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DEPARTMENT OF
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ATTORNEYS FOR CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION) Docket No. CM-DC-2011-004
OF WATER TO WATER RIGHT NOS.)
36-02551 AND 36-07694) **CITY OF POCATELLO'S RESPONSE TO**
) **RANGEN, INC.'S MOTION FOR PARTIAL**
(RANGEN, INC.)) **SUMMARY JUDGMENT RE: MATERIAL**
) **INJURY**

The City of Pocatello ("City" or "Pocatello"), by and through its attorneys, hereby submits this Response to Rangen, Inc.'s Motion for Partial Summary Judgment Re: Material Injury ("Motion").

INTRODUCTION

Rangen, Inc.'s ("Rangen") Motion asks the Hearing Officer for a finding of material injury, prior to hearing, because (1) Rangen is not receiving its decreed amounts, (2) it claims that it can put its decreed amounts of water to beneficial use without waste (a claim that Pocatello disputes), and because (3) the Eastern Snake Plain Aquifer Model ("ESPAM") shows that if all junior water rights are curtailed, more water will be available for diversion by Rangen.

The above listed allegations are insufficient as a matter of law for the Director to conclude that “Rangen has established the necessary *prima facie* elements in showing material injury” because Rangen’s arguments are contrary to the Director’s statutory authority, the framework of the Department’s procedural rules, and prior rulings of the Idaho Supreme Court. Brief in Support of Motion for Partial Summary Judgment Re: Material Injury (“Brief”) at 20.

Further, as the expert reports filed in this case demonstrate (Rangen’s assertions notwithstanding), the parties vigorously dispute key unresolved factual issues in this case.¹ Pocatello’s summary of its disputes with Rangen’s “undisputed facts” is discussed below, and Pocatello submits that certain “facts” on pages 2 through 6 of Rangen’s Brief are either irrelevant or disputed. Although Rangen’s Motion fails on the basis of its flawed legal arguments, Pocatello offers a list of disputed facts because it demonstrates the impropriety of summary judgment. Under either standard—either that Rangen is not entitled to judgment as a matter of law because its legal arguments are flawed, or because Rangen has not established there is no dispute of material fact, Rangen’s Motion must be denied.

DISPUTED FACTS

Rangen has not established that there are no material facts in dispute in this case. Summary judgment shall be denied “if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. At all times, the moving party has the burden of establishing the lack of a genuine issue of material fact. To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material facts exists for an element of the nonmoving party’s case.” *Northwest Bec-Corp v.*

¹ The Idaho Ground Water Appropriators, Inc.’s (“IGWA”) Response to Rangen’s Motion details the factual disputes arising from the disclosure of Pocatello and IGWA’s expert reports and also describes the various determinations under Rule 42 related to the reasonableness of Rangen’s means of diversions, their need for their decreed water supplies, and other Rule 42 factors that are put directly at issue by IGWA and Pocatello’s expert reports. Pocatello incorporates IGWA’s brief by reference.

Home Living Serv., 136 Idaho 835, 838, 41 P.3d 263, 266 (2002) (internal citations omitted). Further, courts “should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party.” *Id.*

As established by the attached affidavits² and expert reports filed in this matter, Pocatello alleges the following facts that necessarily prevent entry of an order granting Rangen’s Motion:

1. Rangen is not currently putting all of its water to beneficial use. Expert Rebuttal Report of John D. Woodling at 9, 16–20, Feb. 7, 2013 (“Woodling Rebuttal Report”) (describing unutilized and underutilized facilities despite available water); *see also*, Expert Witness Report of Thomas L. Rogers, Dec. 21, 2012 (“Rogers Report”).
2. Rangen cannot establish either historical flows or change in flows because of serious questions regarding the reliability of its measurements over the last 30 years. Spronk Water Engineers, Inc. Expert Report at 8–12, Dec. 21, 2012 (“Spronk Report”); Spronk Water Engineers, Inc. Expert Rebuttal Report at 5–13, Feb. 7, 2013 (“Spronk Rebuttal Report”).
3. Rangen’s means of diversion is not reasonable because its diversion structure is inadequate to deliver all available first use water to all of the raceways in the Rangen Research Hatchery. Woodling Rebuttal Report at 9; Spronk Report at 6–7; *see also*, Rogers Report at 14; Rangen Groundwater Discharge and ESPAM2.1 Hydrogeologic Investigation by Bern Hinckley at 22–23, Dec. 21, 2013.
4. Rangen does not require additional water to conduct research and meet its beneficial use. Woodling Rebuttal Report at 8–15; Spronk Report at 24; Spronk Rebuttal Report at 22.
5. Modeling results regarding increased reach gains to Rangen from curtailment of ESPA wells are unreliable. Hydrology, Water Right and Groundwater Modeling Evaluation of Rangen Delivery Call by Charles M. Brendecke at 4-11 to 4-13, Dec. 21, 2012.

