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DEPARTMENT OF
WATER RESOURCES

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

Attorneys for IGWA

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79560

IGWA's Post-Hearing Brief

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

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Application for Transfer no. 79560 (the “Application”) seeks to change the place of use of a 10 cfs portion of water right 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen hatchery on Billingsley Creek to mitigate material injury to Rangen pursuant to IDWR’s *Order Approving IGWA’s Fourth Mitigation Plan* entered October 29, 2014.¹ Under Idaho Code § 42-222, this transfer should be approved so long as:

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

As discussed below, the Application meets these requirements.

1. The transfer will not injure other rights.

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

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

¹ *Order Approving IGWA’s Fourth Mitigation Plan*, In the Matter of the Fourth Mitigation Plan Filed by the Idaho Ground Water Appropriators for the Distribution of Water to Water Right Nos. 36-02551 & 36-07694 In The Name of Rangen, Inc., IDWR Docket No. CM-MP-2014-006 (Oct. 29, 2014).

² Rangen Protest p. 2 ¶ 6 (Oct. 17, 2014).

³ King, Tr. 87:23-88:2 (rough draft).

⁴ SPF Opening Report p. 1 (Ex. 4002 p. 4).

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

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

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

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

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

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

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

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

⁶ *Evans v. Teton County*, 139 Idaho 71, 75 (2003).

⁷ *Miles v. Idaho Power Co.* 116 Idaho 635, 641 (1989).

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

⁹ Brockway, Tr. 218:10-13 (rough draft).

¹⁰ SPF Initial Report pp. 1-2 (Ex. 4002 pp. 4-5).

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

1.B.i Shepherding water through Billingsley Creek.

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

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

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

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

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

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

¹¹ SPF Initial Report pp. 1-2 (Ex. 4002 pp. 4-5).

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

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

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

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

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

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

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

¹³ King, Tr. 75:23-76:4.

¹⁴ Erwin, Tr. 24:23 (rough draft).

¹⁵ Erwin, Tr. 36:10-38:4 (rough draft).

¹⁶ Brockway, Tr. 235:6-14 (rough draft).

¹⁷ Ex. 5017 pp. 24-25.

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

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

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

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

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

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

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

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

¹⁸ AMEC Dec. 12 memo, Ex. 4008 p. 6.

¹⁹ *Id.* at 2.

²⁰ Rangen Protest p. 2 ¶ 6 (Oct. 17, 2014).

²¹ *Order Approving IGWA's Fourth Mitigation Plan*, In the Matter of the Fourth Mitigation Plan Filed by the Idaho Ground Water Appropriators for the Distribution of Water to Water Right Nos. 36-02551 & 36-07694 In The Name of Rangen, Inc., IDWR Docket No. CM-MP-2014-006 (Oct. 29, 2014).

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

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

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

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

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

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

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

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

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

²⁴ Emphasis added.

that increased consumption does not necessitate a finding of enlargement.²⁵

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

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

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

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

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

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

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

²⁵ Brockway, Tr. 231:7-223:7 (rough draft).

²⁶ Ex. 4004, p. 22.

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

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

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

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

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

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

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

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

²⁷ Idaho Code § 42-203C.

²⁸ Ex. __.

²⁹ *Id.* at 2 ¶ 8.

³⁰ *Id.* at 2 ¶ 5.

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

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

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

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

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

6. Fish propagation is an established beneficial use.

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

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

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

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

³¹ Brockway Opening Report, Ex. 4004 p. 10.

³² Amended Moratorium Order, Ex. 5007 p. 4.

³³ King, Tr. 14:14-83:9.

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

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

DATED this 1st day of January, 2015.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

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

³⁴ Amended Moratorium Order, Ex. 5007 p. 5.

CERTIFICATE OF MAILING

I certify that on this 2nd day of January, 2015, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

Original: Director, Gary Spackman Idaho Department of Water Resources P. O. Box 83720 Boise, Idaho 83720-0098 deborah.gibson@idwr.idaho.gov kimi.white@idwr.idaho.gov garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☒ Hand Delivery ☒ E-mail
Robyn Brody Brody Law Office, PLLC P. O. Box 554 Rupert, Idaho 83350-0554 robynbrody@hotmail.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail
J. Justin May May Browning & May PLLC 1419 W Washington Boise, Idaho 83702-5039 jmay@maybrowning.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail
Fritz X. Haemmerle Haemmerle Haemmerle P. O. Box 1800 Hailey, Idaho 83333-1800 fxh@haemlaw.com	☐ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail