

IN THE SUPREME COURT FOR THE STATE OF IDAHO

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APR 29 2015

IN THE MATTER OF THE  
DISTRIBUTION OF WATER TO WATER  
RIGHT NOS. 36-02551 & 36-07694  
(RANGEN, INC.) IDWR DOCKET CM-  
DC-2011-004

RANGEN, INC.,

Petitioner- Appellant,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN, in  
his capacity as Director of the Idaho  
Department of Water Resources,

Respondents-Respondents on  
Appeal,

and

IDAHO GROUND WATER  
APPROPRIATORS, INC., FREMONT  
MADISON IRRIGATION DISTRICT,  
A&B IRRIGATION DISTRICT, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY, AND  
THE CITY OF POCA TELLO,

Intervenors.

SUPREME COURT DOCKET NO. Snake River Basin Court of Appeals  
42772-2015 Entered on ATS by: \_\_\_\_\_

Snake River Basin Adjudication No.  
CV-2014-1338 & CV-2014-179  
(consolidated for purposes of Reporter's  
Transcript and Clerk's Record only)

**APPELLANT RANGEN, INC.'S OPENING BRIEF**

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

Honorable Eric J. Wildman, Presiding

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## **I. STATEMENT OF CASE**

### **A. NATURE OF CASE.**

This appeal involves a water delivery call made by Rangen, Inc. (“Rangen”). The primary issues presented involve the interpretation of the source and point of diversion elements of Rangen’s Partial Decrees. The interpretation of Rangen’s Partial Decrees is critical because taking away Rangen’s water rights through an administrative interpretation has proven to be the only successful defense against the call.

### **B. COURSE OF PROCEEDINGS.**

Rangen has been trying to get more water to its Research Hatchery for more than a decade. Rangen made its first delivery call in September/October 2003. (D.Ct.R., Vol. 1, p. 000082).<sup>1</sup> The Department used the first Enhanced Snake Plain Aquifer Model (“ESPAM1”) to evaluate Rangen’s 2003 call. (*Id.*) Based on ESPAM1, the Department determined in a written *Order* that Rangen was suffering material injury as a result of junior-priority ground water pumping and ordered curtailment of some groundwater rights. (D.Ct.R., Vol. 1, p. 000105-000109). The Department amended the *Order* on March 10, 2004 and then rescinded that *Order* on March 14, 2005. (D.Ct.R., Vol. 1, p. 000110-000138).

After the Department rescinded its *Amended Order* on Rangen’s 2003 delivery call, the Department issued a *Second Amended Order* on May 19, 2005, reversing course and determining

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<sup>1</sup> Exhibit 1 to the *Clerk’s Record on Appeal* consists of the Agency Record & Hearing Transcripts as Lodged with the District Court May 28, 2014. (R. p. 765). Citations to “D.Ct.R.” throughout this brief refer to this record before the District Court, which is contained on “Separate CDs from *Clerk’s Record on Appeal – Total of 17 Disks*”. *Id.* Citations to transcripts indicated by “Tr.” also refer to this record before the District Court.

that Rangen was not being materially injured by junior-priority ground water pumping and that its call was futile. (D.Ct.R., Vol. 1, p. 000139-000173). The Department used ESPAM1.1, a revised version of the model, as the basis for the Second Amended Order. Rangen requested a hearing before the Department on June 3, 2005. (D.Ct.R., Vol. 1, p. 000174-000175). The Department did not convene a hearing. (D.Ct.R., Vol. 1, p. 000006). On March 31, 2009, Rangen filed another delivery call and requested a hearing. (D.Ct.R., Vol. 1, p. 000176-000190). Again, no hearing was held. (D.Ct.R., Vol. 1, p. 000006).

After Rangen made its March 31, 2009, delivery call, the Department discovered that ESPAM1.1 had a serious error that underestimated the amount of water that would accrue to Rangen's Research Hatchery if junior-priority pumping were curtailed. (D.Ct.R., Vol. XXI, p. 4204 ¶ 82). The Department continued refine the ESPAM Model, and when ESPAM 2.0 was on the verge of being completed, Rangen filed the *Petition for Delivery Call* at issue. (D.Ct.R., Vol. 1, p. 000007).

Shortly after Rangen filed the *Petition*, Director Spackman convened a status conference and informed Rangen and IGWA (IGWA was the only intervenor at that time) that ESPAM2.0 was not ready to be used. (Tr. 20120109 Status Conf., p. 18, L. 15 – p.19, L. 8). Director Spackman then scheduled a series of approximately monthly status conferences to monitor the progress of the Model. (*Id.* at p. 26, L. 2 – p. 27, L. 22).

The Director conducted a two-week hearing on the delivery call at issue from May 1, 2013 – May 16, 2013. (*See*, Tr., Vol. I-XII). The Director issued the *Final Order Regarding Rangen*,

*Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* on (“*Final Order*”) on January 29, 2014 – two years after Rangen filed the *Petition* at issue.

Rangen timely filed a *Petition for Judicial Review* of some portions of the *Final Order* and the Director’s summary judgment ruling regarding the source/point of diversion elements of Rangen’s Partial Decrees. The District Court affirmed the Director’s interpretation of Rangen’s Partial Decrees on October 24, 2014. (R., p. 000668).

### **C. STATEMENT OF FACTS.**

Rangen is a family-owned agricultural company located in Buhl, Idaho. (Tr., Vol. I, p. 53, L. 13-16). Rangen’s aquaculture division operates the “Research Hatchery.” (*Id.*); (Tr., Vol. I, p. 58, L. 10-11). Rangen built the Research Hatchery in about 1962 and has been raising fish there for 50+ years. (Tr., Vol. II, p. 522, L. 8-10). The facility was built to develop and test Rangen’s fish feeds and showcase Rangen’s involvement in the aquaculture industry. (*Id.*).

The Research Hatchery is located a few miles South of Hagerman. (*See*, Exh. 1001). The facility sits on 60+ acres and is situated along a canyon rim. (*See*, Exh. 1004). A 1986 aerial photograph shows the current configuration of the facility and full raceways. (*See*, Exh. 1006). Most of the raceways are empty today. (*See* Exh. 1206A).

Rangen filed the *Petition for Delivery Call* at issue on December 13, 2011. (D.Ct.R., Vol. 1, p. 000001-000215). The delivery call was based on Water Right Nos. 36-02551 and 36-07694 because Rangen thought its other rights were being satisfied. The two water rights have a combined diversion rate of 74.54 cfs (48.54 + 26).

The water that supplies the Research Hatchery is spring water that comes from the canyon wall at the head of the facility. (*See*, Exh. 1029, p. 2). The source of Rangen’s water rights listed in the Partial Decrees is “Martin-Curren Tunnel” and the point of diversion is described as a ten acre parcel. (Exh. 1026, 1028). A hotly contested legal issue is whether the term “Martin-Curren Tunnel” refers only to a tunnel structure (*See* Exh. 1291 for tunnel mouth photo) or whether that term is a local name for all of the spring water coming from the canyon wall at the head of the Research Hatchery. Most of the issues raised below pertain to the source of Rangen’s water and the point of diversion.

## **II. ISSUES PRESENTED ON APPEAL**

1. Whether the term “Martin-Curren Tunnel” Constitutes a Latent Ambiguity?
2. Whether Rangen Can Use the Bridge Dam Since it is Part of a Diversion Structure that Lies Mostly within the Ten Acre Tract Described in the Partial Decrees?
3. Whether the Doctrine of Quasi-Estoppel Precludes the Director’s Limitation of Rangen’s Source?
4. Whether there is Substantial Evidence to Support the Director’s Adoption of Sullivan’s 63/37 Regression Analysis?
5. Whether there is Substantial Evidence to Support the Determination the Junior-Priority Ground Water Users are Using Water Efficiently and Without Waste.
6. Whether Rangen is entitled to attorney fees on appeal.

## **III. STANDARD OF REVIEW**

This Court reviews legal issues de novo. *Polk v. Larrabee*, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000). The standard of review for factual matters is as follows:

The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. In an appeal from the decision of district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review... The Court may overturn the Board's decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion.. The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary."

*Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted).

#### **IV. ARGUMENT**

##### **A. THE TERM “MARTIN-CURREN TUNNEL” CONSTITUTES A LATENT REFERENTIAL AMBIGUITY.**

###### **1. Overview.**

The water that supplies the Research Hatchery is spring water that flows from the canyon wall at the head of the facility. Some of the water comes from the mouth of a tunnel structure and some of the water comes from springs scattered across the canyon wall. The decreed source of Rangen’s water rights is the “Martin-Curren Tunnel; tributary to Billingsley Creek.” (Exh. 1026, 1028). The Director ruled that the term “Martin-Curren Tunnel” unambiguously refers to the tunnel structure in the canyon wall, but does not encompass any of the other spring water.

(D.Ct.R., Vol. XXI, p. 004426-004427). The District Court affirmed this ruling. Rangen contends that the ruling was error as a matter of law.

In rendering its opinion, the District Court held that: “[f]or Rangen to now argue, in a proceeding outside the scope of the SRBA, that the decrees do not accurately reflect its historical beneficial use constitutes an impermissible collateral attack on the decrees.” (R., p. 000685). The Court explained that “. . . if Rangen disagreed with how its water rights were recommended and ultimately decreed, it had an opportunity and responsibility to voice such concerns in the appropriate forum – the SRBA.” (R., p. 000684). It is important to clarify Rangen’s position.

First, Rangen did not challenge the source in the SRBA because the term “Martin-Curren Tunnel” is the local name for the tunnel structure itself and the springs around it. The use of the local name was required by the Department’s Adjudication Rules. Rangen does not believe that the name of the source in its Partial Decrees is wrong. In fact, when IGWA and Pocatello raised this defense in the delivery call, Rangen actually filed a Motion for Partial Summary Judgment seeking a ruling from the Director that the Partial Decrees encompassed all of the spring water that supplies the Research Hatchery. (D.Ct.R., Vol., XIII, 002566). Rangen’s position is that the Director’s *interpretation* of what the name refers to was erroneous and that he should have concluded that the name was subject to two different interpretations depending upon the context in which the name is being used.

Second, Rangen is not using evidence of its historic use of water to establish the ambiguity. The ambiguity exists because the name Martin-Curren Tunnel has more than one meaning. The evidence of what water Rangen has used and how it has been diverted and where it is used is being

presented to resolve the ambiguity and determine which of these meanings was intended by the parties.

Finally, the District Court was concerned that other decrees, that are not at issue in this case, use Martin-Curren Tunnel to describe their water source. (R., p. 000686) The fact that an ambiguous term might be used with different intended meanings is inherent in the nature of an ambiguity. The interpretation of Rangen's decrees does not depend upon how other decrees might potentially be interpreted in the future. There is no evidence that anyone other than Rangen has ever used the spring water on the talus slope.

## **2. The Court Should Conduct a De Novo Review.**

This Court has explained that when interpreting water decrees the Courts should use the same interpretation rules applied in contract cases. *A&B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). Whether a contract is ambiguous is a question of law. *Boel v. Stewart Guar. Title Co.*, 137 Idaho 9, 13, 43 P.3d 768, 772 (2002) (citing *Terteling v. Payne*, 131 Idaho 389, 391-92, 957 P.2d 1387, 1389-90 (1998)). Thus, the Court should review whether the source of Rangen's water is rights is ambiguous de novo. *Polk v. Larrabee*, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000).

## **3. The Latent Ambiguity Rule.**

Dr. Sanford Schane, a linguistics professor at the University of California, San Diego, published an article in the Thomas Jefferson Law Review examining the types of ambiguities that arise in the law. Schane, Sanford, "Ambiguity and Misunderstandings in the Law, Thomas Jefferson L.R., Vol. 26, No.1 (2002). At the outset of his article Dr. Schane explained that:

“Paradoxically enough, the word ambiguity itself has more than one interpretation.” *Id.* at p. 1. He explains that there are basically three types of ambiguities: (i) a lexical ambiguity, an ambiguity where a word has more than one objective, dictionary meaning (*Id.* at p. 4); (ii) a referential ambiguity caused by uncertainty of reference (*Id.* at p. 8); and (iii) an ambiguity caused by categorization vagueness such as trying to determine at what point a processed chicken becomes a “manufactured” good under a particular regulation (*Id.* at p. 10). Dr. Schane goes on to compare and contrast three legal decisions which illustrate the different types of ambiguities that can arise.

The ambiguity in this case is most like the situation in *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375, a water cooler case for lawyers. Dr. Schane explains that in *Raffles*, a buyer agreed to purchase cotton to be shipped from India to Liverpool. Schane, Sanford, “Ambiguity and Misunderstandings in the Law, Thomas Jefferson L.R., Vol. 26, No.1, p. 2 (2002). The contract specified that the cotton was to be shipped on a vessel called the “Peerless.” *Id.* There was nothing ambiguous on the face of the contract. *Id.* Unfortunately, the parties did not recognize that there were two ships called “Peerless” – one that arrived in Liverpool in October and one that arrived in December. The ambiguity created by the use of the name “Peerless” was latent in the sense that it only became apparent in the context of the facts of the case; there was nothing on the face of the contract that would tend to demonstrate an ambiguity. *Id.* at p. 14-15. The seller shipped the cotton on the vessel that was scheduled to arrive in December, and the buyer refused the goods because they did not arrive in October on the Peerless ship he contemplated. *Id.* at p. 3. The court determined that there was no meeting of the minds and refused to enforce the contract. *Id.* at p. 15.



This Court has recognized that some ambiguities are obvious on the face of the document and others become apparent when examining the facts and circumstances of a case:

There are two types of ambiguity, patent and latent. A patent ambiguity is an ambiguity clear from the face of the instrument in question. Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous.

\* \* \*

**A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.** *Cool*, 139 Idaho at 773, 86 P.3d at 487. **Although parol evidence generally cannot be submitted to contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears.** *Salfeety v. Seideman (In re Estate of Kirk)*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995). Where the facts in existence reveal a latent ambiguity in a contract, the court seeks to determine what the intent of the parties was at the time they entered into the contract. *See Snoderly v. Bower*, 30 Idaho 484, 488, 166 P. 265, 266 (1917) (“It is not for the court or jury to make a contract for the parties, but only to determine what the parties intended the ambiguous terms to mean at the time they entered into the agreement.”).

*Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) (citations omitted) (emphasis added).

There is a two-step evidentiary process for addressing a “latent” ambiguity:

It will be seen from this rule that the process in explaining latent ambiguity is divided into two parts: First, the introduction of extrinsic evidence to show that the latent ambiguity actually existed, and second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.

*Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265 (1917). This Court applied the two-step process in *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-49 (1952). In *Williams*, a well driller agreed to drill a well to supply water to a potato processing plant. The parties’ agreement stated that that the well driller would drill a hole “sufficiently straight to accommodate a ten inch pump at a sufficient depth below the water level to insure a continuous

flow of water.” *Id.* at 17, 245 P.2d at 1047. The well driller started work on the well and drilled to over 200 feet. He demanded payment, but the potato processor refused to pay claiming that the well was not straight enough to accommodate a water-lubricated pump.

This Court found that the testimony demonstrated that the term “ten inch pump” was susceptible to different meanings and that the ambiguity had to be resolved by extrinsic evidence:

Where a writing contains a reference to an object or thing, such as a pump, and it is shown by extrinsic evidence that there are two or more things or objects, such as pumps, to which it might properly apply, a latent ambiguity arises; *Queen Insurance Co. v. Meyer Milling Co.*, 8 Cir., 43 F.2d 885; *Meinhardt v. White*, 341 Mo. 446, 107 S.W.2d 1061; *Hall v. Equitable Life Assurance Co. of the U. S.*, 295 Mich. 404, 295 N.W. 204; *Zydel v. Clarkson*, 29 Ohio App. 382, 163 N.E. 584; *Koplin v. Franklin Fire Ins. Co.*, 158 Pa.Super.301, 44 A.2d 877. See also 32 C.J.S., Evidence, § 961, page 917, and Jones on Evidence, 4th Ed., Vol. 4, Sec. 472, p. 902, wherein the general rule is recognized that parol evidence cannot be received to contradict, vary, add to or subtract from the terms of an unambiguous written agreement, but where it is also recognized that there are some well recognized exceptions to this rule which includes, as does this case, a situation where a latent ambiguity might not appear upon the face of the contract, but lies hidden in the subject to which it has reference: Where such ambiguity is thus disclosed by extrinsic evidence such as was disclosed by the appellant through his testimony, such ambiguity may be removed by the same means, that is, extrinsic evidence to show which type of pump the description related to. Jones on Evidence, 4th Ed., Vol. 4, Sec. 472, p. 902.

