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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE
APPLICATION FOR TRANSFER OF
WATER RIGHT NO. 36-7072
(TRANSFER APPLICATION #79560) IN
THE NAME OF IGWA FOR NORTH
SNAKE GWD, MAGIC VALLEY GWD,
SOUTHWEST IRRIGATION DISTRICT
ON BEHALF OF THE OWNER, SEAPAC
OF IDAHO, INC.

RANGEN, INC.'S CLOSING BRIEF

Rangen, Inc., by and through its attorneys, submits the following Closing Brief in accordance with Director Spackman's verbal order on December 18, 2014.

I. INTRODUCTION

On September 12, 2014, an Application for Transfer of Water Right No. 36-7072 (Transfer Application No. 79560) in the Name of IGWA for North Snake Ground Water District, Magic

Valley Ground Water District and Southwest Irrigation District on Behalf of the Owner, SeaPac of Idaho, Inc. (“Transfer Application”) was filed to change the place of use from SeaPac to Rangen.

Rangen timely filed a Protest to the approval of the Transfer Application. A hearing on the Transfer Application was held December 18, 2014.

II. STANDARD FOR APPROVING

Section 42-222 of the Idaho Code governs transfers. In order to approve a transfer:

[t]he director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B , Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.

I.C. § 42-222(1). “Regardless of whether or not an application for transfer is protested, Section 42-222, Idaho Code, requires that the department evaluate whether there would be injury to other water rights, there would be an enlargement in use of the original right.” (Exh 5017). Accordingly, the burden is on the applicant to show non-injury and no enlargement.

III. ARGUMENT

A. THE TRANSFER FAILS TO MAINTAIN STREAM CONDITIONS.

One of the foundational tenets of the prior appropriation doctrine is that subsequent appropriators have a vested interest in the maintenance of the stream as it was at the time of their appropriation:

“A subsequent appropriator has a vested right against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation. ‘A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation.’ The subsequent appropriator is entitled to the surplus, and any attempt of the prior appropriator to make a sale of such surplus to

someone else to the injury of existing appropriators, though subsequent, is of no avail.”

Bennett v. Nourse, 22 Idaho 249, 125 P. 1038 (1912) (quoting *WIEL ON WATER RIGHTS*, 3d ed., sec. 302), citing *Baer Bros. etc. Co. v. Wilson*, 38 Colo. 101, 88 P. 265; *Handy Ditch Co. v. Loudon Irr. Canal Co.*, 27 Colo. 515, 62 P. 847; MILLS' IRRIGATION MANUAL, p. 68; see also, *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, supra, 272 P.2d at 361. *Fuller v. Mining Co.*, 12 Colo. 12, 19 P. 836; *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 P. 313; *Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 144, 53 P. 318; Kin. Irr. §§ 175, 231, 248; BLACK, POM. WATER RIGHTS, § 69; *Junkans v. Bergin*, 67 Cal. 267, 7 P. 684; *Hague v. Irrigation Co.*, 16 Utah 421, 52 P. 765, 41 L.R.A. 311; *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. (C. C.)* 49 F. 430; *Mining Co. v. Holter*, 1 Mont. 296; *Kidd v. Laird*, 15 Cal. 161 (Cal. 1860).

This does not mean that a water right may not be changed in any way. Courts recognized very early that appropriators must be allowed to make changes to the character of water rights while maintaining priority. *Fuller v. Swan River Placer Min. Co.*, 19 P. 836 (Colo. 1888), *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, 272 P.2d 629, 631 (Colo. 1954). These changes can include moving the place of diversion or even the place of use. *Id.* ***The caveat is that the relative priorities of water rights must be maintained so that junior appropriators are not injured.*** *Id.* (Emphasis added).

Once there are junior water rights present on a stream, a prior appropriator may not expand its appropriation, consumptive use, or alter the pattern of return flow if such a change impacts the availability of water to junior appropriators or expands the original appropriation. *Baer Bros. Land & Cattle Co. v. Wilson*, 88 P. 265 (Colo. 1906).

If appellant was the only appropriator, it would have the right to change the point of diversion or place of use of the water as frequently as desired, because there would be none having rights which might be affected; but, when a subsequent appropriator makes his diversion, he acts under the belief that the water appropriated by his senior will continue to be used as it was at the time of the making of the appropriation of the junior. So a subsequent appropriator has a vested right as against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation.

