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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 CLOSING REPLY BRIEF**

Rangen, Inc., by and through its attorneys, submits the following Closing Reply Brief in accordance with Director Spackman's verbal order on May 16, 2013.

I. INTRODUCTION

Tim Deeg, the Chairman of the Board of the Idaho Ground Water Appropriators, testified that he knows that Idaho is a prior appropriation state. (Tr., p. 1747, l. 18-21). He admitted that Idaho farmers understand that curtailment is a risk they take if a junior user is causing harm to a senior user. (Tr., p. 1748, l. 1-4). Mr. Deeg also admitted that junior-priority groundwater pumping in the Eastern Snake Plain Aquifer impacts Rangen's spring flows. (Tr., p. 1750, l. 2-

12). Mr. Deeg acknowledged that farmers who have late water rights understand that there is a risk that senior users like Rangen will call for their water. (Id.).

Despite IGWA's acknowledgement of the inherent risks involved in farming and their participation in the development of ESPAM2.1, IGWA and Fremont-Madison now claim that the Department should not use the model to evaluate Rangen's Call even though the model is the best available science and IDWR Staff recommends its use. The Staff's analysis of Rangen's Call using ESPAM2.1 shows that curtailment of junior-priority groundwater pumping within the boundaries of the model domain would result in an increase of 18 cfs at Rangen's spring cell. See, Exh. 3203, p. 7. Ninety percent of this water is predicted to show up within 13 years of curtailment – about the amount of time that has elapsed since Rangen made its first delivery call. (Id., p. 8). This would take Rangen's water flows to approximately 30 cfs (approximately 12 cfs of current flows + 18 cfs) which is more than two and a half times what Rangen is presently receiving and is well within the 20-30 cfs range which Pocatello claims Rangen needs to operate a commercial facility.

Curtailment would also result in a net aquifer recharge of approximately 1.2 MAF per year which is much needed and will benefit other water users who are also short of water. Even when the staff used the model to predict the results of curtailment using a Buhl to Salmon Falls reach analysis, ESPAM2.1 still showed that 17 cfs of water would show up at Rangen's spring cell within 11 years. While Rangen disputes the notion that its water right is limited to water that comes from the mouth of the Martin-Curren Tunnel itself, IDWR Staff developed a regression analysis which shows that 70% of the predicted water flow increase will accrue at the mouth of the Martin-Curren Tunnel. This means that even if Rangen cannot call on any water except that which comes from the mouth of the tunnel itself, a point Rangen does not concede, the model

still predicts an increase of 12.5 cfs if junior-priority groundwater pumping is curtailed across the area of common groundwater supply. Even under the most conservative analysis, Rangen's water flows would double from what it is presently receiving and fall within the range which Pocatello claims is needed for a commercial facility (20-30 cfs).

Despite the ESPAM2.1 model results, the opposing parties contend that the Director should reject Rangen's Petition for Delivery Call in its entirety. Their position is untenable because: (1) Rangen's Partial Decrees encompass Rangen's historical and actual beneficial use of the spring water that forms the headwaters of Billingsley Creek; (2) the opposing parties have not proven with clear and convincing evidence that junior-priority groundwater pumping is not causing material injury; (3) they have not proven with clear and convincing evidence that Rangen's diversion is unreasonable; (4) there is no rational or scientific basis for applying a ten percent "trimline" to the ESPAM2.1 results; and (5) Rangen's call is not futile. For these reasons, Rangen's Petition for Delivery Call should be granted in its entirety.

II. ARGUMENT

A. The Term "Martin-Curren Tunnel" Encompasses the Spring Complex that Forms the Headwaters of Billingsley Creek.

The opposing parties contend that Rangen's Delivery Call is limited to the water that comes from the mouth of the Martin-Curren Tunnel itself. In fact, Pocatello has crafted its entire closing analysis around the proposition that the Director has already ruled that Rangen cannot call on any water besides that which comes from the mouth of the Martin-Curren Tunnel, and argues that the Department cannot "paper over" Rangen's alleged illegal diversions. Pocatello misreads the Director's ruling and its assertion goes too far.

From the outset it is important to recognize that Director Spackman has not ruled that Rangen is limited to calling on water coming from the mouth of the Martin-Curren Tunnel itself.

He ruled that there are genuine issues of material fact as to whether Rangen can divert and call on spring water flows that emanate from outside the mouth of the tunnel, but are still within the 10 acre tract designated as Rangen's point of diversion. See, Order Granting in Part and Denying in Part IGWA's Petition for Reconsideration and Clarification, pp. 7-8. While Rangen disagrees with the assertion that its Partial Decrees do not include spring water outside the ten acre tract and has briefed this issue in detail in Rangen Inc.'s Closing Brief, the Director's ruling is what prompted Rangen to have Dr. Brockway perform a detailed analysis of where the spring water comes from. Dr. Brockway testified at trial that 97% of the spring water flows emanate from the ten acre tract defined in Rangen's Partial Decrees.

Just as Pocatello has misread Director Spackman's ruling on Rangen's source, it has also misread Idaho law regarding quasi estoppel. Pocatello argues that "Rangen's illegal diversions are just that, and cannot be 'papered over' due to the Department's failure to independently investigate whether Rangen is diverting from locations inconsistent with its decree." City of Pocatello's Closing Brief, p. 12. To support its position, Pocatello argues that Rangen cannot establish the elements of quasi estoppel. There are multiple problems with Pocatello's analysis.

To begin with, Pocatello has simply misstated Idaho law regarding quasi estoppel. Pocatello argues in its closing brief that:

> **Nor has Rangen established the elements necessary for quasi estoppel: quasi-estoppel requires prejudicial reliance by the party asserting estoppel, showing that said party has "'changed their position as a result of the alleged representation and suffered a detriment as a result thereof.'"** *Willig v. State, Dep't Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (citation omitted). While Rangen claims that it has relied upon the Department's lack of action to continue to appropriate water from the talus slope, Rangen has not *changed* its position to its detriment—Rangen has always appropriated water from its undecreed points of diversion, well before the Director issued the Second Amended Order in May of 2005.

City of Pocatello's Closing Brief, p. 11. This is not an accurate statement of Idaho law.

The Idaho Supreme Court explained the difference between equitable estoppel and quasi estoppel in Willig v. State Dep't Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). Pocatello cites the Willig decision, but does not accurately state the holding. While it is true that equitable estoppel requires a misrepresentation or concealment of fact and detrimental reliance, quasi estoppel does not require those showings. The Willig court actually held: "**Quasi estoppel is distinguished from equitable estoppel 'in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient.**'" Willig v. State, 127 Idaho at 261, 899 P.2d at 971 (quoting Evans v. Idaho State Tax Comm., 97 Idaho 148, 150, 540 P.2d 810, 812 (1975) (emphasis added). "**The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position**." Willig, 127 Idaho at 261, 899 P.2d at 971 (citing Mitchell v. Zilog, Inc., 125 Idaho 709, 715, 874 P.2d 520, 526 (1994) (emphasis added).

In this case, it would be unconscionable for the Department to find that Rangen's water rights do not include the entire spring complex that forms the headwaters of Billingsley Creek, which Rangen has been putting to beneficial use for the past 50 years. In 1979, the Department issued an Order granting Rangen the right to measure its water flows at the outlets rather than the inlets because IDWR recognized that it was impossible to measure inflows given the numerous springs that are the source of Rangen's water rights. (Exh. 1029, p.30). Rangen put the water to beneficial use, measured it regularly, and documented its flows over the past 50 years. In 2003, the Department independently investigated whether Rangen's use of water was within the scope of its rights when Rangen made its first Delivery Call. Cindy Yenter and Brian Patton were the Department employees who lead the 2003 investigation. (Tr., p. 547, l. 17-25). See, Exh. 1129

for a copy of Ms. Yenter's investigation memo which is titled "Water Right Review and Sufficiency of Measuring Devices, Rangen Aquaculture." Ms. Yenter explained that as part of the investigation, she and Mr. Patton examined how the water traveled through the facility, where the diversions were made, sufficiency of the water supply, and interconnection of the raceways:

> Q. Cindy, go over kind of procedurally what you did when Director Dreher asked you to go down to the Rangen facility in 2003.
>
> A. Okay. As I recall, we just did a basic walk-through of the facility, starting at the diversion, worked our way down through the facility, discussed how water traveled through the facility, where the measurements were made, where each use was diverted, you know, where the water discharged. Just -- and that's pretty standard when we go out to do an investigation, is kind of start at the top, work your way down. But we just went down through and asked questions related to, you know, sufficiency of the water supply and what was the -- you know, where did they divert their irrigation water and the interconnection between the raceways, because sometimes in a hatchery that's obvious and sometimes it's not so obvious.

(Tr., p. 550, l. 19 – p. 548, l. 4).

Following Ms. Yenter's investigation, the Department recognized in paragraph 54 of its findings in the Second Amended Order issued on May 19, 2005 that Rangen is legally entitled to appropriate water from the spring complex that forms the headwaters of Billingsley Creek. In that Order, the Department found:

> **The flow measurements that are considered to be representative of the total supply of water available to the Rangen hatchery facilities under water right nos. 36-15501, 36-02551, and 36-07694, consist of the sum for the discharge from raceways designated by Rangen as the "CTR" raceways and the flow over the check "Dam."** The dam is sited upstream for the discharge points from the CTR raceways and downstream from the discharge points from raceways designated by Rangen as the "Large" raceways. The sum of the discharge from the CTR raceways and the flow over the check dam is considered to be representative of the total supply of water available even though that at times some of the flow over the check dam may include water flowing from small springs downstream from the diversion to the Large raceways, water discharged

from the Large raceways that was not diverted though the CTR raceways and irrigation return flows.

See, Second Amended Order dated May 19, 2005 (attached to Haemmerle Affidavit in Support of Motion for Partial Summary Judgment re: Material Injury). See, Exh. 1074 for a diagram showing Rangen's measurement points discussed above.