Further, based on information disclosed by Rangen to date and the analyses of Pocatello’s experts, Pocatello specifically disputes the following “undisputed” facts alleged in Rangen’s Motion:

1. Rangen claims that it “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 [sic] if it had more water.” Brief ¶ 9, at 5. However, Pocatello disputes that Rangen is putting all of its water to beneficial use. Rangen’s own expert has admitted

² See Affidavit of John D. Woodling, attached to this Response as Exhibit 1; and Affidavit of Greg K. Sullivan, attached to this Response as Exhibit 2.

that the facility previously raised seven lots of eggs per year but fails to substantiate that the reason it only raises three lots of eggs per year is because of water flows. Expert Report of Charlie E. Smith at 5, Dec. 21, 2012 (“Smith Report”); *see also* Woodling Expert Rebuttal Report at 9 (stating that the Hatch House now “sits idle” 30 weeks out of the year despite available water). In fact, as demonstrated in Mr. Sullivan’s expert report, the primary constraint on Rangen’s fish production at this point is not water, but a contract it has entered into with Idaho Power. Spronk Report at 21 (“[A]vailable flow records show that Rangen has more than enough flow to meet its delivery obligations to Idaho Power, and that Rangen could grow more fish if it wasn’t constrained by the flow and density criteria in the Idaho Power contracts.”). *See also*, Woodling Rebuttal Report at 20 (“Fish production at the Rangen Unit has decreased over time in a manner unrelated to water flows.”).

2. Rangen claims that “[t]he location [sic] of the measurements for Rangen’s water are well-established and have been previously recognized by the Department.” Brief ¶ 10, at 5. Pocatello’s expert Mr. Sullivan described significant discrepancies in flow records and measurement points at the Rangen facility. Spronk Report at 8–12; Spronk Rebuttal Report at 5–13. Between 1981 and 2009 the method of calculating Rangen’s flows changed multiple times, and has resulted in significant discrepancies between records. Spronk Report at 9 (“For the period of concurrent IDWR and LRE records from 1995 – 2009, the differences in monthly flows range as high as 5.0 cfs and average 0.2 cfs.”). Furthermore, in the 2005 Second Amended Order, issued in response to the prior Rangen delivery call, the Director found that “measurements of flows through hatchery raceways reported by Rangen may be systematically about 10 percent lower than actual flows.” Second Amended Order ¶ 76, at 18, In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551, and 36-07694, (May 19, 2005). In any event, there is “uncertainty about the accuracy of the historical Rangen flow records.” Spronk Report at 10.
3. Pocatello disputes Rangen’s claim that it is entitled to call for water under right 36-07694. Brief ¶ 7, at 4. As explained in Mr. Sullivan’s report there was not sufficient flow to decree Rangen’s junior right in 1977: “The reported monthly average flow in April 1977 was 35.2 cfs, and this is far less than would have been necessary to supply any portion of Rangen’s April 12, 1977 priority water right. The highest monthly average flow reported in 1977 was 47.1 cfs. Based on Rangen’s diversion records, there was no flow available in 1977 for Rangen to appropriate on top of its 1962 water right.” Spronk Report at 12. A similar finding was previously made by IDWR, which declined to consider injury to water right 36-07694 in Rangen’s 2003 Delivery Call because there was no evidence that there was ever water available for appropriation for water right no. 36-07694 and Rangen thus could not claim injury from its absence. Second Amended Order, ¶¶ 62, 63 at 14–15, ¶ 72 at 17, ¶ 27 at 29.

ARGUMENT

I. RANGEN’S SUMMARY JUDGMENT ARGUMENTS ARE INCONSISTENT WITH IDAHO LAW

A. Idaho law does not encompass a presumption of material injury.

Rangen’s Motion asks the Director to presume that it is materially injured because it is not receiving its full decreed amount. As discussed above, it cannot even be established how much water Rangen is receiving at its facility due to errors and inconsistencies in measuring methodologies. However, even if Rangen is not receiving its full decreed amount, that fact creates no presumption about material injury nor does it establish the “prima facie” elements of injury as asserted in Rangen’s Brief at 20.

The only presumption available to Rangen under Idaho law is that established in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* (“AFRD#2”): that the senior need not re-prove his decreed amounts in a conjunctive delivery call. 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). However, the AFRD#2 presumption that a senior is entitled to his decreed amounts does not create a parallel “presumption of injury”; nor does it require the Director to find material injury after receiving the senior’s delivery call and decrees. Instead, the material injury determination is a fact-specific inquiry that requires the Director to consider relevant factors under Idaho law and the Conjunctive Management Rules (“CMR”) as properly within his discretion.³

³ The Director’s discretion to evaluate material injury claims rather than to simply shut and fasten junior ground water users’ wells arises out of the Idaho Constitution, which establishes the public ownership of the waters of the State of Idaho and further provides that the State of Idaho holds the waters in trust for the use of its citizens for beneficial purposes, subject to the broad authority of the legislature to regulate and restrict the use of waters of the state. Idaho Const. art. XV, §§ 1, 3 (“[t]he right to divert and appropriate the unappropriated waters of any natural stream to *beneficial uses*, shall never be denied”) (emphasis added); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 19, 156 P.3d 502, 520 (2007) (“[a] water right does not constitute the ownership of the water; it is simply a right to use the water to apply it to a beneficial use. ‘In the absence of a beneficial use, actual or at least potential, a water right can have no existence.’”) (citation omitted). “A person who is not applying the water to a beneficial purpose cannot waste it or exclude others from using it.” *Id.* at 19, 156 P.3d at 521. “Wasting of irrigation water is disapproved by the constitution and laws of this state.” *Martiny v. Wells*, 91 Idaho 215, 218, 419 P.2d 470, 473

The 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.

Id.