Id. at 265. There is no requirement that the expansion or change in pattern of return flow cause any particular junior appropriator to suffer a shortage of water as a direct result of the transfer. There is not even a requirement that the stream be over appropriated. The issue is maintenance of the relative priorities between appropriations of water. The focus of the analysis is on the historic original use of the water by the senior and whether that has changed. Even if the change would not presently cause an actual shortage of water for any particular junior, the change from the original use permanently alters the relative priorities of water rights on the stream. In a future shortage, a junior that might not otherwise have been out-of-priority may be curtailed.

The injury is the expansion of use or change of historic patterns of return flows. This is why the inquiry is directed to the “enlargement in use of the **original right**.” *See*, Idaho Code § 42-222(1) (emphasis added). The historical consumptive use and return flows upon which the water right was obtained are what subsequent appropriations are entitled to rely upon. Even if the water right were later transferred again, the appropriate inquiry would be whether the later transfer changed the impact from use of the original right. Expansion of consumption or other reduction of the quantity of water which returns to the stream under a senior water right effectively changes the relative priorities on the stream. That change in relative priority is what causes the injury to junior appropriators. If the proposed change would expand the use of the water and yet not cause a shortage of water downstream, the appropriate action would be to issue a new water right with a

new priority date for the new use. There is no such unappropriated water in this case and the transfer should simply be denied. (Exh 5007).

In this case, the GWDs have failed to prove that the Application protects the original stream conditions. As set forth below, all the evidence establishes that the original stream conditions are not protected by the Application, and, therefore it should be denied.

B. THE MAGIC SPRINGS PROJECT CAUSES INJURY TO OTHER WATER USERS.

The most fundamental and primary issue in this transfer is whether the GWDs' Application can be approved since the return flows to the Snake River are not protected. Well-established case law provides that return flows to a stream should be protected in transfer cases. In this transfer, the GWDs cannot show that return flows will remain the same, and therefore, injury has occurred.

Colorado has substantial case law addressing this issue. For example, in *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996), the Colorado Supreme Court explained:

One of the basic tenets of Colorado water law is that junior appropriators are entitled to maintenance of the conditions on the stream existing at the time of their respective appropriations. Equally well established is the principle that a change of water rights cannot be approved if the change will injuriously affect the vested rights of other water users. This protection extends not only to surface water users but to users of all water tributary to a natural stream, including appropriators of tributary underground water. Furthermore, this protection extends to junior appropriators' rights in return flows: **It has been fundamental law in this state that junior appropriators have rights in return flow to the extent that they may not be injured by a change in the place of use of the irrigation water which provides that return flow.**

Id. at 80. (Emphasis added).

Out of this statement of law comes the proposition that in order to approve a transfer, the applicant must prove that: (1) the consumptive use of the water is the same; and (2) that the amount

of return flows remains the same.¹ These principles were discussed in *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954), an oft cited case under Colorado water law. In that case, the City of Golden purchased an irrigation right for which the City sought to change the point of diversion and purpose of use. *Id.* at 630. The original right had been conveyed out of Clear Creek from the Swadley Ditch. The transfer sought to move the point of diversion from the Swadley Ditch to the Clear Creek Ditch, a point five miles upstream from the original point of diversion. The users of the Swadley Ditch protested the transfer, arguing among other things that the “petitioner had not sustained its burden of proof by a sufficient showing that the vested rights of protestants would not be injuriously affected by said change; [and] that the trial court had in effect attempted to place said burden upon the protestants to prove injury.” *Id.* at 631.

The Colorado Supreme Court reversed the trial court’s decision to grant the application, finding that there was insufficient evidence in the record to sustain the decision. There were two problems with the trial court’s decision. The first problem was that there was insufficient evidence in the record as to whether the use of water under the original right was “excessive.” Specifically, the court noted that “[t]he extent of needed use in original location is the criterion in considering change of point of diversion.” *Id.* 635.

