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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 Petition for Reconsideration**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Director pursuant to IDAPA 37.01.01.740.02 to reconsider and amend the *F)nal Order Regard)ng Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* entered January 29, 2014(referred to herein as the "Order"). Specifically, IGWA asks the Director to: (1) withhold curtailment of groundwater rights until a decision is entered on IGWA's pending mitigation plan, (2) reduce the zone of curtailment to avoid excessive waste and hoarding of water, and (3) phase in any curtailment over 5 years.

1. Curtailment should be withheld until a decision is entered on IGWA's mitigation plan.

The Order, issued in late January, schedules curtailment to begin March 14, but provides that affected groundwater users "may participate in a mitigation plan through a Ground Water District or Irrigation District."[1]As explained below, the opportunity to avoid curtailment by providing mitigation is required by law; however, the Order does not appear to provide adequate time for IDWR to review and approve, and for IGWA to implement, IGWA's pending mitigation plan.

The Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules) provide that when the Director makes a finding of material injury, junior groundwater users may avoid curtailment "pursuant to a mitigation

[1]Order 42.

plan approved by the Director."[2] As explained in IGWA's Motion for Stay filed concurrently herewith, Judge Melanson ruled in the Blue Lakes and Clear Springs delivery call cases that due process entitles holders of junior-priority groundwater rights to submit a mitigation plan after the Director makes a finding of material injury, and before the Director undertakes to regulate (i.e. curtail) groundwater use. This is binding precedent for the Director.

IGWA seeks to avoid curtailment by providing mitigation to Rangen, and has filed a mitigation plan with the IDWR for that purpose. It is very unlikely, however, that the plan can be approved and implemented before curtailment commences March 14. As the Director is aware, mitigation plans must be published for two weeks, there is 10-day protest period, and a hearing may be held. Further, some mitigation solutions require engineering, easements, utilities, equipment, property acquisitions, and construction works to implement.

In an ideal world, IGWA would have designed, engineered, held hearings on, obtained IDWR approval of, and constructed every possible mitigation solution before the Director made a determination of material injury. This is not realistic, however, in a world where prior curtailment orders have imposed heavy financial obligations on groundwater users, and where actions to improve the overall health of the Eastern Snake Plain Aquifer (ESPA) take priority over dubious claims of material injury.

Until the Director determined that Rangen is legitimately suffering material injury, made findings concerning the extent of the injury, and ruled on the source of Rangen's water rights, pursuing a mitigation plan would have speculative and potentially a waste of time and resources for all involved. With those findings now made, IGWA is in a position to identify mitigation solutions that are available and capable of meeting the ordered mitigation obligation. IGWA wasted no time doing this, filing a mitigation plan that identifies multiple mitigation solutions within two weeks after the Order was issued.

Consistent with the due process ruling of Judge Melanson, IGWA asks the Director to amend or stay the Order (as requested in IGWA's Motion for Stay) to withhold regulation of groundwater until a decision is made on IGWA's mitigation plan and adequate time is afforded to implement approved mitigation solutions.

2. Curtailment of 157,000 acres, when less than 1% of the curtailed water may benefit Rangen after 50 years, results in excessive waste of water.

The most startling aspect of the Order is its adoption of a trimline that extends curtailment to the point that water rights are curtailed even if less than 1% of the curtailed water will reach the Curren Tunnel after 50 years.[3] Previously, Di-

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[2] IDAPA 37.03.11.040.01.b.

[3] The trimline adopted in the Order approximates the Great Rift, which results in Rangen receiving as little as 0.63% of the water curtailed under some junior-priority water rights. (Order 39.) For the sake of simplicity, this trimline is referred to herein as a 1% trimline.

rector Dreher applied a 10% trimline to the Rangen call, which exposed 735 acres to curtailment and resulted in a futile call.[4] In contrast, the 1% trimline exposes 157,000 acres to curtailment. This is a monumental departure from the 10% trimline applied by Director Dreher, and it has created severe uncertainty and concern for Magic Valley farmers, dairymen, businesses, and cities that now face the likelihood of massive curtailment, additional delivery calls, and re-litigation of issues decided previously in the SWC case.

With the appeals of the Clear Springs, Blue Lakes, and SWC delivery call orders complete, cooperative efforts had been undertaken between surface and groundwater users to improve groundwater levels across the ESPA. These efforts likely will be derailed by continued litigation, uncertainty, and new mitigation obligations if the 1% trimline is retained.

