water from the tunnel alone.¹⁶ Treating “Martin-Curren Tunnel” as an umbrella term to describe multiple water sources creates confusion as to the source of these water rights, whereas the name loses no clarity when used to describe the tunnel specifically.

With only one tunnel supplying water to Rangen, and all water rights from that tunnel listing “Martin-Curren Tunnel” as their source, there is no question that the name “Martin-Curren Tunnel” refers to the tunnel specifically, and not Billingsley Creek or the springs at the head of the Creek. Thus, there is no latent ambiguity.

¹⁴ Brockway et al. Report, Dec. 20, 2012, p. 8 (Ex. 1284 at 8).

¹⁵ Ex. 2201.

¹⁶ Ex. 2401 at 94.

Moreover, Rangen’s latent ambiguity argument violates IDWR Adjudication Rule 60. Rangen claims “Martin-Curren Tunnel” is “a local name for the entire complex that forms the headwaters of Billingsley Creek.”¹⁷ However, Adjudication Rule 60.02.c allows water sources to be identified by the name in local common usage only if no official name is listed on the U.S. Geological Survey Quadrangle map.¹⁸ Billingsley Creek is listed on the USGS quad map; therefore, Rangen was required to name Billingsley Creek as the source of its claimed right to divert water from Billingsley Creek at the Bridge Dam.

Rangen’s problem is not one of ambiguity, but of its own failure to include different points of diversion from different sources of water in its SRBA claims. IDWR Adjudication Rules require water users to identify multiple points of diversion if “the claim is for a single water delivery system that has more than one (1) point of diversion, or the claim is for a single licensed or decreed water right that covers more than one (1) water delivery system,”¹⁹ and, if points of diversion are from different sources, the Rules require the claimant to identify the source for each diversion.²⁰

Accordingly, in other instances where a tunnel and natural springs are located near each other, the SRBA decrees identify the tunnel and spring as separate sources of water. For example, water right no. 36-7071 identifies the Hoagland Tunnel and adjacent Weatherby Springs as separate water sources with separate points of diversion.²¹ Similarly, water right no. 36-131 identifies “Spring 8” and “Spring 9” as separate sources, listing two different points of diversions within the same 10-acre tract.²²

¹⁷ Rangen Opening Br. at 11.

¹⁸ IDAPA 37.03.01.

¹⁹ Rule 60.02.d.v.

²⁰ Rule 60.02.c.ii.

²¹ See **Appendix A** attached hereto.

²² See **Appendix B** attached hereto.

If Rangen claimed the right to divert water from Billingsley Creek in addition to the Martin-Curren Tunnel, it had a duty under the Adjudication Rules to list both sources and points of diversion. If there were errors or deficiencies in Rangen's water right licenses, the SRBA provided an opportunity to correct them.

Rangen's failure to comply with the Adjudication Rules does not create ambiguity. Indeed, There would be no debate about the meaning of Martin-Curren Tunnel if Rangen had properly claimed two points of diversion from two sources, as the Adjudication Rules require.

It is not this Court's duty to stretch the doctrine of latent ambiguity to effectively add a source that Rangen failed to claim in the SRBA, nor is it Rangen's privilege to bootstrap its error into a water right that is better than what is shown on its decrees. Therefore, this Court should uphold the Director's ruling that the name "Martin-Curren Tunnel" unambiguously refers to the man-made tunnel at Rangen, and deny Rangen's latent ambiguity argument.

2. If a latent ambiguity exists, extrinsic evidence demonstrates that "Martin-Curren Tunnel" refers to the tunnel specifically.

If this Court determines the name Martin-Curren Tunnel is ambiguous, extrinsic evidence nonetheless demonstrates that it refers to the tunnel specifically, and not to Billingsley Creek or the springs at the head of the Creek. This is evident by IDWR back-file documents and common usage of the name "Martin-Curren Tunnel."

i. IDWR back-file documents.