The second problem with the transfer was that there was insufficient evidence in the record on “return flows.” The Court held:

In addition to the duty of water in change of point of diversion cases, **due consideration also must be [] had with the amount of return flow, both before**

¹ Many of these principles have been codified in statutes. However, these principles predate statutory adoption and have been recognized under constitutional provisions similar or identical to Idaho’s Constitutional Provisions, Art. XV, Sections 1 through 5, or the principles have their origination in common law. See e.g., *Kidd v. Laird*, 15 Cal. 161 (Cal. 1860).

and after the change, that the stream may remain as it was, and not suffer depletion, nor yet that the user at the point of changed location be obliged to add thereto. The first is not permissible and the latter not required. Where it appears that the change sought to be made will result in depletion to the source of supply and result in injury to junior appropriators therefrom, the decree should contain such conditions as are proper to counteract the loss, and should be denied only in such instances as where it is impossible to impose reasonable conditions to effectuate this purpose.

Id. (Citations omitted). (Emphasis added).

In this case, the GWDs have not established their burden of proof with respect to the consumptive use elements of the original right versus the transferred right, and they have not shown that the return flow to the Snake River is the same. As to the return flow, the original right is used in SeaPac's Magic Springs facility and immediately returned to the Snake River. Under the proposed transfer the water will flow through Rangen's Research Hatchery and then down Billingsley Creek. Both Frank Erwin and Cindy Yenter, Department witnesses, opined or testified that the Magic Springs water, if the transfer is granted, will not return to the Snake River. (Tr. p. 24, l. 16-18; p. 26, l. 14-18) (Exh 4014). Frank Erwin also testified that it would be impossible to administer the transfer in such a way to ensure that the Magic Springs water would ever return to the Snake River. (Tr. p. 24, l. 19 – p. 26, l. 13).

Scott King, the GWDs' engineering expert who testified, did not testify that the same amount of water would enter the Snake River before and after the transfer. To the contrary, King testified that he agreed with Frank Erwin's testimony and that it was unlikely that any water delivered to the head of Billingsley Creek would return to the Snake River:

Q. And you heard his testimony that none of it would make it back to the Snake River? Do you understand that?

A. I think Mr. Erwin described parts of the years it would make it to the Snake River and parts of the years it wouldn't. And it would depend on the quantity of water, and perhaps not all of it would make it back to the Snake River.

Q. Okay. I don't want to fight with you. He said most likely that most of it, if not all of it, would not make it back to the Snake River. That was his testimony; correct?

A. Yes, during the irrigation season.

Q. Okay. And you don't have any specific facts in your quiver that you could disagree with Mr. Erwin's testimony; correct?

A. No, I do not.

Q. So Mr. Erwin's testimony is in fact correct; correct?

A. Yes.

(Tr. p. 93, l. 4-23).

Sophia Sigstedt, another engineering expert for the GWDs who practices in Colorado and is obviously familiar with the case law discussed above, recognized that maintaining the return flow to the Snake River is essential for a transfer. She testified:

Q. In terms of looking at how this water would actually be used, the only thing that you looked at was evaporation?

A. That's the only thing that matters in terms of the transfer from the way that I look at it, *because what we're trying to make sure that we don't change is how this water enters the Snake River, so before it entered directly at Magic Springs.*

(Tr. p. 165, l. 19 – p. 166, l. 1) (Emphasis added). In response to whether she disagreed with Frank Erwin's testimony, the best opinion she could give was, "I honestly do a little – I do disagree with it in sum." (Tr. p. 165, l. 11-12).

Even her evaporation analysis was flawed. She merely calculated the evaporation loss of the 10 cfs of water while located in Billingsley Creek. She failed to consider the many diversions

from Billingsley Creek, and she failed to consider all the other parts of a consumptive use analysis as set forth under Idaho Code § 42-202B(1). Under that Section, “consumptive use” is defined as follows: “‘Consumptive use’ means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” By only looking at the evaporation of water in Billingsley Creek, Ms. Sigstedt did not even perform a correct analysis of “consumptive use” under Idaho law. As such, her testimony should be disregarded.

In order to attempt to address the injury caused by the proposed transfer, Ms. Sigstedt attempted to provide evidence that the GWDs have previously mitigated for the transfer through recharge. There are legal and factual problems with this position. As a matter of law, the type of recharge credit envisioned by the GWDs was rejected by Judge Wildman in his decision on the First Mitigation Plan because there is no guarantee that such recharge activities will continue. *Rangen v. IDWR et al.*, CV-2014-2446, *Memorandum Decision and Order on Petition for Judicial Review*. The proposed mitigation is also not the type of “mitigation” envisioned by the Department in its own Transfer Memo. *See* Exh. 5017, pp. 24-26.

