

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

IN THE MATTER OF DISTRIBUTION OF)	CM-DC-2011-004
WATER TO WATER RIGHT NOS. 36-02551)	
AND 36-07694)	ORDER GRANTING IN PART AND
)	DENYING IN PART IGWA'S
(RANGEN, INC.))	PETITION FOR
)	RECONSIDERATION AND
)	CLARIFICATION
)	

On April 22, 2013, the Director issued an *Order Granting in Part and Denying in Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source* ("Order Re: Source"). The Director found that Rangen, Inc. ("Rangen") is entitled to judgment as a matter of law on the issue of the source of its water rights and ordered that its water rights shall be administered as surface water rights. The Director concluded, "The fact that the source and tributary are named, demonstrate that the rights were decreed from a surface water source." *Order Re: Source* at 4. The Director also concluded that his designation of surface water is consistent with three Idaho Supreme Court decisions, one of which involved the Martin-Curren Tunnel. *Id.*

On May 6, 2013, Idaho Groundwater Appropriators, Inc. ("IGWA") filed *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* ("Petition"). In its *Petition*, 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 [sic] 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.

Petition at 1-2.

With regards to the characterization of IGWA's argument in the *Order Re: Source*, the Director modifies Finding of Fact 4 and Conclusions of Law 4 and 7. The second sentence of

Finding of Fact 4 is modified to read as follows: "In its Response, IGWA agrees that the Director 'does not have the authority to change the decreed elements of Rangen's water right.'" The first sentence of Conclusion of Law 4 is modified to read as follows: "IGWA argues the Director should administer the rights as ground water." The first sentence of Conclusion of Law 7 is modified to read as follows: "While IGWA argues that Rangen's Martin-Curren Tunnel water rights should be administered as ground water rights, IGWA does not state what difference in administration would occur."

As to the remainder of IGWA's petition, the Director denies the request for reconsideration. Contrary to IGWA's suggestion, the order is not "unclear" as to the Director's basis for concluding that Rangen's Martin-Curren Tunnel water rights are surface water. The Director's conclusion is based on the SRBA decrees for these rights. The source element in the decrees for these water rights reads: "Martin-Curren Tunnel." If the source for these water rights had been ground water, the decreed source element for these water rights would have read ground water. IGWA is attempting to create ambiguity where there is none. The Director disagrees with IGWA's argument that "[t]he issue of whether the Martin-Curren Tunnel should be administered as a surface or ground water source was not adjudicated in the SRBA... ." *IGWA Response* at 2. The decree does in fact "answer the question of whether the Martin-Curren Tunnel should be administered as a surface or ground water diversion." *Id.* The fact that the water rights were not decreed as ground water by the SRBA district court establishes that it is a surface water source. Rangen's Martin-Curren Tunnel water rights must be administered as surface water sources.

Based on the forgoing and pursuant to IDAPA 37.01.01.711 and 37.01.01.770, the Director modifies the *Order Granting in Part and Denying in Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source*. The Director adopts the modifications discussed above.

FINDINGS OF FACT

1. On March 8, 2013, Rangen filed a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* ("Source Brief"). In its Source Brief, Rangen seeks a ruling on two points: (1) the source for its Martin-Curren Tunnel water rights (36-2551, 36-7694, and 36-15501) is surface water, not ground water; and (2) its delivery call "is not limited only to water from the mouth of the Martin-Curren Tunnel itself." *Source Brief* at 2.

2. Regarding the issue of whether the legal source of its Martin-Curren Tunnel water rights is ground water or surface water, Rangen points to its SRBA decrees and prior licenses, as well as the supporting documents. Rangen also relies on the Department's adjudication rules for the proposition that if its Martin-Curren Tunnel water rights were ground water, the adjudication rules required the claims to be made for "ground water." IDAPA 37.03.01.060.02.c ("AJ Rule 60"). "Rangen's Partial Decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of a tributary is unique to surface water sources." *Source Brief* at 15. Rangen argues that any attempt to change its decreed source from surface water to ground water would constitute an impermissible collateral attack on its decrees.

