

ORIGINAL

Robyn M. Brody (ISB No. 5678)
Brody Law Office, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780
robynbrody@hotmail.com

J. Justin May (ISB No. 5818)
May, Browning & May, PLLC
1419 W. Washington
Boise, Idaho 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com

Fritz X. Haemmerle (ISB No. 3862)
Haemmerle & Haemmerle, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com

RECEIVED

JAN 10 2013

DEPARTMENT OF
WATER RESOURCES

Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
FOR DELIVERY CALL OF RANGEN,
INC.'S WATER RIGHT NOS. 36-02551
& 36-07694

Docket No. CM-DC-2011-004

**RANGEN, INC.'S BRIEF IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: MATERIAL INJURY**

COMES NOW, Rangen, Inc. ("Petitioner" or "Rangen"), by and through its attorneys of record, Robyn M. Brody of Brody Law Office, P.L.L.C.; J. Justin May of May, Browning & May, P.L.L.C.; and Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and hereby submits this Brief in Support of Rangen's Motion for Partial Summary Judgment Re: Material Injury.

I. PROCEDURAL BACKGROUND AND SUMMARY

Rangen filed its Petition for Delivery Call on December 13, 2011 (hereinafter “Call”) because Rangen has suffered, is suffering and will suffer, material injury as a result of junior-priority ground water pumping in the areas encompassed by the boundaries of the Enhanced Snake Plain Aquifer Model 2.1 (“ESPAM2.1”), within the Eastern Snake River Plain Aquifer (“ESPA”).

A hearing on Rangen’s Call is scheduled to begin on May 1, 2013. Rangen is requesting that the Department rule as a matter of fact and law prior to that hearing that Rangen is suffering “material injury” as a result of junior-priority groundwater pumping in the areas encompassed by the ESPA and ESPAM2.1. A finding of material injury can be made based on General Provision 5, the Conjunctive Management Rules (“CMR’s”) and based on the expert reports filed to date.

Rangen further seeks an Order that if the intervenors, Idaho Groundwater Appropriators, Inc. (“IGWA”), the City of Pocatello, and Fremont-Madison Irrigation District, wish to move forward with any defense, including futile call, that it is their burden to establish these defenses as a matter of law, by clear and convincing evidence.

II. FACTS

1. Rangen, Inc. (“Rangen”) is a family corporation that has been in business since 1925. Its headquarters is located in Buhl, Idaho. Rangen, among other things, is a leading feed manufacturer in the United States aquaculture markets. *Courtney Aff.*, ¶ 2.

2. As part of its aquaculture business, Rangen owns and operates a research and fish propagation facility (“Research Hatchery”) near Hagerman, Idaho. A sketch of Rangen’s Research Hatchery is attached as Exhibit 1A to the Affidavit of Wayne Courtney (“*Courtney Aff.*”) and an aerial photograph of the facility is attached as Exhibit 1B. *Id.*, ¶ 3.

3. The water that sustains Rangen's Research Hatchery is spring water from an area commonly referred to as the Thousand Springs area of the Thousand Springs Reach of the Snake River within Water District 130. The Thousand Springs area is characterized by many flowing springs of high quality water that is well suited to aquaculture and fish propagation. *Id.*, ¶ 4.

4. Rangen's water comes from a spring source through and near the Martin-Curren Tunnel. The springs located in the vicinity of the Martin-Curren Tunnel are tributary to Billingsley Creek, a tributary of the Snake River in Gooding County. *Id.*, ¶ 5.

