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ATTORNEYS FOR CITY OF POCATELLO

BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 AND 36-07694 (RANGEN, INC.)	)	Docket No. CM-DC-2011-004
	)	**CITY OF POCATELLO'S CLOSING BRIEF**

INTRODUCTION

In December of 2011 Rangen, Inc. ("Rangen") placed a delivery call asking for curtailment of the Eastern Snake Plain Aquifer ("ESPA") to deliver water to its partially decreed water rights to be used to rear fish at its hatchery near Buhl, Idaho. Rangen has made two different claims for relief: that it is either entitled to 76 cfs of water under its partial decrees or alternatively, that Rangen is entitled to the amount of water that could be obtained from curtailment of all ground water rights within the ESPA. Rangen alleges it requires additional amounts of water in order to satisfy its beneficial uses, which it claims as: 1) fish research; 2) to raise conservation fish for Idaho Power Company's ("Idaho Power") mitigation under its Federal Energy Regulatory Commission licenses, and 3) to raise fish for the commercial market.

The case that the parties eventually took to trial looked very different from Rangen's petitioned demands. The Director determined that only Rangen's Martin-Curren Tunnel ("Tunnel") source was subject to Rangen's partial decrees, and that the spring flows collected and delivered to the Large Raceways and CTR Raceways at the Lower Diversion were not among the physical supplies for which Rangen could place a delivery call. *Order Granting In Part and Denying In Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source*, Apr. 22, 2013 ("Source Order). The parties' presented evidence about the quantities of water available at Rangen's decreed source, but the evidence of beneficial use that Rangen alleged and that the City of Pocatello's ("Pocatello") experts analyzed included uses arising from all sources of water, not just the Tunnel source. Rangen's witnesses did not present evidence of amounts of water relied upon that were comprised solely of the Tunnel source; nor did Rangen's witnesses testify about the additional amounts of water required. In a sense, all of the data related to fish production from Rangen is irrelevant: it only establishes what Rangen was capable of producing throughout the history of the facility if it relied on 40% more water than was ever available at the Tunnel. The Director's Source Order establishes that Rangen has no right to demand protection of sources beyond the Curren Tunnel; further, that any past use of water from an undecreed source cannot be relied upon to establish past beneficial use of Rangen's decreed water rights.

Against this complicated backdrop, Rangen's claims and the evidence received in this case must be evaluated under the Conjunctive Management Rules ("CMR") and the legal framework established by a variety of Idaho Supreme Court decisions, including *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD#2*"), *Clear Springs Foods, Inc. v. Spackman*, and *A&B Irrigation District v. Idaho Department of Water Resources.* 143 Idaho 862, 154 P.3d 433 (2007); 150 Idaho 790, 252 P.3d 71 (2011); 153 Idaho 500, 284 P.3d 225 (2012). The Idaho

Department of Water Resources' ("Department") application of the CMR must be by reference to Idaho law regarding what constitutes material injury and the extent of agency discretion of the agency associated with considering and administering a delivery call.

I. SUMMARY OF THE EVIDENCE

A. Water supply determined by Rangen's partial decrees

Perhaps more so than in any prior delivery call, these first principles of Idaho law provide the basis for evaluating the evidence in this case. As a starting point, Rangen asserted claims to sources of water beyond that to which it was entitled under its decrees. *Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source* ("Source Motion"), Mar. 8, 2013. As the Director found in his Source Order, Rangen is entitled only to protection of its partial decrees in the amounts of water arising at the Martin-Curren Tunnel; to the extent its water supply has included additional water arising on the Lower Talus Slope, below the tunnel and collected at the Lower Diversion, Rangen's reliance has been misplaced—at least for purposes of a delivery call. Exhibits 1026, 1028; Source Order.

