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RECEIVED  
OCT 24 2014  
DEPARTMENT OF  
WATER RESOURCES

Attorneys for Rangen, Inc.

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

**STATE OF IDAHO**

**IN THE MATTER OF DISTRIBUTION  
OF WATER TO RANGEN, INC.'s  
WATER RIGHT NOS. 36-15501, 36-134B,  
AND 36-135A**

**DOCKET NO.: CM-DC-2014-004  
  
SUPPLEMENTAL AFFIDAVIT OF J.  
JUSTIN MAY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO                     )  
  )  
County of Ada                     )

J. Justin May, being sworn upon oath deposes and says:

1. My name is J. Justin May. I am an attorney licensed to practice law in the State of Idaho.

I represent Rangen, Inc. in the above-captioned matter. The matters contained in this Affidavit are based on my personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of an email I received from Garrick


Baxter, a Deputy Attorney General for the Idaho Department of Water Resources, on

**SUPPLEMENTAL AFFIDAVIT OF J. JUSTIN MAY IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT - 1**

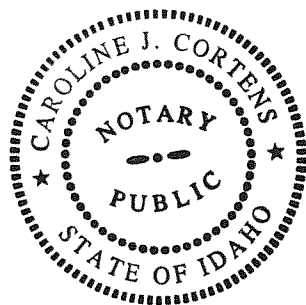
October 15, 2014.

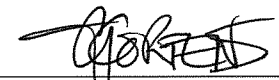
3. Attached hereto as Exhibit 2 is a true and correct copy of *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* filed in CM-MP-2014-001 and CM-DC-2011-004.
4. Attached hereto as Exhibit 3 is a true and correct copy of *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, filed in CM-MP-2014-001 and CM-DC-2011-004.
5. Attached hereto as Exhibit 4 is a true and correct copy of *Order Limiting Scope of Mitigation Plan; Limiting Scope of Hearing; Setting Deadline to Submit Engineering Plans* filed in CM-MP-2014-005.

DATED this 24th day of October, 2014.

  
\_\_\_\_\_  
J. Justin May

SUBSCRIBED AND SWORN to before me this 24th day of October, 2014



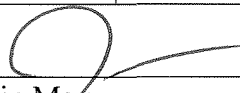
  
\_\_\_\_\_  
Notary Public for the State of Idaho  
Residing at: BOISE IDAHO  
My Commission Expires: 6/26/2020

## **CERTIFICATE OF SERVICE**

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 24th day of October 2014 he caused a true and correct copy of the foregoing document to be served upon the following:

<b>Original:</b> Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Garrick Baxter IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Randall C. Budge Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI Kittredge Building, 511 16th Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Dean Tranmer CITY OF POCATELLO P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>

Robert E. Williams WILLIAMS, MESERVY & LOTHSPREICH P.O. Box 168 Jerome, ID 83338 rewilliams@cableone.net	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Candice McHugh Chris Bromley MCHUGH BROMLEY 380 S.4 <sup>th</sup> St., Ste. 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Jerry R. Rigby Hyrum Erickson Robert H. Wood RIGBY, ANDRUS & RIGBY, CHARTERED 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>

  
J. Justin May

# **EXHIBIT 1**

## Robyn Brody

---

**From:** Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>  
**Sent:** Wednesday, October 15, 2014 9:15 AM  
**To:** Robyn Brody; Blades, Emmi  
**Cc:** Justin May; Fritz Haemmerle; TJ Budge; Randy Budge  
**Subject:** RE: MC Tunnel Measurements

Robyn,  
Sorry for the delay in getting back to you. IDWR tells me that the pressure transducer was installed 3/5/14. Regarding your second request, yes, some measurements provided were taken by IDWR on site. Michelle's current meter measurements for 2014 are:

3/5/14 2.00 cfs  
5/13/14 0.53 cfs  
8/22/14 1.19 cfs

Garrick

**From:** Robyn Brody [mailto:robynbrody@hotmail.com]  
**Sent:** Thursday, October 02, 2014 3:57 PM  
**To:** Baxter, Garrick; Blades, Emmi  
**Cc:** Justin May; Fritz Haemmerle; TJ Budge; Randy Budge  
**Subject:** MC Tunnel Measurements

Dear Garrick:

Thank you for providing the MC Tunnel measurements to me. After Frank Erwin's deposition in connection with IGWA's first mitigation plan, John Homan sent the parties an email explaining some of the problems with the Department's measurement equipment in the MC Tunnel and explaining that a new pressure transducer was scheduled to be installed in March, 2014. Can you please verify whether the new pressure transducer was installed?

Also, can you verify whether the measurements that were provided include any taken by IDWR on site while they were at the MC Tunnel? If not, we would also like all documents which reflect any such on-site measurements by staff.

Thank you very much.

Robyn

Robyn M. Brody  
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# **EXHIBIT 2**



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

<b>IN THE MATTER OF THE MITIGATION</b>	)	<b>CM-MP-2014-001</b>
<b>PLAN FILED BY THE IDAHO GROUND</b>	)	<b>CM-DC-2011-004</b>
<b>WATER APPROPRIATORS FOR THE</b>	)	
<b>DISTRIBUTION OF WATER TO WATER</b>	)	<b>AMENDED ORDER APPROVING</b>
<b>RIGHT NOS. 36-02551 AND 36-07694 IN</b>	)	<b>IN PART AND REJECTING</b>
<b>THE NAME OF RANGEN, INC.</b>	)	<b>IN PART IGWA'S MITIGATION</b>
	)	<b>PLAN; ORDER LIFTING STAY</b>
	)	<b>ISSUED FEBRUARY 21, 2014;</b>
<b>IN THE MATTER OF DISTRIBUTION OF</b>	)	<b>AMENDED CURTAILMENT</b>
<b>WATER TO WATER RIGHT NOS. 36-02551</b>	)	<b>ORDER</b>
<b>AND 36-07694</b>	)	
<b>(RANGEN, INC.)</b>	)	
	)	

**PROCEDURAL BACKGROUND**

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"). The Curtailment Order recognized that holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides "simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the "Martin-Curren Tunnel"] or direct flow of 9.1 cfs to Rangen." *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen "may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year." *Id.*

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("Mitigation Plan") to avoid curtailment imposed by the Curtailment Order. The Mitigation Plan set forth nine proposals for junior-priority ground water pumpers to meet mitigation obligations: 1) credit for current and ongoing mitigation activities; 2) mitigation via the Sandy Pipe; 3) assignment of water right no. 36-16976; 4) fish replacement; 5) monetary compensation; 6) improvements to the Curren Tunnel diversion; 7) drilling a horizontal well in the vicinity of the Curren Tunnel; 8) drilling new groundwater wells or utilizing existing wells with delivery over-the-rim; and 9) construction of a direct pump-back and aeration system within the Rangen facility.

On March 14, 2014, Rangen, Inc. ("Rangen") filed three documents with the Department: *Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project; Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing*; and *Rangen, Inc.'s Petition to Intervene to Become a Party Protestant and Rangen's Motion for Reconsideration Re: Denial of Participation in Mitigation Plan Hearing*. At the commencement of the hearing on IGWA's Mitigation Plan, which was held on March 17-19, 2014 at the Department's State office in Boise, Idaho, the Director verbally ruled on Rangen's motions and petition to intervene. Specifically, the Director granted Rangen's motion to exclude evidence of the Tucker Springs Project; dismissed proposals four and five of IGWA's Mitigation Plan, and granted Rangen's petition to intervene. On March 26, 2014, the Director issued the following to reflect those verbal rulings: *Order Granting Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project; Order Granting in Part and Denying in Part Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing*; and *Order Granting Rangen, Inc.'s Petition to Intervene and Denying Motion for Reconsideration*.

### **APPLICABLE LAW**

Conjunctive Management Rule 43.03 ("Rule 43.03") establishes the following factors that "may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights":

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

- e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.
- f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.
- g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.
- h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.
- i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.
- j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.
- k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.
- l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.
- m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.
- n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.
- o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.043.03(a-o).

A proposed mitigation plan must contain information that allows the Director to evaluate these factors. IDAPA 37.03.11.043.01(d).

While Rule 43.03 lists factors that “may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights,” factors 43.03(a) through 43.03(c) are necessary components of mitigation plans that call for the direct delivery of mitigation water. A junior water right holder seeking to directly deliver mitigation water bears the burden of proving that (a) the “delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law,” (b) “the mitigation plan will provide replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source,” and (c) “the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage.” IDAPA 37.03.11.043.03(a-c). These three inquiries are threshold factors against which IGWA’s Mitigation Plan must be measured.

To satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the Curtailment Order; (2) the components of the proposed Mitigation Plan can be implemented to timely provide mitigation water as required by the Curtailment Order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.

Consideration of the first three factors in Rule 43.03 requires that the water be provided in the season of use.

## **ANALYSIS**

This order approves portions of IGWA’s Mitigation Plan, but determines that the quantities of mitigation water available to Rangen during the time of need are insufficient to fully mitigate as required by the Curtailment Order. As a result, curtailment of the use of water by a segment of the ground water holders whose use was curtailed in the Curtailment Order is required.

This order recognizes credit for only two components of IGWA’s proposed Mitigation Plan: (1) aquifer enhancement activities (conversions, recharge, and voluntary curtailments), and (2) exchange of irrigation water diverted from the Curren Tunnel with operational spill water from the North Side Canal Company. The Director rejects the remaining components (proposals 3, 6-9) of IGWA’s Mitigation Plan. The primary reason for rejection of the other proposed components of IGWA’s Mitigation Plan is the lack of evidence in the record to determine how the proposals could be implemented, either legally or physically. IGWA did not address and carry its evidentiary burden by: (1) establishing the legality of the proposal, (2) presenting details about how the proposed physical infrastructure could be physically located, constructed and operated, and (3) predicting when the proposal could be completed to provide the required

mitigation. The only evidence that IGWA presented about proposed physical infrastructure was testimony that the proposals requiring infrastructure would be feasible or that there is no reason why IGWA could not implement sections of its mitigation proposals. Brendeke, Tr., Vol. II, pp. 483-85, 494-95, 501, 504, 511, 515, 519, 522-23, 525-27. Testimony that IGWA has an optimistic vision of successfully completing Proposals 3 and 6 through 9 of its Mitigation Plan is not a substitute for presenting actual activities or written plans demonstrating that it has initiated and at least completed preliminary tasks in implementing its Mitigation Plan.

#### Use of ESPAM 2.1

The Eastern Snake Plain Aquifer Model (“ESPAM”) is a calibrated regional ground water model representing the Eastern Snake Plain Aquifer (“ESPA”). In the Curtailment Order the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen’s renewed delivery call. In this order, the Director uses ESPAM 2.1 to determine the simulated benefits of aquifer enhancement activities conducted by IGWA and other private entities and to determine a curtailment date because of a mitigation deficiency.

#### Benefits of Aquifer Enhancement Activities

ESPAM 2.1 can simulate the equilibrium, steady-state impacts resulting from a constant stress, or, alternatively, it can simulate the impacts of constant or time-variable stresses during a specific period of time. Model simulations that analyze impacts over a specific time period are called “transient runs.” The length of the simulation is dependent on the time period of interest. Curtailment of ground water pumping was simulated over a period of five years representing the five-year curtailment phase-in period from April 2014 through March 2019. Aquifer enhancement activities by IGWA and other private entities were simulated over a period of fourteen years representing April 2005 through March 2019. In both simulations, the volume of benefit to the aquifer during each year was averaged over a one-year “stress period.” For example, the volume of aquifer enhancement activities during 2005 was input into the model at a constant rate from April 2005 through March 2006.

For purposes of both the Curtailment Order and analyzing the mitigation required in response to Rangen’s delivery call, the Department employed an annual stress period in ESPAM 2.1, predicted the annual volume accruing to the Curren Tunnel within each year of the five-year phase-in period, and calculated an average annual mitigation flow requirement for each year from the annual volume. The mitigation requirement was calculated by dividing the total volume predicted to accrue over a one year period by 365 days and converting the units to cubic feet per second. The use of the average annual mitigation requirement promotes annual planning and is a reasonable time period for model prediction and analysis.<sup>1</sup>

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<sup>1</sup> The Director notes that Rangen also evaluated IGWA’s aquifer enhancement activities using an annual stress period approach. See Rangen Ex. 2071. Rangen’s evaluation neglected aquifer enhancement activities performed by Southwest Irrigation District and the ongoing transient effects of aquifer enhancement activities performed by IGWA in prior years, thus Rangen’s evaluation did not include all of the transient benefits predicted to accrue to the Curren Tunnel after April 2014.

