

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693
WILLIAMS, MESERVY & LOTHSPREICH, LLP
Attorneys at Law
153 East Main Street
P. O. Box 168
Jerome, Idaho 83338
Telephone: (208) 324 2303
Facsimile: (208) 324 3135
rewilliams@cableone.net
Attorney for Cities of Bliss, Buhl, Burley, Carey,
Declo, Dietrich, Gooding, Hazelton, Heyburn,
Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell

CANDICE MCHUGH

IDAHO STATE BAR NO. 5908
CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
MCHUGH BROMLEY, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-
cmchugh@mchughbromley.com
cbromley@mchughbromley.com
Attorneys for Cities of Bliss, Buhl, Burley, Carey,
Declo, Dietrich, Gooding, Hazelton, Heyburn,
Jerome, Paul, Richfield, Rupert, Shoshone, and
Wendell

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

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02551 AND 36-07694

(RANGEN, INC.)

CM-DC-2014-004

**COALITION OF CITIES' RESPONSE
TO RANGEN, INC.'S MOTION FOR
SUMMARY JUDGMENT**

COME NOW the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Cities"), by and through their counsel, and hereby respond to Rangen, Inc.'s ("Rangen") *Motion for Summary Judgment* ("Motion") filed with IDWR on September 29, 2014.¹

¹ Filed contemporaneously with the *Motion for Summary Judgment* was Rangen's *Memorandum in Support of Motion for Summary Judgment* ("Memorandum") and the *Affidavit of J. Justin May in Support of Motion for Summary Judgment* ("May Affidavit").

I. INTRODUCTION

Rangen moves the Director to enter an order, as a matter of law, on four issues:

1. Enter an Order finding that Rangen has suffered, and will suffer, material injury to Rangen's 1884, 1908 and 1957 Water Rights as a result of junior-priority ground water pumping in the ESPA, including, but not limited to Water Districts 1, 34, 100, 110, 120, 130 and 140 to the extent those Districts overlie the ESPA;
2. Enter an Order finding that the defenses to Rangen's claim of material injury were previously adjudicated and rejected;
3. Immediately, and without further hearing or delay, administer and distribute water in the ESPA, including, but not limited to Water Districts 1, 34, 100, 110, 120, 130 and 140 to the extent those Districts overlie the ESPA in accordance with the prior appropriation doctrine as required by I.C. § 42-602; and
4. Immediately, and without further hearing or delay, order the water masters of the ESPA, including, but not limited to Water Districts 1, 34, 100, 110, 120, 130 and 140 to curtail junior-priority ground water pumping as necessary to deliver Rangen's water in accordance with the prior appropriation doctrine.

Motion at 1-2.

Rangen's *Motion* should be denied for three reasons. First, the water rights that are the subject of Rangen's most recent delivery call cannot be materially injured because Rangen's water supply exceeds the alleged material injury. Second, water right nos. 36-134B and 36-135A (domestic² and irrigation purposes of use) have never been evaluated by IDWR or whether the rights are materially injured in a delivery call case; thus, summary judgment should be denied because no factual record has been developed to support curtailment. Third, while the Director has found material injury to other fish propagation water rights held by Rangen, the fish propagation water right that is the subject of this delivery call – water right no. 36-15501 – has not been examined under IDWR's *Rules for Conjunctive Management of Surface and Ground*

² The domestic purpose of use under water right nos. 36-134B and 36-135A have likely never been fully investigated by IDWR for any purposes given the *de minimis* nature of the rights.

Water Resources, IDAPA 37.03.11 (“CM Rules”). The measurements from the Martin-Curren Tunnel upon which Rangen bases its demand for curtailment are incomplete, not accounting for all diversions from the Tunnel. As a result, there are genuine issues of material fact in dispute and summary judgment should be denied.

