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DEPARTMENT OF
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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.) Docket No. CM-DC-2011-004
36-02551 AND 36-07694)
) **CITY OF POCATELLO'S PRE-HEARING**
(RANGEN, INC.)) **BRIEF**
_____)

COMES NOW, City of Pocatello ("Pocatello"), by and through undersigned counsel, to file its trial brief in the above-captioned matter.

INTRODUCTION

The delivery call filed by Rangen, Inc. ("Rangen") has been limited by order of the Director to the decreed supplies associated with the Curren Tunnel in Rangen's partial decrees. For the most part, the evidence in this case has been developed by reference to the uses of water made generally at the Rangen facility, without regard for whether the water was associated with adjudicated or unadjudicated sources of water. The reality is that Rangen has historically used a variety of physically available water sources. Based on the Director's impending order related to

Rangen’s Motion for Summary Judgment regarding the scope of supplies encompassed by their partial decrees, Pocatello now understands that *only* the supplies arising from the Curren Tunnel are legally available supplies¹, and thus the only supplies that are legally subject to a cognizable claim of injury.

Pocatello has developed evidence evaluating Rangen’s beneficial use of its water rights based on information provided by Rangen. In hindsight, it appears that most of the information Rangen provided in discovery (including deposition testimony and expert reports and with the exception of some flow data) does not distinguish between water supplies used because they were *physically* available and water supplies used because they were *legally* available. To comply with the Director’s expected order on summary judgment, Pocatello is currently working to disaggregate the water uses associated with Rangen’s adjudicated amount from the total physical supplies of water from its technical analyses previously submitted in this matter²; Pocatello assumes other parties are doing the same.

Despite the new legal framework provided by the Director’s Order, the facts related to Rangen’s water uses haven’t changed, and Rangen is still not injured. What follows is a preview of the evidence Pocatello expects to provide or elicit at trial; however, this evidence has not yet been broken out into information related to Rangen’s use of legally available supplies (i.e., the sources adjudicated under its partial decrees) versus its use of physically available supplies.

I. BACKGROUND

A. The beneficial use of Rangen, Inc.’s (“Rangen”) water rights is applied-research to validate decisions about fish food formulations, and limited fish production for conservation purposes.

¹ The term “legally available” is used to describe the water supply that is covered by Rangen’s partial decrees; “physically available” is used to describe all water supplies that may have been used by Rangen in the past, adjudicated and unadjudicated.

² Pocatello will file timely file exhibits as provided for under the Director’s most recent scheduling order; however, it will supplement with revised exhibits to the extent those are necessary to be consistent with the Director’s summary judgment order limiting consideration of injury to adjudicated water supplies.

The Rangen Research Hatchery was designed and constructed as a research facility; this fact informs the analysis of Rangen’s beneficial use of its water rights. Rangen’s official name is the “Rangen Aquaculture Research Center,” and its witnesses describe it as a “world-renown[ed] research facility.” Brock Dep. 49:16–18, (Jan. 22, 2013). The purpose of the facility is and has historically been to conduct applied research to evaluate changes in feed formula proposed by Rangen’s Aquaculture Feeds Division. These feeding trials act as “selling points” for Rangen’s marketing of its feed to its customers. Kinyon Dep. vol. I, 18:15–18, (Sep. 10, 2012). Unlike commercial hatcheries, the Rangen Research Hatchery’s facilities include a number of research labs and a large “Greenhouse” which houses large circular tanks that are used to conduct replicated research. *See* John Woodling Expert Rebuttal Report at 8, Feb. 8, 2013 [Ex. 3363]. These indoor facilities create ideal research environments because of the ease of replication and control. Ramsey Dep. vol. II, 222:24–223:5 (Nov. 13, 2012); Raceway Experiment Reviews as of July, 2002 [Ex. 3564]. Nearly all of Rangen’s research has been conducted with its water rights arising at the Curren Tunnel, which is the supply that is both legally and physically available to Rangen for distribution to its Hatch House, Greenhouse and Small Raceways. As described below, the water supplies associated with the Curren Tunnel have historically been adequate, and continue to be adequate, to allow Rangen to conduct its fish research. The evidence will show that Rangen’s full decreed amount is *not* required for Rangen to continue its historical and current research uses.

