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	)	**CM-DC-2011-004**
	)	**ORDER ON RECONSIDERATION**
(RANGEN, INC.)	)	

BACKGROUND

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued a *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Final Order") in response to the *Petition for Delivery Call* filed by Rangen, Inc. ("Rangen").

Three petitions for reconsideration of the Final Order were filed. On February 11, 2014, the Idaho Ground Water Appropriators, Inc. ("IGWA") timely filed *IGWA's Petition for Reconsideration* ("IGWA Petition"). On February 12, 2014, Rangen timely filed *Rangen, Inc.'s Motion for Reconsideration and Clarification* ("Rangen Motion"). On February 12, 2014, the City of Pocatello ("Pocatello") timely filed *City of Pocatello's Motion to Reconsider* ("Pocatello Motion"). Various responsive briefs were submitted by the parties.

ANALYSIS

Response to Rangen's Petition for Reconsideration

In its motion, Rangen asks the Director to alter findings of fact and conclusions of law related to its decreed source and point of diversion. *Rangen Motion* at 1-3. Rangen further asks the Director to modify conclusions of law regarding the trim line, the ratio of water predicted to accrue to the Martin-Curren Tunnel, and the weir coefficient identified by Pocatello's expert. *Id.* at 3-4. Finally, Rangen also asks the Director to clarify his determination and calculations for a phased-in mitigation plan. *Id.* at 4. This order responds to each request in turn.

1. **<u>The Martin-Curren Tunnel is not a name in local common usage describing the entire Rangen spring complex.</u>**

Rangen asks the Director to reconsider the conclusion that Rangen "is limited to the water that flows from the mouth of the Martin-Curren Tunnel itself, and not the entire spring complex that forms the headwaters of Billingsley Creek." *Rangen Motion* at 1. For support of this argument, Rangen refers to IDAPA 37.03.01.060.02.c, which sets forth the minimum standards for identifying the source of water supply in a claim in an adjudication. This rule provides in relevant part:

> For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle map. If no official name has been given, the name in local common usage should be listed. If there is no official or common name, the source should be described as 'unnamed stream' or 'spring.'

Rangen argues that the name "Martin-Curren Tunnel" was not intended to describe the tunnel itself, but instead is the name in local common usage for the entire Rangen spring complex. The record supports a conclusion to the contrary. In his testimony, the watermaster for Water District 36A, Frank Erwin, distinguished between the Martin-Curren Tunnel and the springs that feed Billingsley Creek. Erwin, Vol. I, pp. 232, 237-238. Erwin has lived in Hagerman all his life and has been watermaster for Water District 36A for 16 years. *Id.*, p. 230. The fact he distinguishes between the tunnel and the spring complex is significant because he is in a position to know whether the entire spring complex is commonly referred to as the Martin-Curren Tunnel. A former Rangen employee, Lynn Babington, testified regarding this issue and his testimony is mixed. Counsel for Rangen asked, "What did you understand was the Curren Tunnel?" Babington's initial response was, "The Curren Tunnel was the – up on the hillside, a tunnel there." Babington, Vol. I, p. 190. He then stated that he considered all springs arising as the source for the hatchery and that he considered the name Martin-Curren Tunnel as referring to all the springs. *Id.* Babington's testimony does not persuade the Director that the Martin-Curren Tunnel is a name of local common usage for all the springs in the Rangen complex. In addition to Erwin's testimony, the record is replete with references and exhibits specifically identifying the Martin-Curren Tunnel as a unique structure at a specific location, thereby distinguishing between the spring complex and the Martin-Curren Tunnel itself. Rangen Ex. 1290; Rangen Ex. 1446A, B and C; IGWA Ex. 2408A and B; IGWA Ex 2286, IGWA Ex. 2328 (diagram of Martin-Curren Tunnel); Pocatello Ex. 3277; Pocatello Ex. 3278; Pocatello Ex. 3648; Pocatello Ex. 3651. All measurements taken by the Department that identify the Martin-Curren Tunnel as the source refer only to water measured in the tunnel itself, not the spring complex. Anytime the tunnel was mentioned in the proceeding, there was no confusion by the witnesses between the Martin-Curren Tunnel and the rest of the spring complex. When the topic was the Martin-Curren Tunnel, the witnesses would testify about the physical structure itself, not the spring complex as a whole. The name Martin-Curren Tunnel is not ambiguous and does not create a latent ambiguity in the partial decree as suggested by Rangen. If Rangen truly believed that Martin-Curren Tunnel was the common name for the entire spring complex, Rangen should have sought and had its water right decreed with additional points of diversion because the entire spring complex stretches over at least two ten-acre tracts. Rangen Ex. 1446B. The fact that only a

single ten-acre tract was decreed and the Martin-Curren Tunnel is located in that single ten-acre tract suggests that the reference to the Martin-Curren Tunnel was not understood to describe the entire spring complex.

