

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

NORTH SNAKE GROUND WATER
DISTRICT, MAGIC VALLEY GROUND
WATER DISTRICT and SOUTHWEST
IRRIGATION DISTRICT,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN, in
his capacity as Director of the Idaho
Department of Water Resources,

Respondents,

and

RANGEN, INC.,

Intervenor.

Case No. CV-2015-083

RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

ATTORNEYS FOR RESPONDENTS

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682 Deputy
Attorneys General
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

*Deputy Attorneys General for Idaho
Department of Water Resources*

ATTORNEYS FOR INTERVENOR

J. Justin May
MAY, BROWNING & MAY, PLLC
1419 W. Washington
Boise, ID 83702
Telephone: (208) 429-0905
jmay@maybrowning.com

Robyn M. Brody
BRODY LAW OFFICE, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
robynbrody@hotmail.com
Fritz X. Haemmerle
HAEMMERLE & HAEMMERLE, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
fxh@haemlaw.com

Attorneys for Rangen, Inc.

ATTORNEYS FOR PETITIONERS

Randy C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE &
BAILEY, CHTD.
P.O. Box 1391
Pocatello, ID 83201
Telephone: (208) 232-6101
rcb@racinelaw.net
tjb@racinelaw.net

*Attorneys for the North Snake Ground
Water District, Magic Valley Ground
Water District and Southwest Irrigation
District*

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (“Districts”), appeal a final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) denying an application for a water right permit (“Application 36-16976”) filed by the Districts. Application 36-16976 was filed for the purpose of delivering mitigation water to Rangen, Inc. (“Rangen”) in the event the Director determined junior ground water users within the boundaries of the Districts were causing material injury to Rangen and needed to provide mitigation or be curtailed. Ex. 1000, p. 2. The order appealed is the February 6, 2015, *Final Order Denying Application* (“Final Order”).

B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

Rangen owns and operates a fish propagation and research facility near the head of Billingsley Creek. R. p. 349. The Rangen facility has existed for over fifty years. Rangen diverts water to the facility from the Martin-Curren Tunnel and from the head of Billingsley Creek, which is fed by various springs arising on a talus slope east of the facility and by overflow water from the Martin-Curren Tunnel diversion structures. *Id.* The Rangen facility is comprised of a green house, hatch house, and small raceways which are all located south of the Billingsley Creek channel. R. p. 350. The facility also includes a set raceways know as the large raceways and a set known as the CTR raceways, both of which are located north of the Billingsley Creek channel. *Id.*

Rangen diverts water to its facility from several points of diversion. Rangen first diverts water from a pipe placed in the mouth of the Martin-Curren Tunnel that conveys water to the hatch house and greenhouse. Tr. p. 123. Water emanating from the Martin-Curren Tunnel flows into a

concrete structure called the Farmers Box. *Id.* Two pipelines deliver water out of the Farmers Box toward a structure called the Rangen Box. *Id.* at 123-24. A single pipe runs out of the Rangen Box to the hatch house, greenhouse, and small raceways. *Id.* at 124. All of the water from the talus slope and the overflow from the Farmers Box and Rangen Box collects and forms the headwaters of Billingsley Creek. Rangen has historically diverted water from a large diversion on Billingsley Creek (“Bridge Diversion”) which supplies water to the large raceways and CTR raceways. Ex. 1048; Ex. 1059. The flow in Billingsley Creek has, at times, exceeded 12 cfs at the Bridge Diversion over the last decade. Ex. 1021; Ex. 1022; Ex. 1040, p. 1; Ex. 2017. Currently, Rangen diverts almost all the water arising upstream of the Bridge Diversion. Tr. p. 249. Water used in the Rangen facility is returned to Billingsley Creek at the end of the CTR raceways. R. p. 350.

Rangen holds five water rights for the Rangen facility that were decreed through the Snake River Basin Adjudication (“SRBA”). Rangen’s decreed rights are summarized as follows:

Right	Source	Purpose and Period of Use	Quantity	Priority	Point of Diversion
36-00134B	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31) Irrigation (03/15 – 11/15)	0.07 cfs 0.05 cfs	10/09/1884	T07S R14E S32 SESWNW
36-00135A	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31)	0.05 cfs	04/01/1908	T07S R14E S32 SESWNW
36-15501	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	1.46 cfs	07/01/1957	T07S R14E S32 SESWNW
36-2551	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31) Domestic (01/01 – 12/31)	48.54 cfs	07/13/1962	T07S R14E S32 SESWNW
36-7694	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	26.0 cfs	04/12/1977	T07S R14E S32 SESWNW

As this chart demonstrates, none of Rangen’s water rights list Billingsley Creek or springs tributary to Billingsley Creek as authorized sources and none list the Bridge Diversion as an authorized point of diversion. Due to a decline in flow from the Martin-Curren Tunnel and the various springs at the headwaters of Billingsley Creek, Rangen filed a *Petition for Delivery Call* with the Department in December 2011 alleging water right nos. 36-02551 and 36-07694 are

being materially injured by junior-priority ground water pumping (“Rangen Delivery Call”). R. p. 351.

On March 8, 2013, Rangen filed with the Director a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* (“Source Motion”). See *Order Granting in Part and Denying in Part Rangen, Inc.’s Motion for Partial Summary Judgment Re: Source* (“Source Order”) at 1.¹ One of the issues raised in the Source Motion was whether the Rangen Delivery Call is limited to the amount of water flowing through the Martin-Curren Tunnel. *Source Order* at 6. As discussed above, Rangen has historically diverted water from the head of Billingsley Creek by means of the Bridge Diversion. Ex. 1008, p. 32. However, the Bridge Diversion is not listed as an authorized point of diversion on Rangen’s water rights. *Id.* The Idaho Ground Water Appropriators, Inc. (“IGWA”),² argued the Director should deny summary judgment by ruling that Rangen has no legal right to call for the delivery of water to points of diversion that were not decreed for water right numbers 36-02551 and 36-07694 by the SRBA Court. *Source Order* at 2. Whether Rangen’s water rights authorize diversion of water from Billingsley Creek became an issue of both fact and law in the Rangen Delivery Call. See *id.* at 6-7.

The Districts filed Application 36-16976 with the Department on April 3, 2013, the day of oral argument for the Source Motion before the Director. Application 36-16976 proposes diverting a combined total of 12 cfs from “Springs; Billingsley Creek” for purposes of “mitigation for

¹ If a party moves the Court to “take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.” IRE 201(d) (emphasis added). “Judicial notice may be taken at any stage of the proceeding.” IRE 201(f). Pursuant to IRE 201(d), Respondents request the Court take judicial notice of the Source Order that was included in the record of Case No. CV-2014-1338 and is attached hereto as Appendix A.

² The Districts are members of IGWA. Tr. p. 26.

irrigation” and “fish propagation.” Ex. 1000, p. 1. Application 36-16976 includes the following statement:

The Ground Water Districts [sic] this water for mitigation purposes to protect ground water use on the Eastern Snake Plain in the event that the Director finds Rangen to be materially injured and orders junior groundwater users to provide mitigation or be curtailed. Mitigation water will be delivered to Rangen for fish propagation purposes. The Ground Water Districts, if unable to secure Rangen’s consent, will use their power of eminent domain as set forth in Idaho Code section 42-5224(13) to secure necessary easements for mitigation facilities.

Id. at 2.

Rangen, as owner of the property at the proposed place of use and points of diversion of Application 36-16976, filed a protest.³ The proposed place of use was described as the SENE of Section 31 and the SWNW of Section 32, T07S, R14E. *Id.* Application 36-16976 was amended on February 11, 2014, updating the proposed place of use to include the SWNE of Section 31, T07S, R14E, which contains the end section of Rangen’s CTR raceways. Ex. 1001, p. 2. This amended proposed place of use covers the entire Rangen facility. Tr. p. 87. Application 36-16976 was amended a second time on May 27, 2014. Ex. 1004. The second amendment changed one of the proposed beneficial uses from “mitigation for irrigation” to “mitigation” and revised the answers to some of the application questions. *Id.* Application 36-16976 lists two proposed points of diversion. Ex. 1004, p. 1. The Districts’ initial disclosures also describe two points of diversion: “Water will be delivered . . . either by gravity flow through an existing headgate (the “Bridge Diversion”) on Billingsley Creek . . . or by pumping water from Billingsley Creek to various fish rearing facilities at the Rangen hatchery.” Ex. 1009, p. 2. Both proposed diversion structures (the Bridge Diversion and the proposed pump station) are located in the SWSWNW of Section 32. Ex. 1015, p. 26; Ex. 1041; Ex. 1048. The proposed pump station would allow up to 4.0 cfs of water to

³ Blind Canyon Aquaranch, Inc., also filed a protest, but did not participate in the hearing regarding Application 36-16976.

be diverted from Billingsley Creek to the facility structures on the south side of the creek (hatch house, greenhouse and small raceway). Tr. p. 156. The remaining 8.0 cfs described in Application 36-16976 would be diverted through the existing Bridge Diversion to supply the large raceways and CTR raceways. Ex. 1015, p. 23; Tr. p. 144.