Although the Rangen Research Hatchery was originally designed as a research facility, in recent years it has shifted its focus to producing conservation fish for Idaho Power. *See* Idaho Power Contracts [Ex. 3003]; *see also* Greg Sullivan Expert Response to IDWR Staff Memorandum, Fig. 2-5b, Apr. 5, 2013 [Ex. 3351]. Production of conservation fish requires

rearing scenarios which are distinct from those used in commercial production; such as strict water flow and fish density requirements, and in Rangen’s case, the use of special “triploid eggs.”³ Thomas Rogers Expert Witness Report at 5, 7, Dec. 21, 2012 [Ex. 3200]. Rangen has reduced the number of egg orders it places per year from seven times to just three, coinciding with the due dates for conservation fish under the Idaho Power Contract. *Id.* at 8, 11; John Woodling Expert Rebuttal Report at 4 [Ex. 3363]; Kinyon Dep. vol. I, 49:1–55:3; Tate Dep. 68:17–69:4 (Sep. 11, 2012). Although Rangen produces fewer fish now than it did prior to the Idaho Power Contract, Pocatello’s experts have estimated that its revenue from that contract exceeds revenues from certain years in the 1990s when flows were much higher because of the premium price paid for conservation fish. *See* Greg Sullivan Expert Response to IDWR Staff Memorandum, Fig. 2-5c [Ex. 3352]; Charlie Smith Expert Report at 5, Dec. 21, 2012 [Ex. 3190] (stating that Rangen raises fish for Idaho power “due to a much better price per pound than that paid for processed fish”).

B. Rangen’s beneficial use of its water rights has not included formal involvement in the commercial market.

Rangen does sell some fish on the commercial market currently, but these are “spot sales” of leftover conservation fish rather than on-going contract sales; Rangen could not produce any long-term contracts for commercial fish sales. Rangen would not disclose what percentage of its business is commercial fish sales, but it is “definitely the minority” of their aquaculture division’s revenues. Courtney Dep. vol. II, 107:17–23 (Mar. 21, 2013). The fish that are sold on the commercial market are conservation quality fish (triploids) grown at conservation densities, so they are distinguishable from meat fish typically raised in the

³ Triploid eggs are specially treated to produce sterile fish which are preferred for mitigation purposes because they do not interbreed with native trout once released. Smith Dep. 107:24–108:9 (Mar. 7, 2013). Triploid eggs are specifically required under the Idaho Power Contracts. *See* Ex. 3003.

commercial industry. It appears that Rangen made a decision to shift away from commercial production in the early 2000s, when their production levels dropped off dramatically. *See* Greg Sullivan Expert Response to IDWR Staff Memorandum, Fig. 2-5b [Ex. 3351]. The largest drop in production occurred not because of declining flows, but as a result of a management decision to cease using off-site rearing locations which Rangen had previously leased such as the “Woods ponds”. *Id.* The “Woods ponds” are another physically available water supply, unrelated to Rangen’s legally available supplies at the Curren Tunnel, that Rangen leased to expand its production capabilities. Rangen cited cost concerns and a desire not to compete with its feed customers as reasons for ceasing to lease the off-site facilities it once did. Kinyon Dep. vol. I, 77:19–78:3, 81:14–83:19. Rangen’s concern that it not compete with its feed customers on the commercial market is unique to Rangen, and demonstrates that its business model does not include maximizing production for commercial purposes.

II. LEGAL STANDARD FOR DIRECTOR TO FIND THAT RANGEN IS INJURED.

A. If Rangen does not require its full decreed amount to “exercise” its water right, as evaluated by reference to Rule 42, Rangen is not injured.

“Material injury” is defined as a “[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 37.03.11.10.14. Rule 10.14’s reference to “the exercise” of a water right refers to an appropriator’s actual use of the water right, which is rooted in the beneficial use requirement found in the Idaho Constitution. In *AFRD#2*, The Idaho Supreme Court ruled that the Director’s material injury determination is tied to the senior’s beneficial use:

If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res. (“AFRD#2”), 143 Idaho 862, 876, 154 P.3d 433, 447 (2007) (emphasis added).

