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ATTORNEYS FOR THE 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 REPLY TO RANGEN, INC.'S AND SURFACE WATER COALITION'S CLOSING BRIEFS**

The City of Pocatello ("City" or "Pocatello") by and through its attorneys hereby submits its Reply to Rangen, Inc.'s ("Rangen") and the Surface Water Coalition's ("SWC") Closing Briefs dated June 21, 2013. In aid of the arguments in this brief, Pocatello incorporates both specifically (as reflected in the citations within) and generally the arguments and record citations found in Pocatello's Closing Brief and Pocatello's Proposed Findings of Fact, Conclusions of Law and Order.

I. STANDARDS OF PROOF: THE RECORD DEMONSTRATES THAT RANGEN'S OPERATIONS AND MEANS OF DIVERSION ARE REASONABLE

Rangen summarizes the questions to be answered by the Director as:

- "whether the petitioner is suffering 'material injury';"
- "whether the petitioner is diverting water efficiently and without waste; and"

- "whether the respondent junior-priority water right holders are using water efficiently and without waste."

Rangen's Closing Brief at 4. Rangen's list is incomplete.

As a starting point, and as described in Pocatello's Closing Brief, the Director must take a step back, before examining Rangen's claims for material injury, and interpret the existing partial decree. Pocatello's Closing Brief and Pocatello's Proposed Findings of Fact, Conclusions of Law, and Order ("Proposed Findings") explained in detail the portions of Rangen's physical supply that are subject to its partial decrees, and thus subject to protection in a delivery call. In this regard, the Director is authorized to interpret but not re-adjudicate Rangen's decrees; the Director also has discretion to consider whether or not Rangen is injured based on shortages to its decreed sources of water. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (rejecting senior appropriator's position that its current and future need for water was irrelevant in a delivery call proceeding). *AFRD#2* also established the presumption that the senior is entitled to his decreed quantity—a presumption that is complicated in this case by the fact that Rangen's partial decrees protect from injury only the flows at the Martin-Curren Tunnel, which has historically produced far less than the flow rates reflected on Rangen's decrees. *Id.* at 878, 449. Regardless of what Rangen *needs* in the way of flows for its beneficial uses, the Martin-Curren Tunnel supply is limited in both flow rate and amounts that would accrue to the source from curtailment. All of this is part and parcel of the Director's obligations in determining whether the senior's water rights are injured.

In addition to evaluating the decree, the Director must make an evaluation of the reasonableness of Rangen's operations. "[T]he Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost." *Id.* Pocatello's Closing Brief and

Proposed Findings also discussed Rangen's inherently unreasonable operations and unreasonable means of diversion. The Idaho Supreme Court has determined that reasonableness is not a part of a senior's decree, but rather is effectively an implied limitation on the operation of the senior's decree. *Id.* at 877, 154 P.3d at 448; CMR 37.03.11.042.01.g (the Director may consider "[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices").

A. The evidence is clear and convincing that Rangen's operations and means of diversion are unreasonable and that Rangen is not injured

Against this backdrop, Pocatello and Idaho Ground Water Appropriators, Inc. ("IGWA") presented evidence that demonstrates that Rangen is not injured; that Rangen's call is futile; and that Rangen's operations and means of diversion are both unreasonable. The evidence on these points satisfies the "clear and convincing" standard, and was not refuted by Rangen. To wit:

1. There is clear and convincing evidence in the record that Rangen's operations are unreasonable.

    a. Until just before the hearing in this matter, Rangen wasn't even aware it had relied upon physical water supplies beyond those subject to its partial decrees.

        i. Rangen has diversion locations that divert both Martin-Curren Tunnel water and additional water arising on the slopes below the Tunnel. Pocatello's Proposed Findings ¶ IV.C.47.

        ii. Exhibit 3650, Figures 2-7 and 2-5a, demonstrates that the Martin-Curren Tunnel flow is roughly 40% of the total flow at the Rangen facility. Tr. vol. VI (Sullivan), 1359−63, May 8, 2013.