On April 22, 2013, the Director issued the Source Order disposing of the Source Motion. The Director concluded that, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW, including the Bridge Diversion. *Source Order* at 6-7. As to the question of whether Rangen is limited to diverting water only from the Martin-Curren Tunnel, the Director denied summary judgment, concluding there were questions of material fact related to how Rangen diverts water from the tunnel. *Id.* at 7.

The Director conducted a hearing for the Rangen Delivery Call on May 1-16, 2013. Ex. 1008, p. 3. On January 29, 2014, the Director issued the *Final Order Regarding Rangen Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order). The Director addressed whether Rangen is limited to diverting water only from the Martin-Curren Tunnel. The Director stated:

15. The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract: SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7S, R14E, Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E. A decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

Ex. 1008, p. 32. The Director concluded that certain ground water users within the boundaries of the North Snake Ground Water District and Magic Valley Ground Water District were causing material injury to Rangen by reducing flows from the Martin-Curren Tunnel. Ex. 1008, pp. 31-36. The Director ordered that junior priority water rights within those districts would be curtailed if mitigation was not provided to Rangen.⁴ *Id.* at 42.

An administrative hearing for Application 36-16976 was conducted on September 17, 2014, in Twin Falls, Idaho, by Department employee James Cefalo as the Hearing Officer. On November 18, 2014, the Hearing Officer issued a *Preliminary Order Issuing Permit* and signed Permit to Appropriate Water No. 36-16976 (“Permit”). On December 2, 2014, Rangen filed with the Director *Exceptions to Preliminary Order* and *Rangen’s Brief in Support of Exceptions to Preliminary Order*. On February 6, 2015, the Director issued the Final Order denying Application 36-16976. The Districts filed their *Petition for Judicial Review* of the Final Order with this Court on March 5, 2015.

⁴ On October 24, 2014, the District Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* in Case No. CV-2014-1338 (“Memorandum Decision”). The Court affirmed the Director’s determination in the Curtailment Order that Rangen’s water rights only authorize diversion of water from the Martin-Curren Tunnel, and not the Bridge Diversion. *Memorandum Decision* at 10-15. The Memorandum Decision on appeal to the Idaho Supreme Court.

II. ISSUES ON APPEAL

The issues presented by the Districts are as follows:

1. Application 36-16976 contemplates using a pump station, screw-operated headgate, pipes and related facilities to deliver mitigation water to Rangen. Is the Director's conclusion that Application 36-16976 does not contemplate a "project" - and was filed in bad faith - supported by substantial evidence in the record as a whole, contrary to law, or an abuse of discretion?
2. Under Idaho Code, the "local public interest" means "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." Did the Director violate Idaho Code or abuse his discretion by concluding that Application 36-16976 was not in the local public interest based on concerns over precedent and fairness rather than the effects on the public water source?

Respondents' formulation of the issues presented is as follows:

1. Whether the Director's conclusion that part of Application 36-16976 was not filed in good faith is based upon analyses consistent with Idaho Code § 42-203A(5) and the Department's Water Appropriation Rules and based upon findings supported by substantial evidence in the record.
2. Whether the Director's determination that Application 36-16976 is not in the local public interest is consistent with requirements set forth in Idaho Code §§ 42-203A(5) and 42-202B(3).

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act (“IDAPA”), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep’t of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. THE DIRECTOR PROPERLY CONCLUDED PART OF APPLICATION 36-16976 WAS NOT FILED IN GOOD FAITH

Idaho Code § 42-203A(5) requires the Director to determine whether an application to appropriate waters of Idaho "is not made in good faith." The applicant bears the burden of proof regarding factors set forth in Idaho Code § 42-203A(5). In addition, Rule 45.01.c of the Department's Water Appropriation Rules, IDAPA 37.03.08, sets forth the criteria for determining whether an application is made in good faith. Rule 45.01.c states:

The criteria requiring that the Director evaluate whether an application is made in good faith . . . requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project.

IDAPA 37.03.08.45.01.c.

In determining part of Application 36-16976 was not made in good faith, the Director analyzed the intentions of the Districts with respect to filing the application. The Director pointed to testimony of Lynn Carlquist ("Carlquist"), chairman of the North Snake Ground Water District, in response to questioning by counsel for Rangen about the intent of the Districts in filing Application 36-16976:

Q. Now I take it when you filed this in April of 2013 you had absolutely no intent to raise fish on Rangen's property?

A. That was not our intent at the time, no.

Q. And today you have no intent of raising fish on Rangen's property; correct?

A. That's correct.

Q. Now, Lynn, last time we spoke I asked you that if you get this permit, you understand that you have to perfect it somehow; correct?

A. That's right.

Q. And when I asked you that last time, you told me that it was your intent to obtain the permit and then assign the permit to Rangen for us to perfect; correct?

A. Well, that would be the easiest way for us to perfect it, if they would agree to that.

Q. Okay. So you would be taking advantage of Rangen's existing fish facility that it built, correct, to do that?

A. Yes.

Q. You would be taking advantage of the diversion apparatus that Rangen has built and has had in place for 50 years to do that; correct?

A. That's correct.

R. p. 356. The Director also analyzed Application 36-16976 in light of Rule 45.01.c's statement that an application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary *to construct and operate the proposed project*, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. . . .
- ii. The applicant is in the process of obtaining other permits needed *to construct and operate the project*; and
- iii. There are no obvious impediments that prevent the successful *completion of the project*.

IDAPA 37.03.08.45.01.c.i-iii (emphasis added). The Director determined the lack of a "project" was a barrier to approving part of Application 36-16976:

[F]or a majority of the quantity of water sought to be appropriated, there is a threshold impediment to "completion of the project." To perfect a project for a water right, there inherently must be completion of works for beneficial use. The testimony of Lynn Carlquist quoted above demonstrates the Districts' intent at the time of filing [Application 36-16976] was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility the way Rangen has done for the last fifty years. The initial filing by the Districts did not contemplate any construction of works and completion of any project. Furthermore, even at this point, with respect to at least 8.0 cfs of the 12 cfs the Districts propose for appropriation, Rangen will continue to divert through its existing Bridge Diversion. There is no "project" and consequently cannot be a "completion of the project" for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use. [Application 36-16976] fails the bad faith test based on the threshold question of whether there will be a project, and whether there will be any construction of works for perfection of beneficial use.

R. p. 362. The Director's conclusion is based upon analyses consistent with Idaho Code § 42-203A(5) and the Department's Water Appropriation Rules and based upon findings supported by substantial evidence in the record.

The Districts argue that, contrary to the Director’s determination, Application 36-16976 meets the criterion set forth in Rule 45.01.c.iii that “[t]here are no obvious impediments that prevent the successful completion of the project.” *Opening Brief* at 15. Specifically, the Districts assert the Director “mistakenly impose[d] a ‘construction of works’ requirement that is not found in the Idaho Code or [Department’s] Water Appropriation Rules.” *Id.* However, the words “construct” and “operate” are explicit in Rule 45.01.c.i (“[t]he applicant shall have legal access to the property necessary to construct and operate the proposed project”) and Rule 45.01.c.ii (“[t]he applicant is in the process of obtaining other permits needed to construct and operate the project”). The Districts acknowledge this language, yet argue these provisions only apply “if the project requires new construction.” *Opening Brief* at 16. The Districts argue that, were it the intent of Rule 45.01.c to impose a requirement of construction, “the Rules would need to explicitly state that an application must involve new construction to satisfy the good faith requirement.” *Id.*

The District’s argument ignores the plain language of Rule 45.01.c. Statutory construction requires that the language of a statute be given its plain, obvious, and rational meaning. *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). Administrative rules are subject to the same principles of statutory construction as statutes. *Rhodes v. Industrial Commission*, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993). Interpretation of an administrative rule should begin, therefore, with an examination of the literal words of the rule. *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999). In addition, the language should be construed in the context of the rule as a whole. *See Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). Here, Rule 45.01.c.i and ii explicitly require legal access and necessary permits “to construct and operate the project.” (emphasis added). Rule 45.01.c.iii requires there be no “obvious impediments that prevent successful completion of the project.” (emphasis added).