### Benefits of Mitigation Using Senior Irrigation Water Rights

Ground water pumping for irrigation causes depletions of Curren Tunnel flows during the non-irrigation season after ground water pumping ceases. As stated above, however, predicted accretions to flows in the Curren Tunnel from curtailment were modeled over one year stress periods to determine the obligations of the ground water users to mitigate for their ground water diversions. Predicted accretions to the Curren Tunnel resulting from aquifer enhancement activities were also modeled over one year stress periods.

In this order, the Director also employs an annual time period to evaluate the average benefit of IGWA's proposal to deliver water to Rangen that would have been diverted pursuant to irrigation water rights held by Howard (Butch) and Rhonda Morris (hereafter referred to in the singular as "Morris"). The Curtailment Order allowed staged mitigation, requiring incremental increases in mitigation for each of the first five years of implementation. Each of the incremental mitigation requirements assumed an average obligation within each year. For each of the first four years, the determination of the annual obligation was computed by applying annual stresses and computing an average annual obligation. Because the Department's conjunctive management rules limit the staged mitigation period to five years, the mitigation obligation for the fifth year increased to the full 9.1 cfs obligation. Similarly, an annual averaging of delivery of irrigation water can be employed to determine whether the junior water right holder has satisfied the mitigation obligation. Averaging IGWA's mitigation activities over a period of one year will establish consistent time periods for combining delivery of the Morris water for mitigation and the average annual benefit provided by aquifer enhancement activities, and for direct comparison to the annual mitigation requirement. If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency. The senior water right holder will be assured of a water supply, particularly during periods of low spring flow, as the low flow periods occur during the irrigation season in recent years. *See Rangen Ex. 2045, 2073.*

### Time Period for Mitigation

The first year mitigation requirement of 3.4 cfs will begin on April 1, 2014, and continue through March 31, 2015. On April 1, 2015, the ground water users must have sufficient mitigation in place to deliver 5.2 cfs to Rangen, either by direct delivery or by transient modeled accretions.

## **FINDINGS OF FACT**

### **Eastern Snake Plain Aquifer Model Version No. 2.1**

1. ESPAM is a calibrated regional ground water model representing the ESPA. In the Curtailment Order the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen's renewed delivery call. The Department will use ESPAM 2.1 to determine the simulated benefits of aquifer enhancement activities conducted by IGWA and other private

entities, and, if there is a deficiency in the Mitigation Plan, to determine a curtailment date to provide for the deficiency.

### **Proposal No. 1: Aquifer Enhancement Activities**

2. Proposal No. 1 requests mitigation credit for the following ongoing and future activities by IGWA: (a) conversions from ground water irrigation to surface water irrigation, (b) voluntary “dry-ups” of acreage irrigated with ground water through the Conservation Reserve Enhanced Program (“CREP”) or other cessation of irrigation with ground water, and (c) ground water recharge. This order will subsequently refer to these activities as “aquifer enhancement activities.”

3. Exhibit 3001 in the hearing record contains data compiled by the Department that quantifies the aquifer enhancement activities of IGWA and other private entities during the time period beginning in 2005 through 2010. Data for 2011-2013 private aquifer enhancement activities were received into evidence as Exhibits 1022, 1023, 1082 and 1083.

4. In the past, the Department input data for aquifer enhancement activities into ESPAM as a stress in the model to simulate benefits accruing to spring/Snake River reaches from the aquifer enhancement activities that benefit spring/Snake River reaches that supply water to senior surface water right holders who called for delivery of water pursuant to their senior surface water rights against junior ground water right holders. These data have been recognized by the Department in other conjunctive management contested cases as a reliable representation of previous aquifer enhancement activities of IGWA. *See Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, In the Matter of the Idaho Ground Water Appropriators, Inc.’s Mitigation Plan for Conversions, Dry-ups, and Recharge, Doc. No. CM-MP-2009-006 (July 19, 2010), *aff’d on appeal in Memorandum Decision and Order on Petition for Judicial Review*, CV-2010-3822 (Fifth Jud. Dist., Twin Falls County, April 22, 2011).

5. The Curtailment Order stated that, to avoid curtailment, IGWA must either provide mitigation of 9.1 cfs in combined direct flows and steady state simulated flows to Rangen during 2014, or must provide 3.4 cfs of direct flows to Rangen during the first year of the Curtailment Order. To predict the benefit of aquifer enhancement activities in a steady state and also to predict transient benefits of aquifer enhancement activities in year 2014, ESPAM Model 2.1 must be run (a) once to determine the steady state benefits assuming constant implementation of fixed aquifer enhancement activities; and (b) once in transient mode with a stress period for each year of aquifer enhancement activities (2005 – 2013 plus projected future activities) to determine the benefits of past and projected future activities predicted to accrue to the Curren Tunnel during each year of the five-year phase-in period.

6. Exhibit 1025 summarizes model runs predicting benefits to Rangen resulting from steady state simulations of activities in 2011, 2012, and 2013. The predicted flow benefits to Rangen in Exhibit 1025 were accepted and referred to by all parties in the presentation of evidence.

7. For comparison with the phased-in requirement of 3.4 cfs during the first year of the Curtailment Order, it is necessary to predict the benefits of aquifer enhancement activities that would accrue during the first year. Rangen used ESPAM 2.1 to evaluate the transient benefits of aquifer enhancement activities beginning in 2014 in Exhibit 2071, but neglected to include ongoing transient benefits of prior IGWA aquifer enhancement activities that occurred between 2005 and 2013 and neglected to include aquifer enhancement activities performed by Southwest Irrigation District. *See* Brockway, Tr. Vol. III, p. 681-685. Using the data entered into evidence at the hearing, the Department input data into the model for each year of private party aquifer enhancement activities from 2005 through 2014. The 2005 through 2013 data were compiled from previously documented activities. IDWR Ex. 3001; IGWA Ex. 1025. For 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero. The Department determined the average annual benefit from aquifer enhancement activities predicted to accrue to the Curren Tunnel between April 2014 and March 2015 is 871 acre feet, which is equivalent to an average rate of 1.2 cfs for 365 days. The modeling files and a summary table of the model results are included on a CD accompanying this order.

#### **Proposal No. 2: Mitigation Using Senior Irrigation Water Rights Diverted from the Curren Tunnel**

8. IGWA proposes to mitigate using water from Morris, who holds certain senior irrigation water rights from the Curren Tunnel. Specifically, IGWA and Morris agreed that IGWA would deliver Snake River water discharging from the North Side Canal Co. system into the Sandy Ponds as operational spill to Morris through the Sandy Pipeline, and, in exchange, Morris would forego diversion of water from Curren Tunnel pursuant to water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A, and 36-10141B that bear priority dates senior to Rangen's fish propagation water rights. The foregone diversion of water by Morris will result in discharge and capture of water from the Curren Tunnel by Rangen that would have been diverted and used by Morris but for the agreement with IGWA.

9. It is necessary to apply the first three threshold factors of Rule 43.03.

#### Legality of Use of North Side Canal Company Water Spilled into the Sandy Ponds

10. Morris is presently irrigating approximately 205 acres of his own land with wastewater from the Sandy Ponds. Morris, Tr. Vol. II, p. 371-72. Morris testified that he also irrigates adjacent land owned by Musser and Candy with water from the Sandy Ponds. Morris, Tr. Vol. II, pp. 363, 372.

11. Morris holds a water right to irrigate 125 acres of his own land with water from the Sandy Ponds. Department records do not identify any water rights in the name of Musser or Candy to irrigate their lands with water from the Sandy Ponds.

12. The lands of Musser, Candy, and Morris are all within the water right place of use service area of the North Side Canal Company. *See* Exhibit 3000. The Sandy Ponds were originally constructed by North Side Canal Company to capture its operational spill for water



quality purposes. When North Snake Ground Water District acquired the Sandy Ponds, it enlarged the size of the ponds. The enlargement of the ponds did not change the character or assumed ownership of the water in the ponds, however. Until other water rights are established authorizing diversion and use of water from the ponds, the Department will presume the water in the ponds is North Side Canal Company operational spill water that is being captured and may be applied to North Side Canal Company lands. *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950).

#### Quantity of Water Delivered to Rangen

13. The quantity of water available for diversion by Morris pursuant to water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A, and 36-10141B is limited by the discharge of the Curren Tunnel and by diversions of other water users pursuant to other senior water rights.

14. The Morris water rights authorize a beneficial use of irrigation. The contribution of water to Rangen by leaving water in the Curren Tunnel that normally would have been diverted by Morris only benefits Rangen during the irrigation season. In contrast, as identified in the Curtailment Order, the modeled 2014 **year-round** average Curren Tunnel depletion resulting from junior ground water pumping is 3.4 cfs. *Curtailment Order* at 42. The benefit to Rangen of Morris' non-diversion of water from the Curren Tunnel must be estimated and then compared to the year-round depletion average. The calculation of the average first year depletion of 3.4 cfs starts April 1. IGWA needs to compensate for depletions of water for the entire 365 days from April 1 to March 31.

15. Morris irrigates crops from approximately April through mid-October. Tr. Vol. II, p 392-93. The number of days he would have irrigated with water from the Curren Tunnel is approximately 184 days (April 15 through October 15). This means that IGWA can claim credit only for that volume of water available to Morris for 184 days between April 15 and October 15.

16. Flows discharging from the Curren Tunnel have been measured for approximately twenty years. The Curren Tunnel discharge is the sum of the average monthly flow measured at the mouth of the tunnel by the Department (Exhibit 2045) and the average monthly flow diverted into Rangen's six-inch PVC pipe (Exhibit 3000). The magnitude of discharges from the Curren Tunnel varies annually and seasonally depending on hydrologic conditions, related water uses, and other activities on the ESPA.

17. Table 1 lists the average irrigation season (April 15 through October 15) flow from the Curren Tunnel for years 1996 through 2013. There is a distinct change in the magnitude of average irrigation season flow values starting in 2002. It is likely that the average discharge from the Curren Tunnel during the 2014 irrigation season will be within the range represented by the 2002-2013 conditions. From 2002 through 2013, the average irrigation season flow has varied between 2.3 cfs and 5.7 cfs. The years of 2002 through 2013 will be used as a historical data set to predict the flows from the Curren Tunnel for 2014. The average of the average irrigation season values for each year from 2002 through 2013 is 3.7 cfs.

Year	Average Curren Tunnel discharge, April 15 - October 15
1996	12.4
1997	17.9
1998	17.0
1999	15.2
2000	13.9
2001	8.0
2002	4.5
2003	3.9
2004	4.4
2005	2.3
2006	5.7
2007	4.9
2008	3.2
2009	2.8
2010	2.3
2011	3.4
2012	4.1
2013	2.8
2002-2013 average	3.7

Table 1. Average Curren Tunnel discharge during Morris' irrigation season.

18. Rangen holds water rights for irrigation and domestic purposes that identify Curren Tunnel as the source of water. Water right no. 36-134B authorizes diversion of 0.09 cfs from the Curren Tunnel and bears a priority date of October 9, 1884.

19. Morris holds water rights for irrigation and stockwater purposes that identify Curren Tunnel as the source of water. Water right no. 36-134D authorizes diversion of 1.58 cfs of water from the Curren Tunnel. Water right no. 36-134E also authorizes diversion of 0.82 cfs for water from the Curren Tunnel. Both water right no. 36-134D and water right no. 36-134E bear a priority date of October 9, 1884 (identical to the priority date for Rangen's water right no. 36-134B identified above). Morris is entitled to divert a total of 2.4 cfs from the Curren Tunnel under water right nos. 36-134D and 36-134E. Morris currently diverts up to 15 miner's inches of water from the Curren Tunnel for maintenance of his irrigation pipe. Morris, Tr. Vol. II, p. 390.

20. Walter and Margaret Candy (hereafter referred to in the singular as "Candy") hold water right no. 36-134A, a water right authorizing diversion for domestic use of 0.04 cfs and irrigation of 36 acres with water from the Curren Tunnel. Water right no. 36-134A authorizes a total diversion of 0.49 cfs from the Curren Tunnel for both the domestic and irrigation uses and bears a priority date of October 9, 1884 (identical to the priority date for Rangen's water right no. 36-134B identified above). Water right 36-134A authorizes a diversion rate of 0.014 cfs per acre. Candy uses water from the Curren Tunnel for domestic use and to irrigate land around

their home. The land irrigated with water from the tunnel is approximately one half acre. Morris, Tr. Vol. II, p. 382. As stated above, the remainder of Candy's land is irrigated from the Sandy Pipeline. Candy's domestic water use is 0.04 cfs. Because irrigation is included in a small domestic use of one-half acre or less, the total use by Candy is limited to 0.04 cfs.