Rangen also states that the Department should be "precluded by the doctrine of quasi estoppel" from concluding the decreed source is solely the Martin-Curren Tunnel. *Rangen Motion* at 2. Rangen fails to cite any case law or provide any argument to support this statement. Moreover, equitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003).

2. <u>Rangen's partial decree does not permit Rangen to divert water from a point of diversion adjacent to the decreed point of diversion.</u>

In the Final Order, the Director recognized that Rangen historically diverted water from Billingsley Creek at a point of diversion commonly referred to as the Bridge Diversion, but that because the Bridge Diversion was not within Rangen's decreed point of diversion (SESWNW Sec. 32, T7S, R14E), Rangen is not entitled to divert water at the Bridge Diversion. *Final Order* at 32. This is because 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. Rangen cites to a previous version of adjudication rule 37.03.01.060.05.d, which provides that the location of the point of diversion should be described "to the nearest ten (10) acre tract (quarter-quarter-quarter section) if that description is reasonably available." Rangen appears to be arguing that because the Bridge Diversion is in the ten-acre tract *nearest* to SESWNW, then Rangen can use it as a point of diversion. This is an illogical argument. The reason for describing a point of diversion to the 10-acre tract is to provide more specificity of the location of the point of diversion, not create more ambiguity. If Rangen's interpretation were adopted, suddenly the 10-acre tract description becomes much larger as all neighboring 10-acre tracts become potential locations for points of diversion. This is not an interpretation ever adopted by the Department and Rangen's suggestion to the contrary is incorrect.

3. <u>IGWA and Pocatello have demonstrated efficient use of water without waste.</u>

Rangen requests the Director alter his conclusion that IGWA and Pocatello have demonstrated efficient use of water without waste. *Rangen Motion* at 3. Rangen argues, "There is no evidence in the record to support Conclusion 59 that '...the junior-priority water right holders are using water efficiently and without waste.'"

The evidence in the record supports Conclusion of Law 59. Lynn Carlquist, President of North Snake Ground Water District, testified as to his water use practices and the practices of others in his district. Carlquist, Vol. VII, pp. 1671-1673. He described how he sprinkler irrigates and how almost 100 percent of the members of his ground water district also sprinkler irrigate. *Id.* He also testified about the conversions that the district has undertaken to reduce reliance on ground water pumping and increase recharge. *Id.*, pp. 1692-1693. He testified as to the steps the district takes to monitor diversions to ensure its member are not using more water than they have a right to. *Id.*, p. 1727. Similarly, Tim Deeg, President of IGWA, testified about

how he sprinkler irrigates and the costs of his pumping and about the various projects IGWA has undertaken to reduce reliance on ground water pumping, increase recharge and remove end guns. Deeg, Vol. VIII, pp. 1739-1740, 1748, 1751. He suggested that ground water pumpers will pump only the minimum amount of water to get by because of the costs associated with pumping ground water. *Id.*, pp. 1753-1754. Deeg also testified about how the ground water districts monitor ground water diversions to ensure the ground water pumpers are using water consistent with their decrees. *Id.*, p. 1765. Pocatello presented evidence of its water user through Justin Armstrong, Pocatello's Water Superintendent. Armstrong, Vol. V, pp. 1104-1107. Contrary to Rangen's suggestion, there is evidence in the record to support the conclusion that junior ground water pumpers efficiently use water without waste.

4. **Conclusions of Law 42 through 46 (references to the 10% trim line) are necessary to the Director's opinion.**

Rangen asks the Director to alter the Final Order by deleting Conclusions of Law 42 through 46 because they reference ESPAM 1.1 and the 10% trim line associated with ESPAM 1.1. *Rangen Motion* at 3. Rangen argues that these references are "not necessary or relevant" as to ESPAM 2.1. The Director disagrees. Idaho Code § 67-5248(1) provides that an agency order must contain "a reasoned statement in support of the decision." Conclusions of Law 42 through 46 set forth the history and established case law related to the application of a trim line. One argument raised in this proceeding by Rangen and the Surface Water Coalition is that no trim line should be used at all. As Conclusion of Law 46 points out, this argument has been considered and rejected by Idaho courts. Moreover, Conclusions of Law 43 through 45 explain how the application of the trim line in the Rangen proceeding is consistent with the application of the trim line in the Clear Springs and Blue Lakes delivery calls. These conclusions of law are directly relevant to this proceeding and are a part of the Director's "reasoned statement in support" of his decision as required by Idaho Code § 67-5248(1).