*Id.* at 20, 245 P.2d 1048-49.

**4. The Term “Martin-Curren Tunnel” Loses Clarity When Applied to the Facts of the Case.**

The term Martin-Curren Tunnel and its various iterations such as Curran Tunnel or Curran Spring(s) is used interchangeably to describe a corrugated pipe or tunnel structure in the canyon wall as well as the springs that emanate from the pipe and the talus slope below it to form the headwaters of Billingsley Creek. Like most proper names, its usage and meaning cannot

necessarily be derived by simply parsing the dictionary meaning of the words that it includes. Lynn Babbington was the manager of the Research Hatchery who was involved in licensing of the 1977 right and worked at the facility for about twenty years. When asked what he understood the term “Curran Tunnel” to mean, Mr. Babbington explained:

Q. Okay. And take a look now at page 29 of that license. And do you see the note there, the comment, it says, "Source known locally as Curren Tunnel"?

A. Uh-huh.

Q. You have to say "yes."

A. Yes.

Q. Okay. What did you understand was the Curren Tunnel?

A. **The Curren Tunnel was the -- up on the hillside, a tunnel there. But it was known to me to be all of the -- all of the water up there. Whether it be called Curren Tunnel or head of Billingsley Creek or Curren Springs, they were all -- all meant the same thing. It was the -- all the springs that was a source to the hatchery.**

(Tr., Vol. I, p. 190, L. 19 – p. 191, L. 2) (emphasis added).

Mr. Babbington makes the point that the term “Martin-Curren Tunnel” refers to two different things depending upon the context in which the term is used. He makes the point that Martin-Curren Tunnel means the hole in the hillside, but it also means all of the spring water at the head of the Research Hatchery when talking about where Rangen’s water comes from. Lonny Tate, one of Rangen’s fish culturists who has worked at the Research Hatchery for nearly 35 years, had to ask for clarification of IGWA’s use of the term “Martin-Curren Tunnel” when it was unclear from the context. The exchange between IGWA’s attorney and Mr. Tate went as follows:

Q: **Do you measure the flow that comes out of the Curren Tunnel?**

A: **Classify “the Curren Tunnel.”**

Q: It may be easiest, Justin –

**Well, I’m speaking of the actual physical tunnel in the hillside** that has the -

A: The culvert?  
Q: The culvert, yeah.  
A: No.

(Tr., Vol. 4, p. 883, l. 23 – p. 884, l. 6) (emphasis added). Mr. Tate’s question was not argumentative, but instead was a legitimate clarification and IGWA’s counsel responded by giving Mr. Tate more context so that he could understand to what counsel was referring.

The local custom of using Martin-Curren Tunnel to refer to both the pipe and the springs at the headwaters of Billingsley Creek is apparent from license for Rangen’s 1977 right (36-07694). The license describes the source of Rangen’s water as “springs tributary to Billingsley Creek.” (Exh. 1029, p. 28). **There is an important note, however, at the bottom of the license stating “[s]ource known locally as Curran Tunnel”** (Exh. 1029, p. 29). Similarly, the application for this water right had a typewritten designation of source as “underground springs”. (Exh. 1029, p. 31) The term “Curran Tunnel” was hand-printed right above the designation. (*Id.*)

This Court should find that the local name “Martin-Curren Tunnel” is reasonably susceptible to at least two different meanings depending upon the context in which it is used, and is, therefore, ambiguous. If a contract term “loses clarity” when applied to the facts of a particular situation, then there is a latent defect in the instrument which must be resolved using parol evidence. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) (“A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.”) (citations omitted).

**5. Rangen's Historical Beneficial Use of the Water and the Department's Prior Findings Require that the Latent Ambiguity be Resolved in Rangen's Favor.**

The resolution of which meaning of Martin Curren Tunnel was intended in this case seems simple. Although the manner in which the source of Rangen's water rights has been described has changed multiple times, the physical source of the water Rangen uses has remained the same. (Exh. 1027; Exh. 1029). Rangen has been using the same water at its Research Hatchery to raise fish for more than fifty years. (Tr., Vol. II, p. 522, L. 8-10). This water emanates from the corrugated pipe as well as other springs on the talus slope, which together form the headwaters of Billingsley Creek. *See, Argument Section B below.* In this context, the obvious meaning of Martin Curren Tunnel intended by parties is the broader meaning encompassing the headwaters of Billingsley Creek and including the talus slope. The Department recommended "Martin Curren Tunnel" as the source of Rangen's water rights. (R., 000683). If this description was intended to restrict or change Rangen's historical usage, surely the Department's administration of the water rights would have changed once the Partial Decrees were entered. Yet, it did not. Prior to February 2014, IDWR never told Rangen that it could not use the spring water from the talus slope. (Tr., Vol. V, p. 1177, L. 22 – p. 1178, L. 11).

The Department of Water Resources is intimately familiar with Rangen's facility, the manner in which it diverts and uses water, and the evolution of the description of the source of Rangen's water. Tim Luke, the Water Compliance Bureau Chief for the Department, has been out to the Research Hatchery on numerous occasions since 1992. (Tr., Vol. V, p. 1130, L. 22 – p. 1131, L. 2). Mr. Luke testified at the hearing:

Q. Now, again, the full time you've been observing Rangen, you know that all the water that's collected off the slope goes through their facility? You're aware of that?

A. Yes.

Q. IDWR is aware of that; correct?

A. Yeah. *They're diverting the water the same as they always have. And the water rights used to be -- at one time they didn't say Curren Tunnel. They said springs.*

(Tr., Vol. V, p. 1177, L. 22 - p. 1178, L. 6) (Emphasis added).

After Gary Funderberg, the state examiner, did his field report for Rangen's 1977 water right, Lynn Babbington, the manager of the Research Hatchery at the time, wrote to Mr. Funderberg asking him to allow Rangen to measure water flows at the outlets of its Research Hatchery rather than the inlets. Mr. Babbington's letter stated:

Recently Gary Funderberg, senior water resources agent southern region, made a field examination of our water system so that our license could be issued. At this time he noted that we did not have a measuring device at the inlet. With the terrain and collection system of the water it is not feasible to have a measuring device at the inlet.

All the water is run through steel or concrete ponds and thru a measuring device at the outlet. I would like to request that the measuring device at the inlet be waived.

(Exh. 1029, p. 52). Mr. Babbington explained at the hearing that it wasn't possible to have measuring devices at all of the "inlets" because the springs feeding the Research Hatchery were all over the hillside at the head of the facility:

A. That was after Gary had been out -- Gary Funderberg had been out and did his field exam and had said that we needed a -- it called for a measurement device at the inlet. **But the inlet was every place on the hillside, so to speak, with many springs, individual springs coming in that it wasn't feasible to measure those.** So I asked if we could measure at the -- at the exit of the ponds.

(Tr., Vol. I, p. 188, L. 20 – p. 189, L. 6). (Emphasis added). The Department entered an order approving Rangen's request to measure at the outlets. (See, Exh. 1029, p. 30).