Tim Luke, the Department's enforcement officer, testified that numerous IDWR employees, including himself, have been to the Rangen facility multiple times since the 2003 investigation, and no one has ever informed Rangen that it's water usage is outside the scope of its Partial Decrees. Given Rangen's 50 year history of water usage, the Department's order allowing Rangen to measure flows at the outlet because the spring sources were too numerous at the inlets, the Department's 2003 investigation, the Department's 2005 findings, and the fact that no one from the Department has ever told Rangen that its water usage was improper, it would be unconscionable for the Department to now change positions and hold that Rangen's water usage is outside the scope of its Partial Decrees. While Rangen does not have to show any type of detrimental reliance for the doctrine of quasi estoppel to apply, Rangen has detrimentally relied on the Department's conduct and findings.

On April 1, 2013, just after the Director heard oral arguments on Rangen's Motion for Partial Summary Judgment re: Source, IGWA's Ground Water Districts filed a claim to appropriate the spring water that Rangen has been using for the past 50 years and threatened to condemn Rangen's property to obtain access to it. See, North Snake GWD, Magic Valley GWD, et al.'s Application for Permit filed with IDWR on April 3, 2013 (attached hereto as Appendix A). Rangen subsequently filed a Late Claim in the SRBA to protect its historical usage of the water in the event of an adverse determination by Director Spackman, but IGWA's Ground Water Districts and Pocatello have now filed objections stating that Rangen's claim is too late

and has been improperly filed. See, Ground Water Districts' Objection to Rangen Inc.'s Motion to File Amended Claim and Pocatello's Corrected Response to Rangen's Motion for Late Claim and Amended Late Claim (attached hereto as Appendices B and C).

It would be unconscionable to allow this result given Rangen's historical use of the water, the Department's investigation and findings, and no notice that Rangen's historical water usage is improper. Pocatello's argument that Rangen cannot establish the elements of quasi estoppel is flawed and should be rejected. The bottom line is that Rangen's water usage is within the scope of its Partial Decrees, and, even if the Director were to be inclined to rule otherwise, the doctrine of quasi estoppel precludes such as ruling.

B. The Opposing Parties Have Not Even Addressed Whether Junior Ground Water Users Are Using Water Efficiently and Without Waste.

Rule 40.03 states that the Director ***will*** consider whether the junior-priority groundwater pumpers are using water efficiently and without waste. The rule states in relevant part:

> The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

IDAPA 37.03.11.040.c. The question of whether a junior is using water efficiently and without waste is a threshold question. The Director must consider the responding junior's use of water when evaluating a call, yet the opposing parties produced no evidence during the hearing related to the issue and did not even address this issue in their briefs. For this reason alone, the opposing parties' defenses to Rangen's call must fail.

C. The Opposing Parties Have Not Proven with Clear and Convincing Evidence that Rangen is Not Suffering Material Injury.

IGWA acknowledges that "since Rangen is receiving less than the maximum rate of diversion authorized under its water rights, any finding that Rangen is not suffering material injury must be supported by clear and convincing evidence." IGWA's Post-Hearing Brief, p. 8

(emphasis added). IGWA goes on to state: "Rangen must make a *prima facie* showing that it is suffering material injury, but once that is accomplished, juniors have the ultimate burden of proving no injury by clear and convincing evidence." Id. . "Once a decree is presented to an administrate 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).

Rangen Inc.'s Closing Brief sets forth in detail how its use of the water rights at issue has been hindered and impacted by reduced water flows caused by junior-priority groundwater pumping. Rangen has had to reduce fish production, lay off research, production and management staff, reconfigure water usage (added underground pipeline to move water from Small Raceways to Large Raceways) and lease additional facilities. Rangen has also had to alter research techniques (e.g., use cages in raceways) and even forego research because of the complexities involved in managing fish production, water flows and ingredient availability. Rangen has made a *prima facie* showing of material injury which means that the burden is on the opposing parties to prove non-injury by clear and convincing evidence.

The opposing parties argue that the Director should find that Rangen is not being materially injured by junior-priority groundwater pumping because: (1) Rangen does not need additional water to meet its obligations under the Idaho Power contract; (2) Rangen can perform research in the Greenhouse; and (3) Rangen does not operate its hatchery to maximize fish production. These arguments miss the mark and do not constitute the "clear and convincing" evidence that the Director needs to find in favor of the opposing parties.

To begin with, as explained in Rangen Inc.'s Closing Brief, the amount of water Rangen "needs" to fulfill the Idaho Power Contract is not the correct legal analysis. As Joy Kinyon,

Rangen's Aquaculture General Manager explained, Rangen has been responding to declining water flows for decades and has entered into the Idaho Power contract because it enables the company to beneficially use the limited water and personnel resources that it now has. The Idaho Power contract is the result of decades of declining water flows caused by junior-priority groundwater pumping, and it would be improper and unjust to measure Rangen's "need" for the water by how it is has adapted to the injuries it has sustained.

The correct legal analysis is whether Rangen can beneficially use the additional 18 cfs that ESPAM 2.1 shows would accrue if junior-priority groundwater pumping were curtailed across the model domain. Rangen has a 50+ year history of raising commercial trout and conducting valuable research at its Research Hatchery at flows much higher than 30 cfs (the current flows plus the predicted increase). The company is uniquely positioned in the trout industry because it makes its own feed and has the ability to sell all of the fish it raises, including those that are used for research. Joy Kinyon has no doubt about the company's ability to raise and sell fish and conduct research. Contrary to the opposing parties' assertion, Mr. Kinyon did not testify that Rangen does not want to sell fish on the open market because it competes with its customers. Mr. Kinyon explained that when it leased additional facilities (facilities other than the Research Hatchery) it had to balance that issue**, but not with respect to selling fish raised at the Research Hatchery**. (Tr., p. 512, l. 12-17).

The fact that Rangen has enough water to conduct research in the greenhouse also does not give rise to a finding that Rangen is not being materially injured by junior-priority groundwater pumping. Doug Ramsey explained how difficult conducting research has become as a result of the reduced water flows:

> Q. Mr. Ramsey, has Rangen's ability to conduct research at the research hatchery, has it been hindered or impacted by the declining water flows at the hatchery?

A. Absolutely.

Q. In what ways?

A. It makes it very difficult -- please repeat the question.

Q. Sure. Has Rangen's ability to conduct research at the research hatchery been hindered or impacted by declining spring flows at the hatchery?

A. Yes, it has. And to answer your question, **one is timing is very difficult to get an experiment all set up and then going at this point with low flows.** We have a number of components that must come together all at once in order for an experiment to happen. And those will be, of course, having the flow available at the hatchery or the lab at that time. **Another component is the fish themselves. And we have to have a particular size of fish.** Typically, **we're targeting, quite often, an ingredient in the feed or a size of feed that will require us to have a particular size fish. So that's another component that needs to be there at the same time. So the timing is a difficult thing.** Another problem with the low flows at this point is it's difficult to do experiments that start, say, in the hatch house and then are carried through out to the production ponds. Quite often -- in an ideal world we'd like to test these diets from egg to market size in our fish just to see how it performs throughout the entire rearing cycle.

And that's very difficult with these flows that are just not enough to have a block of ponds watered up or at least, you know, enough raceways watered up at that time that we can conduct that part of the experiment. **And then finally, along with the low flows and timing for that experiment that I explained just a minute ago is the problem with replication in our trials. Simply don't have enough water to have the number of replicates or rearing units to be able to do a statistically sound experiment.**

(Tr., p. 691, l. 10 – p. 693, l. 2) (emphasis added). While there may be enough water to run experiments in the greenhouse, this does not address coordination problems such as having the right size fish at the right time for an experiment.

In addition, Joy Kinyon explained that greenhouse research is not enough – Rangen needs to be able to test their production feeds in production settings like their customers have:

A. Well, I understand exactly what the researchers are telling us in regards to laboratory size studies. That is not what my customers want. I talk to the customers a lot, they talk to our salespeople a lot, and our customers want to

know what our feeds are going to do in a commercial feeding trial. And we don't do commercial size feeding trials in the greenhouse or in the hatchery.

Q. And why do your customers want to know -- why is it different? Why is the research done in the raceways different than what's done in the greenhouse?

A. Because the raceways are much more similar to how our customers have to raise their fish, and they're of the grow-out size that's in the large raceways. So we're testing the actual feed sizes that the majority of our feed sales are made in that size of that feed range, I guess. I'm not making myself clear, but it's relative to pellet size.

(Tr., p. 529, L 24 – p. 530, L. 16).

Contrary to the opposing parties' assertions, Rangen does not do research as some sort of marketing gimmick. Rangen has used the Research Hatchery to develop leading edge feeds and feed ingredients such as a stabilized form of Vitamin C that is now used throughout the aquaculture industry. Joy Kinyon testified that Thorlief Rangen, the founder of the Research Hatchery, was passionate about aquaculture, and even received a lifetime achievement award from a leading industry group. Even if Rangen conducted research solely for marketing purposes, this is not improper. Moreover, the impact on marketing is directly tied to its inability to propagate fish – the beneficial purpose stated in Rangen's Partial Decrees. Rangen's ability to propagate fish has been hindered and impacted by junior-priority groundwater pumping, and this, in turn, impacts Rangen's ability to develop new feeds through research.

To support its position, IGWA cites the Director's decision in the Clear Springs mitigation plan dispute wherein Clear Springs argued that the mitigation plan would damage Clear Springs' image. See, Final Order Concerning the Over-the-Rim Mitigation Plan, In the Matter of Distribution of Water to Water Right Nos. 36-04013A, 36-04013B, and 36-07148, CM-MP-2009-004, p. 3. This decision has no application to this case. The Director's finding was limited to the proposition that when evaluating a mitigation plan, the state would only take

into consideration whether the mitigation plan delivered the quantity and quality of water required. That proposition has no application at this stage of the Rangen proceedings, and IGWA's reliance on the Director's decision is misplaced.

