BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-15501, 36-02551, AND 36-07694	))))	**AMENDED ORDER**

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of a letter dated September 23, 2003, and a subsequent letter dated October 6, 2003. Both letters were from J. Dee May ("May"), an attorney representing Rangen, Inc. The September 23 letter sought administration of "the diversion of water in District 36A in such a way that [Rangen] receives its full appropriation of the above referenced water rights" for use at hatchery facilities owned and operated by Rangen near Hagerman, Idaho. Because there are no water rights in Water District No. 36A that are junior in priority to the water rights listed above and divert from the same sources as the listed rights, the Director requested additional clarification concerning the nature of the administration of water rights sought by Rangen. In his October 6 letter, May described the administration sought by Rangen to be the administration of "all water right diversions junior to [Rangen's] that are interfering with and impacting [Rangen's] water rights under the water right numbers referenced above." The Director issued an Order on February 25, 2004, in response to these two letters. The Director now enters the following Findings of Fact, Conclusions of Law, and Amended Order with revisions to Findings of Fact Nos. 21, 54, 70, 74, 75, and 77, and Conclusions of Law No. 22.

FINDINGS OF FACT

The Eastern Snake River Plain Aquifer and the Department's Ground Water Model

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," USGS Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. (See IDAPA 37.03.11.050).

2. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA east and southeast of Hagerman, Idaho.

3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause reductions in spring flows tributary to the Kimberly to King Hill (or Thousand Springs) reach of the Snake River, although the reductions in flows from individual springs caused by ground water withdrawals from individual wells or groups of wells cannot be determined using the Department's existing ground water model for the ESPA.

4. Surface and ground water studies for the Eastern Snake River Plain, funded in part by the Idaho Legislature, were recently completed by or on behalf of the Department, with the participation of other public and private entities. These studies provide additional data that is being used to reformulate and recalibrate the ground water model used by the Department to calculate the amount, location, and timing of surface water depletions caused by the withdrawal and use of ground water throughout the plain overlying the ESPA. The purpose for the additional data collection and model reformulation/calibration is to reduce uncertainty in modeled results. Although development of the reformulated and recalibrated ground water model is nearly complete, the model will not be ready for use in making water management determinations until the latter part of 2004. In the meantime, the results from simulations using the Department's existing ground water model provide the best available technical basis for making some water management decisions.

5. The Department is implementing full conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain consistent with Idaho law and available information. The results of simulations from the Department's existing ground water model are suitable for determining the area containing those ground water diversions for which the depletion of water from the ESPA results in the most direct and significant reduction in the flow of water from springs tributary to the Snake River in the Thousand Springs reach.

The Thousand Springs Ground Water Management Area and Interim Stipulated Agreement

6. Discharges from springs in the Thousand Springs area have diminished and are expected to be further diminished primarily because of significant reductions in incidental recharge of the ESPA from surface water irrigation, resulting from changes in surface water irrigation systems and application practices (conversion from application by flood irrigation to application by sprinkler systems), and the last four consecutive years of drought. For example, decreases in the springs supplying the Rangen hatchery facilities can be correlated with repairs made to the facilities of the North Side Canal Company to reduce losses of surface water to ground water from the canal company's facilities above those springs in 1987, 1998, and 2000. Spring discharges are also reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in relatively close proximity to the area of the springs. When superimposed on diminished spring discharges resulting from changes in surface water irrigation and drought, reductions in spring discharges caused by ground water

depletions under relatively junior priority water rights can potentially cause injury to senior priority water rights dependent on spring sources.

7. On August 3, 2001, the Director issued orders designating the Thousand Springs Ground Water Management Area and the American Falls Ground Water Management Area in exercise of his statutory authorities to administer rights to the use of ground water, in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law. In issuing these orders, the Director also announced his intent to issue additional orders prior to September 1, 2001, directing that holders of certain water rights for the use of ground water cease ground water withdrawals beginning March 15, 2002, pursuant to Idaho Code § 42-233b.

8. On August 31, 2001, the Director was advised by representatives of certain holders of senior priority surface water rights and certain holders of junior priority ground water rights that an agreement in principle had been reached under which the holders of junior priority ground water rights agreed to provide replacement surface water for the next two irrigation seasons in an amount equal to what the information then available to the Director indicated would have resulted from the curtailment of ground water diversions intended by the Director within the Thousand Springs Ground Water Management Area, or an appropriate reduction in ground water diversions to the extent that replacement water was not provided.

9. Based upon the representations that an agreement in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs or American Falls Ground Water Management Areas.

10. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into a detailed, written, stipulated agreement with representatives of certain holders of senior priority surface water rights in the Thousand Springs area titled: "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36" (the "Stipulated Agreement"). The Director conditionally approved the Stipulated Agreement by interlocutory order on January 18, 2002. Rangen was not a signatory to the Stipulated Agreement.

11. Under the Stipulated Agreement, the represented holders of senior priority surface water rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide 40,000 acre feet of replacement water during each irrigation season of each year of the two-year term of the Stipulated Agreement as replacement for the estimated increase in the quantity of water that would have been discharged through springs in the Thousand Springs area as a result of curtailment of ground water diversions intended by the Director after six months, based on the Department's simulations of curtailment using the existing ground water model for the ESPA. The estimated increase in the amount of water that would have been discharged through springs in the Thousand Springs area after one full year of curtailment of the ground water diversions intended by the Director, based on the simulations of curtailment using the Department's existing ground water model for the ESPA, is 48,000 acre feet. The replacement

water was to be used to enhance spring flows in the Thousand Springs reach. In the event the full amount of replacement water could not be provided, the Stipulated Agreement provided that the holders of ground water rights would reduce their diversion and use of ground water for irrigation in proportion to the lack of replacement water provided up to a maximum reduction of 10 percent.

12. Under the Stipulated Agreement, the parties also agreed not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication ("SRBA District Court") requesting authority for the Director to implement interim administration of water rights in Basin 36. Basin 36 is the administrative basin defined by the Department primarily for the purpose of managing surface water and for administering water rights for the use of surface water decreed in proceedings preceding the Snake River Basin Adjudication. Basin 36 includes most of the area in the Thousand Springs Ground Water Management Area. The remaining portion of the Thousand Springs Ground Water Management Area is within the Department's Administrative Basin 37.

13. The holders of ground water rights party to the Stipulated Agreement fully met their obligations under the Stipulated Agreement in 2002 and 2003.