While the Order relies heavily on a geologic feature (the Great Rift) as the basis for the trimline, its conclusions of law correspond with IGWA's assertion that the trimline decision may take into account various factors, including the law against excessive waste or hoarding of water, uncertainty in the predictions generated by ESPAM 2.1, and the potential that any additional water Rangen receives from curtailment will not actually result in the production of more fish.[5] IGWA asks the Director to reconsider uncontroverted evidence addressing these factors, and, in response, return to a 10% trimline consistent with the Director Dreher's prior order in this case.

A key function of the trimline is to prevent excessive waste or hoarding of Idaho's water resources. The Order acknowledges that, under Idaho law, "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used,"[6] and that "[n]either the Idaho Constitution, nor statutes, permit ... water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use."[7]As explained on pages 21-27 of IGWA's Post-Hearing Brief, there is a long list of Idaho Supreme Court rulings that limit administration by priority as necessary to avoid excessive waste or hoarding of water resources. These decisions are reflected in Conjunctive Management Rule 20.3: "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 ...."[8]

The Order contains no findings or conclusions that expressly define the point at which curtailment will result in excessive waste or hoarding of water, but the trimline adopted in the Order allows only one conclusion: that the Director be-

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[4] Second Amended Order, p. 19 (CL 79-80) (May 19, 2005).

[5] *See* Order pp. 31 (CL 11) and 37 (CL 42).

[6] Order p. 29 (quoting *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44 (1915)).

[7] Order p. 31 (CL 11) (quoting *American Falls Reservoir Dist. No. 2. v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880 (2007)).

[8] IDAPA 37.03.11.020.03.

lieves administration by priority is not excessively wasteful even if only 0.63% of the curtailed water right will reach the senior user after 50 years—leaving the remaining 99.37% to waste.[9] To further illustrate the disparity between the amount of water curtailed and the benefit to Rangen, the curtailment of 157,000 acres eliminates the use of 3,140 cfs for irrigation to provide 9.1 cfs to Rangen.[10] On an acre-feet comparison, the 1% trimline eliminates the use the 549,500 acre-feet annually for irrigation, in addition to water for municipal, dairy, and industrial purposes, to provide only 6,588 acre-feet to Rangen.[11] In other words, the 1% trimline allows Rangen to hoard more than 542,912 acre-feet of water annually that Rangen will never put to beneficial use.

As explained on pages 29-31 of IGWA's Post-Hearing Brief, the Idaho Supreme Court and the United States Supreme Court have both held that administration by priority produces excessive waste and hoarding of water if less than 10% of the curtailed water will benefit the senior. In *Van Camp v. Emery* the Idaho Supreme Court explained: "In this arid country where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home-building, it will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application."[12] Citing *Van Camp*, and applying Idaho law, the United States Supreme Court reached the same conclusion in its *Schodde v. Twin Falls Land & Water Company* decision:

> Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land 100 inches, can he then object to those above him and appropriating the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation.[13]

Issue of waste, hoarding, and reasonable use are sometime framed in terms of the reasonableness of the senior's means of diversion, or reasonableness of the appropriation, but the objective is the same—ensuring that administration by pri-

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[9] Order p. 39 (CL 51). The 99.37% of the curtailed water that will not accrue to Rangen will accrue to springs or Snake River reaches where there is no beneficial use, no delivery call, or where senior water needs are already being mitigated.

[10] Assuming an irrigation diversion rate of 1 miner's inch (0.02 cfs) per acre.

[11] Assuming an authorized diversion volume of 3.5 acre-feet per acre for irrigation, curtailment of 157,000 acres eliminates use of 549,500 acre-feet annually. The predicted 9.1 cfs benefit to Rangen equates to 6,588 acre-feet annually.

[12] 13 Idaho 202, 208 (1907).

[13] *Schodde v. Twin Falls Land Company*, 224 U.S. 107, 119 (1912).

ority is undertaken in a manner consistent with the "policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources."[14]

The Idaho Supreme Court recently affirmed this in its *American Falls Reservoir District no. 2 v. Idaho Department of Water Resources* ("*AFRD2*") decision, quoting *Schodde* to explain that "water rights must be exercised with some regard to the public and necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."[15] The Court repeated that "[n]either the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use."[16]

The Order disregards this precedent, claiming that the Director has "limited discretion" to determine whether administration by priority will result in excessive waste or hoarding of Idaho's precious water resources.[17] IGWA respectfully asks the Director to reconsider this assumption.