Rangen relies on the water right application and license for water right 36-7694 which identify the water source as "underground springs,"²³ which Rangen contends is a reference to Billingsley Creek and the springs at the head of the Creek in addition to the man-made tunnel. This is illogi-

²³ Rangen Opening Br. at 12-14 (emphasis added).

cal. If the intent was to identify above-ground springs, there is no reason to describe it as “underground.” The same is true if the intent was to identify Billingsley Creek as the source.

Rangen emphasizes that the application for permit for water right 36-7694 has a handwritten note stating “Curren Tunnel,”²⁴ and the license includes the condition: “source known locally as Curran Tunnel.”²⁵ However, this only demonstrates that the term “underground springs” was used to refer to the Martin-Curren Tunnel. It does not show that the term “Martin-Curren Tunnel” was used to refer to Billingsley Creek or the above-ground springs at the head of the Creek.

Thus, the permit and license documents for water right 36-7694 do not support Rangen’s argument that “Martin-Curren Tunnel” means Billingsley Creek and springs in addition to the tunnel itself.

ii. Common usage of the name Martin-Curren Tunnel refers to the man-made tunnel above Rangen.

The name Martin-Curren Tunnel was developed long before Rangen came into existence.²⁶ A 1931 court decree explains that the original water rights from the tunnel were diverted “above the head waters of Billingsley Creek, by means of a tunnel commonly known as the Curren Tunnel, or Curren Spring.”²⁷ As mentioned above, these early water rights are supplied by water from the tunnel alone, originally via an open ditch and now via pipes that convey it southward, away from Billingsley Creek.²⁸ They do not receive water from Billingsley Creek or the springs at the head of the Creek. Thus, when Rangen filed SRBA claims listing “Martin-Curren Tun-

²⁴ Rangen Opening Br. at 14-15.

²⁵ *Id.* at 13.

²⁶ Ex. 2361.

²⁷ Ex. 1027A at 113.

²⁸ Ex. 2401 at 21.

nel” as the source, it claimed the right to divert water from the tunnel specifically.

Under Rangen’s theory that “Martin-Curren Tunnel” means Billingsley Creek and the springs at its head, the tunnel would have no name. This defies common sense, as well as common usage. As mentioned above, all of the witnesses who testified at the hearing used the name Curren Tunnel or Martin-Curren Tunnel to refer to the tunnel specifically, and used other terms to refer to the springs at the head of Billingsley Creek.

The coaxed testimony of Lynn Babbington²⁹ is equivocal at best, and does not overcome the far more universal use of the name Martin-Curren Tunnel to refer to the tunnel specifically.

Thus, even if this Court rules that the name Martin-Curren Tunnel is ambiguous, the weight of the evidence still demonstrates that it refers to the man-made tunnel specifically, and not Billingsley Creek or the springs in the head of the Creek.

3. Rangen’s measurement of water from other sources does not change the meaning of Martin-Curren Tunnel.

Rangen argues this Court must interpret “Martin-Curren Tunnel” to mean the tunnel, Billingsley Creek, and above-ground springs collectively on the basis that Rangen has historically measured water flows in Billingsley Creek that take in water from all of those sources.³⁰ The measurement of water, however, does not define the name of a source, nor do the IDWR Adjudication Rules provide for the naming of water sources based on where water measurements are taken.

²⁹ Rangen Opening Br. at 15-16; Tr. 190:19-191:2.

³⁰ Rangen Opening Br. 14-19.

Rangen points out that the IDWR has inspected and approved its water measurements,³¹ but this does nothing to change the meaning of the name Martin-Curren Tunnel.

Moreover, Rangen's water measurement location cannot be determinative of the source of its water rights because the measurements include irrigation return flows originating above the Hagerman Rim and spring flow arising below the Rim that are not put to beneficial use in any of Rangen's raceways.

For these reasons, the Court must conclude the name Martin-Curren Tunnel refers to the man-made tunnel specifically.