21. Alvin and Hope Musser Living Trust (hereafter referred to in the singular as "Musser") hold water right no. 36-102. Water right no. 36-102 authorizes the diversion of 4.1 cfs for irrigation purposes on Musser's property, and bears a priority date of April 1, 1892. Morris is farming Musser's property but Morris does not irrigate Musser's property with water right no. 36-102. Instead, Morris is irrigating the Musser's property with water from the Sandy Pipeline.

22. Rangen holds water right no. 36-135A. Water right no. 36-135A authorizes diversion of 0.05 cfs for irrigation and domestic purposes, and bears a priority date of April 1, 1908.

23. Candy holds water right no. 36-135B. Water right no. 36-135B authorizes diversion of 0.51 cfs for irrigation purposes and bears a priority date of April 1, 1908. Morris is farming Candy's property but Morris does not irrigate Candy's property with water right no. 36-135B. Instead, Morris is irrigating the land with water from the Sandy Pipeline.

24. Morris holds water right nos. 36-135D and 36-135E. Water right no. 36-135D authorizes the diversion of 1.58 cfs for irrigation and stockwater purposes. Water right no. 36-135E authorizes the diversion of 0.82 cfs for irrigation and stockwater purposes. Both water rights bear a priority date of April 1, 1908.

25. The following spreadsheet quantifies the allocation of water according to the priority dates of water rights offered for mitigation. Water right nos. 36-134A, 36-134B, 36-134D, and 36-134E are the earliest priority date (October 9, 1884) water rights authorizing diversion of water from the Curren Tunnel. The total flow rate authorized for diversion pursuant to these water rights is 2.98 cfs. A flow rate of 3.7 cfs exceeds the 2.98 cfs maximum diversion rate authorized by water rights held by Morris, Candy, and Rangen bearing an 1884 priority date. Morris will divert 0.3 cfs of Curren Tunnel water into his irrigation pipeline. Candy will divert 0.04 cfs, and because his lands are being irrigated with water from the Sandy Pipeline, he will not divert the remaining 0.45 cfs pursuant to water right no. 36-134A. Rangen will divert 0.09 cfs pursuant to water right no. 36-134B.

26. Water right no. 36-102 (Musser) is the next water right in priority bearing a priority date of April 1, 1892, and authorizing diversion of 4.1 cfs.. Because Musser lands are being irrigated by water from the Sandy Pipeline, Musser will not divert water from Curren Tunnel, and the next in line priority holders must be considered until the total quantity of use or mitigation equals 3.7 cfs.

27. Water right nos. 36-135A (Rangen), 36-135B (Candy), 36-135D (Morris), and 36-135E (Morris) all bear a priority date of April 1, 1908. Rangen will divert 0.05 cfs. Candy will not divert water authorized by water right no. 36-135B because his lands are being irrigated with

water from the Sandy Pipeline. Morris's water right nos. 36-135D and 36-135E are available for additional mitigation.

Water Right Holder	Water Right Number	Water Right Quantity (cfs)	Diverted for beneficial use, not available for mitigation (cfs)	Non-diversion of Morris water, available for mitigation (cfs)
Morris	36-134D & 36-134E	2.4	0.3	2.1
Candy	36-134A	0.49	0.04	
Rangen	36-134B	0.09	0.09	
Musser	36-102	4.1	0.00	
Rangen	36-135A	0.05	0.05	
Candy	36-135B	0.51	0.00	
Morris	36-135D	1.58	0.0	1.12
Morris	36-135E	0.82	0.00	
Total			0.5 <sup>2</sup>	3.2

As a result of the above summary, IGWA would be entitled to the following for mitigation:

$$3.7 \text{ cfs} - 0.3 \text{ cfs (Morris)} - 0.14 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 3.2 \text{ cfs (approximately)}$$

The average annual mitigation benefit provided by the Morris water for comparison with the annual requirement (3.4 cfs for April 1, 2014, through March 31, 2015; 5.2 cfs for April 1, 2015, through March 31, 2016; etc.) is computed as follows:

$$\frac{184 \text{ days}}{365 \text{ days}} \times 3.2 \text{ cfs} = \text{annual average of 1.6 cfs provided}$$

365 days

If Morris foregoes diversion of the 0.3 cfs from the Curren Tunnel, additional water would be available for IGWA as follows:

$$3.7 \text{ cfs} - 0.14 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 3.5 \text{ cfs (approximately)}$$

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<sup>2</sup> Number reflects rounding to the nearest 1/10 of a cfs.

If Morris foregoes diversion of the 0.3 cfs from the Curren Tunnel, the average annual benefit provided is computed as follows:

$$\begin{array}{rcl} 184 \text{ days} & & \\ \hline & \times & 3.5 \text{ cfs} = \text{annual average of 1.8 cfs provided} \\ 365 \text{ days} & & \end{array}$$

On April 23, 2014, Morris provided a letter to the Department agreeing to “cease diverting 0.3 CFS from Curren Tunnel through [his] irrigation pipeline.” Letter from Howard Morris to Gary Spackman, *Re: Rangen Case No.’s CM-MP-2014-001-004* (April 23, 2014).

### **Proposal No. 3: Assignment of IGWA’s Water Right Application to Rangen**

28. IGWA proposes to assign pending application to appropriate water no. 36-16976 to Rangen as mitigation. Application no. 36-16976 proposes to appropriate 12 cfs from Springs and Billingsley Creek at Rangen’s existing physical diversion from Billingsley Creek known as the “bridge diversion.”

29. IGWA filed application to appropriate water no. 36-16976 on April 3, 2013, shortly after the Director ruled in the contested case for Rangen’s delivery call that Rangen’s water rights only authorize diversion of water from the Curren Tunnel. This ruling was the basis for a determination in the Director’s Curtailment Order that Rangen does not hold a water right authorizing diversion of water from Billingsley Creek at the bridge diversion.

30. IGWA’s water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application.

#### Legality of Assigning Application to Appropriate Water no. 36-16976 to Rangen

31. Pursuant to Rule 43, the Director can approve Proposal No. 3 only if the Director believes that the application can provide water to Rangen in the time of need, i.e. this year. The pending application cannot be prejudged in this proceeding. IGWA essentially asked the Director to prejudge the application. The Director declines to do so. The application seeks authorization to divert 12 cfs from a point of diversion on the Rangen property. IGWA Ex. 1018 at 1. A map attached to the application shows the general area of the planned point of diversion. *Id.* at 4. The Department published notice of the application and the application was protested by Rangen. Rangen also filed a competing application and a transfer to address the point of diversion issue. The facts behind IGWA’s application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts which have developed in this case, the Director concludes that it is too speculative to consider.

#### Quantity of Water Delivered to Rangen

32. As stated above, the facts behind IGWA's application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts of this case, the Director concludes that it is too speculative to determine that Rangen will deliver water in its time of need pursuant to this application.

#### **Proposal Nos. 4 and 5: Mitigation with Money or Fish**

33. IGWA proposed fish replacement or monetary compensation to mitigate injury caused to Rangen by junior-priority ground water pumpers. These proposals will not be evaluated in this order because Proposal Nos. 4 and 5 were dismissed as part of IGWA's Mitigation Plan in the *Order Granting in Part and Denying in Part Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing* issued March 26, 2014.

#### **Proposal No. 6: Cleaning, Deepening, or Enlarging Curren Tunnel**

34. IGWA suggests that cleaning, maintaining, and improving the Curren Tunnel will increase the flows from Curren Tunnel. IGWA implies that the Director should require that Rangen grant IGWA access to the tunnel to remove debris and rock from the tunnel and to assess whether the tunnel can be deepened or enlarged.

#### Quantity of Water Delivered to Rangen from Proposed Tunnel Cleaning

35. At the hearing, Erwin was asked about clean out work he did on the Curren Tunnel in the mid-1970s for a previous owner of Morris' property. Erwin Tr. Vol. II, p. 331-32. When asked how far back into the tunnel he worked, he testified that he went back to the end of the corrugated metal pipe and his work focused on cleaning rock and debris out of the tunnel at this point in an attempt to improve flows into corrugated metal pipe. *Id.* at 332-33. When asked whether this improved the flow out of the Curren Tunnel, Erwin stated, "I think at that particular point in time it probably increased the flow coming out of the pipe and probably lessened the flow that was running around the pipe." *Id.* at 334. Erwin was then asked about other tunnels that had been cleaned out. He testified that "there was some work done on the Hoagland Tunnel to remove debris and to possibly improve the flow at the mouth of the tunnel" but that he could not describe exactly what work had been done because he did not perform the work. *Id.* at 336. He also testified that he performed maintenance work on the Florence Livestock Spring Tunnel, and still had some more work to do on it, but that "the only debris that is being removed is at the actual mouth or outflow of the tunnel" and that it is "from rock and debris [that has fallen] into the ditch that carries the water away from the tunnel outside of the area of the tunnel." *Id.* at 337. He testified, "We did not, to my knowledge, increase the water coming out of the tunnel." *Id.* at 338.

36. Morris was also asked about his clean out work on the Hoagland Tunnel. Morris Tr. Vol. II, p. 384. He testified that he cleans the Hoagland Tunnel "annually" and that the work increased the flow of water but that the work was not on the inside of the tunnel but "[p]retty much, on the outside of the tunnel." *Id.* at 385. Dr. Brockway testified that he did go "about 100

feet” into the Curren Tunnel “probably around 1995” and that “at least for that hundred feet there was no debris in the tunnel.” Brockway Tr. Vol. III, p. 707, 715. Dr. Brockway testified that he would not expect there to be a lot of debris in the bottom of the tunnel because the tunnel was developed in basalt. *Id.* at 708. He concluded that cleaning the tunnel “would result in very little, if any, increase of flow.” *Id.* at 708. Dr. Charles Brendecke, an expert for IGWA, testified “I’m aware that periodically there’s debris build-up upstream of the corrugated pipe” but that he does not know “the degree to which this causes flows to be diverted away from the normal outlet at the tunnel.” Brendecke Tr. Vol. III, p. 553-54.

#### Quantity of Water Delivered to Rangen from an Enlargement or Deepening of Curren Tunnel

37. There is evidence in the record that deepening or enlarging the Curren Tunnel could increase flows from the Curren Tunnel. However, there is no evidence quantifying the potential increase and the record lacks a specific plan of how IGWA would enlarge or deepen the tunnel to timely provide water during the 2014 irrigation season. Moreover, testimony in the record raises concern about whether enlarging or deepening the tunnel would negatively change the hydrology of the tunnel.

#### **Proposal No. 7: Construction of a Horizontal Well**

38. IGWA proposes to drill a horizontal well in the vicinity of the Curren Tunnel and divert the water from the well to Rangen’s facility. IGWA proposes to drill the horizontal well near the Curren Tunnel at an elevation lower than the outlet of the Curren Tunnel.

#### Legality of Constructing a Horizontal Well

39. Prior to construction of a horizontal well, IGWA would need to obtain a water right to divert and beneficially use water from the horizontal well. IGWA has not filed any applications to appropriate water from a horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The source of water proposed to be diverted is trust water. The Department has issued a moratorium on all appropriations of water from the ESPA in the area where the proposed horizontal well would be constructed. Any horizontal well proposal will need to address injury to other water users. IGWA failed to satisfy its burden because it failed to present any evidence that it will be able to address the injury to other water users.

#### Quantity of Water Delivered to Rangen

40. IGWA has failed to present evidence that it could timely deliver water to Rangen when water is needed by Rangen in 2014. No evidence was presented quantifying the available water supply. The lack of information makes the proposal too speculative to approve.

## **Proposal No. 8: Mitigation With Water from New Wells or Existing Wells**

41. IGWA proposes to drill new ground water wells or utilize existing wells to deliver water directly to Rangen. IGWA asserts this plan would be similar to its over-the-rim plan previously approved in the Snake River Farm delivery call.

### Legality of Diverting Ground Water From New or Existing Wells and Delivering the Water to Rangen for Mitigation

42. IGWA has not identified any water rights that could be exercised, through a change in nature of use, to deliver water to Rangen. Because no water rights have been identified, the Director cannot evaluate important components of the water rights such as priority date, flow rate limitations, volume limitations, and periods of use to determine whether water diverted pursuant to the water rights could be delivered for mitigation.

