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DEPARTMENT OF  
WATER RESOURCES

A. Dean Tranmer (ISB # 2793)  
City of Pocatello  
P. O. Box 4169  
Pocatello, ID 83201  
(208) 234-6149  
(208) 239-6986 (Fax)  
dtranmer@pocatello.us

Sarah A. Klahn (ISB # 7928)  
Mitra M. Pemberton  
White & Jankowski, LLP  
511 Sixteenth Street, Suite 500  
Denver, CO 80202  
(303) 595-9441  
(303) 825-5632 (Fax)  
sarahk@white-jankowski.com

ATTORNEYS FOR THE CITY OF POCATELLO

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

IN THE MATTER OF DISTRIBUTION ) Docket No. CM-DC-2011-004  
OF WATER TO WATER RIGHT NOS. )  
36-02551 AND 36-07694 ) **CITY OF POCATELLO'S RESPONSE TO**  
) **RANGEN, INC'S MOTION FOR**  
(RANGEN, INC.) ) **RECONSIDERATION AND CLARIFICATION**  
\_\_\_\_\_ )

COMES NOW, City of Pocatello ("Pocatello"), by and through its undersigned attorneys, to respond to Rangen, Inc.'s Motion for Reconsideration and Clarification ("Motion"). For the reasons within, the Director should deny the portion of the Motion that asks for reconsideration (paragraphs 1 through 6); Pocatello takes no position on the requested clarification.

1. The Director properly found that Rangen's decreed source is limited to waters arising at the Curren Tunnel.

Contrary to Rangen's arguments, the Director's findings that limit Rangen to the Curren Tunnel source under its partial decrees is supported by legal analysis of the partial decrees as well as evaluation of the decree terms vis a vis applicable regulations. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13,*

1962 (“Final Order”), Findings of Fact (“FOF”) ¶¶ 16–31, Conclusions of Law (“COL”) ¶¶ 15–18 (Jan. 29, 2014).

Rangen’s Motion reargues the “latent ambiguity” issue and that the Idaho Department of Water Resources is precluded from interpreting Rangen’s partial decrees by the doctrine of “quasi-estoppel.” Motion at 2. Both of these arguments were previously made in the briefing on *Rangen, Inc.’s Motion for Partial Summary Judgment Re: Source*, dated March 8, 2013. Rather than repeat its arguments in response to Rangen’s position, Pocatello refers the Director to its briefing in the record opposing Rangen’s interpretation. See *City of Pocatello’s Response to Rangen, Inc.’s Motion for Partial Summary Judgment Re: Source* at 1–5 (Mar. 22, 2013); *City of Pocatello’s Pre-Hearing Brief* at 7–9 (Apr. 22, 2013), and *City of Pocatello’s Proposed Findings of Fact, Conclusions of Law, and Order* at ¶ IV.D (June 21, 2013).

2. Rangen’s partial decrees are limited by their terms to allowing Rangen’s diversions to the Curren Tunnel.

Rangen’s Motion repeats its prior arguments that its diversions should be allowed by reference to the location of its diversion structures rather than the legal point of diversion described in its partial decrees. See, e.g., *Rangen, Inc.’s Closing Brief* at 22–33 (June 21, 2013). Pocatello’s responses to those prior arguments have not changed; in addition, Pocatello notes that it presented direct evidence from Mr. Sullivan on the location of the described 10-acre tract within which Rangen is authorized to divert, and cross-examined Dr. Brockway on the same point.<sup>1</sup> The Director’s legal analysis of Rangen’s point of diversion is appropriate; to the extent this is a mixed question of fact and law, there is also substantial evidence to support the decision. Tr. vol. VI, 1332:5–1333:2 (Sullivan), May 8, 2013; vol. VII, 1656:2–25 (Sullivan), May 9,

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<sup>1</sup> Tr. vol. VI, 1330–32, May 8, 2013; vol. IX, 2061, May 13, 2013; vol. V, 1075–76, 1081–90, May 7, 2013.

