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,

vs.

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

Respondents-Respondents on Appeal,

and

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

Intervenors-Respondents on Appeal.

SUPREME COURT DOCKET NO. 42772-2015

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

RANGEN, INC.'S COMBINED REPLY BRIEF

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

Honorable Eric J. Wildman, Presiding

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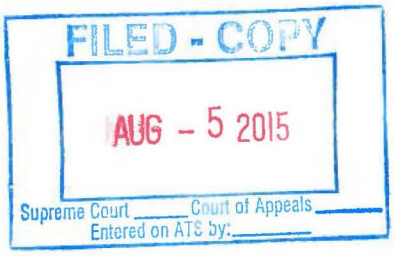

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Rangen, Inc. ("Rangen") submits the following Combined Reply Brief to address the arguments made by the Idaho Department of Water Resources ("IDWR"), Idaho Ground Water Appropriators, Inc., ("IGWA") and the City of Pocatello ("Pocatello") (collectively referred to as "Respondents"). The Respondents have raised substantially similar arguments so Rangen hereby submits a single combined brief.

I. INTRODUCTION

The water situation at Rangen's Research Hatchery has worsened dramatically over the years due to a number of factors including junior-priority ground water pumping. To give the Court some perspective, the Director found that in 1966 Rangen's total hatchery flows averaged 50.7 cfs. (D.Ct.R., Vol. 21, p. 004198, ¶ 53)[1] The Director found that by 2012 the same flows averaged only 14.6 cfs. (*See id.*). A Research Hatchery that was once robust and staffed by dozens of scientists and fish experts is now staffed by a skeleton crew and weeds grow in empty raceways. There is no doubt that junior-priority ground water pumping in the ESPA is causing material injury to the Hatchery's flows and the Respondents do not challenge that finding. (D.Ct.R., Vol. 21, p. 004223, ¶ 36).

The Director's decision to limit the source of Rangen's water rights to water flowing from the mouth of the tunnel structure further significantly reduces the amount of water Rangen may use under its senior water rights. By way of example, the flow from the mouth of the tunnel structure only without the talus slope was a mere 1.44 cfs on May 1, 2013, the day the delivery call trial began. (D.Ct.R., Vol. 22, p. 004457)[2]. The Director's decision also reduces the quantity

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[1] Exhibit 1 to the *Clerk's Record on Appeal* (R., p. 000765) consists of the Agency Record & Hearing Transcripts as Lodged with the District Court May 28, 2014. Citations to "D.Ct.R." throughout this brief refer to this record before the District Court which is contained on "Separate CDSs from *Clerk's Record on Appeal* – Total of 17 Disks". *Id.* Citations to transcripts indicated by "Tr." and exhibits indicated by "Exh." Also refer to this record before the District Court.

[2] The flow would actually be slightly higher because the water that flows through Rangen's 6" pipe to the Hatch House is not included in this IDWR measurement.

of mitigation necessary under the Director's Order by approximately 37% because of the Director's holding that only 63% of increased flows as a result of curtailment would accrue to the mouth of the tunnel.

The impact of the decision may not end with the loss of the use of water that Rangen has used for 50+ years. It may also mean that Rangen will not receive any additional future water from the junior-priority pumpers who were ordered to mitigate for the injury they are causing. Immediately after the Director announced his source decision at a pretrial conference, some of IGWA's Ground Water Districts ("Districts") filed an application to appropriate 12 cfs of the talus slope spring water that the Director ruled is not covered by Rangen's Partial Decrees. (D.Ct.R., Vol. 20, p. 004096-004099). The Districts proposed to condemn Rangen's property to gain access to the talus slope so that they could then assign Rangen the same water the company had been using. The Districts proposed to satisfy their mitigation obligation without providing Rangen any additional water or curtailing a single junior-priority ground water right. The Director recently rejected the Ground Water Districts' application, but they have appealed the decision and it remains unresolved. From Rangen's perspective, the source of the hatchery water is the single biggest issue involved in this appeal.

II. ARGUMENT

A. The Court Should Rule as a Matter of Law that the Term "Martin-Curren Tunnel" is Reasonably Susceptible to Different Interpretations.