B. Amounts available at the Tunnel

The evidence showed that flows at the Tunnel have been declining dramatically since the 1970s. While the Tunnel appears to have provided the basis for the 50 cfs rate of flow associated with Rangen's 36-2551 water right (albeit in 1971, Exhibit 3650, Figure 2-6b), the average annual flow during 1971 was approximately 33 cfs. Exhibit 3650, Figure 2-5c. Amounts available at the Tunnel decreased steadily from that point, with a brief recovery during the early part of the 1980s, and again during the late 1990s. *Id.* Today, Rangen's annual average flow from the Tunnel is approximately 4.4 cfs. *Id.* Rangen relied steadily during its entire history on both Tunnel Flows and Lower Diversions to produce fish.

C. Rangen failed to adequately measure its water supplies

Rangen's measurement data associated with its diversions has long been called into question by the Department. As the evidence developed, Rangen was unable even to substantiate the amounts of water it had historically diverted (never mind that the amounts measured included water supplies which are not the subject of Rangen's partial decrees). It is essential for the Director to evaluate the nature and extent of a senior's diversion and beneficial use of a water right in responding to a delivery call. Rangen's total flow data was shown by Pocatello's measurement analyses to be systematically low by at least 15%. *See* Pocatello's Proposed Findings of Fact, Conclusions of Law, and Order ("Proposed Findings"), Section V.B. Rangen did not present flow data related to its uses of water from the Tunnel. Accordingly, Rangen's historical measurements do not inform the Director's inquiry into the amount of water Rangen needs for its beneficial uses. However, Rangen's failure to properly measure flows—even if the flows measured included water from sources Rangen cannot call for under its partial decrees—shows it is unreasonable in its operations.

D. Nature of Rangen's beneficial uses and quantities of water required to satisfy beneficial uses

There is no evidence in the record to substantiate that Rangen's beneficial uses are short of water. First, there is no evidence at all of what Rangen's historical operations would have been with regard to fish production and hatchery research if it had limited its use of water to its decreed source of water at the Tunnel. Rangen's fish production, instead, relied on total physical supply, including water from undecreed sources at the Rangen hatchery and in the delivery call.

Relying on its total flows at the hatchery, Rangen claimed to be a commercial fish producer that also produced conservation fish and performed fish research. To the contrary, the evidence at hearing showed that Rangen is actually a fish research facility that sells its fish

grown for research to Idaho Power and, when there is enough left over, on the commercial spot market. Proposed Findings, Section VI.A. and B. As a result, Rangen's demands for water can be satisfied with a water supply much smaller than that available to it under its decrees.

This is fortunate, because the flow data associated with Rangen's decreed water source, the Martin-Curren Tunnel, demonstrates that the Martin-Curren Tunnel has never produced anything close to the 76 cfs Rangen demanded under its decrees. *See Second Amended Order* ¶ 63, at 14–15, In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551, and 36-07694, May 19, 2005; Proposed Findings, Section V.A.

Given the small amounts of water historically available, it is perhaps not surprising that Rangen has never relied solely on its Martin-Curren Tunnel diversions but instead used all physically available water supplies in its hatchery. Proposed Findings, Section IV.B.37. Based on the historical pattern of flows from the Martin-Curren Tunnel as shown in Exhibit 3650, Figures 2-5c and 2-6b, Rangen could never have produced the numbers of fish it produced in the 1980s and 1990s had it relied solely on the Martin-Curren Tunnel flows.

1. Amounts required to produce fish for conservation or the spot market

Rangen's fish production data does not inform the Director's evaluation of how much water Rangen requires under its decree for two reasons: first, because the amounts of fish grown historically relied on the total physical supply at the facility (rather than being limited to the Martin-Curren Tunnel) and second, because Rangen relied on additional hatchery space at rented facilities around the Thousand Springs area until 2003. Proposed Findings, Section VI.E. Accordingly, there is little relationship between Rangen's fish production in a given year and the amount of water available in that year from Rangen's decreed source. Of course, any evaluation of historical fish production data must be made with an understanding of the windfall that

Rangen experienced from its reliance on the Lower Diversions. With the Lower Diversions, Rangen was able to increase its available water supply by nearly 40%.