Idaho Code section 42-602 requires the Director to distribute water according to all elements of the prior appropriation doctrine, including beneficial use without waste. As a result, scrutiny of the water right does not end at the time a license or decree is entered:

If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

Id. at 876, 154 P.3d at 447 (emphasis added).

Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.

Id. at 880, 154 P.3d at 451. In *AFRD#2*, the Court went on to explain that the doctrine of beneficial use without waste is alive and well in Idaho water law, and applies with equal force in delivery call proceedings:

While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.

Id. (emphasis added).

Pursuant to the same rule, a senior appropriator cannot place a delivery call for water that he cannot put to a beneficial use. Rangen's rights to appropriate water are conditioned by its

(1966) (citing article XV of the Idaho Constitution). Furthermore, "it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof." *Id.* See also *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809, 252 P.3d 71, 89 (2011) ("The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters . . .").

ability to put the water to beneficial use without waste—Rangen’s allegation that its combined decreed flow rate is not being fulfilled is not enough. Brief at 12. Further, and as described below, rather than simply running the ESPAM to determine if curtailment will increase the amount of water available to Rangen, as suggested by Rangen, the Department’s determination of material injury requires evaluation under Rule 42.

In administration, Rangen’s rights are subject to a determination of whether the amount of water sought through a delivery call is necessary in light of the principles of beneficial use without waste. In Idaho, the legislature has recognized that an appropriation must be for “some useful or beneficial purpose” [Idaho Code section 42-104] and that

Water being essential to the industrial prosperity of the state, and all agricultural development . . . depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, **its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state . . . are declared to be the property of the state . . . and the right to continue the use of any such water shall never be denied . . .**

I.C. § 42-101 (emphasis added).

The Director’s obligation to review more than Rangen’s decrees and the ESPAM Model is clear. The evaluation of whether or not Rangen is materially injured, as governed by the CMRs, is an area that falls within the sound discretion of the Department and its expertise. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (rejecting SWC arguments that the Director must presume injury and finding “[t]he Rules do give the Director the tools by which to determine ‘how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].’”) (citation omitted). “[W]here the agency’s particular technical expertise is involved, the court must be particularly zealous in guarding the agency’s discretion.” *Idaho Conservation League v. Thomas*, 917 F. Supp. 1458, 1464 (D. Idaho 1995), *aff’d*, 91 F.3d 1345 (9th Cir. 1996) (citing

Fed. Commc'ns Comm'n v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 813–14, 98 S.Ct. 2096, 2121-22 (1978)).

This Court's reasoning in *AFRD#2* has not been disturbed since the case was announced in 2007, and applies with equal force to the matter at hand. Indeed, this reasoning was recently affirmed by the Idaho Supreme Court in *Clear Springs*. 150 Idaho at 808, 252 P.3d at 89 (“[t]he policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.”). Rangen's right to divert water pursuant to its rights “is not an unrestricted right,” and Rangen's contention that their rights should be administered otherwise finds no support in Idaho water law. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120, 32 S.Ct. 470, 473 (1912).

B. Rangen's interpretation of CMR 10.14 is inconsistent with Idaho law.

In seeking its relief, Rangen places great weight on the definition of “material injury” in CMR 10.14. However, Rangen's arguments ignore the fact that Rule 10.14 references Rule 42, which provides the standard by which the IDWR may evaluate material injury:

[material injury is defined as the] [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 and as set forth in Rule 42.

IDAPA 37.03.11.010.14 (emphasis added). Rangen goes on to argue that proof of interconnection (and IGWA and Pocatello's admissions regarding interconnection) between Rangen's spring and the ESPA resolves the dispute. Brief at 7, 17. This, too, is an erroneous and unfortunate misstatement of Idaho law and the CMRs. If Pocatello can establish that Rangen's water rights are not being used reasonably (which Pocatello alleges, *inter alia*), or that Rangen's means of diversion is unreasonable (which Pocatello also alleges, *inter alia*), or that Rangen does not require and has never received its full decreed amounts (which Pocatello alleges

as well, *inter alia*), these showings under Rule 42 and Idaho law support the Director finding no injury to Rangen's water rights.

In this regard, Rangen has misplaced reliance on the *Clear Springs* holding which excluded evidence related to the profitability of the senior water user's business from consideration in the material injury context. Brief at 17. *Clear Springs*, 150 Idaho at 810, 252 P.3d at 91. The *Clear Springs* holding arises from the substance of CMR 42, which does not contemplate inquiry into the senior's business decisions *per se*. If, as in the case of Rangen, a fish hatchery could produce more fish than it is presently producing, this failure to maximize the beneficial use of available water supplies is a question of reasonableness of water use, not Rangen's profitability. See Woodling Rebuttal Report at 16–20; Rogers's Report at 10–15; Smith Report, Exh. 3 (concluding that with 15 cfs Rangen could produce significantly more fish than Rangen's records indicate it has produced in recent years).

C. The ESPAM Model may be used in any future curtailment analysis, but not to determine material injury.

IDWR has already considered and rejected this “depletion equals injury” approach to administration as contrary to Idaho law. In the A&B Irrigation District (“A&B”) Delivery Call, the Department refused to rely on certain model curtailment scenarios to conclude A&B was injured by junior pumping in his initial order regarding material injury. Order of January 29, 2008 at 31–33, *In the Matter of the Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area*. At hearing, A&B argued that the Department was required to use said runs to find material injury.

