

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RANGEN, INC., an Idaho Corporation,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
capacity as Director of the Idaho Department of  
Water Resources,

Respondents,

and

NORTH SNAKE GROUND WATER  
DISTRICT, MAGIC VALLEY GROUND  
WATER DISTRICT and SOUTHWEST  
IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR  
TRANSFER 79560 IN THE NAME OF NORTH  
SNAKE GWD, MAGIC VALLEY GWD,  
SOUTHWEST IRRIGATION DISTRICT.

Case No. CV-2015-1130

LODGED

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho
JUL 23 2015
By _____ Clerk
Deputy Clerk

**RANGEN, INC.'S OPENING BRIEF**

On Review from the Idaho Department of Water Resources

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Honorable Eric J. Wildman, Presiding

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**TABLE OF CONTENTS**

**I. STATEMENT OF THE CASE** ..... 3

    A. Introduction ..... 3

    B. Procedural Background ..... 3

    C. Statement of Facts ..... 4

**II. ISSUES PRESENTED ON APPEAL**..... 5

**III. STANDARD OF REVIEW** ..... 5

**IV. ARGUMENT**..... 6

    A. The Director exceeded his authority by approving a transfer that causes injury to other water users and constitutes an enlargement of the original water right. .... 9

        1. The transfer results in a 10 cfs reduction in return flow to the Snake River below the Magic Springs facility. .... 11

        2. The reduction in return flow to the Snake River caused by this transfer causes injury to other water users. .... 13

        3. The Director erred by concluding that there was no enlargement of the original right. 17

    B. Director Erred by relying upon mitigation to approve the transfer despite injury to other water users and enlargement of the water right..... 19

    C. The Director erred in approving a Transfer Application for speculative beneficial use referred to as fish propagation/mitigation. .... 22

    D. Rangen’s substantial rights have been prejudiced..... 25

**V. CONCLUSION**..... 26

## TABLE OF AUTHORITIES

### Cases

<i>Baer Bros. Land &amp; Cattle Co. v. Wilson</i> , 88 P. 265 (Colo. 1906).....	7, 8
<i>Bassett v. Swenson</i> , 51 Idaho 256, 5 P.2d 722 (1931).....	24
<i>Bennett v. Nourse</i> , 22 Idaho 249, 125 P. 1038 (1912).....	7
<i>Branson v. Miracle</i> , 107 Idaho 221, 687 P.2d 1348 (1984).....	24
<i>Cache La Poudre Irr. Co. v. Larimer &amp; Weld Reservoir Co.</i> , 25 Colo. 144, 53 P. 318.....	7
<i>City of Pocatello v. State of Idaho</i> , 152 Idaho 830, 275 P.3d 845 (2012).....	6, 8
<i>City of Thornton v. Bijou Irrigation Co.</i> , 926 P.2d 1 (Colo. 1996).....	15, 18
<i>Farmers Highline Canal &amp; Reservoir, Co. v. City of Golden</i> , 272 P.2d 629 (Colo. 1954).....	7, 15, 18
<i>Handy Ditch Co. v. Loudon Irr. Canal Co.</i> , 27 Colo. 515, 62 P. 847.....	7
<i>Hawkins v. Bonneville County Board of Commissioners</i> , 254 P.3d 1224 (2011).....	26
<i>High Plains A&amp;M, LLCV v. Southeastern Colorado Conservancy District</i> , 120 P.3d 710 (Colo. 2005).....	23
<i>Jenkins v. State, Dept. of Water Resources</i> , 103 Idaho 384, 647 P.2d 1256 (Idaho 1982).....	6, 15
<i>Joyce Livestock v. U.S.A.</i> , 144 Idaho 1, 156 P.3d 502 (2007).....	24
<i>Junkans v. Bergin</i> , 67 Cal. 267, 7 P. 684; <i>Hague v. Irrigation Co.</i> , 16 Utah 421, 52 P. 765, 41 L.R.A. 311.....	7
<i>Kidd v. Laird</i> , 15 Cal. 161 (Cal. 1860).....	7, 15
<i>Last Chance Min. Co. v. Bunker Hill &amp; S. Min. &amp; Concentrating Co. (C. C.)</i> 49 F. 430.....	7
<i>Lemmon v. Hardy</i> , 95 Idaho 778, 519 P.2d 1168 (1974).....	24
<i>Mining Co. v. Holter</i> , 1 Mont. 296.....	7
<i>Polk v. Larrabee</i> , 135 Idaho 139, 15 P.3d 1147 (2000).....	6
<i>Strickler v. City of Colorado Springs</i> , 16 Colo. 61, 26 P. 313.....	7
<i>United States v. Pioneer Irrigation Water District</i> , 144 Idaho 106, 157 P.3d 600 (2007).....	23
<i>Urrutia v. Blaine County</i> , 134 Idaho 353, 2 P.3d 738 (2000).....	6

### Statutes

I.C. § 42-222(1).....	6
I.C. §42-5224(13).....	24
Idaho Code § 42-203B.....	10
Idaho Code § 42-222.....	14
Idaho Code § 42-222(1).....	8, 18

## I. STATEMENT OF THE CASE

### A. Introduction

This is an appeal from decisions made by the Idaho Department of Water Resources (“IDWR”) and its Director, Gary Spackman, approving an application filed by the Idaho Ground Water Appropriators, Inc. (“IGWA”) for transfer of Water Right No. 36-7072 (Transfer Application No. 79560) in the Name of IGWA for North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District on Behalf of the Owner, SeaPac of Idaho, Inc. (“Transfer Application”). The Transfer Application proposes to change the place of use of 10 cfs of water right no. 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen fish hatchery by pumping the water via a buried pipeline approximately 2.5 miles. (A.R., p. 398, ¶3)<sup>1</sup>. This appeal is taken from the Director’s *Amended Final Order Approving Application for Transfer*, dated March 18, 2015 (A.R., p. 396-416) (“Order”).

