

*Attorneys for IGWA*

<p>RANGEN, INC, an Idaho corporation,</p> <p>Petitioner,</p> <p>vs.</p> <p>IDAHO DEPARTMENT OF RESOURCES, and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources,</p> <p>Respondent.</p>	<p>Case No. CV-2014-4970</p> <p><b>Second Affidavit of Thomas J. Budge</b></p>
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STATE OF IDAHO )  
 : ss.  
County of Bannock )


1. I am counsel of record for the Idaho Ground Water Association in the above action and have personal knowledge of the facts and matters stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of a Memorandum of Agreement between IGWA and SeaPac of Idaho, Inc., allowing IGWA to deliver up to 10 cfs from Magic Springs to Rangen.

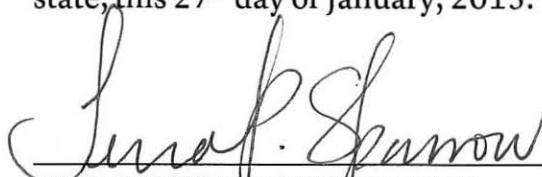
3. Attached hereto as Exhibit B is a true and correct copy of a fully executed Water Supply Bank Rental Agreement allowing IGWA to deliver 7.81 cfs from Magic Springs to the Rangen fish hatchery on Billingsley Creek.

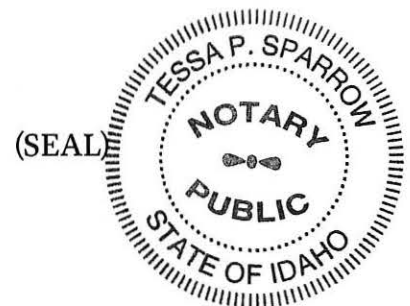
4. Attached hereto as Exhibit C is a true and correct copy of IGWA's *Post-Hearing Brief* filed with the Idaho Department of Water Resources *In the Matter of Transfer No. 79560*.

DATED this 27th day of January, 2015.

  
\_\_\_\_\_  
Thomas J. Budge, Affiant

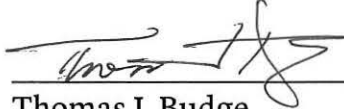
SUBSCRIBED AND SWORN TO before me, a Notary Public for said state, this 27<sup>th</sup> day of January, 2015.

  
\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at: Pocatello, Idaho  
Commission expires: 10/15/15



## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2014, I served a true and correct copy of the foregoing was served by the method indicated:

  
\_\_\_\_\_  
Thomas J. Budge

Clerk of the Court Snake River Basin Adjudication 253 3rd Ave. N P.O. Box 2707 Twin Falls, ID 83303	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email
Director Gary Spackman Garrick L. Baxter Emmi Blades Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:emmi.blades@idwr.idaho.gov">emmi.blades@idwr.idaho.gov</a> <a href="mailto:deborah.gibson@idwr.idaho.gov">deborah.gibson@idwr.idaho.gov</a> <a href="mailto:kimi.white@idwr.idaho.gov">kimi.white@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Robyn M. Brody Brody Law Office, PLLC P.O. Box 554 Rupert, ID 83350 <a href="mailto:robynbrody@hotmail.com">robynbrody@hotmail.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC P.O. Box 1800 Hailey, ID 83333 <a href="mailto:fxh@haemlaw.com">fxh@haemlaw.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, ID 83702 <a href="mailto:jmay@maybrowning.com">jmay@maybrowning.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

Sarah Klahn Mitra Pemberton WHITE JANKOWSKI, LLP 511 16 <sup>th</sup> St., Suite 500 Denver, Colorado 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Dean Tranmer CITY OF POCATELLO P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER RSHOLT & SIMPSON 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 <a href="mailto:tlr@idahowaters.com">tlr@idahowaters.com</a> <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Jerry Rigby RIGBY ANDRUS & RIGBY 25 N. 2 <sup>nd</sup> East Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

# **Exhibit A**

## **Memorandum of Agreement**

STATE OF IDAHO )  
 : ss.  
County of \_\_\_\_\_ )

On this \_\_\_\_ day of January, 2015, before me, a Notary Public for the State of Idaho, personally appeared \_\_\_\_\_, known or identified to me to be the \_\_\_\_\_, of SEAPAC OF IDAHO, INC., that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

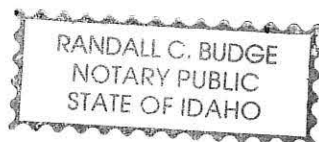
(SEAL)

\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at:  
My Commission Expires:

STATE OF IDAHO )  
 : ss.  
County of Bannock )

On this 7<sup>th</sup> day of January, 2015, before me, a Notary Public for the State of Idaho, personally appeared RANDY BROWN, known or identified to me to be the Chairman, of SOUTHWEST IRRIGATION DISTRICT, LYNN CARLQUIST, known or identified to me to be the Chairman, of NORTH SNAKE GROUND WATER DISTRICT and DEAN STEVENSON, known or identified to me to be the Chairman, of MAGIC VALLEY IRRIGATION DISTRICT, that executed the instrument or the person who executed the instrument on behalf of said corporations, and acknowledged to me that such corporations executed the same.

