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DEPARTMENT OF
WATER RESOURCES

Attorneys for Rangen, Inc.

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

**IN THE MATTER OF DISTRIBUTION
OF WATER TO WATER RIGHTS HELD
BY RANGEN, INC., WATER RIGHT
NOS. 36-00134B, 36-00135A, AND 36-
15501**

**DOCKET NO. CM-DC-2014-004

RANGEN, INC.'S MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Rangen, Inc. ("Rangen"), by and through its attorneys of record, submits the following Memorandum in Support of Motion for Summary Judgment.

I. INTRODUCTION

Rangen made the Delivery Call at issue because of declining water flows at its Research Hatchery in Hagerman and Director Spackman's recent decision to restrict the source of Rangen's water rights. The Director has already made all of the factual and legal determinations necessary to evaluate this Call, and the Department possesses all of the water measurements for the Martin-Curren Tunnel. There simply is no need for the evidentiary hearing scheduled for November 2014,

**RANGEN, INC.'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 1**

and this Petition for Delivery Call should have been acted upon without requiring Rangen to file this Motion for Summary Judgment. Rangen respectfully requests that the Director enter an Order granting Summary Judgment in Rangen's favor and ordering the relief requested.

II. STANDARD OF REVIEW

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). When a tribunal assesses a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. *See G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Likewise, all reasonable inferences which can be made must be drawn in the nonmovant's favor. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988).

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

III. STATEMENT OF UNDISPUTED FACTS

1. Rangen is a family corporation that has been in business since 1925. Its headquarters is located in Buhl, Idaho. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call*, Findings of Fact at ¶ 12 ("*Final Order*" attached as Exhibit 1 to *May Affidavit*).

2. Aquaculture is one of Rangen's business enterprises. Id.

3. As part of its aquaculture business, Rangen owns and operates a research and fish propagation facility ("Research Hatchery") near Hagerman, Idaho. Id. at ¶ 13.

4. Rangen holds the following five (5) water rights for the Research Hatchery:

ELEMENTS OF RANGEN, INC.'S WATER RIGHTS					
WATER RIGHT NO.:	36-00134B	36-00135A	36-15501	36-02551	36-07694
PRIORITY DATE:	Oct. 9, 1884	Apr. 1, 1908	July 1, 1957	July 13, 1962	Apr. 12, 1977
SOURCE:	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek
QUANTITY:	0.09 cfs ¹	0.05 cfs	1.46 cfs	48.54 cfs	26.0 cfs
DIVERSION POINT:	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW
PURPOSE AND PERIOD OF USE:	Domestic (0.07 cfs) 01-01 to 12-31	Domestic (0.05 cfs) 01-01 to 12-31	Fish Propagation (1.46 cfs) 01-01 to 12-31	Domestic (0.10 cfs) 01-01 to 12-31	Fish Propagation (26.0 cfs) 01-01 to 12-31
	Irrigation (0.09 cfs) 03-15 to 11-15	Irrigation (0.05 cfs) 03-15 to 11-15		Fish Propagation (48.54 cfs) 01-01 to 12-31	
PLACE OF USE:	Domestic T07S R14E S31 SENE S32 SWNW	Domestic T07S R14E S31 SENE S32 SWNW	Fish Propagation T07S R14 E S31 SENE S32 SWNW	Domestic T07S R14E S31 SENE S32 SWNW	Fish Propagation T07S R14E S31 SENE S32 SWNW
	Irrigation T07S R14E S31 SWNE 2 SENE 4 S32 SWNW1 (7 acres total)	Irrigation T07S R14E S31 SWNE 2 SENE 4 S32 SWNW 1		Fish Propagation T07S R14E S31 SENE S32 SWNW	

Id. at p. 5.

5. Rangen filed a *Petition for Delivery Call* on December 13, 2011. *Final Order*, Findings of Fact, ¶ 1. The 2011 Delivery Call was only for the 1962 and 1977 rights because it did

not appear the other rights were being injured given the total flows available at the Research Hatchery. *See Final Order*, Findings of Fact, ¶ 24.

6. In the *Final Order* on Rangen's December 2011 Delivery Call, Director Spackman ruled that the source of Rangen's water rights is limited to water that emanates from the mouth of the Martin-Curren Tunnel and does not include the other spring water that Rangen has historically put to beneficial use. *Final Order*, Findings of Fact, ¶¶ 26-30 and Conclusions of Law, ¶¶ 15-18.

