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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
FOR DELIVERY CALL OF RANGEN,
INC.'S WATER RIGHT NOS. 36-02551
& 36-07694

Docket No. CM-DC-2011-004

RANGEN, INC.'S TRIAL BRIEF

(RANGEN, INC.)

COMES NOW, Rangen, Inc. ("Petitioner" or "Rangen"), by and through its attorneys, pursuant to the Director's Order Granting Unopposed Motion to Extend Pre-Hearing Brief Deadline dated April 18, 2013, and hereby submits the following Trial Brief.

I. BACKGROUND AND SUMMARY

Rangen filed its Petition for Delivery Call on December 13, 2011 (hereinafter "Call") because Rangen has suffered, is suffering and will suffer, material injury as a result of junior-priority ground water pumping within the Eastern Snake River Plain Aquifer ("ESPA") and the boundaries of the Eastern Snake Plain Aquifer Model 2.1 ("ESPAM 2.1"). Rangen requests that

the Department administer and distribute water in the areas encompassed by ESPAM 2.1 in accordance with the prior appropriation doctrine as required by the Idaho Constitution Art. XV, § 3, and I.C. §§ 42-101, 226, 602 and 607 and order immediate curtailment of junior-priority ground water pumping as necessary to deliver the water to which Rangen is entitled.

Rangen has two decreed water rights which are not currently being satisfied: (1) Water Right No. 36-02551 which has a priority date of July 13, 1962 and a diversion rate of 48.54 cfs (which together with its companion Water Right No. 36-15501 for 1.46 cfs grants a total flow of 50 cfs), and (2) Water Right No. 36-07694 which has a priority date of April 12, 1977 and a diversion rate of 26.0 cfs. The Partial Decrees grant Rangen the right to use that amount of water for year-round fish propagation at its Research Hatchery located near Hagerman, Idaho. The source for the water rights set forth in the Partial Decrees is “Martin-Curren Tunnel; Tributary: Billingsley Creek.”

A hearing on Rangen’s Call is scheduled to begin on May 1, 2013. Rangen requests the following at the hearing:

- The Director should use ESPAM2.1 to evaluate Rangen’s Call as recommended by the ESHMC and the IDWR staff and as set forth in the Director’s Order dated July 27, 2012.
- The Director should not impose a “trim line” because there is no rational basis for doing so.
- The Director should rule that Rangen’s water rights encompass the entire Martin-Curren Tunnel spring complex that forms the head of Billingsley Creek.
- The Director should rule that Rangen is suffering “material injury” as a result of junior-priority groundwater pumping.

- The Director should rule that the Intervenor's have not carried their burden of proving their defenses by clear and convincing evidence and have not demonstrated that the use of the water by junior-priority groundwater pumpers is being done efficiently and without waste.
- The Director should preclude the Intervenor's from introducing any evidence of mitigation since mitigation is a distinct issue that gives rise to a separate hearing after material injury is found.

Rangen respectfully requests that the Director grant Rangen all of the relief set forth in its Petition for Delivery Call.

II. TRIAL ISSUES

A. ESPAM 2.1 IS THE BEST AVAILABLE SCIENTIFIC TOOL TO EVALUATE RANGEN'S CALL AND SHOULD BE USED.

Rangen requested that the Director use ESPAM2.0 to evaluate its call when it filed its Petition in December, 2011. See Petition at ¶¶ 15-18. On January 19, 2012 at the first status conference in this case, the Director explained that ESPAM2.0 was not yet ready to be rolled-out by the Department, but that the Department would zealously pursue completion of the model. Hearing Transcript, p. 18, line 15 – p. 19, line 8. On July 16, 2012, after the Department completed its work on ESPAM2.0, twenty members of the Eastern Snake Hydrologic Modeling Committee, a voluntary committee that provides input to the Department on issues related to ESPAM, issued a statement to the Director that: "The Eastern Snake Hydrologic Committee recommends that the Department begin using ESPAM version 2 rather than ESPAM version 1.1 for ground water modeling." See Email from Raymondi to Spackman dated July 16, 2012. On July 27, 2012, the Director issued an Order adopting the ESHMC's recommendation. The Order stated in relevant part:

A hearing for the Rangen, Inc. delivery call is scheduled to begin on January 28, 2013. The Department will utilize ESPAM version 2.0 in the delivery call. As it relates to the Rangen, Inc. delivery call, any and all issues associated with ESPAM version 2.0 and the Department's use of ESPAM version 2.0 will be addressed during the course of the January 28, 2013 hearing.