    b. Rangen witnesses admitted at trial that Rangen's operations had never been limited to reliance on the Martin-Curren Tunnel source of water. Pocatello's Proposed Findings ¶ IV.B.37. As such, Rangen's claim of injury to its water rights is based in part on its reliance on physical supplies beyond those subject to protection

under Rangen's partial decrees. An admission of a party opponent is adequate to satisfy the clear and convincing standard.

c. Rangen has relied on physical supplies beyond those subject to its partial decrees; however, it has not even used the available physical supplies reasonably.[1]

i. Evidence showed that Rangen could increase production using its current water supplies. Pocatello's Proposed Findings at ¶¶VI.A.-B., VI.D., and VI.E.; Tr. vol. VIII (Rogers), 1818:14−1824:24; 1881:25-1884:3, May 10, 2013.

(1) For example, Rangen does not use the peaks of the seasonal high flows at the facility to produce more fish. Ex. 3333, Tr. vol. VIII (Rogers), 1829:22−1831:8.

(2) Rangen could purchase eggs more often during the year to more closely follow their seasonal flow regime and produce more fish. Tr. vol. VIII (Rogers), 1833:14−22

(3) Installation of aeration devices would allow Rangen to make the most out of its existing water supplies. Tr. vol. VIII (Rogers), 1943:15−19.

ii. Rangen cannot make 100% of its first use water available throughout its facility. Pocatello's Proposed Findings at ¶IV.C.

(1) Approximately two-thirds of the total water supply is not available to the hatch house, Greenhouse and Small Raceways. Ex. 3650, Fig. 2-7.

(2) Rangen has never formally considered installing a pipe to pump first use water from the Lower Diversion to the hatch house, Greenhouse or Small Raceways.

(3) Mr. Rogers testified that pumps could be installed to recirculate or augment Rangen's available

[1] *See* CMR 37.03.11.042.01.h (the Director may consider "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion").

physical supply.[2] Tr. vol. VIII (Rogers), 1866:3−1872:11.

(4) Rangen did not refute this evidence, but only argued that it would complicate its operations.

d. Rangen failed to accurately measure the total flow used in the hatchery, and its flow measurements are not consistent with industry standards.

i. Tr. volume VI (Sullivan), pages 1428:12−1430:2; Exhibit 3345, Figure 2-4 (measurements systematically low at 15.9%).

ii. Tr. volume V (Brockway), pages 1079−80).

iii. Exhibit 2131 (Idaho Department of Water Resources water measurement standards).

iv. Exhibit 3345, Tables 2-5 through 2-7 [graphs].

e. Rangen's partial decrees describe a 10-acre tract within which Rangen must divert the physical supplies from the Martin-Curren Tunnel that are the subject of its partial decrees. Rangen's Lower Diversion outside of the 10-acre tract is a per se unlawful point of diversion and an unreasonable means of diversion.

i. Over two-thirds of Rangen's diversions are made at the unlawful Lower Diversion point. Ex. 3650, Fig. 2-7.

ii. This evidence is clear and convincing—as well as unrefuted. Indeed, Rangen admits that its Lower Diversion is outside of the 10-acre tract. Rangen's Closing Brief at 32.

2. Neither Rangen's decreed water supplies at the Martin-Curren Tunnel nor its total physical supply (including diversions at the undecreed point of diversion at the Large Raceways) have ever been adequate to satisfy water right no. 36-07694.[3]

a. Pocatello's Proposed Findings ¶IV.B.

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[2] *See* CMR 37.03.11.042.01.b (the Director may consider "[t]he effort or expense of the holder of the water right to divert water from the source"); CMR 42.01.e (the Director may consider "[t]he amount of water being diverted and used compared to the water rights").

3 *See* CMR 37.03.11.042.01.a (the Director may consider "[t]he amount of water available in the source from which the water right is diverted").

b. Tr., volume VI (Sullivan), pages 1369:1−1370:12; Exhibits 1028, 3656.