5. **There is substantial evidence in the record to support Conclusions of Law 21 and 22.**

Rangen argues that the Director's determination that 63% of the benefits of curtailment to the Rangen spring complex would be realized at the Martin-Curren Tunnel is not supported by substantial evidence in the record. *Rangen Motion* at 4. A review of the record shows that this is not true. Conclusion of Law 21 cites Findings of Fact 50 and 101, which in turn reference Greg Sullivan's testimony related to United States Geological Survey ("USGS") measurements and his plot of a regression line to determine the 63% ratio. Sullivan's testimony constitutes substantial evidence. Rangen states that Sullivan's reliance on USGS flow data is inconsistent with IDWR staff opinion. *Id.* While IDWR staff member Tim Luke testified there was some concern with the quality of the stream channel where the USGS takes its measurements, this does not prevent the Director from adopting an approach which relies upon the USGS data for support. As discussed in the Final Order, the method used by the USGS to measure flows on Billingsley Creek is considered a standard method of water measurement and is listed as an acceptable measuring method in the Department's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices,* and is employed to calibrate the accuracy of weirs and other measuring devices. *Final Order* at 10, FF ¶ 47. Furthermore, USGS flow

measurements are widely accepted as accurate and objective measurements. *Id.* Rangen argues that Sullivan also provided another regression analysis showing that 75% of the benefits of curtailment to the Rangen spring complex would be realized at the Martin-Curren Tunnel. *Rangen Motion* at 4. However, as described in Finding of Fact 102, there are justifications for using the 63% ratio. First, all parties to the proceeding recognized that the data used to calculated the 75% ratio under-reported the actual flows through the Rangen facility. *Final Order* at 23, FF ¶ 102. The Director concluded that the alternative approach that results in the 63% ratio was a "credible method" to correct the under-reported data. *Id.* Moreover, if the 75% ratio is used to determine the increase in the Martin-Curren Tunnel flows, this would result in Rangen benefiting from its own under-reporting of flows.

6. <u>Finding of Fact 51 is supported by substantial evidence in the record</u>.

Finding of Fact 51 addresses certain analysis undertaken by IGWA's expert Greg Sullivan. Finding of Fact 51 provides:

> Sullivan derived a weir coefficient for the Rangen Facility by solving the standard weir equation for the weir coefficient using 14 of the USGS flow measurements and Rangen head measurements made nearest in time. Sullivan derived an average weir coefficient of 3.62. Sullivan, Vol. VI., pp. 1438-1439.

Rangen argues that Finding of Fact 51 is not supported by substantial evidence and is not necessary to the Director's decision. *Rangen Motion* at 4. The Director disagrees. First, the record clearly shows that Sullivan derived a weir coefficient for the Rangen Facility and that the average weir coefficient was 3.62. Sullivan, Vol. VI., 1434-1440. Moreover, the weir coefficient is relevant to this proceeding. The derived weir coefficient supports Conclusions of Law 19 through 22, which conclude that Rangen's use of a nonstandard measuring device with an inaccurate rating curve resulted in a systematic under-measurement of the flows through the Rangen Facility and that less than 75% of the benefits to the Rangen's spring complex would be realized at the Martin-Curren Tunnel.

7. <u>Clarification of phased-in curtailment.</u>

Finally, Rangen requests that the Director "clarify the Final Order by articulating how he determined how much mitigation water must be delivered each year of the five year phase-in." *Rangen Motion* at 4-5. The following is an explanation of the specific calculations to determine how much mitigation water is required. The volume of mitigation water required during the first four years of the five year phase-in period was calculated using the transient, superposition version of ESPAM 2.1. The benefit of curtailment to the aquifer was simulated at a constant rate equivalent to the average annual consumptive use. The simulated volume of water accruing to the Rangen model cell during each of the first four years was calculated from the model results and multiplied by 63% to predict the volume of benefit at the Martin-Curren Tunnel. The volume accruing to the Martin-Curren Tunnel during each year was converted to an average discharge rate in cubic feet per second. The predicted volume of benefit at the Martin-Curren Tunnel during each of the first four years of curtailment was found to be 2,442 AF (3.4 cfs), 3,742 AF (5.2 cfs), 4,368 AF (6.0 cfs) and 4,813 AF (6.6 cfs). *Final Order* at 42. The predicted