Additionally, as a matter of fact, the recharge activities do not, in any way, mitigate for the continued damage caused by the GWDs' pumping in the ESPA. In calculating the recharge credit, Ms. Sigstedt failed to calculate the net effect of continued groundwater pumping:

Q. Okay. And what we are addressing is we've got a situation where we've got groundwater pumping that is occurring -- okay? -- and that is impacting all of these springs that you are calculating reach gains for.

A. Right.

Q. And it's reducing each of those springs.

A. Right.

Q. And you accept that?

A. I accept that, but I –

Q. And you accept that it's reducing those springs; correct?

A. Yes.

Q. Okay. There's a reduction there?

A. That's correct.

Q. And there has been a little bit of mitigation that has occurred, and that reduces the impact to those springs by a certain amount; correct?

A. That's correct.

Q. Okay. And so what you're looking at in your calculation is not the net effect of what that pumping is, but you're looking at just the gains that are there; correct?

A. That's right.

(Tr. p. 171, l. 9-25; p. 172, l. 1-7).

It seems entirely reasonable that if the GWDs are evaluating credits, they should also be required to evaluate the debits on the other side of the accounting equation. Contrary to the methodology employed by Ms. Sigstedt, Dr. Brockway performed a full accounting of credits and debits (i.e., continued groundwater pumping). Dr. Brockway testified the effects of groundwater pumping on the individual streams far exceeds the benefits of recharge:

A. We ran the ESPAM-2.1 model for – and looked at the simulated steady-state benefit to the six model cells that contribute spring water to Billingsley Creek using the 2013 IGWA mitigation efforts as outlined by IDWR, and the benefits to those six model cells, there's about 2.83 cfs.

Q. Okay.

A. Then if you -- using the same model and the same six model cells, if you look at the impact of junior groundwater pumping with the -- with the Great Rift trim line in there, the impact is 33.3 cfs to the Rangen model cell.

(Tr. p. 213, l. 18-28; p. 214, l. 1-4). *See also*, Exh. 5019.

To summarize, the GWDs, based on the testimony of their two expert witnesses, have failed to satisfy their burden of showing non-injury by the transfer. All of the Department and Rangen witnesses, on the other hand, affirmatively stated and showed, based on the actual and historical use of water in Billingsley Creek, that 10 cfs of water transferred to the head of Billingsley Creek under this transfer would not make it to the Snake River.

Furthermore, based on the testimony of Frank Erwin and Charles Brockway, there is no way to provide any type of condition to transfer which would guarantee that the 10 cfs of water would ever make it to the Snake River.

Q. Okay. So just so I understand your testimony, Frank, I think you previously told me that it's not possible that that 10 cfs of water would return to the Snake River during the irrigation season?

A. I don't believe it would, no.

(Tr. p. 26, l. 14-18). *See also*, Brockway testimony. (Tr. pgs. 190-191).

Mr. Erwin also testified that because of the lack of adequate measuring devices, the inability to provide 24/7 surveillance, and the inability to calculate conveyance loss from all of the Billingsley Creek diversions, it would be currently "impossible" to make sure the 10 cfs of water delivered to Rangen would ever make its way back to the Snake River. (Tr. pgs. 25-26). Because it would be impossible to currently deliver the 10 cfs of water to the Snake River, this transfer should be denied because return flows to the Snake River cannot be guaranteed.

C. THE TRANSFER RESULTS IN AN ENLARGEMENT OF THE ORIGINAL RIGHT.

Idaho Code § 42-222(1) provides that transfers may be allowed if the transfer “does not constitute an enlargement in use of the original right.” As previously discussed, based on the second use of water after it leaves the Rangen facility and before the water enters the Snake River, the evidence is that the water will be consumed by other users in the Billingsley Creek system. Cindy Yenter, the Wastewatermaster for Water District 130, in opposing the Application stated in her recommendation: “it is not unreasonable to predict that 10 cfs injected at the head of Billingsley Creek will not be returned to the Snake River, but will be consumed by downstream creek diversions. Consequently this proposal is changing a non-consumptive use of water to one which is ultimately consumptive to the original source and tributary.” (Exh. 4014).