3. Rangen's beneficial uses are not injured.

a. Research (Pocatello's Proposed Findings ¶ VI.C)

i. Rangen can currently conduct research at certain times each year in all areas of the facility except the Large Raceways. *See* Tr. vol. III (Ramsey), 711:14−21, May 3, 2013.

ii. Rangen's historical operations have not relied on research conducted in the larger raceways. *See* Pocatello's Proposed Findings ¶¶ 112−16.

iii. In the face of Pocatello's testimony involving an evaluation of Rangen's actual research documents, Rangen presented only testimony of its manager Lynn Babington who left Rangen's employ nearly 30 years ago regarding his recollection of Rangen's alleged use of the Large Raceways for research.

iv. In addition, Rangen's current research scientist Doug Ramsey was unable to explain why, if Large Raceway studies were such an important part of Rangen's research efforts, there were only 13 examples of large raceways studies (most conducted 30 years ago) in the entire body of documentation regarding Rangen's research.

v. Neither Mr. Babington's conclusory testimony or Mr. Ramsey's lack of knowledge on this point serves to refute Pocatello's clear and convincing evidence that research projects have been conducted mainly in the small raceways, Greenhouse and hatch house, developed by analysis of Rangen's documents.

b. Conservation fish production

i. Rangen has never failed to satisfy its contract for Idaho Power's conservation fish due to shortages in water supplies. (Pocatello's Proposed Findings ¶¶ VI.A, VI.E)

c. Commercial fish production

i. Rangen's commercial fish production is limited to fish that are not required to satisfy the Idaho Power contract. However, be that as it may, Rangen's historical fish production is not correlated with available flows.

(Pocatello's Proposed Findings ¶¶ VI.B, VI.E generally; *see also*, Pocatello's Proposed Findings ¶¶ VI.E.126-129, Exhibit 3286.)

B. Although clear and convincing evidence supports the Director finding that Rangen's operations and means of diversion are unreasonable and that Rangen's water rights are not injured, the "reasonableness" findings do not require a showing beyond the preponderance of the evidence

Rangen alleges that every factual finding in this delivery call must be supported by clear and convincing evidence. Rangen's Closing Brief at 8. Pursuant to the Idaho Supreme Court's decision in *A&B v. Spackman*, "[o]nce a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012) (emphasis added). An example of the types of determinations by the Director decisions requiring "clear and convincing" evidence would be the Director's finding that the flow rates reflected in Rangen's partial decrees far exceed historical flows available in priority requires clear and convincing evidence. This finding has been established by clear and convincing evidence. Pocatello's Proposed Findings ¶IV.B. Similarly, the finding Rangen seeks that its partial decrees allow it to divert water from a source other than the Martin-Curren Tunnel and from points outside of its decreed point of diversion within the 10-acre tract also require clear and convincing evidence, as such findings would change the terms of Rangen's decrees. *See* Part III below.

However, the Director's evaluation of reasonableness of Rangen's operations and/or means of diversion does not involve interpretation of Rangen's partial decrees, or the potential to vary decree terms. Thus, the Director does not require clear and convincing evidence to find Rangen's operations are unreasonable, but may instead rely on the preponderance of the evidence standard. As previously explained by the Idaho Supreme Court, "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." *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 877, 154 P.3d at 448. Accordingly, any findings regarding "the reasonableness of a diversion, the reasonableness of use" at Rangen's facility need be supported by a preponderance of the evidence. *Id.* at 876, 154 P.3d at 447; *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho App. 437, 439, 926 P.2d 213, 215 (1996) ("[T]he preponderance of the evidence standard [is] generally applied in administrative hearings.").