volume of benefit at the Martin-Curren Tunnel during the fifth year of curtailment was found to be 5,148 AF (7.1 cfs). Because the Director can only phase in curtailment over five years per Conjunctive Management Rule 20.04, this then necessitated the full obligation of 9.1 cfs be provided in the fifth year.

Response to IGWA's Petition for Reconsideration

1. **Curtailment has been stayed pending a decision on IGWA's mitigation plan.**

In its petition, IGWA asks the Director to withhold curtailment of groundwater rights until a decision is entered on IGWA's pending mitigation plan. *IGWA Petition* at 1. This request has already been addressed through other proceedings. On February 11, 2014, IGWA filed *IGWA 's Mitigation Plan and Request for Hearing* ("Mitigation Plan"). On February 12, 2014, IGWA filed *IGWA's Petition to Stay Curtailment, and Request for Expedited Decision* (Petition to Stay Curtailment). In its Petition to Stay Curtailment, IGWA asked the Director to withhold curtailment of groundwater rights until a decision is entered on IGWA's pending mitigation plan. The Director granted IGWA's request to stay curtailment on February 21, 2014. IGWA's request is moot.

2. **The application of the Great Rift as a basis for a trim line is consistent with previous proceedings and is supported by existing case law.**

It its petition, IGWA raises a number of objections related to the Director's use of the Great Rift as a basis for a trim line and suggests that its use results in the impermissible waste of water. *IGWA Petition* at 2-7. IGWA suggests that the Director should "return" to the 10% trim line used in previous administrative matters and that existing case law actually requires the application of a 10% trim line. *Id.* at 34. The Director disagrees with IGWA's analysis.

First, IGWA's suggestion that the Director should apply a 10% trim line with respect to the model cell containing the Martin-Curren Tunnel is inconsistent with the 10% trim lines used in administration of previous Thousand Springs delivery calls. ESPA model version 1 was used to delineate trim lines for the previous Thousand Springs delivery calls. The ESPA model version 1 trim lines included areas in which 10% or greater of the curtailed use would result in benefits to a group of springs tributary to a reach of the Snake River (commonly referred to as a "spring reach"). Because a spring reach contains numerous springs that are not available to the calling party, significantly less than 10% of the curtailed use benefitted the calling party. The portion of the benefit received by the calling party was estimated based on spring flow rate data for all springs in the reach. For example, as discussed in the Final Order, in the Clear Springs Foods delivery call, the calling party was predicted to receive only 6.9% of the benefit to the spring reach. In the Blue Lakes delivery call, the calling party was predicted to receive only 20% of the benefit to the spring reach. In these delivery calls, a 10% trim line limited the area subject to curtailment to areas where at least 0.69% (6.9% of 10%) and 2% (20% of 10%), respectively, of the curtailed use was predicted to benefit the calling party. *Final Order* at 38.

ESPA model version 2, the updated model used in the Rangen delivery call, was improved by calibration to more detailed spring flow data. Because of this improvement, the

Department can predict the benefit to smaller groups of springs, in addition to spring reaches. In the recent Rangen delivery call, the trim line delineated by the Great Rift generally limits the area subject to curtailment to areas where at least 0.63% of the curtailed use benefits the calling party. Comparing the benefit to the calling party at the trim line in previous Thousand Springs area delivery calls (0.69% and 2%) and the benefit to Rangen at the eastern boundary of the Great Rift trim line (0.63%) establishes that the standard applied previously in the Clear Springs Foods and Blue Lakes delivery calls is similar to the standard used in the recent Rangen delivery call.

Moreover, if the Department were to return to the approach used in previous Thousand Springs delivery calls, it would apply a 10% trim line with respect to the Buhl to Thousand Springs reach, which is the calibrated spring reach in ESPA model version 2 containing the Martin-Curren Tunnel and numerous other springs. If the Department were to change its approach and delineate a 10% trim line for the Buhl to Thousand Springs reach, the trim line would be similar to the trim line delineated using the Great Rift. IGWA's argument that because a 10% trim line with respect to the spring reach was used previously, a 10% trim line with respect to the model cell containing Curren Tunnel should be applied in this scenario, is like comparing apples to oranges. To correctly compare, the benefits to the calling party should be examined.