### B. Procedural Background

On September 12, 2014, an Application for Transfer of Water Right No. 36-7072 (Transfer Application No. 79560) in the Name of IGWA for North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District on Behalf of the Owner, SeaPac of Idaho, Inc. (“Transfer Application”) was filed to change the place of use from SeaPac to Rangen. (A.R., p. 2-60).

Rangen timely filed a Protest to the approval of the Transfer Application. (A.R., p. 71-74). The parties submitted expert reports regarding the Application. A hearing on the Transfer Application was held December 18, 2014, and the parties filed closing briefs. At the Director’s

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<sup>1</sup> All references to the Agency Record (“A.R.”) shall be from the record In the Matter of the Application for Transfer 79560 which was lodged in this case. All references to the Record (“R.”) shall be from the record for IDWR Docket No. CM-MP-2014-006 which was also lodged in this case.

request, the Department staff reviewed and analyzed the expert reports and testimony at the hearing and data and information in possession of the Department, and prepared a Staff Memorandum regarding the Application. The Staff Memorandum was originally submitted as Attachment A to the *Notice of Taking Official Notice of Staff Memorandum*, dated January 27, 2015. (A.R., p.340-342) and later was Attachment A to the Director's Order (A.R., p. 408-414). On February 10, 2015, Rangen filed *Rangen, Inc.'s Expert Report in Response to Staff Memorandum* (A.R., p. 346-359) and *Rangen, Inc.'s Response to Staff Memorandum* (A.R., p. 360-366).

On February 19, 2015, the Director issued the *Final Order Approving Application for Transfer*. (A.R., p.367-387). On February 25, 2015, IGWA filed a *Petition for Reconsideration* (A.R., p. 388-391) and on February 25, 2015, IGWA filed a *Corrected Petition for Reconsideration* on that order (A.R., p. 392-395). On March 18, 2015, the Director issued an *Order on Reconsideration* (A.R., p. 417-421) and the *Amended Final Order Approving Application* ("Order") (A.R., p. 396-416).

### C. Statement of Facts

On January 29, 2014 the Director of the Idaho Department of Water Resources ("IDWR") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (R., Exh. 2001). The Director concluded that "Ground water diversions have reduced the quantity of water available to Rangen for beneficial use of water pursuant to its water rights (R. Exh. 2001, p. 36, Conclusion of Law 32). In addition to determining that Rangen is being materially injured by junior-priority ground water pumping on the Eastern Snake Plain (R. Exh. 2001, p. 36, Conclusion of Law 36), the Director specified that any mitigation plan must provide: 1) "simulated steady state benefits of 9.1 cfs to [the] Curren Tunnel", or 2) "direct flow of 9.1 cfs to Rangen". (R., Exh. 2001, p.42). As one of the attempts by IGWA to avoid curtailment resulting from the Director's determination, IGWA filed its Fourth Mitigation

Plan on August 27, 2014. (R., p. 1-24). Under the Plan, IGWA will lease or purchase up to 10 cfs of spring water from SeaPac of Idaho, Inc., a fish hatchery located near the Snake River. (R., p. 184 at ¶ 8). The water will be pumped from what is called "Magic Springs" and then piped to the Rangen Research Hatchery approximately 2.5 miles away. This matter concerns the water right transfer application for that mitigation plan.

## **II. ISSUES PRESENTED ON APPEAL**

- 1) Did the Director exceed his statutory authority by approving a transfer application that injures other water rights and results in an enlargement of the original water right?
- 2) Did the Director err by relying upon mitigation to approve this transfer application?
- 3) Did the Director err or exceed his statutory authority by approving a transfer application that is speculative?

## **III. STANDARD OF REVIEW**

The standard of review for factual matters under the Idaho Administrative Procedures Act is as follows:

The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. In an appeal from the decision of district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review. . . . The Court may overturn the Board's decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary."

*Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted). Courts review legal issues de novo. *Polk v. Larrabee*, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000).

#### IV. ARGUMENT

Section 42-222 of the Idaho Code governs transfers. In order to approve a transfer:

[t]he director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B , Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.

I.C. § 42-222(1). “The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights. . . .” *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (Idaho 1982). “Regardless of whether or not an application for transfer is protested, Section 42-222, Idaho Code, requires that the department evaluate whether there would be injury to other water rights, there would be an enlargement in use of the original right.” (Exh 5017); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001); *See also City of Pocatello v. State of Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Discussing accomplished transfers pursuant to I.C. § 42-1425).

[I.C. § 42-222(1)] provides that the director “shall approve” the transfer “provided” two condition are met, i.e., that no other water rights are injured, and that the original use is not enlarged. Hence if either of the two conditions are not me, there is no authorization to approve the proposed transfer.

*Jenkins*, 647 P.2d at 1260.

This statutory framework for evaluating transfers arises from one of the foundational tenets of the prior appropriation doctrine. Subsequent appropriators have a vested interest in the maintenance of the stream as it was at the time of their appropriation:

“A subsequent appropriator has a vested right against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation. ‘A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation.’ The subsequent appropriator is entitled to the surplus, and any attempt of the prior appropriator to make a sale of such surplus to someone else to the injury of existing appropriators, though subsequent, is of no avail.”

*Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912) (quoting *WIEL ON WATER RIGHTS*, 3d ed., sec. 302), citing *Baer Bros. etc. Co. v. Wilson*, 38 Colo. 101, 88 P. 265; *Handy Ditch Co. v. Loudon Irr. Canal Co.*, 27 Colo. 515, 62 P. 847; *MILLS' IRRIGATION MANUAL*, p. 68; see also, *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, supra, 272 P.2d at 361. *Fuller v. Mining Co.*, 12 Colo. 12, 19 P. 836; *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 P. 313; *Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 144, 53 P. 318; Kin. Irr. §§ 175, 231, 248; *BLACK, POM. WATER RIGHTS*, § 69; *Junkans v. Bergin*, 67 Cal. 267, 7 P. 684; *Hague v. Irrigation Co.*, 16 Utah 421, 52 P. 765, 41 L.R.A. 311; *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. (C. C.)* 49 F. 430; *Mining Co. v. Holter*, 1 Mont. 296; *Kidd v. Laird*, 15 Cal. 161 (Cal. 1860).