14, On October 10, 2003, the Director issued *Order In the Matter of Distribution of Water to Water Rights Nos. 36-02659, 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-07004, 36-07080, 36-07167, 36-07176, 36-07725, 36-07731, and 36-08089* in which the Director determined that through his approval of the Stipulated Agreement, he approved the amount of replacement water as being adequate mitigation to the Thousand Springs reach for the depletionary effects of ground water withdrawals for the two-year term of the agreement. By offseting the depletionary effects, any material injury potentially caused by out-of-priority diversion of ground water was adequately mitigated during the term of the Stipulated Agreement.

15. The Stipulated Agreement expired on December 31, 2003, and is no longer in effect.

Creation and Operation of Water Districts No. 120 and No. 130,
And Status of Thousand Springs and American Falls Ground Water Management Areas

16. Consistent with the Stipulated Agreement, the State of Idaho filed a motion with the SRBA District Court on November 19, 2001, requesting an order authorizing the interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 36 and 43 overlying the ESPA in the Thousand Springs area. The State of Idaho also sought authorization for the interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 35 and 41 overlying the ESPA in the American Falls area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued two orders on February 19, 2002, creating Water District No. 120 and Water District No. 130 pursuant to the provisions of Idaho Code § 42-604.

17. On August 30, 2002, the State of Idaho filed a second motion with the SRBA District Court requesting an order authorizing the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 37 overlying the ESPA in the Thousand Springs area. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 8, 2003, revising the boundaries of Water District No. 130 to include the portion of Administrative Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604. The boundaries for Water District No. 130 encompass the North Snake Ground Water District and most of the Magic Valley Ground Water District.

18. On July 10, 2003, the State of Idaho filed a third motion with the SRBA District Court requesting an order authorizing the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 29 overlying the ESPA in the American Falls area. On October 29, 2003, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 22, 2004, revising the boundaries of Water District No. 120 to include the portion of Administrative Basin 29 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

19. Water Districts No. 120 and No. 130 were created, and the respective boundaries revised, to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. As a result, the watermasters for Water Districts No. 120 and No. 130 were given the following duties to be performed in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of any stipulated agreement; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

20. During 2002, in the course of carrying out the duties set forth in Finding 19, the watermaster for Water District No. 130 identified five unauthorized diversions of ground water for uses that were in excess of the beneficial use authorized under a water right or for uses at unauthorized places of use. Pursuant to instructions from the Director, Notices of Violation were issued, Consent Orders entered, and penalties were assessed for each of these five illegal uses of ground water.

21. During 2003, in the course of carrying out the duties set forth in Finding 19, the watermaster for Water District No. 130 identified two additional unauthorized diversions of

ground water; one for violation of a Consent Order entered in 2002, and another for a large expansion in use beyond the beneficial use authorized under a water right. Notices of Violation have been issued for both unauthorized diversions.

22. The Director issued final orders on August 29, 2003, dissolving the Thousand Springs Ground Water Management Area and reducing the area of the American Falls Ground Water Management Area. Even though spring discharges in the Thousand Springs area have generally not improved since 2001 when the Thousand Springs Ground Water Management Area was designated, the Director determined that the Thousand Springs Ground Water Management Area was no longer necessary and preserving the original area of the American Falls Ground Water Management Area was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now accomplished through the operation of Water Districts No. 120 and No. 130.

The Conjunctive Management Rules

23. Idaho Code § 42-603 authorizes the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

24. On October 7, 1994, the Director issued *Order Adopting Final Rules*; the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Conjunctive Management Rules"), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

25. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

26. The Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02.

27. The Conjunctive Management Rules "may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right … ." IDAPA 37.03.11.020.04.

28. Pursuant to Idaho Code § 67-5291, the Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session). During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the

Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

The Letters Submitted on Behalf of Rangen Seeking Administration of Water Rights and Application of the Conjunctive Management Rules

29. On September 23, 2003, the Director received a letter from May representing Rangen, Inc. seeking the administration of "the diversion of water in District 36A in such a way that [Rangen] receives its full appropriation of the above referenced water rights."

30. On September 25, 2003, the Director responded to the letter of September 23, 2003, from May requesting "additional clarification concerning the nature of the administration of water rights in Water District 36A" being sought, since "there are no water rights in Water District No. 36A that are junior in priority to the listed rights and divert from the same sources as the listed rights."

31. On October 10, 2003, the Director received a second letter from May dated October 6, 2003. In that letter, May clarified that Rangen was seeking the administration of "all water right diversions junior to [Rangen's] that are interfering with and impacting [Rangen's] water rights under the water right numbers referenced above."

32. The water rights held by Rangen that Rangen sought to have protected by the administration of junior priority water rights are as follows pursuant to decrees issued by the SRBA District Court:

Water Right No.:	36-15501	36-02551	36-07694
Priority Date:	July 1, 1957	July 13, 1962	April 12, 1977
Beneficial Use:	Fish Propagation	Domestic (0.1 cfs) and Fish Propagation (48.54 cfs)	Fish Propagation
Diversion Rate:	1.46 cfs	48.54 cfs	26.00 cfs
Period of Use:	Jan. 1 – Dec. 31	Jan. 1 – Dec. 31	Jan. 1 – Dec. 31

33. Rule 10.04 of the Conjunctive Management Rules defines a "delivery call" as: "A request from the holder of a water right for administration of water rights under the prior appropriation doctrine." The two letters from May seeking administration of water rights interfering with and impacting Rangen's water rights described in Findings 29 and 31 come within the definition of a delivery call.

34. Water Districts No. 36A, No. 120, and No. 130 were created pursuant to Idaho Code § 42-604. Water District No. 36A contains water rights senior in priority to Rangen's

water rights that divert from a portion of the same sources as Rangen's water rights as well as water rights that divert from other sources, most of which are hydraulically connected but some of which are not hydraulically connected to the sources for Rangen's water rights. Although some of the other sources are hydraulically connected to the sources for Rangen's water rights, water rights diverted from those sources do not interfere with and impact Rangen's water rights. Therefore, there are no water rights in Water District No. 36A that can be administered to prevent injury to Rangen's rights.

35. Water District No. 120 contains water rights that are junior in priority to Rangen's water rights and divert from ground water that is hydraulically connected to the source for Rangen's water rights. Such water rights could potentially interfere with and potentially impact Rangen's water rights.

