

RECEIVED

DEC 13 2011

DEPARTMENT OF
WATER RESOURCES

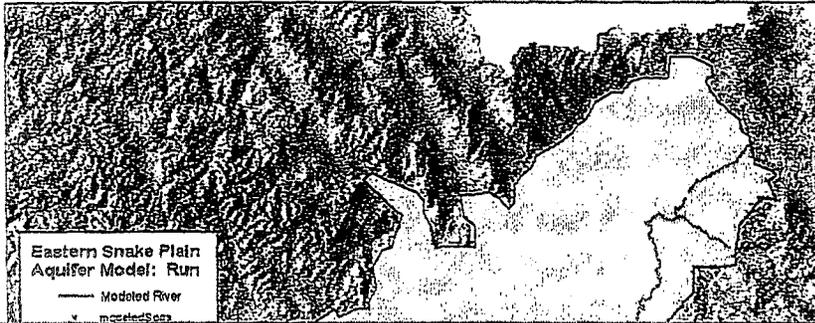
BEFORE THE IDAHO DEPARTMENT
OF WATER RESOURCES

STATE OF IDAHO

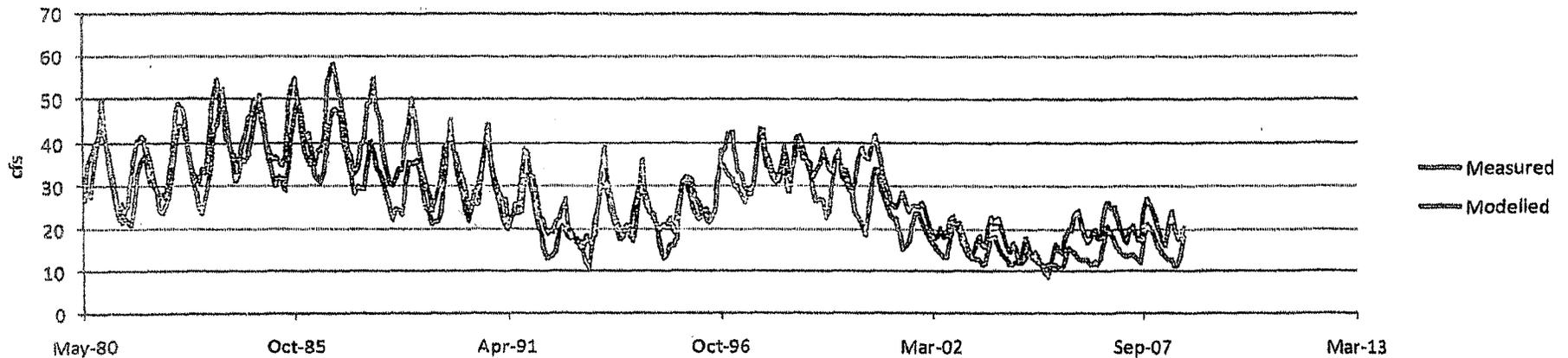
IN THE MATTER OF
DISTRIBUTION OF
WATER TO RANGEN,
INC.'s WATER RIGHT
NOS. 36-02551 AND 36-
07694

DOCKET
NO.: _____

PETITION FOR
DELIVERY CALL



RANGEN



Robyn M. Brody (ISB No. 5678)
Brody Law Office, PLLC
PO Box 554
Rupert, ID 83350
Telephone: (208) 420-4573
Facsimile: (208) 260-5482
rbrody@cableone.net
robymbrody@hotmail.com
Attorney for Rangen, Inc.

J. Justin May (ISB No. 5818)
May, Browning & May, PLLC
1419 West Washington
Boise, ID 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com
Attorneys for Rangen, Inc.

Fritz X. Haemmerle (ISB No. 3862)
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fhaemmerle@haemmerle.com
Attorneys for Rangen, Inc.

