IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (RANGEN, INC.) IDWR DOCKET NO. CM-DC-2011-004.

Supreme Court Docket No. 42772-2015

Snake River Basin Adjudication
No. CV-2014-1338
(Consolidated Gooding County
Case No. CV-2014-179)

RANGEN, INC.,

Petitioner-Appellant,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his official 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 POCATELLO,

Intervenors.

IDAHO DEPARTMENT OF WATER RESOURCES' BRIEF IN RESPONSE TO RANGEN'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 THE CASE

A. NATURE OF THE CASE

This case arises out of an appeal from two final orders issued by the Director ("Director") of the Idaho Department of Water Resources ("Department") in response to the December 13, 2011, *Petition for Delivery Call* filed by Rangen, Inc. ("Rangen"), alleging water right nos. 36-02551 and 36-07694 are being materially injured by junior-priority ground water pumping. The two final orders are the January 29, 2014, *Final Order Regarding Rangen, Inc.'s Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order") and the March 4, 2014, *Order on Reconsideration*.

Rangen presents six issues on appeal. The first three issues relate to how the Director interpreted the Snake River Basin Adjudication ("SRBA") partial decrees for Rangen's water rights. The Director held that the plain language of the decrees limits Rangen to one point of diversion: T07S R14E S32 SESWNW. R. Vol. XV, p. 3176. The Director rejected Rangen's argument that it can divert water outside its decreed point of diversion. *Id.* Based on the plain language of the partial decrees, the Director also held that the decreed source for Rangen's water rights is the Martin-Curren Tunnel, not the entire spring complex that forms the headwaters of Billingsley Creek. R. Vol. XXI, pp. 4219-20. The District Court, acting in its appellate capacity, affirmed the Director's interpretation of Rangen's partial decrees. *See Memorandum Decision and Order on Petitions for Judicial Review*, Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179) (Oct. 24, 2014) ("Memorandum Decision"). The first three issues raised by Rangen challenge these determinations. Rangen also alleges on appeal that the Director erred by adopting a regression analysis proposed by the City of Pocatello's expert witness, Greg Sullivan ("Sullivan"), and that the Director erred in finding that junior ground

water users are using water efficiently and without waste. Finally, Rangen asserts it is entitled to attorney fees on appeal.

B. STATEMENT OF FACTS

1. Layout of the Rangen Facility

Rangen owns and operates a fish research and propagation facility ("Rangen Facility") in the Thousands Springs area near Hagerman, Idaho. Tr. Vol. I, p. 55. Below is a site map of the Rangen Facility reproduced from Exhibit 2286:

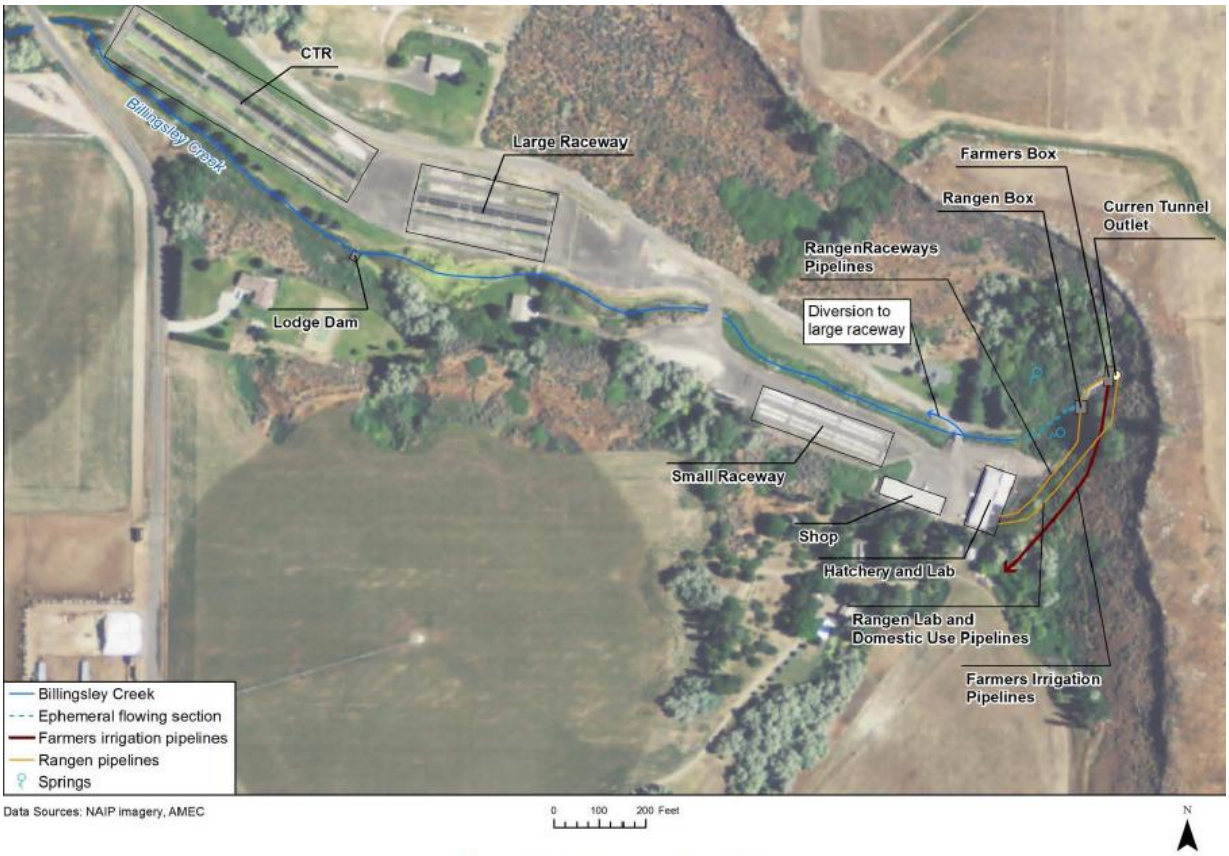

Figure 3.3: Rangen Site Map

The Rangen Facility starts with a hatchery for the incubation of fish eggs and proceeds to a series of concrete channels for fish rearing, now commonly referred to as the "small raceways," "large raceways," and "CTR raceways." Tr. Vol. I, pp. 60, 61, 66.

2. Source of Water and Diversions

Immediately east of the Rangen Facility, water emanates from numerous springs on the talus slopes just below the canyon rim. Water also emanates from what is called the "Martin-Curren Tunnel."[1] The Martin-Curren Tunnel is a large, excavated conduit constructed high on the canyon rim and extends approximately 300 feet into the canyon wall. Tr. Vol. IV, p. 911. The first fifty feet of the tunnel is supported by a corrugated metal pipe approximately six feet in diameter. Tr. Vol. IX, p. 2039. The remaining 250 feet of the excavation is an open tunnel unsupported by any structure. *Id.* The record does not clearly establish when the Martin-Curren Tunnel was built, but the tunnel predates construction of the Rangen Facility. R. Vol. XXI, p. 4191.

A concrete collection box located near the mouth of the Martin-Curren Tunnel collects water for delivery to Rangen and holders of early priority irrigation water rights via pipelines. Ex. 3651. The concrete box is commonly referred to as the "Farmers' Box." Further down the talus slope is a second concrete water collection box with an open top, commonly referred to as the "Rangen Box." Rangen transports water from the Farmers' Box through two plastic pipes down to the Rangen Box. Tr. Vol. VII, p. 1661. Water is delivered from the Rangen Box via a steel pipe to the small raceways. *Id.* at 1584-85. The water diverted by Rangen can then be routed from the small raceways down through the large and CTR raceways. *Id.* Water can also be spilled out the side of the Rangen Box and returned to the talus slope.