5. Rangen has five (5) water rights for the Research Hatchery that have been decreed through the Snake River Basin Adjudication. *Id.*, ¶ 6. Rangen's decreed water rights are summarized as follows:

Water Right No.:	36-00134B	36-00135A	36-15501	36-02551	36-07694
Priority Date:	October 9, 1884	April 1, 1908	July 1, 1957	July 13, 1962	April 12, 1977
Beneficial Use:	Irrigation (0.09 cfs) and Domestic (0.07 cfs)	Irrigation (0.05 cfs) and Domestic (0.05 cfs)	Fish Propagation	Domestic (0.10 cfs) and Fish Propagation (48.54)	Fish Propagation
Diversion Rate:	0.09 cfs	0.05 cfs	1.46 cfs	48.54 cfs	26.0 cfs
Period of Use:	Jan. 1 - Dec. 31 (Domestic) Feb. 15 - Nov. 30 (Irrigation)	Jan. 1 - Dec. 31 (Domestic) Feb. 15 - Nov. 30 (Irrigation)	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31

6. Rangen has been measuring and recording the water delivered to its Research Hatchery since 1966. Based on the flow data attached as Exhibits C and D to the *Ramsey Aff.* ..

the amount of water available for Rangen's Research Hatchery has declined significantly over the years. *Id.*, ¶ 6.

7. The only water rights which have been, and are currently being, satisfied are 36-00134B (0.09 cfs), 36-00135A (0.05 cfs) and 36-15501 (1.46 cfs). *Id.*, ¶ 7. Rangen is not receiving the water to which it is entitled pursuant to decreed water rights nos. 36-02551 and 36-07694. Copies of the partial decrees associated with these rights are attached as Exhibit 2 to *Haemmerle Aff*, Exhibit A..

8. The license for water right 36-02551 was issued on April 26, 1967. *Id.*, Exhibit B (hereinafter "36-02551 *Backfile*"), p. 28. On or about January 19, 1967, prior to licensing, George H. Lemmon, the local watermaster, filed a report with the Department of Reclamation on the flows for water right 36-02551 (then designated permit no. 30654). Using a velocity meter, Lemmon measured the flows through the Research Hatchery as follows:

Date:	Curren Tunnel:	3 Pipes:	Creek:
June 22, 1966	45.41 cu ft	8.10	37.31
July 27, 1966	51.30	8.45	42.85
September 21, 1966	62.42	3.22	59.20
October 21, 1966	69.89	0.82	69.07
November 21, 1966	58.38	—	—
December 27, 1966	49.23	0.40	48.83

Id., p. 51. Lemmon also noted that "[a]ll the water in the creek was put threw the fish facilities."

Id.

9. Rangen is currently putting all of its water to a beneficial use, for the purposes set forth in the decrees, and it has the ability to continue to put more water to a beneficial if it had more water. *See generally, Smith Aff.* Exhibit A (“*Smith Report*”), p. 3.

10. Rangen's flow measurements are recorded as the sum of discharges from the spring flows as they go through the “CTR” raceways *added to the spring flows over the Lodge Pond dam board.* *Maxwell Aff.*, ¶¶ 4-5; *Ramsey Aff.*, ¶ 3; *see also*, Exhibit A to *Maxwell Aff.* for a sketch showing these measurement points. The location of the measurements for Rangen's water are well-established and have been previously recognized by the Department as follows:

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

Haemmerle Aff., Exhibit F (*Second Amended Order* in the Matter of Distribution of Water, Finding of Fact No. 54, p. 13).

11. Water flows at Rangen have been steadily declining since Rangen's licensed rights were issued. In ten-year time increments, flows at Rangen Research Hatchery have declined as follows:

Years	Average Flows (cfs)
1966-75	51.4
1976-85	36.8
1986-95	29.4
1996-05	21.5
2006-12	14.4

Ramsey Aff., Exhibit D.

12. In September and October 2003, Rangen filed a water call with the Department because Rangen was not receiving all the water to which it is entitled. Rangen's 2003 call requested that the Director administrator "all water right diversions junior to [Rangen's] that are interfering with and impacting [Rangen's] water right numbers referenced above [water rights 36-15501, 36-02551 and 36-07694]."

13. Pursuant to Rangen's first call, the Director issued three separate Orders: (a) the *Order* dated February 25, 2004 (hereinafter "*Order*"); (b) the *Amended Order*, dated March 10, 2004 (hereinafter "*Amended Order*"); and (c) the *Second Amended Order*, dated May 19, 2005 (hereinafter "*Second Amended Order*"). See, *Haemmerle Aff.*, ¶ 9, Exhibits D-F. The aforementioned Orders were issued under the Departments earlier ESPAM models, which used a "stream stretch" approach in applying the model. Unlike earlier models, this call is under ESPAM 2.1 can be used to model discharges at individual spring sources, as opposed to stream reaches. ESPAM2.1 represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries such as Billingsley Creek.