Because Application 36-16976 proposes no construction or operation of a project for at least 8 cfs of the 12 cfs proposed for appropriation, there can be no successful completion of a project for that 8 cfs. Therefore, the Director's determination that part of Application 36-16976 fails the good faith test is consistent with the requirements of Rule 45.01.c.i-iii

The Districts also argue the Director's finding that "the Districts' intent at the time of filing [Application 36-16976] was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility" is not supported by evidence in the record. *Opening Brief* at 18-19. The Districts propose that "[t]he only possibly inference concerning the Districts' intent at the time of filing is that they intended to construct pumps and use eminent domain if needed to deliver water to Rangen." *Id.* at 19.

First, it is important to recognize the Director's finding that the Districts' original intent was to simply assign the Permit to Rangen is not a factual determination that, if changed as the Districts propose, would alter the Director's conclusion that, for at least 8 cfs of the 12 cfs proposed for appropriation, Application 36-16976 was not filed in good faith. The Director ultimately recognized the Districts plans had changed and a pump station was proposed that would allow up to 4.0 cfs of water to be diverted from Billingsley Creek. R. p. 354, 362.⁵ The Director did not conclude Application 36-16976 was not filed in good faith because the Districts' simply intended to assign the Permit to Rangen. Rather, the Director concluded part of Application 36-16976 was not filed in good faith because "[t]here is no 'project' and consequently cannot be a 'completion of the project' for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use." R. p. 362.

⁵ The Districts assert the "pumps could be upsized to divert the full amount if needed." *Opening Brief* at 7. However, the testimony at the hearing only supported the development of a 4 cfs pump station. Tr. p. 132 ("So 4 would be the max, and they could go down from there."); *see also* Ex. 1015, p. 23.

Further, contrary to the Districts' argument, the Director's finding that "the Districts' intent at the time of filing [Application 36-16976] was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility" is supported by substantial evidence in the record. The Districts acknowledge the testimony of Carlquist quoted in the Final Order "could potentially be construed to support the conclusion that the Districts had no intent but to assign the permit to Rangen." *Id.* at 18. In addition, *IGWA's Mitigation Plan and Request for Hearing* ("First Mitigation Plan"), filed with the Department on February 11, 2014, in response to the Curtailment Order specifically lists "Assignment of water right no. 36-16976" as a mitigation proposal and states: "Permit 36-16976 includes the Bridge Diversion as an authorized point of diversion. IGWA will make a direct delivery to Rangen, to the extent needed . . . by assigning water right no. 36-16976 to Rangen." *First Mitigation Plan* at 3 (emphasis added).⁶ In the Final Order, the Director referenced the First Mitigation Plan in support of his determination that "[t]he Districts' originally proposed assigning the Permit to Rangen. . . ." R. p. 364. The Districts point to additional testimony of Carlquist where he stated the Districts could either "do a mitigation plan" or "just assign the permit" to Rangen and to Application 36-16976's listing of "Hydraulic pumps (size TBD)" as part of the diverting works. *Opening Brief* at 18. The Districts argue such information "demonstrates [the Districts'] intent from the outset to construct works to perfect the right." *Id.* at 19. However, the existence of conflicting evidence is not grounds for overturning the Director's decision. If the findings of fact are based on substantial evidence in the record, even if the evidence is conflicting, the Director's findings will not be overturned on appeal. *Barron*, 135 Idaho at 417, 18 P.3d at 222. Here, the Director's finding that "the Districts' intent at the time of

⁶ Pursuant to IRE 201(d), Respondents request the Court take judicial notice of the First Mitigation Plan that was included in the record of Case No. CV-2014-2446 and is attached hereto as Appendix B.

filing [Application 36-16976] was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility” is supported by substantial evidence in the record.

B. THE DIRECTOR PROPERLY CONCLUDED APPLICATION 36-16976 IS NOT IN THE LOCAL PUBLIC INTEREST

Idaho Code § 42-203A(5) requires that, in reviewing an application to appropriate waters of Idaho, the Director must determine whether the application “will conflict with the local public interest” as defined in Idaho Code § 42-202B. Local public interest “is defined 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.” Idaho Code § 42-202B(3).

Here, the Director determined that approval of Application 36-16976 would not be in the local public interest. The Director stated:

34. Approval of [Application 36-16976] would establish an unacceptable precedent in other delivery call proceedings that are or may be pending. In the Rangen Delivery Call, the Director determined that certain ground water users were causing material injury to Rangen by reducing flows from the Curren Tunnel and that junior-priority water rights would be curtailed if mitigation was not provided to Rangen. The Districts’ originally proposed assigning the Permit to Rangen as part of IGWA’s first mitigation plan. *See Amended Final Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order.* The Director noted at that time “IGWA’s water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application.” *Id.* While a race to file an application to appropriate water does not itself establish that [Application 36-16976] is not in the local public interest, [Application 36-16976] attempts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has been using for fifty years. [Application 36-16976] is the epitome of a mitigation shell game. [Application 36-16976] brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek. It is not in the local public interest to approve such an application.

R. p. 364.

The Districts argue “the Final Order violates [Idaho Code § 42-202B(3)]” because it “does not discuss the effects of the proposed use on the public water resource.” *Opening Brief* at 21. The

Districts point to the Director's statement that "[Application 36-16976] brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek" and argue the statement represents a conclusion by the Director that Application 36-16976 "will *not* affect the public water supply." *Id.* Contrary to the Districts' argument, the Director *did* analyze the effects Application 36-16976 would have on the public water resource. Specifically, the Director recognized that approval of Application 36-16976 would allow the Districts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has used for fifty years. R. p. 364. In other words, approval of Application 36-16976 would have a negative effect on the public water resource because it would allow the Districts to mitigate for material injury they caused to Rangen with water Rangen previously relied upon. Such approval "is the epitome of a mitigation shell game" and would "establish an unacceptable precedent in other delivery call proceedings that are or may be pending." *Id.*

The Districts also argue the Director erred in concluding "it is inconsistent with the local public interest and inappropriate for the Districts to exercise their power of eminent domain as a vehicle to obtain a water right for mitigation wholly located on land owned by Rangen." *Id.* at 21-22. The Districts suggest this conclusion is "beyond the definition of the local public interest...since the issue has no effect on the public water resource." *Id.* at 22. The Districts assert that Application 36-16976 will have "only a positive effect" on the public interest because it will not diminish the Billingsley Creek water supply but will "provide Rangen with a more reliable supply of water." *Id.* Contrary to the Districts' argument, how the Districts exercise eminent domain and how mitigation water is delivered to the injured party does have an effect on the public water resource and local public interest. Again, allowing the Districts to obtain a water right for mitigation as proposed by Application 36-16976 would have a negative effect as it would allow the

Districts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has used for fifty years. “It is not in the local public interest to approve such an application.” R. p. 364. In addition, as noted in the Final Order, Rangen filed a competing application to appropriate water no. 36-17002 with the Department on February 3, 2014, that identified the Bridge Diversion as a point of diversion. *Id.* at 353. On January 2, 2015, application for permit no. 36-17002 was approved for 28.1 cfs for fish propagation, with a priority date of February 3, 2014. *Id.* at n.4. Therefore, Application 36-16976 would not “provide Rangen with a more reliable supply of water” as the Districts contend.

The Director’s determination that approval of Application 36-16976 is not in the local public interest fits within the local public interest definition set forth in Idaho Code § 42-202B(3) because the Districts’ mitigation proposal does nothing to mitigate for already depleted flows at Rangen’s facility and leaves Rangen with the same water supply as existed prior to the Rangen Delivery Call. The Director acted consistent with Idaho Code as an application that will be part of a mitigation plan which does not provide any actual relief to the senior calling party is not in the local public interest.

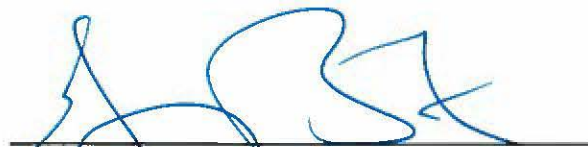
V. CONCLUSION

The Director's conclusion that Application 36-16976 was not filed in good faith is based upon analyses consistent with Idaho Code § 42-203A(5) and the Department's Water Appropriation Rules and based upon findings supported by substantial evidence in the record. The Director's determination that Application 36-16976 is not in the local public interest is consistent with requirements set forth in Idaho Code §§ 42-203A(5) and 42-202B(3). The Districts' substantial rights have not been violated. Accordingly, the Court should affirm the Director's Final Order denying Application 36-16976.