Water is delivered to the hatchery through a six-inch white PVC pipeline that diverts water from inside the Martin-Curren Tunnel. The water is used in the hatchery and then discharged either back into Billingsley Creek or directly into the small raceways and used in the large and CTR raceways. Tr. Vol. VI, p. 1336. Rangen's main diversion for the large raceways

[1] The terms "Martin-Curren Tunnel" and "Curren Tunnel" are used interchangeably by the parties.

is located downstream from the talus slope, where the defined channel for Billingsley Creek begins. *Id.* This diversion is commonly referred to as the "Bridge Diversion." The Bridge Diversion collects and diverts spring flows that arise on the talus slope and water spilled from the Rangen Box. *Id.*

3. Rangen's Water Rights

Rangen holds five water rights for the Rangen Facility that were decreed through the SRBA. Rangen's decreed rights are summarized as follows:

Right	Source	Purpose and Period of Use	Quantity	Priority	Point of Diversion
36-00134B	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31) Irrigation (03/15 – 11/15)	0.07 cfs 0.05 cfs	10/09/1884	T07S R14E S32 SESWNW
36-00135A	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31)	0.05 cfs	04/01/1908	T07S R14E S32 SESWNW
36-15501	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	1.46 cfs	07/01/1957	T07S R14E S32 SESWNW
36-2551	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31) Domestic (01/01 – 12/31)	48.54 cfs	07/13/1962	T07S R14E S32 SESWNW
36-7694	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	26.0 cfs	04/12/1977	T07S R14E S32 SESWNW

C. PROCEDURAL BACKGROUND

On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department alleging water right nos. 36-02551 and 36-07694 are being materially injured by junior-priority ground water pumping in the areas encompassed by Enhanced Snake Plain Aquifer Model ("ESPAM") version 2.0. R. Vol. I, pp. 4-5. Rangen did not allege injury to water right nos. 36-00134B, 36-00135A, and 36-15501. *Id.* The *Petition for Delivery Call* requested the Director curtail junior ground water rights in the areas encompassed by ESPAM 2.0 in accordance with the prior appropriation doctrine as necessary to deliver water to Rangen's senior priority water rights. *Id.* at 8.

Several dispositive motions were filed prior to the delivery call hearing. Of relevance here, on March 8, 2013, Rangen filed a *Motion* and *Brief in Support of Motion for Partial Summary Judgment Re: Source*. The source identified on the SRBA partial decrees for water right nos. 36-02551 and 36-07694 is the "Martin-Curren Tunnel." Ex. 1026; Ex. 1028. The point of diversion for both water rights is described to the ten acre tract: T07S R14E S32 SESWNW. *Id.* Rangen argued it "is not limited only to water from the mouth of the Martin-Curren Tunnel itself," R. Vol. XIII, p. 2570, but rather has the right to divert water from the entire spring complex, even those springs that are located outside its ten acre tract point of diversion. *Id.* at 2585.

The Director first examined whether Rangen is entitled to divert water from the spring complex outside the ten acre tract point of diversion identified on the partial decrees. On this issue, the Director concluded Rangen could not call for water from springs located outside the decreed point of diversion:

> The point of diversion element decreed by the SRBA district 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. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right) (emphasis added); 37.03.11.010.25 (defining "water right" to mean "[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree . . . .")(emphasis added).

R. Vol. XV, p. 3176. As to the question of whether Rangen is limited to diverting water only from the Martin-Curren Tunnel, the Director denied summary judgment, concluding there were questions of material fact related to how Rangen diverts water from the tunnel. *Id.* at 3176-77.

Starting on May 1, 2013, a two-week hearing was held. The hearing was bifurcated. The first part of the hearing focused on issues of material injury and beneficial use and the second part of the hearing focused on issues related to ESPAM 2.1.[2]

On January 29, 2014, the Director issued the Curtailment Order. The Director concluded his material injury determination could only consider water diverted by Rangen from the Martin-Curren Tunnel because the source element on Rangen's partial decrees is unambiguously described as "Martin-Curren Tunnel." R. Vol. XXI, pp. 4219-20. As part of his material injury analysis in the Curtailment Order, the Director had to evaluate historic flows through the Rangen Facility. The Director first looked to historic water flows reported to the watermaster by Rangen. Because Rangen used a nonstandard measuring device with an inaccurate rating curve to determine flow rates, the Director found, based upon clear and convincing evidence, that Rangen's reported historic flows were lower than actual flows. R. Vol. XXI, p. 4198. As a result, the Director utilized a regression analysis proposed by Sullivan that best reflected the relationship between Martin-Curren Tunnel discharge and the corrected historic measurement of total spring complex discharge. *Id.* at 4210. The Director ultimately concluded that, while junior-priority water right holders are using water efficiently and without waste, pumping by junior ground water users has materially injured Rangen. *Id.* at 4228. The Director ordered that holders of junior-priority ground water rights be curtailed unless they implemented a mitigation plan that provided "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id*. at 4229. Three petitions for reconsideration of the Curtailment Order were filed. On March 4, 2014, the Director issued his *Order on Reconsideration*.

[2] ESPAM 2.0 was updated shortly before the hearing commenced. The latest version is referred to as ESPAM 2.1.

On March 24, 2014, Rangen filed a petition seeking judicial review of the Director's Curtailment Order and subsequent *Order on Reconsideration*. On October 24, 2014, the District Court entered its Memorandum Decision affirming the Director on all decisions challenged by Rangen in this appeal to the Idaho Supreme Court.

II. ISSUES PRESENTED ON APPEAL

The issues presented by Rangen are as follows:

1. Whether the term "Martin-Curren Tunnel" constitutes a latent ambiguity.

2. Whether Rangen can use the Bridge Diversion 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 that junior groundwater users are using water efficiently and without waste.

6. Whether Rangen is entitled to attorney fees on appeal.

Respondents' formulation of the first three issues is as follows:

1. Whether the SRBA partial decrees unambiguously limit Rangen to water arising from the "Martin-Curren Tunnel."

2. Whether Rangen is only entitled to divert water within the ten acre tract point of diversion described in the SRBA partial decrees.

3. Whether the doctrine of quasi-estoppel precludes the Director from administering water rights consistent with the plain language of the SRBA partial decrees.

Respondents agree with Rangen's formulation of the last three issues.

Additional issue raised by Respondents:

1. The Director and Department are entitled to an award of reasonable attorney fees on appeal pursuant to I.C. § 12-117(1) and (2) because Rangen's challenges to the SRBA partial decrees constitute collateral attacks on the decrees and are without a reasonable basis in law or fact.

III. STANDARD OF REVIEW

In an appeal from a decision of the district court acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court's decision. *Chisholm v. Twin Falls County,* 139 Idaho 131, 132, 75 P.3d 185, 187 (2003). The Court does not substitute its judgment as to the weight of the evidence presented, Idaho Code § 67-5279(1), but instead defers to the agency's findings of fact unless they are clearly erroneous. *Chisholm,* 139 Idaho at 132, 75 P.3d at 187. When conflicting evidence is presented, the agency's findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether the Court might have reached a different conclusion. *Barron v. Id. Dept. of Water Resources,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The agency's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the agency reached. *See, e.g., Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974).

"A strong presumption of validity favors an agency's actions." *Young Elec. Sign Co. v. State ex rel. Winder,* 135 Idaho 804, 807, 25 P.3d 117, 120 (2001). The agency's action may be set aside, however, if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron*, 135 Idaho at 417, 18 P.3d at 222. In addition, the Court will affirm an agency action unless a substantial right of the appellant has been prejudiced. *Id.* If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. THE PARTIAL DECREES UNAMBIGUOUSLY LIMIT RANGEN TO WATER ARISING FROM THE MARTIN-CURREN TUNNEL

In responding to Rangen's *Petition for Delivery Call*, the Director examined the provisions of the SRBA partial decrees for water right nos. 36-02551 and 36-07694. The Director concluded the plain language of the source element of the partial decrees only allows Rangen to divert water from the "Martin-Curren Tunnel." R. Vol. XXI, pp. 4219. The Director explained that, pursuant to Idaho Code § 42-1420, "[a] decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right" and that "[a]dministration must comport with the unambiguous terms of the SRBA decrees." *Id.* Because the partial decrees unambiguously identify the source of the water as the Martin-Curren Tunnel, the Director properly concluded the partial decrees limit Rangen to only water discharging from the tunnel. In this appeal, Rangen argues the term "Martin-Curren Tunnel" constitutes a latent ambiguity in the SRBA partial decrees for water right nos. 36-02551 and 36-07694 and seeks to present evidence outside the four corners of the partial decrees. *Rangen's Opening Brief* at 7-19.

When interpreting a partial decree, the starting point is the face of the decree. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986)("We turn to the decree's relevant provisions to determine whether the decree is ambiguous."). Whether an ambiguity exists in a decree is a question of law, over which this Court exercises free review. *See Dr. James Cool, D.D.S. v. Mountainview Landowners Co-op. Ass'n, Inc.*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004). There are two types of ambiguity, patent and latent. A patent ambiguity is an ambiguity clear from the face of the instrument in question. *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. *Id*. Rangen does not argue that a patent ambiguity exists in its partial decrees. Indeed, the identifier "Martin-Curren Tunnel" is not patently ambiguous. The name refers to a specific, identifiable, and known structure. Instead, Rangen asserts the source of its senior water rights is latently ambiguous because the term "Martin-Curren Tunnel," when applied to the facts as they exist, gives rise to a latent ambiguity regarding Rangen's authorized water source. *Rangen's Opening Brief* at 12.