This does not mean that a water right may not be changed in any way. Courts recognized very early that appropriators must be allowed to make changes to the character of water rights while maintaining priority. *Fuller v. Swan River Placer Min. Co.*, 19 P. 836 (Colo. 1888), *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, 272 P.2d 629, 631 (Colo. 1954). These changes can include moving the place of diversion or even the place of use. *Id.* ***The caveat is that the relative priorities of water rights must be maintained so that junior appropriators are not injured.*** *Id.* (Emphasis added).

Once there are junior water rights present on a stream, a prior appropriator may not expand its appropriation, consumptive use, or alter the pattern of return flow if such a change impacts the

availability of water to junior appropriators or expands the original appropriation. *Baer Bros. Land & Cattle Co. v. Wilson*, 88 P. 265 (Colo. 1906).

If appellant was the only appropriator, it would have the right to change the point of diversion or place of use of the water as frequently as desired, because there would be none having rights which might be affected; but, when a subsequent appropriator makes his diversion, he acts under the belief that the water appropriated by his senior will continue to be used as it was at the time of the making of the appropriation of the junior. So a subsequent appropriator has a vested right as against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation.

*Id. at 265.* There is no requirement that the expansion or change in pattern of return flow cause any particular junior appropriator to suffer a shortage of water as a direct and immediate result of the transfer. *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001); *See also City of Pocatello v. State of Idaho*, 152 Idaho 830, 275 P.3d 845 (2012). There is not even a requirement that the stream be over appropriated. The issue is maintenance of the relative priorities between appropriations of water. The focus of the analysis is on the historic original use of the water by the senior and whether that has changed. Even if the change would not presently cause an actual shortage of water for any particular junior, the change from the original use permanently alters the relative priorities of water rights on the stream. *City of Pocatello v. State of Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Rejecting claimant's argument that "[f]uture injury is also not a proper concern under the term of §42-1425, as only injuries to the other water right holders on the date of the change could justify denial of a claim"). In a future shortage, a junior that might not otherwise have been out-of-priority may be curtailed.

The injury is the expansion of use or change of historic patterns of return flows. This is why the inquiry is directed to the "enlargement in use of the **original right.**" *See*, Idaho Code § 42-222(1) (emphasis added). The historical consumptive use and return flows upon which the water right was obtained are what subsequent appropriations are entitled to rely upon. Even if the

water right were later transferred again, the appropriate inquiry would be whether the later transfer changed the impact from use of the original right. Expansion of consumption or other reduction of the quantity of water which returns to the stream under a senior water right effectively changes the relative priorities on the stream. That change in relative priority is what causes the injury to junior appropriators. If the proposed change would expand the use of the water and yet not cause a shortage of water downstream, the appropriate action would be to issue a new water right with a new priority date for the new use. There is no such unappropriated water in this case and the transfer should simply be denied. (Exh 5007).

The burden is on the applicant to show non-injury and no enlargement. *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 18 P.3d 219 (Idaho 2001).

**A. The Director exceeded his authority by approving a transfer that causes injury to other water users and constitutes an enlargement of the original water right.**

The principal problem with this transfer is that it causes a 10 cfs reduction in the return flow to the Snake River below the point where the Sea Pac Magic Springs facility discharges into the Snake River. This is of particular significance in this case because of the complex and interrelated water rights some of which utilize water from the Snake River downstream from Magic Springs and some of which depend in part upon the flow of water at the Murphy Gage located on the Snake River downstream from Magic Springs. It is also important to note that already existing water shortages have prompted a moratorium prohibiting the issuance of new consumptive water rights. (Exh. 5007). Any attempt to obtain a new water right to accomplish the use of water contemplated by this transfer would likely implicate this moratorium.

Since the time that the Magic Springs water was appropriated, subsequent appropriators downstream have appropriated the water in the Snake River including the return flow from the Magic Springs rights for a variety of beneficial uses. Additionally, in October 1984, Idaho Power

Company and the State of Idaho entered into the Swan Falls Agreement. (A.R., p. 286-318). Among other things, the Agreement provided that Idaho Power's hydropower water rights are subordinated to upstream water rights in existence in October 1984. (A.R., p. 290, ¶ 7(D)). The Agreement together with implementing legislation also provided that Idaho Power's water rights in excess of a seasonal minimum stream flows and less than the decreed quantity of Idaho Power's water rights be placed in a trust. (A.R., p. 289, ¶7(A)); Idaho Code § 42-203B. The water rights are "held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; . . ." Idaho Code § 42-203B. The Idaho Power water rights held in trust are commonly referred to as "Trust Water."

Trust Water is subject to appropriation for future upstream beneficial use. Water rights obtained for the use of the Trust Water occurring after October 1984 are commonly referred to as "Trust Water Rights." Idaho Power's water rights are subordinated to such Trust Water Rights; however, if flows are reduced below the seasonal minimum stream flows, Trust Water Rights are subject to curtailment. Water Rights in existence in October 1984 are not subject to curtailment based upon the seasonal minimum stream flows. (A.R., p. 290, ¶ 7(D)).

The relative priorities of the various water rights in this system are incredibly complex. This transfer would affect those relative priorities. As discussed above, each of the water rights holders has a vested interest in the stream conditions existing at the time of their respective appropriations. The effect of this transfer would be to eliminate approximately 10 cfs of return flow that has historically flowed into the Snake River from Magic Springs. Because the Magic Springs water right has a priority date of 1969, this would have the same practical effect as granting a new fully consumptive water right with a retroactive 1969 priority date. Each of the users in this system whose rights are either junior or subordinated to such a new water right are injured by such

an insertion. This right is senior to each of the Trust Water Rights and reduces the quantity of Trust Water available for subsequent appropriation. This additional water right would also not be subject to the seasonal minimum stream flows at the Murphy Gage. The retroactive insertion of a new fully consumptive 1969 priority water right injures these subsequent appropriators regardless of whether the use of that water right would directly lead to a reduction in flow of water below the level of seasonal minimum stream flows.