Based on Ms. Yenter's recommendation, the Department considers enlargement to be defined as whether the transfer is “consumptive to the original source and tributary.” This definition of “enlargement” is consistent with all the authority in Idaho and other jurisdictions which state that the return flows to a stream or river must be protected. *City of Thornton v. Bijou Irrigation Co*, supra; *Farmers Highline Canal & Reservoir, Co. v. City of Golden*, supra. In this case, as demonstrated by the testimony of Frank Erwin and Dr. Brockway, the 10 cfs of water under the original water right was wholly non-consumptive because all of the water from Magic Springs made it to the Snake River.

The right as transferred to the head of Billingsley Creek is wholly, or mostly, consumptive because little, if any, of the water makes it back to the Snake River. Because the water right is consumptive, it means the original right has been enlarged. Even if the water was not consumed, the transfer alters the conditions of the stream flow in the Snake River as to junior appropriators

and, therefore, violates the juniors' rights to stream conditions which existed at the time of those original appropriations. At the very least, the GWDs have not met their burden of proving that the transfer does not alter the stream conditions with respect to the rights of junior appropriators. Because enlargements are prohibited, there is no condition which might allow the Director to approve the transfer.

D. THE PROPOSED TRANSFER SHOULD NOT BE APPROVED BECAUSE IT INJURES TRUST WATER RIGHTS.

The Magic Springs water was originally appropriated in 1969 to raise fish at the Magic Springs facility. (Exh. 4000, p. 21). Fish propagation does not consumptively use any water. The water simply flows through the Magic Springs facility and is discharged directly into the Snake River. Since the time that the Magic Springs water was appropriated, subsequent appropriators downstream have appropriated the water in the Snake River including the return flow from the Magic Springs rights for a variety of beneficial uses. Additionally, in October 1984, Idaho Power Company and the State of Idaho entered into the Swan Falls Agreement. (attached hereto as Appendix A). Among other things, the Agreement provided that Idaho Power's hydropower water rights are subordinated to upstream water rights in existence in October 1984. *See*, Appendix A, 7(D). The Agreement together with implementing legislation also provided that Idaho Power's water rights in excess of a seasonal minimum stream flows and less than the decreed quantity of Idaho Power's water rights be placed in a trust. *See*, Appendix A, 7(A); Idaho Code § 42-203B. The water rights are "held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho;" Idaho Code § 42-203B. The Idaho Power water rights held in trust are commonly referred to as "Trust Water."

Trust Water is subject to appropriation for future upstream beneficial use. Water rights obtained for the use of the Trust Water occurring after October 1984 are commonly referred to as “Trust Water Rights.” Idaho Power’s water rights are subordinated to such Trust Water Rights; however, if flows are reduced below the seasonal minimum stream flows, Trust Water Rights are subject to curtailment. Water Rights in existence in October 1984 are not subject to curtailment based upon the seasonal minimum stream flows. Appendix A, 7(D).

The relative priorities of the various water rights in this system are incredibly complex. This transfer would affect those relative priorities. As discussed above, each of the water rights holders has a vested interest in the stream conditions existing at the time of their respective appropriations. The effect of this transfer would be to eliminate approximately 10 cfs of return flow that has historically flowed into the Snake River from Magic Springs. Because the Magic Springs water right has a priority date of 1969, this would have the same practical effect as granting a new fully consumptive water right with a retroactive 1969 priority date. Each of the users in this system whose rights are either junior or subordinated to such a new water right are injured by such an insertion. This right is senior to each of the Trust Water Rights and reduces the quantity of Trust Water available for subsequent appropriation. This additional water right would also not be subject to the seasonal minimum stream flows at the Murphy Gage. The retroactive insertion of a new fully consumptive 1969 priority water right injures these subsequent appropriators regardless of whether the use of that water right would directly lead to a reduction in flow of water below the level of seasonal minimum stream flows.

E. THE TRANSFER SHOULD NOT BE APPROVED BECAUSE IT IS SPECULATIVE.

Rangen argued previously in the hearing on the GWDs' attempt to appropriate the talus slope spring water at the Research Hatchery (Permit No. 36-16976 hereinafter "Permit Case") that the permit should not be granted because it was speculative. Some of those same principles apply to transfer cases such as this one.