The Respondents take the position that there is only one reasonable interpretation of the name "Martin-Curren Tunnel." They argue that that the term "tunnel" has a plain, ordinary meaning that can be found in a dictionary and since there is only one "tunnel" on Rangen's property, the name "Martin-Curren Tunnel" can only refer to that structure. The Respondents' arguments miss the mark. The designated source of Rangen's water is "Martin-Curren Tunnel" –

not tunnel or even "Martin-Curren tunnel." The question the Court has to answer is: can the name "Martin-Curren Tunnel" reasonably be interpreted to include not only the tunnel structure itself, but also the springs surrounding it? If this proper name can reasonably be interpreted to refer to more than just the tunnel structure itself, then the Partial Decrees are ambiguous. *See Latham v. Garner*, 105 Idaho 854, 858, 673 P.2d 1048, 1052 (1983) (An instrument which is reasonably subject to differing interpretation is ambiguous).

Rangen's position is that the name "Martin-Curren Tunnel" is ambiguous in much the same way that the name "Tampa Bay" is ambiguous. The name "Tampa Bay" describes a body of water, a city (sometimes more than one), a football team, a baseball team, and a hockey team. A Google search reveals that while people commonly refer to Tampa Bay as a city, there is no such city. The proper name is "City of Tampa" (*see* http://www.tampagov.net) and "Tampa Bay" when used to describe a geographic region more properly refers to a loosely defined collection of municipalities and counties. The name Martin-Curren Tunnel as used locally refers to more than just the tunnel structure.

1. The Existence of One "Tunnel" is Not Dispositive.

The Respondents begin their argument with the assertion that Rangen's reliance on *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 and *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045 (1952) is misplaced. They point out that *Raffles* involved a situation where there were two ships named Peerless and the *Williams* case involved two types of 10-inch pumps. The Respondents argue that because there are not two tunnels on Rangen's property that could be confused, then these cases do not apply and the term "Martin-Curren Tunnel" cannot possibly be ambiguous. This argument is based upon the mistaken premise that the name "Martin-

Curren Tunnel" can only be used to reference an actual tunnel of some kind. Common or proper names are not necessarily used that way.

The Respondents have misconstrued Rangen's reliance on *Raffles* and *Williams*. Rangen relied on the *Raffles* case to illustrate what Dr. Schane calls a "referential" ambiguity. The contract in *Raffles* designated a cotton shipment to be delivered on a ship called the "Peerless." The point to be made was that, like the Partial Decrees in this case, there was nothing on the face of the document that would indicate that the proper name that was used was ambiguous. The only real distinction between the present case and *Raffles* is that the contract in *Raffles* specified what was being named – a ship. In this case there is no such information about precisely what is referred to by the name "Martin-Curren Tunnel." We know only that it is a reference to a source of water. The tunnel, the talus slope, and various springs that form the head waters of Billingsley Creek are all located in an area known locally as the "Martin-Curren Tunnel." In other words, the argument that there must be two tunnels would only apply to this case only if the decree named the source as "a tunnel known as the Martin-Curren Tunnel." Rangen relied on the *Williams* case to give another example of a referential ambiguity and demonstrate how the two-step evidentiary process for addressing a latent ambiguity works.

The fact that Rangen's property only has one tunnel does not render the name "Martin-Curren Tunnel" unambiguous. Referential ambiguities can arise in different ways. In *Moon v. Moon*, 914 P.2d 1133 (Oregon C.A., 1996), the Oregon Court of Appeals addressed a referential ambiguity that is similar to the one at issue here. The Moons divorced in 1989 and entered into a marital settlement agreement that was then incorporated into a dissolution judgment. *Id.* The integrated judgment provided in part:

> 3. Wife's property: Wife shall have as her sole and separate property, free and clear of any interest of Husband, the following:

"(a) The residence and real property located at 833 Cedar Avenue, Redmond, Oregon, subject to any encumbrance thereon.

* * *

4. Husband's Property: Husband shall have as his sole and separate property, free and clear of any interest of Wife, the following:

(a) The residence and real property located at 20995 Vista Bonita Drive, Bend, Oregon, subject to any encumbrance thereon.

* * *

10. Full Disclosure: The parties have each entered into this Agreement upon mature consideration and it is expressly based upon the promise that neither party has any asset or other property except that which is described or distributed herein."

Id. at 1133-34.

At the time of their divorce, the Moons owned a residence and an adjacent pasture in Bend, Oregon. *Id.* at 1134. The address for the residence was 20995 Vista Bonita Drive. The adjacent pasture, however, was an entirely separate parcel. When the husband decided to take out financing to build on the pasture, he discovered that his wife's name was still on the property. *Id.* The husband asked her to sign a quitclaim deed relinquishing her interest, but she refused. He sued her to quiet title to the property.

The dispute in *Moon* was whether the language "located at 20995 Vista Bonita Drive" referred only to the residence itself or whether it could reasonably be interpreted to cover the adjacent pasture as well. The trial court determined that the language at issue unambiguously referred to the residence and did not include the separate, adjacent pasture. The Oregon Court of Appeals reversed the determination by applying the latent ambiguity doctrine and finding that the description was reasonably susceptible to differing interpretations:

> Applying those principles, we agree with husband that the reference in paragraph 4(a) to the "residence and real property located at 20995 Vista Bonita Drive" is ambiguous. That is so for two reasons. First, the agreement itself, in paragraph 10, evinces the parties' intent and belief that the agreement addressed all of their jointly owned property. *Deerfield Commodities, Ltd. v. Nerco, Inc.*, 72 Or.App. 305, 319, 696 P.2d 1096, *rev. den.* 299 Or. 314, 702 P.2d 1111 (1985).

> Second, reference to extrinsic evidence of the circumstances under which the agreement was made, ORS 42.220, discloses that, in addition to the home and real estate at 20995 Vista Bonita Drive, the parties also owned the adjacent pasture lot, which had no street address. Given the combination of those two factors, the "located at" language of paragraph 4(a) could be reasonably construed to include not only the residence but also the pasture lot. *See* Williams v. Wise, 139 Or.App. 276, 280, 911 P.2d 1261 (1996) (finding terms of a lease contract to be ambiguous).

914 P.2d at 1135-36.

The Respondents also argue that the name "Martin-Curren Tunnel" is unambiguous because the term "tunnel" can be found in a dictionary or has a commonly understood meaning. This Court recognized in *Mountainview Landowners Coop. Ass'n v. Cool*, 139 Idaho 770, 86 P.3d 434 (2004) that a dictionary definition of a word used in a contract does not necessarily render a document unambiguous. In *Cool*, there was a dispute between Dr. Cool and his wife, the owners of beachfront property, and their homeowner's association. Before Dr. Cool and his wife bought the property, their predecessors entered into a Private Property Use Agreement with the homeowner's association. The Private Property Use Agreement allowed neighbors to use part of the Cools' beach for "swimming and boating." A dispute arose over the association's use of the property. Dr. Cool and his wife argued that the term "swimming" was narrowly defined in the dictionary as propelling oneself through the water and did not include things like sunbathing. The District Court disagreed with the application of the dictionary definition, finding that there was a latent ambiguity in the word "swimming." The District Court applied an expansive definition, finding that "swimming" included activities like picnics and social gatherings. This Court agreed that there was a latent ambiguity in the term "swimming," but remanded the case back to the District Court to determine the original intent of the parties at the time the Private Property Use Agreement was drafted.

Rangen's Partial Decrees define the source of Rangen's water simply as "Martin-Curren Tunnel; Tributary to Billingsley Creek." This is the name in local common usage as required by IDAPA 37.03.01.060.02.c. The term "Martin-Curren Tunnel" can certainly be reasonably interpreted to refer to the tunnel structure itself, but it can also be reasonably interpreted to include the surrounding spring complex. Lynn Babbington, a former manager who worked at the Hatchery for over 20 years and was involved in the permitting of Rangen's water rights, explained:

> Q. Okay. And take a look now at page 29 of that license. And do you see the note there, the comment, it says, "Source known locally as Curren Tunnel"?
> A. Uh-huh.
> Q. You have to say "yes."
> A. Yes.
> Q. Okay. What did you understand was the Curren Tunnel?
> A. **The Curren Tunnel was the -- up on the hillside, a tunnel there. But it was known to me to be all of the -- all of the water up there. Whether it be called Curren Tunnel or head of Billingsley Creek or Curren Springs, they were all -- all meant the same thing. It was the -- all the springs that was a source to the hatchery.**

(Tr., Vol. 1, p. 190, L. 12 – p. 191, L. 2) (emphasis added).

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

> Q: **Do you measure the flow that comes out of the Curren Tunnel?**
> A: **Classify "the Curren Tunnel."**
> Q: It may be easiest, Justin – **Well, I'm speaking of the actual physical tunnel in the hillside** that has the -
> A: The culvert?

Q: The culvert, yeah.
A: No.