**1. The transfer results in a 10 cfs reduction in return flow to the Snake River below the Magic Springs facility.**

As originally appropriated, water right 36-7072 is a fully non-consumptive fish propagation right. (A.R., p. 398, Finding of Fact 1). Water from Magic Springs was diverted through the Sea Pac Magic Springs facility, used for raising fish, and then flowed out the end of the raceways into the Snake River. *Id.* Following the transfer the water is pumped approximately 2.5 miles to Rangen's facility at the head of Billingsley Creek. (A.R., p. 398, Finding of Fact 3). The water is used in Rangen's facility and then flows into Billingsley Creek where it is consumptively used by other Billingsley Creek water users and or evaporates from Billingsley Creek. (A.R., p. 399, Finding of Fact 8). There was consensus amongst all those that testified at the hearing or submitted reports that during most of the year none of the water pumped into Billingsley Creek would reach the Snake River. The result is that the transfer reduces the quantity of water available in the Snake River below Magic Springs by 10 cfs.

Both Frank Erwin and Cindy Yenter, Department witnesses, opined or testified that the Magic Springs water, if the transfer is granted, will not return to the Snake River. (A.R., Tr. p. 24, l. 16-18; p. 26, l. 14-18) (Exh 4014). Frank Erwin also testified that it would be impossible to administer the transfer in such a way to ensure that the Magic Springs water would ever return to the Snake River. (A.R., Tr. p. 24, l. 19 – p. 26, l. 13).

Scott King, the GWDs' engineering expert who testified, did not testify that the same amount of water would enter the Snake River before and after the transfer. To the contrary, King testified that he agreed with Frank Erwin's testimony and that it was unlikely that any water delivered to the head of Billingsley Creek would return to the Snake River:

Q. And you heard his testimony that none of it would make it back to the Snake River? Do you understand that?

A. I think Mr. Erwin described parts of the years it would make it to the Snake River and parts of the years it wouldn't. And it would depend on the quantity of water, and perhaps not all of it would make it back to the Snake River.

Q. Okay. I don't want to fight with you. He said most likely that most of it, if not all of it, would not make it back to the Snake River. That was his testimony; correct?

A. Yes, during the irrigation season.

Q. Okay. And you don't have any specific facts in your quiver that you could disagree with Mr. Erwin's testimony; correct?

A. No, I do not.

Q. So Mr. Erwin's testimony is in fact correct; correct?

A. Yes.

(A.R., Tr. p. 93, l. 4-23).

Rangen's expert, Dr. Brockway, offered the following opinion in response to the IDWR

Staff Memorandum:

The Watermaster, Frank Erwin, testified at hearing that there would be diversions of the increased 10 cfs from Billingsley Creek to irrigators who have historically been short of water under existing water rights and that he could not 'shepherd' the additional flow through the Billingsley Creek system to the Snake River. Mr. Erwin also testified that, even though he could not quantify the exact volume of additional consumptive use that may occur, it could be up to the entire 10 cfs. Even though neither SPF nor Ms. Sukow attempted to estimate the potential consumptive use of all or part of the 10 cfs of new water which would be available in Billingsley Creek, the magnitude is likely to be significant. Frank Erwin testified that the only way

he would be able to assure that the 10 cfs reached the Snake River is if there were a pipeline installed from the end of the Rangen raceways.

An estimate of the potential consumptive use increase can be performed if it is assumed, as the Watermaster stated, that the full 10 cfs is diverted to existing water short users and a reasonable irrigation application efficiency is utilized. However, it is not possible to determine which existing irrigation water rights would require additional water to be fully supplied or where they are located. There are approximately 210 water rights diverting from Billingsley Creek which authorize the irrigation of a total of 86.1 acres.

In any case, there will be increased consumptive use attributable to the use of water right 36-7072 and this is not allowed under Idaho Code 42-222.

(A.R., p. 354-355).

Based upon the evidence presented the Director made the following findings:

Neither IGWA nor Rangen attempted to quantify the percentage of the 10 cfs lost to consumptive use by water users once water leaves the Rangen facility. Frank Erwin, Watermaster for Water District 36A, testified regarding the complexity of water distribution in Water District 36A and explained that, given the complexity along with insufficient measuring devices and gauging stations and the possibility of diversions by downstream irrigators, it would "be a very difficult task to actually track that water." Tr. p. 21-35

IGWA's expert acknowledged that "[w]ater delivered to the Rangen facility pursuant to the Application could, after leaving the Rangen facility, be consumptively used by other Billingsley Creek water users or evaporate from from Billingsley Creek." Ex. 4002 at 5. IGWA's expert explained that, "[i]f this occurred at a time when minimum stream flows at the Murphy Gage are violated, it could contribute to enforcement of the Swan Falls Agreement, which may include curtailment of other water rights." Ex. 4002 at 5.

(A.R., p.399, ¶ 7 & 8).

The GWDs did not meet their burden to show that water pumped to Billingsley Creek pursuant to this transfer would return to the Snake River.

**2. The reduction in return flow to the Snake River caused by this transfer causes injury to other water users.**

The Director concluded that:

While the only evidence regarding injury is speculative suggesting a potential for injury to water users that may be curtailed in the event of a violation of the Swan

Falls minimums, as noted above, IGWA's expert concluded "it would be reasonable to include in the approval of the Application a condition that requires mitigation be provided sufficient to offset depletion of water right 36-7072 in the event of a violation of the Swan Falls minimums." Ex. 4003 at 5.