In addition, Rangen's operations for approximately the last 10 years have been managed to produce conservation fish to satisfy the Idaho Power Contract. Proposed Findings, Section VI.A. Under the Idaho Power Contract, Rangen has been required to satisfy certain density and flow indices. *Id.* In practical terms, this means that Rangen's beneficial use of water for conservation fish is less intensive than that of a true commercial fish producer. To the extent Rangen has satisfied its Idaho Power Contract, it has had sufficient water. Because of the limitations of the Idaho Power Contract, this is a case in which more water apparently would not, in fact, produce more fish.

2. Water quantities required to satisfy Rangen's research uses

The water required to satisfy Rangen's research uses of its decreed water supplies are the clearest cut of all of its aquaculture uses. Because of the arrangement of Rangen's diversion works within the decreed 10 acre tract, the Martin-Curren Tunnel supply serves initially the Hatch House, Greenhouse, and Small Raceways. Proposed Findings, Section VI.B. Rangen's research has historically been performed in these facilities. *Id.* Section VI.C. During the entire period for which research reports are available, Rangen only conducted research in the large raceways 13 times. Proposed Findings VI.C. Testimony from Rangen's witnesses established that Rangen could continue to rely on these research facilities with available water supplies. *Id.* Accordingly, Rangen does not require additional water to conduct more research.

E. Curtailment, even if warranted, is not reasonable under the circumstances

Rangen has requested curtailment of all rights junior to its 1962 water right number 36-2551 to satisfy its alleged shortage in this matter. As summarized above (and as described in detail in Pocatello's Proposed Findings), Rangen is not injured, so curtailment is no warranted.

However, even if Rangen were injured, curtailment would not provide amounts of water that would be of material use to Rangen. Curtailing the entire ESPA to improve flows at the Curren Tunnel would, at best, produce approximately 11 cfs on average. Exhibits 3654, 3657. Added to the existing average Curren Tunnel flow of 4.4 cfs on average, the total amount to be produced at the Curren Tunnel after more than 20 years would be approximately 15 cfs. The record demonstrates that Rangen requires 30 cfs to conduct Large Raceway studies and that the flows during the time Rangen alleges is was a commercial fish producer were in excess of 20-30 cfs on average. Proposed Findings at VI.A.-C. Curtailment for 20 years to produce 15 cfs after would not materially change Rangen's position, and that makes curtailment futile under Idaho law. Furthermore, the evidence showed that Rangen would receive extremely small amounts of water from curtailment of remote junior ground water users such as FMID and Pocatello. Proposed Findings at VII.

II. RANGEN CANNOT SEEK CURTAILMENT TO INCREASE WATER SUPPLIES BEYOND ITS DECREED SOURCE AT THE MARTIN-CURREN TUNNEL

The Idaho Supreme Court, affirming the decisions of the SRBA Court, has determined that the first step in evaluating a delivery call is to consult the senior's decree. *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012). Rangen argued in pre-trial motions that it may place a call for not just the amount of water that arises at the Martin-Curren Tunnel—which is Rangen's decreed source—but that Rangen can call for water arising from springs on the talus slope below the Martin-Curren Tunnel that Rangen diverts at the "Rangen Lower Diversion" outside of the 10 acre tract. Rangen's argument relied on its interpretation that Rangen's entire currently used physical supply, including water diverted from points of diversion and sources that are outside of its decreed terms, are protected by its partial

decrees, rather than merely the water at the Martin-Curren Tunnel. On April 22, 2013, the Director denied Rangen's requested relief, finding that

> Rangen's partial decrees also unambiguously state that the only source for its water rights is Martin-Curren Tunnel, tributary to Billingsley Creek. The partial decrees do not list "Spring(s)" and/or "Unnamed Stream(s)" as additional sources. . . . **the decrees do not state that sources other than Martin-Curren Tunnel are lawfully diverted within the ten-acre tract.** Thus, there are genuine issues of material fact in dispute as to whether Rangen can divert from sources other than Martin-Curren Tunnel that are located within T07S R14E S32 SESWNW.