(SEAL)



Randall C. Budge  
\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at: Bannock County  
My Commission Expires: 10/11/16

SEAPAC OF IDAHO, INC.,  
an Idaho corporation

Dated: January 12, 2015

By: [Signature]  
Name: KEO ARNEY  
Title: CHAIRMAN

NORTH SNAKE GROUND WATER DISTRICT

Dated: January 7, 2015

By: [Signature]  
Name: Don Stearns  
Title: Chairman

MAGIC VALLEY GROUND WATER DISTRICT

Dated: January 7, 2015

By: [Signature]  
Name: Don Stearns  
Title: Chairman

SOUTHWEST IRRIGATION DISTRICT

Dated: January 7, 2015

By: [Signature]  
Name: Randy Brown  
Title: Chairman

STATE OF IDAHO )

: ss.

County of Twin Falls )

On this 12 day of January, 2015, before me, a Notary Public for the State of Idaho, personally appeared Ken Ashley, known or identified to me to be the President, of SEAPAC OF IDAHO, INC., that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.



Mike Hamilton

NOTARY PUBLIC FOR IDAHO

Residing at: Buhl

My Commission Expires: 9-26-15

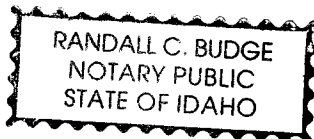
STATE OF IDAHO )

: ss.

County of Bannock )

On this 7<sup>th</sup> day of January, 2015, before me, a Notary Public for the State of Idaho, personally appeared RANDY BROWN, known or identified to me to be the Chairman, of SOUTHWEST IRRIGATION DISTRICT, LYNN CARLQUIST, known or identified to me to be the Chairman, of NORTH SNAKE GROUND WATER DISTRICT and DEAN STEVENSON, known or identified to me to be the Chairman, of MAGIC VALLEY IRRIGATION DISTRICT, that executed the instrument or the person who executed the instrument on behalf of said corporations, and acknowledged to me that such corporations executed the same.

(SEAL)



Randall C. Budge

NOTARY PUBLIC FOR IDAHO

Residing at: Bannock County

My Commission Expires: 10/11/16

# **Exhibit B**

## **Water Supply Bank Rental Agreement**

## WATER SUPPLY BANK LEASE CONTRACT

This Lease Contract ("Lease") is effective January 1, 2015, between the Idaho Water Resource Board ("Board"), and

**Lessor:** SEAPAC OF IDAHO  
PO BOX 546  
BUHL ID 83316  
208-837-6541

### RECITALS

1. The Board is authorized under chapter 17, title 42, Idaho Code to operate a water supply bank and to contract with lessors to act as an intermediary in facilitating the rental of water.
2. The Lessor has filed a completed application to lease water rights described below into the Water Supply Bank on forms supplied by the Idaho Department of Water Resources.
3. The Director of the Idaho Department of Water Resources has reviewed the application for compliance with the Water Supply Bank rules and has approved the Lease subject to conditions listed below.

NOW, THEREFORE, in consideration of the mutual covenants and contracts herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. **WATER RIGHTS:** The Lessor shall lease and the Board shall accept into the Bank the Applicant's water rights described as follows:

#### Summary of Water Rights or Portions Leased to the Bank

<u>Water Right</u>	<u>Lease Rate</u>	<u>Lease Volume</u>	<u>Acre Limit</u>	<u>Total Leased Acres</u>
36-7072	7.81 CFS	Not Stated	N/A	N/A
<b>Combined Lease Totals: 7.81 CFS      Not Stated      N/A      N/A</b>				

The water rights described herein shall be available for rental from the Bank as follows:

Authorized Period of Use under Lease: 01/01 to 12/31

2. **COMPENSATION:** The Lessor shall accept and the Board shall pay compensation determined by the amount of water rented under the following rental rate during such times as the water is rented from the Bank over the term of this Lease.