43. IGWA cites the Director's approval of the over-the-rim plan in the Snake River Farm delivery call as support for its argument that the Director should conditionally approve Proposal No. 8 and then allow IGWA to provide engineering and other plans at a later date. However, there are important distinctions between the progress IGWA had made in the over-the-rim plan when it was considered by the Department and this plan. At the time the hearing for the over-the-rim plan was heard, IGWA had exerted significant effort to justify the plan, including identifying water rights that would be acquired and wells that could be used, testing of water temperature, quality, and evaluating the reliability and biosecurity of the proposed pumping system. IGWA had also provided preliminary engineering plans. While the Director conditionally approved the over-the-rim plan, IGWA had taken significant steps towards implementation of that plan. Here, IGWA has not taken any steps toward implementation of this proposal.

44. There is no evidence in the record that would allow the Director to recognize mitigation provided through new or existing wells.

### Quantity of Water Delivered to Rangen

45. No evidence was presented in the record about how water could physically be delivered to Rangen, and whether IGWA could obtain necessary rights of way. No quantification of available water was presented. Planning and design for an over-the-rim project would take at least six months. IGWA could not timely deliver water to Rangen when water is needed in 2014.

## **Proposal No. 9: Mitigation by Pumping Water in Billingsley Creek Back to Rangen**

46. IGWA proposes a direct pump-back and aeration system within the Rangen facility to satisfy mitigation obligations.



### Legality of IGWA Providing a Direct Pump-Back and Aeration System Within the Rangen Facility

47. There is no evidence in the record that IGWA has the water rights or property access to construct and operate a pump-back and aeration system to provide mitigation to Rangen. IGWA did not present any evidence about how the water rights or property access would be acquired. IGWA also failed to provide even basic design plans in support of this proposal.

### Delivery of Pump-Back Water to Rangen

48. There is no evidence in the record that IGWA could timely deliver water to Rangen when Rangen needs the water in 2014.

### **Mitigation Shortfall**

49. Proposal No. 1 provides an average of 1.2 cfs during the first year (April 1, 2014, through March 31, 2015) through aquifer enhancement activities.

50. Proposal No. 2 provides an average of 1.8 cfs through delivery of water not diverted by Morris.

51. There is no evidence in the record establishing that other proposals would provide mitigation during the first year.

52. The Mitigation Plan provides an average predicted benefit of 3.0 cfs during the first year, if Morris foregoes diversion of all water from the Curren Tunnel as stated in his letter.

53. The Mitigation Plan fails to provide the required 3.4 cfs during the first year, and the mitigation shortfall is 0.4 cfs.

54. Curtailment dates coinciding with various priority dates were iteratively entered into ESPAM 2.1 to determine the curtailment date required to provide the mitigation shortfall. A curtailment date of July 1, 1983, is predicted to provide an average benefit of 0.4 cfs during the first year to the Curren Tunnel.

### **Conclusion**

55. IGWA's evidence established that foregone diversion of Curren Tunnel water by Morris is predicted to deliver an average of 1.8 cfs water directly to Rangen from April 1, 2014, through March 31, 2015, if Morris foregoes diversion of all water from the Curren Tunnel as stated in his letter.

56. IGWA's evidence established that it can provide an average of 1.7 cfs of water to Rangen through its aquifer enhancement activities, based on steady state ESPAM 2.1 model runs.

57. IGWA's evidence established that it can provide 1.2 cfs of water from its aquifer enhancement activities, based on transient ESPAM 2.1 model runs, from April 1, 2014, through March 31, 2015.

58. IGWA's evidence established that it can provide a total of 3.5 cfs in steady state benefits to Rangen. The steady state mitigation credit of 3.5 cfs is 5.6 cfs less than the 9.1 cfs obligation.

60. IGWA can provide a total of 3.0 cfs of direct flow benefits to Rangen from April 1, 2014, through March 31, 2015. The mitigation credit of 3.0 cfs is 0.4 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of July 1, 1983, or later (junior) must be curtailed to provide the 0.4 cfs to Rangen.

61. IGWA did not establish that it can provide any steady state benefits or direct delivery of water to Rangen in the current annual period for the following proposals: assignment of a water right application, cleaning and/or reconstruction of the Curren Tunnel, drilling a horizontal well, delivery of water from new or existing wells, or pumping water back through the Rangen facility.

## **CONCLUSIONS OF LAW**

### **Aquifer Enhancement Activities**

1. IGWA is entitled to a mitigation credit of 1.7 cfs toward its steady state obligation of 9.1 cfs because of its aquifer enhancement activities.

2. IGWA is entitled to a mitigation credit of 1.2 cfs toward its April 1, 2014, through March 31, 2015, direct flow obligation of 3.4 cfs because of its aquifer enhancement activities.

3. The steady state and direct flow obligations are separate alternatives in the Director's Curtailment Order, and the model simulations resulting in the above steady state and direct flow credits are mutually exclusive.

### **Irrigation Water Not Diverted from the Curren Tunnel**

4. IGWA is entitled to a mitigation credit of 1.8 cfs for Curren Tunnel water directly provided to Rangen because of the non-diversion of irrigation water from the Curren Tunnel pursuant to water rights held by Morris and because Morris has agreed to cease diverting any water from the Curren Tunnel through his irrigation pipeline. The quantity of 1.8 cfs counts toward both the steady state and direct flow obligations in the Curtailment Order.

## **Assignment of IGWA's Water Right Application to Rangen**

5. Because all IGWA offered to Rangen at the hearing is assignment of a bare application to appropriate water for mitigation with no supporting evidence about its development and perfection, there is currently no legal basis for the Director to hold that an application to appropriate water can provide mitigation to Rangen. Furthermore, the unique factual situation of this case will likely play an important role in the application proceeding. IGWA is not entitled to any mitigation credit for its proposal to assign application to appropriate water no. 36-16976 to Rangen.

## **Cleaning, Deepening, or Enlarging Curren Tunnel**

6. IGWA is asking the Director to grant it mitigation credit for cleaning the Curren Tunnel. Even if the Director were inclined to grant some sort of credit, there is no evidence in the record for determining the credit. Erwin, the only person with firsthand experience with the cleaning of the inside of a tunnel, testified the work he did in the Curren Tunnel "probably" increased the flow discharging from the tunnel, but provided no estimate. Dr. Brockway concluded that cleaning the Curren Tunnel "would result in very little, if any, increase of flow." There simply is not sufficient evidence in the record to support granting credit to IGWA for cleaning the Curren Tunnel.

7. The Conjunctive Management Rules require that a senior water right holder maintain a reasonable means of diversion. Occasional cleaning of the diversion works is a reasonable expectation. The Director will order and instruct Rangen to inspect the tunnel at both ends of the corrugated metal pipe and clean any debris from the tunnel to improve flows into and from corrugated metal pipe. Rangen must grant IDWR access at the time of cleaning to observe and document the extent of cleaning.

8. Any physical work to deepen or enlarge the tunnel could not be completed to timely provide water to Rangen during the 2014 irrigation season when the water is needed.

9. Legitimate concerns exist about whether deepening or enlarging the tunnel would reduce flows instead of improve flows. The lack of a detailed proposal of how to enlarge or deepen the tunnel, when coupled with the uncertainty associated with the project and the potential negative impacts on other water right holders, is cause for rejecting the deepening or enlarging proposal.

10. IGWA is not entitled to any mitigation credit for its proposals to clean, deepen, or enlarge the Curren Tunnel.

## **Construction of a Horizontal Well**

11. IGWA did not establish what water rights would be exercised to deliver water to Rangen from a new horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well

could be constructed. The planning and construction of a delivery system could not be completed in 2014 during the time water is needed by Rangen.

12. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water directly to Rangen from a newly constructed horizontal well.

#### **Mitigation with Water from New Wells or Existing Wells**

13. IGWA did not establish what water rights would be exercised or that there were any commitments by the owners of wells, either by contract or acquisition, authorizing diversion of water to Rangen from new wells or existing wells for mitigation. The planning and construction of a delivery system could not be completed in 2014 during the time water is needed by Rangen.

14. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water directly to Rangen from new wells or existing wells.

#### **Mitigation by Pumping Water in Billingsley Creek Back to Rangen**

15. IGWA did not establish what water rights would be exercised or that IGWA owns, or that there are commitments by an owner of land, authorizing construction of a pump-back system and delivery of Billingsley Creek water.

16. IGWA's failure to provide even basic design plans for a pump-back system is justification for denial of this proposal.

17. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water from Billingsley Creek directly to Rangen through a pump-back system.

#### **Conclusion**

18. IGWA is entitled to a total steady state mitigation credit of 3.5 cfs toward its steady state obligation of 9.1 cfs.

19. IGWA is entitled to a total direct credit of 3.0 cfs toward its first annual period direct flow obligation of 3.4 cfs as a result of Morris' agreement not to divert any water from the Curren Tunnel. The mitigation credit of 3.0 cfs is 0.4 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of July 1, 1983, or later must be curtailed to provide the 0.4 cfs to Rangen.

#### **ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Director APPROVES Proposal No. 1 (aquifer enhancement activities) and Proposal No. 2 (delivery of Morris Curren Tunnel water) of IGWA's Mitigation Plan.

IT IS FURTHER ORDERED that the Director rejects Proposal Nos. 3 and 6 through 9 of IGWA's Mitigation Plan.

IT IS FURTHER ORDERED that Rangen shall inspect the Curren Tunnel at both ends of the corrugated metal pipe and clean any debris from the tunnel to improve flows into and from corrugated metal pipe. Rangen must grant IDWR access at the time of cleaning to observe and document the extent of cleaning.

IT IS FURTHER ORDERED that IGWA is granted 1.2 cfs of transient mitigation credit for the annual period from April 1, 2014, through March 31, 2015, because of its past and ongoing, multi-year aquifer enhancement activities.

IT IS FURTHER ORDERED that IGWA is granted 1.8 cfs of mitigation credit for the annual period from April 1, 2014, through March 31, 2015, for direct delivery of surface water from Curren Tunnel to Rangen, because Morris agreed to cease diverting any water from the Curren Tunnel through his irrigation pipeline.

IT IS FURTHER ORDERED that, IGWA will be granted 3.0 cfs of total annual mitigation credit for the annual period from April 1, 2014, through March 31, 2015.

IT IS FURTHER ORDERED that the 3.0 cfs total mitigation credit is 0.4 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014, through March 31, 2015.

IT IS FURTHER ORDERED that water rights bearing priority dates junior or equal to July 1, 1983, shall be curtailed during the 2014 irrigation season.

IT IS FURTHER ORDERED that the stay issued in the February 21, 2014, *Order Granting IGWA's Petition to Stay Curtailment* of the Curtailment Order is hereby lifted.

IT IS FURTHER ORDERED that at 12:01 a.m. on or before May 5, 2014, users of ground water holding consumptive water rights bearing priority dates junior or equal to July 1, 1983, as may be determined from Attachment A to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that this amended order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.<sup>3</sup>

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<sup>3</sup> Curtailment was stayed by separate order of the Director dated April 28, 2014. *Order Granting IGWA's Second Petition to Stay Curtailment*. The stay is still in place but the stay may be revoked upon further order of the Director.

IT IS FURTHER ORDERED that, pursuant to Conjunctive Management Rule 37.03.11.040.40, watermasters for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, shall permit the diversion and use of ground water by water rights with priority date senior to July 1, 1983, to continue out of priority diversions within the water district provided IGWA's Mitigation Plan is complied with.