3. The second issue raised by Rangen is whether its “demand for water is limited to the amount of water that would flow through the mouth of the Martin-Curren Tunnel itself and not the springs complex that supplies the Research Hatchery.” *Id.* at 17. While the source of its rights is described as Martin-Curren Tunnel, Rangen argues that Martin-Curren Tunnel is a part of a greater springs complex that supplies its facilities. “Because Rangen’s historical appropriations, point of diversion and use of water includes water from the entire spring complex at the head of its Research Hatchery,” Rangen argues it should be entitled to judgment as a matter of law that its delivery call is not limited to water that flows only through the mouth of the Martin-Curren Tunnel. *Id.* at 19.

4. On March 22, 2013, IGWA filed a *Response to Rangen’s Motion for Partial Summary Judgment Re: Source* (“IGWA Response”). In its Response, IGWA agrees that the Director “does not have the authority to change the decreed elements of Rangen’s water right.” *Response* at 3. However, IGWA argues the Director is not precluded “from administering water based on hydro-geology reality.” *Id.* “The issue of whether the Martin-Curren Tunnel should be administered as a surface or ground water source was not adjudicated in the SRBA, but is a matter within the Director’s discretion when responding to a delivery call.” *Id.* IGWA argues the Martin-Curren Tunnel should be administered as a ground water source because it meets the statutory definition of a well contained in Idaho Code § 42-230(b) (defining well as “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.”). IGWA argues that to the extent AJ Rule 60 is inconsistent with Idaho Code, the statute must control. IGWA claims the Martin-Curren Tunnel “extends at least 70 feet below land surface”¹ and is therefore ground water. *Id.* at 4. IGWA also argues that the Idaho Supreme Court has already held that water flowing from a tunnel is ground water. *In re General Determination of Rights to Use of Surface and Ground Waters of Payette River Drainage Basin*, 107 Idaho 221, 687 P.2d 1352 (1984) (hereinafter referred to as “*Miracle Mine*”).² There, the Court held that water emanating from a mine portal was ground water. IGWA states “[w]ater emanating from the Martin-Curren Tunnel is no different.” *IGWA Response* at 5.

5. Responding to Rangen’s request that the source of its Martin-Curren Tunnel water rights is made up of the Tunnel and surrounding springs, IGWA argues that Rangen’s decrees are unambiguous: “Had Rangen claimed an entitlement to water from Billingsley Creek or springs in the Rangen area, it had a duty to claim points of diversion on those sources.” *Id.* at 8. The only point of diversion decreed to Rangen in the SRBA is located in a ten-acre tract: SESWNW, Sec. 32, Township 7 S., Range 14 E. IGWA cites to the *Third Affidavit of Charles M. Brendecke* (March 22, 2013) to show the location of the Martin-Curren Tunnel and the ten-acre tract. *IGWA Response* at 10. Exhibit F to the *Third Affidavit of Charles M. Brendecke* depicts the Martin-

¹ To support this factual statement, IGWA cites to a December 20, 2012 report of its expert witness, Bern S. Hinckley. *Rangen Groundwater Discharge and ESPAM 2.1 Hydrogeologic Investigation*, Hinckley, Bern. S. (December 20, 2012). In that report, Hinckley states, “The tunnel opening is approximately 75 ft. west of the rim and approximately 70 ft. below the rim elevation.” *Id.* at 20. Hinckley goes on to say, “The Curren Tunnel is a horizontal, flowing well.” *Id.* 21. Idaho Code § 42-230(b) defines a “well” as “vertical” not horizontal.

² IGWA refers to this case interchangeably as *Birthday Mine* or *Miracle Mine*.

Curren Tunnel and the ten-acre tract. “Rangen has no right to call for the delivery of water to points of diversion that the SRBA court did not include in Rangen’s partial decree.” *Id.* at 11.