(A.R., p. 401, ¶ 4). Setting aside for the moment the issue of mitigation, which is discussed below, this conclusion by the Director is troubling. The Director's statement seems to suggest that he perceives a difference between "a potential for injury to water users that may be curtailed" and the type of injury to other water users that is prohibited by I.C. § 42-222. To the extent that the Director's Order implies that there may be no injury to other water users because there is only an increased risk for potential curtailment, the Director is incorrect as a matter of law. It is precisely this diminished priority or increased risk of curtailment that is prohibited by Idaho Code § 42-222. As discussed above, junior appropriators have a vested interest in the stream conditions existing at the time of their appropriation. *See Section IV(A)(1) above.*

In *Barron*, the Department of Water Resources recognized that the potential for reduced availability constitutes injury pursuant to § 42-222 and denied the transfer application at issue. The Idaho Supreme Court affirmed the denial and stated:

There is, on the other hand, in addition to the watermaster's recommendation, other evidence in the record indicting that Barron's transfer would potentially injure other water users. For example, the Stanton memorandum recites that a number of other water rights exist on Chimney Creek – the watercourse where Barron proposes to transfer his upstream point of diversion. Of these rights, Stanton reports that the largest are located downstream from the proposed point of diversion and that several contain priority dates earlier than 1905 – the original priority date for 37-02801. Hence, the IDWR's concern over the potential for reduced availability, *i.e.*, injury, to those rights appears valid.

*Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001).

In *Jenkins*, the Court addressed the issue of injury in the context of the reinstatement of a forfeited or abandoned water right.

If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise

junior appropriators. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.

*Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

By changing the return flow into the Snake River, this transfer diminishes the priority and increases the risk of curtailment for many of junior water rights including those water rights commonly referred to as trust water rights. *See section A, supra*. Colorado has substantial case law addressing this issue. For example, in *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996), the Colorado Supreme Court explained:

One of the basic tenets of Colorado water law is that junior appropriators are entitled to maintenance of the conditions on the stream existing at the time of their respective appropriations. Equally well established is the principle that a change of water rights cannot be approved if the change will injuriously affect the vested rights of other water users. This protection extends not only to surface water users but to users of all water tributary to a natural stream, including appropriators of tributary underground water. Furthermore, this protection extends to junior appropriators' rights in return flows: It has been fundamental law in this state that junior appropriators have rights in return flow to the extent that they may not be injured by a change in the place of use of the irrigation water which provides that return flow.

*Id.* at 80. (Emphasis added).

Out of this statement of law comes the proposition that in order to approve a transfer, the applicant must prove that: (1) the consumptive use of the water is the same; and (2) that the amount of return flows remains the same.<sup>2</sup> These principles were discussed in *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954), an oft cited case under Colorado water law. In that case, the City of Golden purchased an irrigation right for which the City sought to change the point of diversion and purpose of use. *Id.* at 630. The original right had been

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<sup>2</sup> Many of these principles have been codified in statutes. However, these principles predate statutory adoption and have been recognized under constitutional provisions similar or identical to Idaho's Constitutional Provisions, Art. XV, Sections 1 through 5, or the principles have their origination in common law. *See e.g., Kidd v. Laird*, 15 Cal. 161 (Cal. 1860).

conveyed out of Clear Creek from the Swadley Ditch. The transfer sought to move the point of diversion from the Swadley Ditch to the Clear Creek Ditch, a point five miles upstream from the original point of diversion. The users of the Swadley Ditch protested the transfer, arguing among other things that the “petitioner had not sustained its burden of proof by a sufficient showing that the vested rights of protestants would not be injuriously affected by said change; [and] that the trial court had in effect attempted to place said burden upon the protestants to prove injury.” *Id.* at 631.

The Colorado Supreme Court reversed the trial court’s decision to grant the application, finding that there was insufficient evidence in the record to sustain the decision. There were two problems with the trial court’s decision. The first problem was that there was insufficient evidence in the record as to whether the use of water under the original right was “excessive.” Specifically, the court noted that “[t]he extent of needed use in original location is the criterion in considering change of point of diversion.” *Id.* 635.

The second problem with the transfer was that there was insufficient evidence in the record on “return flows.” The Court held:

In addition to the duty of water in change of point of diversion cases, due consideration also must be [] had with the amount of return flow, both before and after the change, that the stream may remain as it was, and not suffer depletion, nor yet that the user at the point of changed location be obliged to add thereto. The first is not permissible and the latter not required. Where it appears that the change sought to be made will result in depletion to the source of supply and result in injury to junior appropriators therefrom, the decree should contain such conditions as are proper to counteract the loss, and should be denied only in such instances as where it is impossible to impose reasonable conditions to effectuate this purpose.

*Id.* (Citations omitted). (Emphasis added).

In this case, the GWDs have not established their burden of proof with respect to the consumptive use elements of the original right versus the transferred right, and they have not shown that the return flow to the Snake River is the same. As to the return flow, the original right

is used in SeaPac's Magic Springs facility and immediately returned to the Snake River. Under the proposed transfer the water will flow through Rangen's Research Hatchery and then down Billingsley Creek. *See Section IV(A)(1) above.*

To summarize, the GWDs, based on the testimony of their two expert witnesses, have failed to satisfy their burden of showing non-injury by the transfer. All of the Department and Rangen witnesses, on the other hand, affirmatively stated and showed, based on the actual and historical use of water in Billingsley Creek, that 10 cfs of water transferred to the head of Billingsley Creek under this transfer would not make it to the Snake River.

Furthermore, based on the testimony of Frank Erwin and Charles Brockway, there is no way to provide any type of condition to transfer which would guarantee that the 10 cfs of water would ever make it to the Snake River.

Q. Okay. So just so I understand your testimony, Frank, I think you previously told me that it's not possible that that 10 cfs of water would return to the Snake River during the irrigation season?