B. Rangen cannot divert water from sources or points of diversion that are not included in its water right decrees.

Rangen contends it can call for the delivery of water to the Bridge Dam diversion on Billingsley Creek, even though its water rights do not include a point of diversion for the Bridge Dam or list Billingsley Creek as a source, claiming the Bridge Dam is “part of a diversion structure that lies mostly within the ten acre tract.”³² There is no legal or factual basis for this argument, which the Director considered,³³ and rejected.³⁴

Rangen's assertion that the Bridge Dam is part of a diversion structure “mostly within the ten acre tract” is, frankly, bizarre. The partial decrees for water right numbers 36-2551 and 36-7694 identify Rangen's point of diversion from the Martin-Curren Tunnel in the SESWNW of Section 32,³⁵ as depicted in the IDWR map contained at R. Vol. 13, p. 2707. The Bridge Dam diversion, on the other hand, is squarely within the SWSWNW, shown by the dot numbered 163 on Exhibit 1446C.

³¹ Rangen Opening Br. 15-19.

³² Rangen Opening Br. at 19.

³³ Rangen Closing Br. at 22-33 (R. Vol. 19, pp. 3919- 3930).

³⁴ Final Order at 32-33 ¶¶ 16-18 (R. Vol. 21 pp. 4189-4190).

³⁵ Third Brendecke Aff., Exs. D & E (R. Vol. 14, p. 2748 & 2750).

What Rangen is really saying is that the Bridge Dam is part of a conveyance system, but this argument also fails, for two reasons.

First, the point of diversion from a natural waterway defines the source. Judge Barry Wood made this clear in the SRBA: “. . . Clear Lakes’ subjective intent as to which particular spring it was diverting from does not establish the source. The point of diversion establishes the source.”³⁶ Thus, regardless of whether Billingsley Creek is part of its conveyance system, Rangen’s decreed point of diversion from the Martin-Curren Tunnel establishes the source, and its delivery call is limited to water emanating from the Tunnel.

Second, Rangen is not authorized to use Billingsley Creek as part of its conveyance system because its water rights do not include a point of injection into Billingsley Creek or point of re-diversion from Billingsley Creek. Under Idaho law, once water enters a natural waterway it becomes part of the public water supply and available for appropriation. Water can be transported through natural waterways, but only if the water user maintains control and dominion over it. This requires strict measurement of water injected into and re-diverted from the natural waterway.

Rangen does not measure or control water that it purports to transport through Billingsley Creek. Instead, water from the Curren Tunnel that isn’t diverted into the 14-inch steel pipe from the “Rangen Box” is discharged onto the talas slope below the Rangen Box where it sinks underground or flows into Billingsley Creek, becoming part of the public water supply.

Without authorized points of injection and re-diversion, combined with strict measurements, Rangen has no legal authority to transport water from the tunnel through Billingsley Creek. The Director understands this, which is why he rejected Rangen’s argument that Billingsley Creek is part of its conveyance system.

³⁶ *Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*, SRBA Subcase Nos. 36-2708 & 36-7218 (Fifth Jud. Dist., Twin Falls County) (August 15, 2000).

Thus, Rangen’s assertion that the Bridge Dam is part of its diversion structure is misplaced, and, in any case, does not permit Rangen to divert water from sources other than the Curren Tunnel.

Rangen also makes the argument that the Bridge Dam is “encompassed by the decreed point of diversion under IDWR’s Historical Rules,” claiming that it is good enough that the Bridge Dam is located within a 10-acre tract adjacent to the decreed 10-acre tract for Rangen’s water rights.³⁷ Rangen cites the Adjudication Rule that describes points of diversion to the “nearest ten (10) acre tract,”³⁸ claiming this means that SRBA decrees do not describe the tract the diversion structure is actually located in, but instead an adjacent tract. Under this theory, when a watermaster seeks to distribute water, he or she would first locate the decreed 10-acre tract, and then look north, south, east, and west to try and locate the subject diversion structure in an adjacent tract. This argument is complete nonsense. “To the nearest ten (10) acre tract” means the tract *within* which the diversion structure is located, not a neighboring tract. There are more than 150,000 SRBA partial decrees that verify this.