II. POCATELLO HAS PRESENTED EVIDENCE THAT IT IS BENEFICIALLY USING ITS WATER RIGHTS AND RANGEN WAIVED ITS RIGHT TO CHALLENGE POCATELLO'S EVIDENCE ON THIS POINT

A. Under Idaho law, Pocatello is entitled to the presumption that it is entitled to the amounts reflected in its partial decrees

Rangen contends that Pocatello has failed to present evidence that it is using its water rights efficiently without waste, as Rangen contends is required by CMR 40.03. However, the standard identified in CMR 40.03 is not self-executing—in other words, if Rangen is entitled to the presumption that it is entitled to its decreed amount, so is Pocatello. Contrary to Rangen's suggestion, the fact that Pocatello's decrees are junior in priority creates no additional burden on Pocatello to show it requires its supplies and is using them reasonably. In the absence of evidence by Rangen or SWC that Pocatello's operations are wasteful, there is no inquiry to be made on this point by the Director.[4]

Further, Rangen had the opportunity to develop just this type of evidence at trial and waived its opportunity. Justin Armstrong, Pocatello's water superintendent testified that the City serves over 16,000 customer accounts, and delivers water for commercial, industrial, irrigation, and culinary beneficial uses. Tr. vol. V, 1098:11−19, May 7, 2013. Exhibit 3314, prepared by Spronk Water Engineers, identifies Pocatello's water rights. Mr. Armstrong testified that the

[4] And, of course, if the Director finds Rangen is not injured, the issue of whether the juniors are being efficient is irrelevant.

City relies on its groundwater rights for all its culinary uses, and that its Airport wells rely on groundwater for the biosolids program. Tr. vol. V, 1102:23−1103:9; 1111:17−1112:6. Rangen did not cross-examine Mr. Armstrong regarding Pocatello's use of its water rights, and there are no allegations that Pocatello wastes water.[5] Accordingly, if the Director finds it to be necessary, there is evidence in the record that Pocatello puts its water rights to beneficial use without waste.

B. Curtailing Pocatello's wells would not provide Rangen a usable amount of water

Whatever the nature of Pocatello's water use—and as stated above, Rangen waived its opportunity to develop evidence in this regard—curtailment of Pocatello's wells for any reason will not lead to usable amounts of water at Rangen. Rangen's manager of aquaculture operations, Mr. Kinyon, agreed that the 5 to 8 gallons per minute of water that would accrue at Rangen after curtailment of *all* of Pocatello's junior ground water pumping after a lengthy period of time would "'not . . . make a tremendous difference by itself in our hatchery operation.'" Pocatello's Proposed Findings ¶ 138 (quoting Tr. vol. II (Kinyon), 494:23−495:6, May 2, 2013. *See also* Pocatello's Proposed Findings ¶ VI.

III. RANGEN IS NOT ENTITLED TO AN INTERPRETATION OF ITS PARTIAL DECREES THAT AMOUNTS TO A READJUDICATION

A. Rangen may only divert water from its decreed source, the Martin-Curren Tunnel

In his April 22, 2013 Order, the Director made two findings:

> Rangen's partial decrees unambiguously state that the point of diversion element is located as follows: "T07S R14E S32 SESWNW within Gooding County." 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 "Springs(s)" and/or "Unnamed Springs(s)" as additional sources."

[5] As Rangen points out, waste is an affirmative defense to be raised by opposing parties.

Order Granting in Part and Denying in Part Rangen's Motion for Partial Summary Judgment Re: Source ("Order re Partial Summary Judgment") at 6, Apr. 22, 2013 (citations omitted). Despite these rulings, Rangen has asked the Director to re-adjudicate its decrees to allow it to continue to divert water (1) not originating from the Martin-Curren Tunnel; and (2) to divert at points outside of the 10-acre tract ("T07S R14E S32 SESWNW within Gooding County") specified in its partial decrees. Rangen's Closing Brief at 13.

Because the Director has already concluded that Rangen's decreed point of diversion and source are "unambiguous", parole evidence cannot be considered to interpret these terms. Order re Partial Summary Judgment at 6. A decree that is clear on its face must be interpreted pursuant to its plain meaning. *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 528, 272 P.3d 491, 500 (2012). The rule in Idaho is that parole (extrinsic) evidence may not be submitted to contradict the plain terms of a written agreement that is unambiguous on its face. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). "'[E]vidence of custom or usage may not be introduced to vary or contradict the terms of a plain and unambiguous contract. . . ." *Id.* (citation omitted).