Finally, Rangen's use of the water does not have to be perfect – it only has to be reasonable. As explained in Rangen Inc.'s Closing Brief, to find that Rangen is "wasting" water, the opposing parties have to prove by clear and convincing evidence that Rangen's use is unreasonable. (See, Rangen Inc.'s Closing Brief, pp. 49-55; see also, Beasely v. Engstrom, 31 Idaho 14, 169 P. 1145 (1917)). Rangen's use of the existing water flows serves a valuable public function – raising conservation fish similar to those raised by state-owned hatcheries. Rangen does not limit its production to conservation fish only. Rangen raises more fish than it sells to Idaho Power and sells those fish to commercial food processors. The opposing parties' decision to raise a waste defense seems particularly disingenuous where they have failed to put on any evidence of whether their use of water is reasonable and efficient, let alone perfect.

"Maximizing" production is more art and experience than science given the fact that Rangen has to purchase eggs 12-18 months in advance, has to guess at what its water flows will be, has to predict what its mortality rate will be, and must manage its production within the density and flow indices specified by Idaho Power because it does not have enough water to open additional raceways. While the opposing parties complain that Rangen should match its production cycle to its peak flows, they disregard the fact that Rangen's production schedule is tied directly to its Idaho Power contract. No one testified that Rangen's decision to enter into that contract was unreasonable. To the contrary, John Woodling and Tom Rogers both testified that Rangen's use of the water was reasonable. Dr. Woodling testified:

> A. But they are bringing in -- they are bringing in -- they are filling the hatch house twice a year. And they move those fish down. Which takes the small

raceways, and then they move it into the large raceways. If they had smaller lots of fish going through there, then they would potentially have room in the large raceways to put additional fish. Okay?

And they also would not be under the constraints of the Idaho Power contract, so they could be -- they could have stocked higher numbers. **So to a certain extent, they are choosing to run the hatchery the way they do. And I'm not saying, that they shouldn't do it. They are making a profit, and good for them. But they could do it in a different way to get more fish through with the water that they have.**

Q. **But as you just suggested, they are doing it in that way. And the way in which they are doing it is reasonable?**

A. **It seems to fit their needs, certainly. I'm not passing judgment on that.**

(Tr., p. 1293, L. 14 – p. 1294, L. 8).

Tom Rogers testified:

Q. Can you explain what you mean when you – what you were meaning when you were talking about waste, and waste in your opinions in this case?

A. I believe I mentioned the fact that conservation hatcheries raise fish at a low flow index. **In other words, more water per fish to induce a better looking fish, one that's able to survive in the wild. And that would be considering a not wasteful situation, if you were trying to rear fish for that purpose.**

(Tr., p. 1848, L. 25 – p. 1849, L. 8) (emphasis added).

The bottom line is that Rangen is making excellent beneficial use of its existing water flows and has the capacity and ability to put to beneficial use the additional 18 cfs that ESPAM2.1 predicts would accrue if curtailment were ordered. Rangen has made a *prima facie* showing of how its use of its water rights is being materially hindered and impacted by junior-priority groundwater pumping, and the opposing parties have not carried their burden of proving non-injury by clear and convincing evidence. As such, the Director should make a finding that Rangen use of the water rights at issue is being materially injured by junior-priority groundwater pumping across the model domain and should grant Rangen's Petition for Delivery Call in its entirety.

D. The Opposing Parties Have Not Proven with Clear and Convincing Evidence that Rangen's Diversion System is Unreasonable.

1. Rangen's diversion is not unreasonable.

The opposing parties contend that Rangen should be precluded from making a delivery call until Rangen improves its diversion and conveyance system or demonstrates it is not feasible to do so. Specifically, they argue that Rangen should be required to: (1) drill a vertical well; (2) drill a horizontal well in the vicinity of the Martin-Curren Tunnel; and/or (3) pump water that would otherwise go to the Large Raceways to the Small Raceways. Rangen has addressed these arguments at length in Rangen Inc.'s Closing Brief and will not repeat those arguments here except to clarify a point that IGWA makes.

Neither Rangen nor its counsel has ever argued that Rangen does not need additional water in the Small Raceways. IGWA asserts that Rangen's counsel, through cross-examination questions, explained that Rangen does not pump water from the dam to the Small Raceways because Rangen does not need more water in the Small Raceways. See, IGWA's Post-Hearing Brief, pp. 13-14. The line of questioning cited by IGWA does not support this proposition at all. The point being made on cross-examination is that taking first use water from the Large Raceways and diverting it to the Small Raceways without additional water being available throughout the facility does not enhance Rangen's production capacity. Even Tom Rogers recognized that a pump recirculation system was not certain to enhance production and testified only that it **may** enhance Rangen's production. Rogers testified:

> Q. So there is really no reason, in this facility, that you would want to pump into the small raceways?
>
> A. What we're talking about is efficiency of the use. I'm sure they are using it. But can you use it more efficiently? **Maybe so.** **Maybe** you can do that by pumping back up to the small raceways, adding to the first use water up there, and raising additional fish.

(Tr., p. 1891, l. 20 – p. 1892, l. 2) (emphasis added). Testimony that a pump system **may** increase production capacity does not satisfy the clear and convincing evidence that is required to deny Rangen's Petition for Delivery Call. The Idaho Supreme Court has explained that a "theory" is not enough to show non-injury:

> 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.

A&B Irrigation District v. IDWR, 153 Idaho 500, 519, 284 P.3d 225, 244 (2012) citing, Moe v. Harger, 10 Idaho 302, 77 P. 645 (1904) (emphasis added and in original).

Moreover, 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 517, 284 P.3d at 242 (emphasis added). Because the opposing parties have failed to establish that Rangen's diversion is unreasonable with clear and convincing evidence, this is not a basis for denying Rangen's Petition for Delivery Call.

2. The appropriation of water from springs is not *per se* unreasonable.

IGWA also argues that Rangen's "means of appropriation" is unreasonable. This argument is based upon an attempted analogy to Schodde v. Twin Falls Land & Water Company, 224 U.S. 107 (1912). It is not entirely clear, but IGWA appears to be arguing that it is *per se* unreasonable to appropriate water from springs because the discharge from springs is dependent upon aquifer levels (i.e., springs go down when the aquifer goes down). This argument has no merit and the attempted analogy to Schodde is misplaced.

In Schodde, the senior water right holder constructed water wheels to divert water from the Snake River. The water wheels were used to power the diversion of Schodde's water right for irrigation. Twin Falls Land & Water Company later built a dam below Schodde's water wheels, which caused the current necessary to power the wheels to stop flowing. Schodde sued Twin Falls Land & Water Company for damages due to the interference with the operation of his water wheels. The U.S. Supreme Court held that Schodde could not appropriate the entire flow of the Snake River in order to power his water wheels. The Court, however, affirmed that Schodde had the right to use the amount of water actually appropriated by him and put to beneficial use.

IGWA raised the same Schodde argument in Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71 (2011). Clear Springs and Blue Lake Trout Farms, like Rangen, raised fish utilizing water rights from "certain springs emanating from the canyon wall along a section of the Snake River . . . . Those springs are fed by the aquifer." Id. at 75. The Director in Clear Springs

ordered curtailment. IGWA argued on appeal that the curtailment orders violated Schodde. After reviewing Schodde, the Idaho Supreme Court stated:

> The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights. Thus, In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007), we cited *Schodde* for the proposition that "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication [of a water right]."

Id. at 90. Schodde allows for the Director to evaluate whether a senior water right holder's means of diversion is reasonable. "Under the law, the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development must challenge the Spring Users' means of diversion." Id.

It is apparent from the Clear Springs decision that the Idaho Supreme Court rejected IGWA's argument that a diversion from springs "fed by the aquifer" is *per se* unreasonable, but left the door open for juniors to prove by clear and convincing that a particular diversion structure is unreasonable. As discussed at length above and in Rangen Inc.'s Closing Brief, the opposing parties have not carried their burden of proof. In the absence of evidence that Rangen's particular diversion structures are unreasonable, IGWA's arguments based upon Schodde must fail and Rangen's Petition for Delivery Call should be granted.

E. Rangen's Water Measurements are Reliable.

Rangen addressed the reliability of water measurements in its Closing Brief. See, Rangen Inc.'s Closing Brief, Section III(C)(2). However, there are a few issues raised by the opposing parties which need to be addressed here.

1. Pocatello's argument that Rangen's measurements are "systematically low by at least 15% is unfounded and is not a basis for denying Rangen's Petition for Delivery Call."

During trial, Greg Sullivan, a hydrologist for the City of Pocatello, asserted that Rangen's water measurements were "systematically low by 15%." Sullivan made this argument even though he previously asserted during his deposition and in his export reports that Rangen's measurements were in error by 30% to 40%. (Tr., p. 1607, L. 21-25; p. 1608, L. 1-5). Sullivan testified that his opinions had "evolved." (Tr., p. 1608, L. 6-7). Sullivan's opinions "evolved" in the sense that he stopped disputing the accuracy of the head measurements taken by Rangen and the "sticking the weir" method used to take those measurements (Tr. p. 1588, L. 14-22) and, instead, disputed the weir coefficient and ratings tables used by Rangen. (Tr., p. 1588, L. 12-13). As hard as Sullivan tried to create error upon which a denial of Rangen's Petition for Delivery Call could be based, his efforts failed for several reasons.

First, Sullivan's assessment of "error" is not consistent with the Department's assessment of Rangen's water measurements. The Department, in its Staff Report, concluded that the difference between its measurement and Rangen's measurement was between 7.7% to 6.31%. The Staff Report concluded:

> IDWR staff measured a total of 18.97 cfs at the Rangen hatchery based on sum of the Large raceways + Lodge Dam, or a total of 18.69 cfs based on sum of CTR raceways and Lodge dam. The 2003 measurement report submitted to IDWR by Rangen reports a total of 17.51 cfs on November 24, 2003, which is a difference of either 1.46 or 1.18 cfs, or a difference of -7.7% and -6.31% respectively. IDWR measured 0.48 cfs at the Lodge dam on November 25, 2003.