II. STANDARD OF REVIEW

Summary judgment may only be granted “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 293 P.3d 630, 632 (2012). In order to meet its burden, “the moving party must challenge in its motion and establish through evidence that no issue of material facts exist for an element of the nonmoving party’s case.” *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002). In reviewing a motion for summary judgment, the Director must “construe all disputed facts and make all reasonable inferences in favor of the nonmoving party.” *Pioneer Irr. Dist. v. City of Caldwell*, 288 P.3d 810, 813 (2012). The Director must “liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party.” *Northwest* at 838, 41 P.3d at 266. “Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.” *Id.*

III. ARGUMENT

A. Rangen’s Motion for Summary Judgment Must be Denied Because Its Water Supply Exceeds Its Alleged Material Injury

In its *Motion*, Rangen seeks curtailment of junior-priority ground water users to benefit its water supply at the Martin-Curren Tunnel (“MCT”). In the *May Affidavit*, Rangen attached measurements, which counsel represents were taken by IDWR from MCT. Assuming,

arguendo, that the measurement data is known and reliable, and that Rangen has correctly apportioned MCT water amongst the other MCT users, Rangen fails to acknowledge that its current total water supply (MCT + talus slope + springs + Billingsley Creek) obviates any allegation of material injury.

The CM Rules authorize the Director to examine, “The extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies . . .” CM Rule 42.01.g (emphasis added). CM Rule 42.01.g is facially constitutional. *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 154P.3d 433 (2007). In the Surface Water Coalition (“SWC”) delivery call, the SWC alleged material injury because it was not receiving the full quantity of its natural flow and the full quantity of its storage supply. The Director disagreed. Applying CM Rule 42.01.g to his material injury analysis, the Director concluded it was proper to examine the entire water supply available to the SWC (natural flow, storage, and supplemental ground water rights), not just discrete sources. The Director’s application of CM Rule 42.01.g was affirmed on judicial review. *Order on Petition for Judicial Review*, Fifth Jud. Dist. Gooding County, Case No. 2008-551, p. 23 (July 24, 2009). Therefore, in conjunctive management, the Director does not limit his material injury analysis to whether a particular source is fully satisfied; rather, the Director examines whether the “water supplies” available to the senior-priority water user, when viewed together, meet the senior’s reasonable needs.

Here, Rangen bases its allegation of material injury to a discrete source, the MCT. In the Director’s January 29, 2014 *Final Order Regarding Rangen, Inc.’s [2011] Petition for Delivery Call*, CM-DC-2011-004 (“Final Order”), the Director concluded that the source of Rangen’s water rights was the MCT, with its point of diversion located in T07S, R14E, S32 SESWNW.

The Director concluded that water right nos. 36-2551 and 36-7694 were materially injured and ordered curtailment of junior-priority ground water rights in order to provide 9.1 cfs to Rangen at MCT. The *Final Order* determined, however, that Rangen's historic water supply was MCT, spring water emanating from the talus slope around MCT, and surface water from Billingsley Creek.

Because Rangen was only legally authorized to use water from MCT, on January 31, 2014, shortly after issuance of the *Final Order*, IDWR issued a *Notice of Violation and Cease and Desist Order* ("NOV") requiring Rangen to cease diverting water from the Bridge Diversion. After receiving the NOV, Rangen availed itself of a compliance conference with IDWR to discuss its illegal use of water. After the compliance conference, IDWR issued a *Consent Order and Agreement* (March 7, 2014) ("Consent Order"), authorizing Rangen to continue diverting water from the Bridge Diversion.³

Despite the *Final Order's* conclusion that the source of Rangen's water rights is MCT, the *Consent Order* allows Rangen to continue its historic practice of using water from other sources. Even without a record to judge the MCT measurements contained in *Exhibit 3* to the *May Affidavit*, the factual record from the 2011 delivery call shows Rangen's water supply greatly exceeds its present claim of material injury to water right nos. 36-134B, 36-135A, and 36-15501. CM Rule 42.01.g.

The record from the 2011 delivery call established that Rangen has been measuring its water use "since 1966." *Final Order* at 7. "Since 1995, Rangen has been required by the Department to measure the flows through the Rangen Facility and report the measurements

³ A hearing recently concluded on Rangen's *Application for Permit No. 36-17002* and the Idaho Ground Water Appropriators, Inc.'s *Application for Permit No. 36-16976*. Whatever the outcome of these contested cases, Rangen will be provided with an additional source of supply.

annually to the watermaster.” *Id.* The sum of Rangen’s measurements “quantify all inflow that is tributary to Billingsley Creek upstream from those measurement locations, except for diversions to the senior irrigation rights from the Farmers’ Box.” *Id.* at 8. It was found that Rangen “under-reports” its measurements by “15.9%.” *Id.* at 11, 33.