A. I don't believe it would, no.

(A.R. Tr. p. 26, l. 14-18). *See also*, Brockway testimony. (A.R. Tr, pgs. 190-191).

Mr. Erwin also testified that because of the lack of adequate measuring devices, the inability to provide 24/7 surveillance, and the inability to calculate conveyance loss from all of the Billingsley Creek diversions, it would be currently "impossible" to make sure the 10 cfs of water delivered to Rangen would ever make its way back to the Snake River. (A.R. Tr. pgs. 25-26). Because it would be impossible to currently deliver the 10 cfs of water to the Snake River, this transfer should be denied because return flows to the Snake River cannot be guaranteed.

**3. The Director erred by concluding that there was no enlargement of the original right.**

The Director concluded:

Because the reason for the proposed transfer is to mitigate material injury to Rangen, the nature of use will be described in the transfer documents as "Mitigation." This proposed change in nature of use does not alter that water right no. 36-7072 will be used for non-consumptive fish propagation purposes, but only reflects that water delivered to Rangen pursuant to the transfer will help satisfy mitigation obligations imposed by the Curtailment Order. The proposal to change the nature of use of water right no 36-7072 from "Fish Propagation" to "Mitigation" does not constitute an "enlargement in use of the original right" as prohibited by Idaho Code § 42-222.

*Final Order, p 8.* The Director erred by ignoring the fact that the transferred water will be fully consumed in Billingsley Creek and will not return to the Snake River. *See section A(1) above.*

Idaho Code § 42-222(1) provides that transfers may be allowed if the transfer "does not constitute an enlargement in use of the original right." As previously discussed, based on the second use of water after it leaves the Rangen facility and before the water enters the Snake River, the evidence is that the water will be consumed by other users in the Billingsley Creek system. Cindy Yenter, the wastermaster for Water District 130, in opposing the Application stated in her recommendation: "it is not unreasonable to predict that 10 cfs injected at the head of Billingsley Creek will not be returned to the Snake River, but will be consumed by downstream creek diversions. Consequently this proposal is changing a non-consumptive use of water to one which is ultimately consumptive to the original source and tributary." (Exh. 4014).

Based on Ms. Yenter's recommendation, the Department considers enlargement to be defined as whether the transfer is "consumptive to the original source and tributary." This definition of "enlargement" is consistent with all the authority in Idaho and other jurisdictions which state that the return flows to a stream or river must be protected. *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, supra. In this case, as demonstrated by the testimony of Frank Erwin and Dr. Brockway, the 10 cfs of water under the original water right was wholly non-consumptive because all of the water from Magic Springs made it to the Snake River.

Ms. Sukow, in her Staff Memorandum evaluated the issue of consumption in Billingsley

Creek. She concluded:

Because of the complexity of water distribution in Water District 36A, it is difficult to determine what percentage of the 10 cfs will reach the Snake River during the irrigation season if diversion and consumptive use by downstream uses are not prevented. Some will discharge to the Snake River as either surface or subsurface flow, and the impact to the Snake River will be less than 10 cfs. A very conservative approach would be to assume a maximum impact of 10 cfs. A less conservative approach would be to assume a reasonable value for efficiency of the delivery and irrigation systems to estimate an impact.

(A.R., p.409).

The GWDs failed to show how much of the 10 cfs of water would make it back to the Snake River because it did not do a full analysis under Section 42-202B(1). No other evidence exists showing that any water would make its way back to the Snake River. The GWD's did not meet their burden to show that there would be no enlargement of the original use of the water right. The Director's conclusion that there was no such enlargement was in excess of his statutory authority and is not supported by substantial evidence.

**B. Director Erred by relying upon mitigation to approve the transfer despite injury to other water users and enlargement of the water right.**

The Director impliedly acknowledged that other water rights are injured by this transfer, however the Director noted that:

IGWA's expert concluded "it would be reasonable to include in the approval of the Application a condition that requires mitigation be provided sufficient to offset depletion of water right 36-7072 in the event of a violation of the Swan Falls minimums."

5. The Department's analysis demonstrates that benefits of IGWA and Southwest Irrigation District's past aquifer enhancement activities to the Snake River between Kimberly and King Hill are predicted to exceed 10 cfs between April 2014 and March 2015.

(A.R., p. 401 -402, ¶ 4 & 5) (citations omitted). The also Director concluded:

As a condition of approval, IGWA and Southwest Irrigation District will be required to continue into the future aquifer enhancement activities sufficient to offset any depletion of flow in the Snake River between Kimberly and King Hill due to the transfer. Prior to the start of each irrigation season, IGWA must submit documentation of the rate of flow to be diverted from Magic Springs for the upcoming year and documentation of past aquifer enhancement activities to establish sufficient mitigation for the upcoming year.

(A.R., p.402, ¶ 6).

Similarly, with regard to enlargement, the Director relied upon this same mitigation, concluding that:

Rangen's argument regarding expansion of historical consumptive use is mooted by the condition of approval requiring IGWA and Southwest Irrigation District to continue into the future aquifer enhancement activities sufficient to offset any depletion of flow in the Snake River between Kimberly and King Hill due to the transfer.

(A.R., p. 403, ¶ 8).

The Director's determinations that any injury or enlargement is offset by mitigation activities that have been or will be provided by IGWA and Southwest Irrigation District is not supported by substantial evidence. The most obvious initial problem with the Director's finding is the reliance upon activities that were conducted by IGWA. IGWA is not the applicant in this matter. The Director made no findings with regard to activities, if any, that may have been conducted by the GWDs that are the applicants in this matter. This error is compounded by the condition that IGWA, a third party, mitigate for the injury caused by this transfer.

Both the Director and the GWDs also failed to address a broader issue with the purported mitigation relied upon for this transfer. The purpose of this transfer application is to provide water for IGWA's Fourth Mitigation Plan. (A.R., p.396-397). The purpose of the Fourth Mitigation Plan is to allow junior ground water pumping on the ESPA to continue and is made necessary because IGWA's First Mitigation Plan does not fully mitigate for the impact of the junior ground water pumping. Yet, IGWA's insufficient First Mitigation Plan consists of the very same

mitigation activities relied upon by the Director and IGWA to mitigate for the injury caused by this transfer. (A.R., p.408-414).