IGWA also contrasts the futile call determination in the first Rangen delivery call in 2005 with the results of the most recent Rangen delivery call. *IGWA Petition* at 2-3. However, the trim line applied in the first Rangen delivery call also limited curtailment to areas where at least 10% of the curtailed use was predicted to benefit *a river reach* containing Curren Tunnel and numerous other springs. The percentage that would have benefitted *the calling party* also would have been significantly less than 10%. While Director Dreher determined in the first Rangen delivery call in 2005 that the call was futile, the change in result in this proceeding is not due to changes in the approach used to define the trim line as implied by IGWA. Model predictions of benefits to springs in the Billingsley Creek area changed significantly in the latest version of the model because important improvements to spring discharge calibration targets were made. For example, errors discovered in spring flow measurements used in the first version of the model were corrected in the new version of the model and additional, more detailed, spring flow data were available for calibration of the new version of the model. To imply as IGWA does that the application of the trim line is the basis for the change in result is simply incorrect.

The Director, in an exercise of discretion, must consider the diminishing benefits of curtailment beyond the Great Rift. The Great Rift is an area of low transmissivity that justifies its use as a trim line. Low transmissivity impedes the transmission of water through the aquifer at the Great Rift. *Final Order* at 27, FF ¶ 108. This low transmissivity causes the benefit of curtailment compared to the number of acres curtailed to diminish significantly. As provided in Findings of Fact 105 through 108, generally less than 1% of the benefits of curtailment of water users east of the Great Rift will accrue to the Rangen spring cell. Even less will be expected to accrue to the Curren Tunnel. Curtailment of junior ground water irrigation west of the Great Rift would dry up approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Curren Tunnel. *Final Order* at 28, FF ¶ 110. Curtailment of junior ground water irrigation east of the Great Rift would dry up approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately

204,000 acres per cfs of predicted benefit to the Curren Tunnel. *Id.* In addition, there is uncertainty in the model. There is lower predictive uncertainty on the western side of the Great Rift. *Final Order* at 19, FF ¶ 91. There is generally higher predictive uncertainty on the eastern side of the Great Rift, however impacts from several pumping locations evaluated on the eastern side of the Great Rift had negligible impacts on the spring cell evaluated in the Department's predictive uncertainty analysis. *Id.*

IGWA's argument that the trim line should be 10% because 10% was used in previous proceedings is not a persuasive reason for using a 10% trim line in this proceeding. The definition of a 10% trim line is dependent on the length of the reach to which the 10% applies, and calibration reaches are not necessarily consistent between model versions, complicating comparisons of 10% trim lines. What can be analyzed is whether the benefits of curtailment to the calling party are consistent between the various proceedings. The use of the Great Rift to define a trim line is both justified based on the evidence presented in this proceeding, and results in benefits to the calling party that are consistent with those resulting from trim lines applied in previous proceedings.

IGWA's identification of "waste" as an issue arising out of the Rangen curtailment order is incorrect. The fact that a large portion of the water curtailed will not reach Rangen does not mean it is being wasted. Water not reaching Rangen becomes available to other senior water users in the Thousand Springs area. The water also benefits other senior water users with pending delivery calls upstream from the Thousand Springs area (such as the Surface Water Coalition call) because the benefits of curtailment of ground water rights propagate upstream as well as downstream. The real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

IGWA also argues that the Director is compelled to use a 10% trim line based upon prior court precedent. *IGWA Petition* at 6. In support of this argument, IGWA cites to *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) and *Schodde v. Twin Falls Land Company*, 224 U.S. 107 (1912). IGWA argues that these decisions, along with *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862 (2007), "are binding precedent and they draw the line at 10%." *Id.* Nowhere in these decisions does it require the application of a 10% trim line.