In making his material injury determination, the Director is to evaluate the senior’s use based on the non-exclusive factors found in Conjunctive Management Rule (“CMR”) 42. The factors include, among other things, the efficiency or wastefulness of the senior’s use, the effort and expense taken in the diversion, the amount of water being diverted and used compared to the water rights, the existence of measurement devices, and whether the senior’s requirements could be met using a reasonable diversion, improved conveyances, or an alternate point of diversion. IDAPA 37.03.11.042. Conversely, the Director must find that Rangen requires an additional amount of water by reference to the same Rule 42 factors prior to him ordering curtailment.

The discretion granted to the Director in evaluating a delivery call has been upheld by the Idaho Supreme Court. In *AFRD#2*, the Court made clear that the doctrine of beneficial use without waste is alive and well in Idaho water law, and applies in delivery call proceedings:

While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director.

AFRD#2, 143 Idaho at 880, 154 P.3d at 451 (emphasis added). Furthermore, because the Director’s material injury determination involves the agency’s technical expertise, a reviewing court “must be particularly zealous in guarding the agency’s discretion.” *Idaho Conservation League v. Thomas*, 917 F. Supp. 1458, 1464 (D. Idaho 1995) (citation omitted). Rangen’s right to divert water pursuant to its rights “is not an unrestricted right,” and Pocatello’s evidence will demonstrate that Rangen’s water use practices are inefficient and unreasonable, so its attempt to

curtail the entire Eastern Snake Plain Aquifer to continue those practices, should not be tolerated. *See Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120, 32 S. Ct. 470, 473 (1912).

B. Threshold Legal and Factual Issues

Rangen claims injury to two water rights decreed for aquaculture purposes: No. 36-02551 for 48.54 cfs and No. 36-07694 for 26.00 cfs. Water right no. 36-02551 has a 1962 priority date; water right no. 36-07694 has a 1977 priority date. Three threshold legal and factual issues remain to be resolved before the Director can evaluate Rangen’s claim of injury under the rubric identified by the SRBA Court and the Idaho Supreme Court. This brief starts with a discussion of the three remaining issues that will inform the Director’s determinations in this matter. It concludes with a summary of the key evidence that Pocatello and Idaho Ground Water Appropriators, Inc. (“IGWA”) expect to present regarding the merits of Rangen’s claims of injury. Pocatello and IGWA expect to show the Director that Rangen is not injured because its beneficial uses do not require its full decreed amounts.

1. Attributes of Rangen’s decrees.

The starting point for the Rangen delivery call is an examination and interpretation of Rangen’s SRBA partial decrees. Rangen’s claims of injury are limited to its water rights decreed as 36-02551 and 36-07694 for aquaculture uses, including a facility volume for 36-02551 of 123,272 cubic feet. The facility volume associated with 36-07694 is irrelevant because, as discussed in further detail below, at the time of the entry of its license Rangen was not receiving—and since 1977 has never received or relied on water right no. 36-07694. Before getting to the specifics of Rangen’s decrees however, two over-arching and related questions must be answered:

- Was the physical source of water adjudicated by the SRBA associated with water flowing out of the Current Tunnel or did it also include water supplies at the so-called “Lower Talus Slope” location?
- Regardless of the answer to the first question, is the water at the Current Tunnel to be considered ground water or surface water?

The first question establishes the baseline for the amounts of water Rangen has a decreed right to rely on and call for; it is undisputed that if Rangen’s decrees are limited to the water flowing out of the Current Tunnel, the amounts of *decreed* water supply relied upon by Rangen are smaller than those in the historical record except insofar as Rangen has actual measurements of Current Tunnel flows.⁴ The second question involves the extent to which the Director may consider the Ground Water Act provisions of Idaho Code section 42-226 in evaluating Rangen’s claims of injury.

2. The Director’s ability to evaluate the quantity of water required by Rangen for beneficial uses is impaired by the systematic problems with Rangen’s water measurements.

In a delivery call, the Director is called upon to exercise his discretion regarding the amount of water the senior actually requires. *AFRD#2*, at 878, 449, establishes a presumption that the senior is entitled to his decreed amount; however, this entitlement does not establish that a shortage of water results in injury to the senior. As the District Court described, the inquiry is into whether the senior requires his full decreed amount for beneficial uses. If he does not, he cannot call for the water through curtailment or other means because the water right is limited by the amount required for beneficial uses. *Memorandum Decision and Order on Petition for Judicial Review, A&B Irrigation Dist. v. Idaho Dep’t of Water Res.*, Case No. 2009-00647 at 31

⁴ This is only tangentially related to Rangen’s systematic under-measurement of its flows that has been described in Greg Sullivan Expert Rebuttal Report [Ex. 3325] and Greg Sullivan Expert Response to IDWR Staff Memorandum [Ex. 3345].