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER TO RANGEN, INC.'s WATER RIGHT NOS. 36-02551 AND 36- 07694	DOCKET NO.: _____ PETITION FOR DELIVERY CALL
---------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------

Rangen, Inc., by and through its attorneys, submits the following Petition for Delivery Call in accordance with Art. XV, § 3 Idaho Const., I.C. §§ 42-101, 226, 602, 607 and IDAPA 37.03.11.040 or as otherwise provided for by the laws of the State of Idaho:

I. BACKGROUND

1. Rangen, Inc. ("Rangen") is a family corporation that has been in business since 1925. Its headquarters is located in Buhl, Idaho.
2. Rangen, among other things, is a leading feed manufacturer in the US aquaculture markets.
3. As part of its aquaculture business, Rangen owns and operates a research and fish propagation facility ("Research Hatchery") near Hagerman, Idaho. A sketch of Rangen's

Research Hatchery is attached hereto as Exhibit 1A and an aerial photograph taken on August 29, 1986 is attached hereto as Exhibit 1B.

4. The water that sustains Rangen's Research Hatchery is spring water from an area commonly referred to as the Thousand Springs area of the Thousand Springs Reach of the Snake River within Water District 130. The Thousand Springs area is characterized by many flowing springs of high quality water that is well suited to aquaculture and fish propagation.
5. Rangen's water comes from a spring through the Martin-Curran Tunnel. The Martin-Curran Tunnel is tributary to Billingsley Creek, a tributary of the Snake River in Gooding County.
6. Rangen has five (5) water rights for the Research Hatchery that have been decreed through the Snake River Basin Adjudication. Rangen's decreed water rights are summarized as follows:

Water Right No.:	36-00134B	36-00135A	36-15501	36-02551	36-07694
Priority Date:	October 9, 1884	April 1, 1908	July 1, 1957	July 13, 1962	April 12, 1977
Beneficial Use:	Irrigation (0.09 cfs) and Domestic (0.07 cfs)	Irrigation (0.05 cfs) and Domestic (0.05 cfs)	Fish Propagation	Domestic (0.10 cfs) and Fish Propagation (48.54)	Fish Propagation
Diversion Rate:	0.09 cfs	0.05 cfs	1.46 cfs	48.54 cfs	26.0 cfs
Period of Use:	Jan. 1 - Dec. 31 (Domestic) Feb. 15 - Nov. 30 (Irrigation)	Jan. 1 - Dec. 31 (Domestic) Feb. 15 - Nov. 30 (Irrigation)	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31

Copies of the partial decrees associated with these rights are attached hereto as Exhibit 2.

II. RANGEN HAS SUFFERED, AND CONTINUES TO SUFFER,
MATERIAL INJURY FROM JUNIOR-PRIORITY GROUND WATER PUMPING
IN THE AREAS ENCOMPASSED BY ESPAM2

7. Rangen has expended reasonable efforts to divert water for right nos. 36-02551 and 36-07694. See IDAPA 37.03.11.042.01.b.
8. Rangen can beneficially use all of the water to which it is entitled pursuant to its decreed water rights if it is available.
9. Rangen is not wasting water.
10. Rangen has been measuring and tracking the water delivered to its Research Hatchery since 1966. Rangen's flow measurements represent the total supply of water available to the Research Hatchery and consist of measurements taken at the Western end of the facility below the CTR raceways (see sketch attached as Exhibit 1) plus measurements taken at the dam on Billingsley Creek (see also sketch attached as Exhibit 1). The monthly average flow measurements from 1966 to October, 2011 are attached hereto as Exhibit 3A. The weekly average flow measurements from 1996 to October, 2011 are attached hereto as Exhibit 3B.
11. Based on the flow data attached as Exhibits 3A-B, the amount of water available for Rangen's Research Hatchery has declined significantly over the years.
12. The only water rights which have been, and are currently being, satisfied are 36-00134B (0.09 cfs), 36-00135A (0.05 cfs) and 36-15501 (1.46 cfs).
13. Rangen is not receiving all of the water to which it is entitled pursuant to decreed water rights nos. 36-02551 and 36-07694.