Rangen seeks application of the "latent ambiguity rule" to require the Director to examine parole evidence that Rangen suggests allows interpretation of the term "Martin-Curren Tunnel" to mean "the spring water that forms the headwaters of Billingsley Creek." Rangen's Closing Brief at 12−13. Pocatello urges the Director to reject the "latent ambiguity" analysis proposed by Rangen because this narrow legal exception does not apply here. When the language used to describe Rangen's source—"Martin-Curren Tunnel"—is evaluated in light of the facts in this case, there is no latent ambiguity as to what that term refers to, and such a

conclusion is well outside of the circumstances in which Idaho courts have found a latent ambiguity. *Knipe Land Co.*, 151 Idaho at 455, 259 P.3d at 601.

Rangen's only evidence of ambiguity is based on Rangen's decision, years ago, to build the Lower Diversion to collect spring water arising on the talus slope below the Martin-Curren Tunnel. However, Rangen's decision to build and operate a point of diversion outside of the 10-acre tract does not establish that such works are permitted under Rangen's partial decrees, or that Rangen can expand the definition of the source of water beyond the Martin-Curren Tunnel, or that partial decrees may reasonably be interpreted to disregard their plain terms. Simply put, the term "Martin-Curren Tunnel" does not "lose clarity" simply because the Director has interpreted the term contrary to Rangen's preferred meaning. *Id.*; *Black v. Fireman's Fund Am. Ins. Co.*, 115 Idaho App 449, 453, 767 P.2d 824, 828 (1989) (disagreement over meaning of terms does not automatically create an ambiguity, nor "because a dispute exists over the application of the language to a certain fact pattern").

Indeed, in order to find that the term "Martin-Curren Tunnel" is ambiguous, the Director must find that Rangen's interpretation of that term—*i.e.*, "the spring water that forms the headwaters of Billingsley Creek"—is reasonable. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). However, there is no basis to conclude that Rangen's interpretation is reasonable, and Rangen's efforts to obtain such an interpretation to retroactively justify Rangen's decision to divert water outside of its decreed point of diversion is not supported by the law.

Rangen relies on the Idaho Supreme Court's analysis in *Williams v. Idaho Potato Starch Co*. in error. In *Williams*, the Court found that the term "a ten inch pump" contained a latent ambiguity because the contract made "no reference to what type of pump" the parties intended,

and the record contained evidence that "at least three pumps" would qualify under the terms of the contract. The Court's reasoning was based on the fact that "there are two or more things or objects, such as pumps, to which [the term] might properly apply." *Williams*, 73 Idaho 13, 20, 245 P.2d 1045, 1049 (1952). Here, unlike in *Williams*, there is only one tunnel that this term can possibly apply—there are not two "tunnels" in question. Further, the term "tunnel" is not ambiguous—it is defined as "[a] passage under the ground or under the water," or "[a] passage through or under a barrier." WEBSTER'S II NEW COLLEGE DICTIONARY 1187 (1999). Under no conceivable use could the word "tunnel" mean "the spring water that forms the headwaters of Billingsley Creek."