6. On March 22, 2013, the City of Pocatello (“Pocatello”) filed a *Response to Rangen’s Motion for Partial Summary Judgment Re: Source* (“Pocatello Response”). While agreeing with IGWA that Rangen’s Martin-Curren Tunnel water rights should be administered as ground water rights, Pocatello believes the SRBA decrees are ambiguous: “the decrees themselves do not identify the Martin-Curren Tunnel water supply as either ground water or surface water.” *Pocatello Response* at 2. Because of the ambiguity, and citing Idaho Code § 42-230, Pocatello asks the Director to “resolve any alleged ambiguity in the decreed sources of the Curren Tunnel Rights by applying hydrogeologic facts—which support the administration of the Curren Tunnel Rights as ground water.” *Id.* at 4.

7. Responding to Rangen’s request that the source of its Martin-Curren Tunnel water rights is made up of the Tunnel and surrounding springs, Pocatello states, “the partial decrees do not identify a source of supply beyond the Curren Tunnel. Further, there are no terms to suggest that the spring located on the lower talus is a source of water to be served by Rangen’s water rights.” *Id.* at 5. Pocatello argues the only basis Rangen has to include additional spring sources/points of diversion in its delivery call is “the fact that it measures its diversions below the fish hatchery; if Rangen measured its water at the point of diversion (e.g. the Curren Tunnel) as required by Idaho law, the issue of whether springs emanating from the talus slope lower down are properly encompassed in its adjudicated rights would not even arise.” *Id.* If the Director decides that Rangen may “call for water from the lower talus slope . . . the Director should also examine the reasonableness of Rangen’s demands in light of its *per se* unreasonable means of diversion.” *Id.*

8. On March 29, 2013, Rangen filed a *Reply Brief in Support of Motion for Summary Judgment Re: Source* (“Reply”). Rangen states, contrary to Pocatello, that the source of its Martin-Curren Tunnel water rights is unambiguously surface water and must be administered as surface water. Rangen notes that in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), IGWA, appearing as *amicus curiae*, agreed that the source of Martin-Curren Tunnel was surface water. Rangen also distinguishes IGWA’s use of the *Miracle Mine* case: “The water coming from [Miracle] Mine existed only because of the mine; the mining brought it to the surface. In contrast, the Martin-Curren Tunnel only enhances existing, natural spring flows.” *Reply* at 6 (emphasis in original). Because of IGWA’s prior position in *Musser*, Rangen states that IGWA must be estopped from arguing that that source of Martin-Curren Tunnel is ground water. Concerning whether Rangen is entitled to call for delivery of water from the Martin-Curren Tunnel only, or other surrounding springs, Rangen simply states: “Rangen’s delivery call is not limited to water that would flow from the mouth of the Martin-Curren Tunnel itself.” *Reply* at 8.

9. Oral argument was held on April 3, 2013. On April 22, 2013, during the pre-hearing conference, the location of the ten-acre tract was discussed. The Director stated the Department could provide a map showing the location of the Martin-Curren Tunnel and the ten-acre tract that was partially decreed by the SRBA district court as Rangen’s point of diversion. The parties agreed that the Department should provide this map.

CONCLUSIONS OF LAW

1. Rangen presents the Director with two issues on summary judgment. “Summary judgment must be granted ‘if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ I.R.C.P. 56(c).” *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 293 P.3d 630, 632 (2012). The Director must “construe all disputed facts and make all reasonable inferences in favor of the nonmoving party.” *Pioneer Irr. Dist. v. City of Caldwell*, 288 P.3d 810, 813 (2012).

Martin-Curren Tunnel Is A Surface Water Source And Should Be Administered As Surface Water

2. As to the first issue, Rangen seeks a ruling from the Director that the source of its Martin-Curren Tunnel water rights is surface water. Water right nos. 36-2551, 36-7694, and 36-15501 were decreed in the SRBA with the following Source element: Martin-Curren Tunnel, tributary to Billingsley Creek. *See Third Affidavit of Charles M. Brendecke*, Exhibits D & E (March 22, 2013). The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* AJ Rule 60 (“For surface water sources, the source of water shall be identified The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as ‘ground water.’”). Consistent with AJ Rule 60, listing a source and tributary for surface water rights, and only “ground water” for ground water rights, was the custom and practice in the SRBA. In 1997, Rangen’s Martin-Curren Tunnel water rights were partially decreed. The partial decrees were entered pursuant to Idaho Rule of Civil Procedure 54(b). No appeal has ever been taken. The plain language of Rangen’s partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water.

