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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE 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 POST-HEARING RESPONSE BRIEF**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this brief in response to *Rangen, Inc.'s Closing Brief* ("Rangen Brief"), *Rangen, Inc.'s Proposed Findings of Fact and Conclusions of Law* ("Rangen FF & CL"), *Surface Water Coalition's Post-Hearing Memorandum* ("SWC Brief"), *City of Pocatello's Closing Brief* ("Pocatello Brief") *City of Pocatello's Proposed Findings of Fact, Conclusions of Law, and Order* ("Pocatello Proposed FF & CL"), and *Fremont-Madison Irrigation District's Proposed Findings of Fact and Post-Hearing Brief* ("FMID Brief"), all of which were filed June 21, 2013.

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1. A 10% trimline is completely defensible.

Rangen and the SWC contend the Director has no legal authority to implement a trimline. The SWC argues "no legal or policy theory supports a trim line." (SWC Br. 8.) Rangen argues similarly that "any application of a trimline, which has nothing to do with science or modeling, would simply constitute an arbitrary or capricious act." (Rangen Br. 73.) These arguments fail because the Idaho Supreme Court already ruled in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 817 (2011), that implementation of a trimline is a legally justifiable means of accounting for uncertainty in model predictions.

To support their anti-trimline argument, Rangen and the SWC frame the trimline as a strictly mathematical issue. It never has been. While technical data about model uncertainty supports the use of a trimline, its application is ultimately a discretionary decision. Judge Melanson upheld the 10 percent trimline as a proper exercise of the Director's discretion, reasoning that "the model must have a factor for uncertainty as it is only a simulation or prediction of reality." *Id*. at 816. The Idaho Supreme Court agreed, holding the Director properly "perceived the issue as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason." *Id.* at 817.

Rangen attempts to discredit the Supreme Court by asserting the trimline has nothing to do with model uncertainty. To support this, Rangen misrepresents Dr. Brendecke, claiming he opined that the trimline "has nothing to do with model uncertainty." (Rangen Br. 73, quoting Ex. 1369.) This is not true. Dr. Brendecke has never rendered that opinion. This statement is a quote from John Koreny and others, including Dr. Brockway, whose clients oppose a trimline of any kind. Dr. Brendecke quoted Koreny, *et al*., in a letter submitted to the Eastern Snake Hydrologic Modeling Committee, which reads, in relevant part:

> The present discussion of the trim line intertwines two issues which I believe should be separated. The first issue is how uncertainty in model predictions should be expressed in displaying model results. The second issue is whether and how to define a "zone of exclusion" for administrative curtailment. The first issue is largely a technical one; the second is largely a policy one (though its ramifications can be assessed in a technical analysis).
>
> Apparently Koreny, *et.al.*, at least partially agree with me, for they repeatedly state in their white paper that "The trim line has nothing to do with model uncertainty."

(Ex. 1369 at 1.) Dr. Brendecke quoted Koreny and Brockway to make the point that they too recognize model uncertainty as a separate analysis from implementation of a trimline for water administration purposes. (Tr. 2695:3-10.)

Dr. Brendecke's opinion has always been that the trimline is a policy decision that should be informed by model uncertainty. His letter to the Modeling Committee clearly explains this:

> Former Director Dreher loosely tied this 10% definition of the trim line to the uncertainty in estimates of sub-reach river gains, more particularly the uncertainty in river flow gages. He stated in hearing testimony that he viewed this as a minimum level of model uncertainty, noting that model uncertainty had not been quantified. He went on to say that:
>
> *"... I made the determination it was not appropriate to curtail such junior priority ground water use if, in fact, we didn't know whether curtailment would result in a meaningful amount* (emphasis added) *of water reaching the calling senior right.*" (Tr. at 1167:4-8)
>
> It is important to note that the Director did not assert that pumping outside the trim line had no effect on calling senior water rights.
>
> What is a "meaningful amount" of water plainly involves subjectivity; the ESPA model can provide quantitative estimates of hydrologic effects but it cannot tell us if these effects are "meaningful." What is meaningful to one party may not be to another, and what is meaningful in one context may not be in another. The Director must resolve this by setting a policy that reflects his duties to administer and distribute water under the laws in the state of Idaho.
>
> It is my view that the Director Dreher's response reflected his subjective consideration of, among other things, model uncertainty, the potential futility of administrative curtailment, the larger benefits and costs of curtailment, and the policies, regulations and statutes under which he had to operate.
>
> . . .
>
> The Director's application of a trim line may be based solely, in part, or not at all on model uncertainty. He may or may not consider how *de minimus* is defined or exclusion is effected in other states. That he has such discretion has been made clear by the Idaho Supreme Court, by the Hearing Officer and by the District Court. The ESHMC can assist the Director in better defining and describing model uncertainty. It can assist the Director in quantifying the effects of uncertainty and of various forms of

> administrative exclusion. But it cannot, in my view, tell the Director how to develop and apply administrative policy or opine, at least as a group, about what is reasonable or justified in that policy.

(Ex. 1369 at 3, emphasis in original.) In this proceeding Dr. Brendecke maintained the opinion that the trimline is a reasonable means of accounting for uncertainty in the predictions generated by ESPAM2.1:

> It is not my opinion that ESPAM2.1 should not be used at all, but that any application of ESPAM2.1 must acknowledge and accept that there is an inherent and unquantifiable level of uncertainty in the predictions generated by the model. Just because the model predicts a certain impact from a given curtailment does not mean the predicted impact will actually be realized. This bears on the degree of confidence the Director has that a given curtailment will materially benefit Rangen. The alternative I propose is that the Director account for this uncertainty by limiting the scope of curtailment (using a trimline or other method) to junior users for which he is confident that a meaningful amount of the curtailed water will accrue to Rangen within a meaningful time without undue waste of the resource.

(Ex. 2403 at 4.) Mr. Hinckley also testified that using a trimline or "zone of exclusion" is an appropriate approach to accommodating uncertainty and bias in the model results, pointing out that zones of exclusion have been used in other states as well. (Tr. 2489:15-18; 2511:5-13.)

The SWC also attempts to discredit the Supreme Court by pointing out that all of the experts agree that the trimline is ultimately a policy decision, which the SWC contends proves it has nothing to do with model uncertainty. (SWC Br. 7-8.) Not so. The fact that the trimline is a discretionary decision does not mean it cannot or should not be informed by technical data relating to model uncertainty. Almost all policy decisions are informed by technical analyses of one form or another. The Idaho Supreme Court affirmed the 10 percent trimline precisely because it was rationally based on technical data demonstrating uncertainty in model predictions. *Clear Springs Foods*, 150 Idaho at 817.

Notwithstanding the *Clear Springs Foods* decision, the SWC contends the CM Rules "require administration of all junior priority ground water rights located within the ESPA, an area of common ground water supply." *Id*. at 9. According to the SWC, there is one and only one consideration in water administration: priority date.

The SWC has advocated for strict priority administration over and over again—to the IDWR, district court judges, and the Idaho Supreme Court—and been denied at every turn. Such persistence is impressive, but the argument is,

frankly, worn out. Were priority the only consideration, there would have been no need to construct ESPAM. The State could have saved its money. If the Director is to automatically curtail every junior within the area of common groundwater supply, no matter how small or attenuated the impact, the only technical input necessary is delineation of the area of common groundwater supply, which does not require ESPAM. The State obviously recognized that reasonable use and administration of the ESPA requires understanding of the magnitude and timing of impacts and the collateral effects of curtailment.

The Idaho Supreme Court thoroughly considered the SWC's strict priority argument in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 870 (2007), but held "there is a lot more to Idaho's version of the prior appropriation doctrine than just 'first in time.'" *Id*. at 872. The Court ruled that when responding to calls for the delivery of groundwater, the Director must also "make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." *Id*. at 876. The Court has since reinforced this by upholding the 10 percent trimline, which by definition excludes some junior rights within the ESPA from administration, *Clear Springs Foods*, 150 Idaho 790, and by upholding the obligation of seniors to make reasonable improvements to their diversion and distribution facilities before seeking to curtail juniors, *In re Delivery Call of A&B Irrigation District*, 153 Idaho 500 (2012).

The *Clear Springs Foods* decision provides concrete legal basis for the use of a trimline. Preservation of the constitutional right to appropriate unappropriated water further justifies the use of a trimline. As stated in CM Rule 20.03: "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule."

The SWC argues that even if a trimline is legally justifiable, "there was no evidence or testimony provided by any party attempting to provide any factual or technical basis for a 'trim line' or 'zone of exclusion'." (SWC Br. 7.) Rangen similarly argues that "[t]here was no testimony from any party proposing the use of a trimline." (Rangen Br. 73.) These are stunning assertions.