14. The 2003 call, and Rangen's current call, sought to curtail junior groundwater pumping in the Eastern Snake Plain Aquifer ("ESPA") and various water districts operating within the areas of the ESPA and ESPAM2.1. The ESPA is the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," U.S. Geological Survey ("USGS") Professional Paper 1408-F, 1992 excluding

areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

15. The Department defines the ESPA as an area having a common ground water supply. *See*, IDAPA 37.03.11.050.

16. A direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River (e.g., Billingsley Creek) in the Thousand Springs area. Rangen's water rights are deemed "hydrologically interconnected" to the Eastern Snake River Plain Aquifer.¹ Rangen's water rights, and all rights in Basin 36, are subject to the following General Provision: "Except as otherwise specified above, all other water rights under Basin 36 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law." *SRBA, Decree for Connected Sources in Basin 36*. *See also, Brockway Aff.*, Exhibit 1, EXPERT REPORT IN THE MATTER OF RANGEN INC. – AVAILABILITY OF SPRING FLOW AND INJURY TO WATER RIGHTS, by Charles E. Brockway, Ph.D. Brockway Engineering, David Colvin, P.G., Leonard Rice Engineers, and Jim Brannon, Brannon Developments (hereinafter "*BCB Report*"), p. 26, ¶ 1.

17. There is sufficient water that runs in the ESPA to satisfy Rangen's water rights. *See e.g., BCB Report, pp. 21-23* for a discussion of benefits that will accrue to Rangen and others as a result of curtailment.

III. ISSUE PRESENTED

¹ The Director's Report for Basin 36 states: "ADMINISTRATION OF BASIN 36 RELATIVE TO THE SNAKE RIVER. The Eastern Snake River Plain Aquifer, the springs tributary to the Snake River or other surface tributaries, and surface tributaries to the Snake River in Basin 36 downstream from the Milner Dam are hydrologically interconnected to varying degrees. . . . Basin 36 water rights for surface and ground water, and Snake River water rights will be administered conjunctively, pursuant to law, with due consideration as to the actual impacts or ground water diversions on senior water rights."

Whether Rangen has suffered material injury to water rights numbers 36-02551 and 36-07694 as a result of junior-priority groundwater pumping in the ESPA.

IV. STANDARD OF REVIEW

Summary judgment is proper if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). When a court or other tribunal assesses a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. See *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). Likewise, all reasonable inferences which can be drawn from the record must be drawn in the nonmovant’s favor. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct.App.1994). The burden of proving the absence of an issue of material fact rests upon the moving party.

However, “when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *M&H Rentals, Inc. v. Sales*, 108 Idaho 567, 570, 700 P.2d 970 (Ct.App. 1985). “[A] nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment.” *Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485 (2009).

V. ARGUMENT

A. **RANGEN IS SUFFERING MATERIAL INJURY TO ITS USE OF WATER RIGHTS NUMBERS 36-02551 AND 36-07694 AS A RESULT OF JUNIOR-PRIORITY GROUND WATER PUMPING.**

1. BURDENS OF PROOF.

This case involves a call under the Department's Conjunctive Management Rules (CMR). When examining any aspect of a water call, it is important to understand the CMRs and the burdens of proof between the senior and junior water users.