In *Van Camp*, the senior appropriator dammed a creek so that the water would back up, raising the water table to subirrigate his lands. *Van Camp,* 13 Idaho at 208, 89 P. at 754. The *Van Camp* Court held that although Van Camp could divert water from the stream to fill his water right, he could not dam or impede the flow of the remaining water in order to cause a subirrigation of his meadows. *Id.* As discussed in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809, 252 P.3d 71, 90 (2011), the issue in *Van Camp* was whether a senior appropriator was protected in his means of diversion. In *Clear Springs*, IGWA argued that *Van Camp* could be read broadly to require the Director to reduce the amount of water a senior is entitled to under his water right. The *Clear Spring* Court rejected this argument, recognizing the limited holding of Van Camp: "The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion." *Id.* In *Clear Springs*, IGWA also cited *Schodde* as a defense in a delivery call proceeding. As with *Van Camp*, the

Court recognized that the holding of *Schodde* was limited to the reasonableness of the appropriator's means of diversion: "The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights." *Id.* IGWA continues to misinterpret these decisions. IGWA also cites as support *American Falls Reservoir Dist. No. 2*. *IGWA Petition* at 5. This was a facial challenge to the Conjunctive Management Rules. It did not reach substantive issues regarding application of the rules and did not address the use of a 10% trim line. These cases do not address conjunctive administration of ground water right and do not require the application of a 10% trim line.

IGWA also argues that *Clear Springs* does not support the Director's application of a trim line. *IGWA Petition* at 6. In *Clear Springs,* the Department used ESPAM 1.1 to determine effects of ground water pumping, just as ESPAM 2.1 is being applied in this proceeding. *Clear Springs*, 150 Idaho at 814, 252 P.3d at 95. In the Clear Springs delivery call, the 10% trim line was applied based on accrual of the benefits of curtailment to the Buhl to Thousand Springs reach, which contained multiple ESPAM model cells and several other springs not diverted by the calling party. The calling party was estimated to receive 6.9% of the benefits accruing to the Buhl to Thousand Springs reach. In the Clear Springs delivery call, the trim line limited curtailment to areas where the calling party would receive at least 0.69% (6.9% of 10%) of the benefits of curtailment. Because the 10% trim line applied in Clear Springs delivery call was based on model predictions of impacts to a multi-cell reach containing several springs, applying a 10% trim line based on model predictions of impacts to a single model cell, as proposed by IGWA, would result in a significantly different standard than was applied in Clear Springs delivery call. The modification of the trim line is justified because of the ability to now model to individual cells and as opposed to modeling only to the river reaches.

3. <u>Further phasing-in of curtailment over five years as suggested by IGWA results in inequity to the senior.</u>

Finally, IGWA requests that the Director act to further phase-in curtailment over five years. *IGWA Petition* at 8. The Director declines to adopt such an approach. In the Final Order, the Director agreed to phase in mitigation provided by direct flow to Rangen. *Final Order* at 42. The Director concluded that if IGWA is able to provide Rangen the water through direct delivery that Rangen would have otherwise received through curtailment, IGWA should be allowed to do so. As discussed above, the simulated volume of water accruing to the Rangen model cell during each of the first four years was calculated from the model results and multiplied by 63% to predict the volume of benefit at the Martin-Curren Tunnel. The volume accruing to the tunnel during each year was converted to an average discharge rate in cubic feet per second. The predicted volume of benefit at the tunnel during the fourth year of curtailment was found to be 6.6 cfs. *Id.* Because the Director can only phase in curtailment over five years per Conjunctive Management Rule 20.04, the full benefit of 9.1 cfs must be supplied in the fifth year. Now, IGWA asks the Director to further reduce its mitigation obligation on an annual basis, by "stepping down the curtailment priority date." *IGWA's Petition* at 9. First, IGWA mischaracterizes how curtailment has been phased-in previously. Previous proceeding used the model at steady state to determine the benefits, not transient state as suggested by IGWA. Second, adopting the approach advocated by IGWA would result in even less water being owed by IGWA in each of the first four years: 0.7 cfs in year one, 1.9 cfs in year two, 3.2 cfs in year three, 4.3 cfs in year four. *Id.* The Director finds no justification for taking such action in this

proceeding. The Director concludes that this would result in an inequitable benefit to IGWA. IGWA should be required to provide the quantity of water that otherwise would have been supplied to Rangen through curtailment.

Response to Pocatello's Motion to Reconsider

1. Mootness is the correct legal doctrine under which to evaluate Pocatello's argument related to the extent of beneficial use of Rangen's junior water right.