**Minimum Payment Acceptable:** Current Rental Rate

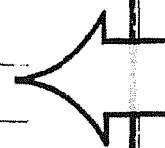
3. **TERM OF LEASE:** This Lease shall take effect when both parties have signed it and shall continue in effect until December 31, 2016.
4. **WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE:** The Lessor shall abide by all terms and conditions contained in the Water Supply Bank Conditions of Acceptance, attached hereto as "Attachment A" and incorporated herein by this reference.
5. **DUPLICATE ORIGINAL:** This Lease is executed in duplicate. Each of the documents with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Contract on the date following their respective signatures.

SEAPAC OF IDAHO  
PO BOX 546  
BUHL ID 83316

By [Signature]  
Printed Name JEN FLOWAY

Date 1/27/2015  
Title PRESIDENT



IDAHO WATER RESOURCE BOARD  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

By [Signature]  
Brian Patton, Acting Administrator  
Idaho Water Resource Board

Date January 27, 2015

Lease approved by IDWR [Signature]

Date 1/27/2015

**ATTACHMENT A**  
**WATER RIGHT NO. 36-7072**  
**WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE**

The water right or portion thereof leased to the bank is described as follows:

**Lessor:** SEAPAC OF IDAHO  
 PO BOX 546  
 BUHL ID 83316  
 208-837-6541

**Priority Date:** 09/05/1969

**Source:** THOUSAND SPRINGS      **Tributary to:** SNAKE RIVER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
FISH PROPAGATION	01/01	12/31	7.81 CFS	Not Stated
	<b>Total:</b>		<b>7.81 CFS</b>	<b>Not Stated</b>

**LOCATION OF POINT(S) OF DIVERSION:**

SPRINGS      SE¼SE¼SE¼      Sec. 6      Twp 08S      Rge 14E      GOODING County

TWO POINTS OF DIVERSION LOCATED IN T08S, R14E, S06, LOT 8 SESESE

**PLACE OF USE TO BE IDLED UNDER THIS LEASE:** FISH PROPAGATION

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
08S	14E	5											H						
08S	14E	6																H	
08S	14E	8						H	L1										

Total Acres:

**ADDITIONAL CONDITIONS OF ACCEPTANCE**

1. The water rights referenced above will be rented from the bank at the current rental rate.
2. There is no rental payment to the lessor of the water right if the right or a part thereof is not rented from the bank.
3. While a right is in the bank, the lessor may not use the right without approval of the Department even if the right is not rented from the bank. Any violation of the terms of this lease may result in enforcement procedures pursuant to Idaho Code § 42-351 for illegal diversion and use of water and may include civil penalties pursuant to Idaho Code § 42-1701B.
4. A right accepted into the bank stays in the bank until the Board releases it, the lease term expires, or upon request from the lessor to change the term of the lease, provided the Board approves the release. Unless approved by the Department, leased rights may not be immediately available for release.
5. While a water right is in the bank, forfeiture provisions are stayed.
6. Rental of water under this right is subject to the limitations and conditions of approval of the water right.

7. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease.
8. Acceptance of a right into the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other Department application process.
9. In accordance with Idaho Code §§ 42-248 and 42-1409(6), all owners of water rights are required to notify the Department of any changes in mailing address or change in ownership of all or part of a water right. Notice must be provided within 120 days of the change.
10. If a water right leased into the Water Supply Bank is sold or conveyed during the lease term, and if the leased right was rented, the rental proceeds will be disbursed in the following manner regardless of any arrangements between the buyer(s) and seller(s) to the contrary:
  - a. Rental payments will go to the lessor(s) of record at the beginning of the rental season.
  - b. If a change in ownership is processed by the Department during a rental season, rental payment will be made to the person or entity who is the lessor of record at the beginning of that rental season.
  - c. New lessor(s) of record will receive payment after the following rental season.
11. The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.
12. The unleased portion of this right and water right 36-8356 are limited to a combined diversion rate of 140.39 cfs.
13. Fish propagation is for a commercial hatchery.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
**WATER SUPPLY BANK RENTAL AGREEMENT**

This is to certify that: **IDAHO GROUND WATER APPROPRIATORS**  
**C/O THOMAS J. BUDGE**  
**PO BOX 1391,**  
**POCATELLO, ID 83204**  
**(208) 232-6101**

filed an application to rent water from the Water Supply Bank ("Bank"). The Idaho Water Resource Board ("Board"), being authorized to operate a Bank and to contract by and through the Director of the Idaho Department of Water Resources ("Director, Department") for rental of water from the Bank, agrees to rent water as follows:

**Summary of Water Rights or Portions Rented from the Bank**

Water Right	Priority Date	Source	Tributary	Rented Rate	Annual Rented Volume	Acre Limit	Total Rented Acres
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36-7072	09/05/1969	Thousand Springs	Snake River	7.8 cfs	5654.2 af	N/A	N/A
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**Annual Rental Total** **7.81 cfs 5654.2 af N/A N/A**

**Term of Rental:** January 1, 2015 to December 31, 2016  
**Annual Rental Fee:** \$9612.48

The fee for rental of the above-described water is \$96,124.80, however you have a private agreement with the lessor of water right 36-7072 where you only need to pay for the administrative fee associated with the rental of that water right. The fee that will be retained by the Department to offset administrative costs is 10% of the total, or \$9,612.48.