Source Order ¶ 12, at 6–7 (emphasis added) (internal citation omitted). No facts were introduced at hearing to support a conclusion that Rangen may divert from other sources. By the same token, no other sources of water were identified by witnesses or through other evidence in the case that fit within the decreed source of the Martin-Curren Tunnel. Accordingly, the Director should enforce the terms of Rangen's partial decrees and find that it is limited to diverting its source of water at the Martin-Curren Tunnel from existing structures within the 10 acre tract that forms Rangen's decreed point of diversion.

A. The plain language of Rangen's decrees require that it be limited to the Martin-Curren Tunnel

Rangen's petition for delivery call requests the Director enforce its decrees—the Director is required to give said decrees their proper legal effect, and is not permitted to ignore its terms. "A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree." *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (citations omitted). "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right **would be comparable to a**

change in the description of property." *Id.* (emphasis added) (citations omitted). *See also* IDAPA 37.03.11.001 (2013) ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right" (emphasis added)); IDAPA 37.03.11.010.25 (2013) (defining "water right" to mean "[t]he legal right to divert and use . . . the public waters of the state of Idaho").

Rangen's partial decrees limit the source of Rangen's water rights to the Martin-Curren Tunnel. Exhibits 1026, 1028. The Director is required to give meaning to the plain language in Rangen's decrees, which "must be construed as a whole and given a construction as will harmonize with the facts and the law of the case." *Follett v. Taylor Bros.*, 77 Idaho 416, 424, 294 P.2d 1088, 1093 (1956); *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010); *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 523, 284 P.3d at 248 ("We apply the same rules of interpretation to a decree that we apply to contracts."). The Director found that there is no ambiguity in the decreed "source" of Rangen's water rights—accordingly, each decree "must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001); Source Order at 6.

The source of Rangen's water rights cannot be expanded by bootstrapping Rangen's decreed point of diversion—a wholly separate element of Rangen's water rights. "Source" and "point of diversion" are distinct statutory elements of a water right. I.C. § 42-1411(2)(b), (e) ("The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law: . . . (b) the source of water; . . . (e) the legal description of the point(s) of diversion; . . . ."). Indeed, the Idaho Supreme Court recently affirmed that "the source of water and the point of diversion [are]

separate elements." *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012). *See also A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 750, 118 P.3d 78, 82 (2005) ("The director of the IDWR is charged with determining the source of water rights as each new application is filed.").

As explained by the SRBA Court, identification of the source of a water right in a partial decree prevents a water user from expanding its water right beyond that source:

> The naming of the source in a water right provides information that may be relevant in many ways. Naming the source provides notice to potential future (junior) appropriators that there are senior appropriations of the waters from that source. Additionally, **identifying the source in a license or decree prevents the water users from changing to a different source that may still lie within the legal description of the point of diversion** . . . .

Memorandum Decision and Order on Motion for Summary Judgment [and] Order Setting Scheduling Conference at 7.10, In Re SRBA Case No. 39576, 11 SRBA 7, Subcase 63-08447, Aug. 28, 2007. Accordingly, Rangen's source must limited to just that—the Martin-Curren Tunnel, and necessarily cannot include other water arising within the legal description of its decreed point of diversion.

B. The Director is not estopped from interpreting Rangen's partial decrees

Rangen has historically measured its diversions below the fish hatchery, and not at the Martin-Curren Tunnel. Rangen relies on the Department's past reluctance to require Rangen to measure at its point of diversion in its attempt to expand the sources encompassed by its partial decrees. The Department's actions, or lack thereof, do not alter the terms of Rangen's partial decrees. Further, in the prior delivery call matter before the Department, the Director did not address whether Rangen could divert water outside of its decreed point of diversion, nor was he asked to. Indeed, if the Director had answered that question, Rangen's Source Motion—in

which Rangen asked the Director, for the first time, to determine whether its diversion of talus slope water was permitted under its decree—would have been unnecessary.