See, Exh. 3203, p. 60, f/n 12. Most of the difference was attributable to the Department using a different weir coefficient and ratings tables. Again, when the same ratings tables were used, the Department concluded that there was a less than 2% difference in measurements. (Id., p. 61).

The Department found Rangen's measurements to be acceptable and noted that "[s]ystematic under-measurement of discharge at the Rangen spring complex would be expected to result in lower model predictions of discharge and response curtailment at the Rangen spring cell. This would favor the groundwater users, not Rangen." (Id., pp. 13 and 65).

In an effort to create the largest error possible, Sullivan chose to extrapolate a "correct weir coeffficient" using USGS measurements from Billingsley Creek downstream from where Rangen has historically taken its measurements. There are obvious problems with using the USGS data. First, the Department considered and dismissed the use of USGS data because of its lack of reliability and the lack of reliability of in-stream measurements in Billingsley Creek. The Department in its Staff Report concluded:

> The USGS periodically measures the discharge in Billingsley Creek just downstream of the Rangen Hatchery, but subjectively rates most of the measurements fair or poor, indicating that the USGS water measurement experts also found that flow and/or cross sectional conditions in Billingsley Creek are not ideal and contribute to measurement error.

See, Exh. 3203, p. 65.

Second, the evidence presented at trial shows that the source of water for Rangen's historic measurements are different than the source of water for the USGS measurements. There are two additional sources of water for the USGS measurements as reflected in Exhibit 1446C. Those additional water sources are identified as points 188 and 189 on Exhibit 1446C. Because of these additional sources of water, comparing Rangen's water measurements to USGS measurements is truly an "apples and oranges" comparison. Furthermore, the two additional sources of water are located on the east side of a culvert, which conveys water from one side of a road to another. As to whether those sources are included in the USGS measurements, Sullivan

could not testify because he was not sure whether the USGS took the measurements on the east or west side of the culvert on the road. (Tr., p. 1588, L. 13-25).

Third, the weir coefficient "extrapolated" from the USGS measurements is entirely different than the "hybrid" weir coefficient Sullivan created and advocated for in his expert reports. Before Sullivan's measurement conclusions were rejected by the Department in its Staff Report (see, Exh. 3203, p. 58-63), Sullivan believed the proper weir coefficient for Rangen was 3.32, at heads exceeding 3 3/8ths inches. See, Exh. 3128, Table 1-5. Within a hundredth of a decimal point, this is the very same weir coefficient used by Rangen until at least 1999.

To summarize, Sullivan's conclusion that Rangen "systematically under measured by 15%" cannot be considered credible. Sullivan's ever shifting conclusions demonstrate that he was acting more as Pocatello's advocate than an expert when evaluating measurement information. Even if there was systematic under-measurement, this would only hurt Rangen and benefit groundwater users because it would result in lower model predictions of discharge and response to curtailment at the Rangen spring cell. There is no basis for rejecting Rangen's Petition for Delivery Call based on alleged unreliability of its water measurements.

2. Pocatello's Regression Analysis

Sullivan created two different regression analyses of flows for Rangen. At the outset, Rangen rejects the need for any regression analysis because it is entitled to all the spring flows forming the headwaters of Billingsley Creek, and not just those flows coming from the mouth of the Martin Curren Tunnel. Nevertheless, Rangen believes that Sullivan's regression analysis is flawed.

The "development" of Sullivan's regression analysis is reflected in Exhibit 3654, Figure 2. That Exhibit has a red and blue line, with each line reflecting Sullivan's two different regression analyses. The blue line reflects Sullivan's first opinion, and is extrapolated from

Rangen's reported flows. (Tr. p. 2828, L. 8-22). The blue line indicates that Rangen would be entitled to 75% of its reported flows using a regression analysis. The red line reflects Sullivan's second opinion, and is extrapolated to "correct" for Rangen's "15% systematic under measurement." (Tr. p. 2829, L. 10-12). According to Sullivan, the red line corrects the 15% under measurement of water. In this case, Rangen would be entitled to 63% of reported flows.[1]

As stated above, Sullivan's conclusion regarding a 15% error is not credible and should be rejected. For this reason, and should the Department engage in any regression analysis in the event it determines that Rangen can call only on water coming from the mouth of the Martin Curren Tunnel itself, Sullivan's second regression line (the red line) should be entirely rejected as not being credible.

F. ESPAM2.1 should be utilized without an arbitrary limit on curtailment.

ESPAM2.1 indicates that junior-priority groundwater pumping collectively causes a reduction in the discharge at Rangen's spring of 17.9 cfs. IGWA and Fremont-Madison urge the Director to apply a so-called "trimline" to exclude from curtailment nearly all of the junior ground water rights responsible for this impact. Such a "trimline" has been used in previous surface water calls using earlier versions of ESPAM and has been the subject of substantial argument in those calls as well as the present matter. During the hearing on this matter, the Director recognized the contentious history surrounding the concept of a "trimline":

> The final order that is issued will have a direct reference to this particular matter. And furthermore, if there is any sort of curtailment limitation line, I'm not sure that's the right statement. But if there is, it will not be called a "trim line." Because I think it's become such a sensitive term, or phrase, that it probably ought to be. And it has some sort of connotation to references to even past

[1] The Department, in its Staff Report, at page 34, did a regression analysis and concluded Rangen would be entitled to 70% of its reported flows. Sullivan testified that if there was a 6 to 7 percent difference between Rangen reported flows and actual flows, then the regression would fall somewhere between the blue and red line indicated in Exhibit 3654. (Tr. p. 2830, L. 10-24).

> percentages, which I think we ought to abandon all of those things. So it will have some other reference, if there is such a thing.

(Tr., p. 1501, l. 20 – 24, p. 1504, l. 9 - 19). Clearly, the term "trimline" has a great deal of baggage in this case and should not be used. However, the issue is far more fundamental than merely the label that is used to describe the concept.

There is no technical or policy justification for excluding junior ground water users from curtailment based upon a percentage of impact on Rangen's spring compared to impact on other areas of the aquifer. Excluding individual junior ground water users on this basis improperly ignores the collective impact of pumping and the Director's obligation to conjunctively administer ground water and surface water rights. Furthermore, a trimline which excludes junior ground water pumping which impacts and hinders a senior's use of water is an affront to the prior appropriation doctrine and denies a senior user its constitutionally guaranteed property right.

1. There is no technical or scientific basis for the use of a trimline due to uncertainty in the model.

IGWA relies primarily upon uncertainty in the model to justify the application of a trimline. However, as acknowledged by the City of Pocatello "...there does not appear to be a basis to adopt a trimline based on specific technical uncertainty analyses . . .." (City of Pocatello's Closing Brief, p.15). Neither IGWA nor any of the other parties provide any technical or scientific justification for the application of a "trimline" based upon uncertainty. IGWA simply argues that ESPAM2.1 is not perfect. According to IGWA, these "imperfections must be acknowledged." Such vague arguments provide no more rationale for the imposition of a "trimline" than IGWA's refrain during the hearing that ESPAM2.1 should be used "with caution."

IGWA urges the Director to simply adopt the 10% "trimline" applied by the previous Director with an earlier version of ESPAM. In previous decisions, the 10% "trimline" was justified as reflecting the perceived uncertainty in that earlier version of the model. Whatever the merits of this justification as it relates to earlier versions of the model, such a justification has no application to ESPAM2.1.

IGWA's own expert, Dr. Brendecke, stated that "[t]he trimline has nothing to do with model uncertainty." (Exh. 1369). All of the other experts that testified in this matter agreed. The Department's staff also agrees. In fact, any uncertainty in the ESPAM2.1 would equally affect the calculations necessary to apply the "trimline." The Department in its Staff Report stated:

> If ESPAM2.1 were not capable of providing a reasonable prediction of the effects of model-wide curtailment on discharge at the Rangen spring cell, it would also be incapable of reasonably predicting response functions for the Rangen spring cell and would not be able to provide a reasonable prediction of the location of the 10% trimline that Brendecke (2012) proposes.

Exh. 3203, p.5.

The basis upon which the Idaho Supreme Court upheld the previous Director's decision to apply a 10% "trimline" has no application to ESPAM2.1. No scientific or technical justification has been put forward related to ESPAM2.1. The Department's staff does not consider the application of a "trimline" to be a scientific or technical issue. According to staff, "[w]hether a trimline should be applied, and the basis for delineating a trimline, are policy and/or legal decisions." Id.

2. Policy decisions, such as to whether or not to apply a trimline, are still subject to prohibitions against arbitrary and capricious actions.

"[H]ydrologically connected surface and ground waters must be managed conjunctively." Spackman, at 89 (Citing Musser). Having established the hydrological

connection between junior ground water and Rangen's spring, the decision to exclude some of those junior ground water users from curtailment based upon percentage of impact without any scientific or technical justification would be arbitrary and capricious. "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." American Lung Ass'n of Idaho/Nevada v. State, Department of Agriculture, 142 Idaho 544, 130 P.3d 1062 (2006), citing Enterprise, Inc. v. Nampa City, 96 Idaho 734, 536 P.2d 729 (1975).

The issue of excluding junior ground water rights known to be contributing to the impact on senior surface water rights is fundamental to the conjunctive management of ground water and surface water rights. Given the distributed nature of the impact from ground water pumping, conjunctive management is impossible if the collective impact of junior ground water pumping is ignored.