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

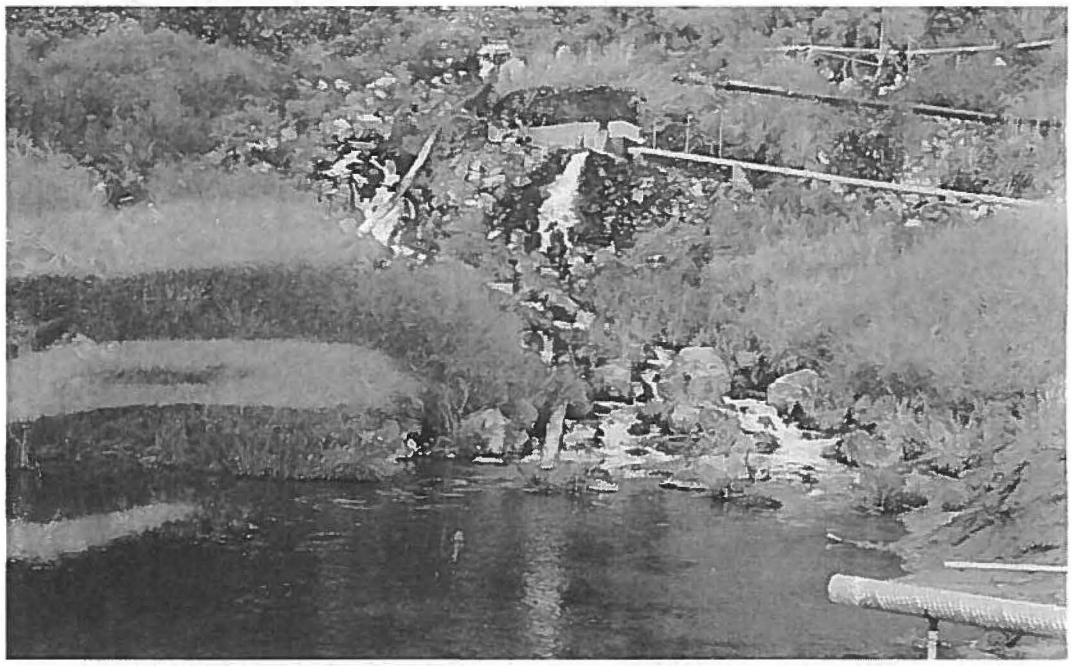
The term "Martin-Curren Tunnel" is a proper name. It cannot be defined by simply resorting to a dictionary definition of the term "tunnel." The fact that there is only one tunnel on Rangen's property likewise does not mean that the name can only refer to that structure. There are other facts and circumstances, as discussed below, that make it clear that the name "Martin-Curren Tunnel" can reasonably be interpreted to include the spring complex at the head of Rangen's facility. As such, the Court should find that it is ambiguous as a matter of law.

2. The Court Should Conduct a De Novo Review to Determine Whether the Term "Martin-Curren Tunnel" Loses Clarity When Applied to the Facts and Circumstances.

Pocatello argues that the Court should defer to the Director's conclusions pertaining to witness testimony as it relates to whether the name "Martin-Curren Tunnel" is ambiguous. *Pocatello's Response Brief*, p. 7. The District Court affirmed the Director's determinations, finding that the Director's conclusions concerning the testimony of Lynn Babbington, Frank Erwin and other witnesses were supported by substantial and competent evidence and had to be affirmed. (R., p. 000681). This was error. Whether a document is ambiguous is a question of law over which this Court exercises free review. *Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995). Under the two-step latent ambiguity doctrine, this Court should do its own review of the facts and circumstances of the case. This means not only examining the documents involved, but also reviewing and weighing the testimony of the witnesses.

a) The Physical Layout of Rangen's Property and the Names Used to Describe Rangen's Source.

To begin its analysis of the facts and circumstances, the Court should examine the physical layout of Rangen's property and the backfiles for Water Right Nos. 36-02551 and 36-07694. The Martin-Curren Tunnel structure itself is situated on a canyon wall at the head of Rangen's Research Hatchery. It is surrounded by countless springs. Water cascades down the canyon wall not only from the tunnel structure, but also from all sorts of cracks and fissures to a pond in front of the Bridge Dam that supplies water to Rangen's Large Raceways. The following is a photo of part of the canyon wall and the pond in front of the Large Raceways:



Exh. 1017A, p. 9. The mouth of the Martin-Curren Tunnel structure itself is at the top of the photograph. The Bridge Dam and 36" pipeline that supplies water to the Large Raceways is at the opposite end of this pond and is not shown in the photo.