"The [CMR] rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." *American Falls Reservoir No. 2 v. IDWR*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007). "Idaho law," as defined by CMR 10.12, means "[t]he constitution, statutes, administrative rules and case law of Idaho." *Id.*² To initiate a water delivery call, the CMRs "require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury." *Id.* at Idaho 877. "Material injury" is defined by the CMRs as "[h]indrance to or impact upon *the exercise of a water right* caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." IDAPA 37.03.11.010.14 (emphasis added). *See e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2010). "The Rules further provide that the petitioner file a description of his water rights, including the decree, license, permit or claim for such right, the water diversion and delivery system he is using and the beneficial use being made." *Id.*

When responding to a water call, "the burden is not on the senior water rights holder to re-prove an adjudicated right." *Id.* at Idaho 878. The Idaho Supreme Court has held:

While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The

² "Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules. Due to the changing nature of the law and rules, it is unnecessary to incorporate extant law unless specifically necessary to a clear understanding of the particular Rule." *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho at 873.

presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

Id. at 878.

Rather, to avoid the senior having to relitigate its decreed water rights, and if a junior water user argues that the senior can use less than the decreed quantity of the right, the junior water user bears the burden of proving that less water can be used under any theory supporting an argument for the use of less water. “Once a decree is presented to an administrative agency or court, **all changes to that decree**, permanent or temporary, must be supported by clear and convincing evidence.” *A&B Irrigation District v. IDWR*, 153 Idaho 500, 284 P.3d 225, 249 (2012); see also, *A&B Irrigation District v. IDWR, Minidoka County*, Case No. 09-647; and see, *Memorandum Decision and Order on Petitions for Rehearing* (Nov. 2, 2010) and *Memorandum Decision and Order on Petition for Judicial Review* (May 4, 2010), decisions attached as Exhibit G to *Haemmerle Aff.*

Since nearly the time of statehood, the Idaho Supreme Court has held that it is the junior’s burden of establishing non-injury, and any other theory justifying a senior not obtaining its water, by clear and convincing evidence:

This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; **and it would take more than a theory, and, in fact, clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator**, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.

Id. at P.3d 244, citing Moe v. Harger, 10 Idaho 302, 77 P. 645 (1904) (emphasis added and in original).

In continuing to apply the clear and convincing standard to juniors in conjunctive management matters, the Idaho Supreme Court has held that the possibility of any error in the process of making a call should be borne by the juniors:

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. **However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season.** Any burden of this uncertainty should be borne by the junior.... [I]f the Director's determination is only based on a finding 'more probable than not.' The senior's right is put at risk and the junior is essentially accorded the benefit of uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

Id. at P.3d 242. (Emphasis added).

Specifically, if the junior alleges that the senior can use water differently than the way the senior's water right is decreed, the junior bears the burden of proof by a clear and convincing standard. This means that if IGWA, the City of Pocatello, or Fremont-Madison Irrigation District contend that their junior-priority pumping does not affect Rangen's use of water, they have the burden of proving a "futile call" by clear and convincing evidence. *Moe v. Harger, 10 Idaho 302, 307, 77 P. 645, 647 (1904); Josslyn v. Daly, 15 Idaho 137, 96 P. 5687 (1908); Silkey v. Tiegs, 54 Idaho 126, 28 P.2d 1037 (1934); A&B Irrigation District v. IDWR, 153 Idaho 500, 284 P.3d 225, 249 (2012).* "Futile call" is defined as, "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be

satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.” IDAPA 37.03.11.010.08.³

In addition to the junior’s general burden of proving “no injury” and “futile call” by clear and convincing evidence, the junior bears the burden by clear and convincing evidence as to the following specific issues: (1) establishing waste, *A&B Irrigation District v. IDWR*, 153 Idaho 500, 284 P.3d 225, 241 (2012), *citing Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976); (2) water not being put to a beneficial use, *Id.*; and (3) forfeiture or abandonment, *Id.*, *citing, Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984).

2. RANGEN HAS SUFFERED AND WILL CONTINUE TO SUFFER MATERIAL INJURY AS A RESULT OF JUNIOR GRODUN WATER PUMPING.

a. RANGEN HAS LICENSED AND DECREED WATER RIGHTS WHICH ARE NOT BEING FILLED.