As stated above, the *Final Order* entitles Rangen to 9.1 cfs for material injury to water right nos. 36-2551 and 36-7694. Material injury to those water rights is mitigated. *Order Approving IGWA’s Second Mitigation Plan*, CM-MP-2014-003 (June 20, 2014). Assuming, *arguendo*, that pumping by junior-priority ground water rights causes the full extent of material injury to the water rights that are the subject of this delivery call, the maximum extent of injury is 1.6 cfs:

	Quantity (cfs)
Water Right No. 36-134B	0.09
Water Right No. 36-135A	0.05
Water Right No. 36-15501	1.46
Total	1.60

Memorandum at 3.

According to the most recent annual data provided by Rangen to IDWR (2013), and not taking into account Rangen’s systematic 15.9% under-reporting of the water it uses, Rangen’s water supply greatly exceeds 1.6 cfs:

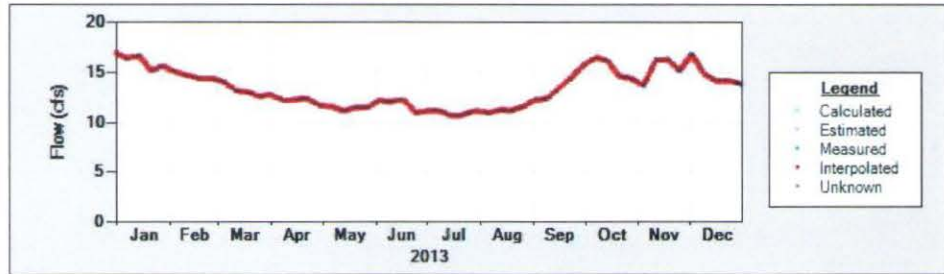


View Annual Summary
Print & Export Data
Reset User Preferences
Log Off

Annual Summary

Point of Diversion: 360410089 - D - RANGEN HATCHERY

Year Type:
Calendar Year
Year Period:
01/01/2013 - 12/31/2013
Water District:
36A Billingsley Creek



Annual Summary for Water District 36A Billingsley Creek 360410089 - D - RANGEN HATCHERY

DISCHARGE, CUBIC FEET PER SECOND, CALENDAR YEAR 01/01/2013 - 12/31/2013
c - Calculated, e - Estimated, i - Interpolated, m - Measured and n - Not Specified

Publish Date: 10/9/2014
(Ver. 2.0.0.1)

<https://www.idwr.idaho.gov/apps/wm/DiversionDataApplication/AnnualSummary.aspx>.

According to the 2013 data that supports the above graph, and not taking into account Rangen’s systematic 15.9% under-reporting of the water it uses, the minimum amount of water Rangen used was 10.7 cfs; whereas the maximum amount was 17.0 cfs in 2013. *Exhibit A* to the *Affidavit of Chris M. Bromley*. Because Rangen’s water supply is more than enough to supply water right nos. 36-134B, 36-135A, and 36-15501, Rangen is not materially injured and its *Motion* must be denied. CM Rule 42.01.g.

B. Rangen’s Motion For Summary Judgment Must be Denied Because It Has Provided No Evidence That Its 1884 and 1908 Water Rights Are Materially Injured

Regardless of the amount of water that is available for diversion under water right nos. 36-134B and 36-135A, Rangen has provided no facts to support its assertion that its domestic⁴ and irrigation water rights are materially injured.

1. Water Right Nos. 36-134B and 36-135A

Rangen holds two water rights for domestic and irrigation purposes of use, decreed by the district court in the Snake River Basin Adjudication (“SRBA”). Rangen’s domestic and irrigation water rights are summarized as follows:

	Water Right No. 36-134B	Water Right No. 36-135A
Source	Martin-Curren Tunnel; tributary to Billingsley Creek	Martin-Curren Tunnel; tributary to Billingsley Creek
Quantity	0.09 cfs	0.05 cfs
Priority Date	10/09/1884	4/1/1908
Point of Diversion	T07S, R14E, S32 SESWNW	T07S, R14E, S32 SESWNW
Purpose and Period of Use	Irrigation, 0.09 cfs, 2/15 – 11/30; Domestic, 0.07 cfs, 1/1 – 12/31	Irrigation, 0.05 cfs, 2/15 – 11/30; Domestic, 0.05 cfs, 1/1 – 12/31
Place of Use	Irrigation: T07S, R14E, S31 SWNE (2 acres); T07S, R14E, S31 SENE (4 acres); T07S, R14E, S32 SWNW (1 acre) Domestic: T07S, R14E, S31 SENE; T07S, R14E, S32 SWNW	Irrigation: T07S, R14E, S31 SWNE (2 acres); T07S, R14E, S31 SENE (4 acres); T07S, R14E, S32 SWNW (1 acre) Domestic: T07S, R14E, S31 SENE; T07S, R14E, S32 SWNW