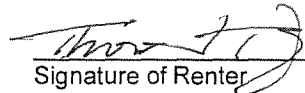
No rental fees will be refunded once the fee is collected and the start date for a Rental Agreement has passed.

Detailed water right conditions are attached.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

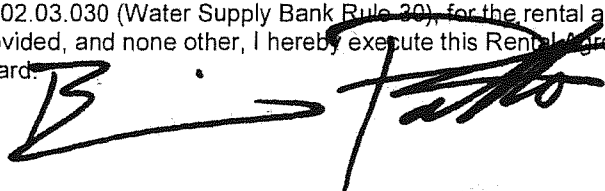
**WATER SUPPLY BANK RENTAL AGREEMENT**

The undersigned renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described in this agreement:

      Thomas J. Budge, Attorney for IGWA      1-25-15  
Signature of Renter      Printed Name and Title\*      Date

\*Please provide title of signatory if signing on behalf of a company or organization or with power of attorney

Having determined that this agreement satisfied the provisions of Idaho Code § 42-1763 and IDAPA 37.02.03.030 (Water Supply Bank Rule 20), for the rental and use of water under the terms and condition herein provided, and none other, I hereby execute this Rental Agreement on behalf of the Idaho Water Resource Board:

  
By  
BRIAN PATTON, Acting Administrator  
Idaho Water Resource Board

Date January 27, 2015

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
**WATER SUPPLY BANK RENTAL AGREEMENT**

**WATER USE DETAILS**

**LOCATION OF POINT(S) OF DIVERSION**

THOUSAND SPRINGS SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  Sec. 6 Twp 08S Rge 14E GOODING County  
TWO POINTS OF DIVERSION LOCATED IN T08S, R14E, S06, LOT 8 SESESE

**BENEFICIAL USE**

FISH PROPAGATION

**SEASON OF USE**

01/01 TO 12/31

**RENTER'S PLACE OF USE:** FISH PROPAGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
07S	14E	31			H	H													
07S	14E	32							H										

Total Acres:

**CONDITIONS APPLICABLE TO ALL RENTED WATER RIGHTS**

1. The use of water under this agreement shall be subject to the provisions of Idaho Code § 42-1766.
2. Rental of the specified right from the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other department application process.
3. Use of water under this agreement does not constitute a dedication of the water to renter's place of use, and upon expiration of this agreement, the points of diversion and place of use of the water shall revert to those authorized under the water right and/or again be available to rent from the bank.
4. This rental does not grant any right-of-way or easement to use the diversion works or conveyance works of another party.
5. Use of water under this agreement shall not prejudice any action of the Department in its consideration of an application for transfer or permit filed by the applicant for this same use.
6. Renter agrees to comply with all applicable state and federal laws while using water under this agreement.
7. Renter agrees to hold the Board, the Director and the state of Idaho harmless from all liability on account of negligent acts of the renter while using water.
8. Renter acknowledges and agrees that the Director may terminate diversion of water if the Director determines there is not a sufficient water supply for the priority of the right or portion thereof being rented.
9. Failure of the renter to comply with the conditions of this agreement is cause for the Director to rescind approval of the rental agreement.
10. The water right(s) referenced above is accepted into the bank and rented in accordance with a private agreement formulated between the lessor and the renter. Administrative fees will be paid based on the current rental rate.

11. All conditions specified and ordered by the Director of Water Resources in the Order Approving IGWA's Fourth Mitigation Plan are relevant and apply to this rental agreement.
12. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 130.
13. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the pipeline delivering water to the Rangen Facility.

# **Exhibit C**

**IGWA's Post-Hearing Brief**

Randall C. Budge (ISB# 1949)  
Thomas J. Budge (ISB# 7465)  
RACINE OLSON NYE BUDGE  
& BAILEY, CHARTERED  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
(208) 232-6101 – phone  
(208) 232-6109 – fax  
rcb@racinelaw.net  
tjb@racinelaw.net

*Attorneys for IGWA*

**IDAHO DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF APPLICATION FOR  
TRANSFER NO. 79560

**IGWA's Post-Hearing Brief**

Idaho Ground Water Appropriators, Inc., on behalf of North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (collectively, the “Districts”), submits this post-hearing brief pursuant to the Director’s verbal instructions at the close of the hearing on December 18, 2014, and rules 564 and 650.02.f of the Rules of Procedure of the Idaho Department of Water Resources.