Dr. Brendecke's expert report is replete with trimline analyses, including the specific opinion that curtailing a junior where less than 10% of the curtailed water is predicted to accrue to the senior results in waste of the ESPA. (Ex. 2401 at 1-3.) He affirmed this at the hearing:

> Q. Now, in some of your reports you've used the dirty word "trim line"; right?
>
> A. I used that word in my reports, yes.

Q. And we've also heard the word "zone of exclusion," which I understand to be the same thing.

A. Yes.

Q. Since this is -- and I think Mr. Arkoosh brought this up with Mr. Hinckley. This is our last chance to ask you what you would advise the Director to do. Are you advising the Director to use any particular zone of exclusion?

A. I think I made a statement in my December report that he should not curtail people that have less than a 10 percent impact on Rangen. But I haven't expressed any other opinions about how a zone of exclusion should be defined specifically.

Q. Okay. And so you're advising the Director to use a 10 percent trim line?

A. I advised him to not curtail people that don't have at least 10 percent effect on Rangen because I'm not convinced that the model is accurate enough to distinguish effects smaller than that. But I didn't tell -- I didn't say he should use a 10 percent trim line.

Q. Well, I think in your deposition you said that the Director should use no less than a 10 percent trim line.

A. Well, that was consistent with the opinion in my report.

(Tr. 2740:9-2741:14.)

Mr. Hinckley provided additional data that supports the 10% trimline. He explained that ESPAM2.1 is poorly reflective of actual hydro-geologic conditions at Rangen, that it over-predicts the amount of water Rangen is likely to receive from curtailment, and that implementation of a trimline is a reasonable approach to address this bias:

Q. Okay. Is there -- have you done an analysis or is there a number in the record here that informs us how to craft this zone of exclusion?

A. I think it would fundamentally be a policy decision that would be the synthesis of what all of these reports address.

Q. So there's nothing, to your knowledge, in this record to quantify how to craft a zone of exclusion?

A. Oh, I think there's a great deal of quantitative information here with which one might craft a zone of exclusion.

. . .

Q. What are you suggesting? What great deal in the record do you identify?

> A. Well, the results of the ESPAM. I've seen charts of the number of acres to be curtailed under various trim lines. I've identified a whole variety of factors that I believe bias the results of ESPAM in predicting the impact of curtailment. I could go on and on.

(Tr. 2537:13-2539:5.)

Mr. Contor agreed that ESPAM2.1 is inherently constrained by the accuracy of its input data, and that a trimline is an appropriate response to this:

> Establishing the Trim Line threshold itself is a policy question, which may in part consider uncertainty. The quantity uncertainty arising from the Water Budget and its effect on Transmissivity is likely at a minimum 15% to 20%. Overall uncertainty exceeds this single-component estimate, especially when questions are asked for small reaches and at small time scales.

(Ex. 4001 at 23.)

Contrary to the assertions of Rangen and the SWC, there is a massive amount of evidence in the record to support maintaining the 10 percent trimline that water users have come to rely on, including the following:

- ESPAM2.1 is a simplification of reality and does not perfectly predict the impacts of hydrologic changes in the ESPA. (Brockway, Tr. 2386:9-15; Ex. 4001 at 12; Ex. 2401 at 10.)
- ESPAM2.1 has been constructed and programmed to show that a change in water conditions at any model cell will impact every other cell within the model domain, regardless of whether there is an actual impact. (Brendecke, Tr. 2756:3-22.)
- There are significant uncertainties in the input data used in ESPAM2.1. (Contor, Tr. 2860:16-2861:19, 2874:9-18.) For example, uncertainty in the water budget is on the order of 17%, which translates into uncertainty in transmissivities. (Ex. 4001 at 11; Contor, Tr. 2882:19-2883:3.)
- Very good model calibration can be achieved with an incorrect model. (Contor, Tr. 2878:13-22.)
- The uncertainty analysis performed by the IDWR was not intended to provide a confidence interval range or probability distribution on the predictions of ESPAM 2.1. (Ex. 1277; Wylie, Tr. 2922:3-20, 2945:18-2946:10.) This is why the Director must use his discretion to determine how to account for uncertainty in ESPAM 2.1 predictions.
- The measured effects of hydrologic changes in ESPAM2.1 are regional in nature and do not necessarily apply well on a single model cell. (Contor, Tr. 2896:15-18, 2902:6-2903:15.) For example, the 1900 validation run demonstrates that the Model performed satisfactorily in general, yet failed

at Rangen, predicting zero flow. (Ex. 1281 at 25, Hinckley, Tr. 2465:18-2469:16.)

- ESPAM2.1 simulates Snake River reach gains in the Rangen area that reflect very little of the observed, large seasonal fluctuations in those gains (Hinckley, Tr. 2485:5-23.)

- ESPAM2.1 simulates groundwater flow in the model cells immediately west and south of Rangen that is the opposite of the observed flow direction. (Ex. 2247 at 42, 76; Hinckley, Tr. 2456:15-25.)

- ESPAM2.1 produces biased results for Rangen, including:

  - ESPAM2.1 systematically under-predicts flows at Rangen by an average of 6.1 cfs in the first eight years of the calibration period and systematically over-predicts flows by 4.7 cfs in the last ten years of the calibration period. (Exs. 2300 and 2424.) This may be due to an error in the water budget in the Rangen area from unaccounted for improvements to the North Side Canal Company water delivery system. (Ex. 2396, *cf*. Brendecke, Tr. 2584:5-2591:19, 2595:15-2597:13.) In any case, this systematic over-prediction

  - ESPAM2.1 simulates groundwater levels near Rangen that are far higher than measured groundwater levels. (Ex. 2301, *cf.* Brendecke, Tr. 2597:14-2598:8; Ex. 2302, *cf.* Brendecke, Tr. 2600:1-15; Ex. 2247 at 68; Ex. 2248 at 12, *cf*. Hinckley, Tr. 2445:30-2447:23.)

  - ESPAM2.1 predicts a 1-foot increase in the elevation of the groundwater table at Rangen will have a far greater impact on flows from the Curren Tunnel than are shown by actual water measurements. (Ex. 2248 at 7, *cf.* Hinckley, Tr. 2477:2-22.)

  - The foregoing errors indicate the actual benefit to Rangen will be much smaller than the predicted benefit. (Ex. 2401 at 32; Hinckley, Tr.2446:23-2447:13, 2486:11-2487:10, 2513:11-22; Ex. 2401 at 10; Brendecke, Tr. 2773:11-2775:15.)

  - Based on the bias of ESPAM2.1 toward over-prediction of the impact of curtailment on groundwater discharge at Rangen, the effect of the unlimited curtailment sought by Rangen is likely to be substantially less than predicted by ESPAM2.1. (Hinckley, Tr. 2518:9-13; Brendecke, Tr. 2665:25-2667:9.)

- Rangen's measurement methodology of "sticking the weir" shares the same +/- 10% margin of error as the USGS stream gauges that were cited as justification for a 10 % trimline in prior delivery call cases. (Sullivan, Tr. 1429:12-1434:9-17; Luke, Tr. 1113:2-7, 1166:1-17.)

- Rangen's actual water measurements are inaccurate by more than 15% because of Rangen's use of unconventional and inaccurate rating tables. (Sullivan, Tr. 1429:12-1430:2.) The IDWR was not aware of the unconventional and inaccurate rating tables used by Rangen when it determined Rangen's measurement methodology to have a +/-10% margin of error. (Yenter, Tr. 556:21-557:1, 572:18-573:11, 585:9-12.)

2. AMEC Alternative Models.

ESPAM2.1 makes a number of assumptions of local hydro-geologic conditions at Rangen that are poorly reflective of actual conditions. Dr. Brendecke made a few localized adjustments to ESPAM2.1 to determine what effect they might have on model results. Rangen attempts to turn these "alternative models" in its favor by asserting that they generate curtailment predictions that are "similar to those shown by ESPAM 2.1." (Rangen Br. 72.) Rangen either misunderstands the purpose of the alternative models (still), or is committed to deliberately misrepresenting them.

The alternative models generate curtailment predictions similar to ESPAM2.1 *only under model-wide curtailment runs*. Yet, they were not constructed or intended to test model-wide curtailment. Their purpose was to explore how local changes to the model might affect local predictions. Due to time and resource constraints, only a few parameters for cells in the immediate vicinity of Rangen were recalibrated. With these adjustments, which did not address or resolve many of the model uncertainties at Rangen, curtailment within the 10 percent trimline generated curtailment results that show substantially less water accruing to Rangen than is predicted by ESPAM2.1. The alternative models were not intended to replace ESPAM2.1, but to illustrate that inaccurate assumptions in the model can significantly affect its predictions.