The notion that Rangen can divert water from sources and points of diversion that are not listed on their water right decrees utterly ignores the purpose of the source and point of diversion elements of its decreed water rights. This Court must rule as a matter of law that Rangen has no right to call for the delivery of water to points of diversion that are not listed in its water right decrees.

C. Rangen’s quasi-estoppel claim is barred.

Rangen takes the position that the IDWR should be estopped from ruling that Rangen is limited to water from the Martin-Curren Tunnel, citing the IDWR’s purported awareness that Rangen historically diverted water

³⁷ Rangen Opening Br. at 27.

³⁸ Rangen Opening Br. at 28 (quoting IDAPA 37.03.01.060.05.d).

from Billingsley Creek.³⁹ In other words, Rangen claims the IDWR should be required to allow Rangen to use water in ways that violate its SRBA decrees. This argument fails for two reasons.

First, government agencies like the IDWR are not generally subject to estoppel claims, and the prior conduct of IDWR that Rangen refers to does not rise to the level of unconscionability that might warrant an exception to the rule. Rangen complains that the IDWR was aware for many years that Rangen's flow measurements reflect flows in Billingsley Creek in addition to flows from the Curren Tunnel, claiming this amounts to formal IDWR approval of Rangen's use of Billingsley Creek.⁴⁰ However, the site visits by Yenter and Luke that Rangen refers to were not made in response to a complaint about illegal water use. They were investigating measurement protocol, not scrutinizing Rangen's decreed source.

While the IDWR may be criticized for not discovering Rangen's unauthorized use of Billingsley Creek water, this type of error certainly does not rise to the level of a "great wrong or injustice" as existed in *Boise City v. Wilkinson*.⁴¹ The IDWR likely was not particularly concerned with scrutinizing Rangen's diversion structures, since Rangen's fish propagation water rights are deemed non-consumptive, and it is not realistic to expect IDWR personnel to dissect every aspect of water use any time they make a site visit.

In the *Sagewillow* case cited by Rangen, the Idaho Supreme Court adopted this very rationale in declining to require the IDWR to evaluate forfeiture at every turn, stating:

It would be a substantial burden upon the Department to require that in response to every transfer application it conducted investigation into whether the water rights(s) involved had been lost or reduced by forfeiture or abandonment.⁴²

³⁹ Rangen Opening Br. at 30-35.

⁴⁰ Rangen Opening Br. at 32-34.

⁴¹ 16 Idaho 150, 176, 102 P. 148, 157 (1909).

⁴² *Sagewillow v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845 (2003).

Second, Rangen offers no legal support for its argument that the doctrine of quasi-estoppel can be used to force IDWR to administer water rights in a manner that violates SRBA decrees. “A decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.”⁴³ Rangen litigated its water right claims in the SRBA court, and is now bound by them.

Therefore, the Court should reject Rangen’s argument that the doctrine of quasi-estoppel requires the IDWR to distribute water to Rangen in a way that violates its SRBA decrees.

D. The Director’s adoption of Sullivan’s regression analysis is a reasonable exercise of discretion, based on substantial evidence.

The Director adopted Greg Sullivan’s regression analysis to correct the error in Rangen’s water measurement data for three reasons.⁴⁴ First, all of the parties acknowledged that Rangen’s measurement data significantly under-calculated actual water flows from the Rangen Model cell. *Id.* Second, using Rangen’s incorrect measurement data would result in “Rangen benefiting from its own under-reporting of flows if mitigation by direct flow to Rangen is provided in lieu of curtailment.”⁴⁵ Third, the Director concluded that Sullivan’s regression line was the most accurate correction of Rangen’s under-calculated measurements.⁴⁶

Rangen complains that Sullivan’s calculation of the extent of the error in Rangen’s water measurements “evolved,” but this is only because of clarification provided by Rangen witnesses provided at the hearing concerning its rating tables.