RESPECTFULLY SUBMITTED this 23rd day of June, 2015.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



GARRICK L. BAXTER
EMMIL L. BLADES
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA District Court
253 3rd Ave. North
P.O. Box 2707
Twin Falls, ID 83303-2707
Facsimile: (208) 736-2121

() U.S. Mail, Postage Prepaid
(x) Hand Delivery
() Facsimile
() E-mail

RANDALL C. BUDGE
T.J. BUDGE
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

J JUSTIN MAY
MAY BROWNING
1419 W WASHINGTON
BOISE ID 83702
jmay@maybrowning.com

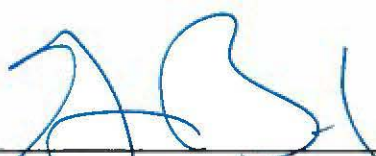
(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

ROBYN BRODY
BRODY LAW OFFICE
PO BOX 554
RUPERT ID 83350
robynbrody@hotmail.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

FRITZ HAEMMERLE
HAEMMERLE & HAEMMERLE
PO BOX 1800
HAILEY ID 83333
fxh@haemlaw.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail



Garrick L. Baxter
Deputy Attorney General

APPENDIX A

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

**IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551
AND 36-07694**

(RANGEN, INC.)

)
) **CM-DC-2011-004**
)
) **ORDER GRANTING IN PART**
) **AND DENYING IN PART**
) **RANGEN, INC.'S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **RE: SOURCE**
)

FINDINGS OF FACT

1. On March 8, 2013, Rangen, Inc. ("Rangen") filed a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* ("Source Brief"). In its Source Brief, Rangen seeks a ruling on two points: (1) the source for its Martin-Curren Tunnel water rights (36-2551, 36-7694, and 36-15501) is surface water, not ground water; and (2) its delivery call "is not limited only to water from the mouth of the Martin-Curren Tunnel itself." *Source Brief* at 2.

2. Regarding the issue of whether the legal source of its Martin-Curren Tunnel water rights is ground water or surface water, Rangen points to its SRBA decrees and prior licenses, as well as the supporting documents. Rangen also relies on the Department's adjudication rules for the proposition that if its Martin-Curren Tunnel water rights were ground water, the adjudication rules required the claims to be made for "ground water." IDAPA 37.03.01.060.02.c ("AJ Rule 60"). "Rangen's Partial Decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of a tributary is unique to surface water sources." *Source Brief* at 15. Rangen argues that any attempt to change its decreed source from surface water to ground water would constitute an impermissible collateral attack on its decrees.

3. The second issue raised by Rangen is whether its "demand for water is limited to the amount of water that would flow through the mouth of the Martin-Curren Tunnel itself and not the springs complex that supplies the Research Hatchery." *Id.* at 17. While the source of its rights is described as Martin-Curren Tunnel, Rangen argues that Martin-Curren Tunnel is a part of a greater springs complex that supplies its facilities. "Because Rangen's historical appropriations, point of diversion and use of water includes water from the entire spring complex at the head of its Research Hatchery," Rangen argues it should be entitled to judgment as a

matter of law that its delivery call is not limited to water that flows only through the mouth of the Martin-Curren Tunnel. *Id.* at 19.

4. On March 22, 2013, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Response to Rangen’s Motion for Partial Summary Judgment Re: Source* (“IGWA Response”). In its Response, IGWA agrees with Rangen that the decreed source of its Martin-Curren Tunnel water rights is surface water, and that the Director “does not have the authority to change the decreed elements of Rangen’s water right.” *Response* at 3. However, IGWA argues the Director is not precluded “from administering water based on hydro-geology reality.” *Id.* “The issue of whether the Martin-Curren Tunnel should be administered as a surface or ground water source was not adjudicated in the SRBA, but is a matter within the Director’s discretion when responding to a delivery call.” *Id.* IGWA argues the Martin-Curren Tunnel should be administered as a ground water source because it meets the statutory definition of a well contained in Idaho Code § 42-230(b) (defining well as “an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained.”). IGWA argues that to the extent AJ Rule 60 is inconsistent with Idaho Code, the statute must control. IGWA claims the Martin-Curren Tunnel “extends at least 70 feet below land surface”¹ and is therefore ground water. *Id.* at 4. IGWA also argues that the Idaho Supreme Court has already held that water flowing from a tunnel is ground water. *In re General Determination of Rights to Use of Surface and Ground Waters of Payette River Drainage Basin*, 107 Idaho 221, 687 P.2d 1352 (1984) (hereinafter referred to as “*Miracle Mine*”).² There, the Court held that water emanating from a mine portal was ground water. IGWA states “[w]ater emanating from the Martin-Curren Tunnel is no different.” *IGWA Response* at 5.

5. Responding to Rangen’s request that the source of its Martin-Curren Tunnel water rights is made up of the Tunnel and surrounding springs, IGWA argues that Rangen’s decrees are unambiguous: “Had Rangen claimed an entitlement to water from Billingsley Creek or springs in the Rangen area, it had a duty to claim points of diversion on those sources.” *Id.* at 8. The only point of diversion decreed to Rangen in the SRBA is located in a ten-acre tract: SESWNW, Sec. 32, Township 7 S., Range 14 E. IGWA cites to the *Third Affidavit of Charles M. Brendecke* (March 22, 2013) to show the location of the Martin-Curren Tunnel and the ten-acre tract. *IGWA Response* at 10. Exhibit F to the *Third Affidavit of Charles M. Brendecke* depicts the Martin-Curren Tunnel and the ten-acre tract. “Rangen has no right to call for the delivery of water to points of diversion that the SRBA court did not include in Rangen’s partial decree.” *Id.* at 11.

6. On March 22, 2013, the City of Pocatello (“Pocatello”) filed a *Response to Rangen’s Motion for Partial Summary Judgment Re: Source* (“Pocatello Response”). While agreeing with IGWA that Rangen’s Martin-Curren Tunnel water rights should be administered as

¹ To support this factual statement, IGWA cites to a December 20, 2012 report of its expert witness, Bern S. Hinckley. *Rangen Groundwater Discharge and ESPAM 2.1 Hydrogeologic Investigation*, Hinckley, Bern. S. (December 20, 2012). In that report, Hinckley states, “The tunnel opening is approximately 75 ft. west of the rim and approximately 70 ft. below the rim elevation.” *Id.* at 20. Hinckley goes on to say, “The Curren Tunnel is a horizontal, flowing well.” *Id.* 21. Idaho Code § 42-230(b) defines a “well” as “vertical” not horizontal.

² IGWA refers to this case interchangeably as *Birthday Mine* or *Miracle Mine*.

ground water rights, Pocatello believes the SRBA decrees are ambiguous: “the decrees themselves do not identify the Martin-Curren Tunnel water supply as either ground water or surface water.” *Pocatello Response* at 2. Because of the ambiguity, and citing Idaho Code § 42-230, Pocatello asks the Director to “resolve any alleged ambiguity in the decreed sources of the Curren Tunnel Rights by applying hydrogeologic facts—which support the administration of the Curren Tunnel Rights as ground water.” *Id.* at 4.

7. Responding to Rangen’s request that the source of its Martin-Curren Tunnel water rights is made up of the Tunnel and surrounding springs, Pocatello states, “the partial decrees do not identify a source of supply beyond the Curren Tunnel. Further, there are no terms to suggest that the spring located on the lower talus is a source of water to be served by Rangen’s water rights.” *Id.* at 5. Pocatello argues the only basis Rangen has to include additional spring sources/points of diversion in its delivery call is “the fact that it measures its diversions below the fish hatchery; if Rangen measured its water at the point of diversion (e.g. the Curren Tunnel) as required by Idaho law, the issue of whether springs emanating from the talus slope lower down are properly encompassed in its adjudicated rights would not even arise.” *Id.* If the Director decides that Rangen may “call for water from the lower talus slope . . . the Director should also examine the reasonableness of Rangen’s demands in light of its *per se* unreasonable means of diversion.” *Id.*

8. On March 29, 2013, Rangen filed a *Reply Brief in Support of Motion for Summary Judgment Re: Source* (“Reply”). Rangen states, contrary to Pocatello, that the source of its Martin-Curren Tunnel water rights is unambiguously surface water and must be administered as surface water. Rangen notes that in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), IGWA, appearing as *amicus curiae*, agreed that the source of Martin-Curren Tunnel was surface water. Rangen also distinguishes IGWA’s use of the *Miracle Mine* case: “The water coming from [Miracle] Mine existed only because of the mine; the mining brought it to the surface. In contrast, the Martin-Curren Tunnel only enhances existing, natural spring flows.” *Reply* at 6 (emphasis in original). Because of IGWA’s prior position in *Musser*, Rangen states that IGWA must be estopped from arguing that that source of Martin-Curren Tunnel is ground water. Concerning whether Rangen is entitled to call for delivery of water from the Martin-Curren Tunnel only, or other surrounding springs, Rangen simply states: “Rangen’s delivery call is not limited to water that would flow from the mouth of the Martin-Curren Tunnel itself.” *Reply* at 8.