⁴ It is worth noting that IDWR exempted, from curtailment in the 2011 Rangen delivery call, non-consumptive “ground water rights [and] ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 . . . pursuant to IDAPA 37.03.11.020.11.” *Final Order* at 42. While Rangen’s domestic rights are from a surface water source, those rights meet the *de minimis* definition set forth in Idaho Code § 42-111 and are considered non-consumptive. If non-consumptive ground water rights are not subject to curtailment, a question arises as to how non-consumptive surface water rights can seek curtailment?

<p>Conditions</p>	<ul style="list-style-type: none"> • Use of this right with right no. 36-135A is limited to the irrigation of a combined total of 7.0 acres in a single irrigation season; • The quantity of water under this right for domestic use shall not exceed 13,000 gallons per day; • Domestic use is for 3 homes and 2 offices; • The quantity of water decreed for this water right for domestic use is not a determination of historical beneficial use. 	<ul style="list-style-type: none"> • Use of this right with right no. 36-134B is limited to the irrigation of a combined total of 7.0 acres in a single irrigation season; • The quantity of water under this right for domestic use shall not exceed 13,000 gallons per day; • Domestic use is for 3 homes and 2 offices; • The quantity of water decreed for this water right for domestic use is not a determination of historical beneficial use.
--------------------------	---	---

Order of Partial Decree for Water Right 36-00134B (January 6, 1998); *Order of Partial Decree for Water Right 36-00135A* (January 6, 1998); *Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decree an Express Statement Regarding General Provisions, Nunc Pro Tunc for Water Right No. 36-134B* (August 27, 2001); *Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decree an Express Statement Regarding General Provisions, Nunc Pro Tunc for Water Right No. 36-134B* (August 27, 2001).

2. Rangen’s 2011 Delivery Call and 2014 Delivery Call do Not Involve the same Beneficial Uses of Water

According to Rangen, its 2011 delivery call and 2014 delivery call “involve the . . . same beneficial use [of water].” *Memorandum* at 8. As to water right nos. 36-134B and 36-135A, that assertion is incorrect. In the *Final Order* on Rangen’s 2011 delivery call, the Director examined material injury only as it pertained to water right nos. 36-2551 and 36-7694. *Final Order* at 1 (Rangen’s alleged “it is not receiving all of the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694”); *Id.* at 6 (“Rangen does not allege injury to water right nos. 36-00134B, 36-00135A, and 36-15501.”).

In addition to not examining water right nos. 36-134B and 36-135A, the Director also specifically found, “Water right nos. 36-00134B and 36-00135A are for irrigation and domestic purposes. They are not for fish propagation.” *Final Order* at 6. Because no water right

examined by the Director in the 2011 delivery call had an irrigation purpose of use, Rangen is not entitled to summary judgment as to the irrigation components of water right nos. 36-134B and 36-135A.

While the Director did examine water right no. 36-2551 in the 2011 delivery call, there were no facts presented by Rangen regarding the domestic component of the right; thus, there was no analysis of Rangen's domestic use. The only purpose of use that was examined was fish propagation under water right nos. 36-2551 and 36-7694. As a result, there are genuine issues of material fact as to whether there can be material injury to the domestic components of water rights that were never examined.

3. Rangen has Provided No Facts to Support a Finding of Material Injury to the Domestic Components of Water Right Nos. 36-134B and 36-135A

As summarized in the above table, the SRBA district court placed identical conditions on the domestic components of water right nos. 36-134B and 36-135A:

- The quantity of water under this right for domestic use shall not exceed 13,000 gallons per day;
- Domestic use is for 3 homes and 2 offices; and
- The quantity of water decreed for this water right for domestic use is not a determination of historical beneficial use.

