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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF DISTRIBUTION
OF WATER TO WATER RIGHT NOS.
36-02551 & 36-07694

(RANGEN, INC.)

Docket No. CM-DC-2011-004

**IGWA's Petition for Reconsideration
and Clarification of the Order Granting
in Part and Denying in Part Rangen's
Motion for Partial Summary Judgment
Re: Source**

Idaho Ground Water Appropriators, Inc. (IGWA) respectfully petitions the Director to reconsider and clarify the *Order Granting in Part and Denying in Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source* ("Order") dated April 22, 2013. This petition will be supported by evidence presented at the hearing in this matter which is currently in process. Given the time constraints on the parties and the Director in carrying out the hearing, and in the interests of justice, IGWA proposes that Rangen be permitted to respond to this Petition in its post-hearing brief, and that the Director rule on this petition as part of his final order.

ANALYSIS

IGWA asks the Director to (i) remove from the Order all statements that assert or infer that IGWA has admitted either that the Curren Tunnel diverts surface water or that water rights from the Curren Tunnel qualify as service water rights; (ii) clarify whether the Director believes the Curren Tunnel meets the definition of a "well" under Idaho Code § 42-230(b); and (iii) if the

Director agrees that the Tunnel meets the statutory definition of a well, reconsider whether water diverted via the Curren Tunnel should be administered as groundwater.

I. The Order should be revised to remove any statement that asserts or infers that IGWA has admitted that the Curren Tunnel diverts surface water, or that water rights from the Tunnel qualify as surface water rights.

The Order contains a few statements that mistakenly assert that IGWA admits the Curren Tunnel diverts surface water, and that Rangen’s water rights qualify as surface water rights. Finding of Fact 4 states: “IGWA agrees with Rangen that the decreed source of its Martin-Curren Tunnel water rights is surface water” Conclusion of Law 4 states: “IGWA argues that even though the source of Martin-Curren Tunnel is unambiguously surface water” Conclusion of Law 7 states: “While IGWA argues that Rangen’s Martin-Curren Tunnel surface water right should be administered as ground water rights” These statements misread or misunderstand IGWA’s *IGWA’s Response to Rangen’s Motion for Partial Summary Judgment Re: Source* (“*IGWA’s Response*”).

IGWA’s Response does not admit the Curren Tunnel diverts surface water, or that water rights from the Tunnel qualify as surface water rights. To the contrary, IGWA argues that all diversions via the Curren Tunnel must be administered as groundwater diversions “because [the Tunnel] diverts ground water and it meets the statutory definition of a ground water well.” (IGWA’s Response at 2.)

It is important that the Order does not purport to contain admissions that IGWA has not made. Therefore, IGWA respectfully asks the Director to revise the Order to remove the statements quoted above and any others that could be construed as admissions that IGWA recognizes the Curren Tunnel as a surface water diversion or that Rangen’s water rights qualify as surface water rights.

II. The Order should clarify whether the Curren Tunnel itself meets the statutory definition of a “well” under Idaho Code § 42-230(b).

The Order concludes that Rangen’s water rights are surface water rights, but it is unclear whether this conclusion is based on a factual determination that the Curren Tunnel does not qualify as a groundwater well, or a legal determination that since the decrees for Rangen’s water rights identify the source as “Martin-Curren Tunnel” the Director feels compelled as a matter of law, in consequence of AJ Rule 60, to treat Rangen’s water rights as surface water rights even though the Tunnel qualifies as a groundwater well under Idaho Code § 42-230(b). For purposes

of appeal, it is important that the Order clarify whether the Director agrees that, as a matter of fact (i.e. without relying on AJ Rule 60), the Curren Tunnel meets the statutory definition of a well under Idaho Code § 42-230(b).

It is unclear from the Order whether the Director recognizes that the Current Tunnel meets the statutory definition of a well. On one hand, Conclusion of Law 5 points out that in the *Miracle Mine* case the Idaho Supreme Court held that water emanating from a mining tunnel qualifies as groundwater, and Conclusion of Law 6 notes that the water rights involved in the *Miracle Mine* case were decreed as groundwater rights in the SRBA. On the other hand, footnote 1 on page 2 of the Order notes that Hinckley characterizes the Martin-Curren Tunnel as a horizontal well, then states: “Idaho Code § 42-230(b) defines a ‘well’ as ‘vertical’ not horizontal.” From these statements it is not clear whether the Director acknowledges that the Curren Tunnel, like the mining tunnel in the *Miracle Mine* case, is a groundwater diversion structure, or whether the Director is concluding that the Tunnel does not qualify as a groundwater well because it is oriented in a more horizontal than vertical direction.

The Order should be revised to clarify that from a factual standpoint, the Curren Tunnel does meet the statutory definition of a well. Idaho Code § 42-230(b) defines “well” as follows:

“Well” is an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained.”