Further, interpreting the source of Rangen's water rights as the Martin-Curren Tunnel does not result in an "absurdity" that would indicate a latent ambiguity. *Knipe Land Co.*, 151 Idaho at 456, 259 P.3d at 602. Indeed, to interpret the decree as permitting Rangen to divert water from sources other than the "Martin-Curren Tunnel" would result in patent absurdity and inconsistency with the other terms of its partial decrees—the Martin-Curren Tunnel is the source of water that can be diverted within Rangen's decreed point of diversion. *Id.* Rangen's partial decrees allow it to divert from the 10-acre tract ("T07S R14E S32 SESWNW within Gooding County"). Exhibits 1026, 1028. The Martin-Curren Tunnel is identified as the source of Rangen's water rights, and the Tunnel is located within the 10-acre tract. The terms of Rangen's partial decrees should be read in harmony, therefore, the reasonable interpretation of Rangen's partial decrees is that Rangen may divert water at the opening of the Martin-Curren Tunnel. Instead, Rangen collects water from spring flow below the Martin-Curren Tunnel and Rangen Box and delivers it to the Large Raceways and CTR raceways by means of a 36-inch pipe. Of Rangen's three means of diversion, only the White Pipe and Steel Pipe carry water diverted from

the Martin-Curren Tunnel. Ex. 3651; Tr. vol. III (Ramsey), 707:23−708:16. Only the White Pipe and Steel Pipe are diversion structures within the 10-acre tract described point of diversion. Accordingly, as discussed below, Rangen is diverting water outside its decreed point of diversion, and from sources outside of the Martin-Curren Tunnel.

Finally, if the Director determines to review parole evidence, the most important parole evidence is Rangen's SRBA claim for water right no. 36-02551,[6] in which Rangen claims as the source of water the "Martin-Curren Tunnel." The claim is verified by Christopher T. Rangen, Rangen, Inc.'s owner, and was presumably reviewed by legal counsel. To date, Rangen's calls for evaluation of parole evidence have steered clear of asking for interpretation of the partial decree by reference to this critical document. It isn't clear why the Director should spend time evaluating the documents in the water rights backfile that reflect what IDWR understood 30 to 40 years ago regarding Rangen's attempts to obtain water rights licenses, when Rangen's *own claim* made at the SRBA is at variance with the claims it made for its water rights licenses. Simply put, Rangen specifically claimed the Martin-Curren Tunnel as the source of its water rights in the SRBA, and now must be held to the language of its partial decrees based on Rangen's claimed source. *See Haener v. Ada County Highway Dist.*, 108 Idaho 170, 697 P.2d 1184 (1985) (in the case of an ambiguous contract, the contract is to be construed against the drafting party).

B. Rangen's partial decrees require Rangen to divert its decreed source of water within the described 10-acre tract

[6] Rangen's claim for water right no. 36-02551 is in the record as one of the documents produced by the Department to IGWA in June of 2012; and also one of the documents produced by IGWA to Rangen on December 4, 2012 in IGWA's Fourth Supplemental Responses to Rangen's First Discovery Requests. Rangen's claim for water right no. 36-07694 is contained in hearing Exhibit 1028, and is identical in terms of the source and point of diversion claimed in 36-02551, although the other terms of the claim vary. Mr. Rangen verified both claims.

Before hearing, the Director held that there were narrow remaining questions of fact as to whether Rangen could divert other water within its decreed point of diversion—the 10-acre tract. Order re Partial Summary Judgment at 7. As described in Pocatello's Proposed Findings, Dr. Brockway's supplemental analysis was unpersuasive in resolving those questions of fact to Rangen's benefit. Pocatello's Proposed Findings ¶ IV.D. However, regardless of disputes of fact regarding the source of water, Rangen is stuck with the plain language of the point of diversion—the described 10-acre tract that contains the Martin-Curren Tunnel and White Pipe and Steel Pipe conveyance structures, described above. No amount of argument can place the Lower Diversion—where two-thirds of Rangen's diversions are made—within that legally described 10 acres.

Despite this reality, Rangen argues in its Closing Brief that it is entitled to maintain the Lower Diversion as a lawful diversion within the terms of the partial decrees because it is part-and-parcel of a "diversion structure that begins at mouth of the Martin-Curren Tunnel itself, continues down the talus slope, channels water into a pond which then supplies water through a 36" concrete pipeline to the Large Raceways." Rangen's Closing Brief at 25. Insofar as this alleged "diversion structure" is limited to the White Pipe and Steel Pipes, which emanate from the Farmer's Box and Rangen Box, Rangen is on firm ground because these structures divert within the 10-acre tract. However, Rangen goes on to suggests that additional water that either does not arise at the Martin-Curren Tunnel or that does arise at the Tunnel but is not diverted at these two pipelines is "channeled down to a pond" that supplies the Large Raceways. *Id*. at 28. Rangen asks for an interpretation that the water be considered to be "diverted" within the described 10-acre tract because it is within the "nearest" 10-acre tract adjacent to the decreed 10-acre tract. *Id.* at 32.