Even though water right no. 36-134B authorizes diversion of 0.07 cfs, and water right no. 36-135A authorizes diversion of 0.05 cfs, the diversion rates cannot “exceed 13,000 gallons per day.” Rangen has provided no evidence to support compliance with any of the decreed conditions, or if domestic water is still used as it was decreed (“3 homes and 2 offices”).

Without facts, and because the decreed places of use are identical, the Cities cannot determine if Rangen is “stacking” the domestic components of its water rights, so as to obtain a total

diversion rate that exceeds 13,000 gallons per day.⁵ Idaho Code § 42-111(3) (prohibition against stacking). Additionally, the Director has never examined a conjunctive management delivery call by the holder of a senior-priority domestic water right against junior-priority ground water users.⁶ With no facts to support its domestic water use, and no legal development of this type of delivery call, Rangen's *Motion* should be denied.

4. Rangen has Provided No Facts to Support a Finding of Material Injury to the Irrigation Components of Water Right Nos. 36-134B and 36-135A

While there is no legal development of conjunctive management delivery calls involving domestic water rights, there is a growing body of law regarding delivery calls by senior-priority irrigators against junior-priority ground water users. *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 315 P.3d 828 (2013); *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012).

Here, other than a simple assertion, Rangen has provided no facts to support any finding of material injury. Without a fully developed factual record, the Cities cannot know, for instance: (1) how Rangen delivers water from its point of diversion to its irrigated place of use; (2) whether Rangen delivers irrigation water by pipe or dirt ditches; (3) how much conveyance loss Rangen has; (4) how many acres Rangen actually irrigates; (5) how many acres Rangen has hardened and can no longer irrigate; (6) what irrigation efficiencies Rangen has implemented; (7) whether Rangen irrigates by gravity, sprinkler, or a combination thereof; (8) whether Rangen

⁵ Water right no. 36-2551, which was examined by the Director in the Rangen's 2011 delivery call, has the identical domestic components as are seen on water right nos. 36-134B and 36-135A, including the express statement that domestic use is for "3 homes and 2 offices." *Order of Partial Decree for Water Right No. 36-02551* (December 29, 1997). The anti-stacking rule equally applies to water right no. 36-2551.

⁶ While a conjunctive management delivery call was filed by James and Trudie Scheff on April 17, 2013 (CM-DC-2013-001) for delivery of a pre-1978 domestic ground water right, the call was later dismissed, with prejudice, by stipulation of the parties.

irrigates efficiently and without waste; (9) what crops Rangen raises on its irrigated acres, if any; (10) how many days during its irrigation season can Rangen apply water to beneficial use; (11) whether Rangen has access to other sources of water for its reasonable irrigation needs; (12) what Rangen’s reasonable in-season demand is; and (13) whether Rangen’s allegation of water shortage is supported by mapping of Rangen’s evapotranspiration. These are just some examples of facts that have been examined by the Director in prior delivery calls by senior-priority irrigators seeking curtailment of junior-priority ground water users. Without any facts to support its delivery call, Rangen’s *Motion* should be denied.

B. Rangen’s Motion For Summary Judgment Must be Denied Because Genuine Issues of Material Fact Exist as to Material Injury to Water Right No. 36-15501

1. Water Right Nos. 36-15501

	Water Right No. 36-15501
Source	Martin-Curren Tunnel; tributary to Billingsley Creek
Quantity	1.46 cfs
Priority Date	7/1/1957
Point of Diversion	T07S, R14E, S32 SESWNW
Purpose and Period of Use	Fish Propagation, 1/1 – 12/31
Place of Use	T07S, R14E, S31 SENE T07S, R14E, S32 SWNW

Conditions ⁷	<ul style="list-style-type: none"> This right and right no. 36-02551 are limited to a total combined facility volume of 123,272 cu. ft.
--------------------------------	--

Order of Partial Decree for Water Right 36-15501 (December 29, 1997).