(Dist. Ct. Minidoka County May 4, 2010) (“If circumstances do not require the full amount of the decreed quantity to accomplish the purpose of use but the senior nonetheless continues to divert the decreed quantity, the issue is one of waste. The wasting of water is not only contrary to Idaho Law but it is a recognized defense to a delivery call.”). While in a more routine delivery call, it may be possible to simply rely on the senior’s diversion records in order to understand how much water the senior has used and then evaluate whether more is required, here the process founders on the first step because, as Spronk Water Engineers, Inc.’s analyses have shown,⁵ Rangen’s water measurements are inherently unreliable and at best must be adjusted downward to account for years of systematic under-measurement.

C. Rangen’s operations are not reasonable.

Rangen makes three slightly different types of aquaculture beneficial uses of its water rights. It uses the water for research, to grow conservation fish for Idaho Power’s mitigation requirements under their FERC licenses, and it sells excess conservation fish on the commercial spot market for “table fish” or for “slaughter.” However, as the evidence will show (and as identified below), with its existing supplies—and even in light of its Idaho Power Contract—Rangen could be producing more fish than it is currently. Furthermore, Rangen itself admits in its Rebuttal Report at page 5 that it does not use all of the water associated with the supply adjudicated to it at the Curren Tunnel. The Director must consider the reasonableness of a senior’s operations because “reasonableness is not an element of a water right”, and unreasonable operations are per se outside of a decreed water right. *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448.

⁵ Greg Sullivan Expert Response to IDWR Staff Memorandum at 9–21 [Ex. 3345].

With this background regarding threshold issues that will inform the Director's consideration of the evidence, the remainder of this brief identifies the key evidence that Pocatello and IGWA will develop during the trial in this matter.

III. KEY EVIDENCE REGARDING OPERATION OF RANGEN'S DECREES AND ITS AQUACULTURE BENEFICIAL USES THAT WILL DEMONSTRATE THAT RANGEN DOES NOT REQUIRE ITS FULL DECREED SUPPLY.

A. Considerations regarding water rights nos. 36-02551 and 36-07694.

1. Water right no. 36-07694.

If a senior has not relied on a particular water right, it cannot seek curtailment to satisfy an alleged shortage associated with that water right. *See* IDAPA 37.03.11.042; *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. The Director should conclude based on Rangen's historical flow measurements that Rangen has never received the water rights associated with its 1977 water right no. 36-07694.

- The flow data used to recommend the license occurred five years prior to the application's filing, so "there was actually no beneficial use ever made under that permit, and the Department should probably not have issued the license." *Yenter Dep.* 30:22–31:14 (Mar. 14, 2013).

- Ms. Yenter's conclusion is consistent with the Director's finding in Rangen's 2003 Delivery

Call where the Idaho Department of Water Resources ("Department" or "IDWR") found:

Based on available records, there was not water available for appropriation at the time or subsequent to the date of appropriation for water right no. 36-07694. Therefore, the Department erred in licensing water right no. 36-07694, and should not have recommended this right for decree in the SRBA.

In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551 and 36-07694, Second Amended Order ¶ 63 (May 19, 2005).

- Furthermore, a review of Rangen’s flow records confirms Ms. Yenter’s and the Department’s analysis. The priority date for 36-07694 is April 12, 1977, but the monthly average flow *at the bottom of the facility* that month was 35.2 cfs; the amounts available at the Curren Tunnel would have been much less. Greg Sullivan Expert Report at 12, Dec. 21, 2012 [Ex. 3274]. Rangen’s records thereafter do not indicate that Rangen ever filled the 1977 right after it was appropriated. *See* Greg Sullivan Expert Report, Fig. 2-5 [Ex. 3280].
- Finally, a review of IGWA’s Exhibit 2283 demonstrates that there the historic record is devoid of evidence that 77 cfs was available, if only the legally available water supplies at the Curren Tunnel.

2. Water right no. 36-02551.

- Rangen has received the water associated with its water right no. 36-02551 at some point in the historical record; however, it has never relied on its water right no. 36-02551 year-round. Greg Sullivan Expert Report, Figs. 2-5, 2-6 [Exs. 3280, 3281]. IGWA’s Exhibit 2283.