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Application for Transfer no. 79560 (the “Application”) seeks to change the place of use of a 10 cfs portion of water right 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen hatchery on Billingsley Creek to mitigate material injury to Rangen pursuant to IDWR’s *Order Approving IGWA’s Fourth Mitigation Plan* entered October 29, 2014.<sup>1</sup> Under Idaho Code § 42-222, this transfer should be approved so long as:

- (1) no other water rights are injured thereby,
- (2) the change does not constitute an enlargement in use of the original right,
- (3) the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code,
- (4) the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and
- (5) the new use is a beneficial use.

As discussed below, the Application meets these requirements.

## **1. The transfer will not injure other rights.**

Rangen’s Protest contends “[o]ther rights will be injured by the transfer.”<sup>2</sup> It does not identify which rights will be injured, but at the hearing Dr. Brockway cited the affect of the transfer on Snake River flows.

There are no water rights downstream of the Magic Springs fish hatchery that could be injured by the transfer.<sup>3</sup> The Districts readily acknowledge, however, that the transfer will have a small impact on Snake River flows, and that if the flow of the Snake River at the Murphy Gauge were to drop below the minimums imposed by the Swan Falls Agreement, so-called “trust water rights” could be curtailed.<sup>4</sup> As explained below, the

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<sup>1</sup> *Order Approving IGWA’s Fourth Mitigation Plan*, In the Matter of the Fourth 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., IDWR Docket No. CM-MP-2014-006 (Oct. 29, 2014).

<sup>2</sup> Rangen Protest p. 2 ¶ 6 (Oct. 17, 2014).

<sup>3</sup> King, Tr. 87:23-88:2 (rough draft).

<sup>4</sup> SPF Opening Report p. 1 (Ex. 4002 p. 4).

Districts have taken actions to offset the impact of the transfer on the flow of the Snake River.

### **1.A Rangen does not have standing to assert injury.**

Before describing the Districts' mitigation, it must be noted that neither Idaho Power nor any holders of trust water rights (most of which are subject to the curtailment order that the transfer seeks to mitigate) have protested the transfer. Moreover, Rangen does not have standing to assert injury to its water rights from the transfer.

Under Idaho Code § 67-5270, only an "aggrieved party" has standing to contest the Director's injury determination. To qualify, Rangen must have "substantial rights [that may be] prejudiced."<sup>5</sup> Standing is a constitutional requirement.<sup>6</sup> It requires a "personal stake" in the outcome of the case.<sup>7</sup>

Because only trust water rights are at risk of curtailment if the Swan Falls minimums are breached, only the holders of trust water rights (and, arguably, Idaho Power) have standing to assert injury. Rangen does not own any trust water rights.<sup>8</sup> Further, Rangen's fish propagation water rights are non-consumptive. Consequently, even if Snake River flows were to drop below the Swan Falls minimums, Rangen's rights would not be at risk of curtailment. Dr. Brockway admitted this at the hearing.<sup>9</sup>

### **1.B The Districts' mitigation activities fully offset the impact of the transfer on Snake River flows.**

The Districts' expert witness, Scott King, acknowledged in his initial report that the transfer could impact the flow of the Snake River due to the transferred water being consumed by evaporation or irrigation after leaving the Rangen hatchery.<sup>10</sup> As explained below, this impact can be minimized by shepherding the transferred water through Billingsley Creek directly to the Snake River, but this is unnecessary because the Districts' ex-

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<sup>5</sup> Idaho Code § 67-5279(4); see *Sandpoint Indep. Highway Dist. v. Bd. of County Comm'rs*, 138 Idaho 887, 892-893 (2003).

<sup>6</sup> *Evans v. Teton County*, 139 Idaho 71, 75 (2003).

<sup>7</sup> *Miles v. Idaho Power Co.* 116 Idaho 635, 641 (1989).

<sup>8</sup> See Ex. 5015 p. 2 (all of Rangen's water rights are senior to October 25, 1984, and benefit from "unqualified subordination" under the Swan Falls Agreement as set forth in the *Order Granting Second Amended Motion to Include Subordination Language*, In re SRBA case no. 39576, Subcase no. 00-91013 (Basin-Wide Issue 13), Twin Falls County District Court, Jan. 12, 2002.)

<sup>9</sup> Brockway, Tr. 218:10-13 (rough draft).