Rangen's backfiles show that myriad names have been used to describe this water over the years. For example:

- Rangen submitted its application to divert 50 cfs of water (eventually decreed as Water Right No. 36-02551) in 1962. *See*, p. 32 of Exh. 1027A. Rangen's application designated the source of that water as "the headwaters of Billingsley Creek which is derived from underground springs." *(Id.)*

- When the State advertised Rangen's application for what is now Water Right No. 36-02551, it designated the source of Rangen's water as the "headwaters of Billingsley Creek." *See*, page 22 of Exh. 1027A.

- After Rangen completed the construction of its Research Hatchery, the State Reclamation Engineer advertised its intent to take proof of Rangen's Completion of Works and again described the source of Rangen's water right as the "headwaters of Billingsley Creek." *See*, p. 18 of Exh. 1027A.

- When the State issued a license to Rangen for the 50 cfs of water in 1967, it designated the source as "underground springs, a tributary of Billingsley Creek." *See*, p. 29 of Exh. 1027A.

- Rangen applied for a supplemental permit to appropriate waters from the same source and using the same diversion structure in April 1977. *See*, p. 31 of Exh. 1029. The application had a typewritten designation of source as "underground springs". *See*, p. 31 of Exh. 1029. The term "Curran Tunnel" was hand-printed right above the designation. *(Id.)* A diagram in the Department's backfile showed the diversion of multiple springs flowing from the canyon wall. *See*, Exh. 1029, p. 19.

- The license for the 1977 right describes the source of Rangen's water as "springs tributary to Billingsley Creek." (Exh. 1029, p. 28). **There is an important note at the bottom of the license stating "[s]ource known locally as Curran Tunnel"** (Exh. 1029, p. 29).

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

> Recently Gary Funderberg, senior water resources agent southern region, made a field examination of our water system so that our license could be issued. At this time he noted that we did not have a measuring device at the inlet. With the terrain and collection system of the water it is not feasible to have a measuring device at the inlet.
>
> All the water is run through steel or concrete \ponds and thru a measuring device at the outlet. I would like to request that the measuring device at the inlet be waived.

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

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

(Tr., Vol. 1, p. 188, L. 20 – p. 189, L. 6). (Emphasis added).

- The Department entered an order approving Rangen's request to measure at the outlets. *See,* p. 30 of Exh. 1029. Rangen has been measuring its hatchery flows at the outlets for decades. See Exh. 1074 for a diagram showing Rangen's measurement points at the outlet of its facility.

The source of Rangen's water had to be identified as part of the claims process in the SRBA. The SRBA has been described as ". . . a 'fair, comprehensive, technically correct, legally sufficient determination (identification and quantification) of *existing* water rights." (*See* David Shaw, "Snake River Basin Water Right Adjudication" available on IDWR website at: http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/SRBA_Court/PDFs/history.pdf) (emphasis added). In other words, the partial decrees entered in the SRBA were supposed to reflect existing rights – not change them.

The backfiles show that there was not a single, set way of naming the source of Rangen's water. While the names used to describe the source changed over the years – the physical source that supplied the Research Hatchery did not. The task in the SRBA was to find a reasonable way of describing the source keeping in mind that the name would be captured in a database field. The Department promulgated naming rules, but those rules did not require precision such as a metes and bounds description. The naming rules simply stated:

> Source of Water Supply. The source of water supply shall be stated at item three (3) of the form.
>
> i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. If no official name has been given, the name in local common usage should be listed. If there is no official name, the source should be described as "unnamed stream" or "spring." The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as "ground water."

IDAPA 37.03.01.060.02.c (emphasis added).

IGWA points to the fact that the partial decrees for other tunnel sources like the Hoagland Tunnel have distinguished been the tunnel structure itself and associated springs. The record does not explain why those decisions were made and they certainly do not make the description of Rangen's source wrong or unreasonable. Lynn Babbington was the only person who testified at trial who was actually involved in the permitting and licensing of Rangen's water rights. He explained that he understood the name "Curren Tunnel" to be:

> Q. Okay. And take a look now at page 29 of that license. And do you see the note there, the comment, it says, "Source known locally as Curren Tunnel"?
> A. Uh-huh.
> Q. You have to say "yes."
> A. Yes.
> Q. Okay. What did you understand was the Curren Tunnel?
> A. **The Curren Tunnel was the -- up on the hillside, a tunnel there. But it was known to me to be all of the -- all of the water up there. Whether it be called Curren Tunnel or head of Billingsley Creek or Curren Springs, they were all -- all meant the same thing. It was the -- all the springs that was a source to the hatchery.**

(Tr., Vol. 1, p. 190, L. 12 – p. 191, L. 2) (emphasis added).