In its motion, Pocatello seeks modification of Conclusions of Law 24 and 25 of the Final Order. *Pocatello Motion* at 3. In Conclusions of Law 24 and 25, the Director found that the question of the extent of historic beneficial use of Rangen's junior water right no. 36-7694 was moot. *Final Order* at 34, CL ¶¶ 24-25. Pocatello argues mootness is not the correct legal doctrine to analyze this issue. *Pocatello Motion* at 3. The Director concludes that mootness is the correct legal doctrine to address issues related to the historic beneficial use of water right no. 36-7694. An issue becomes moot if a judicial determination on that issue will have no practical effect upon the outcome of the case. *Hoagland v. Ada County*, 154 Idaho 900, 912, 303 P.3d 587, 599 (2013). As discussed in the Final Order, a determination related to the extent of historic beneficial use of the junior water right will not result in any relief to Pocatello and IGWA because it is not expected that curtailment will ever result in more water to Rangen than Rangen is entitled to under its senior water rights. The predicted increase in discharge to the Martin-Curren Tunnel from curtailing ground water rights junior to July 13, 1962 (the priority date for water right no. 36-2551) within the ESPAM 2.1 model boundaries, within the area of common ground water supply, and west of the Great Rift is 9.1 cfs. *Final Order* at 28, FF ¶ 109. The average annual discharge from Martin-Curren Tunnel after several years of curtailment within the model boundary is expected to be less than 17 cfs. *Id.* at FF ¶ 111. Because Rangen's two senior fish propagation rights, water right nos. 36-15501 and 36-02551, authorize diversion of a total of 50 cfs from Martin-Curren Tunnel, full curtailment is not expected to bring anywhere near 50 cfs to Rangen and would provide no water to junior water right no. 36-7694. As a decision on the historic extent of beneficial use of water right no. 36-7694 will have no practical effect upon the outcome of this case, the issue is moot.

Pocatello also argues that "[a] finding by the Director that this issue is moot could potentially bind the parties from raising this issue in contexts before a court where there is in fact 'a real and substantial controversy that is capable of being concluded by judicial relief.'" *Pocatello Motion* at 3. Pocatello cites *State v. Barclay*, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) in support of this assertion. *Barclay* does not stand for this proposition and is distinguishable from the case at hand. In *Barclay*, the State of Idaho sought to appeal a decision by the Idaho Court of Appeals related to Barclay's criminal sentencing. *Barclay*, 149 Idaho at 7-8, 232 P.3d at 328-329. The Idaho Supreme Court held that the appeal was rendered moot by the fact that Barclay completed his full sentence and "any judicial relief from this Court would simply create precedent for future cases and would have no effect on either party." *Barclay*, 149 Idaho at 8, 232 P.3d at 329. Notwithstanding the mootness determination, the Court vacated the appellate decision so that the State would not be prejudiced and bound by the decision. *Id.* The distinguishing factor when comparing *Barclay* and this proceeding is the fact that the appellate court issued a decision on the specific legal question at issue which, because the decision was

mooted, would have resulted in the state being bound by the decision with no ability to appeal. Here, no ruling on the issue has been made. There is no decision regarding the extent of Rangen's historical beneficial used water right no. 36-7694. Thus, there is no chance of prejudice to any party on the issue. The determination here that the question of the historic extent of beneficial use of water right no. 36-7694 is moot should not prejudice Pocatello or IGWA from raising the issue in other future proceedings should it become an issue.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition for Reconsideration filed by IGWA and the Motion for Reconsideration filed by Pocatello are DENIED.

IT IS FURTHER ORDERED that Rangen's request to clarify the basis for the amounts designated in the mitigation phase-in is GRANTED. Section seven under the subheading titled Response to Rangen's Petition for Reconsideration contains the requested information. Except as to Rangen's request to clarify the basis for the amounts designated in the mitigation phase-in, Rangen's Motion for Reconsideration is DENIED.

Dated this 4th day of March, 2014.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March, 2014, I served a true and correct copy of the forgoing document on the following parties by the methods indicated:

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 P.O. BOX 554 RUPERT, ID 83350 robynbrody@hotmail.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) E-mail
FRITZ HAEMMERLE HAEMMERLE & HAEMMERLE P.O. BOX 1800 HAILEY, ID 83333 fxh@haemlaw.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) 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
SARAH KLAHN MITRA PEMBERTON WHITE & JANKOWSKI, LLP 511 16TH ST., STE 500 DENVER, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) E-mail
C. THOMAS ARKOOSH ARKOOSH LAW OFFICES P.O. BOX 2900 BOISE, ID 83701 tom.arkoosh@arkoosh.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) 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
tlt@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com

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

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

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

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

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

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

Kimi White
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

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

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

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

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

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