

**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)	FINAL ORDER ON
RIGHT NOS. 36-02551 AND 36-07694)	RECONSIDERATION
IN THE NAME OF RANGEN, INC.)	

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 36-02551)
AND 36-07694 (RANGEN, INC.))

BACKGROUND

On January 29, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued a *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”) in the Rangen delivery call case, CM-DC-2011-004. 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 groundwater 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 February 12, 2014, IGWA filed *IGWA’s Petition to Stay Curtailment, and Request for Expedited Decision*. On February 21, 2014, the Director issued an *Order Granting IGWA’s Petition to Stay Curtailment* which stayed enforcement of the Curtailment Order for members of

IGWA and the non-member participants in IGWA's Mitigation Plan until a decision was issued on the Mitigation Plan.

On March 10, 2014, IGWA filed *IGWA's Second Mitigation Plan and Request for Hearing* ("Second Mitigation Plan"). IGWA asserts that the Second Mitigation Plan, referred to as the "Tucker Springs Project," is capable of meeting the full 9.1 cfs mitigation obligation on a year-round basis. *Second Mitigation Plan* at 2.

A hearing was held on IGWA's Mitigation Plan on March 17-19, 2014, at the Department's State office in Boise, Idaho. At the commencement of the hearing, the Director verbally granted *Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project*. A written order reflecting that decision was issued on March 26, 2014.

On April 11, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("Mitigation Order"). The Mitigation Order recognized credit for only two components of IGWA's Mitigation Plan: (1) IGWA's ongoing aquifer enhancement activities, and (2) exchange of irrigation water diverted from the Curren Tunnel with operational spill water from the North Side Canal Company. *Mitigation Order* at 4. The Mitigation Order rejected IGWA's other proposals for mitigation.

On April 25, 2014, Rangen filed *Rangen's Motion for Reconsideration of Order Re: IGWA's Mitigation Plan; Order Lifting Stay; Amended Curtailment Order* ("Rangen's Petition"). On April 25, 2014, IGWA filed *IGWA's Petition for Reconsideration and Clarification* ("IGWA's Petition"). On May 9, 2014, Rangen filed *Rangen, Inc.'s Response to IGWA's Petition for Reconsideration and Clarification*.

ANALYSIS

A. Rangen's Petition

1. Calculation of Credit to IGWA for Exchange of Irrigation Water

Rangen alleges that the Director erred by failing to account for Rangen's use of its 1957 water right from the Curren Tunnel, water right no. 36-15501. *Rangen's Petition* at 2. Rangen argues that, had the Director accounted for water right no. 36-15501, the Director would have reduced the benefit to Rangen of Howard "Butch" Morris ("Morris") foregoing diversions out of the Curren Tunnel. *Id.* Rangen argues that, as a result of the Director's error, the calculations contained in Findings of Fact ¶¶ 18 through 27 must be revised. *Id.* at 4.

Rangen's argument is flawed. Rangen overlooks the fact that water right no. 36-15501 is *junior* to the Morris water rights. Findings of Fact ¶¶ 18 through 27 of the Mitigation Order establish the amount of water available in priority to Morris and available to IGWA for mitigation purposes. As the chart in Finding of Fact ¶ 27 highlights, if the average flow rate from the Curren Tunnel for the 2014 irrigation season is 3.7 cfs, and (a) Morris diverts 0.3 cfs through his irrigation pipeline, (b) Rangen diverts its water rights that are senior to the other two

Morris rights (0.14 cfs), and (c) Candy and Musser do not exercise their water rights except for the 0.04 cfs Candy uses for domestic use, then Morris is entitled to 3.2 cfs of the 3.7 cfs available. This result is reflected in the following calculation shown in Finding of Fact ¶27:

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

Rangen suggests the equation should have included Rangen's water right no. 36-15501 in the computation, which authorizes a diversion of 1.46 cfs. The 1.46 cfs would be added to the 0.14 cfs already included in the equation, for a total of 1.6 cfs. Rangen proposes the following computation:

$$3.7 \text{ cfs} - 0.3 \text{ cfs (Morris)} - 1.6 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 1.8 \text{ (approximately).}$$

If the Director were to adopt Rangen's suggested computation, the Director would unlawfully allocate water to Rangen's junior water right before allocating water to the senior water rights held by Morris. Rangen's water right no. 36-15501 bears a priority date of July 1, 1957. Morris' most junior water right shown in the table in Finding of Fact ¶ 27 has a priority date of December 1, 1908. Because Morris is entitled to the 3.2 cfs before water right no. 36-15501 comes into priority, the Director will not change his computation of the mitigation credit to IGWA for exchange of irrigation water diverted from the Curren Tunnel.