7. The following is a list of all water rights which show the Martin-Curren Tunnel as their source:

Water Right Holder	Water Right Number	Water Right Quantity (cfs)	Priority Date
Morris	36-134D	1.58	10/9/1884
Morris	36-134E	0.82	10/9/1884
Candy	36-134A	0.49	10/9/1884
Rangen	36-134B	0.09	10/9/1884
Musser	36-102	4.1	10/9/1884
Rangen	36-135A	0.05	4/1/1908
Candy	36-135B	0.51	4/1/1908
Morris	36-135D	1.58	4/1/1908
Morris	36-135E	0.82	4/1/1908
Rangen	36-15501	1.46	7/1/1957
Rangen	36-02551	48.54	7/13/1962
Rangen	36-07694	26	4/12/1977

See Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order, CM-MP-2014-001 and CM-DC-2011-004 (attached as Exhibit 2 to May Affidavit) ("Amended Order Re: Mitigation Plan I").

8. The Department measures the flow of water from the Martin-Curren Tunnel. *See* Exhibit 3 to *May Affidavit*. Since January 2014, the flow of the Martin-Curren Tunnel has been under 3 cfs. *See* Exhibit 3 to *May Affidavit*. On June 4, 2014, the last measurement that is available to Rangen, the Department measured the flow from the Martin-Curren Tunnel to be 1.41 cfs. *See id.* The average flow since January 2014 has been 1.82 cfs. *See id.*

9. The current flow from the Martin-Curren Tunnel is not sufficient to satisfy any of the existing water rights that have the Martin-Curren Tunnel as their source. If the current flow is pro-rated among the most senior rights which share the same priority date, all of Rangen's water rights – including the 1884 and 1957 rights which are at issue in this Delivery Call -- are short of water:

Water Right Holder	Water Right Number	Water Right Quantity (cfs)	Priority Date	Allocation of 1.41 cfs to Senior Rights on Prorata Basis
Morris	36-134D	1.58	10/9/1884	0.3147
Morris	36-134E	0.82	10/9/1884	0.1633
Candy	36-134A	0.49	10/9/1884	0.0976
Rangen	36-134B	0.09	10/9/1884	0.0179
Musser	36-102	4.1	10/9/1884	0.8165
Rangen	36-135A	0.05	4/1/1908	0
Candy	36-135B	0.51	4/1/1908	0
Morris	36-135D	1.58	4/1/1908	0
Morris	36-135E	0.82	4/1/1908	0
Rangen	36-15501	1.46	7/1/1957	0
Rangen	36-02551	48.54	7/13/1962	0
Rangen	36-07694	26	4/12/1977	0

10. The Director has ruled that the total average discharge of the spring complex that supplies the Research Hatchery has declined over 33 cfs between 1966 and 2012 in response to changes in the water budget of the Eastern Snake Plain Aquifer (“ESPA”). *Final Order*, Conclusions of Law, ¶ 31.

11. The Director has ruled that the Rangen spring complex is hydraulically connected to the ESPA. *Final Order*, Findings of Fact, ¶ 55.

12. The Director has ruled that increased ground water pumping has contributed to the decline in discharge from the spring complex and the Martin-Curren Tunnel. *Final Order*, Conclusions of Law, ¶ 31.

13. The Director has ruled that declining spring flows have hindered Rangen’s ability to exercise its Martin-Curren Tunnel water rights. *Final Order*, Findings of Fact, ¶¶ 56-60 and Conclusions of Law ¶¶ 26-30, 32.

14. The Director has ruled that Rangen is beneficially using the water. *Final Order*, Findings of Fact, ¶¶ 61-66 and Conclusions of Law, ¶¶ 30.

15. The Director has ruled that Rangen is not wasting water. *Final Order*, Findings of Fact, ¶¶ 63-66 and Conclusions of Law, ¶¶ 29-30, 34, 59.

16. The Director has ruled that Rangen’s means and methods of diversion are reasonable and that Rangen employs reasonable diversion and conveyance efficiency and conservation practices in diverting water from the Martin-Curren Tunnel. *Final Order*, Conclusions of Law, ¶¶ 33-34.

17. The Director has ruled that Rangen has used reasonable effort and expense to divert water from the Martin-Curren Tunnel. *Final Order*, Conclusions of Law, ¶ 35.

18. The Director has ruled that Rangen's exercise of its water rights from the Martin-Curren Tunnel are being materially injured by junior-priority ground water pumping in the ESPA. *Final Order*, Conclusions of Law, ¶ 36.