Without question, the primary rule of water administration is that first in time is first in right. Yet, it is equally undisputed that "this is not an absolute rule without exception."[18] Juxtaposed against the doctrine of priority is the Director's "duty and authority" to evaluate "whether a diversion is reasonable in the administration context."[19] This duty includes "determining whether waste is taking place."[20] These determinations do not undermine the senior's water right, because waste and reasonableness are "not a decreed element of the right."[21]

The Director's duty to ensure that excessive waste or hoarding does not occur is an affirmative obligation, not a matter of limited discretion. Administration by priority must occur, not blindly, but in light of the "policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources."[22] The Idaho Supreme Court made this clear in its *AFRD2* decision:

> While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed,

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[14] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)).

[15] *AFRD2*, 143 Idaho 862, 880 (2007) (internal quotes omitted).

[16] *Id.*

[17] Order p. 39 (CL 52).

[18] *AFRD2*, 143 Idaho at 880.

[19] *AFRD2*, 143 Idaho at 876-77.

[20] *Id.* at 877.

[21] *Id.*

[22] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)).

> the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.[23]

It is hardly conceivable that waste of water does not become excessive when, after 50 years of curtailment, the senior will receive less than 1% of the water that could have been put to beneficial use by the junior. Allowing Rangen to hoard 549,500 acre-feet annually when it will beneficially use no more than 6,588 acre-feet is equally unreasonable.

In an effort to justify the 1% trimline, the Order cites the *Clear Springs Foods* decision, as if the Idaho Supreme Court sanctioned a 1% trimline in that case.[24] This reliance is mistaken for two reasons. First, the Clear Springs and Blue Lakes delivery calls involved different reaches of the Snake River, and the 10% trimlines locations in those cases were far different from the 10% trimline Director Dreher applied in this case.

Second, the Supreme Court did not approve a 1% trimline in its *Clear Springs Foods* decision. While IGWA argued that administration by priority was unreasonable because a handicap of ESPAM 2.1 prevented it from calibrating the trimline to Clear Springs and Blue Lakes specifically, leaving them to receive less than 10% of the water curtailed, the Court refused to address that argument, stating that it goes to the reasonableness of the senior's means of diversion, which, the Court asserted, was not an issue on appeal.[25] Thus, the *Clear Springs Foods* decision should not be read as Supreme Court approval of a 1% trimline.

In fact, if the *Clear Springs Foods* decision provides any guidance on the trimline, it is that the Court was unwilling to find it reasonable to curtail a junior right if less than 1% of the curtailed water will reach the senior. Had the Court believed that to be reasonable, it could have simply affirmed that such waste did not make Clear Springs' and Blue Lakes' means of diversion unreasonable. However, the Court was clearly unwilling to go that far, opting instead to sidestep that issue. Thus, the *Clear Springs Foods* decision does not provide a reliable basis for a 1% trimline.

In contrast, the *Van Camp*, *Schodde*, and *AFRD2* decisions are binding precedent, and they draw the line at 10%. The unappealed district court ruling in the Surface Water Coalition case that upheld a 10% trimline is also binding precedent for the Director. While the 10% rule still results in a significant amount of waste and hoarding of water, it strikes a reasonable balance between the doctrine of pri-

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[23] *AFRD2*, 143 Idaho at 880.

[24] Order p. 38 (CL 43).

[25] *Clear Springs Foods*, 150 Idaho at 810.

ority and the public interest in obtaining the maximum beneficial use, and least wasteful use, of Idaho's valuable groundwater resources.

The law against excessive waste and hoarding of water by itself compels acceptance of a 10% trimline. But that is not all. Other evidence in this case powerfully reinforces the need to limit curtailment to water rights for which ESPAM 2.1 predicts a material benefit to Rangen.

First, there is considerable uncertainty that groundwater use far away from Rangen is actually having the impact on Rangen that ESPAM 2.1 predicts. Substantial evidence was presented to explain important distinctions in the actual hydrogeology near Rangen and what ESPAM 2.1 assumes, and to demonstrate that ESPAM 2.1 systematically over-predicts the effects of changes in groundwater levels on discharge from the Curren Tunnel.[26] This was uncontroverted, and IDWR staff agreed that ESPAM 2.1 over-predicts discharge to the Rangen spring cell.[27]

This uncertainty is best illustrated by the difference between the curtailment predictions of ESPAM 1.1 versus ESPAMA 2.1. Under ESPAM 1.1, curtailment of every groundwater right within the area of common groundwater supply junior to January 1, 1962 (664,300 acres curtailed) was predicted to increase flows to the Thousand Springs to Malad Gorge reach of the Snake River by 5 cfs.[28] Since only a portion of the reach gains to the Thousand Springs to Malad Gorge reach come from the Curren Tunnel, the predicted benefit to Rangen was much smaller.