36. Water District No. 130 contains surface water rights that divert from sources that are hydraulically connected to the sources for Rangen's water rights but do not interfere with or impact Rangen's water rights. Water District No. 130 also contains water rights that are junior in priority to Rangen's water rights and divert from ground water that is hydraulically connected to the sources for Rangen's water rights. Such water rights could potentially interfere with and potentially impact Rangen's water rights.

37. Rule 40 of the Conjunctive Management Rules is titled "Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights from Areas Having a Common Ground Water Supply in an Organized Water District." Rule 40 applies to the delivery calls made by Rangen against the holders of junior priority ground water rights in both Water District No. 120 and Water District No. 130.

38. Some of the junior priority ground water rights that could potentially interfere with and potentially impact Rangen's water rights are not in a water district created pursuant to the provisions of Idaho Code § 42-604 because a final decree has not been issued by the SRBA District Court and the requirements for interim administration of these rights pursuant to Idaho Code § 42-1417 have not been met. Also, some of the junior priority ground water rights that could potentially interfere with and potentially impact Rangen's water rights are in the American Falls Ground Water Management Area described in Findings 7 and 22.

39. Rule 30 of the Conjunctive Management Rules is titled "Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights Within Areas of the State Not in Organized Water Districts or Within Water Districts Where Ground Water Regulation Has Not Been Included in the Function of Such Districts or Within Areas That Have Not Been Designated Ground Water Management Areas."

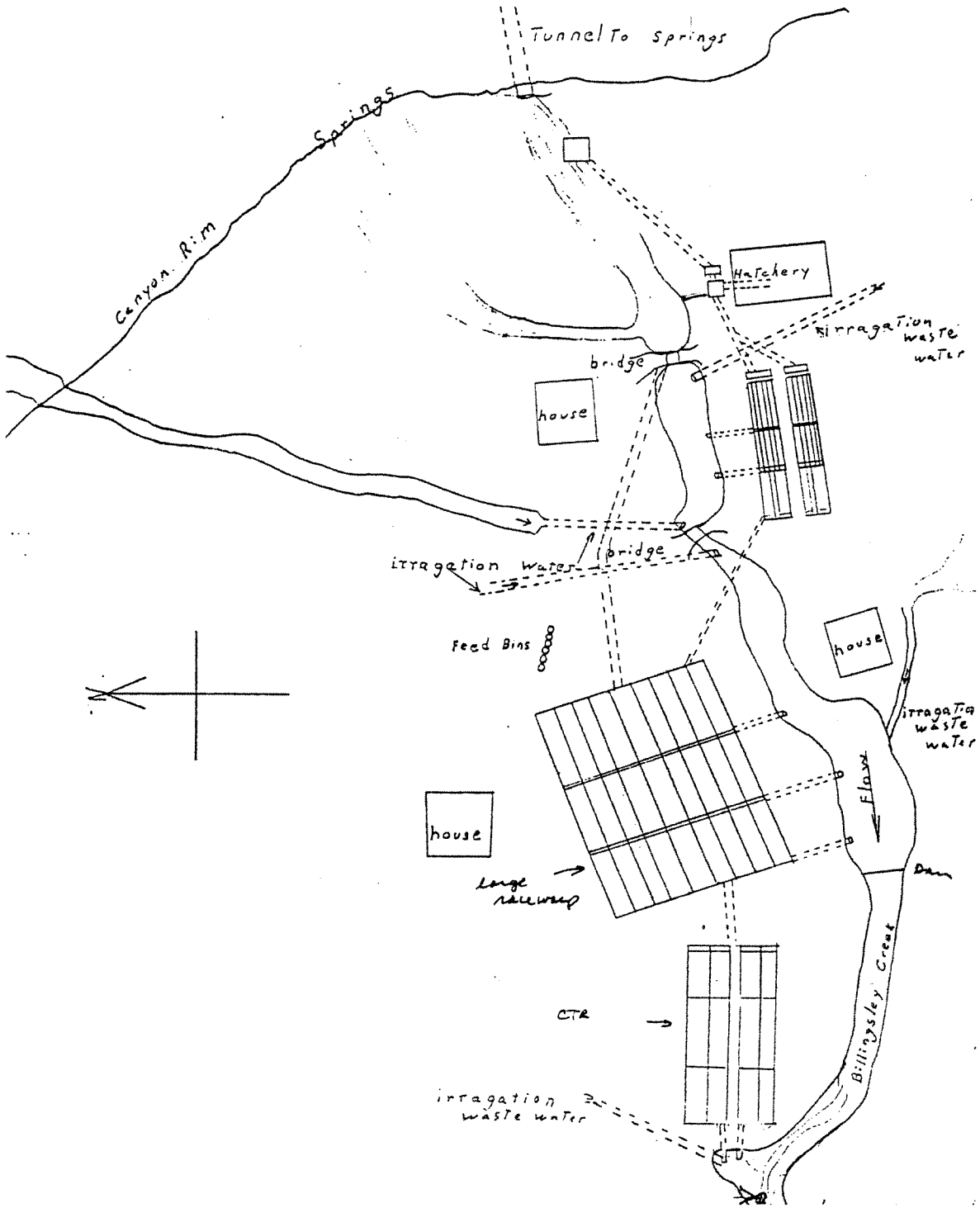
40. Rule 41 of the Conjunctive Management Rules is titled "Administration of Diversion and Use of Water Within a Ground Water Management Area."

41. The two letters from May, described in Findings 29 and 31, seeking administration of water rights interfering with and impacting Rangen's water rights did not meet the requirements set forth in Rule 30 of the Conjunctive Management Rules. Also, the two letters from May did not seek administration of junior priority ground water rights in the American Falls Ground Water Management Area as provided in Rule 41 of the Conjunctive Management Rules. Pursuant to Rule 41, such administration could not occur until the irrigation season of 2005, even if material injury to Rangen's rights was determined to be occurring as a result of diversion and use of ground water under junior priority rights in the American Falls Ground Water Management Area.

42. While Rule 40 of the Conjuctive Management Rules is applicable to the two letters from May, described in Findings 29 and 31, neither Rule 40 nor any other provisions of the Conjunctive Management Rules are applicable to delivery calls or demands for water distribution by the holder of a senior priority water right against the holder of a junior priority surface water right.