2. Estimate of Water Flowing from Curren Tunnel

In its Mitigation Plan, IGWA proposed mitigation by trading water from the Sandy Ponds with senior irrigation water rights from the Curren Tunnel owned by Morris. To calculate credit for the trade, the Director had to predict the flows from the Curren Tunnel for the upcoming irrigation season. To predict those flows, the Director averaged Curren Tunnel irrigation season flow data from 2002-2013. *Mitigation Order* at 9-10.

Rangen argues that averaging "is not appropriate" when determining mitigation credit. *Rangen's Petition* at 5. Rangen argues that averaging "gives IGWA mitigation credit for delivering more water than is actually flowing from the Martin-Curren Tunnel" and that "[t]here is insufficient evidence to conclude that flows in the Martin-Curren Tunnel will be 3.7 cfs or greater in 2014." *Id.*

IGWA's first year mitigation requirement begins on April 1, 2014, and continues through March 31, 2015. *Mitigation Order* at 6. The Director determined the mitigation flow rate contributed by non-diversion of the Morris water rights as follows:

- Years 2002 – 2013 were chosen as analogous years to 2014 because (a) the years are the most recent years with measured data, (b) average irrigation season flows from the Curren Tunnel during this period do not trend upward or downward and represent the range of flows that may be available from the Curren Tunnel during the 2014 irrigation season, (c) there is a discernible change in average irrigation season flows prior to 2002 such that data prior to 2002 should not be used, and (d) the 2002 – 2013 period is a long enough period of data to represent the range of flows that may occur.
- Relying on Morris's testimony of past water use, the Director selected an irrigation season of April 15 through October 15.

- Daily flow rates from the Curren Tunnel were extracted from Department records.
- The daily flow rates were averaged over the period of April 15 through October 15 of each year to establish an average irrigation season flow for each year.
- The twelve average annual flow rates for the years 2002 – 2013 were averaged, resulting in a predicted average flow rate for the 2014 irrigation season of 3.7 cfs.

Measurement data for the Curren Tunnel show there is seasonal and annual variability associated with tunnel flows. For example, the lowest recorded average irrigation season flow rate was 2.3 cfs in 2005. The average irrigation season flow rate in the following year (2006) was 5.7 cfs. The current actual flow does not by itself provide a prediction of what flows will be the rest of the irrigation season. Averaging the most recent twelve years of historical irrigation season flow data is a practical approach of predicting the flows for the irrigation season. Furthermore, Rangen fails to suggest any other predictive tool to estimate average irrigation season flows for 2014. The Director will not change his estimate of water flowing from the Curren Tunnel.

B. IGWA's Petition

1. Clarification of Mitigation Requirements in the Curtailment Order

The Director must clarify the mitigation requirements set forth in the Curtailment Order before addressing specific arguments raised in IGWA's Petition. Specifically, the Curtailment Order required "simulated steady state benefits of 9.1 cfs to Curren Tunnel or **direct flow of 9.1 cfs to Rangen.**" *Curtailment Order* at 42 (emphasis added). **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.* (emphasis added).

The language quoted above granted IGWA two alternatives for mitigation: (1) conduct aquifer enhancement activities or other activities that would produce 9.1 cfs of simulated steady state and/or direct flow benefits to Curren Tunnel, or (2) activities that would provide only direct flow to Rangen. The discretionary five year phase-in of mitigation was only available if IGWA's mitigation provided direct flow to Rangen equal to the phase-in quantities. Each one year requirement is equal to the average ESPAM 2.1 simulated flow benefit of curtailment that would accrue to Curren Tunnel in each of the first four years. Each of the first four annual obligations is an average transient value. The obligation in the fifth year is equal to the entire 9.1 cfs modeled steady state accrued benefit.

By definition, a steady state value for aquifer enhancement cannot qualify as "wet water" that would accrue to Curren Tunnel in a quantity equal to the annual obligation, because the steady state value exceeds that amount of water predicted to accrue to Curren Tunnel during each of the first four years. The Department must calculate an annual transient accretion to Curren Tunnel to match the transient "wet water" mitigation obligation.

2. IGWA's Burden of Proof

In the Mitigation Order, the Director determined IGWA's burden of proof in this mitigation plan proceeding:

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.

Mitigation Order at 4.

