

RECEIVED

MAR 22 2013

DEPARTMENT OF
WATER RESOURCES

A. Dean Tranmer (ISB # 2793)
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 239-6986 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn (ISB # 7928)
Mitra M. Pemberton
J. Ryland Hutchins
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

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: SOURCE**
_____)

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: Source ("Motion"). Rangen's decrees support a finding by the Director that the source of water at the Martin-Curren Tunnel ("Curren Tunnel" or "Tunnel") is ground water whether the Director finds the decrees to be unambiguous as argued by Idaho Ground Water Appropriators, Inc. ("IGWA"), or ambiguous, as argued within. While IGWA and Pocatello reach the same result, we do so by different (but not inconsistent) arguments. The critical inquiry is whether the partial decrees are ambiguous or unambiguous; if they are ambiguous Rangen, Inc.'s ("Rangen") Motion should be denied because of a dispute of fact; if unambiguous, Rangen's Motion should be denied because the source of water is ground water.

STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment can only be granted if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). “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.” *Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002) (internal citation omitted). If the movant seeks interpretation of a document as a matter of law and the document is ambiguous, a question of fact exists and summary judgment is inappropriate. *Porter v. Bassett*, 146 Idaho 399, 405, 195 P.3d 1212, 1218 (2008) (summary judgment denied where deed language was ambiguous). Rangen’s Motion asks the Director to interpret the source language in its partial decrees which by their terms are ambiguous. As such Rangen’s Motion raises issues of disputed fact, and thus cannot be granted.

I. RANGEN’S PARTIAL DECREES ARE AMBIGUOUS

Rangen’s partial decrees 36-02251 and 36-07694 (collectively, the “Curren Tunnel Rights”) adjudicated water rights to the “Martin-Curren Tunnel,” a supply Rangen asks the Director to construe as surface water. Motion at 13–17. However, the decrees themselves do not identify the Martin-Curren Tunnel water supply as either ground water or surface water. *See* Partial Decrees for Water Rights 36-02251 and 36-07694, *attached* as Ex. A to Aff. of Fritz X. Haemmerle In Support of Rangen’s Motion for Partial Summary Judgment Re: Material Injury, Jan. 8, 2013. As described in Rangen’s Motion, the documents in Rangen’s water rights backfile describe the source of water for the Curren Tunnel Rights in a variety of ways, but consistently refer to “underground” springs. However, given the myriad of references to the source of

Rangen’s water rights, the partial decrees are arguably susceptible to multiple reasonable interpretations. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 454–55, 259 P.3d 595, 600–01 (2011) (“A contract term is ambiguous where there are two different reasonable interpretations or the language is nonsensical.”). Because the decrees are ambiguous on their face, the Director should deny Rangen’s Motion. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986); I.R.C.P. 56(c).

It is the failure of the partial decrees to specifically identify the source water as ground water or surface water that creates the ambiguity in the substance of Rangen’s partial decrees. Rangen implicitly admits as much, as it devotes much of its Motion to summarizing the myriad of different ways that the source of the Curren Tunnel Rights has been described through time. Motion at 2–9. *See Knipe Land*, 151 Idaho at 455, 259 P.3d at 601 (“[I]t is only when that instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact.”). The Director should find the partial decrees to be ambiguous, precisely because interpretation of the decrees requires examination of documents outside the four corners of the decrees¹.

A. While the partial decrees are ambiguous and summary judgment is not proper, the Director should determine after a hearing that the source of water at the Curren Tunnel is ground water.

Under Idaho Code section 42-230 a “well” is defined as: “an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained. I.C. § 42-230(b) (emphasis added). The Curren Tunnel fits this definition. Unlike natural surface springs, the Curren Tunnel is an “artificial excavation” which accesses ground water. Rangen staff estimate that the Curren

¹ In addition, Rangen’s reliance on allegations of “local practice” regarding measurement locations, spring identification and related matters (Motion ¶¶ 22–26, at 10–11) is insufficient to meet Rangen’s burden of demonstrating no undisputed facts under Rule 56(c).