43. On October 17, 2003, the Director provided a letter to May initially responding to May's letter of October 10, 2003, described in Finding 31, making a delivery call by seeking administration of water rights interfering with and impacting Rangen's water rights. In his October 17 letter, the Director advised that determinations regarding "material injury" and "reasonableness of water diversions" would be made pursuant to Rule 40 and Rule 42 of the Conjunctive Management Rules in responding to the delivery call against junior priority ground water rights in Water Districts No. 120 and No. 130. In his October 17 letter, the Director also requested that he be provided copies of "all historical records of the amounts of water diverted under the listed rights as soon as practicable." Such records were not available to the Director for diversions under Rangen's water rights prior to 1995 because prior to 1995, the Department did not require the measurement and reporting of diversions under Rangen's rights and most other water rights that were not in organized water districts created pursuant to Idaho Code § 42-604.

44. On November 21, 2003, May transmitted on behalf of Rangen historical records of flow through the hatchery facilities owned and operated by Rangen. Included was the following sketch depicting the layout of the Rangen hatchery facilities, a summary of flows on a monthly basis, and records of periodic flow measurements beginning in 1966 through part of 2003.



Rangen Hatchery Facilities
Hagerman, Idaho

45. The flow measurements that are considered to be representative of the total supply of water available to the Rangen hatchery facilities under water rights nos. 36-15501, 36-02551, and 36-07694, consist of the sum of the discharge from raceways designated by Rangen as the "CTR" raceways and the flow over the check "Dam." The dam is sited upstream from the discharge points from the CTR raceways and downstream from the discharge points from raceways designated by Rangen as the "Large" raceways. The sum of the discharge from the CTR raceways and the flow over the check dam is considered to be representative of the total supply of water available even though at times some of the flow over the check dam may include water flowing from small springs downstream from the diversion to the Large raceways, water discharged from the Large raceways that was not diverted through the CTR raceways, and irrigation return flows.

46. The records of flow measurements submitted by May on behalf of Rangen for the years 1966 through 1974 consist of measurements or estimates of discharges from the Curran Spring made by George Lemmon, a former watermaster for Water District No. 36A. These recorded flows are not representative of the total supply of water available to the Rangen hatchery facilities because water rights for irrigation that are senior in priority to Rangen's rights are entitled to divert the first portion of the discharge from the Curran Spring during the irrigation season. In addition, the recorded flows do not include discharges from springs downstream of the Curran Spring that are upstream of Rangen's diversion to the Large raceways.

47. Without further explanation from Rangen, the Department can not confirm that the records of flow measurements submitted by May on behalf of Rangen for the years 1975 through 1980 are representative of the total supply of water available to the Rangen hatchery facilities. Based on subsequent findings in this order, however, it is not necessary to confirm whether the flow measurements for the years 1975 through 1980 are representative of the total supply of water available to the Rangen hatchery facilities.

Authorized Diversion Rate for Water Rights Nos. 36-15501, 36-02551, and 36-07694

48. Springs discharging in the Thousand Springs area do not discharge at a constant rate or at a rate that progressively increases or decreases from year to year. While there are overall increases or decreases in the discharge from individual springs between years (inter-year variations), there are also pronounced within-year or intra-year variations in discharge from individual springs.

49. Simplistically, overall variations between years in the discharge of springs in the Thousand Springs area result from differences between the amounts of ground water depletions and recharge to the ESPA above the springs, with delays in the response of spring discharge ranging at the extremes from days to decades depending on the proximity of ground water depletions and recharge as well as geologic and hydraulic characteristics of the ESPA. Factors affecting overall variations between years in the cumulative discharge from springs in the Thousand Springs area as well as from individual springs include but are not necessarily limited to: variations in surface water supplies available for irrigation above the ESPA, which affect

cropping decisions and the amount of incidental recharge to the ESPA; changes in the amounts and timing of tributary underflow to the ESPA, which also reflect numerous variations upgradient from where tributary underflow contributes to the ESPA; inter-year variations in precipitation and temperature, which not only affect the amount of surface water used above the ESPA and associated incidental recharge to the ESPA, but also affect the quantity of ground water withdrawals and depletions from the ESPA; and differences between years in the quantity of intentional or managed recharge to the ESPA.

50. Intra-year variations in the discharge from individual springs result from the factors described in Finding 49 but also from other factors including: variations in surface water application above the ESPA and associated incidental recharge in response to seasonal changes in precipitation and temperature; variations in timing of ground water withdrawals and depletions from the ESPA in close proximity to individual springs; and the timing of intentional or managed recharge to the ESPA in close proximity to individual springs.

51. While both the regional and local factors affecting inter-year and intra-year variations in spring discharge are generally understood, the interactions between these factors are complex and the specific effects of individual factors and various combinations of factors on the discharge from individual springs are not presently quantifiable.

52. Both inter-year and intra-year variations in the discharge from the springs that are the sources for water rights nos. 36-15501, 36-02551, and 36-07694 existed when appropriations for these rights were initiated (July 1, 1957; July 31, 1962; and April 12, 1977; respectively). Furthermore, the authorized diversion rates for water rights nos. 36-02551 and 36-07694 were licensed based on when the discharges from the springs that are the source for these rights were at or near the maximum intra-year discharges during the years for which the extent of beneficial use was deemed to be established or confirmed (November 1962 for 36-02551 and October 1972 for 36-07694), although erroneously for water right no. 36-07694 (see Findings 53 and 54 below). There are no other measurements of the total supply of water available to the Rangen hatchery facilities in 1962, nor any other means for determining the intra-year variations in the discharges from the springs comprising the source for water right no. 36-02551.

53. Water right no. 36-07694 was licensed on September 19, 1985, and has an authorized diversion rate of 26.00 cfs. The authorized diversion rate, as licensed, was not based on measurements of the amount of water actually diverted and applied to beneficial use. Rather, the authorized diversion rate was based on an estimate (not an actual measurement) made by George Lemon, a former watermaster for Water District No. 36A, of the discharge from the Curran Spring at or near its seasonal maximum flow in October of 1972. This estimate of the discharge from the Curran Spring was made nearly 5 years before the application for permit to appropriate water was filed for water right no. 36-07694.

54. Based on available records, there was not water available for appropriation at the time or subsequent to the date of appropriation for water right no. 36-07694. Therefore, the Department erred in licensing water right no. 36-07694, and should not have recommended this right for decree in the SRBA. Nonetheless, since the SRBA District Court decreed water right

no. 36-07694, Rangen may be entitled to divert water under this right when such water is physically available. However, because water was not available to appropriate on the date of appropriation for right no. 36-07694, Rangen may not be entitled to have a delivery call recognized against junior priority water rights.

