

**BEFORE THE 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.)) CM-DC-2011-004)) ORDER DENYING) RANGEN, INC.’S MOTION) FOR PARTIAL SUMMARY) JUDGMENT RE: MATERIAL) INJURY) <hr/>
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This matter having come before the Director (“Director”) of the Idaho Department of Water Resources (“Department”) as a motion for partial summary judgment, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

On January 8, 2013, Rangen, Inc. (“Rangen”) filed a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Material Injury* (“Material Injury Brief”). In its Material Injury Brief, Rangen seeks two rulings: (1) “that the Department rule as a matter of fact and law prior to th[e] hearing that Rangen is suffering ‘material injury’ as a result of junior-priority groundwater pumping”; and (2) that the juniors’ burden of defending against the delivery call must be established “as a matter of law by clear and convincing evidence.” *Material Injury Brief* at 2. Rangen supports its claim of material injury by stating that ground water and surface water are interconnected, that it was decreed 76 cfs in the SRBA, and that it is currently receiving only 14 – 15 cfs, which is less than the sum of its decrees. Using the ESPA model, Rangen shows that curtailment of ground water junior to 1962 will increase discharge at the Rangen spring cell by 18 cfs. Rangen states it will put any additional water to beneficial use. Because it believes it adequately establishes a claim of material injury, Rangen argues “it is now the juniors’ burden to prove a recognized defense by clear and convincing evidence.” *Id.* at 20.

On February 8, 2013, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Response to Rangen’s Motion for Partial Summary Judgment Re: Material Injury* (“IGWA Response”). IGWA states there are genuine issues of material fact concerning “whether Rangen legitimately needs additional water to accomplish its beneficial use (CM Rules 42.01.a, 42.01.d, 42.01.e), and whether its water needs (if any) could be met by employing alternate means of

diversion, conveyance efficiencies, and conservation practices (CM Rule 42.01.g and 42.01.h).” *IGWA Response* at 2. Concerning the clear and convincing evidentiary standard, IGWA argues that “not all issues or arguments that may be considered ‘defenses’ are subject to that heightened standard of evidence.” *Id.* IGWA cites two examples of defenses that it believes are governed by the preponderance of the evidence standard: interpretation of a decree; and the reasonableness of a senior’s use.

On February 8, 2013, the City of Pocatello (“Pocatello”) filed a *Response to Rangen’s Motion for Partial Summary Judgment Re: Material Injury* (“Pocatello Response”). Pocatello discusses facts it believes are in dispute and preclude summary judgment: (1) Rangen does not put all of its water to beneficial use; (2) Rangen’s measurement data is not reliable; (3) Rangen’s means of diversion are unreasonable; (4) Rangen does not require more water to conduct research; (5) ESPA model predictions at the Rangen spring cell are unreliable; and (6) despite being licensed and decreed, Rangen cannot call for delivery of its 1977 water right (36-07694) because there was never sufficient flow to satisfy any portion of the 26 cfs right. Pocatello argues the Department has never used the ESPA model to determine material injury.

On February 19, 2013, Rangen filed a *Reply in Support of Motion for Partial Summary Judgment Re: Material Injury* (“Reply”). In its Reply, Rangen reiterates that, because the sources are connected and it is receiving less than its cumulative decreed quantity, it is materially injured as a matter of law. Rangen says junior users will have an opportunity to present any defenses to material injury at the hearing.

Oral argument on the motion was held on April 3, 2013. At the conclusion of the argument, the Director orally denied Rangen’s motion for partial summary judgment re: material injury because there are outstanding genuine issues of material fact. The Director indicated a written order would follow. This is the written order implementing the verbal decision reached at oral argument.

CONCLUSIONS OF LAW

Summary judgment is only appropriate when genuine issues of material fact are absent and the case can be decided as a matter of law. I.R.C.P. 56(c); *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 293 P.3d 630, 632 (2012). In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *Pioneer Irr. Dist. v. City of Caldwell*, 288 P.3d 810, 813 (2012).

Here, issues of material fact are present such that Rangen’s motion must be denied. In its *Material Injury Brief*, Rangen argues that depletion, in and of itself, constitutes material injury. Rangen arrives at this conclusion based on the following facts: it holds decreed water rights; it is presently receiving less than the cumulative decreed quantity; the ESPA model predicts an 18 cfs response at the Rangen spring cell if ground water rights junior to 1962 are curtailed; and it states additional water will be put to beneficial use. Rangen’s argument that depletion equals material injury has been expressly rejected by the Idaho Supreme Court. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *American Falls Res Dist. No. 2 v.*

Idaho Dept. Water Res., 143 Idaho 862, 154 P.3d 433 (2007). Instead, the non-exclusive factors for determining material injury are listed in Rule 42 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources. IDAPA 37.03.11 *et seq.* IGWA and Pocatello point to numerous facts about Rangen's water use and use of the ESPA model that must be resolved through an evidentiary hearing. For example, with regards to water use, IGWA and Pocatello point to questions about the water measurement data for the Rangen facility. With regards to the ESPA model, IGWA and Pocatello point to questions about the application of the model and model uncertainty. Because of these outstanding questions, summary judgment is not appropriate.

Citing *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, Rangen also seeks a ruling that the juniors' burden of defending against the delivery call must be established "as a matter of law by clear and convincing evidence." *Material Injury Brief* at 2. The Idaho Supreme Court's decision in *A&B* supports Rangen's contention that juniors must prove defenses to a delivery call by clear and convincing evidence. However, the *A&B* case speaks for itself. Summary judgment is for determining whether genuine issues of material fact are present in a case, not for affirming restatements of law. IRCP 56(c). The Director does not need to enter an order on summary judgment for the *A&B* case to be applicable in this proceeding.

ORDER

IT IS HEREBY ORDERED that the Rangen, Inc.'s Motion for Partial Summary Judgment is DENIED.

DATED this 25th day of April, 2013.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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