B. Considerations regarding water measurements.

The Director must establish the amount of water Rangen has been receiving in order to establish the amount of water Rangen’s operations rely on, and to evaluate whether Rangen requires the full extent of its decrees. Rangen’s water measurements are insufficient to make these determinations. To wit:

- Rangen has historically measured its water at different locations using varying procedures. Greg Sullivan Expert Report at 8–11 [Ex. 3274].
- Rangen’s measurements have been made with non-standard measuring devices that have not been calibrated, and accordingly do not meet the criteria established by IDWR’s measurement rules. *See* State of Idaho Department of Water Resources Minimum

Acceptable Standards for Open Channel and Closed Conduit Measuring Devices [Ex. 3361]; Greg Sullivan Expert Response to IDWR Staff Memorandum at 9–11 [Ex. 3345].

- Rangen’s measurements are consistently low due to use of an inadequate rating table which relies on the incorrect weir coefficient. Greg Sullivan Expert Response to the IDWR Staff Memorandum at 14–21 [Ex. 3345].
- The issues with Rangen’s measurements places their margin of error well outside of the 10% margin which the Department has stated is acceptable under its measurement standards. Greg Sullivan Expert Response to IDWR Staff Memorandum, Fig. 2-4, Tables 2-5, 2-6 [Exs. 3349, 3358, 3359]; IDWR Staff Memorandum at 13, 59, 65, Feb. 27, 2013 [Ex. 3203].
- All of this evidence relates to measurements of Rangen’s flows that includes all physically available water supplies. Data measured at the Curren Tunnel which reflect the Rangen’s legally available water supplies do not, to our knowledge, have these problems. Figure 2-7 of the 12/21/2012 report. IGWA’s Exhibit 2283.

C. Considerations regarding Rangen’s aquaculture beneficial uses.

- Rangen is authorized to use its water rights for aquaculture purposes. Rangen holds itself out as a research hatchery which supports the aquaculture feed production activities of Rangen’s Feeds Division (a related entity). Rangen’s current primary use of its water is production of conservation fish for Idaho Power. As such, the measure of beneficial use in this case will be the extent to which Rangen requires its full decreed amount to satisfy fish rearing and fish aquaculture-related research, as well as its obligations under its conservation contract with Idaho Power. The evidence will demonstrate that Rangen is not a commercial production hatchery and does not maximize production for commercial purposes.

- Rangen’s fish production has varied with flow, but not as a result of flow. Greg Sullivan Expert Report, Fig. 4-4 [Ex. 3288].
- Rangen’s fish sales have varied with flow, although its return on those sales has not varied with flow. *See* Greg Sullivan Expert Response to IDWR Staff Memorandum, Figs. 2-5a through 2-5d [Exs. 3350–3353].
- Rangen’s research activities have varied with flow, although not as a result of flow. Furthermore, the evidence will show that the Greenhouse and Hatch House, both facilities that require small quantities of water, are the preferred research locations, both supplied by Rangen’s legally available supplies from the Curren Tunnel, and that such research is not the subject of water rights injury. John Woodling Expert Rebuttal Report at 8–14 [Ex. 3363].

D. Considerations regarding reasonableness of beneficial uses.

1. Rangen has an unreasonable means of diversion.
- Rangen’s hatchery has very little “fall” between raceways and is constructed in such a manner so that there is minimum amount of re-oxygenation in between raceways. Charlie Smith Expert Report at 8 [Ex. 3190]. While the records produced by Rangen do not indicate that it has oxygen issues at current production levels, to the extent that Rangen claims to experience oxygen issues at its facility, these are the result of facility design and could easily be remedied by installation of an inexpensive aeration system, like those used by many other hatcheries. John Woodling Expert Rebuttal Report at 9–10 [Ex. 3363]; Thomas Rogers Rebuttal Report at 6–7 [Ex. 3201].