Since the alternative models were not calibrated across the entire model domain, it is not surprising that model-wide curtailment runs produced results similar to ESPAM2.1, nor does it provide a reliable test of the accuracy of ESPAM2.1. Dr. Brendecke explained this upfront in his opening report:

> The aim of this effort is not to present a definitive reformulation of ESPAM2.1, but to illustrate how a few relatively minor changes to its conceptual structure, suggested by detailed hydro-geologic review, could result in significantly different conclusions from a curtailment analysis. In order for either of these alternative conceptual models to be fully developed, it would be necessary to perform similar analyses at other spring complexes as were presented in the foregoing sections of this report and to extend the reach of calibration from that used herein. Nevertheless, the results of these preliminary steps at more realistic representation of local

> hydrogeology illustrate the potential for significant conceptual uncertainty in the application of ESPAM2.1 to localized problems.

(Ex. 2401 at 42.)

Rangen also attempts to verify the reliability of ESPAM2.1 predictions for Rangen by asserting that the "Mud Lake error provided an unintentional water balance and uncertainty analysis demonstrating the robustness of ESPAM 2.1." (Rangen Br. 71.) While the Mud Lake error may demonstrate an unintentional uncertainty analysis, it does not prove accuracy for Rangen. In fact, just the opposite is true. Even though the error occurred hundreds of miles away from Rangen, it had a surprising impact on ESPAM 2.1 parameters at Rangen, as shown in Table 4.10 of Exhibit 2401. (Ex. 2401 at 95)

3. The name "Martin-Curren Tunnel" refers to the man-made tunnel above Rangen, not Billingsley Creek or the other springs near Rangen.

Rangen advances the theory that the name "Martin-Curren Tunnel" refers to the entire Rangen spring complex and to Billingsley Creek as opposed to the man-made tunnel above Rangen. (Rangen Br. 10-32.) Rangen's obvious objective is to obtain authorization to divert water from Billingsley Creek, even though its water rights do not identify Billingsley Creek as a source or include a point of diversion on Billingsley Creek. This contrived argument fails because it contradicts the plain meaning of the word tunnel, the IDWR Adjudication Rules, and common usage of the name Martin-Curren Tunnel.

A. Tunnel means tunnel.

The word "tunnel" means: "An underground or under-water passage. 1. To make a tunnel under or through. 2. To dig in the form of a tunnel." *American Heritage Dictionary* (1981) at 742. It does not mean spring, spring complex, or Billingsley Creek, as Rangen contends. The Director should interpret the name Martin-Curren Tunnel to refer to the tunnel itself, consistent with the defined meaning of the word "tunnel".

B. Rangen's theory that the name Martin-Curren Tunnel refers to Billingsley Creek violates IDWR Adjudication Rules.

Rangen contends Adjudication Rule 60.02.c opens the door to allow the Director to evaluate whether "Martin-Curren Tunnel" refers to "the spring water that forms the headwaters of Billingsley Creek" as opposed to the tunnel itself.[1] (Rangen's Br. 12-13.) This argument is misplaced.

[1] The Adjudication Rules are found at IDAPA 37.03.01.

Adjudication Rule 60.02.c reads, in relevant part: "For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle map. If no official name has been given, the name in local common usage should be listed." (Adjudication Rule 60.02.c.i; emphasis added.) Billingsley Creek is officially listed on the USGS quad map; therefore, Rangen was required by law to identify Billingsley Creek as the source of its diversion from Billingsley Creek.

The Director should interpret Rangen's SRBA decrees consistent with Adjudication Rule 60 by ruling that as a matter of law the name Martin-Curren Tunnel, as used to describe the source of Rangen's water rights, excludes Billingsley Creek.

C. Rangen's failure to follow Idaho law does not create a latent ambiguity in the meaning of Martin-Curren Tunnel.

Rangen claims its historic use of water from Billingsley Creek creates a latent ambiguity in the meaning of the term Martin-Curren Tunnel. (Rangen's Br. 15-20.) The latent ambiguity doctrine is not so generous.

There would be no debate about the meaning of Martin-Curren Tunnel if Rangen had properly claimed two points of diversion from two different sources as the Adjudication Rules require. The Adjudication Rules instruct water users to identify multiple points of diversion if "the claim is for a single water delivery system that has more than one (1) point of diversion, of the claim is for a single licensed or decreed water right that covers more than one (1) water delivery system." (Rule 60.02.d.v.) If the points of diversion are from different sources, the Rules instruct water users to identify each source. (Rule 60.02.c.ii.)

In other instances where a tunnel and natural springs are located within the same 10-acre tract, the SRBA court has identified multiple sources of water. For example, water right number 36-7071 identifies sources from the Hoagland Tunnel and Weatherby Springs which are in the same 10-acre tract, (See ***Appendix A*** attached hereto.) Similarly, water right number 36-131 identifies "Spring 8" and "Spring 9" as separate sources and states that there are two points of diversions within the 10-acre tract. (See ***Appendix B*** attached hereto.)

The reality is that Rangen failed to properly claim its point of diversion from Billingsley Creek. Rangen argues that this error is justified because different names were used in its applications to appropriate water rights 36-2551 and 36-7694. That' excuse lacks any legal support. The SRBA provided an opportunity to correct any deficiencies or errors in its water rights. Regardless of what occurred when IDWR licensed water rights, Rangen had duty to file SRBA claims in accordance with the Adjudication Rules.

The SRBA court did not instruct Rangen to not claim its point of diversion on Billingsley Creek; Rangen did that on its own. Rangen cannot now bootstrap its error into a water right that is better than what is shown on its decrees. The solution for Rangen is to either seek to set its partial decrees aside and amend its claims for water rights 36-2551 and 36-7694 in the SRBA, or file a transfer application with the IDWR. It is not the Director's duty to stretch the doctrine of latent ambiguity beyond reason, and ignore the Adjudication Rules, to fix Rangen's error by effectively amending its decrees.

It is noteworthy that Rangen relied on strict reading of Adjudication Rule 60.02.c to persuade the Director to administer the Martin-Curren Tunnel as a surface water source, arguing that if IGWA believed otherwise it should have raised it in ESPA. *Rangen, Inc's Br. in Support of Mot. for Partial Summ. J. Rel Source* at 2 (Feb. 8, 2013.) It cuts both ways.

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

Even if the Director were to consider common usage of the name Martin-Curren Tunnel, the evidence shows it is used almost universally to refer to the tunnel specifically.

First, all of the other water rights whose source is Martin-Curren Tunnel divert water from the tunnel only.[2] As used on these water rights, the source Martin-Curren Tunnel is clearly limited to water from the tunnel itself.

Second, the name Martin-Curren Tunnel was formulated long before Rangen came into existence. (Ex. 2361.) The 1931 High & Fritchman decree explains the original water rights from the tunnel were diverted "above the head waters of Billingsley Creek, by means of a tunnel commonly known as the Curren Tunnel, or Curren Spring." (Ex. 1027A at 113.) These water rights received water from the tunnel only.

Third, under Rangen's theory that Martin-Curren Tunnel means the entire Rangen spring complex, the tunnel itself would have no name at all. This is illogical. The tunnel is a distinct, well-known geographic feature that was naturally given a name.

Fourth, essentially all of the witnesses who testified at the hearing, including Rangen's own witnesses, used the name Curren Tunnel or Martin-Curren Tunnel to refer to the tunnel specifically, and used other terms such as "lower springs," "talus flows," and "Rangen spring complex" to refer to the natural springs in the Rangen area. Of particular note is Dr. Brockway's opening

[2]Water right nos. 36-134A, 36-134B, 36-134D, 36-134E, 36-102, 36-135A, 36-135B, 36-135D, 36-135E, 36-10141A, 36-10141B.

expert report, submitted before Rangen developed its novel naming theory, which states: "Water delivered to the Research Hatchery is supply by the Curren Tunnel and spring water issuing from the talus slope beneath the tunnel." (Ex. 1284 at 8.)

It is absurd to think the name Martin-Curren Tunnel refers to something other than the tunnel itself. Just as Palisades Reservoir refers to a reservoir, and Snake River refers to a river, Martin-Curren Tunnel refers to a tunnel.

The coaxed testimony of Lynn Babbington (Rangen Br. 20-21; Tr. 190:19-191:2) is ambiguous at best, and does not overcome the far more universal use of the name Martin-Curren Tunnel to refer to the tunnel specifically. Therefore, even if the Director considers common usage of the name Martin-Curren Tunnel he should conclude that it refers to the tunnel specifically, and not Billingsley Creek or the other natural springs at Rangen.

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

Rangen argues the Director must interpret "Martin-Curren Tunnel" to mean the entire Rangen spring complex, including Billingsley Creek and irrigation return flows, because Rangen has historically measured flows from all of those sources. (Rangen's Br. 16-18.) The measurement of water, however, does not define the name of a source. The Adjudication Rules say nothing about naming sources based on where measurements are taken.