Dated this 16<sup>th</sup> day of May, 2014.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of May, 2014, the above and foregoing document was served on the following by providing a copy of the *AMENDED ORDER APPROVING IN PART AND REJECTING IN PART IGWA'S MITIGATION PLAN; ORDER LIFTING STAY ISSUED FEBRUARY 21, 2014; AMENDED CURTAILMENT ORDER* in the manner selected:

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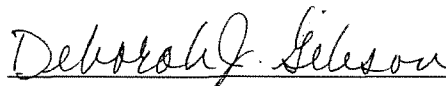
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Deborah J. Gibson  
Admin. Assistant to the Director



# **EXHIBIT 3**

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

IN THE MATTER OF THE MITIGATION	)	CM-MP-2014-001
PLAN FILED BY THE IDAHO GROUND	)	CM-DC-2011-004
WATER APPROPRIATORS FOR THE	)	
DISTRIBUTION OF WATER TO WATER	)	ORDER APPROVING IN PART
RIGHT NOS. 36-02551 AND 36-07694 IN	)	AND REJECTING IN PART
THE NAME OF RANGEN, INC.	)	IGWA'S MITIGATION PLAN;
	)	ORDER LIFTING STAY ISSUED
	)	FEBRUARY 21, 2014; AMENDED
IN THE MATTER OF DISTRIBUTION OF	)	CURTAILMENT ORDER
WATER TO WATER RIGHT NOS. 36-02551	)	
AND 36-07694	)	
(RANGEN, INC.)	)	
	)	

**PROCEDURAL BACKGROUND**

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"). The Curtailment Order recognizes that holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides "simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the "Martin-Curren Tunnel"] or direct flow of 9.1 cfs to Rangen." *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen "may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year." *Id.*

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("Mitigation Plan") to avoid curtailment imposed by the Curtailment Order. The Mitigation Plan sets forth nine proposals for junior-priority ground water pumpers to meet mitigation obligations: 1) credit for current and ongoing mitigation activities; 2) mitigation via the Sandy Pipe; 3) assignment of water right no. 36-16976; 4) fish replacement; 5) monetary compensation; 6) improvements to the Curren Tunnel diversion; 7) drilling a horizontal well in the vicinity of the Curren Tunnel; 8) drilling new groundwater wells or utilizing existing wells with delivery over-the-rim; and 9) construction of a direct pump-back and aeration system within the Rangen facility.

On March 14, 2014, Rangen, Inc. ("Rangen") filed three documents with the Department: *Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project*; *Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing*; and *Rangen, Inc.'s Petition to Intervene to Become a Party Protestant and Rangen's Motion for Reconsideration Re: Denial of Participation in Mitigation Plan Hearing*. At the commencement of the hearing on IGWA's Mitigation Plan, which was held on March 17-19, 2014 at the Department's State office in Boise, Idaho, the Director verbally ruled on Rangen's motions and petition to intervene. Specifically, the Director granted Rangen's motion to exclude evidence of the Tucker Springs Project; dismissed proposals four and five of IGWA's Mitigation Plan, and granted Rangen's petition to intervene. On March 26, 2014, the Director issued the following to reflect those verbal rulings: *Order Granting Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project*; *Order Granting in Part and Denying in Part Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing*; and *Order Granting Rangen, Inc.'s Petition to Intervene and Denying Motion for Reconsideration*.

### **APPLICABLE LAW**

Conjunctive Management Rule 43.03 ("Rule 43.03") establishes the following factors that "may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights":

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

- e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.
- f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.
- g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.
- h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.
- i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.
- j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.
- k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.
- l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.
- m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.
- n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.
- o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.043.03(a-o).

A proposed mitigation plan must contain information that allows the Director to evaluate these factors. IDAPA 37.03.11.043.01(d).

While Rule 43.03 lists factors that “may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights,” factors 43.03(a) through 43.03(c) are necessary components of mitigation plans that call for the direct delivery of mitigation water. A junior water right holder seeking to directly deliver mitigation water bears the burden of proving that (a) the “delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law,” (b) “the mitigation plan will provide replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source,” and (c) “the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage.” IDAPA 37.03.11.043.03(a-c) These three inquiries are threshold factors against which IGWA’s mitigation plan proposal must be measured.

To satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the curtailment order; (2) the components of the proposed mitigation plan can be implemented to timely provide mitigation water as required by the curtailment order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.

Consideration of the first three factors in Rule 43.03 requires that the water be provided in the season of use.

## **ANALYSIS**

This decision approves portions of IGWA’s Mitigation Plan, but determines that the quantities of mitigation water available to Rangen during the time of need are insufficient to fully mitigate as required by the Curtailment Order. As a result, curtailment of the use of water by a segment of the ground water holders whose use was curtailed in the Curtailment Order is required.

This decision recognizes credit for only two components of IGWA’s proposed mitigation plan: (1) Aquifer enhancement activities (conversions, recharge, and voluntary curtailments), and (2) Exchange of irrigation water diverted from the Curren Tunnel with operational spill water from the North Side Canal Company. The Director rejects the remaining components (proposals 3, 6- 9) of IGWA’s mitigation plan. The primary reason for rejection of the other proposed components of IGWA’s mitigation plan is the lack of evidence in the record to determine how the proposal could be implemented, either legally or physically. IGWA did not address and carry its evidentiary burden by: (1) Establishing the legality of the proposal, (2) Presenting details about how the proposed physical infrastructure could be physically located, constructed and operated, and (3) Predicting when the proposal could be completed to provide

the required mitigation. The only evidence that IGWA presented about proposed physical infrastructure was testimony that the proposals requiring infrastructure would be feasible or that there is no reason why IGWA couldn't implement sections its mitigation proposals. Brendeke, Tr., Vol. II, pp. 483-85, 494-95, 501, 504, 511, 515, 519, 522-23, 525-27. Testimony that IGWA has an optimistic vision of successfully completing proposals 3 and 6-9 of its mitigation plan is not a substitute for presenting actual activities or written plans demonstrating that it has initiated and at least completed preliminary tasks in implementing its mitigation plan.

### Use of ESPAM 2.1

The Eastern Snake Plain Aquifer Model ("ESPAM") is a calibrated regional ground water model representing the Eastern Snake Plain Aquifer ("ESPA"). In the Curtailment Order the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen's renewed delivery call. In this decision, the Director uses ESPAM 2.1 to determine the simulated benefits of aquifer enhancement activities conducted by IGWA and other private entities and to determine a curtailment date because of a mitigation deficiency.

### Benefits of Aquifer Enhancement Activities

ESPAM 2.1 can simulate the equilibrium, steady-state impacts resulting from a constant stress, or, alternatively, it can simulate the impacts of constant or time-variable stresses during a specific period of time. Model simulations that analyze impacts over a specific time period are called "transient runs." The length of the simulation is dependent on the time period of interest. Curtailment of ground water pumping was simulated over a period of five years representing the five-year curtailment phase-in period from April 2014 through March 2019. Aquifer enhancement activities by IGWA and other private entities were simulated over a period of 14 years representing April 2005 through March 2019. In both simulations, the volume of benefit to the aquifer during each year was averaged over a one-year "stress period." For example, the volume of aquifer enhancement activities during 2005 was input into the model at a constant rate from April 2005 through March 2006.

For purposes of both the Curtailment Order and analyzing the mitigation required in response to a delivery call, the Department employed an annual stress period in ESPAM 2.1, predicted the annual volume accruing to the Curren Tunnel within each year of the five-year phase-in period, and calculated an average annual mitigation flow requirement for each year from the annual volume. The mitigation requirement was calculated by dividing the total volume predicted to accrue over a one year period by 365 days and converting the units to cubic feet per second. The use of the average annual mitigation requirement promotes annual planning and is a reasonable time period for model prediction and analysis.<sup>1</sup>

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<sup>1</sup> The Director notes that Rangen also evaluated IGWA's aquifer enhancement activities using an annual stress period approach. *See* Rangen Ex. 2071. Rangen's evaluation neglected aquifer enhancement activities performed by Southwest Irrigation District and the ongoing transient effects of aquifer enhancement activities performed by IGWA in prior years, thus Rangen's evaluation did not include all of the transient benefits predicted to accrue to the Curren Tunnel after April 2014.

### Benefits of Mitigation Using Senior Irrigation Water Rights

Ground water pumping for irrigation causes depletions of Curren Tunnel flows during the non-irrigation season after ground water pumping ceases. As stated above, however, predicted accretions to flows in the Curren Tunnel from curtailment were modeled over one year stress periods to determine the obligations of the ground water users to mitigate for their ground water diversions. Predicted accretions to the Curren Tunnel resulting from aquifer enhancement activities were also modeled over one year stress periods.

In this decision, the Director also employs an annual time period to evaluate the average benefit of IGWA's proposal to deliver water to Rangen that would have been diverted pursuant to irrigation water rights held by Howard (Butch) and Rhonda Morris (hereafter referred to in the singular as "Morris"). The Curtailment Order allowed staged mitigation, requiring incremental increases in mitigation for each of the first five years of implementation. Each of the incremental mitigation requirements assumed an average obligation within each year. For each of the first four years, the determination of the annual obligation was computed by applying annual stresses and computing an average annual obligation. Because the conjunctive management rules limit the staged mitigation period to five years, the mitigation obligation for the fifth year increased to the full 9.1 cfs obligation. Similarly, an annual averaging of delivery of irrigation water can be employed to determine whether the junior water right holder has satisfied the mitigation obligation. Averaging IGWA's mitigation activities over a period of one year will establish consistent time periods for combining delivery of the Morris water for mitigation and the average annual benefit provided by aquifer enhancement activities, and for direct comparison to the annual mitigation requirement. If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency. The senior water right holder will be assured of a water supply, particularly during periods of low spring flow, as the low flow periods occur during the irrigation season in recent years. *See* Rangen Ex. 2045, 2073.

### Time Period for Mitigation

The first year mitigation requirement of 3.4 cfs will begin on April 1, 2014, and continue through March 31, 2015. On April 1, 2015, the ground water users must have sufficient mitigation in place to deliver 5.2 cfs to Rangen, either by direct delivery or by transient modeled accretions.

## **FINDINGS OF FACT**

### **Eastern Snake Plain Aquifer Model Version No. 2.1**

1. ESPAM is a calibrated regional ground water model representing the ESPA. In the Curtailment Order the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen's renewed delivery call. IDWR will use ESPAM 2.1 to determine the simulated benefits of aquifer enhancement activities conducted by IGWA and other private

entities, and, if there is a deficiency in the mitigation plan, to determine a curtailment date to provide for the deficiency.

### **Proposal No. 1: Aquifer Enhancement Activities**

2. Proposal No. 1 requests mitigation credit for the following ongoing and future activities by IGWA: (a) conversions from ground water irrigation to surface water irrigation, (b) voluntary “dry-ups” of acreage irrigated with ground water through the Conservation Reserve Enhanced Program (“CREP”) or other cessation of irrigation with ground water, and (c) ground water recharge. This order will subsequently refer to these activities as “aquifer enhancement activities.”

3. Exhibit 3001 in the hearing record contains data compiled by IDWR that quantifies the aquifer enhancement activities of IGWA and other private entities during the time period beginning in 2005 through 2010. Data for 2011-2013 private aquifer enhancement activities were received into evidence as Exhibits 1022, 1023, 1082 and 1083.

4. In the past, the Department input data for aquifer enhancement activities into ESPAM as a stress in the model to simulate benefits accruing to spring/Snake River reaches from the aquifer enhancement activities that benefit spring/Snake River reaches that supply water to senior surface water right holders who called for delivery of water pursuant to their senior surface water rights against junior ground water right holders. These data have been recognized by the Department in other conjunctive management contested cases as a reliable representation of previous aquifer enhancement activities of IGWA. *See Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, In the Matter of the Idaho Ground Water Appropriators, Inc.’s Mitigation Plan for Conversions, Dry-ups, and Recharge, Doc. No. CM-MP-2009-006 (July 19, 2010), *aff’d* on appeal in *Memorandum Decision and Order on Petition for Judicial Review*, CV-2010-3822 (Fifth Jud. Dist., Twin Falls County, April 22, 2011).

5. The Curtailment Order stated that, to avoid curtailment, IGWA must either provide mitigation of 9.1 cfs in combined direct flows and steady state simulated flows to Rangen during 2014, or must provide 3.4 cfs of direct flows to Rangen during the first year of the curtailment order. To predict the benefit of aquifer enhancement activities in a steady state and also to predict transient benefits of aquifer enhancement activities in year 2014, ESPAM Model 2.1 must be run (a) once to determine the steady state benefits assuming constant implementation of fixed aquifer enhancement activities; and (b) once in transient mode with a stress period for each year of aquifer enhancement activities (2005 – 2013 plus projected future activities) to determine the benefits of past and projected future activities predicted to accrue to the Curren Tunnel during each year of the five-year phase-in period.

6. Exhibit no. 1025 summarizes model runs predicting benefits to Rangen resulting from steady state simulations of activities in 2011, 2012, and 2013. The predicted flow benefits to Rangen in Exhibit 1025 were accepted and referred to by all parties in the presentation of evidence.