2. Rangen uses of its available water supply are not reasonably efficient.

An analysis of the amount of water being diverted and used compared to Rangen’s water rights under CMR 42(e) shows that Rangen has not been short of water, and therefore cannot call

for more without causing additional waste. As explained above, the purposes of Rangen's Research Hatchery are research and rearing of conservation fish to meet the Idaho Power Contract. It currently has more than enough water to accomplish both of these purposes. Deposition testimony of Rangen's witnesses, and records it has produced establish:

- Rangen does not maximize its operations. Rangen has sufficient water to operate the Greenhouse or Hatch House individually year-round, and they can be operated simultaneously in every month except for June. Ramsey Dep. vol. II, 213:7–14.
 - Rangen chooses to only rear three lots of eggs per year when it used to rear seven with only marginally higher flows, leaving its Hatch House unused, despite available water, for up to 30 weeks out of the year. John Woodling Expert Rebuttal Report at 8 [Ex. 3363].
 - Rangen has not been able to articulate a reason why they cannot return to their prior practice of raising seven lots of eggs per year beyond a bald claim of insufficient flows. Under existing flow conditions Rangen could raise additional fish by increasing their egg orders. Thomas Rogers Expert Witness Report at 15 [Ex. 3200].
 - In addition to waters which flow through the facility but are not fully utilized to produce fish, Rangen wastes all the flows from the Lodge Pond Dam. These consist of lower springs and irrigation returns which are collected below the diversion to the large and CTR raceways and thus never flow through any of the raceways. The lodge pond dam flows add up to a significant amount of waste which averaged 12.4 cfs from 1966–1974 and 3.5 cfs in the period from 1981–2003. Greg Sullivan Expert Report, Fig. 2-8 [Ex. 3283]; Greg Sullivan Expert Rebuttal Report, Table 3-1 [Ex.

3341]. Curtailment would undoubtedly increase spring flows that accrue to the lodge dam as well, thereby increasing Rangen's wasteful water practices.

- Rangen is not fully utilizing its currently available flow to produce fish, so providing it with more water would only lead to additional waste. Thomas Rogers Expert Witness Report at 10–13, Table 5.4 [Ex. 3200]. Even under the density restrictions of the Idaho Power Contract Rangen could rear more fish than it currently does, and without those restrictions it could rear far more fish still. *Id.*, Table 5.4.
- Production of conservation fish. Rangen currently produces conservation fish for Idaho Power, which is a lucrative substitute for the commercial market.
 - Rangen has always met its Idaho Power contract to produce conservation fish, and in fact is able to rear more than the amount required by the contract and sell those fish on the spot market. Kinyon Dep. vol. I, 51:24–52:25, 54:18–55:3.
- Rangen's use of flows in fish research. Rangen holds itself out as a research facility for fish food research to assist in its marketing of fish food.
 - Records demonstrate that Rangen has historically performed research primarily in the Hatch House and the Greenhouse. John Woodling Expert Rebuttal Report at 11 [Ex. 3363] (of all the research reports produced; only 11 were from tests done in raceways, the rest were done indoors).
 - Rangen prefers to use the Greenhouse and Hatch House facilities for research projects because of the opportunity to control most environmental variables (i.e., these are controlled research environments as compared to the raceways) and more precise measurement of results. Ramsey Dep. vol. II, 222:24–223:5; Raceway Experiment Reviews as of July, 2002 [Ex. 3564].

- o Rangen has sometimes attempted to replicate its indoor experiments in raceways for marketing purposes, but those efforts have been largely unsuccessful in obtaining significant results. John Woodling Expert Rebuttal Report at 12 [Ex. 3363]; Brock Dep. 165:18–166:6.
- o Dr. Woodling (relying in part on Mr. Sullivan’s evaluation of flow data, as well as review of the nature and design of the various research projects conducted by Rangen) concludes that Rangen has adequate water from its legally available adjudicated supplies at the Curren Tunnel to satisfy its historical research uses. John Woodling Expert Rebuttal Report at 16–17 [Ex. 3363].
- o Dr. Woodling also concludes, from a review of Rangen’s research documents, that Rangen’s failure to obtain significant results from raceway studies is a result of the lack of precision of the experimental design; put another way, increasing replicates for raceway tests would be unlikely to improve the validity of Rangen’s results. John Woodling Expert Rebuttal Report at 7, 10–12 [Ex. 3363]; John Woodling Supplementary Report at 4–5 [Ex. 3369].

Respectfully submitted this 22nd day of April, 2013.

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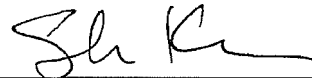
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Pre-Hearing Brief for Docket No. CM-DC-2011-004** upon the following by the method indicated:



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