14. The quantity of water available in the Martin-Curran tunnel, the source of Rangen's water rights, is expected to continue to be insufficient during 2012 and beyond. See IDAPA 37.03.11.042.01.a.
15. Rangen has been, and is currently being, materially injured by junior-priority ground water pumping in the areas encompassed by the Eastern Snake Plain Aquifer Model Version 2.0 ("ESPAM2").
16. Curtailment of junior-priority ground water pumping in the areas encompassed by ESPAM2, would result in a usable amount of water reaching Rangen's point of diversion in a time of need. Rangen is aware of the following facts and information to support its allegation of material injury:
 - A. The Idaho Supreme Court previously affirmed the issuance of a writ of mandate ordering the Department to administer water from Martin-Curran Tunnel (the same source as Rangen's water) in accordance with the doctrine of prior appropriation after the Department failed to deliver water to property owned by Alvin and Tim Musser. See Musser v. Higginson, 125 Idaho, 392, 871 P.2d 809 (1994).
 - B. Rangen made a delivery call in September/October 2003. The Department used its Enhanced Snake Plain Aquifer Model (ESPA1) to evaluate the call. See ¶¶ 3-5, 65, 1-77 of Order dated February 25, 2004. A copy of the February 25, 2004 Order is attached hereto as Exhibit 4.
 - C. Based on computer-simulated curtailment scenarios at that time, the Department determined that Rangen was, in fact, suffering some material injury and ordered curtailment of some junior-priority ground water pumping. See, p. 26 of Exhibit 4.

- D. The Department pointed out in its February 25, 2004 Order that a new ground water model was expected to be ready for use in making water management decisions in late 2004. See ¶ 76, p. 22 of Exhibit 4.
- E. The Department amended the Order on March 10, 2004 (see Exhibit 5 attached hereto) and rescinded it on March 14, 2005.
- F. After the Department's model was reformulated and recalibrated ("ESPAM1.1"), the Department issued a Second Amended Order dated May 19, 2005 in which it determined that Rangen was not being materially injured by junior-priority ground water pumping and that its call was futile. See ¶ 25, p. 28 of Second Amended Order dated May 19, 2005. A copy of the Second Amended Order is attached hereto as Exhibit 6. The Department used the newer version of the model (ESPAM1.1) to reverse its prior determination concerning Rangen's call.
- G. On June 3, 2005, Rangen timely requested a hearing on all aspects of the Second Amended Order and requested the appointment of an independent hearing officer. The Department did not convene a hearing. A copy of the June 3, 2005 request is attached hereto as Exhibit 7.
- H. On March 31, 2009, Rangen filed another delivery call with the Department and requested a hearing. The Department did not convene a hearing. A copy of the March 31, 2009 delivery call is attached hereto as Exhibit 8.
- I. Since the issuance of the May 1, 2005 Second Amended Order, the Department's model has been further refined and Version 2.0 of the Eastern Snake Plain Aquifer Model has been developed. Specifically, a priority of the refinements has been the

“development of a more scientifically based error factor.” See Letter from Director David Tuthill dated February 25, 2009. A copy of Director Tuthill’s letter is attached hereto as Exhibit 9.

- J. ESPAM2 is well calibrated to regional observations and Rangen’s actual observed and documented spring flows. See Exhibit 10 attached hereto for a graph generated by the Department comparing Rangen’s modeled spring flows with actual observed and documented spring flows.
 - K. ESPAM2 is currently the best available science and any administrative modeling scenarios to evaluate the impacts of junior-priority ground water pumping should be implemented using ESPAM2 with a “difference” modeling approach.
 - L. Attached hereto as Exhibit 11 is a Memorandum from Leonard Rice Engineering outlining a computer-generated curtailment scenario using ESPAM2 with a “difference” modeling approach. This curtailment scenario demonstrates that Rangen has been, and is presently being, materially injured by junior-priority ground water pumping in areas encompassed by ESPAM2.
17. To date, the Department has not evaluated Rangen’s rights using ESPAM2. Rangen’s call under this Petition presents issues that are different than those raised previously, and therefore, this Petition necessarily raises issues that were not actually decided by the Department previously.