In contrast, under ESPAM 2.1, curtailment of every groundwater right within the Great Rift trimline junior to July 13, 1962 (157,000 acres curtailed) is predicted to increase flows to the Rangen model cell by up to 14.6 cfs.[29] In other words, with 507,300 few acres curtailed, ESPAM 2.1 predicts that 192% more water will accrue to the Rangen spring cell than ESPAM 1.1 predicted would accrue to the entire Thousand Springs to Malad Gorge reach of the Snake River.

This stunning difference not only illustrates the considerable uncertainty in ESPAM 2.1 predictions for Rangen, it reinforces the extensive evidence at trial showing that ESPAM 2.1 greatly over-predicts the effects groundwater pumping on flows from the Curren Tunnel. The purpose of this evidence is not to contend that ESPAM 2.1 can't be used, but to demonstrate why the uncertainty in the predictions of ESPAM 2.1 should be mitigating by implementing a 10% trimline as Director Dreher did previously in this case.

Second, groundwater levels in the Hagerman area have stabilized in recent years, rising 1-2 feet in some wells.[30] It is simply not in the public interest to elimi-

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[26] Hinckly, Tr. 2447:8-14, 2477:2-22, 2481:22-2483:3, 2486:11-2487:8.

[27] Wylie, Tr. 2913:3-25; Ex. 1416 at 53:21-54:18.Cite.

[28] Second Amended Order, p. 20 (FF 81) (May 19, 2005).

[29] Order p. 25 (FF 106).

[30] Ex. 1250; see also Brendecke, Tr. 2568:16-2570:23.

nate sustainable irrigation of 157,000 acres when, after 50 years of curtailment, less than 1% of the curtailed water will benefit Rangen.

Third, the Curren Tunnel is a poor means of appropriating water that functions no differently than a shallow well. It was excavated high on the Hagerman Rim to allow gravity irrigation of elevated farmland south of Rangen. It was not constructed to provide a reliable supply of water for aquaculture, and doesn't, because it effectively skims water off the top of ESPA and, as such, is very susceptible to small changes in the elevation of the water table. Considering that groundwater levels have stabilized in the Rangen area, it is unreasonable to undertake massive curtailment in an attempt to cause a small amount of additional overflow from a man-made tunnel near the surface of the ESPA. Idaho law does not protect shallow wells, and the Curren Tunnel should be administered in light of that.

Finally, the Director must consider the fact that Rangen has been raising far fewer fish than it is capable of with its current water supply,[31] and Rangen's admission that it chooses to not compete with the commercial fish producers who buy Rangen fish feed,[32] creating a likelihood that the additional water Rangen would receive from curtailment will not result in additional fish production. Should Rangen elect to comply with the Director's recent cease and desist order, which will require emptying many of its raceways, instead of accept alternatives that would allow it continue using water from Billingsley Creek, this will only confirm that Rangen's true objective is not to obtain more water.

For all of these reasons, IGWA respectfully asks the Director to amend the Order and honor the binding precedent set in *Van Camp*, *Schodde*, and *AFRD2* by limiting curtailment to junior water rights for which at least 10% of the curtailed water will benefit Rangen. The fact that hydrogeologic conditions in the vicinity of Rangen will greatly reduce the number of acres curtailed is no excuse to permit excessive waste or hoarding of Idaho's groundwater resources.

3. Curtailment should be phased in.

To the extent the Director continues to order curtailment, it should be phased in over five years. Conjunctive Management Rule 20.04 provides:

> Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct or immediate re-

[31] Ex. 1147, Rogers, Tr. 1949:16-19.