More recently, in 2003, the Department investigated Rangen's water use in detail when Rangen made its first Delivery Call. Cindy Yenter and Brian Patton were the Department employees who lead the 2003 investigation. (Tr., Vol. III, p. 547, L. 17-25; *see also*, Exh. 1129 for a copy of Yenter's investigation memo). Yenter explained that as part of the investigation, she and Patton examined how the water traveled through the facility, where the diversions were made, sufficiency of the water supply, and interconnection of the raceways:

- A. Okay. As I recall, we just did a basic walk-through of the facility, starting at the diversion, worked our way down through the facility, discussed how water traveled through the facility, where the measurements were made, where each use was diverted, you know, where the water discharged. Just -- and that's pretty standard when we go out to do an investigation, is kind of start at the top, work your way down. But we just went down through and asked questions related to, you know, sufficiency of the water supply and what was the -- you know, where did they divert their irrigation water and the interconnection between the raceways, because sometimes in a hatchery that's obvious and sometimes it's not so obvious.

(Tr., Vol. III, p. 550, L. 19 – p. 548, L. 4).

Following Yenter's investigation, the Department recognized in paragraph 54 of its findings in the *Second Amended Order* issued on May 19, 2005, that Rangen is legally entitled to appropriate water from the spring complex that forms the headwaters of Billingsley Creek at the head of its facility. The Director found:

**The flow measurements that are considered to be representative of the total supply of water available to the Rangen hatchery facilities under water right nos. 36-15501, 36-02551, and 36-07694, consist of the sum for the discharge from raceways designated by Rangen as the "CTR" raceways and the flow**

over the check “Dam.” The dam is sited upstream for the discharge points from the CTR raceways and downstream from the discharge points from raceways designated by Rangen as the “Large” raceways. The sum of the discharge from the CTR raceways and the flow over the check dam is considered to be representative of the total supply of water available even though that at times some of the flow over the check dam may include water flowing from small springs downstream from the diversion to the Large raceways, water discharged from the Large raceways that was not diverted through the CTR raceways and irrigation return flows.

(See, D.Ct.R., Vol. 1, p. 000140-000173; see, Exh. 1074 for a diagram showing the measurement points discussed above).

It is reasonable to ask why the Department would recommend “Martin Curren Tunnel” to describe the source of Rangen water rights in the decrees given all of the various descriptions that appear in the backfiles for these water rights. One possible explanation lies in the adjudication rule governing how sources are to be named. See IDAPA 37.03.01.060.02.c. IDWR’s Adjudication Rule 37.03.01.060.02.c required that the source of water be identified by the name in local common usage if no official name has been given. The rule states:

Source of Water Supply. The source of water supply shall be stated at item three (3) of the form.

i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. **If no official name has been given, the name in local common usage should be listed.** If there is no official name, the source should be described as “unnamed stream” or “spring.” The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as “ground water.”

IDAPA 37.03.01.060.02.c. (Emphasis added). As indicated above, the term “Martin-Curren Tunnel” is the local name for Rangen’s spring water.



Given Rangen's historical, beneficial use of all of the spring water and the Department's prior findings in the 2003 delivery call, this Court should resolve the ambiguity in Rangen's favor and rule that the term "Martin-Curren Tunnel" as used in Rangen's partial decrees encompasses all of the spring water that supplies the Research Hatchery.

**B. RANGEN SHOULD BE ALLOWED TO USE THE BRIDGE DAM BECAUSE IT IS PART OF A DIVERSION STRUCTURE THAT LIES PARTIALLY WITHIN THE TEN ACRE TRACT.**

Rangen's Partial Decrees identify the point of diversion as: T07S R14E S32 SESWNW (hereinafter referred to as "10 acre tract" or "Eastern Parcel"). The issue to be decided is whether Rangen can use the Bridge Dam at its facility to channel water through a 36" pipe to the Large Raceways even though the Bridge Dam lies just outside the 10 acre tract described in the Partial Decrees. Shortly after the hearing got started, Director Spackman ruled that Rangen cannot divert water at the Bridge Dam:

The point of diversion element decreed by the SRBA court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion.

(See, D.Ct.R., Vol. XXII, p. 003595) The Director affirmed this ruling in the *Final Order* (R., Vol.

XXI, p. 004189) and the *Order on Reconsideration* (R., Vol. XXII, p. 004427). The District Court affirmed the Director's analysis. There are multiple problems with the Director's analysis and it should be reversed as a matter of law since it involves the interpretation of the Partial Decrees.

First, the Director's ruling erroneously equates source with the point of diversion. A water right holder can have a source of water that is not within the tract identified for its point of diversion. Second, the ruling ignores the fact that the Bridge Dam is part of a diversion structure that lies mostly within the 10 acre tract described in the Partial Decrees. Finally, the Director ignored the evidence that approximately 97 percent of the spring water that supplies Rangen's Research Hatchery emanates from the 10 acre tract and Rangen should be legally entitled to divert it. The Director's determination that Rangen cannot divert through the Bridge Dam was erroneous as a matter of law and should be reversed.

**1. Rangen's Diversion Structure.**

Exhibit 1446C is an aerial photograph prepared by Dr. Chuck Brockway, Rangen's water resource engineer. It shows Rangen's Research Hatchery as it relates to the boundaries of Section 32 (hereinafter referred to as "Water Source Analysis").<sup>2</sup> Exhibit 1446C shows that Rangen's diversion structure straddles two different quarter/quarter/quarter sections that sit next to each other. (Exh. 1446C) Part of the diversion structure (the Farmers Box, Rangen Box and talus slope) lies within the 10 acre tract (described as the SESWNW) that is contained in the Partial Decrees. The end of the pond with the Bridge Dam, however, sits just over the boundary in the Western parcel (actually described as SWSWNW of Section 32).

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<sup>2</sup> The Water Source Analysis has been labeled with numbers which correspond to, among other things, various features of Rangen's diversion structure. A legend for the red dots is found on page 3 of Exhibit 1446A which explains the process that Dr. Brockway used for his Water Source Analysis.

Exhibit 1452 provides a starting place for understanding Rangen's diversion structure:



The mouth of the Martin-Curren Tunnel is shown in the upper left corner of this photograph with multiple white pipes coming from it. There is a concrete box at the mouth of the tunnel which the parties have referred to as the "Farmer's Box." The large concrete box in the center of this photograph is called the "Rangen Box."

Exhibit 3278 provides a "bird's" view of the Martin-Curren Tunnel and Farmer's Box. The pipes labeled "Irrigation Pipelines" were used historically for farmer irrigation (e.g., Musser). The 6" White Pipe takes water to Rangen's hatch house (where eggs and fry are raised), green house (where research is done) and laboratory. The other two white pipes labeled "Small Raceways" and "Lower" take water further down the talus slope as shown here:



(Exh.1453) The concrete structure in this photograph is the Rangen Box shown from above. One of the white pipes from the Farmer's Box feeds water straight into the Rangen Box. The other white pipe diverts water onto the talus slope where it is then channeled downhill.

The following photograph is a front view of the Rangen Box:



(Exh. 1456) Water can be diverted from the Rangen Box to the Small Raceways using the steel pipe that is coming out of the right side of the concrete structure. Alternatively, water can be allowed to go through the opening and then channeled downhill to a pond that supplies water to the Bridge Dam leading to the Large Raceways. (Tr., Vol VII, p. 1662, L. 25 – p. 1663, L. 6).

The next photograph shows water channeled from the talus slope into the pond:



(Exh. 1017A, p. 9). The Bridge Dam and 36" pipeline that supplies water to the Large Raceways is at the opposite end of the pond. The following photograph shows the Bridge Dam. The 36" pipeline to the Large Raceways is behind the slatted grate on the right side of the photo:





(Exh. 1446D-16)

These photographs show that Rangen has a diversion structure that carries water from the mouth of the Martin-Curren Tunnel to the Large Raceways and picks up additional spring water from Rangen's property along the way. Except for the Bridge Dam, Rangen's diversion structure lies in the 10 acre tract. (See Dr. Brockway's Water Source Analysis discussed below). The District Court found that the Bridge Dam is not physically connected to the Farmers' Box or Rangen Box, and, therefore, is a separate diversion structure. This analysis is too narrow.