The "anti-speculation" doctrine previously cited by Rangen in the Permit Case is equally applicable to this proposed transfer. *High Plains A&M, LLC v. Southeastern Colorado Conservancy District*, 120 P.3d 710 (Colo. 2005). The anti-speculation doctrine in transfer cases is invoked to make sure that a transferred water right is "sufficiently described actual beneficial use to be made at an identified location or locations under the change decree." *Id.* at 721. The notion that each water right needs an identified beneficial use and place of use is also consistent with Idaho law in that for every water right, there must be an actual diversion and application of water to a beneficial use. *United States v. Pioneer Irrigation Water District*, 144 Idaho 106, 113, 157 P.3d 600 (2007).

In this case, the right is claimed for "fish propagation/mitigation." (Exh. 4000). Cindy Yenter recommended that the transfer be disallowed because the term "mitigation" was too speculative to determine. (Exh. 4014). Mr. King, the GWDs' water right specialist who worked for the Department for 15 years, could not characterize what this use or uses mean. "I am not sure if it is one or two uses." (Tr. p. 104, l. 21-22). Contrary to his testimony in the permit case, Mr. King testified that "mitigation is always associated with some other use."

Q. Okay. Where is the place of use in your mind, Mr. King, for the -- now, you understand that there are two -- well, you tell me, because I don't understand it. The purpose of use is described as fish propagation slash mitigation; correct?

A. Correct.

Q. Is that one or two uses?

A. Mitigation is an interesting concept in a use, in that mitigation is generally associated with some other use. Our other use here is fish propagation. IGWA is proposing a mitigation use to be delivered to Rangen for fish propagation.

Q. That's interesting. So your testimony is that mitigation is usually associated with some other use like mitigation for fish propagation; correct?

A. Correct.

(Tr. p. 102-103).

Just like the Permit Case, no one knows what the term “mitigation” means. Rangen previously argued in the permit case that the use “mitigation” cannot stand alone, because the term is too speculative. Mr. King, now in this case, evidently agrees with that analysis. The fact remains that the terms “fish propagation/mitigation” is too speculative. If a purpose of use is subject to conflicting interpretations as claimed, it is simply too speculative for the Director to allow. If the GWDs intend that the “mitigation” right may be used in other places to satisfy other users in Billingsley Creek for future mitigation responsibilities, this right as claimed is too speculative to allow.

Furthermore, the GWDs have not shown sufficient rights to the place where the water is to be transferred to, namely, the Rangen facility. (Exh. 5017) (Transfer Memo, p. 18 – “Applicant Does not Own the Place of Use”). Just like the Permit Case, the GWDs must show that they are authorized to use the place of use. To date, the GWDs have only sent a Letter of Intent to File Eminent Domain, which is not sufficient. *See, Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974), *citing Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931). *See also, Joyce Livestock v. U.S.A.*, 144 Idaho 1, 18, 156 P.3d 502, (2007); *Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348 (1984). Also, the GWDs lack the legal authority to condemn under I.C. §42-5224(13)

because the authority to condemn is not broad enough to condemn Rangen's property for the purposes they seek.²

F. THE PROPOSED TRANSFER IS NOT CONSISTENT WITH THE PUBLIC'S INTERESTS.

Minimum stream flows are guaranteed by the State of Idaho to Idaho Power Company through the Swan Falls Agreement (*see Clear Springs v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) for a discussion of the Swan Falls Agreement). The Department of Water Resources recognizes that it has an obligation to manage the ESPA-Snake River system to ensure compliance with the Swan Falls Agreement and avoid injuring trust water rights. *See IDWR Actions Related to the Swan Falls Agreement*, presented by Brian Patton on August 6, 2013 to the Legislative Natural Resources Interim Committee (attached hereto as Appendix B). The Fourth Mitigation Plan does nothing to address the injury caused by junior-priority ground water pumping within the ESPA. The Fourth Mitigation Plan runs afoul of the Department's obligation to manage and protect the ESPA and, is, therefore, contrary to public interests and the conservation of resources.