7. For comparison with the phased-in requirement of 3.4 cfs during the first year of the curtailment order, it is necessary to predict the benefits of aquifer enhancement that would accrue during the first year. Rangen used ESPAM 2.1 to evaluate the transient benefits of aquifer enhancement activities beginning in 2014 in Exhibit 2071, but neglected to include ongoing transient benefits of prior IGWA aquifer enhancement projects that occurred between 2005 and 2013 and neglected to include aquifer enhancement activities performed by Southwest Irrigation District. *See* Brockway, Tr. Vol. III, p. 681-685. Using the data entered into evidence at the hearing, the Department input data into the model for each year of private party aquifer enhancement activities from 2005 through 2014. The 2005 through 2013 data were compiled from previously documented activities. IDWR Ex. 3001; IGWA Ex. 1025. For 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero. The Department determined the average annual benefit from aquifer enhancement activities predicted to accrue to the Curren Tunnel between April 2014 and March 2015 is 871 acre feet, which is equivalent to an average rate of 1.2 cfs for 365 days. The modeling files and a summary table of the model results are included on a CD accompanying this order.

#### **Proposal No. 2: Mitigation Using Senior Irrigation Water Rights Diverted from the Curren Tunnel**

8. IGWA proposes to mitigate using water from Morris, who holds certain senior irrigation water rights from the Curren Tunnel. Specifically, IGWA and Morris agreed that IGWA would deliver Snake River water discharging from the North Side Canal Co. system into the Sandy Pond as operational spill to Morris through the Sandy Pipeline, and, in exchange, Morris would forego diversion of water from Curren Tunnel pursuant to water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A, and 36-10141B that bear priority dates senior to Rangen's fish propagation water rights. The foregone diversion of water by Morris will result in discharge and capture of water from the Curren Tunnel by Rangen that would have been diverted and used by Morris but for the agreement with IGWA.

9. It is necessary to apply the first three threshold factors of Rule 43.03.

#### **Legality of Use of North Side Canal Company Water Spilled into the Sandy Ponds**

10. Morris is presently irrigating approximately 205 acres of his own land with wastewater from the Sandy Ponds. Morris, Tr. Vol. II, p. 371-72. Morris testified that he also irrigates adjacent land owned by Musser and Candy with water from the Sandy Ponds. Morris, Tr. Vol. II, pp. 363, 372.

11. Morris holds a water right to irrigate 125 acres of his own land with water from the Sandy Pond. Department records do not identify any water rights in the name of Musser or Candy to irrigate their lands with water from the Sandy Pond.

12. The lands of Musser, Candy, and Morris are all within the water right place of use service area of the North Side Canal Company. *See* Exhibit 3000. The Sandy Pond was originally constructed by North Side Canal Company to capture its operational spill for water

quality purposes. When North Snake Ground Water District acquired the Sandy Pond, it enlarged the size of the pond. The enlargement of the pond did not change the character or assumed ownership of the water in the pond, however. Until other water rights are established authorizing diversion and use of water from the pond, the Department will presume the water in the pond is North Side Canal Company operational spill water that is being captured and may be applied to North Side Canal Company lands. *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950).

#### Quantity of Water Delivered to Rangen

13. The quantity of water available for diversion by Morris pursuant to water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A, and 36-10141B is limited by the discharge of the Curren Tunnel and by diversions of other water users pursuant to other senior water rights.

14. The Morris water rights authorize a beneficial use of irrigation. The contribution of water to Rangen by leaving water in the Curren Tunnel that normally would have been diverted by Morris only benefits Rangen during the irrigation season. In contrast, as identified in the Curtailment Order, the modeled 2014 **year-round** average Curren Tunnel depletion resulting from junior ground water pumping is 3.4 cfs. *Curtailment Order* at 42. The benefit to Rangen of Morris' nondiversion of water from Curren Tunnel to Rangen must be estimated and then compared to the year-round depletion average. The calculation of the average first year depletion of 3.4 cfs starts April 1. IGWA needs to compensate for depletions of water for the entire 365 days from April 15 to March 31.

15. Morris irrigates crops from approximately April through mid-October. Tr. Vol. II, p 392-93. The number of days he would have irrigated with water from the Curren Tunnel is approximately 184 days (April 15 through October 15). This means that IGWA can claim credit only for that volume of water available to Morris for 184 days between April 15 and October 15.

16. Flows discharging from Curren Tunnel have been measured for approximately 20 years. The Curren Tunnel discharge is the sum of the average monthly flow measured at the mouth of the tunnel by IDWR (Exhibit 2045) and the average monthly flow diverted into Rangen's 6-inch PVC pipe (Exhibit 3000). The magnitude of discharges from the Curren Tunnel varies annually and seasonally depending on hydrologic conditions, related water uses, and other activities on the ESPA.

17. Table 1 lists the average irrigation season (April 15 through October 15) flow from Curren Tunnel for years 1996 through 2013. There is a distinct change in the magnitude of average irrigation season flow values starting in 2002. It is likely that the average discharge from the Curren Tunnel during the 2014 irrigation season will be within the range represented by the 2002-2013 conditions. From 2002 through 2013, the average irrigation season flow has varied between 2.3 cfs and 5.7 cfs. The years of 2002 through 2013 will be used as a historical data set to predict the flows from Curren Tunnel for 2014. The average of the average irrigation season values for each year from 2002 through 2013 is 3.7 cfs.

Year	Average Curren Tunnel discharge, April 15 - October 15
1996	12.4
1997	17.9
1998	17.0
1999	15.2
2000	13.9
2001	8.0
2002	4.5
2003	3.9
2004	4.4
2005	2.3
2006	5.7
2007	4.9
2008	3.2
2009	2.8
2010	2.3
2011	3.4
2012	4.1
2013	2.8
2002-2013 average	3.7

Table 1. Average Curren Tunnel discharge during Morris' irrigation season.

18. Rangen holds water rights for irrigation and domestic purposes that identify Curren Tunnel as the source of water. Water right no. 36-00134B authorizes diversion of 0.09 cfs from Curren Tunnel and bears a priority date of October 9, 1884.

19. Morris holds water rights for irrigation and stockwater purposes that identify Curren Tunnel as the source of water. Water right no. 36-134D authorizes diversion of 1.58 cfs of water from Curren Tunnel. Water right no. 36-134E also authorizes diversion of 0.82 cfs for water from Curren Tunnel. Both water right no. 36-134D and water right no. 36-134E bear a priority date of October 9, 1884 (identical to the priority date for Rangen's water right no. 36-00134B identified above). Morris is entitled to divert a total of 2.4 cfs from Curren Tunnel under water right nos. 36-134D and 36-134E. Morris currently diverts up to 15 miner's inches of water from the Curren Tunnel for maintenance of his irrigation pipe. Morris, Tr. Vol. II, p. 390. Because Morris currently diverts up to 15 miner's inches of water from the Curren Tunnel, the Director will subtract 15 miner's inches (0.3 cfs) from the available supply for mitigation.

20. Walter and Margaret Candy (hereafter referred to in the singular as "Candy") hold water right no. 36-134A, a water right authorizing diversion for domestic use of 0.04 cfs and irrigation of 36 acres with water from the Curren Tunnel. Water right no. 36-134A authorizes a total diversion of 0.49 cfs from the Curren Tunnel for both the domestic and irrigation uses and bears a priority date of October 9, 1884 (identical to the priority date for Rangen's water right

no. 36-00134B identified above). Water right 36-134A authorizes a diversion rate of 0.014 cfs per acre. Candy uses water from the Curren Tunnel for domestic use and to irrigate land around their home. The land irrigated with water from the tunnel is approximately one half acre. Morris, Tr. Vol. II, p. 382. As stated above, the remainder of Candy's land is irrigated from the Sandy Pipeline. Candy domestic water use would be 0.04 cfs. Because irrigation is included in a small domestic use of one-half acre or less, the total use by Candy is limited to 0.04 cfs.

21. Alvin and Hope Musser Living Trust (hereafter referred to in the singular as "Musser") hold water right no. 36-102. Water right no. 36-102 authorizes the diversion of 4.1 cfs for irrigation purposes on Musser's property, and bears a priority date of April 1, 1892. Morris is farming Musser's property but Morris does not irrigate Musser's property with water right no. 36-102. Instead, Morris is irrigating the Musser's property with water from the Sandy Pipeline,

22. Rangen holds water right no. 36-135A. Water right no. 36-135A authorizes diversion of 0.05 cfs for irrigation and domestic purposes, and bears a priority date of April 1, 1908.

23. Candy holds water right no. 36-135B. Water right no. 36-135B authorizes diversion of 0.51 cfs for irrigation purposes and bears a priority date of April 1, 1908. Morris is farming Candy's property but Morris does not irrigate Candy's property with water right no. 36-135B. Instead, Morris is irrigating the land with water from the Sandy Pipeline,

24. Morris holds water right nos. 36-135D and 36-135E. Water right no. 36-135D authorizes the diversion of 1.58 cfs for irrigation and stockwater purposes. Water right no. 36-135E authorizes the diversion of 0.82 cfs for irrigation and stockwater purposes. Both water rights bear a priority date of April 1, 1908.

25. The following spreadsheet quantifies the allocation of water according to the priority dates of water rights offered for mitigation. Water right nos. 36-134A, 36-134B, 36-134D, and 36-134E are the earliest priority date (October 9, 1884) water rights authorizing diversion of water from the Curren Tunnel. The total flow rate authorized for diversion pursuant to these water rights is 2.98 cfs. A flow rate of 3.7 cfs exceeds the 2.98 cfs maximum diversion rate authorized by water rights held by Morris, Candy, and Rangen bearing an 1884 priority date. Morris will divert 0.3 cfs of Curren Tunnel water into his irrigation pipeline. Candy will divert 0.04 cfs, and because his lands are being irrigated with water from the Sandy Pipeline, he will not divert the remaining 0.45 cfs pursuant to water right no. 36-134A. Rangen will divert 0.09 cfs pursuant to water right no. 36-134B.

26. Water right no. 36-102 (Musser) is the next water right in priority bearing a priority date of April 1, 1892 and authorizing diversion of 4.1 cfs.. Because Musser lands are being irrigated by water from the Sandy Pipeline, Musser will not divert water from Curren Tunnel, and the next in line priority holders must be considered until the total quantity of use or mitigation equals 3.7 cfs.

27. Water right nos. 135A (Rangen), 36-135B (Candy), 36-135D (Morris) , and 36-135E (Morris) all bear a priority date of April 1, 1892. Rangen will divert 0.05 cfs. Candy will not divert water authorized by water right no. 36-135B because his lands are being irrigated with water from the Sandy Pipeline. Morris's water right nos. 36-135D and 36-135E are available for additional mitigation.

Water Right Holder	Water Right Number	Water Right Quantity (cfs)	Diverted for beneficial use, not available for mitigation (cfs)	Non-diversion of Morris water, available for mitigation (cfs)
Morris	36-134D & 36-134E	2.4	0.3	2.1
Candy	36-134A	0.49	0.04	
Rangen	36-134B	0.09	0.09	
Musser	36-102	4.1	0.00	
Rangen	36-135A	0.05	0.05	
Candy	36-135B	0.51	0.00	
Morris	36-135D	1.58	0.0	1.12
Morris	36-135E	0.82	0.00	
Total			0.5 <sup>2</sup>	3.2

As a result of the above summary, IGWA would be entitled to the following for mitigation:

$$3.7 \text{ cfs} - 0.3 \text{ cfs (Morris)} - 0.14 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 3.2 \text{ cfs (approximately)}$$

The average annual benefit provided by the Morris water portion mitigation plan for comparison with the annual requirement (3.4 cfs for April 1, 2014 through March 31, 2015, 5.2 cfs for April 1, 2015 through March 31, 2106, etc.) is computed as follows:

$$\begin{array}{l} 184 \text{ days} \\ \hline \end{array} \times 3.2 \text{ cfs} = \text{annual average of 1.6 cfs provided}$$

$$365 \text{ days}$$

If Morris foregoes diversion of the 0.3 cfs from the Curren Tunnel, additional water would be available for IGWA as follows:

$$3.7 \text{ cfs} - 0.14 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 3.5 \text{ cfs (approximately)}$$

<sup>2</sup> Number reflects rounding to the nearest 1/10 of a cfs.

If Morris foregoes diversion of the 0.3 cfs from the Curren Tunnel, the average annual benefit provided would be as follows:

$$\frac{184 \text{ days}}{365 \text{ys}} \times 3.5 \text{ cfs} = \text{annual average of 1.8 cfs provided}$$

### **Proposal No. 3: Assignment of IGWA's Water Right Application to Rangen**

28. IGWA proposes to assign pending application to appropriate water no. 36-16976 to Rangen as mitigation. Application no. 36-16976 proposes to appropriate 12 cfs from Springs and Billingsley Creek at Rangen's existing physical diversion from Billingsley Creek known as the "bridge diversion."