Order Re: Eastern Snake Plain Aquifer Model and the Rangen, Inc. Delivery Call dated July 27, 2012.

After the Director issued the July 27th Order, the Department staff discovered what has been referred to as the "Mud Lake error." The Mud Lake error required the Department to do some additional work on the model and vacate the hearing that was set for January 28th. The Mud Lake error was corrected, and the Department then issued ESPAM2.1 to address this error. On January 16, 2013, the majority of the members of the ESHMC issued a recommendation to the Department to use ESPAM2.1 for groundwater modeling. See Email from Raymondi to Spackman dated January 16, 2013.

The Department issued a Final Report for ESPAM2.1 which explains that "ESPAM2.1 was designed to be used by the Idaho Department of Water Resources as an administrative and planning tool to evaluate the interaction between groundwater and surface-water resources and to support water management decisions." Final Report, p. 1 (Exhibit 1273A). The Final Report also states the ESPAM2.1 is the best available science for understanding the interaction between groundwater and surface water on the Eastern Snake Plain. It states in relevant part:

Although every model represents a simplification of complex processes, with the ESPAM being no exception, ***ESPAM2.1 is the best available tool for understanding the interaction between groundwater and surface water on the Eastern Snake Plain.*** The science underlying the production and calibration of ESPAM2.1 reflects the ***best knowledge of the aquifer system available at this time.*** ESPAM2.1 was calibrated to 43,165 observed aquifer levels, 2,248 river gain and loss estimates, and 2,845 transient spring discharge measurements collected from 14 different springs. ***Calibration parameters indicate an excellent representation of the complex hydrologic system of the eastern Snake Plain.***

Final Report, p. 89 (Exhibit 1273A) (emphasis added).

On February 27, 2013, IDWR staff issued a Memorandum to the Director recommending that ESPAM2.1 be used as a predictive tool to evaluate the effects of groundwater pumping and curtailment of groundwater pumping on discharge at the Rangen spring cell and to evaluate the portion of curtailed use that will accrue to the Rangen spring cell. IDWR Staff Memorandum, p. 3 (Exhibit 1319). The Staff Memorandum recommended in relevant part:

ESPAM2.1 is the *best available scientific tool* for answering the following questions that may be relevant to this water call.

- a. What is the effect of junior groundwater pumping within the ESPA on discharge at the Rangen spring cell?
- b. What portion of curtailed groundwater use will accrue to the Rangen spring cell?
- c. What portion of curtailed groundwater use will accrue to other spring cells and reaches of the Snake River?
- d. How long will it take for the effects of curtailment of junior priority groundwater pumping to reach the Rangen spring cell?
- e. What is the effect of junior groundwater pumping within the ESPA on discharge at the Buhl to Lower Salmon Falls reach?

Exhibit 1319, p. 3 (emphasis added).

The Staff Memorandum also points out that ESPAM2.1 was developed in an open, collaborative environment where all members of the ESHMC were given the opportunity to provide input concerning how the model was developed:

ESPAM2.1 was developed in an open, collaborative environment, with guidance from the Eastern Snake Hydrologic Modeling Committee (ESHMC). During development of ESPAM2.1, the ESHMC provided a forum for discussing model design, providing parties to this water delivery call (and other interested parties) the opportunity for technical review and input throughout the model development process. Decisions regarding the conceptual model, model grid size, drain elevations, locations of transmissivity pilot points, spring discharge and aquifer head targets, the location of general head boundaries, calibration bounds, and other model features were presented to the ESHMC with opportunity for committee members to provide comments and suggest alternative approaches.

Exhibit 1319, p. 4 at ¶¶ 6.

