Docket No. 42772-2015

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 CM-DC-2011-004

RANGEN, INC.,
Petitioner-Appellant on Appeal

v.

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, TWIN FALLS CANAL COMPANY, and CITY OF POCATELLO,
Intervenors-Respondents on Appeal.

INTERVENOR-RESPONDENT ON APPEAL CITY OF POCATELLO'S RESPONSE BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Twin Falls, Case No. CV-2014-1338
(Consolidated Gooding County Case No. CV-2014-179)

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF CASE

A. Nature of the case

This appeal involves Rangen, Inc.'s ("Rangen") efforts to obtain a more favorable interpretation of the decreed source and point of diversion of its senior water rights that are the subject of this delivery call than is supported by the plain language of its partial decrees. Rangen seeks this interpretation, which is contrary to the plain language of its partial decrees, because it would allow Rangen to demand the juniors provide it with additional replacement water.

B. Course of proceedings

City of Pocatello ("Pocatello" or "City") incorporates the "course of proceedings" portion of its Opening Brief in docket number 42836-2015, filed on May 4, 2015 and, to the extent not inconsistent with that description, does not object to Rangen's rendition of the Course of Proceedings.

C. Statement of facts

Pocatello incorporates the Statement of Facts portion of its Opening Brief in docket number 42836-2015, filed on May 4, 2015.

II. STANDARD OF REVIEW

Pocatello incorporates Rangen's standard of review.

III. ARGUMENT

A. Introduction

On appeal, Rangen argues that the Director improperly interpreted its Snake River Basin Adjudication District Court ("SRBA") partial decrees, diminishing the quantity of water Rangen

is entitled to call for. The Director's interpretation of the source and point of diversion elements of Rangen's partial decrees was proper, as was the district court's decision affirming that interpretation. Rangen erroneously suggests in its statement of the case that it has been deprived of its historical water supply through improper decree interpretation; in fact, Rangen put its decrees at issue by filing this delivery call, and cannot now complain that its own operations were in excess of its decrees. Pocatello urges the Court to reject Rangen's arguments on appeal, and to affirm the district court's decision.

Rangen further challenges the district court's decision affirming the Director's determination that the proportion of water to which it is entitled from its decreed source, the Martin-Curren Tunnel, should be determined by reference to the modified regression analysis adopted by the Director. The Director found by clear and convincing evidence that Rangen had historically and systematically undermeasured water flows by approximately 15.9% on average. The record contains substantial evidence to support the Director's findings on this point, and Rangen's appeal should be rejected.

Finally, Rangen challenges the district court's decision affirming the Director's determination that the evidence in the record supported a finding that junior ground water rights demonstrated "efficient use without waste" as required under Rule 40.03 of IDWR's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CMR"). At hearing Rangen made no effort to cross-examine or otherwise challenge the evidence presented by juniors regarding their water use. Further, Rangen argues for an interpretation of CMR 40.03 that is inconsistent with Idaho law: *all* water users—whether junior or senior—are

entitled the presumption that they require their decreed amount. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* (*AFRD#2*"), 143 Idaho 862, 154 P.3d 433 (2007). Rangen's appeal on this point should also be rejected, and the district court's determination on these three issues affirmed.

B. Rangen's partial decrees are not ambiguous and are properly limited to the plain terms of their source and decreed point of diversion.

1. A delivery call requires interpretation of the senior's decree as an element of administration.

The first step of a delivery call is for the Director to interpret the senior's decrees to determine the amounts to which the senior is presumed to be entitled. The Idaho Supreme Court has repeatedly directed IDWR to examine the senior's partial decrees in the context of conjunctive management administration. Indeed, the Director's discretion to conjunctively administer ground water and surface water rights is limited to administration consistent with the senior's decrees. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449; *A&B Irrigation Dist. v. Idaho Dep't of Water Res.* ("*A&B*"), 153 Idaho 500, 514, 284 P.3d 225, 239 (2012). The Director is required to give meaning to the plain language in senior's decrees, which "must be construed as a whole and given a construction as will harmonize with the facts and the law of the case." *Follett v. Taylor Bros*., 77 Idaho 416, 424, 294 P.2d 1088, 1093 (1956); *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010); *A&B*, 153 Idaho at 523, 284 P.3d at 248 ("We apply the same rules of interpretation to a decree that we apply to contracts."). Enforcing the elements of a senior's partial decree is essential to the administration of water in Idaho.

> Finality in water rights is essential. "A water right is tantamount to a real property right, and is legally protected as such." An agreement to change any of the definitional factors of a water right **would be comparable to a change in the description of property**. . . .
>
> A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (citations omitted) (emphasis added). *See also* R. 000678[1] ("The Director is charged with administering water rights in accordance with the elements as described in Rangen's *Partial Decrees.*").

Rangen's decreed source of water is specified on its partial decrees as the "Martin-Curren Tunnel"; its decreed point of diversion is the ten-acre tract described as the SE1/4 of the SW1/4 of the NW1/4 of Section 32, Township 7 South, Range 14 East ("10-acre tract"). In an order on Rangen's *Motion for Partial Summary Judgment Re: Source* (Order on Source), the Director determined that Rangen's source of water was limited to the Martin-Curren Tunnel. Agency R. Vol. 15, pp. 3176−77, but found issues of material fact with regard to the decreed point of diversion and whether additional sources of water could be diverted within the 10-acre tract. *Id.* After trial, the Director affirmed his findings on summary judgment that the source of water was limited to the Martin-Curren Tunnel and also ruled that it was limited to diversions of that source within the 10-acre tract:

[1]Citations to "R." throughout this brief refer to the Clerk's Record on Appeal before the SRBA District Court (Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)). Citations to "Agency R.," "Tr." or "Exh." refer to the Agency Record and Hearing Transcripts before IDWR in Docket No. CM-DC-2011-004 as lodged with the district court.

> 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, R 14E. 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 identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R 14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

Agency R. Vol. 21, p. 4219. The district court properly affirmed the Director's finding; this Court should affirm as well.

2. There is no "latent ambiguity" in the source element of Rangen's decrees, and the narrow exception under the "latent ambiguity" rule should not be applied to interpret the term Martin-Curren Tunnel.

Rangen seeks to invoke the "latent ambiguity rule" to permit examination of parol evidence that Rangen suggests provides a basis to expand the decreed source of the "Martin-Curren Tunnel" from merely the water arising within the physical tunnel structure located above its facility to mean "the spring complex that forms the headwaters of Billingsley Creek." Rangen's Opening Brief at 8−18. However, the Director and district court both found the decrees to be unambiguous [R. 000679], and so parol (extrinsic) evidence may not be submitted to contradict the plain terms of a written agreement that is unambiguous on its face. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). The district court found:

> [t]he *Partial Decrees* at issue here do not lose clarity when applied to the facts as they exist. . . . First, this case is not a case where two or more tunnels exist within

> Rangen's authorized point of diversion, and it is unclear to which one the *Partial Decrees* refer. . . . Here, unlike in *Williams*, the record establishes there is only one tunnel to which the term "Martin-Curren Tunnel" can possibly apply. Second, under no conceivable use can the term "tunnel" mean the greater springs complex that forms the headwaters of Billingsley Creek. If this Court were to hold 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 the entirety of the spring complex that forms the headwaters of Billingsley Creek, the *Partial Decrees* would not gain clarity, but would lose it.

R. 000679 (citations omitted). In order to find that the term "Martin-Curren Tunnel" is ambiguous, this Court must first find Rangen's interpretation that Martin-Curren Tunnel can also mean "the spring complex that forms the headwaters of Billingsley Creek" to be reasonable. *Potlatch Educ. Ass'n*, 148 Idaho at 633, 226 P.3d at 1280. Neither the record nor the legal standards that apply to the "latent ambiguity" rule support such a determination.

Nonetheless, Rangen argues that a latent ambiguity arises with regard to the use of the term "Martin-Curren Tunnel" based on: 1) testimony of former Rangen employees; 2) Rangen's historical diversion and use of the entire spring complex rather than just the flows at the Martin-Curren Tunnel; and 3) prior licenses and IDWR backfile documents. Rangen's Opening Brief at 14. While the Director and district court both rejected Rangen's arguments that the term "Martin-Curren Tunnel" loses clarity in the context of the partial decree interpretation, both also went on to examine this extrinsic evidence cited by Rangen. Agency R. Vol. 21, p. 4460; R. 000680−81. Both concluded that examination of the extrinsic evidence also did not support a finding of latent ambiguity in the use of the term "Martin-Curren Tunnel." *Id.* These determinations should be affirmed. To wit:

- Rangen proffered testimony of prior and long-time employees for the proposition that the term "Martin-Curren Tunnel" has multiple meanings. However, the Director concluded that the quoted testimony is unpersuasive and, as importantly, the record contains evidence to the contrary. The Director's determinations of fact based on observing the testimony of live witnesses and considering it in the scope of the entire record are entitled to deference. *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).
- The references to different water sources made in Rangen's licenses and backfile documents do not support the conclusion that "Martin-Curren Tunnel" is a latent ambiguity in their partial decrees; instead, these multiple references suggest that Rangen failed to timely litigate the nature and extent of its decreed source in the SRBA. The district court's Order went to some pains to describe Rangen's multiple opportunities during the course of the SRBA to rectify the elements of their *Partial Decrees* with the elements of their licensed water rights, and points out that Rangen's silence should be interpreted as acquiescence to the terms of the *Partial Decree*. R. 000683−86.
- Finally, Rangen's reliance on undecreed sources and points of diversion does not support the conclusion that its *Partial Decrees* contain a latent ambiguity but—again—only that Rangen failed to dispute the elements of its decrees in the SRBA. *Id.* at 000684.

As far as satisfying the legal standards for application of the "latent ambiguity" rule, the term "Martin-Curren Tunnel" does not, because the term does not "lose clarity" simply because the Director and district court have interpreted the term contrary to Rangen's preferred meaning. *Black v. Fireman's Fund Am. Ins. Co*., 115 Idaho App. 449, 453, 767 P.2d 824, 828 (1989) ("disagreement [over meaning of terms] does not automatically create an ambiguity," nor "because a dispute exists over the application of the language to a certain fact pattern"). Rangen cites only cases that involved "mistaken identity" of objects that lead to ambiguity in contracts. These decisions are not applicable to the facts in this case.

The *Raffles* v. Wichelhaus case (2 H. & C. 906, 159 Eng. Rep. 373 (Ex. 1864)) relied on by Rangen (Rangen's Opening Brief at 10) is distinguishable from the dispute in this matter. *Raffles* involved two ships with the same name and different dates of sailing, and that confusion that resulted in failure to perform under a contract. The fact of two ships with the same name was the basis for the court's conclusion that the contract was ambiguous. Rangen's Opening Brief at 10. Rangen's reliance on the Idaho Supreme Court's analysis in *Williams v. Idaho Potato Starch Co*. is similarly misplaced. *Id.* at 11. In *Williams*, the Court found that the term "a ten inch pump" contained a latent ambiguity because the contract made "no reference to what type of pump" the parties intended, and the record contained evidence that "at least three pumps" would qualify under the terms of the contract. The Court's reasoning was based on the fact that "there are two or more things or objects, such as pumps, to which [the term] might properly apply." *Williams*, 73 Idaho 13, 20, 245 P.2d 1045, 1049 (1952).

In this case, unlike in *Raffles* and *Williams*, there is only one tunnel to which the term "Martin-Curren Tunnel" can possibly apply. Further, the term "tunnel" is not ambiguous—it is defined as "[a] passage under the ground or under the water," or "[a] passage through or under a barrier." WEBSTER'S II NEW COLLEGE DICTIONARY 1187 (1999). Under no conceivable use could the word "tunnel" mean "the spring complex that forms the headwaters of Billingsley Creek."

Rangen's reliance on IDWR backfile documents and its prior water rights licenses is similarly unpersuasive, and in fact far from creating an ambiguity, these materials undermine Rangen's arguments of ambiguity. Rangen made its water rights claims for a source of water from the "Curran [sic] Tunnel Trib. to: Billingsley Creek." It also claimed a point of diversion from a 40-acre tract rather than the 10-acre tract that was ultimately decreed. R. 000563, 000566. Had Rangen received partial decrees consistent with its claims, its decrees would have authorized Rangen's historical operations as far as source and point of diversion.

However, that is not what happened. In response to these claims, the Department did not recommend Rangen's water rights as claimed in its notices: instead, the source was recommended as "Martin-Curren Tunnel," and the Director recommended the following 10-acre tract as Rangen's point of diversion: SE1/4 of the SW1/4 of the NW1/4, Section 32, as opposed to the larger 40-acre tract claimed by Rangen. R. 000685 n.8. As the district court noted, "[b]asin 36 was a highly contested basin, and the Director's recommendations for water right claims in that basin were highly scrutinized by parties to the SRBA." *Id.* However, no objections (by Rangen or anyone else) were filed to the Director's Recommendations, and

Rangen's partial decrees for water right nos. 36-02551 and 36-07694 were entered. *Id.* at 18. Rangen did not appeal the issuance of either partial decree. *Id.* The resolution of the differences between Rangen's claimed water rights and the water rights as recommended by the Director was necessary to the prior judgment. As a matter of law, the specific determination of the elements of a water right is a necessary part of adjudication. I.C. § 42-1411(2). Yet Rangen did not object to either the recommendations nor did it seek to alter or amend the partial decrees, despite the fact that the decrees differed from the claims filed by Rangen.

Neither the Director nor the district court found the *Partial Decrees* to be ambiguous; the Director and the district court both rejected a finding of "latent ambiguity" based on review of the extrinsic evidence relied upon by Rangen. These rulings should be affirmed, and the source element of Rangen's *Partial Decrees* should be administered pursuant to their plain language.

3. Rangen's partial decrees require Rangen to divert its decreed source of water within the described 10-acre tract.

Rangen also argues that its decreed point of diversion is not a limitation on its operations, and that it may divert water from other locations outside of the described 10-acre tract. Rangen's Opening Brief at 19. Of Rangen's three means of physical diversion, only the 6-inch white pipe ("White Pipe") and 12-inch steel pipe ("Steel Pipe") carry water diverted from the Martin-Curren Tunnel. Exh. 3651; Exh. 1452; Ramsey, Tr. Vol. III, p. 707, L. 23−p. 708, L. 16. Further, only the White Pipe and Steel Pipe divert water within the 10-acre tract decreed point of diversion. A summary of Rangen's diversion practices (both consistent with and inconsistent with its partial decrees) is provided in Mr. Sullivan's testimony. Tr. Vol. VI, pp. 1345−47; Exh. 3651.

Despite the decreed 10-acre geographical limitation on its point of diversion, Rangen has also historically collected water from spring flow arising on the talus slope below the Martin-Curren Tunnel and delivered it to the Large Raceways and CTR raceways by means of the 36-inch pipe. In its Opening Brief, Rangen argues that the Lower Diversion (or the "Bridge Dam") where water is diverted into the 36-inch pipe is "close enough" to the 10-acre tract to be counted as a lawful point of diversion; further, that spring flows arising *below* the Martin-Curren Tunnel but within the 10-acre tract and collected at the Bridge Dam for Rangen's diversion should be considered to be properly within the scope of its partial decrees. Rangen's Opening Brief at 19. Rangen's arguments rely on an analysis performed by Dr. Charles Brockway, claiming to determine how much water emanates from the springs in the 10-acre tract designated as Rangen's point of diversion. The Director considered and rejected this evidence:

> 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). 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.

Agency R. Vol. 21, p. 4219, *see also* p. 4461.

Further, evidence in the record demonstrates that Dr. Brockway's analysis was technically flawed. Dr. Brockway did not measure springs either from within or outside the 10-

acre tract, but only the discrete pipes identified on his map. Exh. 1446C. On cross-examination, Dr. Brockway admitted he did not measure any spring flows at all—whether within the 10-acre tract *or* outside of it. Brockway, Tr. Vol. V, p. 1046, L. 14−p. 1047, L. 8, p. 1058, L. 14−16. In testimony involving Exhibits 1446A−C, Dr. Brockway concluded that all but one of the springs he identified arise below the Martin-Curren Tunnel—in other words, at sources other than the decreed source. Brockway, Tr. Vol. X, p. 2351, L. 24−p. 2352, L. 12. Rangen's own evidence demonstrates that the water diverted at the Lower Diversion is water that arises outside of the Martin-Curren Tunnel, and is diverted at a point outside of the 10-acre tract.[2]

"Source" and "point of diversion" are distinct statutory elements of a water right. I.C. § 42-1411(2) ("The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law: . . . (b) the source of water; . . . (e) the legal description of the point(s) of diversion; . . . ."). Indeed, the Idaho Supreme Court recently affirmed that "the source of water and the point of diversion [are] separate elements." *City of Pocatello v. State*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012). *See also A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist*., 141 Idaho 746, 750, 118 P.3d 78, 82 (2005) ("The director of the IDWR is charged with determining the source of water rights as each new application is filed."). The decreed "source" of Rangen's water rights is the Martin-Curren Tunnel. However, Rangen seeks a ruling from this Court that

[2]As shown on Exhibit 1452, Rangen spills a portion of the Martin-Curren Tunnel flow that is collected in the Rangen Box rather than taking it through the Steel Pipe. However, Mr. Sullivan testified that the spillway at the Rangen Box could be blocked so that Rangen could divert all of the Martin-Curren Tunnel water within its decreed 10-acre tract. Tr. Vol. VII, p. 1653, L. 22−p. 1654, L. 7; Exh. 1452.

would interpret its "source" as any spring water that arises *within* the 10-acre tract which is its decreed point of diversion, but below or outside of the Martin-Curren Tunnel, its decreed source.

The identification of the source of a water right in a partial decree prevents a water user from expanding its water right beyond that source:

> The naming of the source in a water right provides information that may be relevant in many ways. Naming the source provides notice to potential future (junior) appropriators that there are senior appropriations of the waters from that source. Additionally, **identifying the source in a license or decree prevents the water users from changing to a different source that may still lie within the legal description of the point of diversion** . . . .

Memorandum Decision and Order on Motion for Summary Judgment [and] Order Setting Scheduling Conference at 12, In Re SRBA Case No. 39576, Subcase 63-08447, Aug. 28, 2007 (emphasis added).

Rangen's diversions must be limited to its decreed source—the Martin-Curren Tunnel—and necessarily cannot include other water arising within the legal description of its decreed point of diversion. Rangen's diversion should also be limited to its decreed point of diversion—that is within the described 10-acre tract. Rangen seeks this re-adjudication of its existing partial decrees in order to validate Rangen's historical reliance on undecreed sources of water (springs arising outside of the Martin-Curren Tunnel) and diversions made of the undecreed sources of water at an undecreed point of diversion (the Lower Diversion). In addition to flying in the face of the imprecation against using a delivery call to re-adjudicate decreed rights, Rangen's argument conflates the concepts of "source" and "point of diversion," which the Idaho Supreme Court has repeatedly found to be distinct elements of a water right.

City of Pocatello, 152 Idaho at 839, 275 P.2d at 854. The Director's decision should be affirmed as a matter of law and because there is substantial evidence in the record to support his conclusion.

C. The Director is not estopped from interpreting Rangen's partial decrees.

Rangen has historically measured its diversions below the fish hatchery, and not at the Martin-Curren Tunnel. Rangen relies on the Department's past reluctance to require Rangen to measure at its decreed point of diversion in an attempt to expand the sources encompassed by its partial decrees. The Department's past actions, or lack thereof, do not alter the terms of Rangen's partial decrees and the district court properly rejected Rangen's estoppel arguments.

"The doctrine of quasi-estoppel 'prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken.'" *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006) (emphasis added) (citation omitted). "It is based upon the broad equitable principle which courts recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another." *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). "Quasi-estoppel is essentially a last-gasp theory . . . ." *Schoonover v. Bonner County*, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988).

Simply put, quasi-estoppel does not apply in this matter because the Director did not previously decide whether Rangen could divert water in a manner inconsistent with its partial decrees. Indeed, if the Director had answered that question previously, Rangen's *Motion for Partial Summary Judgment Re: Source* [Agency R. Vol. 13, pp. 2566−614]—in which Rangen

asked the Director, for the first time, to determine whether its diversion of lower talus slope water at the Lower Diversion was permitted under its decree—would have been unnecessary. Accordingly the Department is not estopped from finding that the source of Rangen's water rights is limited to the Martin-Curren Tunnel. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) ("Collateral estoppel only applies to issues actually litigated and decided in the prior proceeding.").

Rangen claims that "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." Rangen's Opening Brief at 30. In the prior litigation no party requested, and the Director did not address, whether Rangen was entitled to divert water outside of its decreed terms. As such, there was no change in position by the Department. *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 723, 302 P.3d 341, 348 (2012) ("a plaintiff must at least allege, among other things, a promise or representation by the party to be estopped"). There is no evidence that the Department ever agreed that Rangen was entitled to divert and call for water outside of its decreed water rights.

It is important to note that there are no published cases in which the doctrine of quasi-estoppel has been applied against a governmental entity by an Idaho court. In general, estoppel may not "be applied against the state in matters affecting its governmental or sovereign functions." *Floyd v. Bd. of Comm'rs of Bonneville County*, 137 Idaho 718, 727, 52 P.3d 863, 872 (2002) (quasi-estoppel claim). *See also Sagewillow*, 138 Idaho at 845, 70 P.3d at 683 ("Equitable estoppel may not ordinarily be invoked against a government or public agency

functioning in a sovereign or governmental capacity" and requires "false representation or concealment of a material fact with actual or constructive knowledge of the truth."). Further, Rangen's reliance on this Court's decision in *Terrazas v. Blaine County*, 147 Idaho 193, 200−01, 207 P.3d 169, 176−77 (2009) is misplaced: *Terrazas* stands for the proposition that ordinarily neither equitable nor quasi-estoppel may be applied against a government agency functioning in a sovereign or government capacity except in "exigent circumstances." IDWR's interpretation of the plain language of Rangen's partial decrees is a core governmental function of the agency. The fact that Rangen disagrees with IDWR's interpretation does not create "exigent circumstances."

While Rangen claims that it has relied upon the Department's lack of action to continue to divert water from the lower talus slope [Rangen's Opening Brief at 31], Rangen has not *changed* its position to its detriment—Rangen has always diverted water from its undecreed points of diversion, well before the Director issued the *Second Amended Order* on May 19, 2005. Accordingly, Rangen did not detrimentally rely on the Department's prior ruling, which, as explained above, does not even address the issue of Rangen's illegal diversions. Furthermore, and contrary to Rangen's arguments in its Opening Brief (at page 31), Rangen's Late Claim filed with the SRBA "to protect its historical usage of the water" to which it is not entitled under its decrees does not constitute detrimental reliance.

Furthermore, any actions by the Department, or lack thereof, do not operate to revise the decreed elements of Rangen's water rights. Other water users, such as Pocatello, are bound by the terms of Rangen's partial decrees, and only those terms found therein, which represent

adjudications on the merits of Rangen's water rights. I.C. § 42-1420(1); *A&B*, 153 Idaho at 515, 284 P.3d at 240. Rangen's illegal points of diversion are just that, and cannot be "papered over" simply because the Department did not previously independently investigate whether Rangen is diverting from locations inconsistent with its decree.

IV. SULLIVAN'S REGRESSION ANALYSIS RELIED ON BY THE DIRECTOR TO LIMIT RANGEN'S BENEFIT FROM CURTAILMENT IS BASED ON SUBSTANTIAL EVIDENCE.

Rangen argues that there was not substantial and competent evidence for the Director to adopt Mr. Sullivan's regression analysis, which determines that 63% of the water accruing to the Rangen spring cell as a result of curtailment will show up at the Martin-Curren Tunnel. Rangen's Opening Brief at 32. Instead, Rangen endorses the Department's regression analysis, which predicts that 70% of the increase in water flows accruing to Rangen spring complex from curtailment will accrue to the Martin-Curren Tunnel.

The Department's regression analysis relied on a comparison of Department's flow records of Martin-Curren Tunnel discharge with Rangen's records of discharge for the entire Rangen spring complex (the sum of flows in the CTR raceways and the flow measured at the Lodge Dam). Agency R. Vol. 21, p. 4195, ¶ 33. The Staff Memo disclosure [Exh. 2131] was made prior to Mr. Sullivan's report (disclosed pursuant to the scheduling order, and subsequent to the IDWR Staff Memo), which demonstrated Rangen's flow measurements for the entire Rangen spring complex understated the actual flow by an average of 15.9% because of Rangen's reliance on a faulty rating table. Agency R. Vol. 21, pp. 4198, 4220; R. 000690. As explained below, in order to find that the Sullivan revised regression analysis does not constitute

substantial evidence for purposes of the Director's findings, the Idaho Supreme Court must find that the Director's adoption of Mr. Sullivan's opinions that Rangen's historical flow measurements were systematically low by 15.9% on average was erroneous. However, there is no basis in the record for such a finding, and Rangen has not argued at any time during its appeals that the Director improperly found its historical flow measurements to have been systematically under-measured by 15.9% on average. It is a close question whether Rangen can obtain the relief it seeks, given that it has not raised this question directly before and this Court has declined to entertain issues raised for the first time on appeal. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011).

The Director himself made the connection between Rangen's systematic under-measurements associated with its historical flow data and the implications for the regression analyses—both IDWR's and Mr. Sullivan's originally disclosed analysis. Tr. Vol. VII, pp. 1664−68. Rangen's arguments that the district court erred in finding that there was substantial evidence for Mr. Sullivan's revised analysis, done at the Director's prodding, are misplaced.

A. Evidence of Rangen's flow-related measurement problems is replete and long-standing.

As described below, there are two parts to measuring water flows at the Rangen fish hatchery–the first is to measure the "head" of water; the second is to take the measured "head" of water and compare that to a "rating table" which converts the "head" to rate of flow. Extremely accurate head measurements are useless if the "rating table" is invalid—the "head" measurement cannot be properly translated into rate of flow if the rating table is unreliable. In the captioned

matter, Rangen's Opening Brief focuses only on the "head" measurement and disregards entirely the problems with the rating table used by Rangen employees—problems which render its historical flow measurements unreliable and, as demonstrated by Mr. Sullivan's analysis, resulted in systematic under-measurement of the rates of flow by 15.9% on average.[3]

1. Principles of water measurement

a. Head measurement

Water measurement using a standard weir[4] involves two steps. First, the "head" or energy of water behind a structure like a weir is determined by measuring the depth of flow where the velocity is relatively low. The second step is to convert the head measurement to flow using either a standard weir equation or a rating table generated from a weir equation or derived empirically in the field. Sullivan, Tr. Vol. VI, p. 1380, L. 10−16.

An accurate head measurement can be obtained by measuring at a standard distance behind the weir. Measuring head at an appropriate distance behind the weir is important to ensure that the energy in the flow of water is potential (elevation head) rather than kinetic (velocity head); as the water approaches the weir and picks up speed, more of the energy is converted to kinetic energy. By contrast, measuring head at a location too close to the weir—in other words where more of the energy is kinetic rather than potential—can result in systematic

[3]In addition to the summaries of water measurement evidence and testimony in the remainder of this subsection, the direct testimony of IDWR employee Mr. Tim Luke [Tr. Vol. V, pp. 1133−44; Agency R. Vol. 21, pp. 4194−98] provides substantial background for purposes of understanding the issues associated with accuracy in water measurement.

[4]The standard weir equation is: $Q = C \times L \times H^{1.5}$ where Q = flow (cfs), C = weir coefficient, L = weir length (feet), H = head over weir (feet). *See* Exh. 3345, p. 19; Exh. 3325, Fig. 1-2a, PDF p. 38 of 80.

under-measurement of the head and therefore the flow. *Id.* at p. 1386, L. 9−p. 1387, L. 20, p. 1433, L. 6−8.

b. Converting head measurement to a rate of flow

Rangen converts head measurements to a flow rate in cubic feet per second using a "rating table." Rating tables must be calibrated using a portable standard measuring device or current meter in order to result in reliable measurements. Inaccurate or uncalibrated rating tables will result in unreliable measurements. Yenter, Tr. Vol. III, p. 581, L. 2−7.

c. Dispute with Rangen's measurements arises from its conversion from head to flow

There is no dispute regarding the adequacy of Rangen's head measurements, although Rangen uses a non-standard measuring device that does not conform to IDWR's measurement guidelines. Exh. 2131; Luke, Tr. Vol. V, p. 1133, L. 3−p. 1135, L. 7. Rangen makes head measurements at the wooden damboards in the CTR raceways and wooden damboards at the Lodge Dam in Billingsley Creek using a method described by Dr. Brockway as "sticking the weir." Brockway, Tr. Vol. IV, p. 996, L. 15−p. 997, L. 12. By placing the ruler on the damboard and turning the ruler into the flow of the water ("sticking the weir"), the flow of the water is slowed as it runs up the face of the ruler and the potential energy that would be present at a standard distance upstream from a standard measuring device can instead be approximately measured at the damboard. Sullivan, Tr. Vol. VI, p. 1387, L. 1−p. 1388, L. 4; Yenter, Tr. Vol. III, p. 590, L. 11−23.

The fundamental problem with Rangen's measurements takes place in the second step in flow measurement: converting head measurements into a rate of flow. Rangen converts its head

measurements to rate of flow by use of a faulty rating table. Rangen's own expert, Dr. Brockway, first flagged the problem with Rangen's rating table in his expert report by identifying two "step functions" at H equals .18 feet and .32 feet for "no apparent reason." Exh. 1284, PDF p. 40 of 63.[5] Step functions are unusual in a rating table. Sullivan, Tr. Vol. VI, p. 1378, L. 16−21. A rating table with step functions suggests that the weir coefficient is not consistent throughout all flows. *See* Exh. 3325, Figs. 1-3, 1-4, 1-5, 1-6, PDF pp. 40−43 of 80. No witness was able to identify the origins of the rating table, or to establish that it had been rated or calibrated consistently with IDWR's water measurement guidelines. Brockway, Tr. Vol. IV, p. 1004, L. 16−23; Maxwell, Tr. Vol. II, p. 310, L. 5−7.[6]

2. Mr. Sullivan's comparison of Rangen measurement data with USGS flow data

In light of the unknown origin and problems with Rangen's rating table, and the overall measurement uncertainty regarding Rangen's actual available water supply, Mr. Sullivan performed an evaluation of Rangen measurements against those collected by USGS below the Rangen hatchery in the channel of Billingsley Creek using a current meter.[7] Exh. 3358; Sullivan, Tr. Vol. VI, p. 1414, L. 14−p. 1416, L. 6. The USGS has measured the flow in Billingsley Creek at the bridge immediately below the Rangen hatchery at least once or twice per year in the spring

[5]Mr. Sullivan's analysis confirmed the existence of step functions in the rating table. *See* Exh. 3325, Figs. 1-3, 1-4, 1-5, 1-6, PDF pp. 40−43 of 80.

[6]IDWR's water measurement guidelines provide that flow measurements made with a nonstandard measuring device are adequate if that device "is rated or calibrated against a set of flow measurements using an acceptable open channel current meter" or "standard portable open channel [measuring] device[]." Exh. 2131, p. 2; Luke, Tr. Vol. V, pp. 1135−36.

[7]A current meter measures the flow of water directly by measuring the velocity. No rating table is required when this method is used. Brockway, Tr. Vol. IV, p. 994, L. 17−p. 995, L. 10.

and/or fall, since 1970. Exh. 3650, Fig. 2-3, PDF p. 31 of 46; Sullivan, Tr. Vol. VI, p. 1417, L. 20−p. 1418, L. 15. Mr. Sullivan compared the USGS measurements with Rangen's flow data. Exh. 3345, Fig. 2-4, PDF p. 32 of 52.

The results of Mr. Sullivan's analysis of the USGS and Rangen flow data showed a consistent and systematic under-measurement of Rangen's flows averaging 15.9% based on comparison of 45 measurements made by the USGS between 1980 and 2013. Sullivan, Tr. Vol. VI, p. 1428, L. 12−p. 1430, L. 2; Exh. 3345, Fig. 2-4, PDF p. 32 of 52. In addition to evaluating the extent of under-measurement by Rangen, Mr. Sullivan derived a weighted average weir coefficient for the Rangen facilities by solving the standard weir equation for the weir coefficient using the USGS flow measurements and Rangen head measurements made nearest in time (within a few days). Sullivan, Tr. Vol. VI, p. 1438, L. 21−p. 1439, L. 14.[8] The weighted average weir coefficient determined by Mr. Sullivan was 3.62. This coefficient is significantly greater than the coefficients testified to by Rangen's experts (either 3.06, which was Dr. Brockway's first position or 3.09 *or* 3.33 [Exh. 1284, p. 9; Exh. 1285, p. 2], his later position [Tr. Vol. V, pp. 1079−81]). It is, however, similar to the weir coefficient of 3.68 that Dr. Brockway calculated as appropriate for the Rim View Hatchery, which also measured flow over damboards using the "stick the weir" method similar to Rangen. Brockway, Tr. Vol. IV, p. 1007, L. 4−p. 1009, L. 6.

[8]Mr. Sullivan's analysis to develop the weighted average weir coefficient was the same one used by Dr. Brockway to develop the Rim View weir coefficient. Sullivan, Tr. Vol. VI, p. 1435, L. 4−13.

As the record cites in the prior section demonstrate, there is substantial evidence for Rangen's routine under-measurement of its water flows, including testimony by Rangen's own expert.[9] Indeed, there is no dispute that Rangen's flow measurements understate the actual flow—the only argument is whether the problems with Rangen's flow measurements are legally significant. The Director evaluated all of the evidence and found:

> based upon clear and convincing evidence, that Rangen's use of a nonstandard measuring device with an inaccurate rating curve has resulted in under-reporting of flows at the CTR raceways and Rangen's lodge pond dam.

Agency R. Vol. 21, p. 4198, ¶ 52. The Director's finding that Rangen routinely under-reports flow data was not appealed by Rangen, nor was the Director's reliance on the USGS data incorporated into Mr. Sullivan's analysis.

B. The use of a regression to apportion curtailment accruals to the Martin-Curren Tunnel is undisputed.

Mr. Sullivan conducted the same type of regression analysis found in the IDWR Staff Memo to separate out the effects of curtailment between the Martin-Curren Tunnel and the lower talus slope springs. While IDWR's regression analysis predicted that 70% of the curtailed pumping arising at the Rangen spring cell would accrue at the Martin-Curren Tunnel, Mr. Sullivan's original analysis, based on a regression of Rangen's uncorrected flow data and IDWR's measured data at the Martin-Curren Tunnel, showed that approximately 75% of

[9]As well as Mr. Luke, the IDWR staff member responsible for the measurement portions of the IDWR Staff Memo, who testified at trial that he had reviewed Mr. Sullivan's final opinions and that he "didn't disagree" with Mr. Sullivan's under-measurement analysis showing Rangen routinely under-measures flows by 15.9%. Luke, Tr. Vol. V, pp. 1153−54.

increased spring flow at the Rangen model cell would be expressed at the Martin-Curren Tunnel.[10]

At the end of Mr. Sullivan's testimony, which involved both testimony on Rangen's historical and systematic under-measurement of the total flows at the facility as well as his regression analysis, the Director questioned Mr. Sullivan about how the results of the regression analysis would change if it employed Rangen flow data corrected for the historical 15.9% under-measurement. Mr. Sullivan replied that he expected the percentage of flow from curtailment expressed at the Martin-Curren Tunnel would decrease if the analysis was repeated with Rangen flow data corrected for the historical under-measurement, but that he would have to perform the analysis to confirm this. Tr. Vol. VII, pp. 1663−68, specifically p. 1668, L. 13−25.

Subsequently, Mr. Sullivan repeated the regression analysis but using the historical Rangen flow data *corrected* for the 15.9% under-measurement. The revised results showed that approximately 63% of the effects of curtailment to the model cell containing the Rangen spring cell would be expressed at the Martin-Curren Tunnel. Rangen deposed Mr. Sullivan prior to his testimony on the last day of trial regarding the analysis requested by the Director. On the last day of trial, Mr. Sullivan testified to his revised analysis. Exhibit 3654 was admitted into evidence, reflecting Mr. Sullivan's testimony and analyses in response to the Director's questions earlier in the hearing and substantiating his opinion that 63% of the water accruing to the Rangen spring cell from curtailment will show up at the Martin-Curren Tunnel.

[10]Mr. Sullivan's analysis looked at a longer study period and more refined flow data.

Rangen objected to the admission of Exhibit 3654 and related testimony. In over-ruling the objection the Director noted:

> Okay.··The adjustment to the measured flows [reflected in Exhibit 3654] is a mathematical process that I could have -- you know, they're numbers that I could have computed myself, acknowledging the fact that Ms. Klahn stated that it's not rocket science. I could have computed that myself and probably gone through the development of the regression [reflected in Exhibit 3654] -- the adjusted corrected regression line. And that's all data and information that's in the record.
>
> . . . .
>
> And I'll accept -- I will accept Exhibit[] 3654 . . . into evidence.

Tr. Vol. XII, p. 2812, L. 11−24. The Director accepted Mr. Sullivan's evidence and testimony and found that of the 14.4 cfs of increased flow that would eventually accrue to the Rangen model cell from curtailment at steady-state, 9.1 cfs (63%) would accrue at the Martin-Curren Tunnel. In the Final Order the Director found:

> Historically, the total spring complex discharge is the sum of the flow in Rangen's CTR raceways, Rangen's lodge pond dam, and irrigation diversions from the Farmers' Box. As described in Section V above, Rangen's use of a nonstandard measuring device with an inadequate rating curve has resulted in under-reporting of flows at the CTR raceways and Rangen's lodge pond dam.
>
> In Pocatello Exhibit 3650, Figure 1, Pocatello's expert witness Greg Sullivan plotted data for measured Curren Tunnel flow rates on the "y" axis and data for measured total spring flows on the "x" axis, and performed a linear regression of the data. The resulting regression line represents the historic relationship between Curren Tunnel flow and total flow in the spring complex. The slope of the regression line in Exhibit 3650, Figure 1 is the coefficient 0.7488 associated with the "x" variable and represents the change in flow at Curren Tunnel corresponding to a 1 cfs change in total spring complex flow. The increase in flow at Curren Tunnel resulting from curtailment can be computed by multiplying the predicted increase in total spring flow from ESPAM 2.1 by 0.7488. *Id.*, p. 7. This analysis used flow data reported by Rangen, and predicts that approximately 75% of curtailment benefits accruing to the model cell would accrue to Curren Tunnel. Because this analysis used Rangen's under-reported

> flow data, the Director finds, based upon clear and convincing evidence, that the slope of the regression line is too high.
>
> Sullivan plotted another regression line using adjusted data. Pocatello Ex. 3654, Fig. 1. Data values that were under-reported were "corrected for the historical 15.9% under-measurement of flows by Rangen by multiplying the reported flows by a factor of 1.189 (computed as 1/[1-0.159])." *Id.*, Fn. 2. The slope of Sullivan's alternative regression line is 0.6337, which is the coefficient associated with the "x" variable. This analysis predicts that approximately 63% of curtailment benefits accruing to the model cell would accrue to Curren Tunnel. Because there is uncertainty about the accuracy of the USGS measurements used by Sullivan to adjust the under-reported data, the slope of this regression line may be too low or too high.
>
> There are two reasons why the Director should apply the 63% proportion to determine the increase in Curren Tunnel flow from the total simulated increase in flow to the Rangen model cell. First, all parties agree that the data used to calculate the 75% proportion were under-reported. The alternative regression line plotted by Sullivan is a credible method to correct the under-reported data. Second, applying a 75% proportion to determine the increase in the Curren Tunnel flow may result in Rangen benefiting from its own under-reporting of flows if mitigation by direct flow to Rangen is provided in lieu of curtailment.