3. The conclusion that the source of Rangen’s water rights is surface water is supported by three Idaho Supreme Court decisions. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Court reviewed the Director’s defense of inaction in a delivery call filed by holders of a Martin-Curren Tunnel water right against junior-priority ground water users. The Court stated the source of Mussers’ water right as follows: “The springs which supply the Mussers’ water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer).” *Musser* at 394, 871 P.2d at 811 (emphasis added). The fact that Musser was an appropriator of a surface water right was reconfirmed by the Court in *A&B*. 153 Idaho at 234, 284 P.3d at _____. In *Clear Springs*, the Court examined separate conjunctive management delivery calls initiated by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (“Spring Users”). The Spring Users, like Rangen, “have water rights in certain springs emanating from the canyon wall along a section of the Snake River below Milner Dam in south central Idaho.” *Clear Springs* at 794, 252 P.3d at 75. In *Clear Springs*, IGWA argued that the Spring Users should be administered as ground water users, consistent with Idaho Code § 42-226: “the Spring Users’ priority rights should be protected only in the maintenance of a reasonable aquifer level.” *Clear Springs* at 804,

252 P.3d at 85. The Court rejected this argument: “By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs.” *Id.* (emphasis added). These cases clearly demonstrate that Martin-Curren Tunnel is a surface water source.

4. IGWA argues the Director should administer the rights as ground water. To support this argument, IGWA attempts to create a conflict between AJ Rule 60 and Idaho Code § 42-230. For IGWA, a conflict exists between AJ Rule 60 and Idaho Code § 42-230 because of its belief that Martin-Curren Tunnel is a “well” as defined by Idaho Code § 42-230(b): “‘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.” Emphasis added. IGWA’s argument is misplaced, because, as stated above, Rangen’s water rights are unambiguously surface water. Because Rangen’s Martin-Curren Tunnel water rights are from surface water, there can be no conflict between AJ Rule 60 and Idaho Code § 42-230. Furthermore, AJ Rule 60 applied in the SRBA and has no applicability in administration: “These rules implement statutes governing the filing of notices of claims to water rights acquired under state law . . . in general adjudications” IDAPA 37.03.01.001. To the extent IGWA believed Martin-Curren Tunnel was a ground water right, it should have raised the issue in the SRBA.

5. IGWA cites the Idaho Supreme Court’s decision in *Miracle Mine* to bolster its position that Rangen’s Martin-Curren Tunnel rights should be administered as ground water. The *Miracle Mine* case stemmed from the Payette River Basin Adjudication (“PRBA”). In the PRBA, claims were filed by the Bransons and Miracles for water emanating from a mine portal. “The water in question was developed as a result of and emanated from the Bransons’ mining tunnel on their ‘Birthday # 24’ mining claim.” *Miracle Mine* at 223, 687 P.2d at 1350. On May 20, 1982, the district court issued orders, decreeing the source of the Branson and Miracle rights as ground water. Appeal of the district court’s orders was taken, with the Idaho Supreme Court holding: “the water flow emanating from the mine portal is public ground water subject to appropriation.” *Id.* at 225, 687 P.2d at 1352.

6. While the PRBA was commenced in 1969, “a final unified decree was never entered. Due to unresolved objections to certain rights at the time of the commencement of the SRBA, the Payette Adjudication was consolidated with the SRBA on February 8, 2001.” *Order Denying Late Notice of Claim*, SRBA Subcase No. 65-2794 (Dec. 1, 2010). Because of this, water right holders from the PRBA filed claims in the SRBA for their PRBA water rights. In the SRBA, the Branson and Miracle PRBA water rights were claimed and partially decreed as ground water.³ Because *Miracle Mine* was decided in 1984—prior to the 1987 commencement of the SRBA—any party to the adjudication could have filed objections to Rangen’s water rights and litigated whether the Source element was properly described as surface water. Moreover, because the Branson and Miracle claims were made in the SRBA, water users in the SRBA were on notice of how water emanating from a mine portal could be claimed.