55. The records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities and the records maintained by the Department since 1995 show that the quantity of water available at the Rangen hatchery facilities (sum of the discharge from the CTR raceways and the flow over the check dam) has been sufficient to continuously fill water right no. 36-15501 at the authorized diversion rate of 1.46 cfs.

56. The records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities show that 1987 was the last year in which the quantity of water available at the Rangen hatchery facilities (sum of the discharge from the CTR raceways and the flow over the check dam) was sufficient to fill water right no. 36-02551 at the authorized diversion rate of 48.54 cfs, when the cumulative discharges from springs supplying the Rangen hatchery facilities were at seasonal maximums (November). Since 1987, the quantity of water available at the Rangen hatchery facilities has not been sufficient to fill water right no. 36-02551 at the authorized diversion rate of 48.54 cfs although in 1997 and 1998, the seasonal maximum quantity of water available came within about 5 cfs (or about 10 percent) of the authorized diversion rate.

57. The rates of diversion authorized pursuant to water rights nos. 36-15501 and 36-02551 (1.46 cfs and 48.54 cfs, respectively) are not quantity entitlements that are guaranteed to be available to Rangen. Rather, the authorized rates of diversion are the maximum rates at which water can be diverted under these rights, respectively, when such quantities of water are physically available and the rights are in priority. Rangen can not call for the curtailment of junior priority water rights at all times that insufficient water is physically available to fill water rights no. 36-02551 or no. 36-07694 at the authorized rates of diversion. Rangen is not entitled to a water supply that is enhanced beyond the conditions that existed at the time such rights were established; i.e., Rangen can not call for the curtailment of junior priority water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion for Rangen's rights unless such seasonal variations are caused by depletions resulting from diversion and use of water under junior priority rights.

58. Rangen can only call for the distribution of water to its rights through the curtailment of junior priority ground water rights from the hydraulically-connected ESPA when such curtailment would result in a usable amount of water reaching Rangen's points of diversion in time of need, and depletions causing material injury as a result of diversion and use of ground water under such junior priority rights have not been adequately mitigated.

Factors Considered in Determining Material Injury To and Reasonableness of Water Diversions Under Water Rights Nos. 36-15501, 36-02551, and 36-07694

59. Based on the records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities for the years 1981 through part of 2003 and annual reports submitted by Rangen to the Department for the years 1995 through 2003, the following table summarizes the maximum daily flow and average daily flow by month for the water supply available to the Rangen hatchery facilities (sum of the discharge from the CTR raceways and the flow over the check dam) in 1987 and 2003. The year 1987 was the last year within which the discharge from springs supplying the Rangen hatchery facilities at the seasonal maximum (November) was sufficient to fill water rights nos. 36-15501 and 36-02551 at the cumulative authorized diversion rate of 50 cfs, and 2003 was the last year for which complete data are available.

Month	Year	Maximum Daily Flow	Average Daily Flow
January	1987	44.25 cfs	44.25 cfs
	2003	17.49	16.60
February	1987	42.89	39.75
	2003	16.15	15.07
March	1987	NM*	NM*
	2003	14.56	13.82
April	1987	32.52	28.55
	2003	13.45	12.81
May	1987	23.97	23.29
	2003	13.14	12.89
June	1987	30.43	27.58
	2003	13.00	12.59
July	1987	30.91	29.09
	2003	12.16	11.61
August	1987	40.13	36.70
	2003	12.49	12.02
September	1987	47.94	40.06
	2003	16.97	14.92
October	1987	46.93	46.93
	2003	19.26	18.30
November	1987	50.08	46.52
	2003	19.20	18.20
December	1987	44.39	44.22
	2003	17.10	16.10

*NM = No measurement

60. Comparing same-month maximum daily and average daily flows representing the water supply available to the Rangen hatchery facilities (sum of the discharge from the CTR raceways and the flow over the check dam) between years for the years shown above demonstrates that there have been significant decreases in the water supply available to the Rangen hatchery facilities between 1987 and 2003. Flow measurements for the other years between 1987 and 2003 not shown above demonstrate that the water supply available to the Rangen hatchery facilities generally decreased from 1990 through 1996, rebounded in 1997 and 1998, and then significantly decreased again after 1998 to record lows by 2002 and 2003 for the post-1981 time period.

61. Based on the records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities for the years 1981 through part of 2003 and annual reports submitted by Rangen to the Department for the years 1995 through 2003, the quantity of water available at the source for

water right no. 36-15501 with the priority date of July 1, 1957, is currently sufficient to fill this right at the authorized diversion rate of 1.46 cfs. (See IDAPA 37.03.11.042.01.a).

62. Based on the records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities for the years 1981 through part of 2003 and annual reports submitted by Rangen to the Department for the years 1995 through 2003, and taking into account the variations in spring flows between months that have existed since the date of appropriation for water right no. 36-02551, the quantity of water available at the source for water right no. 36-02551 with the priority date of July 13, 1962, is currently insufficient to fill this right at the authorized diversion rate of 48.54 cfs, even during months when the springs providing the source for this right are discharging at the highest seasonal flows during the year, generally October through January. Based on differences between average monthly flows for the years 1987 and 2003, the estimated annual decrease in the quantity of water available at the source for water right no. 36-02551 for 2003 is 16,000 acre feet. The annual shortage in the quantity of water available at the source for water right no. 36-02551 for 2004 is expected to be similar. (See IDAPA 37.03.11.042.01.a).

63. Based on the records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities for the years 1981 through part of 2003 and annual reports submitted by Rangen to the Department for the years 1995 through 2003, the quantity of water available at the source for water right no. 36-07694 with the priority date of April 12, 1977, is wholly insufficient to fill this right at the authorized diversion rate of 26.00 cfs, even during months when the springs providing the source of water for this right are discharging at the highest seasonal flows during the year, generally October through January. As described in Findings 53 and 54, there was not any water available for appropriation at the time or subsequent to the time that the application for permit to appropriate water for water right no. 36-07694 was filed. (See IDAPA 37.03.11.042.01.a).

64. Based on the results from field inspections conducted on November 25, 2003, by the watermaster for Water District No. 130 and Brian Patton, a registered professional civil engineer, Rangen has expended reasonable efforts to divert water for right no. 36-02551 from its source for use at the Rangen hatchery facilities. (See IDAPA 37.03.11.042.01.b).