A&B's Post-Hearing Memorandum and Proposed Findings at 32, Docket No. 37-03-11-1, A&B Delivery Call, Jan. 23, 2009.⁴

Hearing Officer Schroeder rejected A&B's position and agreed with the Department:

Use of the Eastern Snake Plain Aquifer Model would be appropriate if injury were found but not to determine if injury has occurred.

. . . [The model] is not a tool to establish injury. Were injury to be found it would be proper to consider use of the ESPAM in the same fashion it has been used in the prior cases. This would involve identifying a priority date for potential curtailment to address the sources of injury and to establish a trim line to exclude those areas where influence on the A&B wells is too problematic to justify curtailment.

Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations ("Opinion") at 39–40, A&B Delivery Call, Mar. 27, 2009 (emphasis added); *see also id.* at 40 ("[t]he model was not used in the trout farm calls or the Surface Water Coalition call to determine injury, and the Director did not utilize the model in A&B's call to determine injury."). This finding was adopted into the Department's final order, and A&B did not appeal this issue.⁵

II. BECAUSE DISCOVERY IS NOT COMPLETED AND NO HEARING HAS BEEN HELD, THE DEPARTMENT DOES NOT HAVE THE NECESSARY INFORMATION BEFORE IT TO MAKE A FINDING REGARDING MATERIAL INJURY

A. Rule 42 resolution of material injury issues in this matter, and due process requires that Pocatello be afforded a hearing to present defenses to Rangen's claim of material injury.

Ultimately, the determination of material injury is guided by the factors set forth in CMR 42, and the Director must consider all, and not just some, of the CMR factors. IDAPA 37.03.11.042. The CMR, by their terms, contemplate a determination based on evaluation of certain pieces of information—injury is not a foregone conclusion. In order to make this

⁴ In the A&B Delivery Call, the Department rejected use of the curtailment scenarios as a determination of injury in its initial order, prior to hearing in the matter: "The ESHMC scenarios, such as the A&B Scenario, are not intended for use in administering the state of Idaho's water." Order ¶ 122, at 33, A&B Delivery Call.

⁵ *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 284 P.3d 225, 230 (2012). The Department's decision was affirmed by the Idaho Supreme Court on other grounds.

evaluation, juniors must be afforded an opportunity to complete discovery and cross examine Rangen's witnesses.

Further, due process requires that Pocatello must be given the opportunity of a hearing to cross examine Rangen's employees and consultants and to rebut Rangen's expert testimony. *Clear Springs*, 150 Idaho at 815, 252 P.3d at 96. Contrary to Rangen's arguments, the imposition of the clear and convincing evidentiary standard does not strip the Director of authority to make an evaluation of whether the calling senior requires its full decreed amount of water and, in the event the senior does not, how much (if any) should be delivered. In *AFRD#2*, the Court framed the burden of proof issue as follows:

"Once the initial determination is made that material injury is occurring or will occur, the junior [appropriator] then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call."

Id. at 817, 252 P.3d at 98 (quoting *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449). The Director has not made a finding of material injury—the approach proposed by Rangen requires no exercise of agency discretion, and indeed no judgment at all: the Director would have only ministerial authority to execute the task of reviewing Rangen's petition for delivery call and decrees and order curtailment of the wells on the ESPA. These types of ministerial acts do not amount to a "determination," and do not comport with the Director's obligations to limit delivery of water to beneficial uses.

CONCLUSION

Rangen has not established the "prima facie" elements to show material injury. Brief at 20. Indeed, material injury is not established by a "prima facie" showing—the only presumption that Rangen is entitled to in this proceeding is "[t]he presumption . . . that the senior is *entitled* to his decreed water right"—to be clear, this does not equate to a presumption that a senior's

decreed water right is *materially injured*. *Id.* (emphasis added). The Director's obligation is to hold a hearing to resolve material facts in dispute , and to review more than Rangen's petition, decrees and the ESPAM Model before making a finding of material injury. Accordingly, Pocatello respectfully requests that the Director deny Rangen's Motion.

Respectfully submitted this 8th day of February, 2013.

CITY OF POCATELLO ATTORNEY'S OFFICE

By 
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WHITE & JANKOWSKI

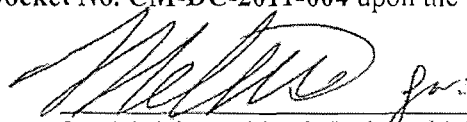
By 
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By 
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Response to Rangen, Inc.'s Motion for Partial Summary Judgment re: Material Injury for Docket No. CM-DC-2011-004** upon the following by the method indicated:



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IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHT NOS.) Docket No. CM-DC-2011-004
36-02551 AND 36-07694)
(RANGEN, INC.)) **AFFIDAVIT OF JOHN D. WOODLING**

STATE OF COLORADO)
County of Mesa) ss.

JOHN D. WOODLING, being first duly sworn upon oath, deposes and says:

I am over the age of 18 and state the following based upon my own personal knowledge and professional expertise:

1. My resume reflecting my professional experience is attached as Exhibit A to this affidavit.
2. I have filed the following report in this case :

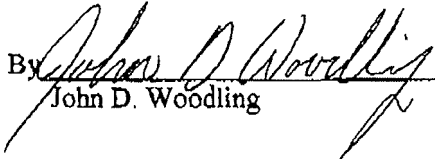
- i. Expert Rebuttal Report, by John D. Woodling, dated February 7th, 2012,

AFFIDAVIT OF JOHN D. WOODLING

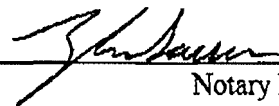
3. The unredacted version of this report, filed under seal, contains my true and correct opinions in this case and the bases of those opinions.
4. The contents of the expert report are based on information known to me at the time of filing of this affidavit, and are true and correct to best of my knowledge, information and belief.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 7 day of February, 2013.