This case provides a clear example of the problem. There is no dispute that junior ground water pumping from the ESPA causes a significant reduction in the discharge from Rangen's spring water flow. The best prediction of that reduction is 17.9 cfs. A great number of junior ground water rights contribute to this reduction. The relative impact of each individual water right's impact upon the Rangen spring flow versus that water right's impact upon the aquifer system, as a whole, is in most cases relatively small because of the distributed nature of the impact of pumping. This is generally true when one looks at the relative impact of any individual ground water pumping comparing the impact upon a single senior water right to the impact upon the aquifer system as a whole.

In other words, a junior ground water pumper's impact upon any particular spring will in most cases be a relatively small percentage of the quantity that user pumps. The Director should

not exclude individual junior ground water rights from curtailment based upon a comparison of that user's impact upon Rangen's spring flow to that user's impact upon the entire aquifer system. Such a comparison is arbitrary and inconsistent with the conjunctive management of ground water and surface water rights.

3. ESPAM2.1 represents the best available science for determining effects of junior ground water pumping on individual spring cells, and it should be used without restrictions.

The fact remains that ESPAM2.1 represents the "best available science" for determining impacts of junior groundwater pumping on the Rangen spring cell. See, testimony of Dr. Brockway (Tr. p. 2340, l. 25 – p. 2341, l. 8); Bern Hinckley (Tr. p. 2487, l. 21 – 24); Dr. Brendecke (Tr. p. 2793, l. 11–14); Dr. Wylie (Tr. p. 2950, l. 3–9); Greg Sullivan (Tr. p. 1642, l. 2–15); and Bryce Contor (Tr. p. 2893, l. 20 – 22). All future ground water models will undoubtedly have some problem, but each successive model will be deemed to be the "best available science" for determining junior ground water impacts. No matter what model is developed, the facts will always indicate that individual pumping has a small relative impact on the target cell, but the collective impact of that junior pumping will be significant.

At some point, the Department will have to decide whether conjunctive management is "fact" or "fiction."[2] This is the case where the Department should find that conjunctive management is a "fact," and that while the application of conjunctive management is harsh, it is the law. These harsh realities have been felt and understood by surface water users since the prior appropriation doctrine was adopted in Idaho's Constitution.

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[2] Dr. Brendecke, IGWA's expert hydrologist actually gave a presentation titled: CONJUNCTIVE MANAGEMENT: SCIENCE OR FICTION? Brendecke, Charles M., presentation to Idaho Water Users Association *18th Annual Water Law and Resource Issues Seminar*, November 8-9, 2001. Boise, Idaho. See, Exh. 2409, p. 5.

G. Rangen's Call is Not Futile.

IGWA and Pocatello argue that Rangen's Petition for Delivery Call should be rejected because its call is "futile." A call is futile if "water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use . . . ." Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). The Department's Conjunctive Management Rules define a futile call as follows:

> 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.

Futile call is a defense and, as with other such defenses, the junior user must prove that a call is futile 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).

IGWA and Pocatello's futile call arguments contradict one another. Pocatello acknowledges that under the most conservative analysis Rangen would receive between 8 and 11 cfs of water from curtailment. (City of Pocatello's Closing Brief, p. 14). However, Pocatello argues that Rangen is currently only entitled to 4.4 cfs of the flow from the Rangen spring and would need a total of 20-30 cfs to "produce conservation fish and to produce fish for the commercial market." Id.

Contrary to the argument in Pocatello's brief, IGWA points out that Pocatello's expert report indicates that an additional small raceway can be utilized with each 2 cfs of additional flow and an additional large raceway could be utilized with each 4.8 cfs of additional flow. (IGWA's Post-Hearing Brief, p. 33; IGWA's Proposed Findings of Fact 32-3; Exh. 3274, p. 14).

Thus, being forced to admit that Rangen could beneficially use 8 to 11 cfs of additional water, IGWA argues that Rangen's call is futile if the Director were to apply a 10% "trimline." (IGWA's Post-Hearing Brief, p. 33.)

As these somewhat comical contradictory arguments suggest, it is difficult to imagine how Rangen's call could be considered futile. In Clear Springs v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011), the fish farms were predicted to receive an additional 10 cfs and 2.67 cfs respectively, which was sufficient to result in curtailment orders. During trial, Rangen's flows were around 12 cfs or less. Most of the raceways in the facility are dry. Even accepting for the purpose of argument that Rangen would receive only 8 to 11 cfs of additional water rather than the approximately 18 cfs predicted by ESPAM2.1, this would nearly double the flow available to Rangen and allow Rangen to use more of its facility to raise fish. An additional 8 to 11 cfs would give Rangen approximately 20 cfs of flow, which even Pocatello admits would be usable. ESPAM2.1 predicts that approximately 6 cfs would accrue to Rangen's spring flow within one year of curtailment, and 90% of it would accrue within 13 years – about the length of time that has passed since Rangen made its first delivery call in 2003.

Moreover, the fact that the additional water might take some years for Rangen to realize is of no significance and has been rejected as the basis for finding a call futile. As to conjunctive management, this Director in the Clear Lakes case previously found:

> [C]urtailing ground water pumping does not provide the immediacy of delivery to the senior user that would be present in the curtailment of surface water. Surface water travels in a channel from one source that may be seen to a destination that can be seen. It can be routed to a particular point. Ground water does not fall into this model. Its route is determined by the contours of fractured basalt interspersed at times with soil of a different composition. Part of the water curtailed may travel one direction, part another. The effects of curtailment may be years to be realized. The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were

> applied in calls for the curtailment of ground water, most calls would be futile. In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.
>
> The hearing officer concluded that "the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks."

Id. at 812.

The uncontradicted evidence in the case is that Rangen would receive a usable amount of water which it could beneficially use and that nearly all of the additional water would show up within the time span that Rangen has been fighting to have its water rights enforced. To deny Rangen its water based on a futile call analysis would deprive Rangen, and likely all other surface water users, of a meaningful opportunity to file and prevail on water calls under conjunctive management.[3] Rangen's call is not futile and its Petition for Delivery Call should be granted.

III. CONCLUSION

Simply stated Rangen's Petition for Delivery Call should be granted because its use of Water Right Nos. 36-02551 and 36-07694 is being hindered and impacted by junior-priority groundwater pumping across the domain of ESPAM2.1 and the area of common groundwater

[3] Even if a call is deemed futile, the Director can still require mitigation or curtailment. "The principle of the futile call applies to the distribution of water under these rules. 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.

supply. ESPAM2.1 demonstrates that Rangen would more than double its current flows as a result of curtailment and the Eastern Snake Plain aquifer would receive a much needed incidental recharge. Other water users who are short would also benefit. The opposing parties have not carried their burden of proving with clear and convincing evidence that Rangen is wasting water, or has an unreasonable diversion system or that its call would be futile. Rangen's Petition for Delivery Call should be granted and curtailment should be ordered so that Rangen receives its Constitutionally protected water rights.

DATED this 19th day of July, 2013.

BRODY LAW OFFICE, PLLC

By _____
Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 19th day of July, 2013 she caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Original: Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery U.S. Mail Facsimile Federal Express E-Mail	☑ □ □ □ ☑
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 kimi.white@idwr.idaho.gov	Hand Delivery U.S. Mail Facsimile Federal Express E-Mail	□ □ □ □ ☑
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Robyn M. Brody

APPENDIX A

FORM 202 03/10 Print form as a 2 page, single-sided document

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR PERMIT

To appropriate the public waters of the State of Idaho

Ident. No. ~~RECEIVED~~

APR 03 2019

WATER RESOURCES
WESTERN REGION

1. Name of applicant(s) North Snake GWD, Magic Valley GWD, et. al Phone 208-232-6101
   Name connector (check one): ☑ and ☐ or ☐ and/or
   Mailing address: c/o Randall C. Budge, 201 E Center Street; P.O. Box 1391 City Pocatello
   State ID Zip 83204 Email: rcb@racinelaw.net
2. Source of water supply Springs; Billingsley Creek which is a tributary of Snake River
3. Location of point(s) of diversion:

Twp	Rge	Sec	Govt Lot	¼	¼	¼	County	Source	Local name or tag #
7S	14E	32		SE	SW	NW	Gooding	Springs; Billingsley Creek	
7S	14E	32		SW	SW	NW	Gooding	Springs; Billingsley Creek	

4. Water will be used for the following purposes:
   Amount 12 cfs (cfs or acre-feet per year) for mitigation for irrigation purposes from 1/1 to 12/31 (both dates inclusive)
   Amount 12 cfs (cfs or acre-feet per year) for fish propagation purposes from 1/1 to 12/31 (both dates inclusive)
   Amount _____ (cfs or acre-feet per year) for _____ purposes from _____ to _____ (both dates inclusive)
   Amount _____ (cfs or acre-feet per year) for _____ purposes from _____ to _____ (both dates inclusive)
5. Total quantity to be appropriated is (a) 12 cubic feet per second (cfs) and/or (b) _____ acre-feet per year (af).
6. Proposed diverting works:
   a. Describe type and size of devices used to divert water from the source. Hydraulic pump(s); size TBD
   b. Height of storage dam n/a feet; active reservoir capacity _____ acre-feet; total reservoir capacity _____ acre-feet. If the reservoir will be filled more than once each year, describe the refill plan in item 11.
      For dams 10 feet or more in height OR reservoirs with a total storage capacity of 50 acre-feet or more, submit a separate Application for Construction or Enlargement of a New or Existing Dam. Application required? ☐ Yes ☐ No
   c. Proposed well diameter is n/a inches; proposed depth of well is _____ feet.
   d. Is ground water with a temperature of greater than 85°F being sought? ☐ Yes ☑ No
   e. If well is already drilled, when? n/a; drilling firm _____;
      Well was drilled for (well owner) _____; Drilling Permit No. _____.
7. Description of proposed uses (if irrigation only, go to item 8):
   a. Hydropower; show total feet of head and proposed capacity in kW. n/a
   b. Stockwatering; list number and kind of livestock. n/a
   c. Municipal; show name of municipality or the applicant's qualifications as a municipal provider. n/a
   d. Domestic; show number of households n/a
   e. Other; describe fully. mitigation for groundwater irrigation; fish propogation

8. Description of place of use:
   a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
   b. If water is used for other purposes, place a symbol of the use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RGE	SEC	NE				NW				SW				SE				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7S	14E	31				M/F													
7S	14E	32							M/F										
**																			

**All acres irrigated from groundwater from the Eastern Snake Plain Aqulfer
Total number of acres to be irrigated: _____

9. Describe any other water rights used for the same purposes as described above. Include water delivered by a municipality, canal company, or irrigation district. If this application is for domestic purposes, do you intend to use this water, water from another source, or both, to irrigate your lawn, garden, and/or landscaping? None for mitigation. Water right nos. 36-2551 and 36-7694 are used for fish propagation purposes at Rangen.