<sup>10</sup> SPF Initial Report pp. 1-2 (Ex. 4002 pp. 4-5).

isting mitigation actions fully offset consumption of the transferred water even if is diverted from the Creek for irrigation use.

### **1.B.i Shepherding water through Billingsley Creek.**

King explained that consumption by irrigation could be eliminated by shepherding the transferred water through Billingsley Creek to the Snake River.<sup>11</sup>

Frank Erwin said it would be difficult to shepherd the transferred water through the Creek because of inadequate measuring devices. He indicated that the amount of loss would need to be calculated, and in-stream measuring devices would need to be added to ensure the transferred water remains in the Creek.

Sophia Sigstedt calculated evaporative loss of 0.039 cfs if 10 cfs were shepherded through the Creek.<sup>12</sup> It is unlikely that seepage loss would significantly increase due to the transfer, but this could be calculated by IDWR if needed.

With respect to measurement of diversions from Creek, Idaho Code § 42-701 requires each appropriator to maintain a reliable measuring device. This is necessary to enable the Director and the watermaster to fulfill their duties to distribute water set forth in Idaho Code §§ 42-602 and 42-607. To the extent any existing device is not up to par, the water district or the appropriator using the diversion should be required to improve it. In other words, an appropriator's failure to maintain reliable measuring devices as required by law does not justify denial of the transfer.

With respect to in-stream measuring devices, Idaho Code § 42-703 makes it "the duty of those using water in any district to place in the streams from which said water is diverted and at such places and intervals on said streams as the department of water resources may require suitable systems or devices for measuring the flow of water." To the extent in-stream devices are needed to accurately distribute water to holders of Billingsley Creek water rights, the district should be required to install such devices. To the extent in-stream devices are needed for the sole purpose of shepherding the transferred water through Billingsley Creek, the Districts should bear the cost of such devices (should shepherding be required).

Dr. Brockway testified concerning the complexity of shepherding water through Billingsley Creek due to gaining and losing reaches. While the Districts do not disagree there may be challenges, they cannot conceive of

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<sup>11</sup> SPF Initial Report pp. 1-2 (Ex. 4002 pp. 4-5).

<sup>12</sup> AMEC Dec. 2 memo, Ex. 4007 p. 3; *see also* Sigstedt, Tr. 146:17-147:2 (rough draft).

such challenges being insurmountable.<sup>13</sup> There are only 11 diversions from the Creek,<sup>14</sup> and IDWR reliably distributes water from many streams with gaining and losing reaches. Further, Mr. Erwin said he could reliability shepherd 2.5 cfs from the Padgett Ditch to the lowest diversion on Billingsley Creek.<sup>15</sup> From the Districts' perspective, adding an in-stream measurement below the lowest diversion on Billingsley Creek would enable the watermaster to shepherd the transferred water (less evaporation), and administer the remaining water the same way the watermaster has historically. In any case, the challenge of adjusting administration of Billingsley Creek does not justify denial of the transfer.

That said, improving and adding measuring devices is necessary only if IDWR requires the transferred water to be shepherded through Billingsley Creek. As explained below, shepherding is unnecessary to avoid injury.

**1.B.ii The Districts' existing mitigation actions fully offset consumption of the transferred water.**

Frank Erwin testified that potentially all of the transferred water could be consumed by crops during the irrigation season if it is allowed to be diverted out of Billingsley Creek. This seems unlikely since the transferred water would simply provide additional water to fields that are irrigated under other water rights (i.e. no new land would be irrigated),<sup>16</sup> and satellite imagery depicts a number of places where irrigation return flow discharges to the Snake River, yet there is no dispute that a significant portion of the transferred water could be consumed by irrigation during the summer.

To the extent consumption of the transferred water will reduce the flow of the Snake River, IDWR's transfer processing memo no. 24 requires "replacement water in the full amount of the injury, at the same time injury would otherwise occur, and of acceptable water quality at the point of diversion for the existing right."<sup>17</sup>

The Districts have for many years invested in recharge, conversions, and dry-ups that increase the flow of water in the Snake River. AMEC calculated cumulative effects of these activities to ESPAM model cells downstream of Milner Dam, all of which contribute flow to the Snake River. The

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<sup>13</sup> King, Tr. 75:23-76:4.

<sup>14</sup> Erwin, Tr. 24:23 (rough draft).

<sup>15</sup> Erwin, Tr. 36:10-38:4 (rough draft).

<sup>16</sup> Brockway, Tr. 235:6-14 (rough draft).