The Director found that other witnesses such as Frank Erwin distinguished between the Martin-Curren Tunnel and the springs that fed Billingsley Creek. *See, e.g., Memorandum Decision and Order on Petitions for Judicial Review*, p. 13 (R., p. 000680). Rangen does not dispute that the term "Martin-Curren Tunnel" can mean the physical structure itself. In fact, Lynn Babbington

made the point that the name "Martin-Curren Tunnel" can refer to the tunnel structure, but he also made the point that it is a shorthand local name for all of the water that feeds the head of the Hatchery. Rangen's point is that the name "Martin-Curren Tunnel" is reasonably susceptible to different interpretations depending on context.

The Director also concluded that other witnesses were not confused when talking about the Martin-Curren Tunnel structure itself or the rest of the spring complex. The Director overlooked the following exchange between Lonny Tate, a long-time hatchery worker and IGWA's counsel:

Q: **Do you measure the flow that comes out of the Curren Tunnel?**
A: **Classify "the Curren Tunnel."**
Q: It may be easiest, Justin –
Well, I'm speaking of the actual physical tunnel in the hillside that has the -
A: The culvert?
Q: The culvert, yeah.
A: No.

(Tr., Vol. 4, p. 883, L. 23 – p. 884, L. 6) (emphasis added). The fact that there was minimal confusion should not be surprising. When the trial of this case started all of the witnesses knew that the source of Rangen's water was a hotly contested issue. Most of the witnesses were expert hydrologists and geologists who would proceed carefully with questions about the source of Rangen's water.

b) The Department's Historical Interpretation of Rangen's Source.

Perhaps even more compelling than the documents in the backfiles is the way that IDWR has actually administered Rangen's water rights since the Partial Decrees were entered. Rangen made a delivery call in 2003. After the call was made, IDWR sent Cindy Yenter and Brian Patton to Rangen's facility to conduct an investigation of Rangen's water rights and operation. Ms. Yenter described the investigation as follows:

Q. Cindy, go over kind of procedurally what you did when Director Dreher asked you to go down to the Rangen facility in 2003.

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

(Tr., Vol. 3, p. 550, L. 19 – p. 551, L. 12). Ms. Yenter issued a 12 page memorandum called "Water Right Review and Sufficiency of Measuring Devices, Rangen Aquaculture" which outlined her findings. Following Yenter's investigation, the Department recognized in paragraph 54 of its findings in the *Second Amended Order* issued on May 19, 2005, that:

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

(D.Ct.R., Vol. 1, p. 000174, ¶54) (*See*, Exh. 1074 for a diagram showing the measurement points discussed above). The flow measurements that are referenced are the flow measurements taken at Rangen's outlets – measurements that include all of the water that comes from the head of the Research Hatchery.

The Respondents want the Court to dismiss the findings in paragraph 54 of the *Second Amended Order* and conclude that the source and point of diversion issues were not raised. Although it is true that there was not an intervening party like in this case to challenge Rangen's source and diversion, the Department's investigatory and administrative obligations were the same then as they are now. Pocatello correctly pointed out in its Response Brief that:

> ***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. 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."

Pocatello's Response Brief, p. 3 (Emphasis added) (citations omitted).

The fact is that the Department investigated Rangen's water rights and its diversion structure and determined that the total flows through the facility were representative of the water available under its water rights. This is a determination that Rangen's water rights include not just the water from the mouth of the Martin-Curren Tunnel, but also the surrounding spring water. The Department has been administering Rangen's water rights consistent with this interpretation of the Partial Decrees for the past decade. These are important facts and circumstances that bear directly on whether the name "Martin-Curren Tunnel" can reasonably be interpreted to include the surrounding spring water at the head of Rangen's Research Hatchery.

B. The Court Should Remand this Matter to the Director for a Determination of What Was Intended by the Use of the Term "Martin-Curren Tunnel."