⁴³ *In re Delivery Call of A& B Irrigation Dist.*, 153 Idaho 500, 515, 284 P.3d 224, 240 (2012).

⁴⁴ Final Order at 23 ¶ 102 (Jan. 29, 2014) (R. Vol. 21, p. 4180).

⁴⁵ *Id.*

⁴⁶ *Id.*

While Rangen would understandably prefer a windfall from its erroneous water measurements, it is entirely reasonable for the Director to correct for the error, and the Director's adoption of Sullivan's regression analysis is reasonable in light of the undisputed fact that Rangen's water measurement data substantially under-calculated actual water flows.

E. The determination that junior users are using water efficiently and without waste is supported by substantial evidence.

Rangen claims there is not substantial evidence to support the Director's determination that junior groundwater users are using water efficiently and without waste, per CM Rule 40.03.⁴⁷ Yet, representatives of North Snake Ground Water District and IGWA both testified that groundwater users are forced to use water efficiently due to pumping costs (unlike Rangen, which pays nothing to extract water from the ESPA, and does a poor job of measuring and managing its water supplies). Lynn Carlquist, President of North Snake Ground Water District, testified that it costs an average of \$160.00 per acre to operate and maintain his wells.⁴⁸ Tim Deeg, President of IGWA, testified that the cost to pump, maintain, and operate his wells is about \$200.00 per acre.⁴⁹ This testimony is representative of all groundwater users, for whom pumping costs provide an inherent, substantial incentive to not divert any more water than is needed to raise the crop being irrigated.

Rangen argues this is insufficient, contending IGWA must put on evidence of irrigation practices on each groundwater-irrigated acre across the Snake River Plain to show it is being irrigated efficiently. This, of course, is entirely unrealistic.

⁴⁷ Rangen Opening Br. at 44-46.

⁴⁸ Carlquist, Tr. Pp. 1676:19-22, 1710:7-16.

⁴⁹ Deeg, Tr. Pp. 1747:16-1748:6, 1753:21-1754:4, 1763:10-16, 1765:5-22.

If Rangen had reason to believe junior groundwater pumpers are wasting water, it was welcome to proffer evidence to contradict the testimony of Carlquist and Deeg. Rangen made no such offer, and without any contradictory evidence, this testimony of Carlquist and Deeg is sufficient for the Director to conclude that groundwater users are using water efficiently and without waste.

F. There is substantial evidence that the Great Rift affects groundwater flow, and it was not abuse of discretion for the Director to account for that, but the Great Rift trim line still results in unreasonable hoarding of the ESPA by Rangen.

Rangen argues the Great Rift trim line is “arbitrary in that it has no scientific basis and it is contrary to Idaho law.”⁵⁰ According to Rangen, Idaho law does not allow trim lines. Yet, the Idaho Supreme Court explicitly ruled in *Clear Springs Foods, Inc. v. Spackman* that a trim line may properly be implemented.⁵¹ The Court has not withdrawn that ruling; therefore, Rangen’s assertion that any use of a trim line is contrary to law is baseless.

As to the scientific basis for the Great Rift trim line, the Final Order cites undisputed evidence that the Great Rift impedes groundwater flow.⁵² Since the ESPA Model is a simplification of reality, it is entirely within the Director’s discretion to account for geologic barriers that the ESPA Model may not accurately reflect.

However, just because the Great Rift affects groundwater flow does not answer the question of whether imposing a trim line at the Great Rift results in excessive hoarding of the ESPA by Rangen. IGWA’s complaint with the Great Rift trim line is not that the Great Rift should not be considered at

⁵⁰ Rangen Opening Br. at 47.