<sup>17</sup> Ex. 5017 pp. 24-25.

calculation shows gains of between 48 and 59 cfs.<sup>18</sup> AMEC also explained that most of these gains flow directly to the Snake River without being diverted for irrigation.<sup>19</sup> Thus, the Districts' mitigation activities provide far more water to the Snake River than would be depleted by the transfer even if the full 10 cfs were consumed by irrigation.

Because injury could occur only if the Swan Falls minimum flows are breached, and because the Districts' mitigation activities more than off-set the consumption of transfer on the flows of the Snake River, the Director should conclude there is no injury to other water rights. The Districts do not oppose a condition of approval that requires mitigation to the Snake River in an amount equal to or exceeding consumption of the transferred water in the event the Swan Falls minimum flows are breached.

## **2. The transfer will not enlarge the use of water right 36-7072.**

Rangen's Protest contends the transfer "constitutes an enlargement of use of the original right."<sup>20</sup> It does not say how, but at the hearing Dr. Brockway opined that enlargement could occur as a result of the transferred water being consumed after it leaves Rangen's fish hatchery.

There is no dispute that the use of the transferred water within Rangen's hatchery will not result in enlargement. Water right 36-7072 is presently used for fish propagation at the SeaPac hatchery, and it will continue to be used for fish propagation at the Rangen hatchery.<sup>21</sup> Both hatcheries raise trout in outdoor raceways of similar construction, using similar techniques.

The issue is whether enlargement occurs based on consumption of the transferred water after it leaves the Rangen hatchery and enters Billingsley Creek.

### **2.A The enlargement analysis does not extend to consumption that may occur after the transferred water returns to the waters of the state.**

Idaho Code § 42-222 does not define "enlargement in use," but does state: "The director may consider consumptive use, as defined in section

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<sup>18</sup> AMEC Dec. 12 memo, Ex. 4008 p. 6.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> Rangen Protest p. 2 ¶ 6 (Oct. 17, 2014).

<sup>21</sup> *Order Approving IGWA's Fourth Mitigation Plan*, In the Matter of the Fourth 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., IDWR Docket No. CM-MP-2014-006 (Oct. 29, 2014).

42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.” Section 42-202B then reads:

(1) “Consumptive use” means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. . . . If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.

Of particular significance, the statute defines consumptive use based on the consumption that occurs before the diverted water “return[s] to the waters of the state.” It does not extend the inquiry to what happens after the diverted water returns to the waters of the state. And IDWR has not traditionally considered what happens after diverted water returns to a public waterway when evaluating enlargement.

Accordingly, the Districts contend the enlargement analysis is limited by statute to the consumption that occurs before the diverted water returns to the waters of the state.<sup>22</sup> (As mentioned above, the Districts believe downstream consumption is relevant to the injury issue.)

In this case, all of the transferred water will be used non-consumptively in the Rangen fish hatchery after which it will return to Billingsley Creek (the waters of the state); therefore, the Districts believe there is no enlargement of the transferred right.<sup>23</sup>

## **2.B If the Director considers downstream consumption, the Application should still be approved.**

Idaho Code § 42-222 states the Director “*may* consider consumptive use” when evaluating enlargement,<sup>24</sup> and Dr. Brockway admitted, when questioned in connection with the hypothetical posed with exhibit 4018,

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<sup>22</sup> King, Tr. 97:2-14, 119:22-120:1, 121:3-9 (rough draft).

<sup>23</sup> Since both uses are non-consumptive, the Districts deemed it unnecessary to attached a water balance to the Application.

<sup>24</sup> Emphasis added.

that increased consumption does not necessitate a finding of enlargement.<sup>25</sup>

Consumption of water diverted from Billingsley Creek should also not result in enlargement, for three reasons. First, because the Districts have mitigated for such consumption, as discussed above. Second, because water right 36-7072 does not have a consumptive use condition. Third, because the Director has authority to reallocate trust water to consumptive uses.

Under Idaho Code § 42-203C, the Director can reallocate trust water if it is in the public interest. Based on the public interest factors set forth in section 42-203C, the Application is in the public interest, as follows.

The first factor considers “[t]he potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy.” The transfer is necessary to avoid curtailment of 157,000 irrigated acres of farmland in the Magic Valley. The direct and indirect economic benefits of approval are unmatched.

The second factor considers “[t]he economic impact the proposed use would have upon electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact.” The transfer will have a small impact on Snake River flows. During the non-irrigation season consumption will be limited to evaporation which will have an insignificant impact on Snake River flows. During the irrigation season the impact will be limited in duration and will at no time exceed 10 cfs. Snake River flows at the Murphy Gauge average between roughly 6,000 and 12,000 cfs annually;<sup>26</sup> thus, the impact of the transfer will be small.

The third factor considers “[t]he promotion of the family farming tradition.” As mentioned above, the transfer will prevent many families from losing their farms.