The bottom line is that ESPAM2.1 is the best scientific tool that is available to evaluate Rangen's Call. All of the experts involved in this matter participated on the ESHMC and had ample opportunity to provide input on the development of the model. ESPAM2.1 has been subjected to the rigorous testing that the Director set forth in his Memorandum to the Committee dated June 9, 2011:

In the discussions with IDWR technical staff, I reminded staff that the purpose of the ESPAM is to provide technical information with regards to water management and administration, water right transfers and permits, and water planning. The Idaho Water Resource Board and various stakeholders also use ESPAM to assess the effects of, and to help guide investments in, various water management measures such as managed recharge and conversion projects. For these and other purposes, ESPAM 2.0 should be fair, reliable, consistent, and verifiable.

In order to accomplish the foregoing, I have instructed IDWR technical staff to subject ESPAM 2.0 to rigorous testing, including: 1) calibration; 2) validation; and, 3) uncertainty analysis. In addition, ESPAM 2.0 must be run using factual inputs and additional hypothetical factual inputs. Simulations from these inputs must be compared with the outcomes of the previous model version.

See Exhibit 1318. ESPAM2.1 is ready to be used and should be applied by the Director to evaluate Rangen's Call. There is no other alternative model or approach that should be used.

B. THERE IS NO RATIONAL BASIS FOR APPLYING A TRIM LINE.

The Intervenors contend that the Director should impose a ten percent trim line just as his predecessors did when using ESPAM1.1. The "trim line," as that term was originally used, delineated an area within the ESPAM boundary where junior-priority groundwater pumping was assumed to result in less than ten percent depletion of the target spring reach at steady state. Director Spackman recognized from the very start of this case that ESPAM2.1 is fundamentally different from ESPAM1.1 and that the concept of a "trim line" is probably not justified:

At least right now there's a trim line [under ESPAM1.1]. It seems to me that there's a huge burden that would be imposed using version 1.1 to overcome that trim line, given its precedent in previous decisions. *I will tell you, in discussing version 2.1*, given the way in which the – and I may slip in my discussion in representations of the model – in its simulations and calibrations to spring nodes –

well, model nodes and springs, rather than reaches of the rivers, *the use of any kind of trim line is much more difficult.*

And trim lines may not be a component at all in using version 2.0. I don't have any idea. But version 2.0 certainly changes because of its accuracy and the way it simulates the impacts of various activities on the plain to a particular cell or node. It changes much of that previous analysis. So I'm giving you more in answering your question. I want to kind of give you a comparison, talking about version 1.1 and 2.0.

Hearing Transcript, p. 23, line 24 – p. 24, line 16 (emphasis added).

Despite the Director's doubts about a trim line, the Intervenor's experts advocate the imposition of the same ten percent trimline that was used by the Department in evaluating calls under ESPAM1.1. The Intervenor's position is unjustified. The trim line has no application in this case.

In analyzing whether the former Directors erred in applying the ten percent trim line, the Idaho Supreme Court in Clear Springs v. Spackman first explained how the District Court viewed the rationale for a "trim line":

The district court held that "the Court concludes that the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model." The court stated, "The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality Given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error." The Court concluded. "Accordingly, the Director did not abuse his discretion in not curtailing ground water appropriators who are within the model's margin of error."

Clear Springs v. Spackman, 150 Idaho 790, 816, 252 P.3d 71, 97 (2011). The Supreme Court analyzed the decision to apply a trim line as follows:

The Director concluded that there was up to a 10% margin of error in the groundwater model due to the margin of error in the stream gauges, and he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material injury to the Spring Users' water rights.

Clear Springs v. Spackman, 150 Idaho 790, 817, 252 P.3d 71, 98 (2011).