Rangen owns several water rights. The rights at issue, water rights nos. 36-02551 and 36-07694, have a combined diversion rate of 74.54 cfs. In 2012, Rangen’s measurements show a yearly average flow of 14.1 cfs. Over the last ten (10) years, Rangen’s average flow of water has been 14.4 cfs. *See, infra*, Statement of Facts, ¶¶ 7-10. Based on these undisputed facts, the Department should rule as a matter of law that Rangen has licensed and decreed water rights which are not being satisfied.

b. RANGEN HAS MADE SUBSTANTIAL EFFORTS AND HAS INCURRED SIGNIFICANT EXPENSES TO DIVERT WATER FROM THE SOURCE.

³ “Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.” IDAPA 37.03.11.020.04.

Rangen has made substantial efforts and incurred significant expense to divert water for the Research Hatchery. Rangen applied for a water permit to develop the Research Hatchery and water right no. 36-02551 in 1962. *See*, p. 36-02551 *Backfile*, p. 125. A sketch of the Research Hatchery is attached as Exhibit 1A to the *Courtney Aff.* and an aerial photo is attached as exhibit 1B to the *Courtney Aff.* Another aerial photo is Figure 5 in the *BCB Report*. The source of the water that serves the Research Hatchery is spring water which comes through and around the Martin-Curren Tunnel. *See*, p. 36-02551 *Backfile*, p. 57, 66, 68, 100-101; *see BCB Report*, p. 8. The Martin-Curren Tunnel is located in a canyon wall above Rangen's Research Hatchery. *See* Figures 6 and 7 in *BCB Report*. Spring water comes through the Martin-Curren Tunnel and also flows out around the Tunnel in an area described as the "talus slope." *BCB Report*, p. 8. This spring water forms the headwaters of Billingsley Creek. *See*, p. 36-02551 *Backfile*, p. 57, 66, 68, 100-101.

Rangen has built a six-inch pipe from inside the Curren Tunnel down to its Hatch House where trout eggs and young fry benefit from the pristine spring water that remains at a nearly constant temperature year round. *BCB Report*, p. 8. Not all of the water from the Curren Tunnel flows through the pipe to the Hatch House. Some of the water flows down the canyon wall into a concrete box where it collects with other spring water from the talus slope. *See*, Figure 7 in *BCB Report*. Rangen diverts water from the concrete collection box through a twelve-inch steel pipe that runs to Rangen's small raceways which are nursery ponds for small fish; water from the small raceways is reused when it is channeled to the large raceways. *BCB Report*, p. 8. Any water that is not diverted through the six-inch pvc pipe in the Curren Tunnel or the twelve-inch pipe at the concrete collection box is then channeled down the property to a concrete and thirty-six inch pipeline intake structure that serves Rangen's large raceways. *See*, Figure 8 in *BCB*

Report. Water from the large raceways is re-used when it is piped through a thirty-six inch pipe to the CTRs. Rangen's methods of diverting the spring water that comes through and around the Curren Tunnel is reasonable. See e.g., *Haemmerle Aff.*, Exhibit F, (*Second Amended Order*, Finding of Fact No. 54, p. 13). Rangen channels all of the spring water on its property to the collection areas where it can be used for fish propagation and research. Rangen maintains the diversion structures in a reasonable condition and manner as illustrated by Figures 6-8 in the *BCB Report*.

c. THE EXISTENCE OF WATER MEASURING AND RECORDING DEVICES.

Rangen has been measuring water flows at the Research Hatchery since 1966. Dan Maxwell, a fish culturist at the Research Hatchery, is currently responsible for taking the measurements and has been taking the measurements in the same manner for the last thirteen years. *Maxwell Aff.*, ¶¶ 1, 3. In order to measure all of the water that flows through the Research Hatchery and is available for use, Maxwell takes two separate measurements and adds them together. *Id.*, ¶ 4. He takes one measurement at the bottom of the top set of the CTR ponds and he takes the other measurement where the water flows over the Lodge Pond dam board. *Id.*, ¶¶ 4-5. These two locations are shown as "measurement points" on the sketch attached as Exhibit A to *Maxwell Aff.* He takes the measurements by placing a metal yardstick at the top of the dam boards in both locations. *Id.*, ¶¶ 4-5. The yardstick is placed so that it faces the water. *Id.*, ¶ 4. A photograph of Maxwell taking a measurement is attached as Exhibit B to *Maxwell Aff.*

Maxwell records the water measurements to the nearest 1/8 inch on a notepad. *Id.* He then takes the measurements and converts them to cubic feet per second using a conversion chart. *Id.*, ¶ 6; see also Exhibit D to *Maxwell Aff.* He records the results on a chart such as that

attached as Exhibit E to *Maxwell Aff.* Douglas Ramsey, a Research Scientist at the Rangen Hatchery, records the Maxwell's measurements in the computerized spreadsheet attached as Exhibits Cand D to the *Ramsey Aff.*

Frank Erwin, the local watermaster, testified during his deposition that he has observed Maxwell taking water measurements at the Rangen Hatchery and had to admit that Maxwell's measurements were more accurate than his own:

Q: Okay. Have you ever met a fellow by the name of Dan Maxwell?

A: Yes, uh-huh.

Q: Okay. Now I know you mentioned that you went out there and saw them measuring water. Was that Dan you were with?

A: I've watched Dan do it, and I've watched Lonny [Tate, another fish culturist] do it, both.

Q: When you were with Dan, did you take issue with how he took the measurements?

A: I -- I have no issues with it. I had to agree with him a couple of times that he was a little more accurate at reading the staff gauge than I was.

Q: Is there anything that you've ever asked Dan to do differently in terms of how he measures water?

A: No.

Q: How about Lonny, have you ever watched him measure the water?

A: I believe I did one time, uh-huh.

Q: And did you have any issue with how Lonny did it?

A: No.

Erwin Depo., (Tr., p. 99, l. 8 – p. 100, l. 5) (attached as Exhibit H to *Haemmerle Aff.*). Rangen provides its water measurements on an annual basis to the water master. *Id.*, (Tr., p. 100, l. 6-8). Erwin has never had any problem with Rangen's annual reports. *Id.*, (Tr., p. 100, lines 21-23).

As the water master, Erwin has the authority to reject the measurements, but he has never rejected Rangen's measurements. *Id.*, (Tr., p. 100, l. 24 – p. 101, l. 4).

Rangen's experts also observed Maxwell taking water measurements and did not take issue with the methodology used. *BCB Report*, p. 9. The experts concluded that the table Maxwell uses to convert the water measurements to cubic feet per second is likely to be more accurate than a standardized "look up" table. *Id.* In September 2009, during the development of ESPAM2, Jim Brannon, one of Rangen's experts, gave a presentation to the Eastern Snake Hydrologic Modeling Committee (ESHMC), an advisory group to the Department, concerning estimates of the entire Rangen spring flow, including those measured through the Curren tunnel, those diverted into irrigation pipelines, and those diverted to the Research Hatchery. *See, Brannon Affidavit in Opposition to IGWA's Motion to Continue Hearing and Request for Expedited Decision*, ¶ 3. IDWR and the ESHMC actually approved the historical Rangen spring flow measurements and used them as a calibration target for ESPAM2.1. *Id.*

d. THE EXERCISE OF JUNIOR-PRIORITY GROUND WATER RIGHTS INDIVIDUALLY OR COLLECTIVELY HAS AFFECTED, AND CONTINUES TO AFFECT, THE QUANTITY AND TIMING OF WATER AVAILABLE TO RANGEN.

As a matter of law and fact, groundwater pumping in the ESPA impacts Rangen's use of its decreed water rights. There is no dispute that Rangen would receive more water if junior groundwater pumping for the ESPA were curtailed. The only dispute appears to be precisely how much additional water would be available.

Again, "material injury" is defined by the CMRs as "[h]indrance to or impact upon *the exercise of a water right* caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." IDAPA 37.03.11.010.14 (emphasis added). *See e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2010).