7. While IGWA argues that Rangen’s Martin-Curren Tunnel water rights should be administered as ground water rights, IGWA does not state what difference in administration

³ The SRBA partial decrees are 65-10737 and 65-10839.

would occur. If the Director were to administer Rangen's senior-priority surface water rights as senior-priority ground water rights, he would be required to examine Idaho Code § 42-226 and its principles of full economic development and reasonable pumping levels. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). As recently explained by the Idaho Supreme Court in *Clear Springs*, full economic development and reasonable pumping levels do not apply in calls between senior-priority surface water rights and junior-priority ground water rights: "By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs." *Clear Springs* at 804, 252 P.3d at 85. The Director cannot administer Rangen's senior-priority surface water rights as ground water rights because, to do so, would run counter to *Clear Springs*.

8. Based on the law and the facts, the Director finds that Rangen is entitled to judgment as a matter of law that the source of its Martin-Curren Tunnel water rights is surface water and its rights should be administered as surface water.

The SRBA Partial Decrees For Rangen's Martin-Curren Tunnel Water Rights Authorize Diversion Within A Ten-Acre Tract

9. Rangen's second issue on summary judgment is its position that the point of diversion of its water rights is not limited to the mouth of the Martin-Curren Tunnel, but should also include the greater springs complex that supplies its facilities. Rangen's partial decrees unambiguously state that the point of diversion element is located as follows: "T07S R14E S32 SESWNW within Gooding County." *Third Affidavit of Charles M. Brendecke*, Exhibits D & E (March 22, 2013). Rangen's partial decrees also unambiguously state that the only source for its water rights is Martin-Curren Tunnel, tributary to Billingsley Creek. *Id.* The partial decrees do not list "Spring(s)" and/or "Unnamed Stream(s)" as additional sources.

10. The ten-acre tract is visually depicted in Exhibit F to the *Third Affidavit of Charles M. Brendecke* (March 22, 2013). *See also Spronk Water Engineers, Inc. Expert Report to IDWR Staff Memorandum Dated April 5, 2013, Prepared for the City of Pocatello* at 31 (April 4, 2013) (depicting location of Martin-Curren Tunnel and the ten-acre tract). At the April 22, 2013 pre-hearing conference, the Director agreed to provide a map to the parties depicting the location of the Martin-Curren Tunnel and the ten-acre tract point of diversion that was partially decreed by the SRBA district court to Rangen. Attached to this order is this map.

11. The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right) (emphasis added); 37.03.11.010.25 (defining "water right" to mean "[t]he legal right to divert and use . . .

the public waters of the state of Idaho where such right is evidenced by a decree . . .") (emphasis added).

12. While the SRBA partial decrees list Martin-Curren Tunnel as the source, the partial decrees do not expressly state that Rangen's water rights are limited only to diversion from the mouth of Martin-Curren Tunnel; likewise, the decrees do not state that sources other than Martin-Curren Tunnel are lawfully diverted within the ten-acre tract. Thus, there are genuine issues of material fact in dispute as to whether Rangen can divert from sources other than Martin-Curren Tunnel that are located within T07S R14E S32 SESWNW.


13. Because there are genuine issues of material fact concerning what source(s) of water—other than Martin-Curren Tunnel—Rangen may lawfully divert within T07S R14E S32 SESWNW, the Director cannot find, as a matter of law, that Rangen is entitled to summary judgment on that issue.

ORDER

Based upon the foregoing, the Director GRANTS IN PART 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*. The Director MODIFIES his *Order Granting In Part and Denying in Part Rangen Inc.'s Motion for Partial Summary Judgment Re: Source* as provided above.

The Director DENIES the remainder of IGWA's petition.

Dated this 10th day of May, 2013.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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Current Tunnel outlet



Lower Collection Box



Diversion to Lower Raceways



POU for 36-2551



Township/Range



Sections



QQ

0 200 400

Feet



Aerial photography from 2011
National Agriculture Imagery Program

Prepared April 22, 2013
by Jennifer Sukow, IDWR