All of the experts in this case agree that the “trim line” has nothing to do with model uncertainty (i.e., margin of error). See Exhibit 1369, p. 1 (Brendecke’s Comments on Trim Line and Model Uncertainty); see Exhibit 1444, pp. 4-6 (Koreny/Brockway White Paper). In fact, Rangen expects all of the experts to testify that they had not even heard the term “trim line” before the former Directors used it and that the imposition of a “trim line” was not a concept that was discussed within the ESHMC before it was used. The experts agree that the imposition of a trim line in conjunction with ESPAM2.1 would be a purely subjective determination that cannot be mathematically derived from uncertainty within the model itself. Brendecke Depo., p. 141, lines 3-8; see also Sullivan Depo., p. 32, line 24 – p. 33, line 14. Rangen’s experts will testify that there is no justification for the use of a trim line at all because it does not address model uncertainty and that any assignment of value to the trim line (e.g., 10%, 5%, 3.5%, 2%, 1.7%, 1.5%, 1%, .2%) is arbitrary. Moreover, the use of a ten percent trim line, because of the way ESPAM2.1 is designed, will always result in no curtailment and ignores the impact of collective pumping. This is contrary to CM Rule 42.01.c. which states specifically that the Director should consider the individual and collective effects of junior-priority groundwater pumping. Rule 42.01.c. states in relevant part:

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:

c. Whether the exercise of junior-priority groundwater 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.

IDAPA 37.03.11.042.01c (emphasis added).

The IDWR staff has not recommended the imposition of a trim line. In their Memorandum, they simply state that whether to adopt a trimline is a policy and/or legal decision. Exhibit 1319, p. 5 at ¶ 10. While the Intervenor's experts contend that a trim line should be imposed, their testimony is based on the Department's imposition of a trim line in the past and not any specific justification for its application in this case. There is no rational basis for applying a trim line when evaluating Rangen's Call. The best evaluation of the effects of curtailment of junior-priority groundwater pumping on Rangen's springs is the result of a curtailment run using ESPAM2.1. There is no basis for qualifying the model results in any manner.

C. EVALUATING THE RESPONSES TO RANGEN'S CALL UNDER THE CONJUNCTIVE MANAGEMENT RULES.

This case involves a call under the Department's Conjunctive Management Rules (CMR). Rule 40 of the CMR sets forth the factors that are to be considered when a senior right holder such as Rangen is seeking curtailment of junior-priority ground water rights in areas having a common ground water supply in an organized water district. Rule 40.03 states:

In determining whether diversion and use of water under rights will be regulated under Rule 40.01.a or 40.10.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.

IDAPA 37.03.11.040.c. If a junior-priority groundwater pumper wants to be relieved from responsibility for a call, the junior user has to: (1) prove by clear and convincing evidence a recognized defense (e.g., waste, lack of beneficial use, unreasonable diversions, futile call), and (2) that the junior's use of the water is reasonable and is being done efficiently and without waste.

1. THE INTERVENORS HAVE THE BURDEN OF PROVING WASTE, UNREASONABLE DIVERSIONS, NON-INJURY DEFENSES AND FUTILE CALL BY CLEAR AND CONVINCING EVIDENCE.

IGWA argued to the Idaho Supreme Court in its Amicus Brief in Musser v. Higginson that junior-priority groundwater pumpers are entitled to their day in court to present their defenses to a delivery call before curtailment can be ordered. See Exhibit 1063, p. 42. IGWA explained to the Court that the following defenses have long been part of the fabric of the Prior Appropriation Doctrine: (1) abandonment and forfeiture, (2) waste and duty of water, (3) futile call, and (4) reasonable means of diversion. See id. IGWA's Brief explains:

The most troubling aspect of the Court's opinion is that, despite a bare-bones factual record, it could be read as going beyond the relief sought by the Mussers and undercutting long-established law with respect to defenses available in an action to enforce a call. Were the Department to seek to shut down junior water rights in order to satisfy a call for water by the Mussers (or by anyone else), the affected water users are entitled to their day in court to present their defenses to the proposed action. Those defenses would likely include: (1) abandonment and forfeiture, (2) waste and duty of water, (3) futile call, and (4) reasonable means of diversion. As IGWA has sought to illustrate in this brief (focusing on the latter of the four), these are real defenses which have long been part of the fabric of the Prior Appropriation Doctrine. To the extent the Court's decision can be read as

The Conjunctive Management Rules did not change the defenses available to the Intervenor or who has the burden of proving them. IGWA and the City of Pocatello are entitled to present defenses such as waste and unreasonable diversions, but they have the burden of proving them by clear and convincing evidence.