2013; vol. V, 1075:22–1077:3 (Brockway), May 7, 2013; Exhibit 3650, Final Order, COL ¶¶ 15–18.

3. Pocatello demonstrated efficient use of water without waste.

Pocatello presented evidence of its water use through Mr. Armstrong, Pocatello’s Water Superintendent. Tr. vol. V, 1104–07. Neither on cross-examination nor elsewhere was Mr. Armstrong’s testimony about Pocatello’s water use challenged as inefficient. *Id.* at 1109–10. From the evidence presented, the Director had substantial evidence to conclude that Pocatello was operating efficiently.

4. Conclusions of Law 42 through 46 are necessary to the Final Order.

The Director should reject Rangen’s suggestion that COL ¶¶ 42–46 are unnecessary. These COL provide the analytical backdrop for the Director’s exercise of discretion in this case and constitute part of the Director’s reasoned statement in support of the Final Order. These legal conclusions are drawn from substantial evidence in the record,<sup>2</sup> and are thus important to the legal and logical integrity of the Final Order. I.C. § 67-5248(1) (final agency orders must contain a “reasoned statement in support” of decisions).

5. There is substantial evidence in the record to support Conclusions of Law 21 and 22, specifically that Rangen has received 63% of its flows from the Curren Tunnel, and the finding is also supported as a matter of law.

Rangen requests that the Director adopt 75% as the percentage of flows it receives from the Curren Tunnel, rather than 63% as evidence at hearing supported. Motion at ¶5. Rangen bases its arguments on Mr. Sullivan’s initial testimony regarding Curren Tunnel deliveries as a percentage of uncorrected Rangen flow measurement data, and couples Mr. Sullivan’s 75% testimony with the Staff Memo which concluded, with far less investigation than that conducted by Mr. Sullivan, that Rangen’s flow measurements are only 6 to 7% low. Effectively, Rangen is

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<sup>2</sup> Tr. vol. VII, 1470–75, 1484–94, 1640–41; vol. X, 2327–32, May 14, 2013; vol. XI, 2539–41, May 15, 2013.

requesting that the Director find its historical measurements to have been accurate. There is not substantial evidence in the record for the proposition that Rangen's measurements were historically accurate<sup>3</sup> (quite the contrary, as the list below demonstrates), and more importantly, would lead to an abuse of discretion as it would overestimate the amount of injury to Rangen.

The record is replete with substantial evidence to support Conclusion of Law 21. Rangen used incorrect rating tables that contain unexplained calculations and are based on unknown sources, and which reported lower than actual flows. Tr. vol. VI, 1389–95, 1402–03; Ex. 3358. Based on comparison of Rangen measurements and USGS measurements, Rangen has been undermeasuring flows since 1980 as shown by a comparison of the hybrid table and Rangen table. Tr. vol. VI, 1428–29; Exs. 3358 & 3349. Undermeasurement has ranged from 10 to 20 %, and has averaged 15.9 %, based on 45 measurements between 1980 and 2012 (FOF ¶ 50). Tr. vol. VI, 1427–31.

Conclusion of Law 22 is also supported by substantial evidence. The Director adopted Mr. Sullivan's corrected calculation that 63% of the benefit of curtailment would accrue to the Curren Tunnel, and this percentage should be used to compute the mitigation requirement. Tr. vol. XII, 2798; Ex. 3654. To wit, the regression analysis of the relationship between tunnel and total flow established that the change in Curren Tunnel flow is 63% of change in total flow. Tr. vol. XII, 2795–99; Ex. 3654. Rangen appears to suggest that the Director must adopt the Staff Memo position over that of a testifying expert. However, the Director's discretion allows consideration of all evidence, including evidence that is different than that presented in the Staff Memo. Further, Mr. Luke, the primary author of the Staff Memo sections involving measurement, testified that he "didn't disagree" with Mr. Sullivan's analysis. Tr. vol. V, 1154.