The Farmers' Box, Rangen Box and the Bridge Dam are all integral parts of the same diversion structure that enables Rangen to collect the spring water from the head of its facility and deliver it to its raceways for use. The photograph in Exh. 1017A, p. 9 (above on p. 25) shows how each structure fits together with the next, and, in fact, shows a pipe that ran in the past from the Martin-Curren Tunnel all the way to the pond in front of the Bridge Dam. All that was required by the Adjudication Rules in effect at the time Rangen's Partial Decrees were entered was that the point of diversion be identified to the nearest ten acre tract:

**05. Long Claim Form - Minimum Requirements.** Claims filed on the long claim form shall contain the following information:

\* \* \*

i. The location of the point of diversion shall be described to nearest forty (40) acre tract (quarter-quarter section) or government lot number, and shall include township number (including north or south designations), range number (including east or west designations), section number, and county. **The location of the point of diversion should be described to the nearest ten (10) acre tract (quarter-quarter-quarter section) if that description is reasonably available.** (7-1-93)

IDAPA 37.03.01.060.05.d (emphasis added). In this case, the nearest 10 acre tract that encompasses Rangen's diversion structure is the ten acre tract that is described in the Partial Decrees. Under the Department's adjudication rules, the Bridge Dam is properly encompassed within the decreed point of diversion and Rangen should be allowed to use it to supply water to the Large Raceways. The Court's ruling to the contrary should be reversed.

**2. Rangen's Decrees Should Be Interpreted to Allow the Diversion of 97 Percent of the Spring Water that Flows into the Hatchery Even if Rangen Cannot Use the Bridge Dam.**

Even if the Court finds that Rangen cannot use Bridge Dam, Rangen is still legally entitled to claim as the source of its water 97 percent of the spring water that feeds its Research Hatchery. Dr. Brockway performed a Water Source Analysis to determine how much water emanates from springs in the 10 acre tract and how much water emanates from springs in the Western parcel. (See, Exh. 1446A for a report of the process he used and his findings and Exh. 1446B for a spreadsheet showing his water measurements and water balance calculations) Dr. Brockway went to the Research Hatchery and used a GPS to plot various springs and other features (including pipes). (See, Exh. 1446A, p. 3 for a list of GPS points) He plotted these features on the aerial photograph showing the boundaries of the Eastern and Western parcels. (See, Exh. 1446C for Dr.

Brockway's aerial photograph showing the GPS points and Exhibit 1446D for photographs of the GPS sites) Based on his inspection, he determined that much of the spring water that emanates from the 10 acre tract can be identified, but not measured where it emerges because of difficult terrain. (Tr., Vol. V, p. 1046, L. 18 – p. 1047, L. 8). Water emanating from the Western parcel, in contrast, was more easily measured because it flows through pipes which flow into the pond that feeds the Large Raceways. (*Id.*).

Dr. Brockway asked Rangen personnel to measure the flow of water through the entire facility as they usually do and then he subtracted out the springs flows that came from the Western parcel through the pipes that flow into the pond that feeds the Large Raceways. *Id.* There was one pipe (GPS point 162) that flowed into the pond that carried spring water from both the Eastern and Western parcels. (Tr., p. 1054, Vol. V, L. 10 – p. 1055, L. 6). Because of the terrain, Dr. Brockway had to make an estimate of how much water came from the Eastern parcel and how much came from the Western parcel. (*Id.*) He estimated that 20 percent of the water came from the Western parcel. (*Id.*) Dr. Brockway ultimately concluded that of the 12.44 cfs flowing through the facility on April 22, 2013, 12.06 cfs came from the 10 acre tract that is described as the point of diversion in Rangen's Partial Decrees.

Neither Director Spackman nor the District Court considered Dr. Brockway's Water Source Analysis, presumably because they determined that Rangen's source is limited to the water that comes from the Mouth of the Martin-Curren Tunnel itself. If the Court finds that the term Martin-Curren Tunnel is ambiguous, but that Rangen is not entitled to use the Bridge Dam, the



Court should consider the Water Source Analysis and rule as a matter of law that Rangen's Partial Decrees encompass 97 percent of the spring water that supplies the Research Hatchery.

**C. THE DOCTRINE OF QUASI-ESTOPPEL SHOULD BE USED TO PRECLUDE THE DIRECTOR FROM LIMITING RANGEN'S SOURCE.**

The Court must decide whether the doctrine of quasi-estoppel should be applied to preclude the Director from ruling that the source of Rangen's water is confined to the mouth of the Martin-Curren Tunnel. The Director refused to even consider whether to apply the doctrine of quasi-estoppel, ruling that the doctrine is inapplicable to a governmental agency operating in its sovereign capacity. The District Court did not adopt the Director's analysis, but did rule that the doctrine could only be applied in situations where the government is acting in a purely business and proprietary capacity. (R., p. 0006867). The District Court also made an alternate ruling, that even if the doctrine were applicable, it should not be applied in this case. The Director and District Court's reading of this Court's decisions on the availability of quasi-estoppel in cases involving the government is too narrow and this Court should do its own analysis as to whether the doctrine should be invoked in this case.

**1. Standard of Review.**

This Court ruled in *City of Nampa v. Swayne*, 97 Idaho 530, 547 P.2d 1135 (1976), that the application of estoppel is dependent upon a case by case analysis of the equities involved. 97 Idaho at 534, 547 P.2d at 1139. It is a legal matter over which the Court exercises de novo review. *See, e.g., Tigor Title Co. v. Stanion*, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007) (holding that collateral estoppel is legal issue over which reviewing court exercises free review).

## 2. The Doctrine of Quasi-Estoppel Should be Applied to IDWR.

“The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position.” *Willig v. State Dep’t Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (citing *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994) (emphasis added)). Equitable estoppel and quasi estoppel are different. While it is true that equitable estoppel requires a misrepresentation or concealment of fact and detrimental reliance, quasi estoppel does not require those showings. *Willig*, 127 Idaho at 261, 899 P.2d at 971. The *Willig* court held: “Quasi estoppel is distinguished from equitable estoppel ‘in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient.’” 127 Idaho at 261, 899 P.2d at 971 (quoting *Evans v. Idaho State Tax Comm.*, 97 Idaho 148, 150, 540 P.2d 810, 812 (1975)).

Both the Director and the District Court concluded that the doctrine of quasi-estoppel could not be invoked against the government. While it is accurate to say that this Court has demonstrated a reluctance to apply the doctrine, it has not announced a bright line rule and there is no governmental function vs. business capacity distinction. To the contrary, this Court has always left the door open for a party to make a claim of quasi-estoppel against a government agency under the right circumstances.

Over 100 years ago, Justice Ailshie addressed this issue on rehearing in *Boise City v. Wilkinson*, wherein he explained that:

We recognize that, as a general rule, the doctrine of estoppel does not apply to municipal corporations, and we are not unmindful of the fact that the courts of many states have absolutely refused to apply it to such corporations. **We are not**

prepared, however, to announce an unalterable and unexceptionable rule in this state which would inevitably result in perpetrating wrong and injustice in exceptional cases like this. Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exceptions would be to rob such courts of much of their efficacy and power for administering even-handed justice. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen.

*Boise City v. Wilkinson*, 16 Idaho 150, 177, 102 P. 148, 157 (1909) (emphasis added).

This Court recently made a similar statement in *Terrazas v. Blaine County*, 147 Idaho 193, 200-201, 207 P.3d 169, 176-77 (2009). The *Terrazas* Court had to clarify the Court's position on whether estoppel can be invoked against a governmental entity involved in a zoning matter. The Court explained that the Court has not adopted a bright line rule prohibiting the doctrine of estoppel against the government, and making it clear that the doctrine can be invoked where "exigent circumstances" exist. *See id.* The Court declined to discuss what the "exigent circumstances" are.

In this case, it would be unconscionable to allow the Department to administer Rangen's water rights in a way that precludes Rangen from using the entire spring complex that Rangen has been putting to beneficial use for more than fifty years. The Department has recognized for decades that the source of Rangen's water is the entire spring complex at the head of the facility. In 1979, the Department issued an Order granting Rangen the right to measure its water flows at the outlets rather than the inlets. This recognition is relevant to the source interpretation because if the source of Rangen's water were confined to the water coming from the mouth of the Martin-

Curren Tunnel itself, the water could have easily been measured. There would have been no need to measure water at the outflows and the request would not have been approved. (Exh. 1029, p.30).