By 
John D. Woodling

BEFORE ME, the undersigned, a Notary Public, in and for said County and State on this 7th Day of February, 2013, personally appeared John D. Woodling, who executed the above as his free and voluntary act.


Notary Public

432 White Ave

Grand Junction, CO 81501

My Commission Expires: 02/24/2015

TYLER SASSER NOTARY PUBLIC STATE OF COLORADO NOTARY ID 20114011345 MY COMMISSION EXPIRES FEB. 24, 2015
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CURRICULUM VITAE

John Woodling, Ph.D.

Aquatic Biologist
2180 1/2 K 1/2 Road, Grand Junction, Colorado 81505

970-361-7004

woodling@colorado.edu

EDUCATION

Ph.D., Biology Major, University of Colorado, Boulder, Colorado, 1993.

Title of Doctoral Dissertation: "Factors Effecting Toxicity of Metals To Brown Trout, An In Situ study of the Arkansas River"

M.S., Biology Major, Chemistry Minor, University of Louisville, Louisville, Kentucky, 1971.

Masters Thesis: "Biological, Chemical, and Physical Characteristics of Brashears Creek, Spencer and Shelby Counties"

B.S., Biology Major, Mathematics Minor, Southern Colorado State College, Pueblo, Colorado, 1968.

PROFESSIONAL EXPERIENCE

- | | |
|------------------------------------|---|
| Jan 2007
Present | College Instructor
Mesa State College, Grand Junction, Colorado. Scientific Writing, Aquatic Entomology and Fish Biology (Undergraduate) |
| Jan. 2004
Present | Consultant, Woodling Aquatics, LLC.
Clients include Colorado Trout Unlimited, Colorado State Land Board, Colorado Division of Hazardous Materials and Waste Management, West Slope Water Network, Sierra Club, Western Resource Advocates, Eagle River Watershed Council and Eagle Mine Limited. Prepare technical assessments of environmental issues in aquatic systems. Represent organizations at Colorado Water Quality Control rulemaking hearings and testify as expert witness in US District Court. |
| Jan. 1994
Present. | University Instructor
University of Denver, Community College, Environmental Policy Management
Instructor , Wetland Ecology, General Ecology, Aquatic Toxicology, Research Writing, Endangered Species and Introduction to Water Quality (Graduate level classes) and capstone student advisor. |
| Jan 1998
Present | Research Associate
University of Colorado Boulder, Colorado. Awarded US EPA grant in 2003 to study impacts of estrogenic compounds on Colorado fish populations. |
| Jan. 1997
2003 | University Instructor
University of Colorado, EPO Biology. Stream Biology. |
| July 2002 -
Retired
May 2003 | Cost Center Supervisor
Colorado Division of Wildlife (DOW), Denver Colorado <ul style="list-style-type: none">• Principal duty was to manage and supervise water unit of the habitat section, including water quality and Water Quantity aspects of agency goals and objectives.• Develop budget and work objectives used by DOW to respond to water resource issues.• Supervised and directed water unit employees to achieve program goals Designed and developed web-based model to analyze fishery and habitat data for DOW use. <ul style="list-style-type: none">• Participated in state and federal Superfund and CERCLA by development and writing of and/or review of remedial investigation documents, feasibility studies and remedial action plans; negotiate for the state in settlement actions, testify in water quality related hearings and court cases. |
| July 1987 -
June 2002. | Program Specialist
Colorado Division of Wildlife (DOW), Denver Colorado <ul style="list-style-type: none">• Principal duty was to represent the DOW in all matters pertaining to water quality issues. |

- Developed policy and programs used by DOW to respond to water quality issues.
- Designed and performed laboratory and field research studies of rivers throughout Colorado to define and quantify impacts of pollutants to aquatic ecosystems. Projects included efforts to create biological stream standard proposals for Colorado's eastern plains warm water streams and rivers and mountain trout streams. Potential biological stream standards were developed using results from genetic analysis of trout and aquatic macroinvertebrates, fish community structure modeling and stress hormone response studies on a variety of fish species. Ancillary studies included a multi-year monitoring program of the Eagle River, Arkansas River and Clear Creek to assess efficacy of remediation programs and systematic studies of the fish genera *Phoxinus* and *Cottus* in Colorado.
- Wrote and submitted successful grant applications to receive funding from US EPA, Colorado Department of Public Health and private enterprise for field and laboratory studies.
- Participated in state and federal Superfund and CERCLA by review and/or development of remedial investigation documents, feasibility studies and remedial action plans; negotiated for the state in settlement actions involving fish kills and CERCLA actions.
- Created DOW position in rulemaking hearings for the Colorado Water Quality Control Commission (WQCC) through which stream standards and use classifications are adopted.
- Member Colorado 319 Nonpoint Pollution Task Force.
- Appointed by WQCC to rewrite Colorado Stream Standards for nitrogen compounds.
- Testified as expert witness in court proceedings and rulemaking hearing of the WQCC.