Rangen points out that IDWR has inspected and approved its water measurements. (Rangen's Br. 16-17.) Again, however, this does not change the meaning of the name Martin-Curren Tunnel. The IDWR did not instruct Rangen to measure flow at the outlet of its facility; Rangen asked for permission to do that. (Ex. 1029 at 52.) When Cindy Yenter and Brian Patton checked Rangen's water measurements, they were investigating the measurement protocol, not scrutinizing Rangen's decreed source.

Rangen also notes that the Second Amended Order of May 19, 2005, acknowledges Rangen's measurement locations in the CTR Raceways and on Billingsley Creek at the Lodge Dam. (Rangen's Br. 17.) However, this was a finding of fact made before any evidentiary hearing, and not in response to an argument that Rangen's SRBA decrees do not include a point of diversion on Billingsley Creek. This finding simply demonstrates that the source and point of diversion issue had not been brought to Director Dreher's attention.

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

For these reasons, the Director must conclude that the name Martin-Curren Tunnel refers to the unique tunnel at Rangen, and not Billingsley Creek or irrigation return flows or the various natural springs near Rangen—some of which are used by Rangen and some of which are not—that are included in Rangen's water measurements.

4. Rangen's point of diversion is within the designated 10-acre tract shown on its water rights, not the tract itself.

Rangen's arguments concerning source are predicated on the creative notion that it its "decreed point of diversion is a ten-acre tract that encompasses all of the springs that form the headwaters of Billingsley Creek." (Rangen Br. 22, emphasis in original). Rangen cites no legal authority for this assertion, and it defies logic, the Adjudication Rules, and SRBA practice.

Under Idaho law, a water right cannot be appropriated without a physical diversion of water from a natural waterway. *State v. United States in Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, Subcase No. 36-1545*2, 134 Idaho 106, 996 P.2d 806 (2000) at 111. The "point of diversion" is the location where water is physically diverted. SRBA partial decrees describe each point of diversion "to the nearest forty (40) acre tract (quarter-quarter section) or government lot number." (IDAPA 37.03.01.60.d.i.) The phrase "to the nearest" reflects the fact that the physical point of diversion is located *within* the designated 40-or 10-acre tract. The IDWR created maps for each water right adjudicated in the SRBA that identify with a yellow dot the discrete point of diversion within the designated 40- or 10-acre tract.

The use of the Public Land Survey System to describe where the point of diversion is located does not authorize the water right owner to divert water from any place within the 40- or 10-acre tract. Judge Barry Wood made this clear in his *Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*, SRBA Subcase Nos. 36-2708 & 36-7218 (Fifth Jud. Dist., Twin Falls County) (August 15, 2000):

> . . . Clear Lakes' subjective intent as to which particular spring it was diverting from does not establish the source. The point of diversion establishes the source. Thus, in order to properly claim water from a particular spring, Clear Lakes would have had to physically divert the water from a particular spring, prior to it being co-mingled with the water discharged from the other springs.

(Emphasis added.)

This ruling is consistent with the IDWR policy for adding points of diversion, which requires the filing of a transfer application even if the new point

of diversion will be within the same 40- or 10- acre tract as the existing point of diversion. This is explained in IDWR Transfer Processing Memo No. 8, attached hereto as ***Appendix C***:

> In the case of a claim, license, or decree, a transfer is needed to change the tract in which a point of diversion is located or to add a point of diversion even if the point of diversion to be added is in the original tract described in the license or decree. A transfer is not needed to replace a point of diversion in the original tract if the original point of diversion will be abandoned.

The SRBA decrees for Rangen's water right numbers 36-2551 and 36-7694 describe a single point of diversion within the SWSWNW of Section 32 where the Martin-Curren Tunnel is located. If Rangen desires to add an additional point of diversion, it must file a transfer application with the IDWR.

5. Rangen does not have an authorized point of diversion or re-diversion for its headgate on Billingsley Creek.

Remarkably, Rangen goes so far as to assert a right to divert water from a location that is not even within the 10-acre tract identified on its water right decrees. Rangen's decreed point of diversion is in the SESWNW of Section 32. Rangen's headgate on Billingsley Creek is located in the SWSWNW of Section 32. Rangen claims nonetheless that it can divert water from its headgate on Billingsley Creek based on the idea that it "can have a source of water that is not within the tract identified for its point of diversion." (Rangen Br. 31.)

There is no logical or legal basis to divert water from points of diversion that are not identified on Rangen's water rights. Indeed, that would utterly subvert the purpose of the point of diversion element of the water rights. It would require the Director to effective re-write Rangen's decrees, something he has no authority to do.

Dr. Brockway's faulty estimation of the amount of water in Billingsley Creek that originates within the SESWNW does nothing to change the fact that Rangen has no authorized point of diversion in the SWSWNW of Section 32. Moreover, his estimation is highly speculative and hardly reliable. He did not actually measure the spring flows in the SESWNW, nor did he attempt to quantify underflow to Billingsley Creek in the SWSENW. In fact, one of the springs he did quantify was based on "eyeballing it" as opposed to actual measurements. (Tr. 1054:15-1055:5.)

Rangen also contends that it should be able to call for the delivery of water to its headgate on Billingsley Creek based on the assertion that Billingsley Creek is part of its conveyance system. (Rangen Br. 19, 25, 28-29.) This argument fails for two independent reasons.

First, even if Billingsley Creek were used to convey water from the Martin-Curren Tunnel, Rangen's delivery call would still be limited to water from the Tunnel.

Second, Rangen's water rights do not include a point of injection or point of re-diversion on Billingsley Creek. Under Idaho law, once water enters a natural waterway it becomes part of the public water supply and available for appropriation. Water can be transported through natural waterways, but only if the water user maintains control and dominion over it. These types of water rights have defined points of injection and re-diversion and require strict measurement of water transported through the natural waterway.

Rangen contends it channels water from the Rangen Box to Billingsley Creek, yet Rangen does not measure water exiting the Rangen Box, and much of the water that exits it sinks underground or mingles with other sources before reaching Rangen's headgate on Billingsley Creek, making it impossible for Rangen to maintain control over it. (*See* photo at bottom of Rangen Br. 29.) Therefore, Rangen has no legal authority to transport water from the tunnel through Billingsley Creek.

If Rangen desires to add its headgate on Billingsley Creek as an authorized point of re-diversion for water from the Martin-Curren Tunnel, it must file a transfer application. (Luke, Tr. 1175:6-9.) To add Billingsley Creek as an additional source of water, Rangen would need to file an Application for Permit and obtain a new water right. (Luke, Tr. 1175:10-23.) Or, Rangen can seek to amend its partial decrees through the SRBA. Until that occurs, the Director must limit Rangen's delivery call to water from the Martin-Curren Tunnel, and must consider the effect of junior groundwater pumping on flows from the Tunnel only.

6. Standards of Proof.

Rangen contends "the possibility of any error in the process of making a call should be borne by the juniors." (Rangen Br. 6.) This is an overstatement of the Idaho Supreme Court decision in *In re Delivery Call of A&B Irrigation District*, 153 Idaho 500 (2012). While that decision requires juniors to prove no material injury by clear and convincing evidence, it does not impose that standard or burden on every decision the Director must make in responding to a delivery call under the CM Rules.

The clear and convincing standard applies only to decisions that change the decreed elements of water rights: "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *Id*. at 524. In contrast, determinations that do not change decreed elements, such as reasonable use of water and reasonable means of diversion, are subject to the preponderance

of the evidence standard that normally governs administrative decisions. The Idaho Supreme Court explained this distinction in *AFRD2*:

> 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. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42-1411(2)(a)-(j). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912). Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.

143 Idaho at 876-77. Thus, determinations involving reasonable use of water and the impacts of junior pumping, including applicability of a trimline, are to be based on the preponderance of the evidence.

7. Reasonable Means of Appropriation.

Citing CM Rule 40.03, Rangen contends the Director must consider three issues in responding to its delivery call: "(1) whether the petitioner is suffering "material injury"; (2) whether the petitioner is diverting water efficiently and without waste; and (3) whether the respondent junior-priority water right holders are using water efficiently and without waste." (Rangen Br. 4.) Conveniently, Rangen leaves out a fourth consideration prescribed by CM Rule 40.03:

> In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a or 040.01.b, the Director shall consider whether the petitioner making the delivery call is <u>suffering material injury</u> to a senior-priority water right and is <u>diverting and using water efficiently and without waste</u>, and in a manner **consistent with the goal of reasonable use of surface and ground waters as described in Rule 42**. The Director will also consider whether the respondent junior-priority water right holder is <u>using water efficiently and without waste</u>.

(Emphases added.) Even if the Director finds Rangen is suffering material injury, he must determine the extent to which administration by priority is in keeping with the goal of reasonable use water resources.