The term "Martin-Curren Tunnel" does not constitute a latent ambiguity in the partial decrees for water right nos. 36-02551 and 36-07694. First, this is not a case where there are two or more tunnels within Rangen's authorized point of diversion and it is unclear to which tunnel the partial decrees refer. *See Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-1049 (1952) (holding that a latent ambiguity arose when a writing referred to a pump and it was shown there were two or more pumps to which it might properly apply); *see also Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (where ambiguity arose in a contract because of the use of the name "Peerless" as there were two ships called "Peerless."). The record here "establishes there is only one tunnel to which the term 'Martin-Curren Tunnel' can possibly apply." *Memorandum Decision* at 12. The identifier "Martin-Curren Tunnel" is specific and is not doubtful or subject to a conflicting interpretation. Second, while Rangen suggests the phrase "Martin-Curren Tunnel" means all "the spring water that forms the headwaters of Billingsley Creek," *Rangen's Opening Brief* at 15, this argument fails as the plain language of the partial decrees does not in any way invoke an interpretation that the source is a "spring" or "Billingsley Creek." As the District Court determined, "under no conceivable use can the term 'tunnel' mean the greater springs complex that forms the headwaters of Billingsley Creek." *Memorandum Decision* at 21. A holding "that the term 'Martin-Curren Tunnel' referred

not only to the actual physical tunnel located within Rangen's authorized point of diversion commonly known as the Martin-Curren Tunnel, but also to the entirety of the spring complex that forms the headwaters of Billingsley Creek" as suggested by Rangen would result in a loss of clarity and "offend the common meaning and understanding of the term 'tunnel.'" *Id.* "The Director's determination that the term 'Martin-Curren Tunnel' means the actual physical tunnel located within Rangen's authorized point of diversion . . . is consistent with the plain language of the [partial decrees], consistent with the common meaning and understanding of the term tunnel, and consistent with the facts as they exist as established by the record." *Id.* at 13. Rangen has failed to establish the term "Martin-Curren Tunnel" constitutes a latent ambiguity in the partial decrees for water right nos. 36-02551 and 36-07694.

Even if the Court determines the term "Martin-Curren Tunnel" creates a latent ambiguity, "[a]pplying the proper standard of review, the inquiry is whether the [agency] based its decision on substantial, competent evidence." *See Cool*, 139 Idaho at 774, 86 P.3d at 488. Here, substantial evidence in the record supports the Director's conclusion that "Martin-Curren Tunnel" describes the tunnel itself, and is not a name for the entire Rangen spring complex as suggested by Rangen. In his testimony, the watermaster for Water District 36A, Frank Erwin, distinguished between the Martin-Curren Tunnel and the springs that feed Billingsley Creek. Tr. Vol. I, pp. 232, 237-238. Erwin has lived in Hagerman all his life and has been watermaster for Water District 36A for sixteen years. *Id*. at 230. Erwin's distinction between the Martin-Curren Tunnel and the spring complex is significant because he is in a position to know whether the entire spring complex is commonly referred to as the Martin-Curren Tunnel. Also, the record is replete with references and exhibits specifically identifying the Martin-Curren Tunnel as a unique structure at a specific location, thereby distinguishing between the spring complex and

the Martin-Curren Tunnel itself. Ex. 1290; Ex. 1446A, B and C; Ex. 2408A and B; Ex 2286, Ex. 2328 (diagram of Martin-Curren Tunnel); Ex. 3277; Ex. 3278; Ex. 3648; Ex. 3651. Moreover, all measurements taken by the Department that identify the Martin-Curren Tunnel as the source refer only to water measured in the tunnel itself, not the spring complex. The Director stated that "[a]nytime the tunnel was mentioned in the [delivery call] proceeding, there was no confusion by the witnesses between the Martin-Curren Tunnel and the rest of the spring complex." R. Vol. XXII, p. 4460. When the topic was the Martin-Curren Tunnel, the witnesses would testify about the physical structure itself, not the spring complex as a whole. *Id.*

While Rangen points to testimony of former Rangen employee, Lynn Babington, in support of its argument that a latent ambiguity exists in its partial decrees, Babington's testimony is mixed. Counsel for Rangen asked, "What did you understand was the Curren Tunnel?" Babington's initial response was, "The Curren Tunnel was the – up on the hillside, a tunnel there." Tr. Vol. I, p. 190. He then stated that he considered all springs arising as the source for the Rangen Facility and that the name "Martin-Curren Tunnel" referred to all the springs. *Id*. Babington's testimony did not persuade the Director that the term "Martin-Curren Tunnel" is a name of local common usage for all the springs in the Rangen complex. R. Vol. XXII, p. 4460. Rangen also points to a note associated with the water right backfile and the Department's adjudication rules to argue that the partial decrees' reference to "Martin-Curren Tunnel" describes something more than the tunnel itself. *Rangen's Opening Brief* at 14. However, the existence of conflicting evidence is not grounds for overturning the Director's decision. If the findings of fact are based on substantial evidence in the record, even if the evidence is conflicting, the Director's findings will not be overturned on appeal. *Barron*, 135 Idaho at 417, 18 P.3d at 222. As the District Court determined, the Director's finding that the "testimony did

not give rise to ambiguity or confusion when the term Martin-Curren Tunnel is applied to the facts, and that Rangen's [partial decrees] are plain and unambiguous . . . is supported by substantial evidence in the record and must be affirmed." *Memorandum Decision* at 14.

In addition, Rangen's attempts to challenge the partial decrees for its senior water rights are untimely. As the District Court stated, "Rangen's attempts to point this Court to extrinsic evidence of historic water use of water and its prior licenses . . . is an attempt to raise issues that should have been raised and litigated in the SRBA." *Memorandum Decision* at 17. The District Court continued:

> If Rangen believed the facially plain language of its [partial decrees] does not reflect its actual historic use, those issues needed to be raised in the SRBA. Arguing instead, in a subsequent proceeding outside of the SRBA, that extrinsic evidence creates a latent ambiguity is problematic . . . because it fails to provide proper notice of the alleged latent ambiguity to the parties to the SRBA.

Id. at 17-18. "For 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." *Id.* at 19. The Court must reject Rangen's attempts to attack the SRBA partial decrees for water right nos. 36-02551 and 36-07694 in this appeal.

B. THE PARTIAL DECREES DO NOT AUTHORIZE RANGEN TO DIVERT WATER AT THE BRIDGE DIVERSION

The Director concluded the point of diversion element decreed by the SRBA District Court unambiguously limits diversions under Rangen's water right nos. 36-02551 and 36-07694 to the following ten-acre tract: T07S R14E S32 SESWNW. R. Vol. XXI, p. 4219. The purple triangle in the following picture depicts the location of the Bridge Diversion in relation to the decreed ten acre tract point of diversion:

R. Vol. XV, p. 3180. The yellow dot represents the Martin-Curren Tunnel outlet, located within T07S R14E S32 SESWNW, and the red square represents the lower collection box. *Id.*

In determining the appropriate scope of Rangen's delivery call, the Director evaluated the authorized water source identified in Rangen's partial decrees in conjunction with the authorized point of diversion:

> The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract: SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7S, R14E, Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E. A decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Administration must comport with the unambiguous terms of the SRBA decrees. . . . Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

R. Vol. XXI, p. 4219. As the District Court determined, these findings by the Director "are supported by substantial evidence in the record and must be affirmed." *Memorandum Decision* at 15.

Although Rangen admits the Bridge Diversion lies outside the ten acre tract described in the partial decrees, *Rangen's Opening Brief* at 19, Rangen seeks to evade the plain language of its partial decrees by arguing the Bridge Diversion, Farmers Box, Rangen Box *and* the talus slope all constitute one diversion structure and thus one legal point of diversion. *Id*. at 20, 24. Rangen suggests it can divert water at the Bridge Diversion because this so-called single diversion structure "lies *mostly* within the 10 acre tract described in the Partial Decrees." *Id.* at 20 (emphasis added). These arguments are without legal or factual support.