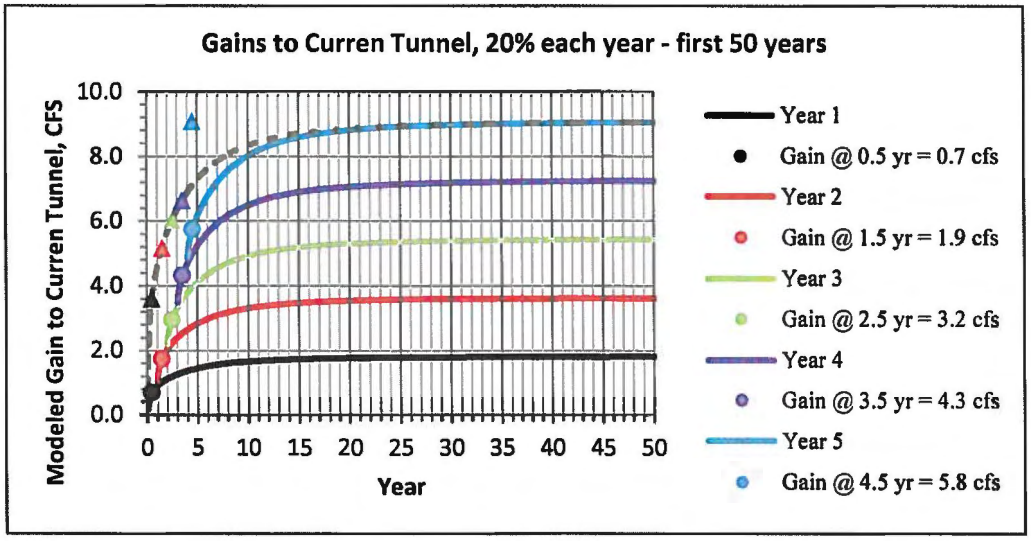
[32] Kinyon, Tr. 512:6-11.

lief would be achieved if the junior-priority water use was discontinued.[33]

In prior delivery call cases where groundwater rights have been curtailed to provide water to springs in the Thousand Springs area, the Director phased in curtailment over 5 years. He did this by stepping down the curtailment priority date so that roughly 1/5 of the acres curtailed were dried up in year one, 2/5 in year two, and so on until full curtailment was achieved in year 5.

The Order takes a much different, more severe approach. Instead of phasing in the curtailment, it orders curtailment of the full 157,000 acres in year one, but phases in the amount of mitigation that must be provided to avoid curtailment. The effect is dramatically different.

Under the Order, junior groundwater users must deliver 3.4 cfs to Rangen as mitigation in year one, or suffer curtailment of the full 157,000 acres. In contrast, phasing in curtailment (as occurred in prior delivery calls) would require juniors to deliver roughly 0.7 cfs (1/5th of 3.4 cfs) as mitigation in year one, or suffer curtailment of roughly 31,400 acres (1/5th of 157,000). The following graph illustrates the difference between immediate curtailment of the full 157,000 acres (dotted gray line), versus phasing in curtailment over 5 years (colored lines):



The graph also illustrates the difference in the amount of mitigation required under the Order compared to phased-in curtailment. The colored triangles depict the mitigation obligations under the Order; the colored dots depict the mitigation obligations that would exist under phased-in curtailment. Of particular note is the year 5 mitigation obligation. The Order presently requires juniors to deliver 9.1 cfs in mitigation to avoid curtailment, even though ESPAM 2.1 predicts that Rangen will receive less than 7 cfs under full curtailment.

[33]IDAPA 37.03.11.020.04.

The plain language of CM Rule 20.04 provides for "staged or phased curtailment."[34] The obvious purpose of the Rule is to ease the burden of curtailment by phasing in the number of acres curtailed. Full curtailment of 157,000 acres serves neither the purpose nor plain language of the Rule.

It goes without saying that immediate curtailment of the full 157,000 acres will have disastrous consequences for the agriculture-based economy of southern Idaho. Therefore, whatever the ultimate extent of curtailment, IGWA asks the Director to phase it in over 5 years, as occurred in the Clear Springs Foods and Blue Lakes Trout delivery call cases.

CONCLUSION

Based on the foregoing, IGWA asks the Director to: (1) withhold curtailment of groundwater rights until a decision is entered on IGWA's pending mitigation plan, (2) reduce the zone of curtailment to avoid excessive waste of water, and (3) phase in any curtailment over 5 years.

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By: _____ February 11, 2014
Randall C. Budge Date
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[34]IDAPA 37.03.11.020.04 (emphasis added).

CERTIFICATE OF MAILING

I certify that on this 11th day of February, 2014, the foregoing document was served on the following persons in the manner indicated.

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