There are three key components to this statute: (i) there must be an artificial excavation, (ii) the excavation must extend more than 18 vertical feet below land surface, and (iii) the excavation must seek or obtain groundwater.

There is no dispute that the Curren Tunnel is an artificial excavation. It was excavated in the late 1800s to provide irrigation water to nearby farmland. Yet, the Order seems to suggest that the Tunnel is not an artificial excavation, comparing it to the natural springs that supply Clear Springs Foods, Inc. and Blue Lakes Trout Farm, Inc. (Order at 4.) Then again, this comparison is found in the conclusions of law portion of the Order, and therefore may not reflect a factual determination of the Director. In any case, there is no dispute of fact that the Curren Tunnel is an artificial excavation.

There is also no dispute that the Tunnel extends more than 18 vertical feet below land surface. The expert report of Bern Hinckley explains that the Tunnel is 300 feet in length and reaches at least 70 vertical feet below land surface. (Hinckley Report December 21, 2012, p. 20-

21.) While footnote 1 of the Order mentions that the Curren Tunnel is oriented in a more horizontal than vertical direction, a plain reading of Idaho Code § 42-230(b) makes clear that the term “vertical” qualifies the depth of the excavation as opposed to its orientation. Indeed, to interpret the term “vertical” to qualify the orientation of the well would lead to absurd results. For example, it would allow an excavation that extends hundreds of feet below land surface to be exempt from the laws governing well drilling and groundwater use simply by being excavated at an angle as opposed to strictly perpendicular to land surface. Under Idaho Code §42-230(b), the defining factor is the depth below land surface, not the orientation of the excavation.

It is also indisputable that the Tunnel captures groundwater. Idaho Code § 42-230(a) defines “groundwater” as “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” The outer 50 feet of the Curren Tunnel is encased in a corrugated metal pipe. Thus, the Tunnel captures groundwater as that term is defined by statute.

For these reasons, IGWA respectfully asks the Director to clarify that, as a matter of fact (i.e. without relying on AJ Rule 60), the Curren Tunnel meets the statutory definition of a well.

III. The Director should reconsider whether water diverted via the Curren Tunnel should be administered as groundwater.

If the Director agrees that the Curren Tunnel does meet the statutory definition of a well, he should reconsider whether water diverted via the Tunnel should be administered as groundwater.

The administration of water is a technical function of the IDWR that requires specialized expertise and experience. The Director is required by law to be an engineer for a reason. In response to a delivery call, he must investigate the water rights involved, the hydrogeologic setting, and the type and degree of hydraulic interconnection between water rights. The Idaho Supreme Court recognized this in its decision in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 876-77 (2007) (“*AFRD2*”), explaining:

Conjunctive administration “requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

Id. at 877 (internal cite omitted).

While AJ Rule 60 is certainly designed to provide direction for the naming of the source element in claims filed with the SRBA, the name is not conclusive as to how the Director must administer water in response to a delivery call under the CM Rules. In other words, while a claimant's or the IDWR's understanding of hydrogeology may have affected the name assigned to a source, the name does not ultimately define the hydrology of the source. The name is a geographic identifier, not a judicial determination of hydrogeology. SRBA Special Master Booth explained this in subcase number 63-08447 (Kandler), stating that the source "is required to be identified simply by its geographic name, without any further analysis as to the origin of the water in the source." 11 SRBA 7 at 7.7 (Aug. 28, 2007). "As regards administration of water rights," he continued,

the identification of the source in a water right helps the water master begin to determine which rights to curtail in times of scarcity. In other words, as a starting point in delivering water to the senior users, the water master would look to junior rights on the same source. Obviously the naming of the source is not definitive as to the hydrologic connection between water rights, as clearly there are situations where the curtailment of juniors with a different named source would provide water to the senior users, as well as situations where curtailment of a junior on the same named source would not provide water to the senior (e.g. futile call).

Id. at 7.10. This comports with the recognition by the Idaho Supreme Court in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 876-77 (2007) that "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication."

Therefore, IGWA asks the Director to reconsider the conclusion that groundwater diverted by the Martin-Curren Tunnel must be administered as surface water. The Director is not precluded from evaluating hydrogeologic conditions and relationships in response to a delivery call, which in this case requires water diverted via the Curren Tunnel be administered as groundwater.

DATED this 6th day of May, 2013.

RACINE OLSON NYE BUDGE &
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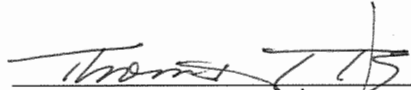
By: _____


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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2013, I caused to be served a true and correct copy of **IGWA's Petition for Reconsideration and Clarification of the Order Granting in Part and Denying in Part Rangen's Motion for Partial Summary Judgment Re: Source** upon the following persons in the manner indicated:



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