IDWR argues that even if the Court were to find that the term "Martin-Curren Tunnel" is ambiguous, there is substantial and competent evidence to support a determination that the term Martin-Curren Tunnel is limited to the tunnel structure itself. The Director did not make this

determination. IGWA contends that if the Court were to find a latent ambiguity then this Court should remand the case back to the Director. After reviewing IGWA's analysis, Rangen concedes that it is correct and this case must be remanded.

C. The Doctrine of Quasi Estoppel Should Be Used to Prevent the Director from Changing the Department's Interpretation of Rangen's Partial Decrees.

The Respondents contend that the doctrine of quasi-estoppel cannot be used to prohibit the Director from changing the Department's interpretation of Rangen's Partial Decrees. They contend that quasi-estoppel cannot be asserted because (1) the Director is acting on behalf of the Department in a sovereign capacity; (2) there has been no change in IDWR's position; (3) there has been no detrimental reliance by Rangen; and (4) IDWR has not asserted a "right." The Respondents' arguments are not well taken.

To begin with, Rangen understands that the Court has expressed reluctance to apply estoppel principles against the government acting in its sovereign capacity. While the Court may be reluctant to estop the government, it unequivocally left the door open to the possibility if "exigent circumstances" or "appropriate circumstances" exist. *See Terrazas v. Blaine County*, 147 Idaho 193, 200-01, 207 P.3d 169, 176-77 (2009). The Respondents' assertion that estoppel can never be applied against the government is a misstatement of Idaho law.

The Respondents also argue that even if quasi-estoppel can be applied against the Department, it should not be applied in this case because IDWR has not changed positions. Their argument is that the issue of source and point of diversion were not addressed by the Department prior to the delivery call at issue. Rangen has addressed that argument at length above.

The final arguments the Respondents make arise out of their mischaracterization of the quasi-estoppel doctrine. Detrimental reliance is not an element of quasi-estoppel. This Court outlined the elements of quasi-estoppel and estoppel in two footnotes in *Terrazas*:

The elements of equitable estoppel are:	The doctrine of quasi-estoppel applies when:
(1) a false representation or concealment of a material facts with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. *Terrazas*, 147 Idaho at 200, 207 P.3d at 176, fn 2 (citing *Williams v. Blakely*, 114 Idaho 323, 325, 757 P.2d 186, 188 (1987)).	(1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Terrazas*, 147 Idaho at 200, 207 P.3d at 176, fn 3 (citing *Allen v. Reynolds*, 145 Idaho 807, 812, 186 P.3d 663, 668 (2008)).

Rangen explained in its Opening Brief the facts upon which the Court could conclude that the Department's conduct caused a disadvantage to Rangen. It is clear from footnote 3, however, that Rangen does not actually have to demonstrate detrimental reliance. Instead, quasi-estoppel can be applied if it would be unconscionable to allow the Department to maintain an inconsistent position. Rangen addressed the unconscionability factor at length in its Opening Brief.

Finally, IDWR's assertion that quasi-estoppel cannot be invoked because the Department has not asserted a "right" is erroneous. While it is true that some cases have discussed the doctrine in terms of a person asserting a right, the *Terrazas* case makes it clear that a change in positions will satisfy the doctrine's requirements. There is ample evidence to support Rangen's claim that the Director should be estopped from changing the Department's interpretation of Rangen's Partial Decrees.

D. The Department Should Not Be Awarded Costs or Attorney's Fees on Appeal.

The Department contends that it should be awarded costs and attorney's fees on appeal under I.C. § 12-117. The Court has interpreted this statute to allow an award only if the losing

party pursued the appeal frivolously or unreasonably. *See Terrazas v. Blaine County*, 147 Idaho 193, 205, 207 P.3d 169, 181 (2009). Even if the Court does not accept Rangen's position, there is nothing frivolous or unreasonable about Rangen asking the Court to review the matters raised herein. The interpretation of Rangen's Partial Decrees involves important legal questions that are entitled to de novo review. It was not unreasonable for Rangen to ask the Court to review the Director's decision to reject his own staff's regression analysis and adopt an "evolving" opinion from an adverse party's expert. The issue of whether the junior users presented sufficient evidence to support their own efficient use of water does not appear to have been addressed by any Court. Rangen's appeal is not frivolous or unreasonable. As such, the Department's request for costs and attorney's fees should be denied.

III. CONCLUSION

For the reasons set forth in Rangen's Opening Brief and those set forth above, Rangen respectfully requests that the Court reverse the Director's decisions addressed in Rangen's Opening Brief and herein.

DATED this 5th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 5th day of August, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by email:

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