Rangen fails to articulate any legal proposition supporting its argument that the Bridge Diversion, Farmers Box, Rangen Box and talus slope constitute one diversion structure. Rangen's argument that the talus slope itself can be a point of diversion for Rangen's fish propagation water rights is contrary to the well established proposition that a physical diversion is necessary to constitute a valid point of diversion for an out-of-stream use of water. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Moreover, the Bridge Diversion collects and diverts water that comes from throughout the talus slope. Ex. 1029, p. 2; Ex. 1446C. Thus, the Bridge Diversion constitutes a unique diversion point for the majority of the water that comes from the talus slope and forms the headwaters of Billingsley Creek, and must be identified on the partial decrees to constitute a valid diversion point.

The record in this case also establishes the Farmers' Box and Rangen Box are not physically connected to the Bridge Diversion. Water emanates from numerous springs on the talus slopes above the Rangen Facility. R. Vol. XXI, p. 4191. Water also emanates from the

Martin-Curren Tunnel, located on the talus slopes above the Rangen Facility. *Id.* The Farmers' Box collects water from the Martin-Curren Tunnel. Ex. 3651. Rangen transports water from the Farmers' Box through two plastic pipes to the Rangen Box further down the talus slope. Tr. Vol. VII, p. 1661. Water is then delivered to the Rangen Facility from the Rangen Box via a steel pipe. *Id.* The water diverted by Rangen can then be routed from the small raceways down through the large and CTR raceways. *Id.* Water can also be spilled out the side of the Rangen Box and returned to the talus slope. The Bridge Diversion, which collects and diverts water that comes from throughout the talus slope, is a separate and distinct diversion structure and is not physically connected to the Farmers' Box or the Rangen Box.

Rangen cites to a previous version of the Department's Adjudication Rules, 37.03.01.060.05.d, which state that 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." Rangen appears to be arguing that, because the Bridge Diversion is in the ten-acre tract *nearest* to SESWNW, then Rangen can use it as a point of diversion. There is no legal basis for this argument. The reason for describing a point of diversion to the ten-acre tract is to provide more specificity of the location of the point of diversion, not create more ambiguity. If Rangen's interpretation were adopted, suddenly the ten-acre tract description becomes much larger as all neighboring ten-acre tracts become potential locations for points of diversion. This is not an interpretation ever adopted by the Department and Rangen's suggestion to the contrary is incorrect.

Even if Rangen has historically relied upon and diverted water at the Bridge Diversion, the Director is bound by the plain language of Rangen's partial decrees. R. Vol. XXI, p. 4219. As the Court recently stated, "the Director's duty to administer water according to technical

expertise is governed by water right decrees." *In re SRBA*, 157 Idaho 385, ____, 336 P.3d 792, 801 (2014). A partial decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Rangen has no right to seek administration for a diversion outside its authorized decreed point of diversion. *See* IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right"); 37.03.11.010.25 ("defining "water right" to mean "[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by decree . . . ."). As the District Court stated, "[t]here is simply no legal basis for Rangen's argument that it can use the Bridge Diversion to collect and divert water even though that diversion structure is not located within its decreed point of diversion." *Memorandum Decision* at 15. "Such an argument ignores the purpose of identifying with particularity the point of diversion element of a decreed water right." *Id*. Because the SRBA decrees are clear and unambiguous, the Director correctly determined that Rangen is restricted to diverting water from within the decreed point of diversion for water right nos. 36-02551 and 36-07694, which does not include the Bridge Diversion.

In addition, the argument that, even though Rangen's decreed point of diversion is facially identified as a specific and identifiable ten-acre tract, the Court should interpret the decrees to allow Rangen to divert not only from that ten-acre tract, but also an adjacent ten-acre tract, constitutes an impermissible collateral attack on the SRBA partial decrees for water right nos. 36-02551 and 36-07694. *See Memorandum Decision* at 18-19. Rangen's remedy was to seek to amend its partial decrees with additional points of diversion, not to argue against the plain language of the decrees in a proceeding outside the SRBA.[3]

[3] On January 16, 2015, after issuance of the final unified decree in the SRBA, and over a year and a half after Rangen was put on notice of issues with its partial decrees and told to seek to set aside the decrees, Rangen filed

Rangen asserts that, even if the Court rejects Rangen's argument that it is entitled to use the Bridge Diversion, the Court should review a water source analysis performed by Dr. Charles Brockway ("Brockway") and interpret Rangen's partial decrees to allow diversion of 97% of spring water that flows into the hatchery. *Rangen's Opening Brief* at 25-27. Rangen also asserts the Director ignored Brockway's water source analysis. *Id.* at 26.

Rangen is incorrect to suggest the Director ignored Brockway's analysis. Instead, the Director considered and rejected the analysis because it rested upon a faulty premise. Specifically, Brockway argued that Rangen is entitled to 97% of the spring water that flows into the hatchery because the springs that arise on the talus slope in the decreed ten acre tract all constitute valid points of diversion. As discussed above, without a physical diversion, the springs themselves do not constitute valid points of diversion for out-of-stream uses. In the Curtailment Order, the Director stated:

> 15. Dr. Charles Brockway ('Dr. Brockway') testified that Rangen is entitled to divert water at the Bridge Diversion (which is located outside the SESWNW) because Rangen is legally entitled to all the water that emanates from springs in the talus slope in the SESWNW. Brockway, Vol. V, p. 1074-1075. When questioned about how Rangen can legally divert water at a point not listed as a point of diversion in its SRBA decree, Dr. Brockway stated that springs arising in the SESWNW constitute a legal point of diversion. *Id.* p. 1075-1076. In other words, Dr. Brockway argues that a physical diversion structure at the springs is not necessary to declare the spring water appropriated, and that a spring itself, without any sort of diversion structure, constitutes a diversion of water.
>
> 16. First, Dr. Brockway's argument ignores the fact that the source listed on the water rights is the Curren Tunnel. Setting aside that impediment for discussion purposes, Dr. Brockway's suggestion that a spring itself constitutes a point of diversion is contrary to Idaho water law. Idaho water law generally requires an actual physical diversion and beneficial use for the existence of a valid water right. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000).

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with the SRBA District Court *Rangen Inc's Motion to Set Aside Partial Decrees*. Rangen requested the partial decrees for water right nos. 36-7694 and 36-2551 be set aside to add to those water rights additional sources of water and an additional point of diversion. On May 4, 2015, the SRBA District Court issued its *Order Denying Motion to Set Aside Partial Decrees*, which denied Rangen's motion because it was untimely, offensive to the principle of finality of judgments, and resulted in great prejudice to other parties. That order is attached hereto as Addendum A.

> The only recognized exception to this rule is for instream beneficial uses of water. *Id.* Taken to its logical conclusion, Dr. Brockway's argument means that any water user could claim as his point of diversion the highest headwater of the state and then argue for protection up to the water source. This troublesome outcome underscores the problem of Dr. Brockway's argument and diminishes the credibility of his testimony.

R. Vol. XXI, pp. 4219-20. Accordingly, the Court should reject Rangen's argument that its partial decrees should be interpreted to allow diversion of 97% of the spring water that flows into the Rangen Facility because the argument is without legal basis.[4]

C. THE DOCTRINE OF QUASI-ESTOPPEL DOES NOT APPLY TO THE DIRECTOR'S EXERCISE OF HIS DUTY TO DISTRIBUTE WATER

Rangen argues the doctrine of quasi-estoppel should be applied to preclude the Director from interpreting Rangen's SRBA partial decrees to limit Rangen to diversions from the Martin-Curren Tunnel. *Rangen's Opening Brief* at 27. Estoppel ordinarily may not be invoked against a government or public agency functioning in a sovereign or governmental capacity. *Terrazas v. Blaine County ex rel. Bd. of Comm'rs,* 147 Idaho 193, 200–01, 207 P.3d 169, 176–77 (2009); *State ex rel. Williams v. Adams,* 90 Idaho 195, 201, 409 P.2d 415, 419 (1965); *Naranjo v. Idaho Dep't of Correction*, 151 Idaho 916, 919, 265 P.3d 529, 532 (Ct. App. 2011). Only when the government is not acting in a proprietary function may estoppel be invoked, and then it must be invoked with caution and only in exceptional cases. *Boise City v. Sinsel*, 72 Idaho 329, 338, 241 P.2d 173, 179 (1952)*; Naranjo*, 151 Idaho at 919, 265 P.3d at 532.