In 2003, when Rangen made its first delivery call, the Department independently investigated whether Rangen's use of water was within the scope of its rights. As explained above, Cindy Yenter and Brian Patton conducted the investigation. (Tr., Vol. III, p. 547, L. 17-25; *See also*, Exh. 1129 for a copy of Ms. Yenter's investigation memo).

Following the investigation, the Department recognized in paragraph 54 of its findings in the *Second Amended Order* issued on May 19, 2005 that Rangen is legally entitled to appropriate water from the spring complex that forms the headwaters of Billingsley Creek:

The flow measurements that are considered to be representative of the total supply of water available to the Rangen hatchery facilities under water right nos. 36-15501, 36-02551, and 36-07694, consist of the sum for the discharge from raceways designated by Rangen as the "CTR" raceways and the flow over the check "Dam." The dam is sited upstream for the discharge points from the CTR raceways and downstream from the discharge points from raceways designated by Rangen as the "Large" raceways. The sum of the discharge from the CTR raceways and the flow over the check dam is considered to be representative of the total supply of water available even though that at times some of the flow over the check dam may include water flowing from small springs downstream from the diversion to the Large raceways, water discharged from the Large raceways that was not diverted through the CTR raceways and irrigation return flows.

(D.Ct.R., Vol. 1, p. 000151; *see also*, Exh. 1074 for a diagram showing Rangen's measurement points discussed above). The District Court found that the issue of source and point of diversion were not raised or addressed in the 2003 delivery call. This is directly contrary to paragraph 54 in the Department's findings and the testimony and memorandum of Cindy Yenter.

Tim Luke, the Department's enforcement officer, testified that numerous IDWR employees, including himself, have been to the Rangen facility multiple times since the 2003 investigation, and no one has ever informed Rangen that its water usage is outside the scope of the Partial Decrees. (Tr., Vol. 5, p. 1177, L. 22 – p. 1178, L. 11).

While Rangen does not have to show detrimental reliance for quasi-estoppel to apply, Rangen has detrimentally relied on the Department's conduct. After the Director's ruling and an application by the North Snake Ground Water District, Magic Valley Ground Water District and others to appropriate the spring water at issue, Rangen filed a Late Claim in the SRBA to protect its historical usage of the water in the event of an adverse determination by Director Spackman. The Court denied the late claim on the basis that it was too late. (R., p. 000683). A Motion to Set Aside Partial Decrees is pending with the SRBA, but no determination has been made.

It would be unconscionable to allow the Department to limit Rangen's water rights given Rangen's prior permits and licenses, Rangen's historical, beneficial use of the water, the Department's investigation in 2003, the findings in the 2005 *Second Amended Order*, and no prior notice that Rangen's historical water usage is improper. The Department and the District Court erred when they concluded that quasi-estoppel cannot be applied and that determination should be reversed.

**D. THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE ADOPTION OF SULLIVAN'S REGRESSION ANALYSIS.**

Because of the way it is calibrated, ESPAM2.1 can only predict how much water would accrue to the entire Rangen spring cell, not just the mouth of the Martin-Curren Tunnel itself. (*See*,

Exh. 3203, p. 10 at ¶ 9). Anticipating that the Director could rule (as he did) that Rangen's water rights are limited to the water that comes from the mouth of the Martin-Curren Tunnel itself, the Department staff developed a linear regression to apportion the water that would accrue as the result of a curtailment between the Martin-Curren Tunnel and the rest of the springs complex. The IDWR staff determined that in the event of a curtailment, 70 percent of the water would accrue to the Martin-Curren Tunnel mouth and 30 percent would accrue to the rest of the spring complex. *See id.* The Director rejected the IDWR staff's 70/30 regression analysis, and instead, adopted the 63/37 regression analysis put together during the hearing by Greg Sullivan, Pocatello's expert hydrologist, that was actually put together during the course of the hearing.

There was not substantial evidence to support the adoption of Sullivan's regression analysis. The term "substantial evidence" means evidence ". . . that a reasonable mind might accept to support a conclusion." *Chisholm v. IDWR*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005) (quoting *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001)). A reviewing court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia County*, 137 Idaho 428, 431, 50 P.3d 443, 446 (2002). A decision is clearly erroneous when it is not supported by substantial and competent evidence. *Galli v. Idaho County*, 146 Idaho 155, 159, 191 P.3d 233, 237 (2008). In this case, the District Court affirmed the Director's decision to adopt Sullivan's regression analysis. This decision was not supported by substantial and competent evidence and should be reversed.

**1. Rangen's Water Measurements are Within Industry Standards and Have Been Accepted by IDWR.**

The IDWR staff based their regression analysis on the historical measurement data provided by Rangen. This approach was reasonable because Rangen's water measurements are within industry standards and have been accepted by IDWR and the local watermaster.

Rangen has been measuring and recording water flows at the Research Hatchery since 1966. (*See*, Exh. 1075 for a summary chart of water measurements that Rangen maintains). Rangen has been reporting those flows directly to IDWR since 1995 and the Department has always accepted them. The IDWR staff concluded in their memorandum that:

Rangen submitted annual water measurement reports directly to IDWR from 1995 through 2009, and to Water District 36A from 2010 to 2012. IDWR has accepted these annual water measurement reports during this period of record understanding that Rangen estimates hatchery diversions or flows using fish raceway check boards as non-standard weir measuring devices.

(*See*, Exh. 3203, p. 13 at ¶ 1).

Dan Maxwell, a fish culturist at the Research Hatchery, is responsible for taking the water measurements. Maxwell takes the measurements every Monday. (Tr., Vol. I, p. 270, L. 1-6). In order to measure all of the water that flows through the Research Hatchery and is available for use, Maxwell takes two separate measurements and adds them together. He takes one measurement at the bottom of the top set of the CTR ponds and he takes the other measurement where the water flows over the Lodge Pond dam board. These two locations are shown as "measurement points" on Exh. 1074. (Tr., Vol. I, p. 269, L. 1-5).

He takes the measurements by placing a metal yardstick at the top of the dam boards in both locations and reading the level of the flow as it passes over the dam boards. (Tr., Vol. I, p. 274, L. 18 – p. 275, L. 1). The yardstick is placed so that the face is perpendicular to the water. (Tr., Vol. I, p. 275, L. 4-6). Frank Erwin, the local watermaster, confirmed at the hearing that when Maxwell takes the readings the ruler is somewhat perpendicular to the water flow. (Tr., Vol. I, p. 249, L. 21 – p. 250, L. 4).

Dr. Brockway, a water resources engineer who has been involved in Idaho water since 1954, explained that the ruler method used by Rangen to measure the water flow is called “sticking the weir.” (Tr., Vol. IV, p. 920, L. 17-20; p. 930, L. 14-23). “Sticking the weir” is used when a standard staff gauge has not been incorporated into the weir setup. (Tr., Vol. IV, p. 930, L. 24 – p. 931, L. 8). Sticking the weir is a common measurement method that fish producers use in Idaho. (Tr., Vol. IV, p. 931, L. 13-20). Dr. Brockway observed Maxwell taking water measurements and testified that Rangen’s flow measurements are accurate and within industry standards. (Tr., Vol. IV, p. 968, L. 17-22).

Frank Erwin, the local watermaster, also testified that he observed Maxwell taking water measurements at the Rangen Hatchery and did not have any issues with the way it was done:

Q. And have you ever watched him measure water out at the facility?

A. Yes, I have.

Q. And did you ever take issue with the way that Mr. Maxwell measures water out at Rangen's facility?

A. No, I haven't. I think he does a good job.

(Tr., Vol. I, p. 244, L. 16-22).