9. Oral argument was held on April 3, 2013. On April 22, 2013, during the pre-hearing conference, the location of the ten-acre tract was discussed. The Director stated the Department could provide a map showing the location of the Martin-Curren Tunnel and the ten-acre tract that was partially decreed by the SRBA district court as Rangen’s point of diversion. The parties agreed that the Department should provide this map.

CONCLUSIONS OF LAW

1. Rangen presents the Director with two issues on summary judgment. “Summary judgment must be granted ‘if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ I.R.C.P. 56(c).” *Ida-Therm, LLC v. Bedrock*

Geothermal, LLC, 293 P.3d 630, 632 (2012). The Director must “construe all disputed facts and make all reasonable inferences in favor of the nonmoving party.” *Pioneer Irr. Dist. v. City of Caldwell*, 288 P.3d 810, 813 (2012).

Martin-Curren Tunnel Is A Surface Water Source And Should Be Administered As Surface Water

2. As to the first issue, Rangen seeks a ruling from the Director that the source of its Martin-Curren Tunnel water rights is surface water. Water right nos. 36-2551, 36-7694, and 36-15501 were decreed in the SRBA with the following Source element: Martin-Curren Tunnel, tributary to Billingsley Creek. *See Third Affidavit of Charles M. Brendecke*, Exhibits D & E (March 22, 2013) The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* AJ Rule 60 (“For surface water sources, the source of water shall be identified The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as ‘ground water.’”). Consistent with AJ Rule 60, listing a source and tributary for surface water rights, and only “ground water” for ground water rights, was the custom and practice in the SRBA. In 1997, Rangen’s Martin-Curren Tunnel water rights were partially decreed. The partial decrees were entered pursuant to Idaho Rule of Civil Procedure 54(b). No appeal has ever been taken. The plain language of Rangen’s partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water.

3. The conclusion that the source of Rangen’s water rights is surface water is supported by three Idaho Supreme Court decisions. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Court reviewed the Director’s defense of inaction in a delivery call filed by holders of a Martin-Curren Tunnel water right against junior-priority ground water users. The Court stated the source of Mussers’ water right as follows: “The springs which supply the Mussers’ water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer).” *Musser* at 394, 871 P.2d at 811 (emphasis added). The fact that Musser was an appropriator of a surface water right was reconfirmed by the Court in *A&B*. 153 Idaho at 234, 284 P.3d at _____. In *Clear Springs*, the Court examined separate conjunctive management delivery calls initiated by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (“Spring Users”). The Spring Users, like Rangen, “have water rights in certain springs emanating from the canyon wall along a section of the Snake River below Milner Dam in south central Idaho.” *Clear Springs* at 794, 252 P.3d at 75. In *Clear Springs*, IGWA argued that the Spring Users should be administered as ground water users, consistent with Idaho Code § 42-226: “the Spring Users’ priority rights should be protected only in the maintenance of a reasonable aquifer level.” *Clear Springs* at 804, 252 P.3d at 85. The Court rejected this argument: “By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs.” *Id.* (emphasis added). These cases clearly demonstrate that Martin-Curren Tunnel is a surface water source.

4. IGWA argues that even though the source of Martin-Curren Tunnel is unambiguously surface water, the Director should administer the rights as ground water. To

support this argument, IGWA attempts to create a conflict between AJ Rule 60 and Idaho Code § 42-230. For IGWA, a conflict exists between AJ Rule 60 and Idaho Code § 42-230 because of its belief that Martin-Curren Tunnel is a “well” as defined by Idaho Code § 42-230(b): “‘Well’ is an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained.” Emphasis added. IGWA’s argument is misplaced, because, as stated above, Rangen’s water rights are unambiguously surface water. Because Rangen’s Martin-Curren Tunnel water rights are from surface water, there can be no conflict between AJ Rule 60 and Idaho Code § 42-230. Furthermore, AJ Rule 60 applied in the SRBA and has no applicability in administration: “These rules implement statutes governing the filing of notices of claims to water rights acquired under state law . . . in general adjudications” IDAPA 37.03.01.001. To the extent IGWA believed Martin-Curren Tunnel was a ground water right, it should have raised the issue in the SRBA.

5. IGWA cites the Idaho Supreme Court’s decision in *Miracle Mine* to bolster its position that Rangen’s Martin-Curren Tunnel rights should be administered as ground water. The *Miracle Mine* case stemmed from the Payette River Basin Adjudication (“PRBA”). In the PRBA, claims were filed by the Bransons and Miracles for water emanating from a mine portal. “The water in question was developed as a result of and emanated from the Bransons’ mining tunnel on their ‘Birthday # 24’ mining claim.” *Miracle Mine* at 223, 687 P.2d at 1350. On May 20, 1982, the district court issued orders, decreeing the source of the Branson and Miracle rights as ground water. Appeal of the district court’s orders was taken, with the Idaho Supreme Court holding: “the water flow emanating from the mine portal is public ground water subject to appropriation.” *Id.* at 225, 687 P.2d at 1352.

6. While the PRBA was commenced in 1969, “a final unified decree was never entered. Due to unresolved objections to certain rights at the time of the commencement of the SRBA, the Payette Adjudication was consolidated with the SRBA on February 8, 2001.” *Order Denying Late Notice of Claim*, SRBA Subcase No. 65-2794 (Dec. 1, 2010). Because of this, water right holders from the PRBA filed claims in the SRBA for their PRBA water rights. In the SRBA, the Branson and Miracle PRBA water rights were claimed and partially decreed as ground water.³ Because *Miracle Mine* was decided in 1984—prior to the 1987 commencement of the SRBA—any party to the adjudication could have filed objections to Rangen’s water rights and litigated whether the Source element was properly described as surface water. Moreover, because the Branson and Miracle claims were made in the SRBA, water users in the SRBA were on notice of how water emanating from a mine portal could be claimed.

7. While IGWA argues that Rangen’s Martin-Curren Tunnel surface water rights should be administered as ground water rights, IGWA does not state what difference in administration would occur. If the Director were to administer Rangen’s senior-priority surface water rights as senior-priority ground water rights, he would be required to examine Idaho Code § 42-226 and its principles of full economic development and reasonable pumping levels. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). As recently explained by the Idaho Supreme Court in *Clear Springs*, full economic development and reasonable pumping levels do not apply in calls between senior-priority surface water rights and junior-priority ground water

³ The SRBA partial decrees are 65-10737 and 65-10839.

rights: “By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs.” *Clear Springs* at 804, 252 P.3d at 85. The Director cannot administer Rangen’s senior-priority surface water rights as ground water rights because, to do so, would run counter to *Clear Springs*.

8. Based on the law and the facts, the Director finds that Rangen is entitled to judgment as a matter of law that the source of its Martin-Curren Tunnel water rights is surface water and its rights should be administered as surface water.

The SRBA Partial Decrees For Rangen’s Martin-Curren Tunnel Water Rights Authorize Diversion Within A Ten-Acre Tract

9. Rangen’s second issue on summary judgment is its position that the point of diversion of its water rights is not limited to the mouth of the Martin-Curren Tunnel, but should also include the greater springs complex that supplies its facilities. Rangen’s partial decrees unambiguously state that the point of diversion element is located as follows: “T07S R14E S32 SESWNW within Gooding County.” *Third Affidavit of Charles M. Brendecke*, Exhibits D & E (March 22, 2013). Rangen’s partial decrees also unambiguously state that the only source for its water rights is Martin-Curren Tunnel, tributary to Billingsley Creek. *Id.* The partial decrees do not list “Spring(s)” and/or “Unnamed Stream(s)” as additional sources.

10. The ten-acre tract is visually depicted in Exhibit F to the *Third Affidavit of Charles M. Brendecke* (March 22, 2013). See also *Spronk Water Engineers, Inc. Expert Report to IDWR Staff Memorandum Dated April 5, 2013, Prepared for the City of Pocatello* at 31 (April 4, 2013) (depicting location of Martin-Curren Tunnel and the ten-acre tract). At the April 22, 2013 pre-hearing conference, the Director agreed to provide a map to the parties depicting the location of the Martin-Curren Tunnel and the ten-acre tract point of diversion that was partially decreed by the SRBA district court to Rangen. Attached to this order is this map.

11. The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion. IDAPA 37.03.11.001 (“rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right) (emphasis added); 37.03.11.010.25 (defining “water right” to mean “[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree . . .”) (emphasis added).

12. While the SRBA partial decrees list Martin-Curren Tunnel as the source, the partial decrees do not expressly state that Rangen’s water rights are limited only to diversion from the mouth of Martin-Curren Tunnel; likewise, the decrees do not state that sources other than Martin-Curren Tunnel are lawfully diverted within the ten-acre tract. Thus, there are

genuine issues of material fact in dispute as to whether Rangen can divert from sources other than Martin-Curren Tunnel that are located within T07S R14E S32 SESWNW.