At the Mitigation Plan hearing, IGWA and others presented evidence about aquifer enhancement activities, water delivered to Morris through the Sandy Pipeline, and quantities of water flowing from the Curren Tunnel that would have been diverted by Morris, but for irrigation with water from the Sandy Pipeline. Based on the evidence, the Director could determine the legality of the activity, the quantity of water that could be delivered to Rangen, the timing of benefits to Rangen from the activities, and that the activities had or would shortly be in place. IGWA received mitigation credit for these activities.

The Director determined the evidence presented by IGWA related to the deepening or enlarging of the Curren Tunnel, the construction of a horizontal well, mitigation with water from new or existing wells, and the pump-back system was insufficient to satisfy IGWA's burden of proof. Throughout its petition, IGWA argues there was sufficient evidence in the record to support approval of these projects.

The evidence for these components was presented as follows, with an almost total absence of detail and commitment:

1. Here is a conceptual idea for mitigation.
2. If physical construction is required and completed in some undisclosed way and construction or other activities are completed in an unspecified period of time, the conceptual idea could provide mitigation to Rangen.
3. The benefits of the mitigation can be quantified, if at all, after the conceptual idea ripens into a design, completion of litigation, and completion of construction or other implementation.

Upon reconsideration, there is no justification to modify the outcome related to these components. IGWA failed to meet its required burden of proof.

3. Timeframe for Implementing the Mitigation Plan.

The Director also rejected a number of IGWA's mitigation proposals because IGWA failed to provide evidence it could timely deliver water to Rangen this year. *Mitigation Order* at 14-16. IGWA argues that the Conjunctive Management Rules do not require its Mitigation Plan to be implemented this year to be approved. *IGWA's Petition* at 5. IGWA also argues that, due to engineering and construction complexities, expectation of delivery in the first year is unreasonable. *Id.*

While the quantification and timing of impacts of ground water pumping on surface water is complex and requires significant scientific study, a basic tenet of water law requires that a senior water right holder is entitled to delivery of water in the time of need and in the quantity to satisfy authorized beneficial uses. The senior water right holder should not be required to wait for years for delivery of water pursuant to the senior water right because the junior water right holder has difficulty timely mitigating for depletions caused by the junior water right holder's out-of-priority diversions.

The Director's authority to phase-in mitigation for five years is the provision in the Conjunctive Management Rules that recognizes the difficulties of immediately providing mitigation and allows the junior water right holder time to fully implement a mitigation plan. The phase-in of mitigation should not be a shield depriving the senior water right holder of water to which the senior water right holder is entitled. It is within the Director's discretion under the Conjunctive Management Rules to establish an appropriate timeframe for mitigation delivery.

4. Arguments in IGWA's Petition

a. Aquifer Enhancement Activities

IGWA argues the Director should have applied a steady state calculation to determine the 2014 mitigation credit for ongoing aquifer enhancement activities instead of a transient state calculation. *IGWA's Petition* at 2. IGWA argues that the Director cannot use a transient state calculation to determine the benefits of IGWA's aquifer enhancement activities in the Mitigation Plan because the Director applied a steady state calculation in the Curtailment Order in calculating IGWA's obligation. *Id.*

IGWA's argument on this issue mischaracterizes the Mitigation Order and misstates the record in this matter. IGWA's suggestion that the Director should only use a steady state analysis for determining the benefits of aquifer enhancement activities is untenable.

As stated earlier, the discretionary five year phase-in of mitigation was only available if IGWA's mitigation provided direct flow to Rangen equal to the phase-in quantities. For the first four years of phase-in, each one year phase-in requirement is equal to the average ESPAM 2.1 simulated flow benefit of continuous curtailment that would accrue to Curren Tunnel in that year. Each of the first four annual obligations is an average *transient value*. For comparison with the first four transient-value annual obligations, the benefits of aquifer enhancement activities must also be modeled with transient simulations for the same time periods. The steady

state calculation of the benefits of aquifer enhancement activities is only suitable for comparison with the steady state mitigation obligation of 9.1 cfs.

IGWA observes that, prior to the hearing, the Department produced a steady state calculation of IGWA's mitigation credits for its mitigation activities. IGWA states that both Rangen and IGWA "agreed with IDWR's use of a steady state calculation to determine mitigation credits from these activities" and that "neither Rangen nor IDWR advocated for, or offered evidence to support, a different approach." *IGWA's Petition* at 2.