Agency R. Vol. 21, p. 4210, ¶¶ 99−102.

The record contains substantial evidence of routine under-measurement of flow data by Rangen; the adjustment to the regression analysis for purposes of calculating the flows at the Martin-Curren Tunnel as a result of curtailment is, as the Director stated, "a mathematical process." There is substantial evidence for Mr. Sullivan's regression analysis adopted by the Director, and Rangen's arguments to the contrary should be rejected.

C. Rangen's criticism that Mr. Sullivan's revised regression analysis does not constitute substantial evidence is without basis.

Rangen erroneously suggests that Mr. Sullivan's revised regression analysis is not reliable because it "evolved" in response to new information as well as the Director's

questions.[11] Rangen attacks Mr. Sullivan's reliance on the USGS flow data collected below the Rangen hatchery as of insufficient quality; Rangen also suggests that irrigation return flows make the comparison with Rangen's flow data suspect. The Director rejected both of these concerns and the district court properly affirmed.

The USGS is the nation's pre-eminent water measurement agency. As Mr. Sullivan testified (and as the Director found [Tr. Vol. VI, p. 1419, L. 19−p. 1420, L. 21]), most of the USGS measurements were rated "good/fair." The USGS ranks measurements as "good" if the accuracy is within 5% and "fair" if the accuracy of the measurement is within 8%. Exh. 3345, pp. 15−16. Similarly, on the issue of comparability, Mr. Sullivan testified and the Director agreed, the USGS measurements were made outside of the irrigation season, so the presence of irrigation return flows at the USGS measurement location below Rangen is irrelevant to evaluating the comparability of the data. Agency R. Vol. 21, p. 4198, ¶ 49.

In summary, Mr. Sullivan's regression analysis was developed in response to information received during discovery and provides a substantial and reliable basis for the Director's findings

[11]Mr. Sullivan's opinions "evolved" in much the same way that Dr. Brockway's opinions "evolved"—in response to new information obtained during the course of discovery as well as the questions posed by the Director at trial. For example, Dr. Brockway's original expert report in this matter vigorously asserted that Rangen relied on a weir coefficient of 3.09 (rather than 3.33, as the Staff Memo found) based on Dr. Brockway's flow measurement analyses performed over 40 years ago for Rim View Hatchery. At deposition, Dr. Brockway produced information that changed his position and opinions, because he had "mis-remembered" what he did for Rim View in the past. Brockway, Tr. Vol. V, pp. 1077−80. In complex litigation, experts are sometimes required to modify their prior opinions based on discovery of new information. The question is not whether Mr. Sullivan's opinions "evolved" but whether their evolution was based solid facts and analyses. The Director found that Mr. Sullivan's opinions were reliable and clear and convincing. Agency R. Vol. 21, p. 4220.

of fact and conclusions of law regarding the proportion of flows Rangen could expect to see at the Martin-Curren Tunnel based on curtailment.

V. THE DIRECTOR HAD SUBSTANTIAL EVIDENCE TO CONCLUDE JUNIORS WERE USING WATER EFFICIENTLY AND WITHOUT WASTE.

Rangen argues that the district court erred in affirming the Director's finding that junior ground water users that were parties to this case satisfied the standards associated with CMR 40.03. Rangen's arguments are without basis.

Rule 40.03 provides:

> **Reasonable Exercise of Rights.** In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b, the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

IDAPA 37.03.11.040.03. The Director identified the testimony that formed the basis for his findings that juniors were "efficiently [using water] without waste." The testimony identified by the Director is not inconsistent with the nature of the evidence the Director has used in the context of determining that senior water rights are using water reasonably without waste. Justin Armstrong, Pocatello's water superintendent testified that the City serves over 16,000 customer accounts, and delivers water for commercial, industrial, irrigation, and culinary beneficial uses. Tr. Vol. V, p. 1098, L. 12−19. Exhibit 3314 identifies Pocatello's water rights. Mr. Armstrong testified that the City relies on its groundwater rights for all its culinary uses, and that its airport wells rely on groundwater for the biosolids program. Armstrong, Tr. Vol. V, p. 1102, L. 23−p.

1103, L. 9, p. 1111, L. 17−p. 1112, L. 6. Accordingly, there is substantial evidence in the record that Pocatello puts its water rights to beneficial use without waste.

The testimony identified by the Director as the basis for his findings was subject to cross-examination by Rangen's counsel and there are no allegations that Pocatello wastes water. Rangen declined to raise these issues directly. Under Idaho law, water users are presumed to be entitled to their decreed amounts, and a delivery call is not an opportunity for re-adjudication of partial decrees. The standard identified in CMR 40.03 is not self-executing—in other words, if Rangen is entitled to the presumption that it is entitled to its decreed amount, so is Pocatello. Contrary to Rangen's suggestion, the fact that Pocatello's decrees are junior in priority creates no additional burden on Pocatello to show it requires its water supplies and is using them reasonably.

VI. CONCLUSION

Rangen's appeal raises no issues for reversal. Based on the evidence and testimony in the record, the Director's proper exercise of agency discretion in this matter, and the district court's proper review under Idaho law, as well as the arguments presented herein, Pocatello respectfully requests that the Court affirm the district court's order on the issues argued within.

Respectfully submitted this 27th day of May, 2015.

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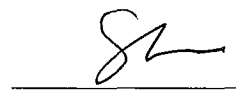
CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2015, I caused to be served a true and correct copy of the foregoing **Intervenor-Respondent on Appeal City of Pocatello's Response Brief** in **Idaho Supreme Court Docket No. 42772-2015** (SRBA Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)) upon the following by the method indicated:



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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief, Intervenor-Respondent on Appeal City of Pocatello's Response Brief in Docket No. 42772-2015, submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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