² Idaho's condemnation statutes specify the three distinct property interests which may be obtained by eminent domain. These three interests are as follows:

7-702. ESTATES SUBJECT TO TAKING. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

The Magic Springs Project does not add any new water to the Hagerman Valley and does not reduce ground water pumping. In fact, the Plan, if actually implemented, further exacerbates the water shortage because it takes water from an area that is already short and puts it in a Snake River tributary where it will be consumed before it reaches the river. Rather than mitigating for the impact of ground water pumping, the Fourth Mitigation Plan compounds that impact and would allow continued mining of the ESPA. The Director may not disregard the injury that continues to be done to the ESPA and allow junior ground water pumping to continue under such a plan.

If unappropriated water were available at Magic Springs and IGWA applied for a new water right to pump water from Magic Springs to the head of Billingsley Creek for the purpose of raising fish and irrigating, such a water right would almost certainly be denied. There is currently a moratorium on such new consumptive rights. *April 30, 1993 Amended Moratorium Order*. If the Department were to approve such a new water right, it would require mitigation for the impact of the new water right.

Because the Fourth Mitigation Plan is inconsistent with public interests and the conservation of resources and allows ground water pumping in the ESPA to continue at a rate that exceeds natural recharge, the Director should deny the proposed transfer application.

G. THE DIRECTOR SHOULD NOT CONDITION THE PERMIT ON “SHEPHERDING” THE WATER TO THE SNAKE RIVER.

Every person who testified at the hearing recognized that if water is pumped from Magic Springs to the Research Hatchery it will not make its way to the Snake River. The water will be consumed by irrigators on Billingsley Creek. *See*, Section B and C, *infra*. Recognizing this issue, the GWDs implicitly argued that the Director could address the problem by ordering the watermaster of District 36A to “shepherd” the water down Billingsley Creek to ensure that it was

not used and was put back in the Snake River. The GWDs' argument is factually and legally flawed.

To begin with, there are serious practical problems with trying to measure the water flows of Billingsley Creek to ensure that the water from Magic Springs actually makes its way to the Snake River. The GWDs contend that shepherding the water is just a matter of improving some diversion structures and adding some measuring devices on Billingsley Creek, but the problem is actually much more complex. When asked if improvements to diversion structures or measuring devices could make "shepherding" the water more feasible, Mr. Erwin explained:

Q. But there could be improvements made to the diversion structures or measuring devices that would make that more feasible?

A. I would -- I would say this much in answer to that question: As far as the diversions away from the stream, we have, I think at least, good control and good measuring devices. I think the problem would be to put gauging stations along the creek, on the creek so that we could determine how much water we were losing or gaining in a particular reach so that we had some idea of how much of that 10 got to that next gauging station.

Right now as far as the deliveries, the majority of the main diversions on Billingsley Creek are all at the very end of it. The Curren Ditch is the only one that diverts towards the upper end of the natural streambed.

And because of that, the Department or the District and the watermaster, I, we have one gauging station on the creek that is above those downstream diversions. And that is where I determine how much water I have to distribute to those approximate 11 downstream diversions, and that's how I determine who's going to end up in priority and who's not.

The thing that -- other thing that makes that complicated is, for example, a lot of the rotations that we've done in the past. That is done just so that there are -- or some of the downstream fish propagation people can stay in business, otherwise all the water in the creek would be consumed in the neighborhood of around 1904 to 1906 in priority. So if everybody took their full allotment during the heat of the summer away from the stream and we didn't rotate it in a little bit, then those fish people would realistically be out of business.

The other aspect you have to understand or realize on the creek itself is from four o'clock in the afternoon in July and August until four o'clock in the morning there can be as much as a 20 cfs variance in the end of the creek. And in other words, what I'm telling you is there are times if you go there at four o'clock in the morning, you'll see 10 or 15 running into the river. If you go there at four o'clock in the afternoon, and it will be dry. So it's very difficult for those folks there to be able to stay in business.

As a footnote, one of the companies there keeps a diesel-powered pump for recirculation when the creek does go dry. And it does. And they do use the pump. So like I said, to figure out what to do with this 10 is going to be really difficult. I just don't know how I can do that.