Here, the Director acted in a governmental capacity pursuant to his statutory obligation under Idaho Code § 42-602 to distribute water in accordance with the prior appropriation doctrine. The Director is statutorily obligated to distribute water consistent with the SRBA

[4] Subsequent to the Director's issuance of the Curtailment Order, on February 3, 2014, Rangen filed with the Department Application for Permit No. 36-17002 seeking approval to divert water from the Bridge Diversion. The Department approved the application and issued Permit 36-17002. Rangen is now authorized to use the Bridge Diversion as a legal point of diversion pursuant to Permit 36-17002.

partial decrees issued by the SRBA District Court. Idaho Code §§ 42-607, 42-1420. As the District Court concluded, "Rangen has failed to establish that under Idaho law quasi-estoppel is available against a governmental agency in the exercise of its governmental functions, or that it may be invoked against a governmental agency that is discharging its statutory duties." *Memorandum Decision* at 20-21.

Even if the Court concludes exceptional circumstances exist so as to allow invocation of quasi-estoppel against the Director, whether exceptional circumstances exist is irrelevant where, as here, the elements of estoppel are not satisfied. *See Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003). The doctrine of quasi-estoppel applies when it would be unconscionable to allow a party to assert a right that is inconsistent with a prior position. *Willig v. State, Dep't of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). This test is not met here because the Director did not "assert a right," but rather interpreted the SRBA partial decrees as required by Idaho law. Moreover, "Rangen has failed to establish that the Director has previously taken a different position with respect to the interpretation of the source and point of diversion elements contained in its [partial decrees]." *Memorandum Decision* at 21. Prior to December 2012, the Department had not been faced with a direct challenge to the source of water for Rangen's water rights. When faced with the request to review the partial decrees entered in the SRBA for water right nos. 36-02551 and 36-07694 in the underlying delivery call proceeding, the Director determined for the first time the decrees unequivocally limit diversion to water discharging from the Martin-Curren Tunnel. Rangen points to an order issued by the Department in 1979 wherein the Department allowed Rangen to measure its water flows at the outlet works under permit no. 36-7694. *Rangen's Opening Brief* at 29. That order is irrelevant because "[i]t certainly did not address the interpretation of the

source and point of diversion elements of Rangen's [partial decrees], which did not exist at that time." *Memorandum Decision* at 21. Rangen also points to an order issued by former Director Karl Dreher dated May 19, 2005, but issues regarding the interpretation of source and point of diversion elements of Rangen's partial decrees were not raised or addressed in that order. Thus, Rangen has failed to demonstrate the Director previously took a different position with respect to the interpretation of the source and point of diversion elements contained in the partial decrees for water right nos. 36-02551 and 36-07694.

Rangen suggests it would be unconscionable for the Department to interpret the SRBA partial decrees to limit diversion to water discharging from the Martin-Curren Tunnel, given Rangen's long history of diverting water at the Bridge Diversion. *Rangen's Opening Brief* at 29. Rangen also points to the Department's visits to the Rangen Facility over the years and suggests the Department had an obligation to inform Rangen that its use of water was improper. *Id.* at 31. Again, however, a decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. While Rangen points to this past history, as the District Court agreed, it is not unconscionable for the Director to interpret partial decrees for water right nos. 36-02551 and 36-07694 consistent with their plain reading and his statutory duty. *See Memorandum Decision* at 21. Rangen has failed to demonstrate the doctrine of quasi-estoppel applies given the circumstances of this case.

D. SUBSTANTIAL EVIDENCE SUPPORTS ADOPTION OF SULLIVAN'S REGRESSION ANALYSIS

Under Idaho law, a reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, and shall not overturn and agency's decision that is based on substantial competent evidence in the record. I.C. § 67-5279(1); *Barron*, 135 Idaho at 417, 18 P.3d at 222. Here, the Director's decision to adopt Sullivan's

regression analysis in the underlying delivery call proceeding is based on substantial evidence in the record and must be affirmed.

ESPAM 2.1 is a regional ground water model of the Eastern Snake Plain Aquifer ("ESPA"). The ESPAM model divides the ESPA into one-square-mile grids. The model cell the Rangen Facility is located in is commonly referred to as the "Rangen model cell." In responding to Rangen's delivery call, the Director utilized ESPAM 2.1 to predict the effects of ground water pumping on the aggregate flows from springs located within the Rangen model cell, including but not limited to the Martin-Curren Tunnel. ESPAM 2.1 cannot distinguish water flowing from the Martin-Curren Tunnel from water discharging from other springs within the model cell. Because Rangen's water rights only authorize diversion of water from the Martin-Curren Tunnel, the Director had to develop a methodology to deduce what percentage of the total modeled spring complex discharge would accrue to the Martin-Curren Tunnel.

To determine how much of the total modeled spring complex discharge would accrue to the Martin-Curren Tunnel, the preferred approach was to develop a ratio based upon historic measured flows of the Martin-Curren Tunnel and overall spring flows, but a problem was identified with the measured overall spring flows. Rangen has measured flows through the Rangen Facility since 1966. Tr. Vol. III, p. 617; Ex. 1075. However, Rangen's use of a nonstandard measuring device with an inaccurate rating curve resulted in under-reporting of certain flows. R. Vol. XXI, p. 4198. Accordingly, the Director rejected regression analyses that utilized historical measurement data provided by Rangen, including: (1) an analysis performed by Department staff that predicted approximately 70% of the curtailment benefits accruing to the Rangen model cell would accrue to the Martin-Curren Tunnel, and (2) an initial regression analysis performed by Sullivan that predicted approximately 75% of curtailment benefits

accruing to the Rangen model cell would accrue to the Martin-Curren Tunnel. The Director determined "[t]he employment of a nonstandard measuring device and the under-reporting of flow rate values due to the uncalibrated rating table is cause to review other available flow rate measurement values." *Id.* at 4197. Therefore, the Director considered, and ultimately adopted, a second regression analysis performed by Sullivan that relied upon measurements taken by the United States Geological Survey ("USGS") out of Billingsley Creek, at a site just downstream of the Rangen Facility. The Director explained:

> Pocatello compared the USGS measurements taken downstream from Rangen with Rangen's reported flows closest to the date of the USGS measurement. Pocatello's expert Greg Sullivan, testified that comparison of Rangen's reported flows with flows measured by the USGS below the Rangen Facility show a systematic under-measurement of Rangen's flows, especially since 1980. Sullivan estimated the measurement error to be 15.9% based on the comparison of 45 measurements by the USGS between 1980 and 2012.

Id. at 4198. Sullivan plotted a second regression line using adjusted data derived from the USGS measurements. Ex. 3654, Fig. 1. Data values that were under-reported were "corrected for the historical 15.9% under-measurement of flows by Rangen." *Id.*, Fn. 2. This alternate regression analysis predicted that approximately 63% of curtailment benefits accruing to the model cell would accrue to the Martin-Curren Tunnel. The other 37% of the benefits from curtailment would accrue to the talus slope springs below the Martin-Curren Tunnel and would not be available to water right nos. 36-02551 and 36-07694. R. Vol. XXI, p. 4210.

There are two reasons the Director applied the 63% proportion to determine the increase in Martin-Curren Tunnel flow from the total simulated increase in flow to the Rangen model cell. *Id.* First, all parties agree the data used to calculate the 75% proportion were under-reported. The Director determined the second regression line plotted by Sullivan is a credible method to correct the under-reported data. *Id.* Therefore, because of Rangen's measurement error, the

Director adopted Sullivan's corrected calculation of the proportion of the benefit to total spring flows in the Rangen model cell that would accrue to the Martin-Curren Tunnel. The Director concluded, based upon clear and convincing evidence, that a percentage of 63% should be used to compute the quantity of water the junior ground water users may be required to provide as mitigation to avoid curtailment. *Id.* at 4220. Second, applying a 75% proportion to determine the increase in the Martin-Curren Tunnel flow may have resulted in Rangen benefiting from its own under-reporting of flows if mitigation by direct flow to Rangen was provided in lieu of curtailment. *Id.* at 4210.