29. IGWA filed application to appropriate water no. 36-16976 on April 3, 2013, shortly after the Director ruled in the contested case for Rangen's delivery call that Rangen's water rights only authorized diversion of water from the Curren Tunnel. This ruling was the basis for a determination in the Director's Curtailment Order that Rangen does not hold a water right authorizing diversion of water from Billingsley Creek at the bridge diversion.

30. IGWA's water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application.

#### Legality of Assigning Application to Appropriate Water no. 36-16976 to Rangen

31. Pursuant to Rule 43, the Director can approve proposal no. 3 only if the Director believes that the application can provide water to Rangen in the time of need, i.e. this year. The pending application cannot be prejudged in this proceeding. IGWA essentially asked the Director to prejudge the application. The Director declines to do so. The application seeks authorization to divert 12 cfs from a point of diversion on the Rangen property. IGWA Ex. 1018 at 1. A map attached to the application shows the general area of the planned point of diversion. *Id.* at 4. The Department published notice of the application and the application was protested by Rangen. Rangen also filed a competing application and a transfer to address the point of diversion issue. The facts behind IGWA's application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts which have developed in this case, the Director concludes that it is too speculative to consider.

#### Quantity of Water Delivered to Rangen

32. As stated above, the facts behind IGWA's application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts of this case, the Director concludes that it is too speculative to determine that Rangen will deliver water in its time of need pursuant to this application.

### **Proposal Nos. 4 and 5: Mitigation with Money or Fish**

33. IGWA proposed fish replacement or monetary compensation to mitigate injury caused to Rangen by junior-priority ground water pumpers. These proposals will not be evaluated in this decision because proposal nos. 4 and 5 were dismissed as part of IGWA's Mitigation Plan in the *Order Granting in Part and Denying in Part Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing* issued March 26, 2014.

### **Proposal No. 6: Cleaning, Deepening, or Enlarging Curren Tunnel**

34. IGWA suggests that cleaning, maintaining, and improving the Curren Tunnel will increase the flows from Curren Tunnel. IGWA implies that the Director should require that Rangen grant IGWA access to the tunnel to remove debris and rock from the tunnel and to assess whether the tunnel can be deepened or enlarged.

#### Quantity of Water Delivered to Rangen from Proposed Tunnel Cleaning

35. Morris testified that cleaning out fallen rock and dirt that collected at the mouth of the Hoagland Tunnel resulted in additional water discharging from the Hoagland Tunnel. Morris Tr. Vol. II, p. 384-85. However, there is no evidence that the rock-fall in any tunnel changed the hydraulic conditions in the tunnel itself. Morris' testimony suggests the rock at the mouth of the Hoagland tunnel likely blocked collection works and created diffuse flow channels around or underneath the collection works that prevented collection of the water into the associated diversion works.

36. There is no fallen rock at the mouth of Curren Tunnel impeding Rangen's collection of water. Curren Tunnel is lined with a large diameter corrugated pipe from its mouth 50 feet into the tunnel. The remainder of the tunnel is completed in basalt rock. IGWA failed to present evidence demonstrating that cleaning the Curren Tunnel would provide any additional water to Rangen.

#### Quantity of Water Delivered to Rangen from an Enlargement or Deepening of Curren Tunnel

37. There is evidence in the record that deepening or enlarging the Curren Tunnel could increase flows from the Curren Tunnel. However, there is no evidence quantifying the potential increase. Any physical work to deepen or enlarge the tunnel could not be completed to timely provide water during the 2014 irrigation season.

### **Proposal No. 7: Construction of a Horizontal Well**

38. IGWA proposes to drill a horizontal well in the vicinity of the Curren Tunnel and divert the water from the well to Rangen's facility. IGWA proposes to drill the horizontal well near the Curren Tunnel at an elevation lower than the outlet of the Curren Tunnel.

### Legality of Constructing a Horizontal Well

39. Prior to construction of a horizontal well, IGWA would need to obtain a water right to divert and beneficially use water from the horizontal well. IGWA has not filed any applications to appropriate water from a horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The source of water proposed to be diverted is trust water. The Department has issued a moratorium on all appropriations of water from the Eastern Snake Plain Aquifer in the area where the proposed horizontal well would be constructed. Any horizontal well proposal will need to mitigate to address injury to other water users. IGWA failed to satisfy its burden because it failed to present any evidence that it will be able to address the injury to other water users.

### Quantity of Water Delivered to Rangen

40. IGWA has failed to present evidence that it could timely deliver water to Rangen when water is needed by Rangen in 2014. No evidence was presented quantifying the available water supply. The lack of information makes the proposal too speculative to approve.

### **Proposal No. 8: Mitigation With Water from New Wells or Existing Wells**

41. IGWA proposes to drill new ground water wells or utilize existing wells to deliver water directly to Rangen. IGWA asserts this plan would be similar to its over-the-rim plan previously approved in the Clear Springs Foods delivery call.

### Legality of Diverting Ground Water From New or Existing wells and Delivering the Water to Rangen for Mitigation

42. IGWA has not identified any water rights that could be exercised, through a change in nature of use, to deliver water to Rangen. Because no water rights have been identified, the Director cannot evaluate important components of the water rights such as priority date, flow rate limitations, volume limitations, and periods of use to determine whether water diverted pursuant to the water rights could be delivered for mitigation.

43. IGWA cites the Director's approval of the over-the-rim plan in the Snake River Farms delivery call as support for its argument the Director should conditionally approve Proposal No. 8 and then allow IGWA to provide engineering and other plans at a later date. However, there are important distinctions between the progress IGWA had made in the over-the-rim plan when it was considered by the Department and this plan. At the time the hearing for the over-the-rim plan was heard, IGWA had exerted significant effort to justify the plan, including identifying water rights that would be acquired and wells that could be used, testing of water temperature, quality, and evaluating the reliability and biosecurity of the proposed pumping system. IGWA had also provided preliminary engineering plans. While the Director conditionally approved the over-the-rim plan, IGWA had taken significant steps towards implementation of that plan. Here, IGWA has not taken any steps toward implementation of this proposal.



44. There is no evidence in the record that would allow the Director to recognize mitigation provided through new or existing wells.

#### Quantity of Water Delivered to Rangen

45. No evidence was presented in the record about how water could physically be delivered to Rangen, and whether IGWA could obtain necessary rights of way. No quantification of available water was presented either. Planning and design for an over the rim project would take at least six months. IGWA could not timely deliver water to Rangen when water is needed in 2014.

#### **Proposal No. 9: Mitigation by Pumping Water in Billingsley Creek Back to Rangen**

46. IGWA proposes a direct pump-back and aeration system within the Rangen facility to satisfy mitigation obligations.

#### Legality of IGWA Providing a direct Pump-Back and Aeration System Within the Rangen Facility

47. There is no evidence in the record that IGWA has the water rights or property access to construct and operate a pump back and aeration system to Rangen. IGWA did not present any evidence about how the water rights or property access would be acquired.

#### Delivery of Pump-Back Water to Rangen

48. There is no evidence in the record that IGWA could timely deliver water to Rangen when Rangen needs the water in 2014.

#### **Mitigation Shortfall**

49. Proposal No. 1 provides an average of 1.2 cfs during the first year (April 1, 2014 through March 31, 2015) through aquifer enhancement activities.

50. Proposal No. 2 provides an average of 1.6 cfs through delivery of water not diverted by Morris. If Morris foregoes diversion of all water from Curren Tunnel, the water available for Proposal No. 2 would increase to an average of 1.8 cfs.

51. There is no evidence in the record establishing that other proposals would provide mitigation during the first year.

52. The mitigation plan provides an average predicted benefit of 2.8 cfs during the first year if Morris continues to divert 0.3 cfs of water from the Curren Tunnel. If Morris foregoes diversion of all water from Curren Tunnel, the average predicted benefit would increase to 3.0 cfs.

53. The mitigation plan fails to provide the required 3.4 cfs during the first year, and the mitigation shortfall is 0.6 cfs if Morris continues to divert 0.3 cfs of water from the Curren Tunnel. If Morris foregoes diversion of all water from Curren Tunnel, the mitigation shortfall would decrease to 0.4 cfs.

54. Curtailment dates coinciding with various priority dates were iteratively entered into ESPAM 2.1 to determine the curtailment date required to provide the mitigation shortfall. A curtailment date of October 13, 1978 is predicted to provide an average benefit of 0.6 cfs to the Curren Tunnel during the first year. A curtailment date of July 1, 1983 is predicted to provide an average benefit of 0.4 cfs during the first year to the Curren Tunnel.

## **Conclusion**

55. IGWA's evidence established that foregone diversion of Curren Tunnel water by Morris is predicted to deliver an average of 1.6 cfs water directly to Rangen from April 1, 2014 through March 31, 2015. If Morris also foregoes diversion of 15 miner's inches (0.3 cfs) of water diverted from Curren Tunnel through his irrigation pipeline during the 2014 irrigation season, the foregone diversion of Curren Tunnel water by Morris is predicted to deliver an average of 1.8 cfs directly to Rangen from April 1, 2014 through March 31, 2015.

56. IGWA's evidence established that it can provide an average of 1.7 cfs water to Rangen through its aquifer enhancement activities, based on steady state ESPAM model runs.

57. IGWA's evidence established that it can provide 1.2 cfs of water from its aquifer enhancement activities, based on transient ESPAM 2.1 model runs, from April 1, 2014 through March 31, 2015.

58. IGWA's evidence established that it can provide a total of 3.3 cfs in steady state benefits to Rangen.

59. Evidence from the hearing establishes that IGWA can provide a total of 2.8 cfs of direct flow benefits to Rangen from April 1, 2014 through March 31, 2015 if Morris continues to divert 15 inches of water (0.3 cfs) from Curren Tunnel through his irrigation pipeline. The mitigation credit of 2.8 cfs is 0.6 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of October 13, 1978 or later (junior) must be curtailed to provide the 0.6 cfs to Rangen.

60. If Morris discontinues diversion of 15 inches (0.3 cfs) through his irrigation pipeline, IGWA can provide a total of 3.0 cfs of direct flow benefits to Rangen from April 1, 2014 through March 31, 2015. The mitigation credit of 3.0 cfs is 0.4 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of July 1, 1983 or later (junior) must be curtailed to provide the 0.4 cfs to Rangen.

61. IGWA did not establish that it can provide any steady state benefits or direct delivery of water to Rangen in the current annual period for the following proposals: assignment of a water right application, cleaning and/reconstruction of the Curren Tunnel, drilling a

horizontal well, delivery of water from new or existing wells, or pumping water back through the Rangen facility.

## **CONCLUSIONS OF LAW**

### **Aquifer Enhancement Activities**

1. IGWA is entitled to a mitigation credit of 1.7 cfs toward its steady state obligation of 9.1 cfs because of its aquifer enhancement activities.

2. IGWA is entitled to a mitigation credit of 1.2 cfs toward its from April 1, 2014 through March 31, 2015 direct flow obligation of 3.4 cfs because of its aquifer enhancement activities.

3. The steady state and direct flow obligations are separate alternatives in the Director's Curtailment Order, and the model simulations resulting in the above steady state and direct flow credits are mutually exclusive.

### **Irrigation Water Not Diverted from the Curren Tunnel**

4. IGWA is entitled to a mitigation credit of 1.6 cfs for Curren Tunnel water directly provided to Rangen because of the non diversion of irrigation water from the Curren Tunnel pursuant to water rights held by Morris. Alternatively, if Morris ceases diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, IGWA is entitled to a mitigation credit of 1.8 cfs for Curren Tunnel water directly provided to Rangen because of the non diversion of irrigation water from the Curren Tunnel pursuant to water rights held by Morris. The quantity of 1.6 cfs or 1.8 cfs counts toward both the steady state and direct flow obligations in the Curtailment Order.

### **Assignment of IGWA's Water Right Application to Rangen**

5. Because all IGWA offered to Rangen at the hearing is assignment of a bare application to appropriate water for mitigation with no supporting evidence about its development and perfection, there is currently no legal basis for the Director to hold that an application to appropriate water can provide mitigation to Rangen. Furthermore, the unique factual situation of this case will likely play an important role in the application proceeding. IGWA is not entitled to any mitigation credit for its proposal to assign application to appropriate water no. 36-16976 to Rangen.