The matter of Rangen's extra-decree points of diversion was not an issue litigated in the prior matter before the Department, and accordingly the Department is not estopped from finding that the source of Rangen's water rights is limited to the Martin-Curren Tunnel. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) ("Collateral estoppel only applies to issues actually litigated and decided in the prior proceeding."). Further, even if a party had requested the Department answer this question in a prior proceeding—which Rangen does not contend is the case here—such enforcement decisions are left to the absolute discretion of the agency. *Heckler v. Chaney*, 470 U.S. 821, 831–32, 105 S.Ct. 1649, 1656 (1985).

Rangen has also not provided a basis for application of equitable estoppel against the Department, as there is no allegation of misrepresentation by the Department. *Sagewillow*, 13 Idaho at 845, 70 P.3d at 683 ("Equitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity[]" and requires "false representation or concealment of a material fact with actual or constructive knowledge of the truth."). Nor has Rangen established the elements necessary for quasi-estoppel: quasi-estoppel requires prejudicial reliance by the party asserting estoppel, showing that said party has "'changed their position as a result of the alleged representation and suffered a detriment as a result thereof.'" *Willig v. State, Dep't Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (citation omitted). While Rangen claims that it has relied upon the Department's lack of action to continue to appropriate water from the talus slope, Rangen has not *changed* its position to its detriment—Rangen has always appropriated water from its undecreed points of diversion, well before the Director issued the Second Amended Order in May of 2005.

Accordingly, Rangen did not detrimentally rely on the Department's prior ruling, which does not even address the issue of Rangen's illegal point of diversion.

Furthermore, any actions by the Department, or lack thereof, do not operate to revise the decreed elements of Rangen's water rights. Other water users, such as Pocatello, are bound by the terms of Rangen's partial decrees, and only those terms found therein, which represent adjudications on the merits of Rangen's water rights. I.C. § 42–1420(1); *A& BIrrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 515, 284 P.3d at 240. Rangen's illegal points of diversion are just that, and cannot be "papered over" due to the Department's failure to independently investigate whether Rangen is diverting from locations inconsistent with its decree.

III. RANGEN'S MEANS OF DIVERSION AND OPERATIONS ARE NOT REASONABLE

The Director of the Idaho Department of Water Resources has "authority to make determinations regarding material injury, the reasonableness of a diversion, [and] the reasonableness of use." *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. "[T]he CM Rules allow the Director to consider reasonable diversion in his determinations." *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 516, 284 P.3d at 241. "Reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication." *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448. In evaluating how much water an appropriator needs to divert, "the question of the reasonableness or unreasonableness of the loss from the ditch through seepage and evaporation is a proper subject for inquiry." *Clark v. Hansen*, 35 Idaho 449, 206 P. 808, 810 (1922).

Evidence at trial established that Rangen's operations are not reasonable.

- Rangen's system of measuring its water rights resulted in systematic undermeasurement.
- Rangen has built its history of fish production and research on reliance on an undecreed supply. This is *per se* unreasonable, and the Director has no authority to order curtailment to restore Rangen's operations to some historical ideal that was actually built on its reliance on undecreed sources of water.
- Rangen's means of diversion are not reasonable. The evidence at hearing established that the water supply conveyed by the 6 inch White Pipe and the 12 inch Steel Pipe are the only means that Rangen has of diverting and conveying Martin-Curren Tunnel water to its facilities. *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 513, 284 P.3d at 238 (affirming Hearing Officer's finding that senior must take steps to make its means of diversion and conveyance reasonable "before it can seek curtailment or compensation from junior users").