65. Based on simulations using the Department's existing ground water model for the ESPA, the diversion and use of ground water under water rights having priority dates later than the priority date for water right no. 36-02551 (July 13, 1962) do affect the quantity and timing of when water is available from springs discharging in the Thousand Springs area. (See IDAPA 37.03.11.042.01.c).

66. Based on the records of flow measurements submitted by May on behalf of Rangen that are representative of the total supply of water available to the Rangen hatchery facilities for the years 1981 through part of 2003 and annual reports submitted by Rangen to the Department for the years 1995 through 2003, as well as the field investigations on November 25, 2003, described in Finding 64, Rangen is currently diverting and using surface water within the

authorized diversion rate for water rights nos. 36-15501 and 36-02551 (50 cfs total). (See IDAPA 37.03.11.042.01.e)

67. Based on the field investigations on November 25, 2003, described in Finding 64, the Rangen hatchery facilities have marginally adequate water measuring and recording devices. However, the watermaster for Water District No. 130 reports that the amounts of water diverted to domestic and irrigation uses is not measured, and the measurements of flows through hatchery raceways reported by Rangen may be systematically about 10 percent lower than actual flows. (See IDAPA 37.03.11.042.01.f).

68. Based on the results from the field inspection on November 25, 2003, described in Finding 64, two potential modifications to the existing Rangen hatchery facilities were identified that could increase the supply of water to the Rangen hatchery facilities during times that water right no. 36-02551 is not satisfied. However, the combined additional flow that could be diverted is estimated to be 0.64 cfs, which is not significant given the shortages in water supply shown and described in Findings 59 and 60. (See IDAPA 37.03.11.042.01.g).

69. Based on the results from the field inspection on November 25, 2003, described in Finding 64, there are actions that potentially could provide alternate means of diversion or alternate points of diversion to increase the supply of water to the Rangen hatchery facilities during times that water right no. 36-02551 is not satisfied. However, the feasibility of these actions is unknown and it is not clear that the actions identified would result in a sufficient increase in the water supply available to fill water right no. 36-02551. Therefore, it can not be determined at the present time whether there are alternate reasonable means of diversion or alternate points of diversion that should be pursued. (See IDAPA 37.03.11.042.01.h).

70. Given the magnitude of the decreases in the water supply available to the Rangen hatchery facilities between 1987 and 2003, shown and described in Findings 59 and 60, and given the facts set forth in Findings 64 through 69, material contributions to the decreased water supply available to the Rangen hatchery facilities caused by depletions to the ESPA resulting from diversion and use of ground water under water rights that are junior in priority to Rangen's water right no. 36-02551 cause material injury. The maximum extent of the material injury can not be more than the decrease in the quantity of water available at the source for water right no. 36-02551, which is currently estimated to be 16,000 acre feet per year (see Finding 62). The extent of material injury is dependent on the factors described in Findings 49 and 50, which can vary significantly from year to year. If material injury to Rangen's water right no. 36-02551 occurs beyond 2004, the amount of material injury must be determined on an annual basis, and will be set forth in subsequent order(s) as necessary.

Effects of Curtailing Ground Water Diversions Under Rights Junior to Water Right No. 36-02551

71. The Department's existing ground water model was used to simulate the effects of curtailing all diversions and use of ground water for agricultural irrigation purposes in Water

Districts No. 120 and No. 130, pursuant to water rights that are junior in priority to Rangen's water right no. 36-02551, which has a priority date of July 13, 1962.

72. Only ground water diverted and used for agricultural irrigation purposes was included in the modeled curtailment simulation. Disregarding the priority dates of ground water rights from the ESPA, the Department has determined that agricultural irrigation using ground water results in 93.5 percent of the total consumptive use causing depletions to the ESPA that contributes to reduced reach gains (or spring discharges) in the Thousand Springs area and reaches of the Snake River that are hydraulically connected to the ESPA. Uses pursuant to all ground water rights from the ESPA for commercial, municipal, domestic, and other purposes besides agricultural irrigation have been determined by the Department to cause depletions to the ESPA of 1.5 percent, 4 percent, 0.5 percent, and 0.5 percent of the total depletions to the ESPA, respectively.

73. The results from the simulated curtailment described in Findings 71 and 72 showed no significant simulated increases in reach gains (spring discharges) in the Thousand Springs area from simulated complete curtailment of ground water rights for agricultural irrigation junior in priority to July 13, 1962, in Water District No. 120 at any time period following simulated curtailment. Therefore, depletions to the ESPA from the diversion and use of ground water in Water District No. 120 under water rights junior in priority to July 13, 1962, do not cause material injury to Rangen's water right no. 36-02551.

74. The results from the simulated curtailment described in Findings 71 and 72 showed an increase in reach gains (spring discharges) in the Thousand Springs area of 26,500 acre feet after one year of simulated complete curtailment of ground water rights for agricultural irrigation junior in priority to July 13, 1962, in Water District No. 130.

75. The 26,500 acre feet of increased reach gain (spring discharges) that resulted from simulated curtailment of ground water diversion and use under water rights for agricultural irrigation in Water District No. 130 junior in priority to Rangen's water right no. 36-02551 accrued to the reach of the modeled Thousand Springs area as a whole. The Department's existing ground water model for the ESPA cannot provide accurate simulations of the effects on individual springs in the Thousand Springs area from curtailing individual ground water rights or groups of ground water rights.

76. The Department's existing ground water model for the ESPA provides the best and most technically sound information that is currently available concerning the effects of ground water depletions on spring discharges in the Thousand Springs area. The new ground water model resulting from the reformulation and recalibration described in Finding 4 is expected to provide more detailed information concerning the effects of ground water depletions on spring discharges in the Thousand Springs area. The new ground water model is not expected to be ready for use in making water management decisions until the latter part of 2004.

77. There currently is no other technical basis as accurate as the simulations from the Department's existing ground water model for the ESPA that could be used to determine the

amount of reductions in spring discharges in the Thousand Springs area caused by depletions from the diversion and use of ground water under junior priority rights that result in material injury to senior priority rights to use water from sources provided by such spring discharges. There also is not currently a sufficient basis to determine that the amount of replacement water or mitigation required to offset such depletions in lieu of curtailment is different than the 26,500 acre feet in increased reach gains (spring discharges) that is simulated to result after one year of curtailing water rights for agricultural irrigation in Water District No. 130 that are junior to the July 13, 1962, priority date of Rangen's water right no. 36-02551.