April 1984 -
July 1987

Coldwater Program Specialist, DOW

- Developed, implemented and monitored statewide DOW coldwater fishery program.
- Developed annual budgets for DOW—fish hatcheries, aquatics section and aquatic research—\$6 million/year.
- Developed statewide DOW fish program budget, including hatcheries.
- Assisted DOW fish hatcheries in increasing production and efficiency.
- Co-authored report that resulted in the reorganization of the DOW fish hatchery system.
- Provided WQCC with technical information regarding water quality issues such as mine drainage.

July 1979 -
April 1984

Warmwater Program Specialist, DOW

- Developed, implemented and monitored statewide DOW warmwater fishery program.
- Prepared DOW response to legislative queries regarding annual budget.
- Worked with fish hatcheries to increase production and efficiency.
- Provided WQCC and Colorado Wildlife Commission with technical information regarding water quality issues such as nutrient enrichment and acid rain.

Sept. 1978 -
July 1979

Project Manager

Camp, Dresser and McKee, Denver, Colorado.

- Prepared bids, planned and directed interdisciplinary studies. Wrote final reports for these studies.
- Represented power companies, coal mining and other underground mining corporations.

Sept. 1973 -
Sept. 1978

Research Biologist

Colorado Water Quality Control Division, Denver, Colorado

- Planned and performed stream and river basin studies concerning impacts of mining, milling, agricultural, domestic and industrial effluents on water quality.
- Monitored and analyzed biological, chemical and physical components of aquatic ecosystems to determine impacts from effluents on these systems.
- Performed in situ assays to determine toxicity of pollutants to resident fish populations.
- Served as expert witness at public hearings and adjudicatory hearings.
- Served as member of subcommittee to develop Colorado water quality standards and use classifications.

Jan. 1971-
May 1971

College Instructor

- Taught Human Anatomy and Physiology, University of Southern Colorado.

Sept. 1971-
June, 1972

High School Teacher

Cathedral High School, Denver, Colorado.

- Taught high school biology and coached football and wrestling.

July 1968-
Dec, 1970

Research Assistant

University of Louisville, Louisville, Kentucky

- Implemented a pre-impoundment study of the Salt River in central Kentucky. Collected and analyzed water quality samples, collected and identified aquatic macroinvertebrate and fish samples.
- Collected and analyzed samples measuring the movement of radioactive nucleotides through a spring-fed system, Doe Run in Kentucky.

Sept. 1966-
Dec. 1967.

Laboratory Assistant

Southern Colorado State College, Pueblo, Colorado.

- Taught laboratory sections in zoology, botany, plant physiology and ecology

PUBLIC SERVICE

Colorado 319 Nonpoint Pollution Council. Voting member 1989-2001.

Cherry Creek Basin Authority. Voting member 2001-2005. Appointed by Governor of Colorado.

PAPERS PRESENTED AT PROFESSIONAL MEETINGS

Woodling, J. 1984. Acid precipitation impacts in the upper Colorado River Basin, a long-term situation . Upper Basin Subtechnical Committee. Western Association of Fish and Wildlife Agencies. Las Vegas, Nevada.

Woodling, J. 1984. Potential impacts on aquatic systems of Colorado attributable to acid precipitation. 9th Annual Colorado Water Workshop. Rural Communities Institute. Gunnison, Colorado.

Woodling, J. 1984. Biologic recovery of Coal Creek: A Colorado stream impacted by mine drainage. 114th Annual Meeting of the American Fisheries Society. Ithaca, New York.

Woodling, J. 1994. The South Platte River from Denver to Nebraska: Water quality monitoring is not a simple process. The South Platte River Forum. Greeley, Colorado.

Jones, R.E., K.H. Lopez, T. Maldonado, T.R. Summers, C.H. Summers, C. Propper, and J. Woodling. 1995. Unilateral ovariectomy influences hypothalamus catecholamine asymmetries in a lizard that exhibits alternation of ovulation. Annual Western Regional Conference on Comparative Endocrinology. Seattle, Washington.

Norris, D.O., S. Felt, J. Woodling, and R.M. Doris. 1995. Internal axis of brown trout, *Salmo trutta*, living in metal-contaminated waters of the Eagle River, Colorado. Annual Western Regional Conference on Comparative Endocrinology. Seattle, Washington.

Woodling, J. 1995. Mine reclamation: What works, what doesn't at the close of the 20th Century. 15th Annual Meeting of the Society of Environmental Toxicology and Chemistry. Denver, Colorado.

Nykerk, S. and J. Woodling. 1996. Nutrient patterns in the mainstem South Platte River, Denver to Julesburg, Colorado: Seasonal and temporal variations, a long-term Tom Sawyer monitoring program. Platte River Basin Ecosystem Symposium. Kearney, Nebraska.

Woodling, J. 1996. What if anything is a redbelly dace in Colorado. 45th annual workshop. Great Plains Fisheries Workers Workshop. Great Plains Fisheries Workers Association. Fort Collins, Colorado.

Woodling, J. 1996. Physiological and weight changes of wild brown trout inhabiting waters with acutely toxic cadmium and zinc concentrations: an *in situ* study. International Congress on the biology of fishes. San Francisco State University. San Francisco, California.