Tunnel extends “maybe 300 foot” back into the canyon rim, and the opening of the Curren Tunnel is located about 70 feet below the canyon rim. Tate Dep. 14:9–12, Sept. 11, 2012, *attached* as Ex. A to Aff. of J. Ryland Hutchins, Mar. 22, 2013; Hinckley Expert Report at 20, Dec. 20, 2012. Accordingly, it is undisputed that the end of the tunnel is well over “eighteen feet in vertical depth” below the land surface of the canyon rim above it. Because the Curren Tunnel penetrates the aquifer to receive its supply, it captures ground water under Idaho Code section 42-230(a) (““Ground water” is all water under the surface of the ground whatever may the geologic structure in which it is standing or moving.”). Following a hearing in this matter, the Director as the trier of fact can resolve any alleged ambiguity in the decreed source of the Curren Tunnel Rights by applying hydrogeologic facts—which support the administration of the Curren Tunnel Rights as ground water.

B. The Director’s interpretation of the partial decrees is within his discretion and is not a re-adjudication.

While the issues raised in the Motion are not proper for determination by summary judgment, the Director has the authority to make a determination at the hearing on how to properly administer Rangen’s water rights. Contrary to Rangen’s arguments, the Director is authorized to interpret the partial decrees in the course of the delivery call; furthermore, his interpretation will not amend or otherwise alter the underlying SRBA partial decrees. In *A&B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 284 P.3d 225, 239 (2012), the Supreme Court affirmed the exercise of the Director’s discretion in interpreting A&B’s partial decrees to require A&B to take reasonable steps to interconnect its water system prior to filing a delivery call. This holding was consistent with the earlier decision of the Idaho Supreme Court, *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.* (“AFRD#2”), 143 Idaho 862, 877, 154 P.3d 433, 448 (2007), in which the Court identified the factors the Director may

consider under the Conjunctive Management Rules in responding to a delivery call. The Court also found that such consideration is not a “re-adjudication” of the water right. *Id.* The Director has the authority to interpret Rangen’s partial decrees in this matter.

II. RANGEN’S DEMAND TO HAVE ITS USE OF THE LOWER SPRINGS RECOGNIZED IN THIS DELIVERY CALL REQUIRES THE DIRECTOR TO EXAMINE WHETHER RANGEN’S MEANS OF DIVERSION IS REASONABLE

As established above, Rangen’s partial decrees are ambiguous because they do not identify whether the source is ground water or surface water; by the same token, the partial decrees do not identify a source of supply beyond the Curren Tunnel. Further, there are no terms to suggest that the spring located on the lower talus is a source of water to be served by Rangen’s water rights. In fact, Rangen would not even have a factual basis to make this argument but for the fact that it measures its diversions below the fish hatchery; if Rangen measured its water at the point of diversion (e.g., the Curren Tunnel) as required by Idaho law, the issue of whether springs emanating from the talus slope lower down are properly encompassed in its adjudicated rights would not even arise. Rangen bootstraps the Department’s past reluctance to require Rangen to measure at its point of diversion into a legal argument to expand the sources encompassed by its partial decrees. This alone is a basis for rejection of Rangen’s Motion that the talus slope water should be included with the Curren Tunnel water as a source of supply.

As a threshold matter, whether Rangen may call for water supplies from the lower talus slope springs is not answered by the plain language of the partial decrees, adding to the argument that the decrees are ambiguous. As such, the Director may examine Rangen’s demand to call for water from the lower talus slope as part of its decreed supply but in so doing, the Director should also examine the reasonableness of Rangen’s demands in light of its *per se* unreasonable means of diversion.

As more fully explained in Pocatello’s Memorandum in Support of Its Motion for Declaratory Order, the configuration of Rangen’s facility prevents lower talus slope water from being used in the upper portions of the facility, namely the greenhouse, hatch house, and small raceways (collectively, “Upper Facilities”). City of Pocatello’s Memorandum In Support of Its Motion for Declaratory Order Regarding Rangen’s Legal Obligation to Interconnect at 2, Mar. 8, 2013. *See also* Hand-drawn Map of Rangen Facility, *attached* as Ex. D to Aff. of J. Ryland Hutchins (showing routing of “springs” entering the facility below the supply pipes for the Upper Facilities). About two-thirds of Rangen’s water supply comes from the talus slope. Colvin Dep. 63:21–64:11, Mar. 4, 2013, *attached* as Ex. B to Aff. of J. Ryland Hutchins. By any measure, Rangen’s inability to use 100% of its first use water throughout its facility is a serious deficiency in Rangen’s diversion works.²