IGWA's argument on this issue misstates the record in this matter. While the Department computed a steady state value of aquifer enhancement activities for the benefit of the parties prior to the hearing, Dr. Charles Brockway, an expert for Rangen, also calculated a transient value for IGWA's aquifer enhancement activities in 2014 and presented the analysis at the hearing. Brockway Tr. Vol. III, p. 679-87. He computed a transient value specifically to evaluate transient effects of IGWA's mitigation activities. *Id.* at 679. He calculated a credit of 0.31 cfs the first year and only 0.62 at the end of five years. Rangen Ex. 2017. His calculation was incomplete, however, because he did not model accretions to the Curren Tunnel resulting from IGWA's aquifer enhancement activities in earlier years. At the hearing, counsel for IGWA objected to this testimony, arguing that Rangen accepted the Department's steady state calculation, and that Rangen could not suggest that recharge activities must be modeled using a transient state run. Budge Tr. Vol. III, p. 685-686. The Director overruled the objection, explaining that "there is, from my perspective, a need to look at both steady-state conditions and transient conditions both." Spackman Tr. Vol. III, p. 686. The Director added evidence to the record quantifying IGWA's aquifer enhancement activities in previous years and stated Department staff would model the 2014 transient benefits for the historic aquifer enhancement activities of IGWA on record with the Department. *Id.* at 686-87. Based upon the information included in the record, the Director will not change the Mitigation Order. The "wet water" requirement of phased-in mitigation was properly quantified by calculating the transient benefits of IGWA's aquifer enhancement activities.

If IGWA wants the Director to recognize credit for aquifer enhancement activities based on an ESPAM 2.1 steady state analysis, the Mitigation Plan cannot be phased-in over five years, and the credit would be compared to the steady state obligation of 9.1 cfs. The mitigation shortfall resulting from comparison of the steady state benefit and steady state obligation would be greater than the shortfall resulting from comparison of the transient values for the first year. The Director assumes IGWA would prefer to rely on the transient benefit analysis that recognizes a five year phase-in, and results in a smaller mitigation shortfall.

The ruling does not require clarification as requested by IGWA.

b. Sandy Ponds Recharge

IGWA argues it should receive mitigation credit for Sandy Ponds recharge. *IGWA's Petition* at 3. IGWA asserts the Department should be able to calculate the mitigation credit using data in the record. *Id.*

Recharge of ground water from the Sandy Ponds cannot be quantified because evidence presented at the Mitigation Plan hearing attempting to determine recharge from the Sandy Ponds was deficient. Recharge calculations are based upon inflows and outflows of water in relation to a recharge site. When asked what information would be needed to calculate credit for Sandy Pond recharge, Department employee Jennifer Sukow testified, “We would need accurate measurements of the water that flowed into the ponds and then all of the outflows from the ponds.” Sukow Tr. Vol. II, p. 303-04. When asked why credit was not given for Sandy Ponds recharge, Sukow stated “I don’t have the data to, you know, calculate the volume that we would input into the model.” Sukow Tr. Vol. II, p. 316-17.

Frank Erwin (“Erwin”), watermaster for Water District 36A, testified that he does not measure diversions into the Sandy Pipeline, nor does he measure the amount of water that bypasses Morris’ diversion and flows into the Curren Ditch. Erwin Tr. Vol. II, p. 322-23.

Morris testified that he irrigates with approximately 8.5 cfs of water from the Sandy Ponds, but this testimony is not sufficient support for recharge credit because it does not appear from record that the 8.5 cfs Morris referenced is the total outflow from the Sandy Ponds. When describing his delivery system, Morris explained that the Sandy Pipeline delivers water from the Sandy Ponds to a cement box near his property and that he then pumps water from the cement box to the lands he irrigates. Morris Tr. Vol. II, p. 368-69. Morris testified that he diverts 6 cfs of the 8.5 cfs “*out of the Sandy Pipeline*” and the remainder is diverted from the Sandy Ponds via a different pump, not the Sandy Pipeline. Morris Tr. Vol. II, p. 377, 408. Both Morris and Erwin testified that excess water above what Morris needs for his irrigation purposes is diverted into the Sandy Pipeline and the excess water then flows out of the cement box and continues onto the Curren Ditch. Morris Tr. Vol. II, p. 369, 404, 409; Erwin Tr. Vol. II, p. 322-23. Morris was unable to estimate how much water flows past the cement box to the Curren Ditch. Morris stated that “it varies a lot” and “[i]t’s hard to put a quantified number to it.” Morris Tr. Vol. II, p. 409. Morris’ diversions and water flowing past the cement box and into the Curren Ditch must be measured to complete the water budget and accurately estimate recharge in the Sandy Ponds. IGWA provided detailed measurement records showing the amount of water that flows into the Sandy Ponds. IGWA Ex. 1032-1033. No such records were provided showing outflows from the Sandy Ponds. Because the Director cannot quantify recharge in the Sandy Ponds due to the lack of evidence, the Director cannot recognize any credit for recharge in the Sandy Ponds.