In determining the effect of mitigation activities, both the Department's Staff Memorandum and the GWD's expert, Ms. Sigstedt failed to calculate the net effect of continued groundwater pumping:

Q. Okay. And what we are addressing is we've got a situation where we've got groundwater pumping that is occurring -- okay? -- and that is impacting all of these springs that you are calculating reach gains for.

A. Right.

Q. And it's reducing each of those springs.

A. Right.

Q. And you accept that?

A. I accept that, but I --

Q. And you accept that it's reducing those springs; correct?

A. Yes.

Q. Okay. There's a reduction there?

A. That's correct.

Q. And there has been a little bit of mitigation that has occurred, and that reduces the impact to those springs by a certain amount; correct?

A. That's correct.

Q. Okay. And so what you're looking at in your calculation is not the net effect of what that pumping is, but you're looking at just the gains that are there; correct?

A. That's right.

(A.R. Tr. p. 171, l. 9-25; p. 172, l. 1-7).

It seems entirely reasonable that if the GWDs are evaluating credits, they should also be required to evaluate the debits on the other side of the accounting equation. Contrary to the methodology employed by Ms. Sigstedt and the Department's Staff Memorandum, Rangen's expert Dr. Brockway performed a full accounting of credits and debits (i.e., continued groundwater pumping). Dr. Brockway testified the effects of groundwater pumping on the individual streams far exceeds the benefits of recharge:

A. We ran the ESPAM-2.1 model for -- and looked at the simulated steady-state benefit to the six model cells that contribute spring water to Billingsley Creek using the 2013 IGWA mitigation efforts as outlined by IDWR, and the benefits to those six model cells, there's about 2.83 cfs.

Q. Okay.

A. Then if you -- using the same model and the same six model cells, if you look at the impact of junior groundwater pumping with the -- with the Great Rift trim line in there, the impact is 33.3 cfs to the Rangen model cell.

(A.R. Tr. p. 213, l. 18-28; p. 214, l. 1-4). *See also*, Exh. 5019.

Because the Director relied upon activities performed by IGWA rather than the applicants for this transfer and failed to account for the net effect of junior ground water pumping together with mitigation activities the Director's approval of this transfer application based upon mitigation is not supported by substantial evidence and should be reversed.

**C. The Director erred in approving a Transfer Application for speculative beneficial use referred to as fish propagation/mitigation.**

The Magic Springs water was originally appropriated in 1969 to raise fish at the Magic Springs facility. (Exh. 4000, p. 21). Fish propagation does not consumptively use any water. The water simply flows through the Magic Springs facility and is discharged directly into the Snake River. The Director exceeded his authority in this case by approving a transfer changing the beneficial use from "fish propagation" to "fish propagation/mitigation".

Although generally applied to applications seeking new water rights, the “anti-speculation” doctrine is equally applicable to this proposed transfer. *High Plains A&M, LLCV v. Southeastern Colorado Conservancy District*, 120 P.3d 710 (Colo. 2005). The anti-speculation doctrine in transfer cases is invoked to make sure that a transferred water right is “sufficiently described actual beneficial use to be made at an identified location or locations under the change decree.” *Id.* at 721. The notion that each water right needs an identified beneficial use and place of use is also consistent with Idaho law in that for every water right, there must be an actual diversion and application of water to a beneficial use. *United States v. Pioneer Irrigation Water District*, 144 Idaho 106, 113, 157 P.3d 600 (2007).

In this case, the right is claimed for “fish propagation/mitigation.” (Exh. 4000). Cindy Yenter recommended that the transfer be disallowed because the term “mitigation” was too speculative to determine. (Exh. 4014). Mr. King, the GWDs’ water right specialist who worked for the Department for 15 years, could not characterize what this use or uses mean. “I am not sure if it is one or two uses.” (A.R. Tr. p. 104, l. 21-22). Contrary to his testimony in the permit case, Mr. King testified that “mitigation is always associated with some other use.”

Q. Okay. Where is the place of use in your mind, Mr. King, for the -- now, you understand that there are two -- well, you tell me, because I don't understand it. The purpose of use is described as fish propagation slash mitigation; correct?

A. Correct.

Q. Is that one or two uses?

A. Mitigation is an interesting concept in a use, in that mitigation is generally associated with some other use. Our other use here is fish propagation. IGWA is proposing a mitigation use to be delivered to Rangen for fish propagation.

Q. That's interesting. So your testimony is that mitigation is usually associated with some other use like mitigation for fish propagation; correct?

A. Correct.

(A.R. Tr. p. 102-103).

The term “mitigation” used as a place of use does not describe the use to which the water will be put in any way that allows evaluation of the impact of the proposed use or administration of the water right. If a purpose of use is subject to conflicting interpretations as claimed, it is simply too speculative for the Director to allow. It is not clear whether the GWDs intend that the “mitigation” right may be used in other places to satisfy other users in Billingsley Creek for future mitigation responsibilities, this right as claimed is too speculative to allow.