Under Rangen’s theory, it can request curtailment of the entire Eastern Snake Plain Aquifer (“ESPA”), including Idaho’s third largest city, so that it can continue its inefficient diversions practices, where approximately two-thirds of the total water supply it claims as part of its decrees is not even available to the upper portion of the facility. Yet Rangen has never formally considered installing a pipe to pump first use water from the lower talus springs to the Upper Facilities. Spronk Water Engineer’s Expert Rebuttal Report at 15, Feb. 7, 2013 (“None of these alternatives [discussed by Rangen in its opening expert report] included the most promising and logical alternative that is pumping water up to the Small Raceways (and Hatch House or Greenhouse if necessary) from the collection area behind the diversion dam for the Large Raceways.”). If Rangen wants the Director to consider both its Curren Tunnel supply and the lower talus slope supply in its delivery call, Rangen must make 100% of its supply available to

² Rangen’s fish expert Charlie Smith was unaware of any fish hatchery that did not have all of its first use water available to the entire facility. Smith Dep. 129:22–131:8, Mar. 7, 2013, *attached* as Ex. C to Aff. of J. Ryland Hutchins.

all of the structures in its facility. Until Rangen does, its diversion from the talus slope springs is unreasonable under the Conjunctive Management Rules and the Supreme Court's holding in *AFRD #2*.

CONCLUSION

The Curren Tunnel is unique among springs in the area because it is an artificial excavation which penetrates deep into the aquifer in order to capture groundwater from the ESPA. The partial decrees for Rangen's Curren Tunnel Rights are ambiguous because the term "Martin-Curren Tunnel" fails to adequately describe the source of Rangen's water rights which could be reasonably interpreted as either ground water or surface water. The Director has the authority to construe the sources of the partial decree, but such an analysis inevitably involves issues of fact which should not be decided in a summary judgment motion. If Rangen wishes to call for water from the lower talus slope as well as the Curren Tunnel its current diversion is not reasonable in so far as it brings the majority of Rangen's water supply into the facility below the Upper Facilities. Accordingly, Rangen's Motion must be denied.

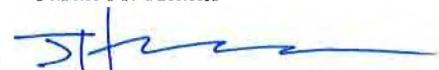
Respectfully submitted this 22nd day of March, 2013.

CITY OF POCATELLO ATTORNEY'S OFFICE

By  for
A. Dean Tranmer

WHITE & JANKOWSKI

By  for
Sarah A. Klahn

By  for
J. Ryland Hutchins

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 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: Source for Docket No. CM-DC-2011-004** upon the following by the method indicated:



Sarah Klahn, White & Jankowski, LLP

<p>Gary Spackman, Director State of Idaho, Dept of Water Resources 322 E Front St PO Box 83720 Boise ID 83720-0098 deborah.gibson@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Original sent via U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile – 208-287-6700 = Phone – 208-287-4803 <input checked="" type="checkbox"/> Email</p>
<p>J. Justin May May Browning 1419 W Washington Boise ID 83702 jmay@maybrowning.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-342-7278 <input checked="" type="checkbox"/> Email</p>
<p>Robyn Brody Brody Law Office PO Box 554 Rupert ID 83350 robynbrody@hotmail.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-434-2780 = Phone 208-434-2778 <input checked="" type="checkbox"/> Email</p>
<p>Fritz Haemmerle Haemmerle Haemmerle PO Box 1800 Hailey ID 83333 fxh@haemlaw.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-578-0564 <input checked="" type="checkbox"/> Email</p>
<p>Garrick L. Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov kimi.white@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-287-6700 <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Blvd Ste 300 Boise ID 83702 rcb@racinelaw.net cmm@racinelaw.net bjh@racinelaw.net</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-433-0167 <input checked="" type="checkbox"/> Email</p>
<p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-234-6297 <input checked="" type="checkbox"/> Email</p>

<p>C. Thomas Arkoosh Arkoosh Law Offices PO Box 2900 Boise ID 83701 tom.arkoosh@arkoosh.com erin.cecil@arkoosh.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-343-5456 <input checked="" type="checkbox"/> Email</p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com jft@idahowaters.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-735-2444 <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-878-2548 <input checked="" type="checkbox"/> Email</p>
<p>Jerry R. Rigby Hyrum Erickson Robert H Wood Rigby Andrus & Rigby PO Box 250 Rexburg ID 83440-0250 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-356-0768 <input checked="" type="checkbox"/> Email</p>