13. Because there are genuine issues of material fact concerning what source(s) of water—other than Martin-Curren Tunnel—Rangen may lawfully divert within T07S R14E S32 SESWNW, the Director cannot find, as a matter of law, that Rangen is entitled to summary judgment on that issue.

ORDER

Based upon the foregoing, the Director GRANTS IN PART and DENIES IN PART Rangen's *Motion for Partial Summary Judgment Re: Source*. Rangen is entitled to judgment as a matter of law on the issue of the source of its water rights and the fact that its water rights shall be administered as surface water rights. Genuine issues of material fact exist as to what source(s) of water—other than Martin-Curren Tunnel—Rangen may divert within T07S R14E S32 SESWNW; therefore, Rangen is not entitled to judgment as a matter of law on that issue.

Dated this 22nd day of April, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

J. JUSTIN MAY
MAY BROWNING
1419 W WASHINGTON
BOISE, ID 83702
jmay@maybrowning.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

ROBYN BRODY
BRODY LAW OFFICE
P.O. BOX 554
RUPERT, ID 83350
robynbrody@hotmail.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

FRITZ HAEMMERLE
HAEMMERLE HAEMMERLE
P.O. BOX 1800
HAILEY, ID 83333
fxh@hamlaw.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

RANDY BUDGE
CANDICE MCHUGH
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

SARAH KLAHN
MITRA PEMBERTON
WHITE & JANKOWSKI
511 16TH ST. STE. 500
DENVER, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

C. THOMAS ARKOOSH
ARKOOSH LAW OFFICES
P.O. BOX 2900
BOISE, ID 83701
tom.arkoosh@arkoosh.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

A. DEAN TRANMER
CITY OF POCATELLO
P.O. BOX 4169
POCATELLO, ID 83205
dtranmer@pocatello.us

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN K. SIMPSON
TRAVIS L. THOMPSON
PAUL L. ARRINGTON
BARKER ROSHOLT & SIMPSON
195 RIVER VISTA PLACE, STE. 204
TWIN FALLS, ID 83301-3029
flt@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com


U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

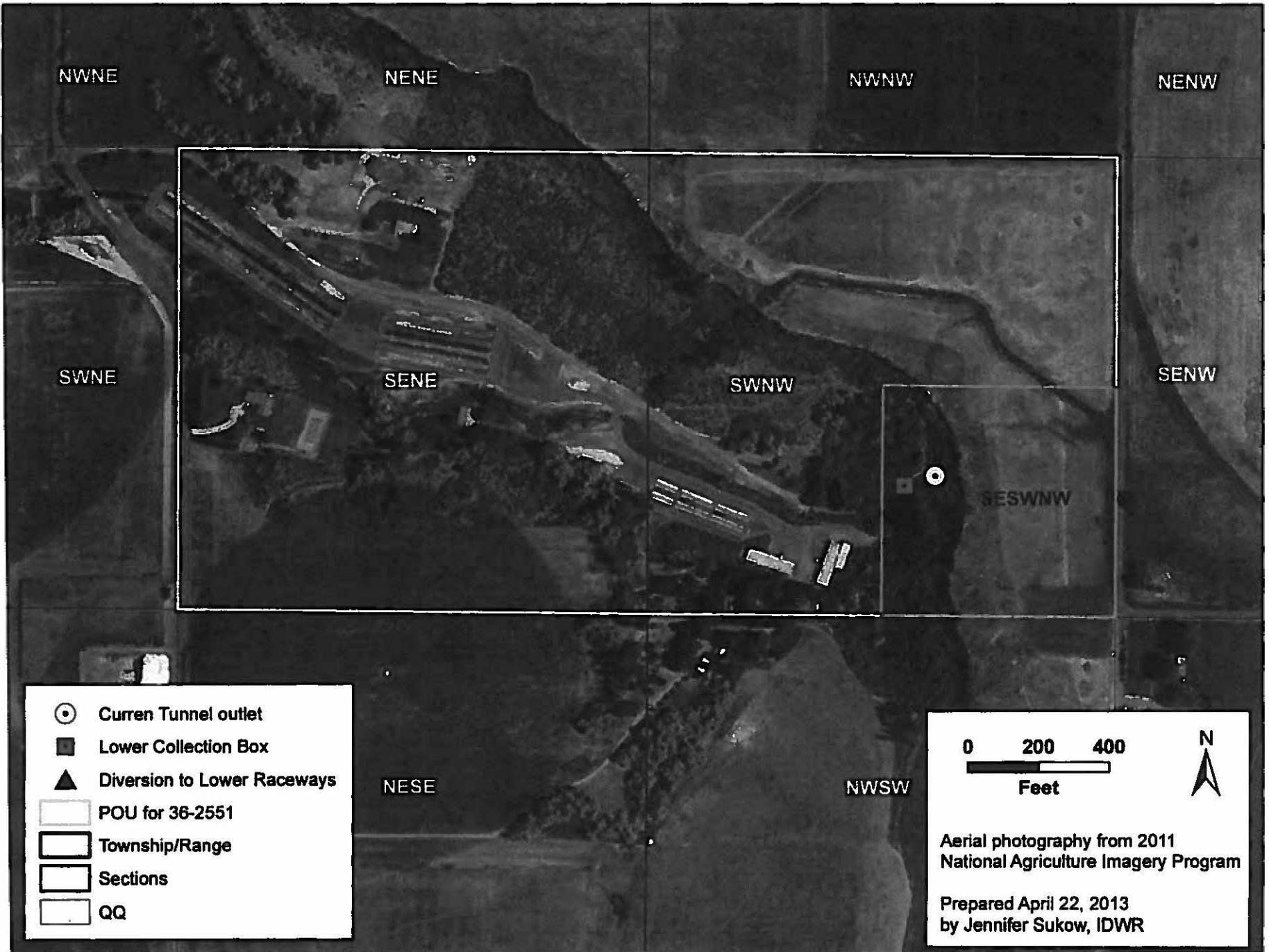
W KENT FLETCHER
FLETCHER LAW OFFICE
P.O. BOX 248
BURLEY, ID 83318
wkf@pmt.org

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JERRY R. RIGBY
HYRUM ERICKSON
ROBERT H. WOOD
RIGBY ANDRUS & RIGBY, CHTD
25 NORTH SECOND EAST
REXBURG, ID 83440
jrigby@rex-law.com
herickson@rex-law.com
rwood@rex-law.com


U.S. Mail, Postage Prepaid
 Facsimile
 E-mail


Deborah Gibson
Assistant to the Director
Idaho Department of Water Resources



- ⊙ Current Tunnel outlet
- Lower Collection Box
- ▲ Diversion to Lower Raceways
- POU for 36-2551
- Township/Range
- Sections
- QQ

0 200 400
 Feet

N


Aerial photography from 2011
 National Agriculture Imagery Program

Prepared April 22, 2013
 by Jennifer Sukow, IDWR

APPENDIX B

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 Idaho Ground Water Appropriators, Inc. (IGWA)

RECEIVED
FEB 11 2014
DEPARTMENT OF
WATER RESOURCES

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

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

Docket No. CM-DC-2011-004

**IGWA's Mitigation Plan
and Request for Hearing**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members and non-member participants in IGWA-sponsored mitigation activities, submits this Mitigation Plan pursuant to rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules) to avoid curtailment under the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* entered January 29, 2014 (the "Curtailment Order"), as amended from time to time.

The Curtailment Order presently requires junior-priority groundwater rights to provide simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen. The mitigation may be phased in over a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs in the first year, 5.2 cfs in the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.¹ IGWA has filed a Petition for Reconsideration that, if granted, is expected to reduce the mitigation obligations.

Proposals 1, 2 and 3 below are immediately available to deliver water directly to Rangen. Proposals 4 through 9 require engineering, technical analysis, land and/or water right acquisition, and facilities construction. Given the short time between issuance of the Curtailment Order on January 29, 2014, and the physical curtailment scheduled to commence March 14, 2014, it is impractical to include

¹ Curtailment Order p. 42.

the specific details, engineering, hydrogeological analysis, technical data, and necessary acquisitions for alternatives 4 through 9 at this time. IGWA asks the Director to review and conditionally approve these solutions in concept, providing necessary guidance for IGWA to proceed with the acquisitions, engineering, technical support, financial plans, and construction commitments necessary to implement these alternatives.

Each of the following proposals is designed to offset the depletive effects of junior-priority ground water withdrawals.