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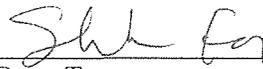
<sup>3</sup> Or even currently accurate, as the discussion of the weir coefficient highlights in the next section.

6. Finding of Fact 51 which determined that the Rangen's weir coefficient should be 3.62 is supported by substantial evidence.

There is substantial evidence in the record to support the finding that Rangen's weir coefficient should be 3.62. Tr. vol VI, 1434-40. Further, Finding of Fact 51, which specifies that 3.62 is the appropriate weir coefficient based on Mr. Sullivan's analysis of USGS flow measurements and Rangen head measurements, is necessary to support Conclusions of Law 19 through 22, which conclude that 63% of Rangen's flow measurements are attributable to Rangen's decreed water source at the Curren Tunnel. If Rangen is to be allowed continued reliance on its non-standard measuring devices and practices described in Findings of Fact 33 through 52, it should also be required to employ a weir coefficient of 3.62 to the measurements it obtains from "sticking the weir." The evidence in the record establishes that Rangen's reliance on any other weir coefficient will not result in accurate measurements.

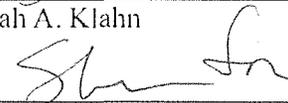
Respectfully submitted this 26th day of February, 2014.

CITY OF POCATELLO ATTORNEY'S OFFICE

By   
A. Dean Tranmer

WHITE & JANKOWSKI

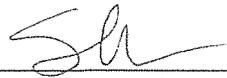
By   
Sarah A. Klahn

By   
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCATELLO

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of February, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Response to Rangen, Inc.'s Motion for Reconsideration and Clarification** for Docket No. **CM-DC-2011-004** upon the following by the method indicated:

  
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 Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Director State of Idaho, Dept of Water Resources 322 E Front St PO Box 83720 Boise ID 83720-0098 deborah.gibson@idwr.idaho.gov	<input checked="" type="checkbox"/> Original sent via U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile – 208-287-6700 = Phone – 208-287-4803 <input checked="" type="checkbox"/> Email
J. Justin May May Browning 1419 W Washington Boise ID 83702 jmay@maybrowning.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-342-7278 <input checked="" type="checkbox"/> Email
Robyn Brody Brody Law Office PO Box 554 Rupert ID 83350 robynbrody@hotmail.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-434-2780 = Phone 208-434-2778 <input checked="" type="checkbox"/> Email
Fritz Haemmerle Haemmerle Haemmerle PO Box 1800 Hailey ID 83333 fxh@haemlaw.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-578-0564 <input checked="" type="checkbox"/> Email
Garrick L. Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-287-6700 <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge Racine Olson Nye Budge & Bailey 201 E Center St / PO Box 1391 Pocatello ID 83204-1391 reb@racinelaw.net bjh@racinelaw.net	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-232-6109 <input checked="" type="checkbox"/> Email
Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-234-6297 <input checked="" type="checkbox"/> Email

<p>C. Thomas Arkoosh  Arkoosh Law Offices  PO Box 2900  Boise ID 83701  tom.arkoosh@arkoosh.com  erin.cecil@arkoosh.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile 208-343-5456  <input checked="" type="checkbox"/> Email</p>
<p>John K. Simpson  Travis L. Thompson  Paul L. Arrington  Barker Rosholt &amp; Simpson  195 River Vista Place Ste 204  Twin Falls ID 83301-3029  tl@idahowaters.com  jks@idahowaters.com  pla@idahowaters.com  jff@idahowaters.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile 208-735-2444  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  Fletcher Law Office  PO Box 248  Burley, ID 83318  wkt@pmt.org</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile 208-878-2548  <input checked="" type="checkbox"/> Email</p>
<p>Jerry R. Rigby  Hyrum Erickson  Robert H Wood  Rigby Andrus &amp; Rigby  PO Box 250  Rexburg ID 83440-0250  jrigby@rex-law.com  herickson@rex-law.com  rwood@rex-law.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile 208-356-0768  <input checked="" type="checkbox"/> Email</p>