In fact, Mr. Erwin testified that Maxwell was actually better at taking the measurements than he is:

Q. (BY MS. BRODY): Did you ever have occasion to consider how well Mr. Maxwell reads the ruler measurements?

A. Yes. I think he does a good job.

Q. And have you ever compared his ability to read the ruler compared to your own?

A. I would put it this way: I think he probably does a little better job at it than I would be able to do.

Q. Rangen sends you annual reports of their water measurements; correct?

A. Yes.

Q. And have you ever taken issue with any of the measurements that Rangen has sent you?

A. No, I haven't.

(Tr., Vol. I, p. 245, L. 11-19).

After reading the water flow level on the ruler, Maxwell records the water measurements to the nearest 1/8 inch on a notepad. (Tr., Vol. I, p. 279, L. 3-10). (*See*, Exh. 1095 for a sample of a weekly measurement notepad). He then takes the water measurements and converts them to cubic feet per second using a rating table or conversion chart. (Tr., Vol. I, p. 279, L. 11-23; *see also*, Exh. 1068 for the conversion chart Maxwell has used since he started taking measurements in 1999). He records the results on a chart such as Exh. 1094. Douglas Ramsey, a Research Scientist at the Rangen Hatchery, then records Maxwell's converted measurements in the computerized spreadsheet that was admitted as Exhibit 1075. (Tr., Vol. III, p. 620, L. 14 – p. 624, L. 6).

Open channel water measurements like Rangen's are deemed acceptable if the measurements are within 10 percent of measurements taken by IDWR. In this case, IDWR has

historically accepted Rangen's measurements because those measurements are within the acceptable +/-10 error range. The IDWR staff concluded:

Although the raceway check boards are not considered standard measuring devices, IDWR accepts measurements using these structures at Rangen and many hatcheries in the area because IDWR's standards allow an accuracy of +/-10 percent for open channel measuring devices when compared to measurements using standard portable measuring devices. Rangen likely under-measures actual flows, but an error up to -10% is acceptable pursuant to IDWR's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices*.

(See, Exh. 3203, p. 13, 58-65) In fact, Rangen's measurements are well within the +/- 10 percent margin. The IDWR staff concluded:

IDWR staff measured a total of 18.97 cfs at the Rangen hatchery based on sum of the Large raceways + Lodge Dam, or a total of 18.69 cfs based on sum of CTR raceways and Lodge dam. The 2003 measurement report submitted to IDWR by Rangen reports a total of 17.51 cfs on November 24, 2003, which is a difference of either 1.46 or 1.18 cfs, or a difference of -7.7% and -6.31% respectively. IDWR measured 0.48 cfs at the Lodge dam on November 25, 2003.

(*Id.*, p. 60, f/n 12) It is important to recognize that under-measurement of spring flows actually favors the groundwater users – not Rangen. The IDWR staff explained in their memo that:

Systematic under-measurement of discharge at the Rangen spring complex would be expected to result in lower model predictions of discharge and response curtailment at the Rangen spring cell. This would favor the groundwater users, not Rangen.

(Exh. 3072, p. 13 at ¶ 5 and p. 65)

Cindy Yenter also concluded that Rangen's measurement techniques are acceptable when she investigated Rangen's 2003 delivery call. (Tr., Vol., III, p. 569, L. 23 – p. 570, L. 2). Ms. Yenter's 2003 investigation memo stated that:

It seems reasonable to conclude that, while Rangen's measuring techniques for the hatchery raceways may not be absolutely correct, they are fairly consistent and are resulting in reported measurements which are no more than about 10 percent lower than actual flows.

(See, Exh. 1129, p. 4) At the hearing, Yenter explained that if she went out and made an *excellent to good* open-channel measurement, it would have an accuracy rating of around  $\pm 5$  percent. (Tr., Vol. III, p. 606, L. 6-25). Yenter believes that Rangen's measurements fall within a 5-10 percent accuracy range. *Id.*

Of the 7.7 percent to 6.31 percent reported margin of error discussed in the IDWR Staff Memo, IDWR concluded that less than 2 percent of the error was attributable to actual measurement error. Most of the error was attributable to using different weir coefficients and rating tables. When the same rating tables were used, IDWR concluded that there was less than 2 percent error:

When using the IDWR head measurements from November 25, 2003 with the Rangen discharge table, the flow at the Large raceways is 16.9 cfs and the flow at the CTR raceways is 16.2 cfs. The Yenter memo states that Rangen staff measured 16.6 cfs and 15.9 cfs at the Large and CTR raceways respectively on November 24, 2003, a difference of only 0.3 cfs between IDWR and Rangen when using the Rangen discharge table, or a difference of less than 2 percent at each set of raceways. The relatively minor differences between the IDWR and Rangen measurements when using the Rangen discharge tables indicates that the differences in flow measurements between IDWR and Rangen on November 25th and 24th, 2003, was due mostly to the use of different weir equations or rating tables, rather than differences in head measurements.

(See, Exh. 3203, p.61).

The bottom line is that Rangen has been taking and recording water measurements for over fifty years at the Research Hatchery. Those methods used have been observed and investigated by

IDWR and the watermaster and they have found them to be within industry standards and have accepted Rangen's measurements. It was reasonable for the IDWR staff to use those measurements to develop its regression analysis.

## **2. Sullivan's "Evolving" Opinions.**

There was no rational basis for the Director to reject the 70/30 regression analysis developed by IDWR staff in favor of the 63/37 regression analysis done by Greg Sullivan. Sullivan first testified during the hearing that he did a regression analysis to determine how to apportion the accrual of water between the mouth of the Martin-Curren Tunnel itself and the rest of the spring complex and determined that the proper apportionment ratio was 75/25. (Tr., Vol. VI, p. 1365, L. 21 - p. 1367, L. 4) He testified that Dr. Brendecke, IGWA's expert, had done the same type of analysis and came up with a substantially similar result. (*Id.*)

On the last day of the hearing Sullivan came back with a new opinion of the proper ratio. He testified that after the Director asked him if the ratio would change if Rangen under-measured its flows he did a new regression analysis (Tr., Vol. XII, p. 2794, L. 22 – p. 2795, L. 6) and determined that the proper ratio is actually 63/37 because Rangen under-measures the flows through its facility by 15 percent. (Tr., Vol. XII, p. 2797, L. 22 – p. 2798, L. 10). The Director rejected the IDWR staff's 70/30 ratio, and instead, adopted Sullivan's revised 63/37 ratio. The Director's decision was erroneous for several reasons.

The first problem with the adoption of Sullivan's analysis is his ever-evolving opinions concerning the error rate in Rangen's measurements. Sullivan testified at the hearing that Rangen's measurements were under-measured by 15 percent. (Tr., Vol. VII, p. 1606, L. 15-18).

This is in stark contrast to the position he took during his deposition and in his expert reports where he asserted that Rangen's measurements were in error by 30 percent to 40 percent. (Tr., p. 1607, L. 21-25; p. 1608, L. 1-5). When questioned about the change of opinion, Sullivan testified that his opinions had "evolved." (Tr., p. 1608, L. 6-7).

The next problem with Sullivan's analysis is his reliance on unreliable USGS data that the IDWR staff considered and rejected. The Department considered and rejected the use of USGS data in evaluating Rangen's measurements because USGS had subjectively rated its measurements as fair or poor. The IDWR staff stated:

The USGS periodically measures the discharge in Billingsley Creek just downstream of the Rangen Hatchery, but subjectively rates most of the measurements fair or poor, indicating that the USGS water measurement experts also found that flow and/or cross sectional conditions in Billingsley Creek are not ideal and contribute to measurement error.

(See, Exh. 3203, p. 65).

In addition, the USGS measurements are not taken at the same place as the Rangen measurements and likely include water that is not measured or used in the Research Hatchery. Exhibit 1446C shows that there are two additional sources of water that are not included in the Rangen measurements. Those additional water sources are identified as points 188 and 189 on Exhibit 1446C. The two additional sources of water are located on the east side of a culvert which conveys water from one side of a road to another. Sullivan testified that USGS measurements are sometimes taken on the east side of the culvert and sometimes on the west side. (Tr., Vol. VII, p. 1599, L. 19-23). Because of these additional sources of water coming into the channel below the

point where Rangen measures its flows, comparing Rangen's water measurements to USGS measurements is truly an "apples and oranges" comparison.