⁵¹ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 816-17 (2011)

⁵² Final Order p. 15 ¶ 71 and p. 19 ¶ 91 (R. Vol. 23, pp. 4172 and 4176).

all, but that it does not go far enough to protect against excessive hoarding of the ESPA by Rangen.⁵³

CONCLUSION

For the foregoing reasons, IGWA asks this Court to rule as follows:

- A. The name “Martin-Curren Tunnel” unambiguously refers to the man-made tunnel above Rangen, not Billingsley Creek.
- B. Rangen cannot divert water from sources or points of diversion that are not included in Rangen’s water right decrees.
- C. Rangen’s quasi-estoppel claim is barred.
- D. The Director’s adoption of Sullivan’s regression analysis is a reasonable exercise of discretion, based on substantial evidence.
- E. The Director’s determination that junior groundwater users are using water efficiently and without waste is supported by substantial evidence.
- F. There is substantial evidence that the Great Rift affects groundwater flow, and it was not abuse of discretion for the Director to account for that, but the Great Rift trim line still results in unreasonable hoarding of the ESPA by Rangen.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



Randall C. Budge
Thomas J. Budge

August 8, 2014

Date

⁵³ See IGWA Opening Br. at 42-64.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2014, a true and correct copy of the foregoing document was served on the persons listed below by the method(s) indicated.



Randall C. Budge

Thomas J. Budge

Clerk of the Court SNAKE RIVER BASIN ADJUDICATION P.O. Box 2707 Twin Falls, ID 83303-2707	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Garrick L. Baxter IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Director Gary Spackman IDAHO DEPT. OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 Deborah.gibson@idwr.idaho.gov	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Robyn M. Brody BRODY LAW OFFICE, PLLC P.O. Box 554 Rupert, ID 83350 robynbrody@hotmail.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Fritz X. Haemmerle HAEMMERLE & HAEMMERLE, PLLC P.O. Box 1800 Hailey, ID 83333 fxh@haemlaw.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail Facsimile Overnight Mail Hand Delivery Email

<p>J. Justin May MAY, BROWNING & MAY, PLLC 1419 West Washington Boise, ID 83702 jmay@maybrowning.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
<p>Sarah Klahn Mitra Pemberton WHITE JANKOWSKI, PLLC 511 16th St., Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
<p>Dean Tranmer CITY OF POCATELLO P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 tl@idahowaters.com jks@idahowaters.com pla@idahowaters.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
<p>Jerry Rigby RIGBY ANDRUS & RIGBY P.O. Box 250 Rexburg, ID 83440 jrigby@rex-law.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

Appendix A

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

8/7/2014

WATER RIGHT NO. 36-7071

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	DELORIS D JONES
Current Owner	JOHN W JONES JR PO BOX 265 HAGERMAN, ID 83332 (208)837-4580
Attorney	D CRAIG LEWIS UNIV OF IDAHO COLLEGE OF LAW 6TH & RAYBURN ST MOSCOW, ID 83843 (208)885-6422
Attorney	PATRICK D BROWN 516 HANSEN ST E PO BOX 125 TWIN FALLS, ID 83303 (208) 733-5044

Priority Date: 07/08/1969

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
HOAGLAND TUNNEL	BILLINGSLEY CREEK
THREE SPRINGS	BILLINGSLEY CREEK
WEATHERBY SPRINGS	BILLINGSLEY CREEK

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
FISH PROPAGATION	1/01	12/31	73.05 CFS	
Total Diversion			73.05 CFS	

Location of Point(s) of Diversion:

THREE SPRINGS	SESENW	Sec. 30	Township 07S	Range 14E	GOODING County
WEATHERBY SPRINGS	SENESEW	Sec. 30	Township 07S	Range 14E	GOODING County
HOAGLAND TUNNEL	SENESEW	Sec. 30	Township 07S	Range 14E	GOODING County

Place(s) of use:

Place of Use Legal Description: FISH PROPAGATION GOODING County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
07S	14E	30		NESW										

Conditions of Approval:

1. THE APPROPRIATOR SHALL CONTINUOUSLY ALLOW 6.50 CFS FROM WEATHERBY SPRINGS TO BE DELIVERED INTO BAR S DITCH FROM THE OUTLET OF FISH OPERATION DESCRIBED ABOVE FROM MARCH 1 UNTIL NOVEMBER 1 OF EACH YEAR, AND SHALL CONTINUOUSLY ALLOW 4.00 CFS FROM WEATHERBY SPRINGS TO BE DELIVERED INTO THE BAR S DITCH FROM THE OUTLET OF FISH OPERATION DESCRIBED ABOVE FROM NOVEMBER 1 UNTIL MARCH 1 OF EACH YEAR.
2. 90 RACEWAYS
3. C18 THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.
4. THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 36-00011A, 36-00011B, 36-00029A, 36-00029B, 36-00033B, 36-00033C, 36-00033D, 36-00033E, 36-00033F, 36-00033G, 36-00041A, 36-00041B, 36-00041C, 36-00041D, 36-00042A, 36-00044, 36-00046, 36-00060, 36-00061, 36-00062, 36-00068, 36-00070, 36-00086C, 36-00086D, 36-00086E, 36-00086F, 36-00086G, 36-00086H, 36-000105, 36-00116, 36-00119, 36-00120, 36-15157 AND 36-11142. FACILITY VOLUME 173,240 CU. FT.

Dates:

Licensed Date:

Decreed Date: 04/10/2000

Permit Proof Due Date:
Permit Proof Made Date:
Permit Approved Date:
Permit Moratorium Expiration Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector: AND
Water District Number: 36A
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Civil Case Number:
Old Case Number:
Decree Plaintiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Appendix B

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

8/7/2014

WATER RIGHT NO. 36-131

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	US DEPT OF INTERIOR FISH & WILDLIFE SERVICE 911 NE 11TH AVE PORTLAND, OR 97232-4181 (503)231-6251
Current Owner	UNITED STATES OF AMERICA ACTING THROUGH USDI FISH AND WILDLIFE SERVICE DIVISION OF ENGINEERING 911 N E 11TH AVE PORTLAND, OR 97232-4181 (503)231-6145

Priority Date: 06/15/1910
Basis: Decreed
Status: Active

<u>Source</u>	<u>Tributary</u>
SPRING NO 8	RILEY CREEK
SPRING NO 9	RILEY CREEK

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
FISH PROPAGATION	1/01	12/31	1 CFS	
Total Diversion			1 CFS	

Location of Point(s) of Diversion:

SPRING NO 8|NWNESE|Sec. 06|Township 08S|Range 14E|GOODING County
 SPRING NO 8|NENWSE|Sec. 06|Township 08S|Range 14E|GOODING County
 SPRING NO 9|NENWSE|Sec. 06|Township 08S|Range 14E|GOODING County

Place(s) of use:

Place of Use Legal Description: FISH PROPAGATION GOODING County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
08S	14E	6		NWSE										

Conditions of Approval:

1. FACILITY VOLUME 3889 CU.FT. USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A TOTAL COMBINED FACILITY VOLUME OF 252,000 CU.FT. COMBINED RIGHT NOS.: 36-00132 & 36-15447.
2. TWO POINTS OF DIVERSION LOCATED IN NENWSE, S06, T08S, R14E.
3. RIGHT NO. 3615447 IS ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE. SOURCES FOR THIS RIGHT ARE SPRING NO. EIGHT AND SPRING NO. NINE, BOTH TRIBUTARY TO RILEY CREEK.

Dates:

Licensed Date:
 Decead Date: 12/29/1997
 Enlargement Use Priority Date:
 Enlargement Statute Priority Date:
 Water Supply Bank Enrollment Date Accepted:
 Water Supply Bank Enrollment Date Removed:
 Application Received Date:
 Protest Deadline Date:
 Number of Protests: 0

Other Information:

State or Federal: S
 Owner Name Connector: Or
 Water District Number: 36A
 Generic Max Rate per Acre:
 Generic Max Volume per Acre:
 Civil Case Number:
 Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close