This ruling does not require clarification as requested by IGWA.

c. Idaho Water Resource Board Recharge

IGWA argues it should receive mitigation credit for ground water recharge conducted by the Idaho Water Resource Board (“Water Board”). *IGWA’s Petition* at 4.

The Water Board diverts water from the Snake River for ground water recharge. Managed ground water recharge by the Water Board is intended to benefit ground water and surface water users whose source of water is hydraulically connected to the Eastern Snake Plain Aquifer (“ESPA”). The benefits of managed ground water recharge by the Water Board are not intended to inure to the benefit of a junior water right holder in responding to a delivery call. IGWA has not previously been granted mitigation credits for the Water Board recharge in the Clear Springs or the Blue Lakes delivery calls. Sukow Tr. Vol. II, p. 301. If IGWA wants to seek credit for the ground water recharge by the Water Board, IGWA should obtain express written approval from the Water Board for individual recognition of credits for simulated benefits of the Water Board’s recharge activities.

This ruling does not require clarification as requested by IGWA.

d. Mitigation Using Senior Irrigation Water Rights Diverted from the Curren Tunnel

IGWA asserts it presented evidence that a stockwater well was drilled to provide an alternate source of water to water right no. 36-102, which allows Rangen to divert 0.07 cfs year-round that would otherwise be delivered to the Mussers from the Curren Tunnel. *IGWA’s Petition* at 4. IGWA contends it should receive mitigation credit for this “water exchange” and requests clarification regarding whether this mitigation credit was included in the Department’s calculation of the 3.0 cfs mitigation credit granted to IGWA for the first year of curtailment. *Id.*

IGWA received credit for this “water exchange” in the Mitigation Order. The table in Finding of Fact ¶ 27 reflects that the Director credited Musser as diverting no water (“0.00” cfs) under water right no. 36-102. *Mitigation Order* at 12. Because Musser does not divert water pursuant to water right no. 36-102 (presumably in part because of the stockwater well drilled by IGWA to provide an alternative source of water), more water is available for Morris under Morris’ more junior water rights and more water is available to IGWA for mitigation. If Musser had been diverting water pursuant to water right no. 36-102, the credit associated with the exchange of Curren Tunnel water with Sandy Ponds water would have been less. There is no other basis for recognition of mitigation credit for IGWA associated with use of the stockwater well.

This ruling does not require clarification as requested by IGWA.

e. Assignment of Water Right 36-16976 to Rangen

In its Mitigation Plan, IGWA proposed to assign its pending application to appropriate water number 36-16976 to Rangen as mitigation. The application proposes to appropriate 12 cfs from “Springs” and “Billingsley Creek” at Rangen’s existing physical diversion from Billingsley Creek known as the “bridge diversion.” The Director rejected the proposal because of the uncertainty of the application and resulting inability to determine whether the proposal would provide water to Rangen in its time of need, i.e. this year. *Mitigation Order* at 13.

IGWA requests that “the Director revise the [Mitigation Order] to find that delivering additional water to Rangen from Billingsley Creek will in fact mitigate material injury, and to approve mitigation credit for the assignment of water right 36-16976 *subject* to a permit being issued, which is being decided in a different proceeding.” *IGWA’s Petition* at 7. IGWA asserts this would be consistent with the Department’s approval of the Snake River Farms over-the-rim mitigation plan where the Department approved the mitigation plan on condition that IGWA obtain approval of the transfers necessary to allow the mitigation water to be used at Snake River Farms. *Id.* at 6.

The underlying facts for the Snake River Farms over-the-rim mitigation plan are distinctly different than the facts underlying the Mitigation Plan. The Director conditionally approved IGWA’s over-the-rim mitigation plan notwithstanding pending administrative transfers. *Final Order Concerning the Over-the-Rim Mitigation Plan* at 9. The proposed transfers sought to consolidate water rights to a handful of wells on the rim just above Snake River Farms. *2009 Replacement Water Plan and Third Mitigation Plan (Over-The-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* at 6-7. IGWA would then divert the water from the handful of wells and pipe the water to Snake River Farms. *Id.* In the over-the-rim mitigation plan, there was no dispute about the right of access to the wells identified as points of diversion by the proposed transfers. Here, Rangen and IGWA each actively disputed the other party’s future opportunity to use water from Billingsley Creek. The specific issue of whether Rangen holds a water right to divert water from Billingsley Creek is currently on appeal to district court. Rangen also filed a second pending application for permit and an application for transfer related to this point of diversion. Given the uncertainty created by the litigation, the outstanding competing applications for new water rights, and Rangen’s application for transfer, the Director cannot justify conditionally approving the application.