1. Request for credit for current and ongoing mitigation activities.

IGWA has for a number of years carried out a range of activities that augment the groundwater supply in the Eastern Snake Plain Aquifer (ESPA), which in turn increases ESPA discharge to springs in the Hagerman area. IGWA has been given mitigation credit for these actions in other delivery call settings. IGWA requests that it likewise be given credit toward the mitigation obligations imposed by the Curtailment Order. IGWA will continue to cooperate with the Department to enable prompt and accurate calculation of such mitigation credits.

A. Conversions.

IGWA's members have converted thousands of acres of irrigated lands from groundwater to surface water within Water Districts 120 and 130. IGWA plans to continue to deliver surface water to conversion acres in the future as required to prevent material injury to holders of senior water rights, including Rangen. These conversions decrease in the amount of groundwater withdrawn from the ESPA, while simultaneously increasing incidental recharge.

B. Voluntary Dry-Ups

IGWA's members have voluntarily dried up irrigated farmland via the Conservation Reserve Enhancement Program (CREP), Agricultural Water Enhancement Program (AWEP), and other programs, reducing groundwater withdrawals from the ESPA.

C. Groundwater Recharge

IGWA's members deliver surface water to the North Side Canal Company (NSCC) system for recharge when water and delivery capacity allow. This water recharges the ESPA through canal seepage, conveyance loss, and recharge sites such as Wilson Lake. Recharge enhances groundwater levels and hydraulically connected surface water sources.

2. Mitigation via Sandy Pipe.

IGWA's member North Snake Ground Water District (NSGWD) constructed the Sandy Pipe in 2003 to provide an alternate supply of water to irrigation water

rights from the Curren Tunnel. The Sandy Pipe has and will continue to deliver water to Butch Morris in lieu of water from the Curren Tunnel pursuant to the Memorandum Agreement between NSGWD and Morris attached hereto as *Exhibit A*. As shown in the Memorandum Agreement, Morris owns water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A and 36-10141B—all of which are senior in priority in Rangen's water right 36-2551. The Morris water rights collectively authorize the diversion of 6.05 cfs. Morris will continue to be provided irrigation water through the Sandy Pipe, providing water from the Curren Tunnel to mitigate injury to Rangen.

Therefore, IGWA requests and is entitled to full credit for this direct delivery of water to Rangen of 6.05 cfs that could otherwise be diverted from the Curren Tunnel under Morris's prior rights.

3. Assignment of water right no. 36-16976.

IGWA's members have pending before the Department an Application for Water Right Permit no. 36-16976, a copy of which is attached as *Exhibit B*, to appropriate 12 cfs from Springs and Billingsley Creek for aquaculture and mitigation purposes. The sole purpose of this Application is to mitigate injury to Rangen. And, given the non-consumptive nature of this water right, it is certain to be approved.

The Curtailment Order provides that the source of Rangen's water rights is limited to the Curren Tunnel only.² Consequently, the Director issued an order on January 31, 2014, directing Rangen to cease and desist illegal diversion of water from Billingsley Creek at its Bridge Diversion located in the SWSWNW Section 32, T7S R14E. The Bridge Diversion will no longer be available for Rangen's use after February 24, 2014, since Rangen does not possess a water right for this point of diversion.

Permit 36-16976 includes the Bridge Diversion as an authorized point of diversion. IGWA will make a direct delivery to Rangen, to the extent needed to meet the full mitigation obligation not satisfied by the credits requested above, by assigning water right no. 36-16976 to Rangen.

4. Fish Replacement.

The Curtailment Order found that Rangen's inability to exercise its water rights from the Curren Tunnel due to declining groundwater discharge from the ESPA has caused a reduction in the number of fish Rangen is able to raise.³ IGWA proposes to deliver to Rangen the number, size, and quality of fish Rangen could raise with the water it would receive from curtailment, at appropriate times and locations. IGWA will cooperate with Rangen to reasonably determine the number of additional fish that could be raised.

² Curtailment Order p. 32.

³ Curtailment Order, pp. 34-35.

5. Monetary Compensation.

As an alternative to fish replacement, IGWA proposes to pay to Rangen in cash the profits Rangen could otherwise obtain from the sale of fish raised with the water it would receive from curtailment. IGWA will cooperate with Rangen to reasonably determine lost profits from reduced fish sales.

6. Improvements to Curren Tunnel diversion.

IGWA recently learned that the Curren Tunnel was regularly cleaned in years past to remove obstructions and sustain ESPA discharge, but that such activities ceases some time ago. There is reason to believe that flow from the Tunnel can be enhanced by proper cleaning and maintenance and improving the Tunnel and other diversion and delivery facilities. This proposal requires that IGWA be allowed access to evaluate the Tunnel and other diversion facilities to determine the nature and scope of maintenance and improvements that would enhance flows therefrom.

7. Horizontal well.

SPF Engineering advised Rangen go that drilling a horizontal well in the vicinity of the Curren Tunnel would likely increase the supply of water available to Rangen. SPF's documents were admitted as exhibits at the hearing and are part of the agency record. IGWA proposes to pay for the cost of engineering and constructing a second horizontal tunnel to increase the flow of water to Rangen. Work will proceed on an "as-needed" basis upon approval of the Director.

8. Vertical well(s) with delivery over-the-rim.

IGWA proposes to drill new groundwater wells or utilize existing wells to deliver water directly to Rangen. This would function similar to IGWA's over-the-rim mitigation plan approved for Clear Springs Foods. The design, engineering and construction components will be proceed as needed upon approval of the Director.

9. Direct Pump-Back.

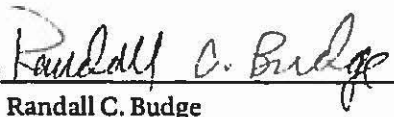
IGWA will pay the costs to engineer, construct, and operate a direct pump-back and aeration system within the Rangen facility to secure sufficient flows to meet mitigation obligations, to the extent of any shortfall to the previously described mitigation alternatives. Pursuant to evidence and testimony at the administrative hearing, to alleviate concerns, redundant power sources and pumps will be included in the pump-back design plan as remediation for power or pump failure.

REQUEST FOR HEARING

Pursuant to CM Rule 43.02, IGWA requests that a Status/Scheduling Conference be set for hearing with notice given to the parties to discuss the mitigation alternatives identified in this plan; and, to schedule necessary hearings.

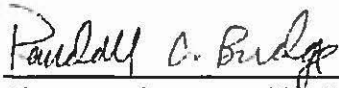
RESPECTFULLY SUBMITTED this 12th day of February, 2014.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: 
Randall C. Budge
T.J. Budge
Attorneys for IGWA

CERTIFICATE OF MAILING

I certify that on this 12th day of February, 2014, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

Director, Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Robyn M. Brody Brody Law Office, PLLC PO Box 554 Rupert, ID 83350 robynbrody@hotmail.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC PO Box 1800 Hailey, ID 83333 fxh@haemlaw.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, ID 83702 jmay@maybrowning.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail

<p>Sarah Klahn Mitra Pemberton WHITE JANKOWSKI, LLP 511 16th St., Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
<p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
<p>C. Thomas Arkoosh Arkoosh Law Offices PO Box 2900 Boise, ID 83702 tom.arkoosh@arkoosh.com</p>	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 tlr@idahowaters.com jks@idahowaters.com pla@idahowaters.com</p>	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
<p>W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org</p>	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail

Exhibit A

FORM 202 11/13

Ident. No. _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT
To appropriate the public waters of the State of Idaho

7/15/2013

1. Name of applicant(s) North Snake GWD, Magic Valley GWD, et al. Phone 208-232-6101

Name connector (check one): and or and/or

Mailing address c/o Randall C. Budge, T.J. Budge, 201 E Center Street, PO Box 1391 City Pocatello

State ID _____ Zip 83204 Email rcb@racinelaw.net, tcb@racinelaw.net

2. Source of water supply Springs; Billingsley Creek which is a tributary of Snake River

3. Location of point(s) of diversion:

TWP	RGE	SEC	Govt Lot	1/4	1/4	1/4	County	Source	Local name or tag #
7S	14E	32		SE	SW	NW	Gooding	Springs; Billingsley Creek	
7S	14E	32		SW	SW	NW	Gooding	Springs; Billingsley Creek	

4. Water will be used for the following purposes:

Amount 12 cfs for mitigation for irrigation purposes from 1/1 to 12/31 (both dates inclusive)
(cfs or acre-feet per year)

Amount 12 cfs for fish propagation purposes from 1/1 to 12/31 (both dates inclusive)
(cfs or acre-feet per year)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per year)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per year)