Rangen argues "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 Sullivan and asserts Sullivan's reliance on USGS flow data is inconsistent with Department staff opinion. *Rangen's Opening Brief* at 38-39. Again, the alternative regression analysis proposed by Department staff that predicted approximately 70% of the curtailment benefits accruing to the Rangen model cell would accrue to the Martin-Curren Tunnel was based on historical measurement data provided by Rangen. Rangen's use of a nonstandard measuring device with an inaccurate rating curve resulted in under-reporting of flows and was direct evidence that other available flow rate measurement values, including those derived by USGS, should be considered. Second, while Department staff expressed concern with the quality of the stream channel where the USGS takes its measurements, this does not prevent the Director from adopting an approach which relies upon the USGS data for support. The method used by the USGS to measure flows on Billingsley Creek is considered a standard method of water measurement, is listed as an acceptable measuring method in the Department's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices,* and is employed to calibrate the accuracy of

weirs and other measuring devices. Furthermore, USGS flow measurements are widely accepted as accurate measurements. As the District Court determined, the Director's decision to utilize Sullivan's regression analysis is supported by substantial evidence in the record and must be affirmed. *Memorandum Decision* at 24-25.

E. SUBSTANTIAL EVIDENCE SUPPORTS THE DIRECTOR'S DETERMINATION THAT JUNIOR GROUNDWATER USERS ARE USING WATER EFFICIENTLY AND WITHOUT WASTE

Rule 40.03 of the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"), requires that the Director consider whether junior-priority water right holders are using water efficiently and without waste when evaluating a petition for delivery call. IDAPA 37.03.11.040.03. Testimony was presented at the hearing in this matter regarding junior-priority water right holders' use of water. The Director concluded the junior-priority water right holders are using water efficiently and without waste. R. Vol. XXI, p. 4228. Substantial evidence in the record supports this conclusion.

Lynn Carlquist, President of North Snake Ground Water District, testified as to his water use practices and the practices of others in his district. Tr. Vol. VII, pp. 1671-73. He described how he sprinkler irrigates and how almost 100 percent of the members of his ground water district also sprinkler irrigate. *Id.* Carlquist also testified about the conversions the district has undertaken to reduce reliance on ground water pumping and increase recharge. *Id*. at 1692-93. He testified as to the steps the district takes to monitor diversions to ensure its member are not using more water than they have a right to. *Id*. at 1727. Similarly, Tim Deeg, President of the Idaho Ground Water Appropriators, Inc. ("IGWA"), testified about how he sprinkler irrigates and about the various projects IGWA has undertaken to reduce reliance on ground water pumping, increase recharge, and remove end guns. Tr. Vol. VIII, pp. 1739-40, 1748, 1751. He

suggested that ground water pumpers will pump only the minimum amount of water to get by because of the costs associated with pumping ground water. *Id*. at 1753-54. Deeg also testified about how the ground water districts monitor ground water diversions to ensure the ground water pumpers are using water consistent with their decrees. *Id*. at 1765. Pocatello presented evidence of its water use through Justin Armstrong, Pocatello's Water Superintendent. Tr. Vol. V, pp. 1104-07. As the District Court found, the testimony considered by the Director in determining junior water users are using water efficiently and without waste "is uncontested in the record. Rangen did not submit conflicting evidence for the Director's consideration as to junior water users it believes are using water inefficiently or wasting water." *Memorandum Decision* at 24. The Director's conclusion that junior ground water pumpers efficiently use water without waste is supported by substantial evidence in the record and must be affirmed.

F. RANGEN IS NOT ENTITLED TO ATTORNEY FEES AND COSTS

Rangen asserts it "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." *Rangen's Opening Brief* at 44. However, Rule 54(e)(1), which addresses attorney fees as costs, "only governs the procedure in the district courts and magistrate's divisions of the district courts, Idaho R. Civ. P. 1(a), not the procedure on appeal to this Court." *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 744, 240 P.3d 583, 590 (2010). In addition, Idaho Appellate Rule 40 provides for the awarding of costs on appeal, and Rule 41 specifies the procedure for requesting an award of attorney fees on appeal. Neither Idaho Appellate Rule 40 or 41 provide independent authority for awarding attorney fees. *Gilman v. Davis*, 138 Idaho 599, 603, 67 P.3d 78, 82 (2003); *Camp v. East Fork Ditch Co. Ltd.*, 137 Idaho 850, 55 P.3d 304 (2002). Therefore, Idaho Code § 12-117(1) is the only provision cited by Rangen that is applicable here.

Idaho Code § 12-117(1) states:

> 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.

The Director's factual findings challenged by Rangen in this appeal are supported by substantial and competent evidence and his determinations of legal issues are not clearly erroneous. Because Rangen cannot demonstrate the Director acted without a reasonable basis in fact or law, Rangen is not entitled to attorney fees and expenses in this matter pursuant to I.C. § 12-117(5)(c).

G. REQUEST FOR ATTORNEY FEES

The Department and Director request an award of reasonable attorney fees should they prevail in this action pursuant to Idaho Code § 12-117(1) and (2). The SRBA partial decrees for Rangen's water right nos. 36-02551 and 36-07694 are clear on their face. The source listed on the partial decrees is "Martin-Curren Tunnel." There is only one Martin-Curren Tunnel, but Rangen asks this Court to adopt an unreasonable interpretation. Under no conceivable interpretation can the term "Martin-Curren Tunnel" mean the greater spring complex that forms the headwaters of Billingsley Creek. Such an interpretation would cause the partial decrees to lose clarity, not gain it. Similarly, the partial decrees unambiguously limit diversions under Rangen's water rights to the following ten-acre tract: T07S R14E S32 SESWNW. There is no legal basis for Rangen's argument that it can use the Bridge Diversion to collect and divert water even though that diversion structure is not located within its decreed point of diversion. In addition, these attempts to collaterally attack the SRBA partial decrees are untimely and must be

rejected. Rangen's arguments regarding the source and point of diversion elements of the SRBA partial decrees are without a reasonable basis in fact or law.

Rangen's argument that quasi-estoppel may be invoked against the Director in discharging his statutory duties under the circumstances of this case is also without a reasonable basis in fact or law. Under Idaho law, only when the government is not acting in a proprietary function may estoppel be invoked, and then, only under exceptional circumstances. Here, the Director acted in a governmental capacity pursuant to his statutory obligation under Idaho Code § 42-602 to distribute water in accordance with the prior appropriation doctrine and his statutory obligations under Idaho Code §§ 42-607, 42-1420 to distribute water consistent with the SRBA partial decrees. Even if the Court concludes exceptional circumstances exist so as to allow invocation of quasi-estoppel against the Director, whether exceptional circumstances exist is irrelevant where, as under the facts of this case, the elements of quasi-estoppel are not satisfied. Rangen's argument that quasi-estoppel may be invoked in this case is without a reasonable basis in fact or law.

Finally, the Director's adoption of Sullivan's regression analysis and determination that junior groundwater users are using water efficiently and without waste are supported by substantial and competent evidence in the record. Rangen's arguments to the contrary are without a reasonable basis in fact. Therefore, the Director and Department respectfully request an award of reasonable attorney fees in this appeal.

V. CONCLUSION

By the unambiguous terms of the SRBA partial decrees for water right nos. 36-02551 and 36-07694, Rangen is limited to diverting water discharging from the Martin-Curren Tunnel. The name "Martin-Curren Tunnel" does not constitute a latent ambiguity in the partial decrees. Rangen is not entitled to divert water from sources outside T07S R14E S32 SESWNW, including the Bridge Diversion. Estoppel is inappropriate as it would prevent the Director from undertaking his statutorily obligated actions to distribute water consistent with the SRBA partial decrees. Even if quasi-estoppel could be invoked, the elements of quasi-estoppel are not met here. The Director's adoption of Sullivan's regression analysis and determination that junior groundwater users are using water efficiently and without waste are supported by substantial evidence in the record. Rangen is not entitled to attorney fees in this matter because the Director's factual findings challenged by Rangen are supported by substantial and competent evidence and his determinations of legal issues are not clearly erroneous. The Director and Department respectfully request reasonable attorney fees on appeal pursuant to Idaho Code § 12-117(1) and (2) because Rangen's arguments are without a reasonable basis in fact or law.

DATED this 27th day of May 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by United States mail, first class, with the correct postage affixed thereto on this 27th day of May 2015.

Document Served: **Idaho Department of Water Resources' Brief in Response to Rangen's Opening Brief**

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Addendum A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase Nos.: 36-2551 and 36-7694**
	)	
Case No. 39576	)	**ORDER DENYING MOTION TO SET ASIDE PARTIAL DECREES**
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I.
BACKGROUND

Prior to the Snake River Basin Adjudication ("SRBA"), Rangen, Inc. ("Rangen") held water right license numbers 30654 and 36-7694. License 30654 authorized Rangen to divert 50 cfs from "underground springs, a tributary to Billingsley Creek" for fish cultural and domestic use under a priority date of July 31, 1962. License 36-7694 authorized Rangen to divert 26 cfs from "springs tributary to Billingsley Creek" for fish propagation under a priority date of April 12, 1977. The point of diversion under both licenses was identified as the following forty acre tract located in Gooding County, Idaho: T7S R14E S32 SWNW.