Woodling, J. and S. Brinkman. 1999. Effects of pre-exposure on toxicity of cadmium and zinc in combination to young brown trout (*Salmo trutta*). Society of Environmental Toxicology and Chemistry. Twentieth National Meeting. Philadelphia, Pennsylvania.

Woodling, J., S. Albeke, S. Nykerk. 2000. Fish community stability and change in the eastern plains streams of Colorado from the 1970s to the new millennia. American Fisheries Society, National Meeting. St. Louis, Missouri.

Woodling, J, T. Maldonado, D.O. Norris and A. Vajada. 2003. Initial observations of intersex fish in the eastern plains streams of Colorado. American Fisheries Society, National Meeting, Quebec, Canada.

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- Woodling, J. 1985. Colorado's Little Fish. Colorado Division of Wildlife, Denver, CO. 77 pp.
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- Jones, R.E., K.H. Lopez, T.A. Maldonado, T.R. Summers, C.L. Summers, C.R. Propper and J.D. Woodling. 1997. Unilateral ovariectomy influences hypothalamic monoamine asymmetries in a lizard (*Anolis*) that experiences alternation of ovulation. General and Comparative Endocrinology. 108:306-315.
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- Woodling, J. 1986. What did I catch? In: Colorado Outdoors. Colorado Division of Wildlife. 35:10-11.
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- Woodling, J. 1994. Listen to the murmur of the cottonwood trees. In: Colorado Outdoors. Colorado Division of Wildlife. 43:28-30.
- Woodling, J. 2004. How many fish could a garter snake eat if a garter snake could eat fish? Colorado Fishing Guide No. 13. Colorado Division of Wildlife. Denver, Colorado.

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- Woodling, J. 1974. Water quality investigations of the mainstem Colorado River, Dotsero to Utah. Colorado Water Quality Control Division. Colorado Department of Health, Denver, Colorado. 45 pp.
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- Woodling, J. 1975. Water quality investigations of the North Fork of the Gunnison River, Delta and Gunnison Counties, Colorado. Colorado Water Quality Control Division. Colorado Department of Health, Denver, Colorado. 14 pp.
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- Woodling, J. 1976. Effects of mining activities on Willow Creek, Mineral County, Colorado. Colorado Water Quality Control Division. Colorado Department of Health, Denver, Colorado. 15 pp.
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Woodling, J. 1990. Use attainability study California Gulch. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 34 pp.

Woodling, J. 1990. Metal tissue analysis of Clear Creek trout. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 20 pp.

Woodling, J. 1990. Intensive creel census: Arkansas River. Lake and Chaffee Counties. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 20 pp.

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Woodling, J. 1992. Episodic metal contamination of the Arkansas River by non-point pollution from California Gulch. Colorado Department of Natural Resources. Colorado Division of Wildlife. 11 pp.

Woodling, J. 1993. Annual Report on the Biological Assessment of the Eagle River Superfund Site, Eagle County, Colorado. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 34 pp.

Woodling, J. 1993. Investigations of Impacts of Point and Non-Point Pollution on Eastern Plains Fisheries in Colorado: South Platte and Arkansas Rivers. Annual Segment Report, Federal Aid Project F-84-R-6. Colorado Division of Wildlife, Denver, Colorado.

Woodling, J. And R. DeWeese. 1993. Assessment of the trout population in the upper Arkansas River Basin of Central Colorado. U.S. Bureau of Reclamation. Loveland, Colorado. 34 pp.

Woodling, J. 1994. Investigations of Impacts of Point and Non-Point Pollution on Eastern Plains Fisheries in Colorado: South Platte and Arkansas Rivers. Annual Segment Report, Federal Aid Project F-84-R-6. Colorado Division of Wildlife, Denver, Colorado.

Woodling, J. 1995. Annual Report on the Biological Assessment of the Eagle River Superfund Site, Eagle County, Colorado. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 48 pp.

Woodling, J. 1996. Physical habitat analysis and biological assessment. Appendix B. Use attainability analysis, Alamosa River Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 74 pp.

Woodling, J. 1996. Annual Report on the Biological Assessment of the Eagle River Superfund Site, Eagle County, Colorado. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 83 pp.

Woodling, J. 1997. Clear Creek Biological Monitoring Program. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 77 pp.

Woodling, J. And J. Dorsch. 1997. Annual Report on the Biological Assessment of the Eagle River Superfund Site, Eagle County, Colorado. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 99 pp.

Woodling, J., D. Langlois and W. Andree. 1998. Intensive Creel Census Eagle River, Eagle County, Colorado, July through October, 1998. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 20 pp.

Woodling, J. and Dan Chase. 1998. Annual Biological Assessment of the Eagle River Superfund Site, Eagle County, Colorado. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 107 pp.

Woodling, J., M. Gasaway and J. Dominquez. 1999. Biological Assessment of Clear Creek. Colorado Department of Natural Resources. Colorado Division of Wildlife, Denver, Colorado. 98 pp.

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Woodling, J. and A. Rollings. 2008. Biological Assessment of Clear Creek. Colorado Department of Public Health and the Environment. Colorado Division of Hazardous Materials and Waste Management, Denver, Colorado.

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Sauter, S., A. Madison, J. Woodling. 2012. Uncompahgre River Water Quality Report. Uncompahgre River Watershed Partnership. Ridgway, Colorado.