As a senior appropriator, Rangen is not required precisely quantity impact. It is sufficient if there is impact. As stated in *Clear Spring v. Spackman*:

Material injury” is defined by the Conjunctive Management Rules as “[h]indrance to or impact upon *the exercise of a water right* caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.” IDAPA 37.03.11.010.14 (emphasis added). The Rule requires impact upon the exercise of a water right. It does not require showing an impact on the profitability of the senior appropriator’s business. Such a holding would conflict with Article XV, § 3, of the Idaho Constitution, which states that “[p]riority of appropriation shall give the better right as between those using the water. * * *

Subject to the rights of senior appropriators, they are entitled the full amount of water they have been decreed for that use. As we have stated, “*Any interference with a vested right to the use of water*, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.” *Bower*, 27 Idaho at 181, 147 P. at 502 (emphasis added).

Id. at Idaho 810. (Emphasis in original).

The interconnection between Rangen’s source and the junior source has been established by law. In the SRBA, the court decreed General Provision 5 for rights in Basin 36. That General Provision reads: “Except as otherwise specified above, all other water rights under Basin 36 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.” *Haemmerle Aff.*, Exhibit A (*SRBA, Decree for Connected Sources in Basin 36*).⁴

The CMR’s also establish the connection between surface water sources and groundwater sources in the ESPA. The ESPA is defined as a “common groundwater source.” IDAPA 37.03.11.050. By definition, once a “common groundwater source” is established, the CMR’s

⁴ General Provision 5 was Decreed based on IDWR’s Director’s Report which stated: “ADMINISTRATION OF BASIN 36 RELATIVE TO THE SNAKE RIVER. The Eastern Snake River Plain Aquifer, the springs tributary to the Snake River or other surface tributaries, and surface tributaries to the Snake River in Basin 36 downstream from the Milner Dam are hydrologically interconnected to varying degrees. . . Basin 36 water rights for surface and ground water, and Snake River water rights will be administered conjunctively, pursuant to law, with due consideration as to the actual impacts or ground water diversions on senior water rights.”

establish that ground water use affects surface water diversions. An “Area Having a Common Ground Water Supply” is defined as follows:

A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01. (Emphasis added). One of the necessary findings to establish a “common groundwater source” is a finding that the “[d]iversion and use of water from the ground water source will cause water to move from the surface water source to the ground water source.” IDAPA 37.03.11.031.032.b.

Before General Provision 5 was decreed and before the CMR’s were adopted, the fact of interconnection between the Marin-Curren Tunnel and the ESPA, and injury caused by junior groundwater pumping, has been historically well-recognized. For example, in answering the Complaint in the *Musser v. Higginson*, Gooding Case No. 22481, the Department admitted in its Answer, with respect to water diverted from the Martin-Curren Tunnel, as follows:

IDWR admits that the immediate source of Petitioner’s irrigation water [Martin-Curren Tunnel] is tributary to the Snake River hydrologically interconnected to the Snake Plain Aquifer. IDWR admits that some ground water diversions from the Snake Plain Aquifer reduce the quantity of water at the Marin-Curren Tunnel during the irrigation season.

Haemmerle Aff., Exhibit I.

Consistent with General Provision 5, the CMR’s and the historically established connection between Rangen’s source and groundwater users in the ESPA, Rangen’s experts concluded, as a matter of fact, that water between the ESPA and Rangen’s springs is interrelated. “The relationships between ESPA water levels and Rangen Spring flows are well correlated. This correlation is an indication that ESPA well pumping and spring flows are hydraulically

connected and that the spatial distribution of the correlated data indicates that the Rangen Spring source water is a large regional area.” *BCB Report*, p. 27.⁵

Likewise, the other experts’ reports filed in this case express and opine that groundwater use in the ESPA is impacting Rangen’s use of its decreed rights. Brendeke, for IGWA, attempts to limit the exposure of some junior groundwater users, but he does not deny that junior groundwater pumping in the ESPA hinders and impacts Rangen’s use of its water rights. *Haemmerle Aff.*, Exhibit J (“*Brendeke Report*”), pgs. 1-2, Summary of Conclusions 15, 22, 23, 24, 27, 85, 86 and 87. For example, Brendeke opines as follows: “Curtailement of the junior groundwater rights within the entire model domain would cause modeled discharge from the Rangen spring complex to increase by 18.07 cfs. *Brendeke Report*, p. 5-3.