Rangen timely filed *Notices of Claim* for water right numbers 36-2551 and 36-7694 in the SRBA. The bases for the claims were prior license numbers 30654 and 36-7694 respectively. In its *Notices*, Rangen claimed the following source: "Curran Tunnel Trib. to: Billingsley Creek." With respect to point of diversion, Rangen claimed the forty acre tract identified above. On November 2, 1992, the Director issued his *Director's Report, Part I, Reporting Area 3 (Basin 36)*, which included recommendations for the claims. A review of the recommendations shows that they diverged from the claims in two material respects. First, the Director recommended the

source of the claims as "Martin-Curren Tunnel," as opposed to the claimed source of "Curran Tunnel." Second, the Director recommended the point of diversion as the following ten-acre tract located in Gooding County, Idaho: "T07S R14E S32 SESWNW," as opposed to the larger forty-acre tract claimed by Rangen. No objections were filed to the Director's recommendations. In December of 1997, the Court entered *Partial Decrees* for the claims consistent with the unopposed recommendations. Rangen did not appeal from the issuance of either *Partial Decree*.

On January 16, 2015, Rangen filed the instant *Motion to Set Aside Partial Decree* pursuant to Idaho Rules of Civil Procedure 60(b)(5) and 60(b)(6). The *Motion* requests that this Court set aside the *Partial Decrees* and modify them to (1) identify the source as "Martin-Curren Tunnel, Curran Springs, flows from a concrete box, as well as from various seeps, rivulets, and springs originating and located on the talus slope, or other springs or seeps which are the headwaters of Billingsley Creek," and (2) add the following point of diversion: "Township 7S, Range 14E, SW1/4SW1/4NW1/4 Sec. 32." Responses in opposition were filed by the State of Idaho, the Idaho Ground Water Appropriators, Inc. ("IGWA"), and the City of Pocatello. A hearing on the *Motion* was held before this Court on April 21, 2015. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or April 22, 2015.

II.
ANALYSIS

More than seventeen years after its *Partial Decrees* were entered, Rangen asks this Court to set aside those *Decrees* on the grounds they do not accurately reflect its historic use. To reopen these subcases at this time would result in great prejudice to other parties that have acted in reliance upon the plain language of those *Decrees*. It would also seriously disrupt the finality of process intended by the Court's entry of the *Partial Decrees*, as well as its entry of the *Final Unified Decree*. Under Idaho law, it is within the discretion of the district court to grant or deny a motion made under Rule 60(b). *Golub v. Kirk-Scott, Ltd.*, 157 Idaho 966, 970, 342 P.3d 893, 897 (2015). For the reasons set forth herein, the Court in an exercise of its discretion declines to set aside the *Partial Decrees*.

A. The *Motion* is untimely and offends the principle of finality.

Rule 60(b) allows a party to seek relief from a final judgment. Such relief is generally disfavored because it disrupts the finality of judgments. In an effort to balance the important principle of finality of judgments with interests of justice, a threshold requirement of the rule is that a motion for relief be made within a reasonable time after judgment is entered. I.R.C.P. 60(b); *Gordon v. Gordon*, 118 Idaho 804, 806, 800 P.2d 1018, 1020 (1990). The *Motion* at issue here fails this threshold requirement.

Rangen's *Motion* was filed more than seventeen years after the subject *Partial Decrees* were entered and certified as final judgments. Rangen also waited until after this Court's entry of the *SRBA Final Unified Decree* to file. This Court fails to find reason for the substantial delay. Rangen's position is that the late filing is justified because it was not until January 2014 that the Department issued an order informing it that its source under the *Decrees* was limited to water discharging from the Martin-Current Tunnel, and that its point of diversion was limited to the ten-acre tract identified in its *Decrees*.[1] This argument is hollow. In the final order to which Rangen refers, the Director simply reiterates to Rangen that the language of its *Partial Decrees* is unambiguous, and means what it plainly states.[2] It is not fairly stated that the Director's recitation of the unambiguous terms of the *Decrees* is what first put Rangen on notice of the issues it now raises. To the contrary, if Rangen believed the *Partial Decrees* did not accurately reflect its historic use of water, it was put on notice of the issue long prior, when its claims were litigated and finally adjudicated in the SRBA.

A review of the SRBA process in these subcases establishes that Rangen knew or should have known of the issues it now raises as early as 1992. That is when the Director issued his recommendations for the claims. Certainly Rangen was put on notice when its *Partial Decrees* were issued in 1997. The language of the recommendations and resulting *Partial Decrees* was

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[1] The final order to which Rangen refers is the Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* issued in IDWR Docket No. 2011-004 on January 29, 2014.

[2] In its *Memorandum Decision and Order* entered in Twin Falls County Case No. CV-2014-1338 on October 24, 2014, this Court held that the language of the subject *Partial Decrees* as it pertains to the source and point of diversion elements is plain and unambiguous, thereby affirming the Director. A copy that *Memorandum Decision and Order* is attached as Exhibit 1 to the *Affidavit in Support of Rangen, Inc.'s Motion to Set Aside Partial Decrees* dated January 16, 2015.

not shrouded in mystery. It plainly identified the authorized source as the Martin-Curren Tunnel, and the point of diversion as a specific ten-acre tract. If Rangen believed it historically diverted water from additional sources and/or points of diversion, it had a duty to timely object to the recommendations and present evidence to rebut the same. I.C. § 42-1411(5). Whether it be by mistake, inadvertence or neglect, or by conscious decision, it did not. Rangen also declined to timely appeal from the entry of either *Partial Decree*. Instead, Rangen waited seventeen years to file the instant Rule 60(b) motion. This is unreasonable under the circumstances. The source and point of diversion authorized under the *Decrees* was ascertainable from a simple reading of their plain language in 1997. If Rangen believed that additional sources or points of diversion were necessary, there was no reason to wait until 2015 to raise that issue. The unambiguous language of the *Partial Decrees* has not changed. It is the same now as it was in 1997.

Allowing such a considerable amount of time to elapse offends the principle of finality of judgments. The Idaho Supreme Court has stated that "[i]t is difficult to overstate the importance of finality of judgments." *Rhoades v. State*, 149 Idaho 130, 138, 233 P.3d 61, 69 (2010). In this matter, Rangen asks this Court to disrupt the finality not only of these two SRBA subcases, but also the finality of a bevy of administrative and judicial proceedings undertaken by the Department and this Court outside the confines of the SRBA. Those proceedings relate to a delivery call filed by Rangen in 2011, alleging that it is short water under the two water rights at issue here due to junior ground water use. The Court will not list all of the administrative and judicial proceedings that have resulted from the 2011 call, but notes only that they are numerous.[3] The Director has entered final orders in the form of curtailment orders, as well as final orders approving and rejecting mitigation plans, applications for transfer and applications for permit. This Court has issued final judgments in judicial review proceedings taken from some of these final orders, and has several more petitions for judicial review pending before it.[4] If Rangen were now to set aside its *Partial Decrees* to add additional sources and points of diversion, these final orders and judgments would be disrupted and subject to reevaluation.

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[3] A listing of many of the administrative and judicial proceedings are set forth in IGWA's *Response* in opposition to Rangen's *Motion* dated March 12, 2015, on pages 4-6.

[4] *See e.g., Judgment* in Twin Falls County Consolidated Case Nos. CV-2014-1338 and 2014-179 dated October 24 2014; *Judgment* in Twin Falls County Case No. CV-2014-2446 dated December 3, 2014; Judgment in Twin Falls County Case No. CV-2014-2935 dated November 19, 2014.

An example makes the point. In his 2014 curtailment order,[5] the Director determined that 14.4 cfs would accrue to the entire spring complex forming the headwaters of Billingsley Creek as a result of curtailment. The Director recognized that only 63% of this water, or 9.1 cfs, was legally available to Rangen under its *Decrees*, since only that percentage emanates from the Martin-Curren Tunnel itself. The remaining 37% was found to emanate from other sources and points of diversion within the spring complex not authorized under Rangen's rights. Instead of a mitigation requirement of 14.4 cfs, the Director required affected juniors to mitigate 9.1 cfs based on the plain language of the *Decrees*. The juniors subsequently proposed and had approved mitigation plans for this amount. The Director's curtailment order, and his orders approving the proposed mitigation plans, would be undone and subject to reevaluation if Rangen is permitted to set aside its *Decrees* to add additional sources and points of diversion within the spring complex.