Q. If you had another gauging station on Billingsley Creek down lower, would that enable you to do that?

A. I think realistically -- and I haven't looked at it from that perspective, but realistically I'm going to say we would almost need a gauging station below every one of those 11 diversions, otherwise I wouldn't have any idea how much water I had left for each one of them. And I -- honestly at this point I don't know how to accomplish that --

Q. Okay.

A. -- physically on the ground.

(Tr., p. 27, l. 18 – p. 30, l. 6).

Even if the water could be “shepherded” to the Snake River, the GWDs miss the point that doing so would ignore the prior appropriation doctrine because the water will be in the stream, but the Billingsley Creek users would not be able to use it. Even Scott King recognized that shepherding the water to the Snake River would require the watermaster to ignore the prior appropriation doctrine. (Tr., p. 133, l. 4-15).

Mr. Erwin explained the problems the “shepherding” concept would create from a practical standpoint:

I guess the first problem I'd have if it's running by an irrigation diversion and they're short, they're going to want to take it. So it's going to be very difficult to try to keep that water within the Billingsley Creek proper.

(Tr., p. 16, l. 21-25).

Mr. Erwin further explained:

A. I'd put it this way: If I had enough deputies to keep their eye on them, maybe. But like I said, if there's a farmer there irrigating, there's water going by and he can't get his pump on, I think you'll have a hard time keeping that headgate closed down. I'm not saying legally I couldn't do it, but that's -- that's going to be difficult and live in the Valley. You may have to find another watermaster. I don't know.

Q. Are you saying that the water users may make it difficult for you to do that because they may be turning their headgates on at times when they're out of priority?

A. I wouldn't say they'd be out of priority. I would say that that water going by to them is in the natural streambed, and as far as they're concerned, it's there for prior appropriation. I don't know how you're going to educate all those guys that that might not be their water. That's going to be a difficult task.

(Tr., p. 32, l.12- p. 33, l 6)

When counsel for the GWDs pressed Mr. Erwin as to why “shepherding” the water would be factually impossible, Mr. Erwin explained:

I think the part I find troubling is, if I'm understanding your testimony correctly, you're saying that you're unable to assure administration by priority because people may open their headgates whether you've instructed them to do that or not?

A. I wouldn't phrase it quite that way. I think the issue here is you're talking about the 10 cubic foot per second of water that you're putting in at Rangen's into Billingsley Creek. From the aspect that I look at that and what's going to happen with it, as it goes downstream, it's going to be co-mingled with all the other spring sources that feed the creek. So to isolate that and to be able to deliver that to a specific location or a specific spot, then it -- and I'm probably out of school here, but it would be my take on it to if you wanted that water to end up in a specific spot, put it in a conduit when it leaves Rangen's and deliver it to that spot.

Q. What's the --

A. I'm not trying to shun my duties as delivering the water. But what I'm trying to say is I'm not sure that there's anyone, whether it was me as the watermaster or you or anyone else, would have the ability to deliver a set amount during a set period of time at a set location on that system. I just would like to see somebody accomplish that.

(Tr., p. 34, l. 8 – p. 35, l. 9) (emphasis added).

Finally, the concept of “shepherding” the water is legally flawed because it creates a de facto minimum stream flow in contravention of I.C. § 42-222(1) and § 42-1504. If the watermaster of District 36A is ordered to deliver a prescribed amount of water down Billingsley Creek and not allow other users to divert it, the order would, in effect, establish a minimum stream flow for Billingsley Creek. Section 42-222(1) expressly prohibits the establishment of a minimum stream flow under the public interest criterion of the laws governing transfers. It states in relevant part: “Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.” There is a set procedure for establishing a minimum stream flow. Under the law, the only entity that can establish a minimum stream flow is the Idaho Water Resource Board. *See* I.C. § 42-1504. Neither the GWDs nor IDWR on its own has the authority to establish a minimum stream flow. As such, the Director should not issue a permit conditioned on the concept that the Magic Springs water be “shepherded” to the Snake River.

IV. CONCLUSION

IGWA has failed to carry its burden of demonstrating that it satisfies the criteria set forth in I.C. §42-222, and, for the reasons set forth above, Rangen respectfully requests that the Transfer Application be denied.

DATED This 2nd day of January, 2015.

MAY, BROWNING & MAY

By  _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 2nd day of January, 2015, I caused a true and correct copy of the foregoing document to be served using the method indicated upon the following:

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