III. RELIEF REQUESTED

18. Pursuant to the Department’s constitutional and statutory duty to supervise the distribution of water under Art. XV, § 3 Idaho Const., I.C. §§ 42-101, 226, 602, 607 and IDAPA

37.03.11.040 or as otherwise provided for by the laws of the State of Idaho, Rangen respectfully requests that the Director:

- A. find that Rangen has suffered, and will suffer, material injury as a result of junior-priority ground water pumping in the areas encompassed by ESPAM2;
- B. administer and distribute water in the areas encompassed by ESPAM2 in accordance with the prior appropriation doctrine as required by I.C. § 42-602;
- C. order the water masters of the areas encompassed by ESPAM2 to curtail junior-priority ground water pumping as necessary to deliver Rangen's water in accordance with the prior appropriation doctrine. See I.C. § 42-607.
- D. order immediate curtailment before any hearing is held because: (I) immediate curtailment is necessary to secure an important government or public interest, to-wit, the guaranteed delivery of water rights obtained under the laws of the State of Idaho; (ii) there is a need for prompt action in that junior diversions continue to prevent Rangen's ability to obtain all its decreed water flows; and (iii) the State of Idaho, by and through its Department of Water Resources and Director, has a duty to supervise the allotment of both surface and ground water to those diverting water for any beneficial purpose; and
- E. if the Department does not order immediate curtailment, then convene a timely hearing of this matter before further damage is done by junior-priority ground water pumping

DATED this 13th day of December, 2011.

BRODY LAW OFFICE, PLLC

By: _____

Robyn M. Brody
Robyn M. Brody

HAEMMERLE & HAEMMERLE, PLLC

By: _____

Fritz X. Haemmerle
Fritz X. Haemmerle

MAY, BROWNING & MAY, PLLC

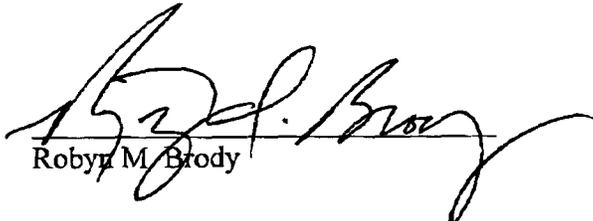
By: _____

J. Justin May
J. Justin May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December, 2011, the above and foregoing document was served in the following manner:

<p>Gary Spackman Interim Director IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail</p>
<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 101 South Capitol Blvd., Suite 300 Boise, ID 83702</p>	<p><input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail</p>
<p>Michael C. Creamer GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83702</p>	<p><input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail</p>


Robyn M. Brody

INDEX OF EXHIBITS

Sketch of Rangen Research Hatchery.....	Exhibit 1A
Photograph of Rangen Research Hatchery dated August 29, 1986.....	Exhibit 1B
Partial Decrees.....	Exhibit 2
Rangen’s Monthly Average Flow Measurements	Exhibit 3A
Rangen’s Weekly Average Flow Measurements.....	Exhibit 3B
IDWR Order dated February 25, 2004.....	Exhibit 4
IDWR Amended Order dated March 10, 2004.....	Exhibit 5
IDWR Second Amended Order dated May 19, 2005.....	Exhibit 6
Letter from Rangen to Director Tuthill dated March 31, 2009.....	Exhibit 7
Rangen’s Petition Requesting Hearing on Second Amended Order of May 19, 2005 and Requesting Appointment of an Independent Hearing Officer.....	Exhibit 8
Letter from Director Tuthill to ESHMC dated February 25, 2009.....	Exhibit 9
IDWR Graph Showing Rangen’s Measured Spring Flow vs. Modeled Results Using ESPAM2.....	Exhibit 10
Memorandum from Leonard Rice Engineers, Inc. dated December 9, 2011.....	Exhibit 11