Acknowledging this, Rangen argues that "IGWA and Pocatello have not proven by clear and convincing evidence that Rangen's diversion structure is unreasonable." (Rangen Br. 54.) As mentioned above, the reasonableness of

Rangen's means of diversion is not decreed in the SRBA, and is therefore subject to the preponderance of the evidence standard.

Moreover, as explained on pages 27-29 of *IGWA's Post-Hearing Brief*, the evidence does persuasively show Rangen's means of appropriation is unreasonable because, if protected, it will unreasonably impede beneficial use of the ESPA. It is not that the Martin-Curren Tunnel is leaky or unlawful to use, but that the only way to sustain the delivery of water to Rangen through the Tunnel is to convert the entire Snake River Plain from sprinkler back to flood irrigation, breach the Palisades Dam and run water through canals during the winter when it is not needed, and dry up more than a half-million groundwater irrigated acres. Even by the clear and convincing standard, Rangen's means of appropriation unreasonably impedes the constitutional right of Idahoans to appropriate unappropriated water.

It bears mentioning that the reasonableness of Rangen's means of diversion is not contingent upon the availability of alternative means of diversion. Even if Rangen did not have the options of drilling deeper into the ESPA or recirculating water through its facility, its means of diversion still unreasonably impede beneficial use of the ESPA. In *Schodde,* for example, the senior's water wheels were deemed unreasonable even though he had no other way to get water to his property:

> it is now impossible for plaintiff to so arrange or change his said dams or water wheels or flumes, or to build or construct other dams or water wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff has not been able to irrigate said lands or any part thereof or to raise profitable crops thereon or to use the same as pasture lands, and will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon, as long as defendant's dam is maintained; that there is no other supply of water available for use upon said lands except the waters of Snake river; that by reason of the backing up of said water and stopping the plaintiff from using said water wheels to raise the waters of Snake river to and upon said lands and cutting off the water supply from plaintiff's lands he has been damaged in the aggregate sum of $56,650.

8. Alternative Means of Appropriation.

Rangen contends that "IGWA and Pocatello have offered no legal authority to support the proposition that a surface water user can drill a well to make up for lost surface water flows." (Rangen Br. 55.) The authority is found in CM Rule 42.01.h:

> The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

In *AFRD2* the Idaho Supreme Court explicitly upheld the Director's authority under this rule to "compel[] a surface user to convert his point of diversion to a ground water source." 143 Idaho at 870.

Rangen complains there are "very serious legal questions as to whether Rangen could ever receive permission to drill this type of well." (Rangen Br. 57.) Of course, Rangen has not tried, nor presented any evidence to prove that it cannot obtain an additional point of diversion. Groundwater pumpers file transfer applications any time a well must be relocated because of collapse or other reasons. Rangen can do the same, and should, under CM Rule 42.01.h.

Rangen criticizes IGWA for not obtaining the permits or easements needed for Rangen to drill a horizontal or vertical well, claiming as a result that IGWA has not met its burden of demonstrating that drilling wells is a reasonable means of improving its water supply. (Rangen Br. 56-57.) That is not the standard. It is the senior's duty to use water efficiently, reasonably, and without waste before seeking to curtail junior rights. IGWA has proven to a high degree of probability that Rangen could drill horizontal or vertical wells to access the prolific ground water supply at Rangen. That is enough. It is now Rangen's obligation to make such improvements, or demonstrate why it can't be done. This is the protocol used in the A&B delivery call case, which the Idaho Supreme Court approved of. 153 Idaho 500, 514 (2012).

Rangen argues that drilling a horizontal well at a lower elevation will likely de-water the tunnel which may impact other water rights from the Tunnel. This speculation is not a valid excuse. IGWA is already mitigating the other rights from the Tunnel via the Sandy Pipe.

Finally, Rangen infers that a tunnel at a lower elevation won't work: "Hinckley theorizes that there would be a 'net gain' by drilling a horizontal tunnel." (Rangen Br. 58.) But Hinckley isn't alone. SPF Water Engineering, an engineering firm hired by Rangen, also concluded there would be a net increase in flow to Rangen:

> One alternative for increasing spring flows to the Rangen facility would be to construct a horizontal well in the vicinity of, but at an elevation below, the Curren Tunnel. The purpose of the horizontal well would be to tap ground water in the vicinity of the Curren Tunnel, but doing so in the context of decreased local ground water levels. Such a horizontal well in the vicinity of the Curren Tunnel

> could be considered a "well deepening" of the current Curren Tunnel discharge point.
>
> The major benefit of a horizontal well is this: if successful, a horizontal well could provide substantial increase in flow to the Rangen facility without requiring new water rights, mitigation for potential new withdrawals from vertical wells located at the Rangen facility, or ongoing operational costs and water quality concerns associated with various pump back strategies.

(Ex. 1199 at 13, emphasis added) Rangen should be required to heed its engineer's recommendation before seeking to curtail junior water rights.

9. Hydraulic Connectivity.

Citing SRBA General Provision 5, Rangen argues that "as a matter of law, the interconnection between Rangen's spring water flows and junior-priority ground water pumping in the Eastern Snake Plain Aquifer has been established." (Rangen Br. 61.) This is true in the sense that it makes all groundwater rights from the ESPA subject to conjunctive administration, but it does not preclude the Director from evaluating the extent of interconnection and the degree of confidence he has that curtailment will materially benefit Rangen.

SRBA General Provision 5 for Basin 36 states: "Basin 36 water rights for surface and ground water, and Snake River water rights will be administered conjunctively, pursuant to law, with due consideration as to the actual impacts of ground water diversions on senior water rights." (Emphasis added.) Accordingly, the Supreme Court ruled in *AFRD2*,

> a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.
>
> . . .
>
> 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."

143 Idaho at 877 (citing *A&B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 422 (1997)).

10. Material Injury.

Rangen contends that material injury is not about its need for water: "Rangen's 'need' for water is not the correct characterization of the legal issue

that needs to be decided. The more accurate issue presented is whether Rangen can put the water to beneficial use." (Rangen Br. 45.) This argument presumes that running water through Rangen's raceways constitutes beneficial use, even if the water is not needed to raise fish. That is not the law. In Idaho, a water user is entitled to only as much water as is reasonable needed to accomplish his or her beneficial use: "It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it." *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207 (1926).

As a practical matter, this is enforced more strictly in some circumstances than others. For example, during periods of heaving spring runoff surface water uses are often encouraged to divert more water than is needed for their crops in an effort to minimize flood risks. In contrast, when it comes to shutting off junior water rights, seniors are held to the amount of water actually needed to accomplish their beneficial use, and no more: "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44 (1915); *see also Munn*, 43 Idaho at 207 ("No person is entitled to use more water than good husbandry requires") and Idaho Code § 42-101 (requiring "economical use, by those making a beneficial application of the same").

Rangen points to the statement in *AFRD2* that the CM Rules "may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place." (Rangen Br. 5, quoting *AFRD2*, 143 Idaho at 878.) This statement must be read in conjunction with the holding in *AFRD2* that the Director is not to presume material injury, but must consider "how much water is actually needed." *Id*. at 877-78. "The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id*. at 878.

For example, the Director is to presume a farmer is entitled to divert water at the maximum rate during the entire season of use, but he must look at how the farmer actually uses water to determine if and when the full rate is needed. If a farmer is raising grain that is harvested in late July or early August, there is no need for water thereafter, even though the season of use extends months later.

Similarly, if a farmer has a water right for 100 acres, but for business reasons chooses to irrigate only 50, he has no right to call for the delivery of water to the 50 acres that are not cultivated. As stated in *AFRD2*, "If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional

requirement that priority over water be extended only to those using the water." 143 Idaho at 876.

The issue in this case is much water Rangen legitimately needs to accomplish its beneficial use. Rangen argues that this determination "must be examined in the context of Rangen's historical use of the water and not what it 'needs' now that it is only receiving 12 cfs out of its decreed rights of 76 cfs and has reduced its operation because of the reduction." (Rangen Br. 45.) IGWA partly agrees with this. If curtailment would provide 76 cfs to Rangen, the Director should evaluate how Rangen would use the additional water. But in this case that would be a meaningless exercise, since curtailment is likely to provide Rangen with only 5-7 cfs with no trimline, and substantially less if a trimline is implemented. (*See* IGWA's Proposed FF 90-93, 97-99.) The issue here is whether this small amount of water would make any difference to Rangen's aquaculture operations.

Rangen claims junior users have not proven by clear and convincing evidence that Rangen is not likely to produce more fish or research with the small amount of additional water it may receive from curtailment. According to Rangen, the evidence presented by juniors is to nothing more than "theories." (Rangen Br. 44.)