Similarly, Sullivan, for Pocatello, attempts to minimize impacts, but he does not dispute that curtailing Pocatello’s own wells would increase water to Rangen. *Haemmerle Aff.*, Exhibit L (“*Sullivan Report*”), pgs. 27, 28 and 29. Specifically, Sullivan opines as follows:

Assuming annual pumping of 3,200 acre-feet per year for the ESPA wells, and assuming the impact on the Curren Spring from this pumping amounts had reached steady-state, Figure 8-2 summarizes the computed increase in flow that would accrue to the Curren Spring through time as a result of curtailment of Pocatello’s ESPA wells that are junior to the 1962 Rangen water right. After 10 years, the flow of the Curren spring would increase by 0.014 cfs. After 30 years, the spring flow would increase by a total of 0.018 cfs.

Sullivan Report, p. 29.

⁵ See e.g., *BCB Report*, p. 5: “Figure 3 is a graph of the cumulative discharge authorized by water rights issued by IDWR for ground water in the Eastern Snake Plan from 1867 through 2005. A plot of the number of ground water rights issued versus the estimated Northside Spring flow (Kjelstrom) shows the relationship between estimated ground water extraction and spring response over ESPA. The magnitude of the decline in the Northside Spring flow is caused by decreases in net recharge to the ESPA caused by changes in water use, including conversion from surface irrigation to sprinkler irrigation, ground water pumping for irrigation, and , to a lesser extent, changes in claimed and drought.”

Finally, there is nothing in the *Contor Report*, for FMID, or *Hinckley Report*, for IGWA, which expressly or implied, suggests that there is no impact between groundwater pumping and Rangen's use of its decreed water. *See, Haemmerle Aff.*, Exhibits K and M.

For purpose of summary judgment, there is no material issue of fact or law that groundwater pumping by junior users is hindering and impacting the discharge of spring flows available to Rangen at the Research Hatchery. "Pumping by junior ground water rights impacts the exercise of Rangen water rights 36-02551 (priority July 13, 1962) and 36-07694 (priority April 12, 1977)." *Id.*, p. 26.

Rangen has established the necessary *prima facie* elements in showing material injury. It is now the juniors' burden to prove a recognized defense by clear and convincing evidence. *A&B Irrigation District v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012).

IV. CONCLUSION

Rangen respectfully requests that the Director enter an Order finding as a matter of law that Rangen has suffered material injury as a result of junior-priority groundwater pumping in the Eastern Snake Plain Aquifer. The undisputed evidence shows that Rangen's use of water rights numbers 36-02551 and 36-07694 is being hindered and impacted by junior-priority groundwater pumping. Because there are no issues of material fact concerning material injury, summary judgment on this issue is appropriate.

DATED This 9 day of January, 2013.

BRODY LAW OFFICE, PLLC

By _____
Robyn M. Brody

~~HAEMMERLE & HAEMMERLE, PLLC~~

By ~~_____~~
~~Fritz X. Haemmerle~~

MAY, BROWNING & MAY

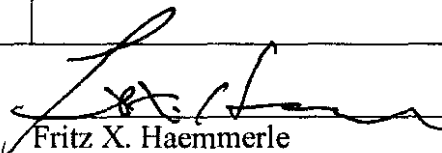
By _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 9th day of January, 2013, he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

<p>Original: Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 101 South Capitol Blvd, Ste 300 Boise, ID 83704-1391 Fax: 208-433-0167 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI Kittredge Building, 511 16th Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Dean Tranmer City of Pocatello P.O. Box 4169</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/></p>

<p>Pocatello, ID 83201 dtranmer@pocatello.us</p>	<p>Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson, L.L.P. 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 Facsimile: (208) 735-2444 tlt@idahowaters.com jks@idahowaters.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>C. Thomas Arkoosh Arkoosh Eiguren P.O. Box 2900 Boise, ID 83702 Tom.arkoosh@aelawlobby.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Jerry R. Rigby Hyrum Erickson Robert H. Wood Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>


Fritz X. Haemmerle