Furthermore, the GWDs have not shown sufficient rights to the place where the water is to be transferred to, namely, the Rangen facility. (Exh. 5017) (Transfer Memo, p. 18 – “Applicant Does not Own the Place of Use”). the GWDs must show that they are authorized to use the place of use. *See, Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974), *citing Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931). *See also, Joyce Livestock v. U.S.A.*, 144 Idaho 1, 18, 156 P.3d 502, (2007); *Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348 (1984). As this Court is aware, there is a pending action to condemn portions of Rangen’s facility. *See North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District v. Rangen, Inc.*, Gooding County Case No. CV-2015-123. That action is currently stayed pending the resolution of various other matters related to the Rangen call. *See Order Staying Proceedings Pursuant to Stipulation*, dated May 12, 2015, Gooding County Case No. CV-2015-123. Rangen contends that the GWDs lack the legal authority to condemn under I.C. §42-5224(13) because the authority to condemn is not broad enough to condemn Rangen’s property for the purposes they seek.<sup>3</sup>

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<sup>3</sup> Idaho’s condemnation statutes specify the three distinct property interests which may be obtained by eminent domain. These three interests are as follows:

**D. Rangen's substantial rights have been prejudiced.**

Rangen's substantial rights have been prejudiced by the Orders at issue. The Orders diminish Water Right Nos. 36-02551 and 36-07694, as those rights were decreed by the Snake River Basin Water Adjudication and permitted and licensed by the Department. Furthermore, Rangen's substantial rights have been prejudiced by the failure of the Director and Department to follow consistent and appropriate procedure when evaluating water rights issues that are related to Rangen's Call and the critical water shortages in the Hagerman Valley. There is undeniably an immediate, although likely short-term benefit, to Rangen from pumping up to 10 cfs of water to the facility. However, the approach of pumping water around amongst short water sources within the Hagerman Valley in order to allow continued mining of the aquifer is short-sighted and merely exacerbates the problem. Rangen has a substantial right in having the correct procedure and legal standards applied to its call and any mitigation plans or transfer application related to its call.

Of course, assuming that a decision is procedurally fair, applicants for a permit also have a substantial right in having the governing board properly adjudicate their applications by applying correct legal standards. *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007); cf. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003) (remanding because the agency misstated the relevant legal standard and denied an application to transfer water rights).

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7-702. ESTATES SUBJECT TO TAKING. The following is a classification of the estates and rights in lands subject to be taken for public use:

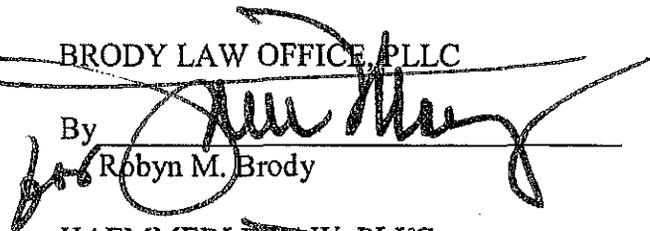
1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.
2. An easement, when taken for any other use.
3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

**V. CONCLUSION**

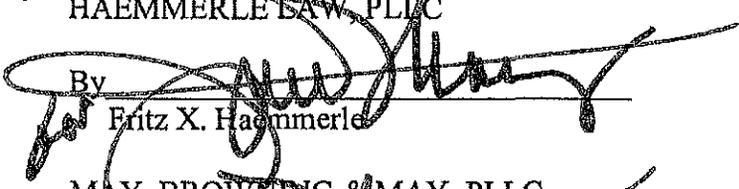
For the reasons specified above, Rangen requests that the Court find that the Order was in violation of Idaho law, in excess of the statutory authority or administrative rules of the Department, arbitrary capricious, and an abuse of discretion. Rangen requests that the Order be reversed and this matter remanded for further proceedings.

DATED this 23<sup>rd</sup> day of July, 2015.

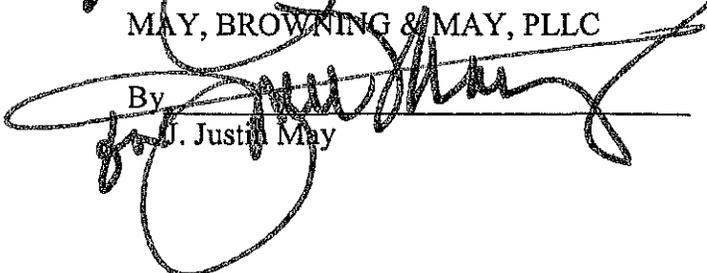
BRODY LAW OFFICE, PLLC

By   
Robyn M. Brody

HAEMMERLE LAW, PLLC

By   
Fritz X. Haemmerle

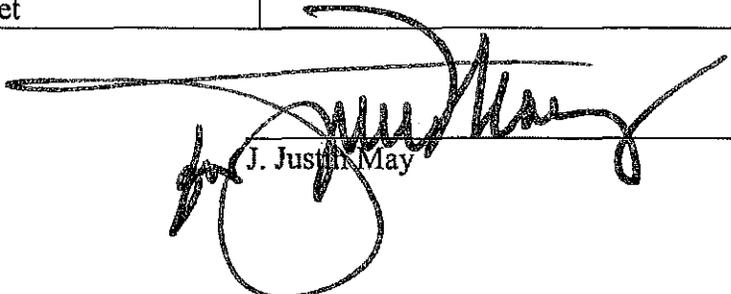
MAY, BROWNING & MAY, PLLC

By   
J. Justin May

### CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 23<sup>rd</sup> day of July, 2015 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

<p><b>Original:</b>                  SRBA District Court                  253 3<sup>rd</sup> Ave. North                  P.O. Box 2707                  Twin Falls, ID 83303-2707                  Facsimile: (208) 736-2121</p>	<p>Hand Delivery <input checked="" type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input type="checkbox"/></p>
<p>Director Gary Spackman                  Idaho Department of Water                  Resources                  P.O. Box 83720                  Boise, ID 83720-0098                  Deborah.gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input checked="" type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter                  Idaho Department of Water                  Resources                  P.O. Box 83720                  Boise, Idaho 83720-0098                  garrick.baxter@idwr.idaho.gov                  kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input checked="" type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>Randall C. Budge                  TJ Budge                  RACINE, OLSON, NYE, BUDGE                  &amp; BAILEY, CHARTERED                  PO Box 1391                  Pocatello, ID 83204-1391                  rcb@racinelaw.net                  tjb@racinelaw.net                  bjh@racinelaw.net</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input checked="" type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>

  
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 J. Justin May