IV. ARGUMENT

A. **The Director Has All of the Water Measurements and Has Made All of the Factual and Legal Determinations Necessary to Grant the Relief Requested.**

To initiate a water delivery call, the CM Rules "require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury." *Id.* at Idaho 877. "Material injury" is defined by the CM Rules as "[h]indrance to or impact upon *the exercise of a water right* caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." IDAPA 37.03.11.010.14 (emphasis added); *see e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2010). "The Rules further provide that the petitioner file a description of his water rights, including the decree, license, permit or claim for such right, the water diversion and delivery system he is using and the beneficial use being made." *Id.* "CM [Rule] 42 lists factors the 'Director may consider in determining material injury and whether the holders of water rights are using water efficiently and without waste." *Id.* at Idaho 876. "Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion." *Id.*

When responding to a water call, and in consideration of CM Rule 42 factors, "the burden **is not** on the senior water rights holder to re-prove an adjudicated right." *Id.* at Idaho 878 (emphasis added). The Idaho Supreme Court has held:

While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

Id. at 878.

Rangen's Petition for Delivery Call at issue sets forth all of the elements required by CM Rule 42. Additionally, the Director must evaluate Rangen's current Petition for Delivery Call in the context of Rangen's December 2011 Call and the various mitigation plans filed in response. These matters involve the same water source, the same diversion works, and the same beneficial use. The Director has already determined that Rangen is beneficially using the water from the Martin-Curren Tunnel and that it is diverting and using the water in a reasonable way. The Director has also recognized that the Martin-Curren Tunnel is hydraulically connected to the ESPA and that junior-priority ground water pumping within the ESPA is causing Rangen material injury. When Rangen filed the Petition at issue, the only question that had to be evaluated by the Director is whether Rangen's 1957, 1908 and 1884 water rights are short. The water measurements necessary to make that determination are in the hands of the Department because it measures the water from the Martin-Curren Tunnel and maintains the flow records. The measurement records submitted herewith were actually obtained from the Department. In fact, the Director has already determined that there is insufficient water in the Martin-Curren Tunnel to satisfy Rangen's 1957 water right. In response to Rangen's request that the Director reconsider his decision not to allocate water to Rangen's 1957 right when ruling on IGWA's First Mitigation Plan, the Director stated:

RANGEN, INC.'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 8

If the Director were to adopt Rangen's suggested computation, the Director would unlawfully allocate water to Rangen's junior water right before allocating water to the senior water rights held by Morris. Rangen's water right no. 36-15501 bears a priority date of July 1, 1957. Morris' most junior water right shown in the table in Finding of Fact ¶ 27 has a priority date of December 1, 1908. Because Morris is entitled to the 3.2 cfs before water right no. 36-15501 come into priority, the Director will not change his computation of the mitigation credit to IGWA for exchange of irrigation water diverted from the Curren Tunnel.

Final Order on Reconsideration, p. 2, CM-MP-2014-001 and CM-DC-2011-004 (attached as Exhibit 4 to *May Affidavit*) ("*Final Order on Reconsideration*")

Given the posture of this case, there is simply no reason to hold an evidentiary hearing in November, 2014. The parties spent nearly three weeks adjudicating Rangen's December 2011 Delivery Call and IGWA and Pocatello were given ample opportunity to present their defenses at that time. The Director considered all of the evidence that was presented and issued a 42 page opinion setting forth all of his Findings of Fact and Conclusions of Law. Those Findings of Fact and Conclusions of Law establish the CM Rule 42 factors in Rangen's favor. When those Findings of Fact and Conclusions of Law are coupled with the Martin-Curren Tunnel water measurements that the Department has in its possession, the Director should grant Rangen's Petition for Delivery Call and order the relief requested. There is no justification for delaying the administration of Rangen's 1884, 1908 and 1957 water rights and Rangen respectfully requests that this Motion for Summary Judgment be granted.

V. CONCLUSION

For the foregoing reasons Rangen respectfully requests that the Director grant Rangen's Motion for Summary Judgment and order the administration of all Martin-Curren Tunnel rights in accordance with the prior appropriation doctrine.

DATED this 26th day of September, 2014.


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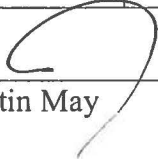
CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 26th day of September 2014 he caused a true and correct copy of the foregoing document to be served upon the following:

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