The Idaho Supreme Court explained that “[t]he [CMR] rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.” American Falls Reservoir No. 2 v. IDWR, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007). “Idaho law,” as defined by CMR 10.12, means “[t]he constitution, statutes, administrative rules and case law of Idaho.” Id.¹ To initiate a water delivery call, the CMRs “require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury.” *Id.* at Idaho 877. “Material injury” is defined by the CMRs as “[h]indrance to or impact upon *the exercise of a water right* caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.” IDAPA 37.03.11.010.14 (emphasis added). *See e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2010). “The Rules further provide that the petitioner file a description of his water rights, including the decree, license, permit or claim for such right, the water diversion and delivery system he is using and the beneficial use being made.” Id.

When evaluating a water call, “the burden **is not** on the senior water rights holder to re-prove an adjudicated right.” 150 Idaho at 878. The Idaho Supreme Court has held:

While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the

¹ “Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules. Due to the changing nature of the law and rules, it is unnecessary to incorporate extant law unless specifically necessary to a clear understanding of the particular Rule.” American Falls Reservoir District No. 2 v. IDWR, 143 Idaho at 873.

water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

Id.

Rather, to avoid the senior having to relitigate its decreed water rights, and if a junior water user argues that the senior can use less than the decreed quantity of the right, the junior water user bears the burden of proving that less water can be used under any theory supporting an argument for the use of less water. “Once a decree is presented to an administrative agency or court, **all changes to that decree**, permanent or temporary, must be supported by clear and convincing evidence.” A&B Irrigation District v. IDWR, 153 Idaho 500, 284 P.3d 225, 249 (2012); see also A&B Irrigation District v. IDWR, Minidoka County, Case No. 09-647; and see *Memorandum Decision and Order on Petitions for Rehearing* (Nov. 2, 2010) and *Memorandum Decision and Order on Petition for Judicial Review* (May 4, 2010), decisions attached as Exhibit G to *Haemmerle Aff.*

Since nearly the time of statehood, the Idaho Supreme Court has held that it is the junior’s burden of establishing non-injury, and any other theory justifying a senior not obtaining its water, by clear and convincing evidence:

This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; **and it would take more than a theory, and, in fact, clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator**, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.

Id. at P.3d 244, *citing* Moe v. Harger, 10 Idaho 302, 77 P. 645 (1904) (emphasis added and in original).

Specifically, if the junior alleges that the senior can use water differently than the way the senior's water right is decreed, the junior bears the burden of proof by a clear and convincing standard. This means that if IGWA, the City of Pocatello, or Fremont-Madison Irrigation District contend at the hearing that their junior-priority pumping does not affect Rangen's use of water, they have the burden of proving a "futile call" by clear and convincing evidence. Moe v. Harger, 10 Idaho 302, 307, 77 P. 645, 647 (1904); Josslyn v. Daly, 15 Idaho 137, 96 P. 5687 (1908); Silkey v. Tiegs, 54 Idaho 126, 28 P.2d 1037 (1934); A&B Irrigation District v. IDWR, 153 Idaho 500, 284 P.3d 225, 249 (2012). "Futile call" is defined as, "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." IDAPA 37.03.11.010.08.²

In addition to the junior's general burden of proving "no injury" and "futile call" by clear and convincing evidence, the junior bears the burden by clear and convincing evidence as to the following specific issues: (1) establishing waste, A&B Irrigation District v. IDWR, 153 Idaho 500, 284 P.3d 225, 241 (2012), *citing* Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976); (2) water not being put to a beneficial use, Id.; and (3) forfeiture or abandonment, Id., *citing* Crow v. Carlson, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984).

² "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.

In continuing to apply the clear and convincing standard to juniors in conjunctive management matters, the Idaho Supreme Court has held that the possibility of any error in the process of making a call should be borne by the juniors:

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. **However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season.** Any burden of this uncertainty should be borne by the junior.... [I]f the Director's determination is only based on a finding 'more probable than not.' The senior's right is put at risk and the junior is essentially accorded the benefit of uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

Id. at P.3d 242 (emphasis added).