### **Cleaning, Deepening, or Enlarging Curren Tunnel**

6. Rangen is not required to construct a deeper or larger tunnel to enhance the flow of water from the Curren Tunnel. The Director does not have the legal authority to require that Rangen grant access to IGWA to study a proposed enlargement, nor does the Director have the authority to order construction proposed by IGWA after studies are complete.

7. The proposed work is not legally possible without Rangen's consent.

8. Any physical work to deepen or enlarge the tunnel could not be completed to timely provide water during the 2014 irrigation season when the water is needed.

9. There was no evidence presented that IGWA could timely deliver water to Rangen when water is needed by Rangen in 2014.

10. IGWA is not entitled to any mitigation credit for its proposal to clean, deepen, or enlarge the Curren Tunnel.

#### **Construction of a Horizontal Well**

11. IGWA did not establish what water rights would be exercised to deliver water to Rangen from a new horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The planning and construction of a delivery system could not be completed in 2014 during the time water is needed by Rangen.

12. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water directly to Rangen from a newly constructed horizontal well.

#### **Mitigation with Water from New Wells or Existing Wells**

13. IGWA did not establish what water rights would be exercised or that there were any commitments by the owners of wells, either by contract or acquisition, authorizing diversion of water to Rangen from new wells or existing wells for mitigation. The planning and construction of a delivery system could not be completed in 2014 during the time water is needed by Rangen.

14. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water directly to Rangen from new wells or existing wells.

#### **Mitigation by Pumping Water in Billingsley Creek Back to Rangen**

15. IGWA did not establish what water rights would be exercised or that IGWA owns, or that there are commitments by an owner of land, authorizing construction of a pump back system and delivery of Billingsley Creek water.

16. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water from Billingsley Creek directly to Rangen through a pump back system.

#### **Conclusion**

17. IGWA is entitled to a total steady state mitigation credit of 3.3 cfs toward its steady state obligation of 9.1 cfs.

18. IGWA is entitled to a total direct credit of 2.8 cfs toward its first annual period direct flow obligation of 3.4 cfs. The mitigation credit of 2.8 cfs is 0.6 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of October 13, 1978 or later must be curtailed to provide the 0.6 cfs to Rangen.

19. Alternatively, upon agreement by Morris that he will not divert 0.3 cfs directly from Curren Tunnel, IGWA is entitled to a total direct credit of 3.0 cfs toward its first annual period direct flow obligation of 3.4 cfs. The mitigation credit of 3.0 cfs is 0.4 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of July 1, 1983 or later must be curtailed to provide the 0.4 cfs to Rangen.

### **ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Director APPROVES proposal no. 1 (aquifer enhancement activities) and proposal no. 2 (delivery of Morris Curren Tunnel Water) of IGWA's mitigation plan.

IT IS FURTHER ORDERED that the Director rejects proposals nos. 3 and 6 through 9 of IGWA's mitigation plan.

IT IS FURTHER ORDERED that IGWA is granted 1.2 cfs of transient mitigation credit for the annual period from April 1, 2014 through March 31, 2015, because of its past and ongoing, multi-year aquifer enhancement activities.

IT IS FURTHER ORDERED that IGWA is granted 1.6 cfs of mitigation credit for direct delivery of surface water from Curren Tunnel to Rangen.

IT IS FURTHER ORDERED that IGWA is granted 2.8 cfs of total mitigation credit for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that the 2.8 cfs total annual mitigation credit is 0.6 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that the stay issued in the February 21, 2014, *Order Granting IGWA's Petition to Stay Curtailment* of the Curtailment Order is hereby lifted.

IT IS FURTHER ORDERED that, at 12:01 a.m. on or before May 5, 2014, users of ground water holding consumptive water rights bearing priority dates junior or equal to October 13, 1978, listed in Attachment A to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that this amended order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition

set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that the watermasters for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, are directed to issue written notices to the holders of the consumptive ground water rights listed in Attachment A to this order. The water rights on the list bear priority dates junior or equal to October 13, 1978. The written notices are to advise the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.

IT IS FURTHER ORDERED that pursuant to Conjunctive Management Rule 37.03.11.040.40, for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, shall permit the diversion and use of ground water by water rights with priority date senior to October 13, 1978 to continue out of priority diversions within the water district provided IGWA's mitigation plan is complied with.

#### CONTINGENT ALTERNATIVE OBLIGATION

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, IGWA will be granted 3.0 cfs of total annual mitigation credit for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that the 3.0 cfs total mitigation credit is 0.4 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that water rights bearing priority dates junior or equal to July 1, 1983 shall be curtailed during the 2014 irrigation season.

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, at 12:01 a.m. on or before May 5, 2014, users of ground water holding consumptive water rights bearing priority dates junior or equal to July 1, 1983, as may be determined from Attachment A to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that this amended order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, the watermasters for the water districts within the area of

common ground water, located west of the Great Rift, and who regulate ground water, are directed to issue written notices to the holders of the consumptive ground water rights listed in Attachment A to this order with water rights that bear priority dates junior or equal to July 1, 1983. The written notices are to advise the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, pursuant to Conjunctive Management Rule 37.03.11.040.40, for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, shall permit the diversion and use of ground water by water rights with priority date senior to July 1, 1983 to continue out of priority diversions within the water district provided IGWA's mitigation plan is complied with.

Dated this 11<sup>th</sup> day of April, 2014.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of April, 2014, the above and foregoing document was served on the following by providing a copy of the *ORDER APPROVING IN PART AND REJECTING IN PART IGWA'S MITIGATION PLAN; ORDER LIFTING STAY ISSUED FEBRUARY 21, 2014; AMENDED CURTAILMENT ORDER* in the manner selected:

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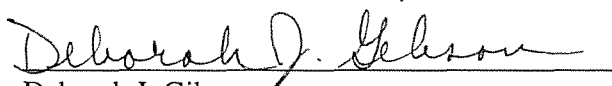
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Deborah J. Gibson  
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# **EXHIBIT 4**

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

IN THE MATTER OF THE AMENDED THIRD  
MITIGATION PLAN FILED BY THE IDAHO  
GROUND WATER APPROPRIATORS FOR THE  
DISTRIBUTION OF WATER TO WATER RIGHT  
NOS. 36-02551 & 36-07694 IN THE NAME OF  
RANGEN, INC.

Docket No. CM-MP-2014-005

**ORDER LIMITING SCOPE OF  
MITIGATION PLAN; LIMITING SCOPE  
OF HEARING; SETTING DEADLINE TO  
SUBMIT ENGINEERING PLANS**

On June 10, 2014, the Idaho Ground Water Appropriators, Inc. ("IGWA"), filed *IGWA's Amended Third Mitigation Plan and Request for Hearing* ("Third Mitigation Plan") with the Director ("Director") of the Idaho Department of Water Resources ("Department"). The Third Mitigation Plan was filed in response to the Rangen delivery call and "pending and threatened delivery calls" from other water users in Water District 36A and is intended "to provide mitigation to Rangen and other water users in the Water District 36A." *Third Mitigation Plan* at 1. The five components of the Third Mitigation Plan are: 1) Sandy Ponds recharge and Sandy Pipe delivery; 2) improvements to the Curren Tunnel diversion; 3) direct delivery of water right no. 36-16976; 4) recirculation of Rangen water rights; and 5) the Aqua Life project.

Notice of the Third Mitigation Plan was published and timely protests were filed by the following: Ruth Musser-Lopez; Little Sky Farms, c/o C. Tom Arkoosh; Alvin and Hope Musser Living Trust, c/o Marjorie M. Mikels; Buckeye Farms, c/o John K. Simpson; Thousand Springs Water Users Association, Inc., and Robert & Susan Gisler, c/o Travis Thompson; Rangen, Inc. ("Rangen"), c/o Robyn Brody, Fritz Haemmerle and Justin May; Blind Canyon Aquaranch, Inc., c/o Gary Lemmon; US Fish & Wildlife Service, c/o Tim Mayer; Bret and Kathleen McKenzie; Vaughn McKnight; and Jamie and Katherine Martin.

A *Notice of Status Conference and Hearing* was issued on July 8, 2014, scheduling a hearing on the Third Mitigation Plan for September 8-10, 2014.

A status conference was held on July 22, 2014. Various concerns were raised by the protestants regarding the scope, breadth, and complexity of the Third Mitigation Plan and the timing of the hearing. This order documents verbal rulings of the Director in response to the concerns raised.

## **Application of the Mitigation Plan to Water Users in Water District 36A Other Than Rangen**

In response to concerns raised by the protestants, IGWA verbally offered to withdraw the request to have the Third Mitigation Plan apply to water users in Water District 36A other than Rangen, thereby limiting the application of the Third Mitigation Plan to the Rangen water rights. The Director verbally granted IGWA's request.

### **Direct Delivery of Water Right No. 36-16976**

At the status conference, the Director considered the specific components of the Third Mitigation Plan and concluded the direct delivery of water right no. 36-16976 component should be dismissed because it raised the same legal issue the Director previously considered and rejected in proceedings related to IGWA's first mitigation plan. *See Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* at 13-14 (May 16, 2014) ("Amended Order"). IGWA attempts to distinguish the proposal regarding water right 36-16976 set forth in the Third Mitigation Plan from the proposal set forth in the first mitigation plan. Specifically, IGWA argues the first mitigation plan proposed to assign application for water right 36-16976 to Rangen for mitigation credit, whereas in the Third Mitigation Plan, IGWA is "simply asking for mitigation credit for water IGWA actually delivers to Rangen under water right 36-16976, if and when it is approved." *Third Mitigation Plan* at 5. The Director rejected the proposal in the first mitigation plan because the application was too speculative:

The Department published notice of the application [for water right no. 36-16976] and the application was protested by Rangen. Rangen also filed a competing application and a transfer to address the point of diversion issue. The facts behind IGWA's application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts which have developed in this case, the Director concludes that it is too speculative to consider.

*Amended Order* at 13. Whether IGWA assigns the water right to Rangen for mitigation credit or whether IGWA simply gets credit for delivery of water, neither characterization changes the speculative nature of the application for water right no. 36-16976. Accordingly, the Director verbally ordered that this component of the Third Mitigation Plan would not be considered in this proceeding.

### **Improvements to Curren Tunnel Diversion**

Various protestants raised concerns about the Curren Tunnel component of the Third Mitigation Plan and their ability to prepare for the September hearing given the complexity of the issues raised by the proposal. Given the complexity of the Curren Tunnel component, the Director bifurcated the proceeding and limited the scope of the September 8-10 hearing to just three components: 1) Sandy Ponds recharge and Sandy Pipe delivery; 2) recirculation of Rangen water rights; and 3) the Aqua Life project. The Curren Tunnel component will be scheduled for hearing at a later date.

### **Deadline to Submit Engineering Plans**

While IGWA submitted preliminary engineering plans with its Third Mitigation Plan, IGWA stated at the status conference that its engineers were working on more detailed engineering plans and that IGWA would be in a position to share those “in a couple weeks.” A number of protestants voiced concern about having sufficient time to review the new engineering plans prior to the hearing. A deadline of Monday, July 28, 2014, was set for IGWA to submit any additional engineering plans to the Department and the parties.

### **ORDER**

IT IS HEREBY ORDERED that IGWA’s request to limit the scope of the Third Mitigation Plan to only the Rangen water rights is GRANTED. The Third Mitigation Plan will not be effective as to any other water rights in Water District 36A.

IT IS FURTHER ORDERED that the scope of the September 8-10 hearing is limited to just three components of the Third Mitigation Plan: 1) Sandy Ponds recharge and Sandy Pipe delivery; 2) recirculation of Rangen water rights; and 3) the Aqua Life project. The component addressing direct delivery of water right no. 36-16976 will not be considered at the hearing on the Third Mitigation Plan and is hereby dismissed. The Curren Tunnel component will be scheduled for hearing at a later date.

IT IS FURTHER ORDERED that Monday, July 28, 2014, is the deadline for IGWA to submit engineering plans it wishes to present at the September 8-10 hearing to the Department and the parties.

Dated this 25<sup>th</sup> day of July, 2014.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July ~~25~~<sup>24</sup>, 2014, I served a true and correct copy of the *Order Limiting Scope of Mitigation Plan; Limiting Scope of Hearing; Setting Deadline to Submit Engineering Plans* on the persons listed below by the method indicated.

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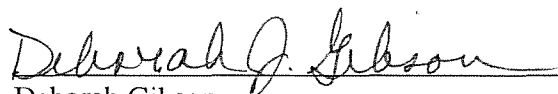
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