10. a. Who owns the property at the point of diversion? Rangen, Inc.
    b. Who owns the land to be irrigated or place of use? Rangen, Inc.; members of applicant Ground Water Districts
    c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing: Idaho Code section 42-5224(13)

11. Describe your proposal in narrative form, and provide additional explanation for any of the items above. Attach additional pages if necessary. The Ground Water Districts this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain in the event that the Director finds Rangen to be materially injured and orders junior groundwater users to provide mitigation or be curtailed. Mitigation water will be delivered to Rangen for fish propagation purposes. The Ground Water Districts, if unable to secure Rangen's consent, will use their power of emenent domain as set forth in Idaho Code section 42-5224(13) to secure necessary easements for mitigation facilities.

12. Time required for completion of works and application of water to proposed beneficial use is 5 years (minimum 1 year).

13. MAP OF PROPOSED PROJECT REQUIRED - Attach an 8½" x 11" map clearly identifying the proposed point of diversion, place of use, section #, township & range. A photocopy of a USGS 7.5 minute topographic quadrangle map is preferred.

The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in rejection of the application or cancellation of an approval.

_____ _____
Signature of Applicant Signature of Applicant

Thomas J. Budge, Attorney _____
Print Name (and title, if applicable) Print Name (and title, if applicable)

For Department Use:

Received by _____ Date _____ Time _____ Preliminary check by _____

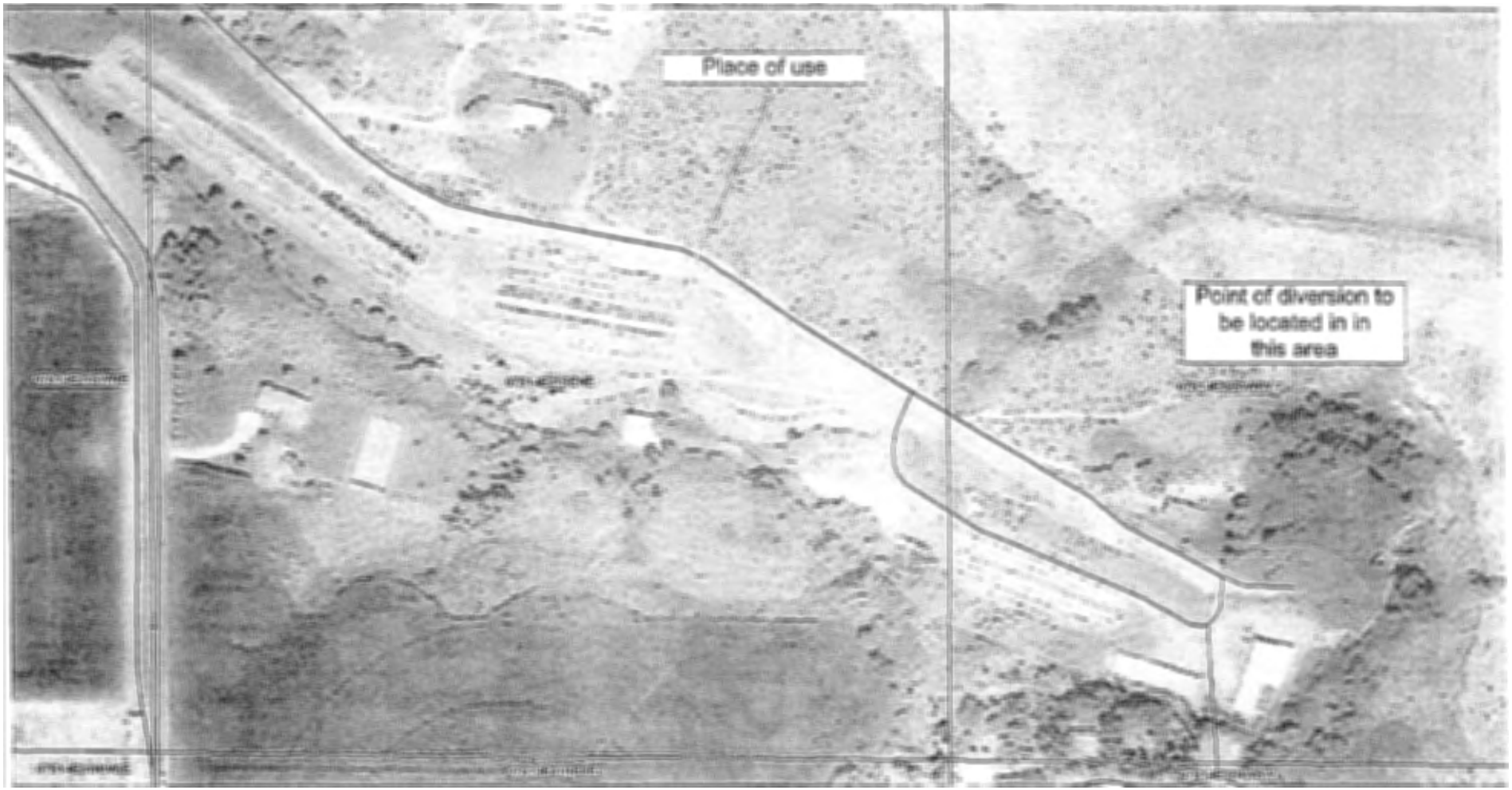
Fee $ _____ Receipted by _____ Receipt No. _____ Date _____

Attachment for Item 1

Name of Applicants
Application for Permit
Submitted 4/3/2013

PERMIT APPLICANTS
GROUND WATER DISTRICTS

Aberdeen American Falls Ground Water District
Bingham Ground Water District
Bonneville-Jefferson Ground Water District
Madison Ground Water District
Magic Valley Ground Water District
North Snake Ground Water District
Clark Jefferson Ground Water District


Place of use
Point of diversion to be located in in this area

APPENDIX B

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Candice M. McHugh (ISB No. 5908)
Thomas J. Budge (ISB No. 7465)
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Attorneys for the Ground Water Districts

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA Case No. 39576	**Subcase Number 36-16977** **GROUND WATER DISTRICTS' OBJECTION TO RANGEN, INC.'S MOTION TO FILE AMENDED CLAIM**

Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District (collectively referred to herein as the "Ground Water Districts") hereby object to the *Motion to File Amended Notice of Claim* filed by Rangen, Inc., on or about April 26, 2013.

The Ground Water Districts incorporate by reference their ***Objection to Rangen, Inc.'s Motion to File Late Notice of Claim*** ("Objection") served on the parties and sent via Federal Express for overnight priority delivery to the Court on May 14, 2013. The Ground Water Districts also agree with the arguments set forth in Pocatello's Response to Rangen's Motion for Late Claim and Amended Late Claim.

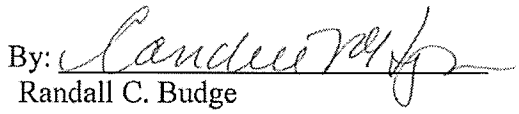
For the reasons set forth in the May 14, 2013 Objection, incorporated by reference herein, the Court must deny Rangen's Motion to File and Late Claim and an Amended Claim.

In addition to the arguments raised, the Ground Water Districts contend that if the Court grants Rangen's Motions to File Late Notice of Claim and Amended Claim, then the subcases for Rangen's overlapping water rights, 36-134B, 36-135A, 36-2551, 36-7694 and 36-15501 should be reopened because key elements of these water rights, including place of use, purpose of use, quantity and season of use overlap with the new claim necessitating at the very least, combined use remarks on the previously decreed water rights; thus, reopening the overlapping water rights is required in order to allow the Court and the Director of IDWR an opportunity to fully and fairly evaluate the water rights and the proposed claim, gather necessary facts and determine if the water rights were reported and decreed accurately and to accurately report to the court the necessary elements on the new claim. This will also allow other water users who are affected by Rangen's claim and users from the Martin-Curren Tunnel an opportunity to participate in the process, if they so desire. The Ground Water Districts have a pending Application for Permit No. 36-16976 for the point of diversion, springs and Billingsley Creek that Rangen is now trying to untimely claim through the SRBA District Court.

The Ground Water Districts reserve the right to further respond to any issues raised by Rangen at the hearing scheduled on the Rangen's motion to file a late and amended claim set for July 23, 2013.

SUBMITTED this 17th day of May, 2013.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: 
Randall C. Budge
Candice M. McHugh
Thomas J. Budge
Attorneys for the Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of May, 2013, a true and correct copy of the foregoing document was served on the following persons in the manner indicated.