78. The amount of replacement water or other mitigation required that could offset depletions from continued out-of-priority diversion and use of ground water is subject to change and may increase or decrease after 2004, depending on hydrologic conditions, the factors described in Findings 49 and 50, and other additional information that will become available, including simulations using the new ground water model resulting from the reformulation and recalibration described in Finding 4.

79. Assuming a crop mix based on averages for Gooding, Jerome, and Minidoka Counties weighted by area for the years 2000 through 2002 from the National Agricultural Statistics Service, U. S. Department of Agriculture, 80 percent of the consumptive crop irrigation use occurs for irrigation through August 14 for years similar to 2002, using the reference consumptive use measured at the Agrimet Station in Kimberly, Idaho.

79. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of

> the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the respective priority of the rights subject to applicable Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. See Idaho Code § 42-607.

4. The Department adopted Conjunctive Management Rules, effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

5. Rule 10 of the Conjunctive Management Rules contains the following pertinent definitions:

> **01. Area Having a Common Ground Water Supply**. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. IDAPA 37.03.11.010.01.
>
> **03. Conjunctive Management**. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply. IDAPA 37.03.11.010.03.
>
> **04. Delivery Call**. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. IDAPA 37.03.11.010.04.

6. Rule 20 of the Conjunctive Management Rules contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

> **01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights**. The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. IDAPA 37.03.11.020.01.

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. IDAPA 37.03.11.020.02.

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. IDAPA 37.03.11.020.04.

7. Rule 40 of the Conjunctive Management Rules sets forth the following procedures to be followed for responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district. IDAPA 37.03.11.040.

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year period to lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in section 42-604, Idaho Code, and under the following procedures:

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions of the Watermaster under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

. . . .

8. Rule 42 of the Conjunctive Management Rules sets forth the factors the Director may consider in determining material injury and the reasonableness of water diversions:

01. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available in the source from which the water right is diverted.

b. The effort or expense of the holder of the water right to divert water from the source.

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

9. The Director created Water Districts No. 130 and No. 120 on February 19, 2002, and extended the boundaries of Water Districts No. 130 and No. 120 on January 8, 2003, and January 22, 2004, respectively, to provide for the administration of ground water rights in the area overlying the ESPA in the Thousand Springs area and the American Falls area, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

10. The Director has appointed watermasters for Water Districts No. 120 and No. 130 to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director. The Director has given specific directions to the watermasters for Water Districts No. 120 and No. 130 to curtail illegal diversions, measure and report diversions, and curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

11. The two letters received on September 23 and October 10, 2003, by the Director from J. Dee May, representing Rangen, Inc., seeking the administration of "all water right diversions junior to [Rangen's] that are interfering with and impacting [Rangen's] water rights" are either delivery calls as defined by Rule 10.04 of the Conjunctive Management Rules against junior priority ground water rights or demands for the administration of surface water rights pursuant to Idaho Code § 42-607.

12. Rule 40 of the Conjunctive Management Rules applies to the delivery calls made by Rangen against the holders of junior priority ground water rights, but not surface water rights, in Water Districts No. 36A, No. 120, and No. 130.

13. There are no surface water rights in Water Districts No. 36A or No. 130 that are junior in priority to Rangen's water right no. 36-02551 and that are diverted from the same surface water source as right no. 36-02551. There are also no surface water rights in Water District No. 120.

14. There are no ground water rights in Water District No. 36A that are diverted from a source that is hydraulically connected to the source for water right no. 36-02551.

15. Rules 40 and 42 of the Conjunctive Management Rules require the Director to make determinations regarding "material injury" and the "reasonableness of water diversions" in responding to a delivery call against junior priority ground water rights in Water Districts No. 120 and No. 130.

16. The reductions in the quantity of water discharging from springs in the Thousand Springs area attributable to depletions to the ESPA from the diversion and use of ground water in Water Districts No. 120 and No. 130 do not automatically constitute material injury to surface water rights diverting from springs or dependent on sources formed by springs even when the diversion and use of ground water occur under water rights that are junior in priority to such surface water rights. Whether reductions in the quantity of water discharging from springs caused by the diversion and use of ground water under junior priority rights in Water Districts No. 120 and No. 130 constitute material injury is dependent on the factors enumerated in Rule 42 of the Conjunctive Management Rules.

17. Based on simulations using the Department's existing ground water model simulating curtailment of all ground water rights for agricultural irrigation in Water District No. 120 junior in priority to July 13, 1962, there would be no material increase in reach gains (spring discharges) in the Thousand Springs area from such curtailment. Therefore, there are no material contributions to the decreased water supply caused by depletions to the ESPA resulting from diversion and use of ground water in Water District No. 120 under water rights that are junior in priority to water right no. 36-02551, and there is no material injury to water right no. 36-02551 from the diversion and use of ground water for agricultural irrigation under such rights

18. Given the magnitude of the decrease in the spring-dependent water supply currently available to the Rangen hatchery facilities, contributions to the decreased water supply caused by depletions to the ESPA resulting from diversion and use of ground water under water rights in Water District No. 130 that are junior in priority to Rangen's water right no. 36-02551 cause material injury.

19. Rule 42.02 of the Conjunctive Management Rules provides that the holder of a senior priority surface water right is prevented from making a delivery call for curtailment of pumping of any well under a junior priority ground water right if the ground water right is covered by an approved and effectively operating mitigation plan. IDAPA 37.03.11.042.02.

20. There currently is no approved and effectively operating mitigation plan in place to mitigate for reductions in discharges from the springs supplying Rangen's water right no. 36-02551 caused by depletions to the ESPA resulting from diversion and use of ground water under rights in Water District No. 130 that are junior to water right no. 36-02551. Therefore, the delivery call by Rangen for distribution of water to water right no. 36-02551 for use at the Rangen hatchery facilities is recognized.

21. The Department's existing ground water model for the ESPA cannot provide accurate simulations of the effects on individual springs in the Thousand Springs area from curtailing individual ground water rights or groups of ground water rights. There currently is no reliable method or basis for determining the effects of diversion and use of ground water under an individual water right or groups of water rights on individual springs in the Thousand Springs area.