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sarahk@white-jankowski.com

ATTORNEYS FOR THE CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHT NOS.) Docket No. CM-DC-2011-004
36-02551 AND 36-07694)
) **AFFIDAVIT OF GREGORY K. SULLIVAN**
(RANGEN, INC.))
_____)

STATE OF COLORADO)
) ss.
County of Denver)

GREGORY K. SULLIVAN, being first duly sworn upon oath, deposes and says:

I am over the age of 18 and state the following based upon my own personal knowledge and professional expertise:

1. I am a principal at Spronk Water Engineers.
2. I hold professional engineering registrations in Colorado, Idaho, Nevada, and Oklahoma.
3. My resume reflecting my professional experience is attached as Exhibit A to this affidavit.
4. I have filed the following reports filed in this case:

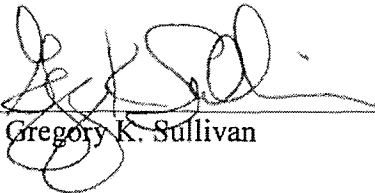
AFFIDAVIT OF GREGORY K. SULLIVAN

EXHIBIT 2

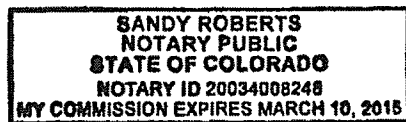
- i. Spronk Water Engineers' Expert Report, dated December 21, 2012.
- ii. Spronk Water Engineers' Rebuttal Report, dated February 7, 2013.
2. The unredacted versions of these reports, filed under seal, contain my true and correct opinions in this case and the bases of those opinions.
5. The contents of the expert reports are based on information known to me at the time of the filing of this affidavit, and are true and correct to best of my knowledge, information and belief.


FURTHER AFFIANT SAYETH NAUGHT.

Dated this 7 day of February, 2013.

By 
Gregory K. Sullivan

BEFORE ME, the undersigned, a Notary Public, in and for said County and State on this 7th Day of February, 2013, personally appeared Gregory K. Sullivan, who executed the above as his free and voluntary act.




Notary Public

My Commission Expires: March 10, 2015

Gregory K. Sullivan, P.E.

Principal Water Resources Engineer

Education: B.S., Civil Engineering, May 1985, Colorado State University.

M.S., Civil Engineering, May 1990, University of Colorado - Denver.
Thesis - "Optimal Water Supply Capacity Expansion Using Objective Space Dynamic Programming"

Continuing Education: Applied Ground Water Flow Modeling,
International Ground Water Modeling Center, Colorado School of Mines

Professional Registration: Professional Engineer in Colorado (#26802), Idaho (#8387),
Nevada (#10868), and Oklahoma (#6174)

Professional Memberships: American Society of Civil Engineers (Water Laws Committee)
Colorado Ground Water Association
American Water Resources Association

Professional Experience:

1990 - Present: *Sprink Water Engineers, Inc., Principal and Senior Water Resources Engineer*

He is responsible for the management and successful completion of water rights engineering and water resources planning projects. Projects include water supply planning, changes of water rights, plans for augmentation, historical consumptive use and stream depletion analyses, water rights evaluations and appraisals, water supply planning, reservoir operations studies, ground water modeling and water rights accounting. Mr. Sullivan has extensive experience in litigation support and has provided expert testimony before courts and state agencies on numerous occasions.

1985 – 1990: *J. W. Patterson & Associates, Inc., Water Resources Engineer*

Performed water supply, hydraulic and hydrologic analyses for agricultural, industrial, commercial and municipal developments. Managed yield and impact analyses of water rights adjudications, transfers, exchanges and plans for augmentation. Conducted ground water studies including aquifer testing, project dewatering and water well design and construction monitoring.



Sprink Water Engineers, Inc.

1000 Logan Street • Denver, Colorado 80203-3011 • 303.861.9700 • fax 303.861.9799

List of Representative Projects:

Arkansas River Compact Litigation, Kansas v. Colorado.
Change of Water Rights and Plan for Augmentation, Perry Park Water & Sanitation
Change of Water Rights, City of Loveland
Change of Water Rights, Perry Park Water and Sanitation District
Cherry Creek Aquifer Modeling Project
Conjunctive Management Rules, Water Resource Coalition (Idaho)
Eastern Snake Hydrologic Modeling Committee, City of Pocatello, Idaho
Lawn Irrigation Return Flow Study, Arapahoe County Water and Wastewater Authority (ACWWA)
Plan for Augmentation, Boulder Mountain Lodge
Plan for Augmentation, Upper Cherry Creek Water Association (UCCWA)
Plan for Augmentation, Cherry Creek Project Water Authority
Rio Grande Project Modeling, State of New Mexico
Snake River Basin Adjudication, City of Pocatello
Snake River Delivery Calls and Litigation, City of Pocatello, Idaho
Water Rights Accounting, ACWWA
Water Rights Accounting, City of Loveland
Water Rights Accounting, UCCWA
Water Rights Protection, ACWWA
Water Rights Protection, East Cherry Creek Valley Water and Sanitation District
Water Rights Protection, Climax Molybdenum
Water Rights Protection, City of Loveland
Water Supply Planning, ACWWA
Water Supply Yield Modeling, Genesee Water and Sanitation District
Plan for Augmentation, Perry Park Water and Sanitation District
Water System Modeling, City of Loveland
Water System Modeling, Cherry Creek Project Water Authority
Water System Modeling, Genesee Water & Sanitation District
Water System Modeling, Perry Park Water & Sanitation