Moreover, there is not sufficient basis to approve the application as mitigation at this time because there will need to be a future determination of the credit IGWA is entitled to. Any credit determination will depend on the flows in Billingsley Creek at the time a permit may be issued to IGWA for mitigation. Unlike the over-the-rim mitigation plan for the Snake River Farms delivery call, where a constant flow of water could be provided from ground water wells, the pending application from Billingsley Creek seeks to appropriate water from a surface water source that may or may not have sufficient water to satisfy IGWA’s mitigation obligation.

This ruling does not require clarification as requested by IGWA.

f. Cleaning the Curren Tunnel

IGWA’s Mitigation Plan requested mitigation credit if water flows from the Curren Tunnel could be improved by cleaning the tunnel. The Director rejected this proposal because “IGWA failed to present evidence demonstrating that cleaning the Curren Tunnel would provide any additional water to Rangen.” *Mitigation Order* at 14.

First, it is necessary to revisit the testimony at the hearing because, upon review, both the *Mitigation Order* and *IGWA’s Petition* do not correctly characterize the testimony. 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's fell [sic] 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.

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.

The Mitigation Order concluded "IGWA failed to present evidence demonstrating that cleaning the Curren Tunnel would provide any additional water to Rangen." *Mitigation Order* at 14. IGWA blames this lack of evidence on Rangen. IGWA asserts it was impossible to determine whether rock-fall impedes the flow of water from the Curren Tunnel because Rangen would not allow IGWA inside the Tunnel to inspect it. *IGWA's Petition* at 9.

IGWA is, in effect, asking the Director to conclude that, because Rangen did not grant IGWA access to the Curren Tunnel, some sort of mitigation credit should be granted to IGWA. The problem with this argument is that, even if the Director was inclined to grant some sort of credit, there is no support in the record for determining what that credit should be. Erwin, the only person who testified who has firsthand experience with the cleaning of the inside of a tunnel, testified that the work he did in the Curren Tunnel "probably" increased the flow coming out of 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 the granting of any sort of credit to IGWA related to cleaning out the Curren Tunnel.

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. Wayne Courtney, vice president of Rangen, is not opposed to cleaning the tunnel but testified that “if there’s to be cleaning in the tunnel, Rangen will do it.” Courtney Tr. Vol. III, p. 594. The Director views Mr. Courtney’s statements on this issue as a statement of willingness on Rangen’s part to undertake such action. The Director will revise the Mitigation Order and instruct Rangen to inspect the Curren Tunnel at both ends of the corrugated metal pipe and clean any debris out of the tunnel in an attempt to improve flows into and from the corrugated metal pipe. Rangen must grant IDWR access at the time of the cleaning work to observe and document the extent of cleaning. IGWA is not entitled to any mitigation credit as a result of the above cleaning and maintenance work.

Consistent with the above discussion, the Director will supplement the findings of fact, conclusions of law, and order section related to this proposal.

g. Enlarging or Deepening the Curren Tunnel

In its Mitigation Plan, IGWA proposed to enlarge or deepen the Curren Tunnel to increase the water flow from the tunnel and provide mitigation to Rangen. The Director rejected this proposal on the basis that “there is no evidence quantifying the potential increase” and that the “physical work to deepen or enlarge the tunnel could not be completed to timely provide water during the 2014 irrigation season.” *Mitigation Order* at 14.

As discussed above, the burden is on IGWA to come forward with sufficiently detailed plans to allow for evaluation of the proposal and IGWA failed to provide such information. IGWA failed to provide specifics on exactly how it proposed to “enlarge” or “deepen” the Curren Tunnel. IGWA failed to provide information to quantify expected results. IGWA asserts there is no evidence quantifying the increase because, until the tunnel is actually enlarged or deepened, it cannot be proven how much additional water will result from the improvement. *IGWA’s Petition* at 10. However, this is not true, as even IGWA’s expert recognized. When asked about potential test methods to evaluate the proposal, Dr. Brendecke testified that test boreholes could have been drilled but they were not. Brendecke Tr. Vol. II, p. 481. IGWA contends this uncertainty is not a reason to reject the proposal. IGWA is wrong. Uncertainty is an appropriate justification, especially when undertaking construction on the tunnel could negatively change the hydrology of the tunnel so that it reduces flows instead of improves the flows. Concerns about interfering with the existing hydraulics of the spring system were discussed in detail in the delivery call hearing and were touched on in the Curtailment Order. Rangen previously hired an engineering firm to evaluate possible ways to improve flows to the Curren Tunnel and one proposal was to drill a horizontal well. As discussed in the Curtailment Order:

The concern regarding the horizontal well was that such a well would likely decrease current discharge to the Curren Tunnel, decrease discharge of other springs in the vicinity of the Curren Tunnel, and possibly reduce ground water levels in wells located on the rim above the Curren Tunnel. Wayne Courtney,

executive vice president for Rangen testified about the concerns with the well proposals. He explained that Rangen did not implement the proposal for alternate points of diversion because Rangen "felt that the risk was too great for any possible outcome." Courtney, Vol. I, p. 111-112. Rangen was concerned that new wells might damage the geohydrology of the area and would actually injure the existing springs and injure water users that rely on the springs for their water. *Id.* at 112. The Director concludes that Rangen's reasons for rejecting the proposals are reasonable.

Curtailment Order at 36.

The concerns with "enlarging" or "deepening" the tunnel are the same as the concerns with drilling a horizontal well. Such action could have a negative effect on other nearby springs and could negatively affect other water right holders. Brendecke Tr. Vol. III, p. 564. 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 proposal.

This ruling does not require clarification as requested by IGWA, but the Director will supplement the Mitigation Order to more fully explain the justification for rejecting the proposal to enlarge or deepen the Curren Tunnel.

h. Horizontal Well

IGWA's Mitigation Plan proposed to drill a new horizontal well at an elevation below the Curren Tunnel to provide mitigation to Rangen. In rejecting the proposal, the Director noted that IGWA would need to obtain a water right to divert and beneficially use water from the horizontal well and that 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. *Mitigation Order* at 15.

IGWA argues that the moratorium on new groundwater rights has no effect because the Director previously ruled that horizontal tunnels are surface water sources. *IGWA's Petition* at 11. IGWA also argues that a new water right is not needed because the Conjunctive Management Rules authorize the Director to allow Rangen to improve its means of diversion to secure a more reliable water supply by accessing the ESPA at a lower elevation. *Id.* Therefore, IGWA requests that the Mitigation Order be revised to allow IGWA to improve Rangen's means of diversion by drilling a horizontal well into the ESPA at an elevation below the Curren Tunnel.

IGWA's argument has numerous problems. First, IGWA is incorrect that a new horizontal well would be diverting surface water. A new well (whether horizontal or vertical) would be diverting groundwater not surface water. Second, even if it was surface water, the distinction IGWA tries to draw regarding the moratorium order is incorrect. The moratorium order applies to all diversions of water in the moratorium area, not just groundwater rights. The moratorium order provides that a "moratorium is established on the processing and approval of presently pending and new applications for permits to appropriate water from all surface and

ground water sources within the Eastern Snake River Plain Area and all tributaries thereto” *Amended Moratorium Order*, In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Eastern Snake River Plain Area and the Boise River Drainage Area, at 4. Because a new horizontal well would divert from the ESPA and because Idaho Code § 42-201 requires all new diversions to comply with the application for permit process, any new proposed diversion is subject to the moratorium. Furthermore, contrary to IGWA’s suggestion, the Conjunctive Management Rules do not authorize the Director to approve a new diversion of water without complying with the application and permit process. The Director’s process for evaluating material injury under Rule 42 does not authorize the Director to exempt water users from the application for permit process.

In addition, the uncertainty and potential negative impacts on other water right holders identified in subsection (g) above are also grounds for rejecting this proposal. The concerns are legitimate and have not been evaluated by IGWA. *Brendecke Tr. Vol. III*, p. 557.

This ruling does not require clarification as requested by IGWA.

i. Pump-back System

In its Mitigation Plan, IGWA proposed to “engineer, construct, and operate a direct pumpback and aeration system within the Rangen facility to secure sufficient flows to meet mitigation obligations, to the extent of any shortfall... .” *Mitigation Plan* at 4. While this option is promising on its face, this proposal was rejected because IGWA failed to lay even the most basic foundation to support approval of this proposal. When asked about a feasibility study, IGWA’s expert Dr. Brendecke testified that he had not conducted any feasibility study. *Brendecke Tr. Vol. II*, p. 525. When discussing the engineering design, Dr. Brendecke did not offer even a basic conceptual plan, but simply testified that he did not think it would be difficult to prepare engineering designs. *Id.* And, instead of providing conceptual plans on how to address issues like biosecurity, backup power and aeration devices, Dr. Brendecke suggested that those issues could be addressed in future plans. *Id.* at 526-27. IGWA presented no testimony about how it would establish a water right for the project or how it would address property access to construct and operate the pump-back system. The lack of this basic information led the Director to conclude the record lacked the evidence that IGWA could have the pump-back system in place this year. *Mitigation Order* at 16.