22. Based on simulations using the Department's existing ground water model simulating curtailment of all ground water rights for agricultural irrigation in Water District No. 130 junior in priority to July 13, 1962, reach gains (spring discharges) in the Thousand Springs area would increase by a total of 26,500 acre feet after one year of simulated complete curtailment of such rights in Water District No. 130. To the extent that 26,500 acre feet of replacement water is supplied to increase spring discharges in the Thousand Springs area in 2004, or is used to obtain comparable results, no material injury could be determined to occur to water right no. 36-02551 in 2004 as a result of diversion and use of ground water for agricultural irrigation in Water District No. 130 under rights junior in priority to July 13, 1962.

23. Ground water districts created pursuant to Idaho Code §§ 42-5202 et seq. are specifically authorized by Idaho Code § 42-5224(11) to "... implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district."

24. Rule 40.02.b of the Conjunctive Management Rules requires the watermaster of Water District No. 130 to "regulate the diversions and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director." IDAPA 37.03.11.040.02.b.

ORDER

In response to the water delivery call made by Rangen, Inc., and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director orders as follows:

IT IS, THEREFORE, HEREBY ORDERED that based on the information currently available to the Director, the watermaster for Water District No. 130 is directed to issue written notices within five (5) days of the date of the original Order in this matter (February 25, 2004) to all holders of consumptive ground water rights in Water District No. 130 that are junior in priority to July 13, 1962, including consumptive ground water rights for agricultural, commercial, industrial, and municipal or other uses. The written notices are to advise the holders of such consumptive ground water rights of this order and to instruct the holders of such rights that they are not to divert ground water pursuant to their rights beginning April 1, 2004, in accordance with the provisions of Idaho Code §§ 42-602 and 42-607, applicable rules adopted pursuant to Idaho Code § 42-603, and the directions and orders of the Director, unless sufficient replacement water is provided as set forth herein.

IT IS FURTHER ORDERED that holders of consumptive ground water rights in Water District No. 130 that are junior in priority to July 13, 1962, who are members of the North Snake Ground Water District or the Magic Valley Ground Water District (the "Ground Water Districts") will be allowed to divert or continue to divert ground water pursuant to their rights beginning on April 1, 2004, or subsequent date as herein provided, through March 31, 2005, provided the following actions are taken by the Ground Water Districts and the associated conditions are satisfied:

(1) The Ground Water Districts must submit a plan to the Director, which the Director approves by April 1, 2004, for providing Rangen with 16,000 acre feet of replacement water of suitable water quality for use by Rangen, and at a location and time usable by Rangen*.

(2) As an alternative to provision (1), the Ground Water Districts must submit a plan to the Director, which the Director approves by April 1, 2004, for providing replacement water, including surface water used in place of diversion and use of ground water, in the amount of 26,500 acre feet between April 1, 2004, and March 31, 2005, to increase spring discharges in the Thousand Springs area, or is used to obtain comparable results.

(3) In the event a plan for providing replacement water pursuant to either provision (1) or provision (2) is submitted or approved after April 1, 2004, then those rights subject to this Order will not be allowed to divert or

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* This Order is issued in response to the delivery call made by Rangen, Inc. There is at least one other order pending that may cause action in compliance provision (1) to be inadequate to avoid curtailment of some portion of consumptive ground water rights in the North Snake and Magic Valley Ground Water Districts that are junior in priority to July 13, 1962.

continue to divert ground water pursuant to their rights until such plan is approved.

(4) If a plan to provide replacement water pursuant to either provision (1) or provision (2) above is approved by the Director, monthly reports documenting the amount, location, and timing for replacement water supplied shall be submitted to the Director on the first of each month following the month in which the Director approves such plan for providing replacement water.

(5) The Director shall evaluate the monthly reports documenting the amount, location, and timing for replacement water supplied by the Ground Water Districts. If at any time the Ground Water Districts are not substantially on schedule to supply the required amount of replacement water in accordance with the plan approved by the Director, except as otherwise provided in provision (6) below, the Director shall determine, based upon the monthly reports and other current water supply information, whether the actions of the districts constitute good faith substantial compliance with the provisions of the water replacement plan. If the Director determines that the Ground Water Districts are not in substantial compliance with the plan, the Director may order the immediate curtailment of all or a portion of the consumptive ground water rights in Water District No. 130 junior in priority to July 13, 1962.

(6) If a plan to provide replacement water pursuant to either provision (1) or provision (2) above is approved by the Director, and the full quantity of replacement water is not supplied, a portion of the replacement water not to exceed 20 percent may be supplied between April 1 and August 31, 2005. Documentation that such portion of the replacement water has been secured for delivery in 2005 must be submitted to the Director by August 1, 2004, and such replacement water shall be provided in addition to any other replacement water that may be required beginning April 1, 2005, by any subsequent order of the Director. This carryover provision is for contingency purposes only and will not be approved as an initial element of a plan to provide replacement water pursuant to either provision (1) or provision (2) above.

(7) If a plan to provide replacement water pursuant to either provision (1) or provision (2) above is approved by the Director, and the monthly report required to be submitted on August 1, 2004, required in (4) above does not demonstrate that the full quantity of replacement water will be supplied prior to March 31, 2005, and the carryover provisions in (6) above are not satisfied, then all or a portion of consumptive ground water rights in Water District No. 130 junior in priority to July 13, 1962, will be curtailed by the watermaster beginning on August 15, 2004, for the remainder of the 2004 irrigation season as follows:

a. If the amount of replacement water confirmed to be supplied prior to March 31, 2005, is 80 percent or less of the amount required herein, then all consumptive ground water rights in Water District No. 130 junior in priority to July 13, 1962, will be curtailed beginning on August 15, 2004; or

b. If the amount of replacement water confirmed to be supplied prior to March 31, 2005, is more than 80 percent of the amount required herein, then the priority date for consumptive ground water rights in Water District No. 130 to be curtailed will be adjusted by the Director to a later date such that the curtailed ground water depletion equals the shortfall in the quantity of confirmed replacement water.

IT IS FURTHER ORDERED that the holder of any consumptive ground water right in Water District No. 130 that is junior in priority to July 13, 1962, who is not a member of either the North Snake Ground Water District or the Magic Valley Ground Water District, may petition the Director prior to March 15, 2004, setting forth the reasons why such right holder should not be subject to this order, or proposing a plan to offset the depletions to the ESPA caused by diversion and use of ground water under that holder's water right(s).

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Section 42-1701A(4), Idaho Code.

DATED this 10th day of March 2004.

KARL J. DREHER
Director