IGWA accepts its burden of demonstrating by clear and convincing evidence that Rangen does not need the additional water it may receive from curtailment to accomplish its beneficial use, but how much better evidence can you get than the fact that Rangen is raising far fewer fish than it could with its current water supply? It is not a theory that Rangen could raise more fish simply by ordering more eggs for each fish lot. (Woodling, Tr. 1306:24-1307:7.) It is not a theory that Rangen could raise more fish by raising more cycles of fish, as it has in the past. (Woodling, Tr. 1302:5-18; Rogers, Tr. 1833:14-23, 1863:20-25.)

Not only that, the evidence shows *why* Rangen does not maximize fish output. Rangen admitted that it does not like to compete with commercial fish producers who buy Rangen fish feed, and that Rangen has made a business decision to not lease other facilities like it did when it was producing fish commercially. (Kinyon Tr. 512:6-11; Tate Tr. 878:7-16, 880:13-22.) Rangen admitted that it decides how many eggs to purchase and how often based on how many fish it needs to meet its contract with Idaho Power, as opposed to how many it can raise with its water supply. (Kinyon, Tr. 482:9-14.) Rangen admitted that its contract with Idaho Power is more profitable than raising fish for commercial purposes. (Kinyon, Tr. 527:16-17; Tate Tr. 901:11-14.) And Rangen admitted that it currently receives sufficient water to meets its contract obligations to Idaho Power. (Courtney, Tr. 531:18-23, 532:9-13; Kinyon, Tr. 507:3-10; Ramsey, Tr. 701:8-14.)

Despite the foregoing, Rangen contends it would raise more fish if it had more water. (Rangen Br. 46.) This begs the question of why Rangen has not adjusted its operation to raise more fish with its current water supply. The fact that Rangen has raised far fewer fish over the last decade than it is capable of, combined with its admission that it does not want to compete with commercial fish producers, clearly demonstrates that Rangen's delivery call is not about water. Rangen cites the testimony of Joy Kenyon that Rangen thoroughly understands the fish market, that producing its own feed provides a competitive advantage, and that Rangen is in the best position to judge its ability to sell fish, but this only reaffirms that Rangen's underproduction with its current water supply is deliberate. (Rangen Br. 47-48.).

Rangen's bare allegation that it would raise more fish is not enough. If Rangen truly intended to maximize fish production, it could have easily explained what it does to produce as many fish as possible with its current water supply, and how many more fish it would raise with an additional 1, 5, or 10 cfs. Rangen is the only party in a position to explain why it doesn't raise as many fish as it could now, and what it would do differently to raise more fish with more water, yet the record is devoid of any such evidence.

Rangen makes a point to argue that its decision to raise fish for conservation purposes is reasonable, even though that requires lower flow and density indexes, and IGWA does not disagree. It is not Rangen's decision to raise fish for Idaho Power that is unreasonable; it is Rangen's effort to curtail beneficial water use under junior rights to purportedly obtain more water when Rangen isn't using its current water supply efficiently. Even within the Idaho Power flow and density indices, Rangen could raise thousands of more fish, if that is its objective.

Rangen states that Lonnie Tate testified that "when ordering eggs his goal is to raise as many fish as he can and still meet the IPC density and flow indices." (Rangen Br. 53.) However, Mr. Tate admitted on cross-examination that he orders just enough eggs to meet the Idaho Power contract, with ample cushion to account for mortality. (CITE.) This is most evident by the fact that Rangen orders only 60,000 eggs in its third lot, even though that lot does not have the flow and density indices of the first and second lots where Rangen orders 125,000 eggs.

Moreover, the record shows that Rangen is not particularly careful about measuring and managing its water supply, and that it has in recent years been more concerned with setting itself up for a delivery call than making full beneficial use of its available supplies.

Rangen's bare allegation that it would raise more fish if it had more water wilts in light of the evidence in the record. Having proven not only that Rangen does not raise as many fish as it could, but also why, there is nothing left to show, short of an admission by Rangen that it does not need any additional water (and

doesn't want the leverage curtailment provides). The clear and convincing standard does not require an admission of guilt, so to speak, but evidence that is highly probable.

The evidence presented meets that standard. It is certain (not just highly probable) that Rangen raises far fewer fish than it is capable of with its current water supply, that it self-limits production to avoid competing with commercial fish producers, that its contract with Idaho Power is more profitable than commercial production, that it can meet its obligations to Idaho Power with its current water supply, and that it receives sufficient water to perform any research it desires in the Greenhouse. Based on this, it is highly probable that the small amount of additional water Rangen can expect to receive from curtailment will not cause it to undertake intensive fish culture practices and jeopardize its relationship with commercial fish producers whose feed purchases generate 95% of the revenue of Rangen's aquaculture division.

11. Rangen Research.

Rangen admits that research is "part of its feed marketing strategy," but points out that Rangen has also made important advancements that are used throughout the aquaculture feed industry. (Rangen Br. 10.) IGWA does not dispute the value of research performed by Rangen. What matters for this proceeding is that Rangen is not prevented due to lack of water from performing any research it desires.

Rangen points out that during Mr. Babbington's tenure with Rangen, research "was done primarily in the large raceways." (Rangen Br. 41.) This is not surprising, since the greenhouse had not yet been constructed. Mr. Babbington left Rangen in 1991; the Greenhouse was constructed in 1992. Thereafter, there was no need to conduct research in the Large Raceways because Rangen had a dedicated research facility that was superior to the large raceways for performing scientific aquaculture tests.

While additional water may enable Rangen to conduct more research in the Large Raceways for marketing purposes, it is not needed for legitimate scientific research purposes.

12. Efforts to Divert Water from the Source.

Rangen claims it "has made substantial efforts to divert water for use at the Rangen research hatchery." (Rangen Br. 44.) Rangen cites as the basis for this the fact that it has installed few pipes and a collection box. *Id.* at 25-28. Such efforts pale in comparison to the effort and expense of nearby groundwater users to divert water from the source.

Rangen paid nothing to construct the Martin-Curren Tunnel, and has for the last half-century expended nothing to improve it, relying on gravity and high groundwater levels in the aquifer to obtain its water supply. Its collection box and pipes would have cost some money, but these were one-time expenditures with no operating costs and little if any ongoing maintenance costs. This is hardly "substantial" compared to the millions of dollars spent annually by the farmers Rangen seeks to curtail to pump water from the aquifer. Tim Deeg testified that he incurs costs of approximately $120 per acre to divert water from the ESPA for irrigation purposes. Assuming all of the juniors that Rangen seeks to curtail expend similar costs, they collectively spend nearly $68 million annually to divert water to irrigate the 565,000 acres Rangen seeks to curtail.

This further illustrates why it is reasonable to require Rangen to improve its diversion and conveyance system before seeking to curtail junior water use.

13. Effects of Curtailment.

Rangen argues the "Director should strike evidence of the economic impact of curtailment." (Rangen Br. 57-59.) By this, Rangen is asking the Director to ignore economic issues that may bear on the reasonableness of its means of appropriation. The *Clear Springs Foods* decision did not go so far. While it does provide that water is not to be administered based on who makes the most profit from it, it does not prohibit the Director from considering economic data that may bear on whether it is reasonable to require the senior to improve its means of diversion or conveyance, or whether administration by priority will unreasonably impede beneficial use of the resource.

As explained on pages 21-17 of *IGWA's Post-Hearing Brief*, whether Rangen's means of diversion is reasonable depends on whether protecting it will unreasonably impede beneficial use of the ESPA. If juniors could readily adapt to a curtailment order by drilling deeper into the aquifer or other measures, Rangen's means of diversion may not unreasonably impede beneficial use of the ESPA.

Similarly, CM Rule 42.01.b instructs the Director to consider the "effort or expense of the holder of the water right to divert water from the source." Whether it is reasonable to require Rangen to incur the cost of improving its diversion or conveyance system before seeking to curtail junior right depends in part on whether it is economically reasonable. In making that determination, it is not inappropriate for the Director to consider the economic effects of curtailment.

Of course, Rangen is adamantly opposed to the Director being aware of the adverse effects of curtailment because they expose the unreasonableness of protecting Rangen's means of appropriating overflow from the ESPA which cannot be sustained without eliminating irrigation of 565,000 acres, scrapping sprinkler systems and reverting to flood irrigation across the Eastern Snake River

Plain, and removing the Palisades Dam so water can be run through canals during the winter when nobody needs it.

14. Efficient Use of Water by Juniors.

Rangen contends the Director must presume juniors are not using water efficiently unless and until juniors prove otherwise. Rangen states: "Evidence of efficient use is a prerequisite for any junior user that wants to be excluded from curtailment," then asserts that "IGWA and Pocatello have not demonstrated that they or any of IGWA's members are using water efficiently and without waste," and that the Director should as a result "rule in favor of Rangen on this issue." (Rangen Br. 60.)