Candice M. McHugh

Original: Clerk of SRBA Court 253 3rd Ave North Twin Falls ID 83303-2707 Phone 208-736-3011 Fax: 208-736-2121	☐ U.S. Mail/Postage Prepaid ☒ **Facsimile** ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
IDWR Repository PO Box 83720 Boise ID 83720-0098	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
Natural Resources Division Chief State of Idaho Attorney's General Office PO Box 44449 Boise ID 83711-4449	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
US Department of Justice Environment & Natural Resources 550 W Fort St MSC 033 Boise ID 83724 david.gehlert@usdoj.gov	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail
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APPENDIX C

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ATTORNEYS FOR THE CITY OF POCATELLO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

		Water Right Claim: 36-16977
In Re SRBA	)	**POCATELLO'S CORRECTED RESPONSE TO RANGEN'S MOTION FOR LATE CLAIM AND AMENDED LATE CLAIM**
Case No. 39576	)	

COMES NOW, the City of Pocatello ("City" or "Pocatello") by and through its attorneys, and hereby submits this Corrected Response to Rangen, Inc.'s ("Rangen") *Motion for Late Claim* dated April 18, 2013, and *Amended Notice of Late Claim* dated April 26, 2013 (collectively, "Late Claim Motion"). In reviewing the filed copy of this Response, undersigned counsel found editorial and citation errors; this brief corrects those errors and is otherwise substantively identical to "Pocatello's Response to Rangen's Motion for Late Claim and Amended Late Claim", dated May 14, 2013.

INTRODUCTION

Rangen, Inc. is a company that produces animal feeds, including fish feeds under its Aquaculture Division. It operates a fish hatchery in the Thousand Springs area to perform aquaculture research for its fish feed production. The fish hatchery holds several water rights, including those that are the subject of Rangen's late claim request, 36-02551 and 36-07694.[1]

The Rangen hatchery is located in the SE1/4 of the NE1/4 in Section 31 and SW1/4 of the NW1/4 of Section 32, Township 7 S., Range 14 E. As shown in Exhibit 1[2] attached to the May 14, 2013, Affidavit of Mitra Pemberton ("Pemberton Aff.") the Rangen's hatchery is located just below the rim of the Snake River plain. Exhibit 1 also identifies Rangen's decreed place of use in yellow outline and the decreed point of diversion (described as being within the SE ¼ SW ¼ of the NW ¼, Section 32, and referred to herein as the "10 acre tract"), outlined in red. *See also,* Pemberton Aff., Exhibits 2 and 3, Rangen's partial decrees for Water Right Nos. 36-2551 and 36-7694.

The decreed source of water for the Rangen hatchery is the Martin-Curren Tunnel. Exh. 2 at 2; Exh. 3. The area below the Martin-Curren Tunnel has been referred to as the "talus slope" because of the rocks and stones that form the broken, rubbly surface. *See* Affidavit of Fritz X. Haemmerle in Support of Motion to File Late Claim ("Haemmerle Aff.") at 4.

Rangen has two structures that divert and control the water from the Martin-Curren Tunnel–one is the 6-inch "white-pipe" that delivers water to its hatch house and greenhouse facilities, as well as for domestic uses on the hatchery. Pemberton Aff., Exhibit 4, *Testimony of*

[1] As identified on the attached Affidavit of Mitra Pemberton, Exhibits 1, 4, 5, 6, 7 and 8 are exhibits, testimony, or pleadings arising from Rangen's Delivery Call, IDWR Docket Number CM-DC-2011-004. Exhibits 2 and 3 are Rangen's partial decrees.

[2] Exhibit 1 is Figure 2-3 from Spronk Water Engineers, Inc. Expert Supplemental Report (showing points of diversion and place of use for 1962 and 1977 water rights), May 5, 2013 submitted in the hearing on Rangen's Delivery Call, IDWR Docket Number CM-DC-2011-004.

Greg Sullivan 129:5-9, May 8, 2013; *see also* Pemberton Aff., Exh. 7 (discussed during Sullivan's testimony as "Exhibit 1291," photo showing Curren Tunnel outlet).[3] Rangen's other diversion structure within the 10-acre tract is a 12-inch steel pipe that arises from the "Rangen box" collection structure and delivers water to its small raceways. Pemberton Aff., Exh. 4 *Testimony of Sullivan*, 130:24-25, 131:1-15; Exh. 8 (discussed as "Exhibit 1292," photo showing Curren Tunnel and pipelines). In addition, Rangen has a collection system outside of the 10-acre tract (a 36-inch corrugated metal pipe that delivers water to the large raceways). The 36-inch pipe collects springs that arise below the Martin-Curren Tunnel at various locations on the talus slope. These springs arise below the existing diversion structures, and in the words of Rangen's expert, Dr. Charles Brockway, are discharged onto the talus slope. Pemberton Aff., Exh. 4, *Brockwy Testimony*, 216:1-5.

Rangen's delivery call (*In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen Inc.),* CM-DC-2011-004) with the Idaho Department of Water Resources was filed in December of 2011; at the time of filing of this Response, trial has not concluded. As part of pre-trial motions practice, on March 8, 2013, Rangen filed a *Motion* and *Brief in Support of Motion for Partial Summary Judgment Re: Source* ("Source Motion") with the Hearing Officer. Pemberton Aff., Exhibit 5. Rangen asked the Director to determine, *inter alia*, that Rangen could place a call for not just the amount of water that arises at the Martin-Curren Tunnel – which is Rangen's decreed source – but that Rangen could also place a call for water arising from springs on the talus slope below the Martin-Curren Tunnel that Rangen diverts at the "Rangen Lower Diversion" outside of the 10-acre tract. Pemberton Aff., Exhibit 1. It is undisputed that the 36-inch pipe diversion is outside Rangen's decreed point of diversion.

[3]The exhibit and testimony were offered in Rangen's Delivery Call hearing, IDWR Docket No. CM-DC-2011-004. Only draft testimony is available at this time; Pocatello will substitute with final testimony when it becomes available.

Pemberton Aff., Exh. 1; Exh. 4 *Brockway Testimony*, 214:17-25, 215: 1-25, 216:1-25, 217:1-25, 218:1-9.

On April 22, 2013, the Director denied Rangen's requested relief, finding that

> Rangen's partial decrees also unambiguously state that the only source for its water rights is Martin-Curren Tunnel, tributary to Billingsley Creek. The partial decrees do not list "Spring(s)" and/or "Unnamed Stream(s)" as additional sources.
>
> . . . .
>
> The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion.

Order Granting in Part and Denying in Part Rangen's Motion for Partial Summary Judgment Re: Source at 6, Apr. 22, 2013, In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen Inc.), CM-DC-2011-004 (internal citation omitted) ("Director's Order"), Pemberton Aff., Exhibit 6. The Director relied upon the Department's Conjunctive Management Rules in reaching this conclusion. *See* Exh. 6 at 6, citing IDAPA 37.03.11.001 (2013) ("'rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right'"); IDAPA 37.03.11.010.25 (2013) ("defining 'water right' to mean '[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree . . . .'") (emphasis in Director's Order).

On April 19, 2013, Rangen filed its Late Claim Motion in the above-captioned proceeding, in anticipation that the Director would deny its Source Motion[4] as described above, in order to "protect its rights to its historic and actual beneficial use of water under the claims

[4] The Director had indicated the likely substance of his order on Rangen's motion at oral arguments on April 3, 2013, thus prompting Rangen to file its motion for late claim.

included for this right" ("Late Claim Motion"). Haemmerle Aff. at 5. On April 26, 2013, Rangen filed an *Amended Notice of Late Claim* in the same matter.

ARGUMENT

A. Rangen's late claim is untimely and not permitted by the SRBA Basin Wide orders.

Rangen has not complied with the orders of this Court in filing its late claim. This Court closed Basin 36 to late claims except under certain narrow exceptions, and Rangen's claim is outside of these narrow exceptions. Accordingly, Rangen's Late Claim Motion must be denied.

On October 12, 2012, the SRBA Court issued its *Order Establishing Deadline for Late Claim Filings in Basins 01, 02, 03, 31, 34, 35, 36,37, 41, 45, 47 and 63,* Basin Wide Issue 16, Subcase No. 00-92099, In Re SRBA Case No. 39576 ("Deadline Order"). "No late claims will be accepted for filing in basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47 and 63," except as expressly provided by the Order. Deadline Order at 4. The Deadline Order provides exceptions to the prohibition on late claims "for *de minimis* domestic and stockwater uses and late claims required to resolve pending litigation on the date of this *Order* in the SRBA, the last date to file a MOTION TO FILE LATE CLAIM in Basins . . . 36 . . . shall be January 31, 2013." *Id.* On February 13, 2013, the SRBA Court entered an *Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, and Disallowal of Unclaimed Water Rights,* Basin-Wide Issue 16, Subcase No. 00-92099, In Re SRBA Case No. 39576 ("Closing Order"). The Court ordered that "except for *de minimis* domestic and stockwater uses and late claims required to resolve pending litigation on the date of this *Order* in the SRBA, claims taking in basin[] . . . 36 . . . is closed." Closing Order at 3.

Rangen apparently believes its late claim is permitted by the Closing Order because its Delivery Call was "pending at the time of the Court's Order Closing Claims Taking Basin 36."

Haemmerle Aff. 2, ¶ 2. However, the Court specified in the Closing Order that "'[p]ending litigation' refers to active, related subcase(s) [in the SRBA] pending at the time of the basin closure deadline wherein an additional late claim(s) is required to resolve the related water rights(s)." Closing Order at 3, n.1 (emphasis added). A delivery call does not satisfy the Court's exceptions identified in its Closing Order. *See id.* Further, Rangen is not claiming a *de minimis* domestic or stockwater use, and its claim does not involve a subcase pending at the time of the basin closure deadline. As explained by the Court in the Closing Order, water users have had notice of the deadlines for SRBA filings, and no other late claims shall be allowed:

> Completion of claims taking in individual basins is an essential first step to completion of the SRBA. Without it, completion of the SRBA will not occur.
>
> . . . .
>
> Claimants in each of these basins previously received extensive first-round and second-round *Notice of Filing Requirements* in the SRBA. *See* Idaho Code § 42-1408. These notice procedures meet constitutional due process requirements.

Closing Order at 2. Indeed, Rangen had actual knowledge of the late claims deadline – Rangen's counsel served on the steering committee that developed the late claims procedure and deadlines within the SRBA. *See Order Establishing Steering Committee and Notice of First Scheduled Meeting*, July 15, 2011, Basin Wide Issue 16, Subcase No. 00-92099, In Re SRBA Case No. 39576. Its untimely filing is not permitted by the plain terms of the Closing Order, and accordingly this Court should dismiss the Late Claim Motion.