Rangen attempts to explain the delay by insisting that prior to the Director's 2014 interpretation, it had continued to divert water from the additional sources and points of diversion it now seeks to add to it *Decrees* and no one, including Department employees, challenged it or told it to stop. This excuse is unavailing. This Court has already addressed Rangen's argument in much the same respect on pages 19-21 of its *Memorandum Decision and Order* issued on October 24, 2014, in Twin Falls County Case No. CV-2014-1338.[6] Rather than repeat it, the Court adopts that analysis by express reference. If someone thought Rangen's water use was inconsistent with its *Decrees*, it is true that person could have raised the issue prior to Rangen's 2011 call. However, no one did. That does not change the fact that Rangen could ascertain its authorized source and point of diversion from a simple reading of its *Decrees*. If it thought additional sources or points of diversion were necessary based on its historic use, it could and should have moved to set aside the *Decrees* long prior to 2015.

All other arguments aside, even if as argued by Rangen that it wasn't until January 2014 that it was notified of the issues it now raises, Rangen still waited a year to file its *Motion*. Six months of that one-year period was after the entry of *SRBA Final Unified Decree*. Indeed, this

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[5] The term "2014 curtailment order" refers to the Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* issued in IDWR Docket No. 2011-004 on January 29, 2014.

[6] A copy that *Memorandum Decision and Order* is attached as Exhibit 1 to the *Affidavit in Support of Rangen, Inc.'s Motion to Set Aside Partial Decrees* dated January 16, 2015.

is after this Court previously issued a decision in October of 2013 in response to Rangen's attempt to file a late claim in the SRBA to divert water from the source and point of diversion at issue here, instructing Rangen in that the appropriate course of action was to move to set aside the *Partial Decrees*.[7] Rangen's *Motion* is untimely on that basis alone.

For these reasons, the Court finds that Rangen's *Motion* must be denied on the grounds that it is untimely and offends the principle of finality of judgments. However, even if the *Motion* were timely, the Court finds that the *Motion* should be denied for the reasons set forth below.

B. The *Motion* results in great prejudice to other parties.

In order for a Rule 60(b) motion to be successful, good cause must be established. *Watson v. Navistar Intern, Transp. Corp.*, 121 Idaho 643, 650-651, 827 P.2d 656, 663-664 (1992). One of the requirements of good cause is the showing of a lack of prejudice to other parties. In this matter, the Court finds that Rangen has failed to establish a lack of prejudice to other parties resulting from its *Motion*.

Were Rangen to set aside its *Decrees* at this late date, great prejudice would result to other parties to the SRBA. Basin 36 was one of the earliest basins to be reported on by the Director, with the *Director's Report* for claims being filed on November 2, 1992. The vast majority of the timely filed claims in the basin were adjudicated, and resulting *Partial Decrees* issued, in the 1990s. The basin has long been a completed basin, meaning that all claims filed in the basin have been fully adjudicated, and the Court has entered the *SRBA Final Unified Decree*. As a result, water users throughout the Snake River Basin are, and certainly have been, justified in relying upon the basin being completed, and upon the facially plain language of the *Partial Decrees* issued in that basin.

The reliance placed by water users on the plain language of the *Decrees* at issue here is particularly compelling. As stated above, these two water rights are the subject of a call initiated by Rangen in 2011. To avoid curtailment, affected junior ground water users have been required to mitigate their injury to the rights. Their mitigation obligations commenced in 2014 and will continue into the future. Substantial investments and expenditures to the tune of millions of

[7] The *Order* referred to is this Court's *Order Denying Motion to File Late Claim* entered in SRBA Subcase No. 36-16977 on October 2, 2013. A copy of that *Order* is attached as Exhibit 1 to the *Affidavit of Michael C. Orr* dated March 9. 2015.

dollars have been undertaken by these users to formulate and implement mitigation plans based on the plain language of the *Partial Decrees* as they now exist. Permitting Rangen to set aside those *Decrees* and alter their elements would work to greatly prejudice these water users. If Rangen were successful, the mitigation obligations of affected juniors may increase to their prejudice. And, the mitigation investments and expenditures already undertaken may prove inadequate, or require modification, to the prejudice of those users. Additionally, Rangen and affected juniors have already undergone substantial litigation at both the administrative and judicial level in relation to the delivery call. That litigation would be undone to the prejudice of the parties if the elements of Rangen's *Partial Decrees* were to be changed as a result of its *Motion.* For these reasons, the Court finds that Rangen has failed to establish the lack of prejudice to other parties resulting from its instant *Motion.*

C. The *Motion* does not meet the requirements of Rule 60(b)(5) or (6).

Under Rule 60(b)(5), a court may relieve a party from a final judgment party if "it is no longer equitable that the judgment should have prospective application." To rely on Rule 60(b)(5), a movant must show two things: (1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written. *Meyers v. Hansen*, 148 Idaho 283, 289, 221 P.3d 81, 87 (2009). Regardless of whether these requirements are met, relief cannot be granted under Rangen's Rule 60(b)(5) request because it is untimely and prejudicial to other parties. That said, the Court fails to see how the *Decrees* have become inequitable as written. Rangen argues that it is no longer equitable to enforce them based on the Director's 2014 interpretation of the *Decrees*. This is not a material change in circumstance. The Director merely interpreted the language of the *Decrees* to be plain and unambiguous. Therefore, the language and legal effect of the *Decrees* is the same now as when the *Decrees* were issued.

Under Rule 60(b)(6), a court may relieve a party from a final judgment for "any ... reason justifying relief from the operation of the judgment." The Idaho Supreme Court has noted that "[t]he appellate courts of this state have infrequently granted relief under Rule 60(b)(6)." *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009). It is undisputed that Rangen did not object to the Director's recommendations for the above-captioned claims. If, as Rangen asserts, the plain language of the Director's recommendations was inconsistent with its historic use, then its failure to file a timely objection was due to mistake, inadvertence or neglect on its part.

While such mistake, inadvertence or neglect could arguably be grounds for relief under Rule 60(b)(1), Rangen did not timely make a Rule 60(b)(1) motion. It cannot now disguise the same argument as a Rule 60(b)(6) motion under Idaho law. *See e.g.*, *Leasefirst v. Burns*, 131 Idaho 158, 163, 953 P.2d 598, 603 (1998) (holding "a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6)").

D. The SRBA subcases cited by Rangen are inapposite to this proceeding.

In support of its *Motion*, Rangen cites several SRBA subcases where this Court has granted motions to set aside partial decrees. These cases are inapposite to the facts and circumstances present here. Most significantly, the subcases cited by Rangen involve motions to set aside that were unopposed. And, many of those motions were granted in resolution of litigation pending in other subcases. Additionally, no findings of prejudice or unreasonable delay were made in those instances. As can be imagined, this Court has entertained a fair number of Rule 60(b) motions throughout the pendency of the SRBA. Some have been granted, and some denied. However, each case turns on its own set of facts and circumstances. Unlike in the subcases cited by Rangen, the facts and circumstances present here establish an unreasonable delay in the filing of the instant *Motion*, resulting prejudice to other parties, and the failure to meet the requirements of Rule 60(b)(5) or (6).

E. Attorney fees.

The State of Idaho and IGWA seek an award of attorney fees in matter. The State makes its request pursuant to Idaho Code § 12-121. IGWA's request is made pursuant to Idaho Code § 12-121 and Idaho Rule of Civil Procedure 11(a)(1). The Court does not find that Rangen has acted frivolously or without a reasonable basis in law or fact in filing its *Motion*. Although the Court has denied the *Motion*, and in so doing has rejected Rangen's arguments, the Court finds that Rangen presented the Court with legitimate issues for it to consider and address. Therefore, the Court in an exercise of its discretion does not find an award of attorney fees to be warranted.

III.

ORDER

Therefore, IT IS ORDERED that Rangen's *Motion to Set Aside Partial Decrees* **is hereby denied.**

Dated May 4, 2015

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO SET ASIDE PARTIAL DECREES was mailed on May 04, 2015, with sufficient first-class postage to the following:

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