Nothing in the CM Rules instructs the Director to presume juniors are using water efficiently to avoid curtailment, and Rangen has not cited legal authority to support this assertion. Under Rangen's theory, even if is not suffering material injury, juniors will be curtailed if they fail to put on evidence they are using water efficiently. This is absurd.

Rangen did not identify a single groundwater that it contended is using water inefficiently or wasting water. All Rangen could generate is evidence that IGWA does not regulate the efficiency with which its members use water. This is not IGWA's mission, and it does not prove its members are wasting water.

It is not realistic to expect IGWA to put on evidence of the irrigation efficiency of each of the 565,000 acres that Rangen seeks to dry up. If Rangen believes some junior user is wasting water, it was welcome to raise the concern. If the Director has reason to believe juniors are wasting water, and that such waste is affecting Rangen, he is welcome to explore it. Until then, there is no need to address the efficiency of junior water use. Juniors are not the ones seeking to curtail beneficial use of the ESPA.

Even if juniors had an affirmative duty to prove they use water efficiently, this burden was satisfied. IGWA's president, Tim Deeg, explained that groundwater users have a built-in incentive to use water efficiently because they pay for every drop of water they divert.

> There is a certain cost associated with pumping, that is, they are not going to just – you are going to pump just a minimum amount of water to get by. There has always been a perception by most surface users, that just by the flip, you love to go flip that switch on, and I don't believe – and we do not, believe me.

(Tr. 1752:11-1754:4.) He testified that the costs of operating, maintaining, and purchasing electricity to pump water is substantial, for him more than $100,000 per year, and that every pumper he knows does everything he can to use water as

efficiently as possible. (Tr. 1752:21-1754:4, 1763:10-16.) IGWA's members have a significant built-in incentive to use no more water than is absolutely needed.

In contrast, Rangen has no such incentive, which makes it so important to scrutinize how Rangen is using water, and which further explains why Rangen is not particularly concerned about maximizing beneficial use of the water it diverts.

Rangen mischaracterizes the record by stating: "Mr. Deeg also testified that there are no active programs to reduce pumping and that ground water pumpers never reduce pumping." (Rangen Br. 63-64.) This statement is taken out of context and ignores the rest of Mr. Deeg's testimony. He clearly stated that IGWA has undertaken many activities to collectively reduce ground water pumping from the ESPA, including conversion projects, drying up acres, and enrolling land in CREP and other water saving programs. (Tr. 1751:5-13, 1759:15-20, 1760:13-15.)

Without any evidence that juniors are using water inefficiently, and given the evidence that juniors are inherently motivated to use water as efficiently as possible, the Director must not conclude that junior priority water right holders are using water inefficiently or wasting water under CM Rule 40.c.

15. Pocatello's Brief

Pocatello notes the difficulty of analyzing material injury in light of the fact that all of Rangen's water measurement and fish production records are based partly on the use of water from a source (Billingsley Creek) and point of diversion that that are not authorized by its water rights. Pocatello correctly points out that the fish production evidence presented by Rangen "establishes what Rangen was capable of producing throughout the history of the facility if it relied on 40% more water than was ever available at the tunnel." (Pocatello Br. 2.) Pocatello suggests the Director should assume that he should disregard Rangen's ongoing use of water from Billingsley Creek in evaluating material injury. From IGWA's perspective this only exacerbates the problem of Rangen's water use, particularly since Rangen continues to use water from Billingsley Creek to raise fish. IGWA contends a better approach is to consider the beneficial use Rangen is actually making with the water it is actually diverting, but to limit its delivery call to water from the decreed source and point of diversion.

16. Futile Call.

Rangen reinforced that it would need to open more raceways in order to raise more fish, quoting the following testimony from Lonnie Tate:

> Q. (BY MR. MAY): Lonnie, would you be able to raise more fish at the Rangen hatchery if you had more water available?

A. Yes.

Q. And what do you base that on?

A. Well, more water, you could open more ponds, and more pond space means more fish."

(Tr. 868: 17-23.) Rangen's fish expert, Charlie Smith, also testified that Rangen would need to open more raceways to raise more fish:

Q. So in your opinion, if Rangen had more water available to fill up the empty raceways that it's got, would it be able to raise more fish?

A. Yes.

(Tr. 868: 10-13.) As explained on page 33 of *IGWA's Post-Hearing Brief*, this confirms that curtailment is futile.

CONCLUSION

Rangen's delivery call should be denied for the reasons set forth in *IGWA's Post-Hearing Brief*.

RESPECTFULLY SUBMITTED this 19th day of July, 2013.

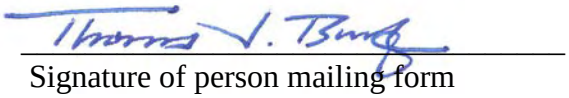
RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: _____

RANDALL C. BUDGE
THOMAS J. BUDGE
Attorneys for IGWA

CERTIFICATE OF MAILING

I certify that on this 19th day of July, 2013, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

Director, Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☒ Hand Delivery ☐ E-mail
Garrick Baxter Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
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Appendix A

36-7071 Water Right No. 36-7071
Partial Decree
Map

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

In Re SRBA	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
Case No. 39576	)	Water Right 36-07071

NAME & ADDRESS: DELORIS D JONES
JOHN W JONES JR
PO BOX 265
HAGERMAN ID 83332

SOURCE:		TRIBUTARY:
	WEATHERBY SPRINGS	BILLINGSLEY CREEK
	THREE SPRINGS	BILLINGSLEY CREEK
	HOAGLAND TUNNEL	BILLINGSLEY CREEK

QUANTITY: 73.05 CFS

THE APPROPRIATOR SHALL CONTINUOUSLY ALLOW 6.50 CFS FROM WEATHERBY SPRINGS TO BE DELIVERED INTO BAR S DITCH FROM THE OUTLET OF FISH OPERATION DESCRIBED ABOVE FROM MARCH 1 UNTIL NOVEMBER 1 OF EACH YEAR, AND SHALL CONTINUOUSLY ALLOW 4.00 CFS FROM WEATHERBY SPRINGS TO BE DELIVERED INTO THE BAR S DITCH FROM THE OUTLET OF FISH OPERATION DESCRIBED ABOVE FROM NOVEMBER 1 UNTIL MARCH 1 OF EACH YEAR.

PRIORITY DATE: 07/08/1969

POINT OF DIVERSION: T07S R14E S30 SESENW SENESW Within GOODING County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	FISH PROPAGATION	01-01 12-31	73.05 CFS

90 RACEWAYS

PLACE OF USE: FISH PROPAGATION Within GOODING County
T07S R14E S30 NESW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

B Wood

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

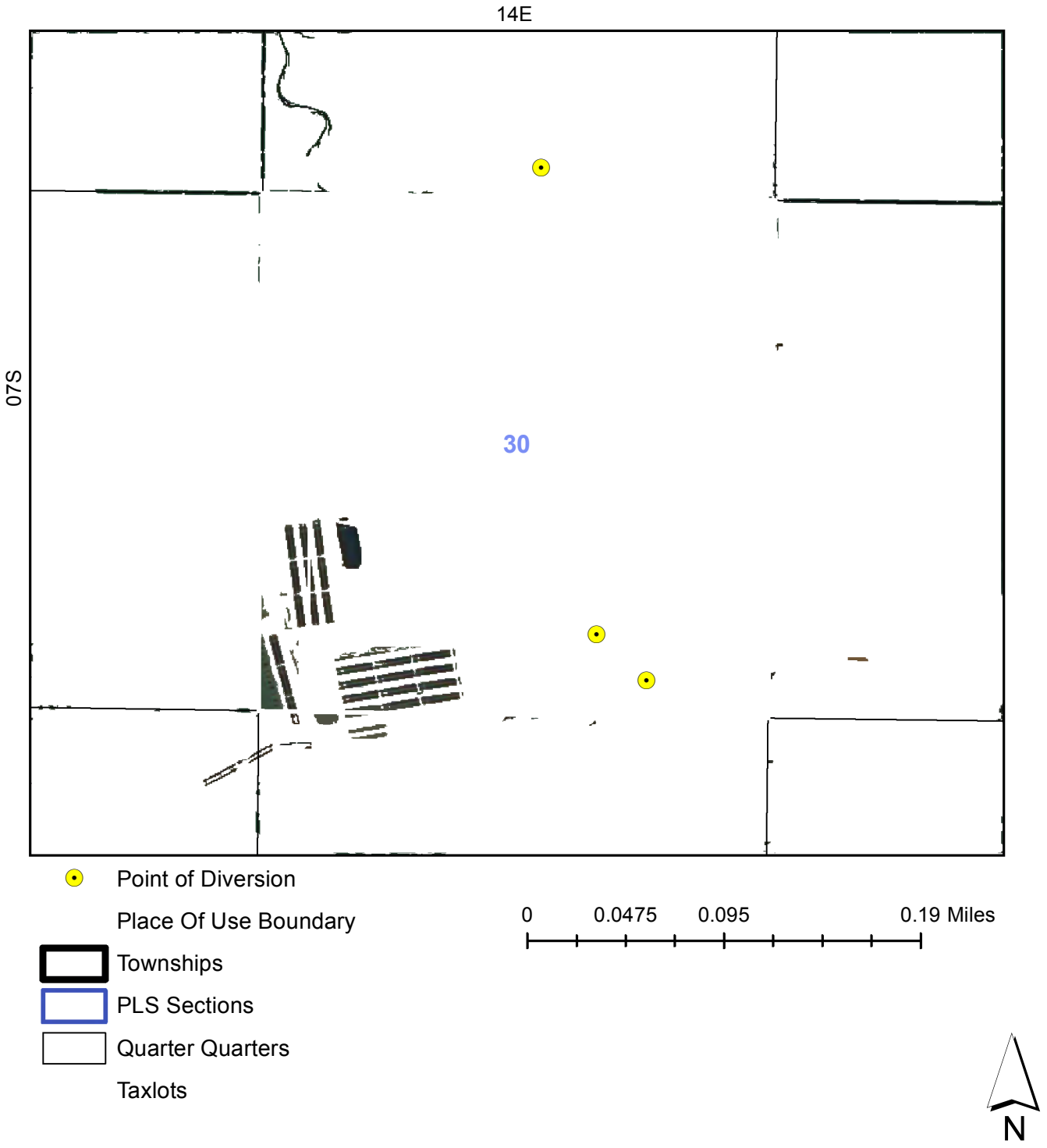
State of Idaho
Department of Water Resources