If Rangen reliably measures its adjudicated water right, stops diverting undecreed sources of water under its partial decrees, and improves its system of diversion from the Martin-Curran Tunnel, the Director may entertain its delivery call and make an inquiry into whether Rangen is materially injured. However, under the current circumstances Rangen's use, conveyance and diversion at the Rangen facility is not reasonable and its delivery call must be denied.

IV. RANGEN'S DELIVERY CALL SHOULD BE FOUND FUTILE

The CMR define a futile call 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. The Department is authorized to administer waters of public streams "in order to supply the prior rights of others." I.C. § 42-607 (emphasis added). The Idaho Supreme Court described the futile call doctrine as follows:

> We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (emphasis added). If curtailment would result in an amount of water reaching the appropriator less than a usable quantity that the appropriator can put to additional beneficial use, the call is futile. *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966) (If the water "would reach Spring Creek in usable quantities, plaintiffs are entitled to enjoin defendant's interference therewith." (emphasis added)).

As described *supra*, the amount of water that would reach Rangen's decreed water source as a result of curtailment is minimal. Rangen would receive between 8 and 11 cfs of water from curtailment of the entire ESPA Common Ground Water area. Exhibits 3654 and 3657. Adding that amount to Rangen's existing Martin-Curren Tunnel supply of approximately 4.4. cfs would provide Rangen with a total water supply of only 15 cfs. Testimony established that, even if Rangen was materially injured, it required approximately 20-30 cfs to produce conservation fish and to produce fish for the commercial market. Curtailment will not produce these amounts of water for Rangen. Exhibit 3650.

However, Rangen is not injured. As explained in Part I.D, additional water will not result in any additional beneficial use by Rangen. Rangen's uses of its water supply over time have historically included sources that are not subject to its decrees; thus, it cannot complain of shortages for production of conservation or commercial fish (for example) because it could not

have made use of the water for those purposes had it been limited to its adjudicated source at the Curren Tunnel. Further, the evidence in the record demonstrates that additional water produced by curtailment would not be put to beneficial use for research purposes—Rangen's research needs can be met with current supplies. Finally, because curtailment will not supply Rangen with a usable amount of water, its delivery call should be found futile.

Furthermore curtailed junior ground water rights will not equally contribute additional water to Rangen. Exhibit 3650, Figure 8-4a shows the total amount of water accruing to all water supplies at Rangen based on curtailment; the regression analysis that Greg Sullivan presented demonstrates that 63% of water produced by curtailment would accrue to the Martin-Curren Tunnel. The percentages plotted on Figure 8-4a describe the benefit to Rangen from curtailing juniors within certain geographic areas. For example, and referring to Figure 8-3a, curtailing all of Pocatello's junior pumping would result in 24 gpm accruing at Rangen; meanwhile, Pocatello would curtail between 3000-6000 af of pumping to provide the 24 gpm.

The Director is authorized to exercise discretion in ordering curtailment. *Clear Springs Foods*, 150 Idaho at 817, 252 P.3d at 98. Previously, the Director has declined to curtail water rights beyond a "trimline", based on uncertainty related to stream gage measurements and the ability of the model to predict accruals to the senior's river reach or spring cell. While there does not appear to be a basis to adopt a trimline based on specific technical uncertainty analyses, the Director is authorized to decline to curtail junior ground water rights if the curtailment will not produce material amounts of water. IDAPA 37.03.11.010.08 ("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.").

Because the amounts to be gained by Rangen from curtailment of areas that contribute less than 2% of the curtailed supply to Rangen's spring cell (as demonstrated by the examples of Pocatello and Fremont Madison Irrigation District amounts) are not material, the Director should decline to order curtailment of these areas. By the same token, the amounts of water to be gained by Rangen from curtailment of the remainder of the ESPA are insufficient to improve Rangen's ability to make beneficial uses of its adjudicated Curren Tunnel supply. Under this two pronged evaluation of the evidence, the Director should decline to order curtailment in response to Rangen's delivery call.

Respectfully submitted this 21st day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Closing Brief** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:

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