The fourth factor considers “[t]he promotion of full economic and multiple use development of the water resources of the state of Idaho.” Again, the transfer is designed to avoid economic disaster.

The fifth and final public interest factor considers “[i]n the Snake River Basin above the Murphy gauge whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year peri-

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<sup>25</sup> Brockway, Tr. 231:7-223:7 (rough draft).

<sup>26</sup> Ex. 4004, p. 22.

od.” The transfer does not result in development of new irrigated farmland; it preserves existing irrigation.

It must be noted that “[n]o single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination,” and that “[t]he burden of proof under the provisions of this section shall be on the protestant.”<sup>27</sup> It is hardly debatable, and Rangen certainly hasn’t proven otherwise, that approval of the Application is in the public interest.

Finally, one other issue that deserves mention is the watermaster’s concern that listing both “mitigation” and “fish propagation” as beneficial uses results in enlargement.<sup>28</sup> While the purpose of the transfer is obvious, there is no IDWR rule or policy that clearly explains which use is most appropriate. Since the Application was filed, however, IDWR has issued permit number 36-16976 with mitigation as the beneficial use, and the same rationale arguably makes mitigation the most appropriate beneficial use here. Either way, the Districts’ concern is simply that they be able to pump water from Magic Springs to mitigate injury to Rangen. They will defer to the Director’s judgment as to whether the approved use should be listed as mitigation, fish propagation, or both.

For all of these reasons, the Director should conclude the transfer does not result in enlargement of water right 36-7072.

### **3. The transfer is consistent with the conservation of water resources within the state of Idaho.**

Rangen’s Protest contends the transfer “is not consistent with the conservation of water resources within the state,” but does not explain how.<sup>29</sup> The transfer does not seek to move water outside of the state, but will instead preserve hundreds of existing water uses within the state. Therefore, it is consistent with the conservation of water resources within the state.

### **4. The transfer is in the local public interest as defined in Idaho Code § 42-202B.**

Rangen’s Protest contends the transfer “will be detrimental to fish and wildlife, fish rearing and spawning habitat, fish passage, waterfowl habitat, and aesthetic beauty and is therefore not in the best interest of the general public of the state of Idaho.”<sup>30</sup> It does not explain which fish, wildlife, habi-

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<sup>27</sup> Idaho Code § 42-203C.

<sup>28</sup> Ex. \_\_.

<sup>29</sup> *Id.* at 2 ¶ 8.

<sup>30</sup> *Id.* at 2 ¶ 5.

tat, and aesthetic beauty will be harmed, and Rangen did not put on any evidence of such harm at the hearing.

Idaho Code § 42-202B defines “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.”

The transfer will be a significant benefit to people in the Hagerman area by adding water to Billingsley Creek which provides valuable fish and wildlife habitat. It will especially benefit Rangen by doubling the amount of water in its raceways. If there is any detriment to the small reduction in downstream flow from Magic Springs, it is offset by the benefit of increased flows in Billingsley Creek.

#### **5. The transfer will not adversely affect the local economy.**

The transfer will positively affect the local economy by enabling Rangen to increase fish production at its facility, improving the flow of water in Billingsley Creek, and preventing groundwater wells in the local area from being shut off. Rangen’s Protest does not contend this transfer will adversely affect the local economy.

#### **6. Fish propagation is an established beneficial use.**

Fish propagation and mitigation are both established beneficial uses of water. Therefore, the Application meets this criterion.

#### **7. The ESPA Moratorium Order does not prohibit this transfer.**

Dr. Brockway’s report claims “the change is contrary to the ESPA moratorium.”<sup>31</sup> However, the moratorium order applies explicitly to new permits (“a moratorium is established on the processing and approval of presently pending and new applications for permits”),<sup>32</sup> and transfers are regularly approved within the moratorium area.<sup>33</sup> Further, even if the moratorium order applied, it allows the Director to approve the transfer if:

- a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
- b) The Director determines that the development and use of the water pursuant to an application will have no effect on

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<sup>31</sup> Brockway Opening Report, Ex. 4004 p. 10.

<sup>32</sup> Amended Moratorium Order, Ex. 5007 p. 4.


<sup>33</sup> King, Tr. 14:14-83:9.

prior prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.<sup>34</sup>

For the reasons discussed above, this transfer meets both exceptions.

DATED this 1st day of January, 2015.

RACINE OLSON NYE BUDGE &  
BAILEY, CHARTERED

By:   
Thomas J. Budge  
*Attorney for the Ground Water Districts*

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<sup>34</sup> Amended Moratorium Order, Ex. 5007 p. 5.