Water Right

36-7071

FISH PROPAGATION

The map depicts the place of use for the water use listed above and point(s) of diversion of this right as currently derived from interpretations of the paper records and is used solely for illustrative purposes. Discrepancies between the computer representation and the pemanent document file will be resolved in favor of the actual water right documents in the water right file.



Map produced on April 25, 2013

Appendix B

36-131 Water Right No. 36-7071
Partial Decree
Map

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

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-00131

1997 DEC 29 PM 4:55

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED

NAME & ADDRESS: US DEPT OF INTERIOR
FISH & WILDLIFE SERVICE REG 1
ATTN DIVISION OF ENGINEERING
911 NE 11TH AVE
PORTLAND OR 97232-4181

UNITED STATES OF AMERICA ACTING THROUGH
US DEPT OF INTERIOR
FISH & WILDLIFE SERVICE
911 NE 11TH AVENUE
PORTLAND OR 97232-4181

SOURCE: SPRING NO. EIGHT TRIBUTARY: RILEY CREEK
SPRING NO. NINE RILEY CREEK

QUANTITY: 1.00 CFS

FACILITY VOLUME 3889 CU.FT.
USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A TOTAL COMBINED FACILITY VOLUME OF 252,000 CU.FT.
COMBINED RIGHT NOS.: 36-00132 & 36-15447.

PRIORITY DATE: 06/15/1910

POINT OF DIVERSION: T08S R14E S06 NWNESE NENWSE Within GOODING County

TWO POINTS OF DIVERSION LOCATED IN NENWSE, S06, T08S, R14E.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	1.00 CFS

PLACE OF USE: FISH PROPAGATION Within GOODING County
T08S R14E S06 NWSE

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DANIEL C. HURLBUTT, JR.
PRESIDING JUDGE
Snake River Basin Adjudication

State of Idaho
Department of Water Resources

Water Right

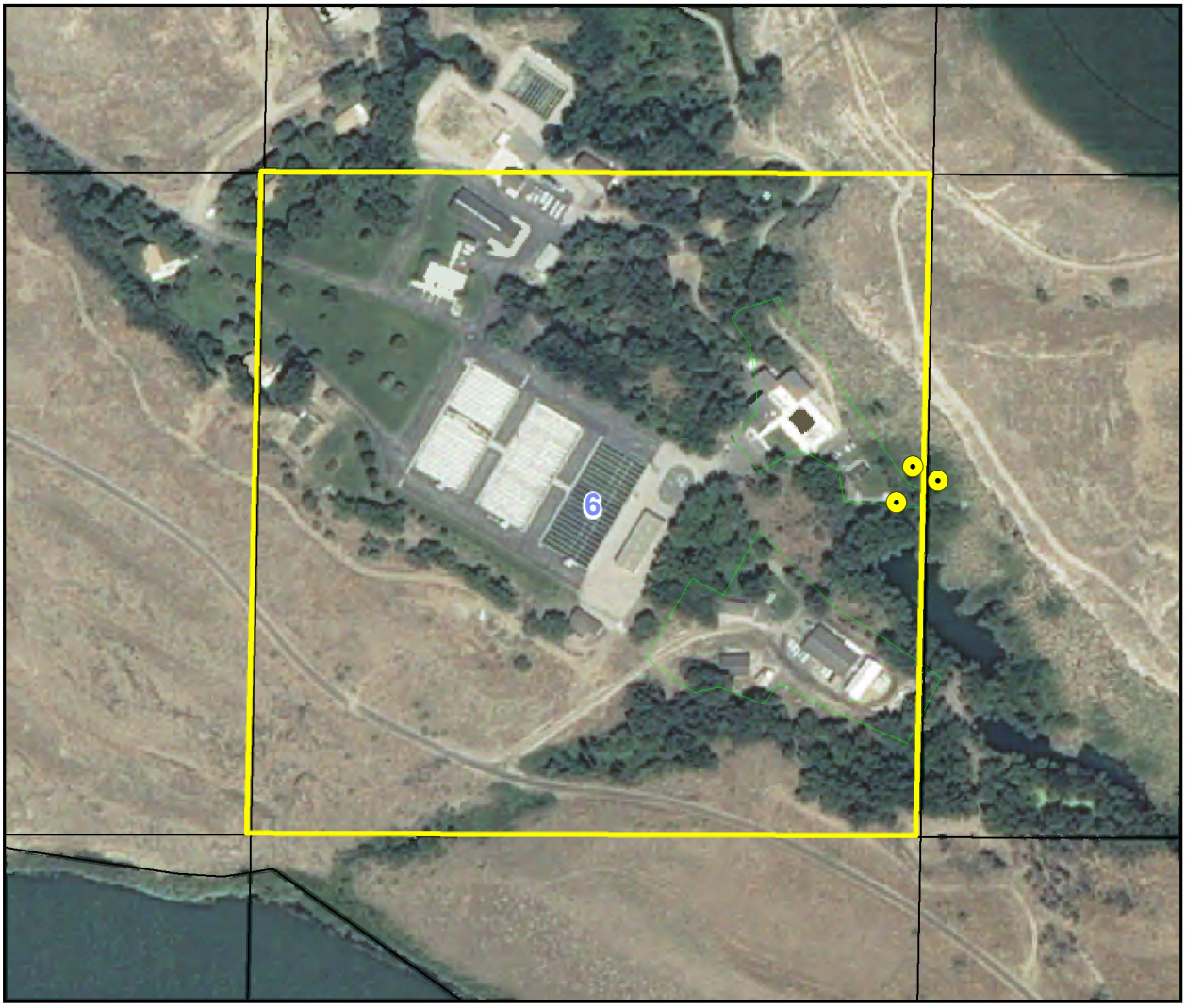
36-131

FISH PROPAGATION

The map depicts the place of use for the water use listed above and point(s) of diversion of this right as currently derived from interpretations of the paper records and is used solely for illustrative purposes. Discrepancies between the computer representation and the pemanent document file will be resolved in favor of the actual water right documents in the water right file.

14E

S80



Point of Diversion
Place Of Use Boundary
Townships
PLS Sections
Quarter Quarters
Taxlots

0 0.045 0.09 0.18 Miles

N

Map produced on April 26, 2013

Appendix C

IDWR Transfer Processing Memo No. 8

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

ADMINISTRATOR'S MEMORANDUM

TO: Resources Administration Division

FROM: Norman C. Young NCY

DATE: May 10, 1984

RE: Point of Diversion Description

Permit Processing No. 6
Transfer Processing No. 8

There has been considerable discussion concerning amendment or transfer requirements when a point of diversion location is changed, point or points of diversion are added or a replacement point of diversion is constructed.

The following will be the policy of the Department:

An amendment is needed to change the tract in which a point of diversion is to be constructed if different than the tract described on the permit. An amendment is also needed to add one or more points of diversion in the same tract described on a permit.

In the case of a claim, license, or decree, a transfer is needed to change the tract in which a point of diversion is located or to add a point of diversion even if the point of diversion to be added is in the original tract described on the license or decree. A transfer is not needed to replace a point of diversion in the original tract if the original point of diversion will be abandoned.