5. Total quantity to be appropriated is (a) 12 cubic feet per second (cfs) and/or (b) _____ acre feet per year (af).

6. Proposed diverting works:

a. Describe type and size of devices used to divert water from the source. Hydraulic pump(s) (size TBD); screw-operated headgate on Billingsley Creek

b. Height of storage dam N/A feet; active reservoir capacity _____ acre-feet; total reservoir capacity _____ acre-feet. If the reservoir will be filled more than once each year, describe the refill plan in item 11. For dams 10 feet or more in height OR reservoirs with a total storage capacity of 50 acre-feet or more, submit a separate Application for Construction or Enlargement of a New or Existing Dam. Application required? Yes No

c. Proposed well diameter is N/A inches; proposed depth of well is _____ feet.

d. Is ground water with a temperature of greater than 85°F being sought? Yes No

e. If well is already drilled, when? N/A; drilling firm _____; well was drilled for (well owner) _____; Drilling Permit No. _____

7. Description of proposed uses (if irrigation only, go to item 8):

a. Hydropower; show total feet of head and proposed capacity in kW. N/A

b. Stockwatering; list number and kind of livestock. N/A

c. Municipal; complete and attach the Municipal Water Right Application Checklist.

d. Domestic; show number of households N/A

e. Other; describe fully. mitigation for groundwater irrigation; fish propagation

8. Description of place of use:

- a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
- b. If water is used for other purposes, place a symbol of the use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RGE	SEC	NE				NW				SW				SE				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7S	14E	31			M/F	M/F													
7S	14E	32						M/F											

Total number of acres to be irrigated: N/A

9. Describe any other water rights used for the same purposes as described above. Include water delivered by a municipality, canal company, or irrigation district. If this application is for domestic purposes, do you intend to use this water, water from another source, or both, to irrigate your lawn, garden, and/or landscaping?
None for mitigation. Water right nos. 36-2551 and 36-7694 are used for fish propagation purposes at Rangen.

10. a. Who owns the property at the point of diversion? Rangen, Inc.
 b. Who owns the land to be irrigated or place of use? Rangen, Inc.; members of applicant Ground Water Districts
 c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing:
Idaho Code Section 42-5224(13)

11. Describe your proposal in narrative form, and provide additional explanation for any of the items above. Attach additional pages if necessary.
The GW Districts will use this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain to mitigate for Rangen's apparent material injury and to provide mitigation for the curtailment of junior groundwater users as specified in the Director's Final Order dated 1/29/14 for Rangen's delivery call. Mitigation water will be provided to Rangen for its Curren Tunnel rights for fish propagation purposes. If unable to secure proper consent, the GWDs will use their power of eminent domain as set forth in I.C. Sec. 42-5224(13) to secure easements, as necessary.

12. Time required for completion of works and application of water to proposed beneficial use is 5 years (minimum 1 year).
 13. **MAP OF PROPOSED PROJECT REQUIRED** - Attach an 8 1/2" x 11" map clearly identifying the proposed point of diversion, place of use, section #, township & range. A photocopy of a USGS 7.5 minute topographic quadrangle map is preferred.

The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in rejection of the application or cancellation of an approval.

Thomas J. Budge
 Signature of Applicant

 Signature of Applicant

Thomas J. Budge, Attorney
 Print Name (and title, if applicable)

 Print Name (and title, if applicable)

For Department Use:

Received by _____ Date _____ Time _____ Preliminary check by _____
 Fee \$ _____ Received by _____ Receipt No. _____ Date _____

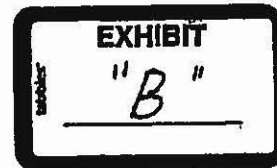


Attachment for Item 1

**Name of Applicants
Amended Application for Permit
Submitted 2/5/2014**

**PERMIT APPLICANTS
GROUND WATER DISTRICTS**

**Aberdeen American Falls Ground Water District
Bingham Ground Water District
Bonneville-Jefferson Ground Water District
Madison Ground Water District
Magic Valley Ground Water District
North Snake Ground Water District
Clark Jefferson Ground Water District**



MEMORANDUM AGREEMENT

This Memorandum Agreement is entered into February 11th, 2014, between North Snake Ground Water District, whose address is 152 E. Main Street, Jerome, Idaho 83338 ("District") and Howard (Butch Morris), whose address is 1101 East 2900 South, Hagerman, Idaho 83332 ("Morris"). The purpose of this Agreement is to provide for the ongoing delivery of irrigation water to Morris through the Sandy Pipeline in consideration for the District's use of certain water rights owned by Morris diverted from the Martin-Curren Tunnel at the head of Billingsley Creek to supply mitigation water to Rangen, Inc.

Water rights at the head of Billingsley Creek diverted from the Martin-Curren Tunnel are reflected in Table 3.1 attached. These include 6.05 cfs under water right numbers 36-134D, 36-134E, 36-135D, 36-135E, 36-10141A and 36-10141B owned by Morris (the "Morris Rights"). The District constructed in 2003 and owns and operates the Sandy Pipeline which delivers irrigation water from the end of the North Side Canal Company system to Morris, with a discharge into Billingsley Creek immediately downstream from Rangen.

The Sandy Pipeline has in the past and will continue in the future to be operated and maintained by the Districts to deliver irrigation water to Morris by reason of which the Morris Rights have not been diverted from the Martin-Curren Tunnel and have instead been delivered to the junior water rights of Rangen. Morris's irrigation diversions from the Sandy Pipeline utilize and replace the full 6.05 cfs available under the Morris Rights. Were it not for the Sandy Pipeline, Morris would take all water available from the Martin-Curren Tunnel under the Morris Rights for irrigation purposes.

The District agrees that Morris may continue to use the Sandy Pipeline without expense to deliver irrigation water to the property he owns. The District and Morris will cooperate with each other and with North Side Canal Company and use their best efforts to continue to supply irrigation water to Morris. In return therefore, Morris agrees that the District may use the Morris Rights as needed to provide mitigation water to Rangen to satisfy the IDWR Director's January 29, 2014 Order curtailing 157,000 acres of ground water rights junior to July 13, 1962.

This Memorandum Agreement is for a period of five (5) years and then will be reviewed by the parties to determine if it should be extended or terminated. By signing this Agreement Morris in no way agrees to any forfeiture or loss of water rights from the Martin-Curren Tunnel.

NORTH SNAKE GROUND WATER DISTRICT

** Signed Copy to be substituted.*

By: /s/
LYNN CARLQUIST, Chairman

/s/
HOWARD (BUTCH) MORRIS

Exhibit "A"

Ex02315

Privileged and Confidential
Attorney-Client Work Product

Table 3.1: Water Rights at Head of Billingsley Creek

User Name	Water Right Number	Priority Date	Amount (cfs)	Source*	Use
Candy	36-134A	10/9/1884	0.49	Martin-Curren Tunnel	Domestic, Irrigation
Rangen, Inc.	36-134B	10/9/1884	0.09	Martin-Curren Tunnel	Irrigation and domestic use
Morris	36-134D	10/9/1884	1.58	Martin-Curren Tunnel	Irrigation, Stockwater
Morris	36-134E	10/9/1884	0.82	Martin-Curren Tunnel	Irrigation, Stockwater
Musser	36-102	4/1/1892	4.1	Martin-Curren Tunnel	Domestic, Irrigation, Stockwater
Rangen, Inc.	36-135A	4/1/1908	0.05	Martin-Curren Tunnel	Irrigation and domestic use
Candy	36-135B	4/1/1908	0.51	Martin-Curren Tunnel	Irrigation
Morris	36-135D	4/1/1908	1.58	Martin-Curren Tunnel	Irrigation, Stockwater
Morris	36-135E	4/1/1908	0.82	Martin-Curren Tunnel	Irrigation, Stockwater
Morris	36-10141A	12/1/1908	0.82	Martin-Curren Tunnel	Irrigation, Stockwater
Morris	36-10141B	12/1/1908	0.43	Martin-Curren Tunnel	Irrigation, Stockwater
Rangen, Inc.	36-15501	7/1/1957	1.46	Martin-Curren Tunnel	Fish propagation use at the hatchery and research facility on Billingsley Creek.
Rangen, Inc.	36-2551	7/13/1962	48.54	Martin-Curren Tunnel	Fish propagation use at the hatchery and research facility on Billingsley Creek. (Includes 0.1 cfs for domestic use.)
Rangen, Inc.	36-7894**	4/12/1977	26.00	Martin-Curren Tunnel	Fish propagation use at the hatchery and research facility on Billingsley Creek.

* SRBA Partial Decree.

** According to a memorandum from Cindy Yenler to Karl Dreher dated December 15, 2003, Rangen's submitted historical flow numbers show that flows have not been available to support water right number 36-7894 since October 1972, which predates the priority year of the right by nearly 5 years. Additionally, during the water right development period flows did not exceed 50 cfs, which is the total of water rights 36-15501 and 36-2551.