Pocatello can imagine many uses for such a creative interpretation of SRBA partial decrees. Indeed, Pocatello's own points of diversion would perhaps benefit from such a novel approach to decree interpretation that allows the Director to disregard the actual legal description of the point of diversion in place of something that's "pretty close"—and more favorable to the water right owners. However, what Rangen seeks is not consonant with the Director's obligations under Idaho law during a delivery call: to interpret—rather than re-adjudicate—partial decrees.

IV. THE DIRECTOR HAS DISCRETION TO MAKE A REASONED DECISION AND EXCLUDE JUNIOR APPROPRIATORS FROM CURTAILMENT

Rangen and SWC challenge as arbitrary and capricious the Director's authority to exclude from curtailment water users contributing what the Director considers a negligible amount of water in any curtailment scenario (previously referred to as a "trimline"), arguing that such exclusion has no basis in science because ESPAM 2.1 is the best available science. Rangen's Closing Brief at 73; *see* SWC Closing Brief *generally*. The senior water users in *Clear Springs Foods, Inc. v. Spackman* made a similar challenge to the Director's application of the trimline in that dispute, arguing that because the model was the "best available technology", imposition of the trimline was an abuse of discretion. The Idaho Supreme Court rejected this argument, and approved the Director's adoption of the trimline under the facts of the *Clear Springs* dispute as an appropriate exercise of agency discretion. *Clear Springs*, 150 Idaho 790, 817, 252 P.3d 71, 98 (2011) (finding that the Director acted within his discretion and "consistently with the legal standards applicable to the available choices, and . . . through an exercise of reason"). The nature of the Director's discretion in this regard has not changed since the announcement of *Clear Springs.*

One basis under Idaho law for the Director to exclude water rights from curtailment is in situations where the elements of a futile call are met. A call is futile if curtailment would result in an amount of water reaching the appropriator that is less than a usable quantity that the appropriator can put to additional beneficial use. *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966) (if water "would reach Spring Creek in usable quantities, plaintiffs are entitled to enjoin defendant's interference therewith.") (emphasis added). As discussed in Pocatello's Proposed Findings at ¶ VII, Pocatello satisfied the elements of a futile call in its determination of the effects of curtailment of water rights junior to 1962 both in terms of how much water will reach Rangen (approximately 1% of the curtailed amount) as well as the determination that many junior and subordinated water rights will benefit from the remaining 99% of curtailed pumping. This determination satisfies the "clear and convincing" evidence standard, and Rangen did not attempt to refute Pocatello's evidence in this regard. Instead, it argued that the effects of curtailment were a "benefit" to other water rights as a whole. Pocatello's Proposed Findings ¶ VII.141. The record contains factual and technical bases for the Director to exercise his discretion, as permitted by *Clear Springs*, and exclude some or all junior water users from curtailment, in the event he finds injury to Rangen.

CONCLUSION

For the reasons identified in Pocatello's Closing Brief, Pocatello's Proposed Findings of Fact, Conclusions of Law and Order, as well as the arguments presented in this brief and evidence available in the record in this matter, Pocatello respectfully requests that the Director reject Rangen's claims of injury and deny its delivery call or, in the alternative, find that Rangen's call is futile as to portions of the aquifer (including Pocatello) and that curtailment will not improve Rangen's position vis a vis its decreed water supplies and thus must be rejected.

Respectfully submitted this 19th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Reply to Rangen, Inc.'s and Surface Water Coalition's Closing Briefs** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:

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