B. Rangen's Motion is untimely pursuant to I.R.C. P. 60(b).

Rule 60(b) of the Idaho Rules of Civil Procedure permits a court to relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ;
> (3) fraud . . . , misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged . . . ; or
(6) any other reason justifying relief from the operation of the judgment.

I.R.C.P. § 60(b) (2012). The decision whether to grant relief under this rule is discretionary with the Court. *See Bach v. Miller*, 148 Idaho 549, 552, 224 P.3d 1138, 1141 (2010); *Order Conditionally Granting Motion to Set Aside Partial Decrees* 12, Dec. 3, 2003, For Water rights 37-07454 and 37-07602, In re SRBA Case No. 39576 ("Conditional Order").

However, such discretion can only be applied to a timely filed motion, and Rule 60(b) contains mandatory deadlines for filing, under which Rangen's Late Claim Motion is untimely. Rule 60(b) states that any "motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken." I.R.C.P. § 60(b) (2012). The time limits in Rule 60(b) are mandatory, and any attempt to set aside a judgment or order pursuant to subdivisions (1), (2), or (3) is not allowed where the applicable time limit under the rule has clearly expired[5]. Over 14 years have passed since entry of Rangen's partial decrees (both entered in 1997), and thus Rangen's late claim is precluded as it does not satisfy the standards in Rule 60(b). Fourteen years is not a reasonable time to wait to seek the relief Rangen requests.

C. Rangen's Rule 60(b) Motion fails on the merits and seeks a re-adjudication of its decreed rights contrary to *AFRD#2.*

Rangen's Late Claim Motion also fails on its merits. Rangen has provided no facts to support a late claim to retroactively bless its operations at what is undisputedly an undecreed point of diversion. Rangen's decrees were entered by the SRBA over 14 years ago, and Rangen's Motion does not claim that it had no knowledge that the decreed legal description was incorrect, or indeed offer any excuse for why it has failed to correct the alleged error in the last

[5] Pursuant to AO1, "Partial decrees are final judgments...". SRBA A01 at 21.

14 years with this Court. Its reliance on what have apparently been unlawful diversions subsequent to the entry of its partial decrees is not "good cause."

Rangen suggests that IGWA's pending permit application before the IDWR makes this late claim necessary. *See* Haemmerle Aff. 4, ¶ 7. However, Rangen sought and received from the Director (in the context of a delivery call) an interpretation of its own partial decrees; upon learning that the Director intended to deny Rangen's Source Motion, IGWA filed for a permit to appropriate the spring water collected by Rangen outside of the 10-acre tract for purposes of providing mitigation water to Rangen (or other spring users downstream). If Rangen has a problem with IGWA's permit application, it ought to litigate that in front of the Department. Raising the pending permit application as a basis for a late claim in the SRBA amounts to a failure to exhaust administrative remedies. *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

Further, as the Supreme Court found in *AFRD#2*, a delivery call cannot result in re-adjudication of a senior's right; this rule applies across the board, regardless of whether the re-adjudication is sought by the appropriator or the juniors. *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007). Put another way: Rangen cannot avoid the results of the Director's interpretation of its own partial decrees (interpretations Rangen sought by filing its motion for summary judgment) by changing the terms of its decrees in the SRBA through a late claim filing.

Finally, Rangen claims that if the Department were to rule that Rangen is limited in diverting water to its decreed point of diversion, "it would result in a great surprise to Rangen." Haemmerle Aff. 5, ¶ 10. "In the context of Rule 60(b), surprise is defined as 'some condition or situation in which a party to an action is unexpectedly placed to his injury, without any default or

negligence of his own, and which ordinary prudence could not have guarded against.'" *LeaseFirst v. Burns*, 131 Idaho 158, 162, 953 P.2d 598, 602 (1998) (citation omitted). If Rangen is unexpectedly injured by the Director's Order, Rangen is entirely at fault for finding itself in that position. Rangen applied for the Curran Tunnel water rights and received partial decrees containing the point of diversion it asked for. If it is indeed the case, as alleged, that "Rangen has always appropriated water coming from the entire talus slope", and not just its decreed point of diversion, then blame for the error in Rangen's partial decrees lies entirely at Rangen's feet, a fact that alone demonstrates negligence on Rangen's part. Haemmerle Aff. at 3. Further, Rangen has been actively engaged in delivery calls before the department for at least 10 years, and presumably is intimately familiar with its partial decrees – ordinary prudence would have required Rangen to review its partial decrees prior to filing its delivery call, which would have unearthed the alleged error in its partial decrees. Accordingly, 'surprise' is not a convincing excuse.

D. If Rangen's motion is permitted, Rangen's partial decrees must be vacated and objectors must be permitted to litigate all contested elements of Rangen's late claim.

SRBA Administrative Order 01 ("AO1") states that "[p]arties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." AO1 at 21. Rangen's motion amounts to a collateral attack on its own decree, which is a final judgment on the merits: [i]n the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment. Conditional Order at 7, ¶ 1. However, while relief from default judgments is typically favored by Courts, as this Court has previously noted,

> water right claims that proceed uncontested through the SRBA are not entirely analogous to a default situation. Uncontested claims are prosecuted by claimants who are usually active in their subcase but face no objectors. Although uncontested, the claims are still in fact "decided on the merits."

Conditional Order at 9, ¶ 5. Therefore, if the Court considers Rangen's late claim motion on its merits, it should interpret said motion as a motion to set aside Rangen's partial decrees pursuant to the applicable procedures outlined in AO1, and the Court must set aside Rangen's prior partial decrees before considering its late claims. In other words, Rangen's partial decrees must be vacated in whole, and in litigating Rangen's late claim motion, as a matter of law, all elements of Rangen's claimed water rights are open to contest and scrutiny, and not simply the point of diversion element noticed by Rangen.

E. IDWR is not administratively estopped from its finding in the delivery call.

Rangen claims that its late claim must be permitted because the Idaho Department of Water Resources has historically recognized "Rangen's right to divert water from the entire talus slope for the water rights," and has "acknowledged and allowed Rangen to appropriate water from the entire talus slope." Haemmerle Aff. 2, ¶ 4. The implications of Mr. Haemmerle's affidavit are twofold: (1) that the Department has already considered the legality of Rangen's diversions outside of its decreed point of diversion, and (2) that the Department can be estopped[6] from interpreting Rangen's partial decrees otherwise – an interpretation, incidentally, that Rangen requested the Department make.

In the prior delivery call matter before the Department, the Director did not address whether Rangen could divert water outside of its decreed point of diversion, nor was he asked to. *See* Haemmerle Aff. Ex. 2. Indeed, if the Director had answered that question, Rangen's Source Motion – in which Rangen asked the Director, for the first time, to determine whether its diversion of talus slope water was permitted under its decree - would have been unnecessary.

[6] "The Idaho Supreme Court has not delineated what circumstances may be so exceptional as to allow invocation of estoppel principles against the government, but whether extraordinary circumstances exist in a particular case is ultimately irrelevant if the elements of estoppel would not be satisfied anyway." *Naranjo v. Idaho Dep't of Correction*, 151 Idaho App. 916, 920, 265 P.3d 529, 533 (2011).

The matter of Rangen's extra-decree points of diversion was not an issue litigated in the prior matter before the Department, and accordingly the Department is not estopped from making such a determination.[7] *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) ("Collateral estoppel only applies to issues actually litigated and decided in the prior proceeding.").

Rangen has also not provided a basis for application of equitable estoppel against the Department, as there is no allegation of misrepresentation by the Department. *Id.* ("Equitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity" and requires "false representation or concealment of a material fact with actual or constructive knowledge of the truth"). Nor has Rangen established the elements necessary for quasi-estoppel: quasi-estoppel requires prejudicial reliance by the party asserting estoppel, showing that said party has "'changed their position as a result of the alleged representation and suffered a detriment as a result thereof.'" *Willig v. State*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (citation omitted). While Rangen claims that it has "relied" upon the Department's "post-decree interpretations" to "continue[] to appropriate water from the talus slope," Rangen has not *changed* its position to its detriment – Rangen claims that it has "always appropriated water" from its undecreed points of diversion, well before the Director issued the Second Amended Order in May of 2005. Haemmerle Aff. 3, ¶¶ 5. 6. Accordingly, Rangen did not detrimentally rely on the Department's prior ruling, which does not even address the issue of Rangen's illegal point of diversion.

Furthermore, any actions by the Department, or lack thereof, do not operate to revise the decreed elements of Rangen's water rights. Other water users, such as Pocatello, are bound by

[7] The 2003 delivery call was denied under a May 2005 Order in which the Department found, *inter alia*, that Rangen's call was futile. See Exhibit 2 to Haemmerle Affidavit.

the terms of Rangen's partial decrees, and only those terms found therein, which represent adjudications on the merits of Rangen's water rights. *See* Conditional Order at 8, ¶ 4. Rangen's illegal points of diversion are just that, and cannot be 'papered over' due to the Departments failure to independently investigate whether Rangen is diverting from locations inconsistent with its decree.

CONCLUSION

Rangen's Motion for Late Claim is an attempt to cure the fact that some of its diversion structures are indisputably outside of the points of diversion identified in its partial decrees. Rangen's partial decrees establish the nature and extent of its water rights – accordingly, Rangen may only divert water from its decreed point of diversion. Rangen has not established a legitimate basis for setting aside its decrees, and given its untimely nature, Pocatello respectfully requests that the Court deny Rangen's Motion.

Dated this 22nd day of May, 2013.

CITY OF POCATELLO ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2013, a copy of **Pocatello's Corrected Response to Rangen's Motion for Late Claim and Amended Late Claim** for **SRBA Water Right Claim: 36-16977** was served as noted to the following parties:

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