Finally, the weir coefficient Sullivan "extrapolated" from the USGS measurements is different than the "hybrid" weir coefficient Sullivan created and advocated for in his expert reports. Before Sullivan's measurement conclusions were rejected by the Department in the staff memo (*see*, Exh. 3203, p. 58-63), Sullivan contended the proper weir coefficient for Rangen was 3.32, at heads exceeding 3 3/8ths inches. (*See*, Exh. 3128, Table 1-5) Within a hundredth of a decimal point, this is the same weir coefficient used by Rangen until at least 1999.

There is not substantial and competent evidence to support the adoption of Sullivan's 63/37 regression analysis. The USGS data he used to develop the regression analysis was considered and rejected by the IDWR staff. USGS itself rated its measurements fair to poor. Rangen's measurements, on the other hand, are within the range of accuracy required by IDWR and have been accepted by the Department. No rational fact finder would reject the regression analysis done by the IDWR staff using Rangen's measurements in favor of an ever-evolving regression analysis built upon USGS data that has been rejected by the Department. The reality is that Sullivan first determined that if there were no error in Rangen's measurements, the proper ratio would be 75/25. Assuming a 15 percent under-measurement error he concluded that the ratio should be 63/37. The ratio developed by the IDWR staff is 70/30 and their estimated under-measurement rate is 6-7 percent. The staff's ratio is half way between Sullivan's two ratios just as their under-measurement of 6-7 percent estimate is half way between Sullivan's assumptions of no error and a 15 percent under-measurement. A rational fact finder would not have adopted Sullivan's second regression

analysis over the IDWR staff's analysis. Because there is not substantial and competent evidence to support Sullivan's regression analysis, that portion of the Director's *Final Order* should be reversed.

**E. THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE DIRECTOR'S DETERMINATION THAT JUNIOR GROUNDWATER USERS ARE USING WATER EFFICIENTLY AND WITHOUT WASTE.**

Conjunctive Management Rule 40.03 states that the Director *will* consider whether the junior-priority groundwater pumpers are using water efficiently and without waste when evaluating Rangen's Petition for Delivery Call. Evidence of efficient use is a prerequisite for any junior user that wants to be excluded from curtailment. The rule states in relevant part:

The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

IDAPA 37.03.11.040.c. The Director concluded in the *Order on Reconsideration* that IGWA and Pocatello carried their burden under this rule. The District Court affirmed this determination. There is not substantial evidence to support this conclusion, and it should be reversed.

The Director ruled that IGWA carried its burden under CM Rule 40.03 based on the testimony of Lynn Carlquist, the chairman of the North Snake Groundwater District, and Tim Deeg, the chairman of IGWA. The Director began his analysis by pointing to the portions of the transcript where Carlquist testified that he and nearly 100 percent of the other farmers in his area use sprinkler irrigation. While sprinkler irrigation (as opposed to flood irrigation) has certainly become standard industry practice, sprinkler use does not mean that farmers are using water

efficiently and without waste. To evaluate the efficient use of water and the use of water without waste requires the introduction of evidence such as:

- Water usage compared to crops in the field or other permitted uses
- Sprinkler package maintenance and replacement practices
- Cultivation practices, including information such crop selection, seed choice, crop rotations and use of cover crops and mulch

This type of information was not introduced because IGWA and its groundwater districts simply do not have it.

Carlquist testified that the North Snake Groundwater District does not do anything to evaluate the efficiency of its farmers:

Q. The North Snake Groundwater District does not do anything to evaluate the efficiency of its farmer members; does it?

A. No.

(Tr., Vol. VII, p. 1726, L. 20-23). Likewise, he testified that the Groundwater District does not do anything to evaluate whether its groundwater pumpers are using water without waste:

Q. The North Snake Groundwater District does not do anything to assess, or evaluate whether its ground water pumpers are using water without waste?

A. No.

(Tr., Vol. VII, p. 1727, L. 4-7). While the North Snake Groundwater District has hired Brian Higgs, a hydrographer, to measure groundwater use within the District every three years (see, Tr., Vol. VII, p. 1715, L. 6-21), Carlquist explained that the District itself makes no assessment concerning whether its pumpers are using their water within their legal rights:

Q. Does the District, itself, have any information, or assess whether a groundwater pumper within the boundaries of the district, is using water within their legal rights?

A. No, we don't maintain anything like that.



(Tr., Vol. VII, p. 1728, L. 1-5). Timothy Deeg, the president of IGWA, likewise testified that IGWA does not monitor the efficiency of its members' groundwater systems:

Q. IGWA does not monitor the efficiency of its individual members irrigation systems?

A. No, it does not.

(Tr., Vol. VIII, p. 1763, L. 7-9).

The Director appears to have concluded based on Deeg's testimony that farmers will only pump what is necessary to get by because of the costs involved. (D.Ct.R., Vol. XXII, p. 004462). This is an erroneous conclusion with no rational basis. How much is too much to pump? The answer to that question varies depending on the farmer and the farmer's business operation. A broad generalization that cost is a disincentive to pump does not equate to the efficient use of water or the use of water without waste. The record developed after two weeks of hearing simply does not provide the basis for the Director or a rational fact finder to conclude that IGWA's members are using water efficiently and without waste.

The Director also concluded that Pocatello carried its burden of demonstrating the efficient use of water without waste based on the testimony of Justin Armstrong. The Director cited Armstrong's testimony at pages 1104-1107 as the basis for his conclusion. (R., Vol. XXII, p. 004428). The testimony the Director relied on is nothing more than the evidence concerning how much water the City of Pocatello's wells produced – not evidence of efficiency or conservation. For example, Armstrong testified:

Q. Okay. So let's look at the airport wells.

And again, this is a system that's disconnected from the City's culinary system; correct?

A. That's correct.

Q. Okay. What's the total production shown here, on average?

A. Total on average is 3,588 acre feet.

(Tr., Vol. V, p. 1105, L. 25 – p. 1106, L. 6). Contrary to the Director's conclusion, Armstrong did not address how the City of Pocatello uses water or how its use is efficient or without waste.

There is not substantial, competent evidence in the record to support the Director's conclusion that junior-priority groundwater users and the City of Pocatello are using water efficiently and without waste. As such, the Director's ruling should be reversed.

**F. RANGEN'S SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED BY THE DIRECTOR'S ORDER.**

Under Section 67-5279(4), a Petitioner can prevail only if it shows that a substantial right has been prejudiced by an administrative decision. In this case, the Director's decision and the District Court's decision to affirm it deprives Rangen of the right to use water that it has lawfully put to beneficial use over the last fifty years. The decision also deprives Rangen of the right to use the Bridge Dam to get water to its Large Raceways. There is no doubt that the decision prejudices Rangen's legal rights and should be reversed for the reasons set forth above.

**G. RANGEN IS ENTITLED TO ATTORNEY FEES AND COSTS.**

As a result of the Department's actions and the decision made by the Director, Rangen has had to retain counsel. For services rendered, Rangen is entitled to attorney fees and costs should it prevail in this action pursuant to Idaho Code § 12-117(1), I.R.C.P. Rule 54 and I.A.R. 40 and 41. Idaho Code Section, in pertinent part, reads:

(1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency,

political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1). This provision applies to petitions for judicial review. I.C. § 12-117(5)(c).

The Director's determination of the legal issues raised on appeal was clearly erroneous and his factual conclusions were not supported by substantial evidence as required by Idaho law. As such, Rangen should be awarded reasonable costs and attorney fees incurred on appeal.

### V. CONCLUSION

Rangen respectfully requests that the decisions identified above be reversed.

DATED this 29th day of April, 2015.

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By: 

Robyn M. Brody

HAEMMERLE LAW, PLLC

By: 

Fritz X. Haemmerle

MAY, BROWING & MAY, PLLC

By: 

J. Justin May

### CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 29<sup>th</sup> day of April, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by U.S. Mail and email:

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J. Justin May