In its petition, IGWA continues to suggest that the Director should have conditionally approved the pump-back proposal as the Director did with the Snake River Farms over-the-rim mitigation plan. *IGWA’s Petition* at 12. However, as discussed in the Mitigation Order, there are differences between this Mitigation Plan and the Snake River Farms mitigation plan:

[T]here 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.

Mitigation Order at 15.

When questioned about the lack of any basic designs, Dr. Brendecke suggested that the short timeframe between the submission of the Mitigation Plan and the hearing did not provide IGWA sufficient time to prepare engineering designs. Brendecke Tr. Vol. III, p. 562. While the timeframe between the Mitigation Plan submission and the hearing was short, it was not so short that some basic design could not be done. As Dr. Brendecke himself recognized, design of a pump-back system should not be difficult. *Id.* at 525. Given the lack of even basic information in the record, the proposal cannot be approved. Because this rationale was not fully developed in the Mitigation Order, the Director will revise the Mitigation Order to supplement the findings and conclusions related to this issue.

Another justification for rejecting the proposal was that IGWA does not have water rights to undertake the pump-back system. *Mitigation Order* at 16. IGWA argues that it does not need to appropriate a new water right to install a pump-back system within the Rangen facility because water users are entitled to recapture and re-use water before it enters the public water supply and a pump-back system can be designed to recirculate water diverted under Rangen's existing water rights. *IGWA's Petition* at 12. IGWA is correct that a water right holder is entitled to recapture and re-use water before it enters the public water supply. However, in this circumstance, it is not the water right holder that is proposing to recapture the water but a third party and the recapture is being done without consent of the water right holder. Where the recapture of the water is by a third party and is being done without consent of the water right holder, a new water right is needed. Another issue is that IGWA provided no evidence regarding the location of the point where the water will be collected and pumped back to Rangen. The Director cannot assume that the collection point for the pump-back system would be on Rangen's property. IGWA's failure to provide plans showing where the diversion point would be located prevents the Director from concluding that a water right is not necessary.

Another justification for rejecting the proposal is that IGWA did not present any evidence about how it would gain access to Rangen's property for locating the systems necessary for the pump-back. *Mitigation Order* at 16. "With respect to property access, IGWA asserts its ground water district members have a statutory right to exercise power of eminent domain." *IGWA's Petition* at 12. IGWA requests that the Director revise the Mitigation Order to authorize development of a pump-back system to meet mitigation obligations, "subject to conditions similar to those imposed on the approval of the over-the-rim mitigation plan for Snake River Farms, as outlined in IGWA's Post-Hearing Brief." *Id.* As described above, there are important differences between the status of the Snake River Farms over-the-rim mitigation plan at the time of its hearing and the status of this Mitigation Plan at the time of hearing. In the Snake River Farms plan, a foundation had already been laid for getting authorizations for easements and other authorizations related to the plan at the time of hearing. Here, there is no similar foundation.

The Director cannot conclude that IGWA will be able to gain access to the Rangen property in a timely manner to provide water in the time of need.

This ruling does not require clarification as requested by IGWA.

CONCLUSION

Based on the foregoing discussion, some modifications to the Mitigation Order are necessary. An amended order will be issued supplementing the findings of facts, conclusions of law and order section and incorporating the modifications identified above.

Dated this 16th day of May, 2014.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2014, the above and foregoing document was served on the following by providing a copy of the *FINAL ORDER ON RECONSIDERATION* in the manner selected:

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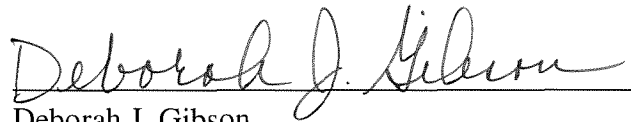
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A handwritten signature in dark ink, reading "Deborah J. Gibson", written over a horizontal line.

Deborah J. Gibson

Admin. Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER ON RECONSIDERATION

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Final Order on Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.