2. RULE 40.03 REQUIRES JUNIOR GROUNDWATER USERS TO DEMONSTRATE EFFICIENT USE OF WATER WITHOUT WASTE.

When evaluating Rangen's Call, Rule 40.03 states that the Director *will* consider whether the junior-priority groundwater pumpers are using water efficiently and without waste. The rule states in relevant part:

The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

IDAPA 37.03.11.040.c. The Groundwater Districts that comprise IGWA's membership have responsibility for measuring their members' groundwater pumping. The Northsnake Groundwater District, Magic Valley Groundwater District, and Aberdeen-American Falls Groundwater District all contract with Brian Higgs of Water Well Consultants to measure and

report their members' groundwater usage. Higgs audits all of the wells for these districts on a three-year cycle, but neither he nor the groundwater districts themselves have any information concerning whether their members are using the water within the boundaries of their decreed rights or whether they are using the water efficiently or without waste. The chairmen of the three groundwater districts testified during their depositions that Higgs enters the water measurement data into WMIS ("Water Measurement Information Systems"), but neither Higgs nor the Groundwater Districts have the ability to query WMIS regarding the amount of water being used. Moreover, the Groundwater Districts and the witnesses they have identified have no information concerning their junior members' use of the water or whether it is being done efficiently or without waste.

D. MITIGATION IS A DISTINCT ISSUE THAT CAN ONLY BE CONSIDERED AT A SEPARATE HEARING AFTER A FINDING OF MATERIAL INJURY.

Although copies of hearing exhibits have not yet been exchanged, it appears from IGWA's exhibit list that it intends to introduce documents pertaining to mitigation options at the upcoming hearing. Mitigation is not at an issue at this hearing. CM Rule 43 governs the submission and consideration of mitigation plans. If the Director finds that Rangen is being materially injured by junior-priority groundwater pumping and orders curtailment, then the Intervenors can submit mitigation plans to IDWR in an effort to show how the plans will prevent injury to Rangen. Under CM Rule 43.01.d., the Director will provide notice of a proposed mitigation plan to Rangen and then hold a separate hearing as determined necessary and consider the plan under the procedural provisions of I.C. § 42-222 in the same manner as transfer applications. IDAPA 37.03.011.043.01.d. Mitigation is not an issue at this stage of Rangen's call and any evidence related to mitigation plans should not be considered by the Director.

Rangen may file a separate Motion in Limine to exclude mitigation evidence once exhibits are exchanged.

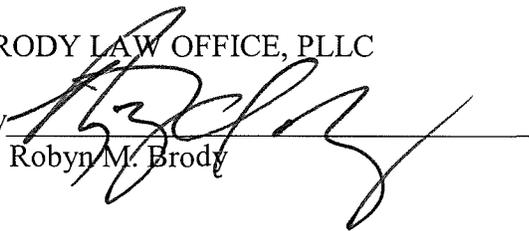
IV. CONCLUSION

Rangen respectfully requests that the Director use ESPAM2.1 without any trim line to evaluate Rangen’s Petition for Delivery Call and enter Findings of Fact and Conclusions of Law finding the following: (1) that Rangen water rights encompass the entire Martin-Curren Tunnel springs complex that forms the headwaters of Billingsley Creek, (2) that Rangen has suffered material injury to Water Rights Nos. 36-02551 and 36-07694 as a result of junior-priority groundwater pumping in the Eastern Snake Plain Aquifer and the boundaries of ESPAM2.1, and (3) that that responding parties have not proven any of their defenses by clear and convincing evidence and that they have not demonstrated that the juniors’ use of the groundwater is being done efficiently and without waste. Rangen requests that the Director enter an Order requiring curtailment and that it not consider any evidence of mitigation until such time as IGWA or the City of Pocatello has submitted a Mitigation Plan in compliance with CM Rule 43.

DATED this 22nd day of April, 2013.

BRODY LAW OFFICE, PLLC

By


Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 22nd day of April, 2013 she caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

<p>Original: Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
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