2. Water Right No. 36-15501 was Not Analyzed in the *Final Order*

Rangen claims, because the Director has found material injury to its other fish propagation water rights, the Director has all the necessary information before him to enter an order of material injury as to water right no. 36-15501. It must be said, however, that no analysis of water right no. 36-15501 has ever been done by the Director in a delivery call: “Water right nos. 36-15501, 36-02551, and 36-07694 authorize a total, cumulative diversion of 76.0 cfs for fish propagation. . . . Rangen alleges that it ‘is not receiving all of the water to which it is entitled pursuant to decreed water right nos. 36-02551 and 36-07694.’ *Petition* at 3. Rangen does not allege injury to water right nos. 36-00134B, 36-00135A, and 36-15501.” *Final Order* at 6. Without an examination of water right no. 36-15501, and a fully developed record, it would be inappropriate to find material injury on summary judgment. “Simply put . . . a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right.” *In re Distribution of Water to Various Water Rights Held By or For Benefit of A&B Irr. Dist.*, 155 Idaho 640, 648, 315 P.3d 828, 836 (2013).

⁷ Counsel is unaware that the Condition in water right no. 36-15501 was examined during the hearing on Rangen’s 2011 delivery call. There is an identical condition found on water right no. 36-2551. As such, there are genuine issues of material fact in dispute that should be understood based on a fully developed record.

3. There are Genuine Issues of Material Fact as to Whether there is Insufficient Water in Martin-Curren Tunnel

Using the MCT measurements from Exhibit 3 to the *May Affidavit*, Rangen divides, or apportions, the available water between the MCT water users. *Memorandum* at 5. Rangen does this in an attempt to show there is no water available to it for beneficial use. The data in *Exhibit 3* to the *May Affidavit* is for a six-month period, 1/1/2014 – 6/4/2014. During that period, 2.71 cfs was the greatest recorded flow (1/2/2014); 0.55 cfs was the lowest recorded flow (5/8/2014); and 1.82 cfs was the average recorded flow. Because of the variability in flows, there are genuine issues of material fact as to whether the measured flows at MCT are sufficient or insufficient. As observed by the Fifth Judicial District Court:

An undisputed fact in this case is that the spring flows inherently fluctuate between high and lows on a seasonal basis and between years from factors other than ground water pumping. R. Vol. 16 at 3707-08. Therefore if all ground water pumping by all junior appropriators was eliminated, seasonal variations in flows would still exist. As a result, a decreed spring flow right may never have historically received the decreed flow rate for the entire decreed period of use. . . . Pursuant to the CMR, to the extent junior ground water pumpers are not the cause of the seasonal lows then there is no material injury or concomitant obligation to supply mitigation for the seasonal reductions in flows pursuant to a mitigation plan.

Order on Petition for Judicial Review, Fifth Jud. Dist. Gooding County, Case No. 2008-551, p. 19 (June 19, 2009).

The limited data contained in the *May Affidavit* show seasonal variability in the water supply available at MCT. Because the CM Rules authorize the Director to account for seasonal variability in his material injury analysis, CM Rule 42.01.c, there are genuine issues of material fact as to whether a finding of material injury should be based on the lowest recorded flow over a six-month period, the average flow over a six-month period, the greatest flow over a six-month period, or a review of data over a greater period of time.

The data relied upon by Rangen to support its claim of material injury does not represent the entire flow available to it from MCT. “Discharge from the mouth of Curren Tunnel has been measured by the Department since 1993. Pocatello, Ex. 3650, p. 5. The measured discharge does not include flow in the 6-inch PVC pipe. The sum of the tunnel discharge and flow in the 6-inch PVC pipe represents the flow available from the Curren Tunnel source.” *Final Order* at 11. The data relied upon by Rangen does not include measured discharge from the 6-inch PVC pipe and is, therefore, an incomplete representation of flow available to Rangen at MCT.

Because the data contained in the *May Affidavit* and relied upon by Rangen is incomplete, there are genuine issues of material fact as to whether the data is reliable for purposes of a material injury analysis. “Material injury is a highly fact specific inquiry that must be determined in accordance with the IDAPA conjunctive management rule 42.” *American Falls* at 868, 154 P.3d at 439. Understanding measurements is highly specific. Without a complete understanding of all the water that is available to Rangen, there are genuine issues of material fact in dispute that should be developed through the hearing process.

////

////

////

IV. CONCLUSION

Based on the foregoing, the Cities respectfully request that Rangen's *Motion* be denied, as the water supply available to Rangen exceeds the amount of its alleged material injury. If the Director does not find that Rangen's water supply exceeds the decreed quantity of its calling water rights, there are genuine issues of material fact that are inappropriate to decide in summary judgment.

RESPECTFULLY SUBMITTED.

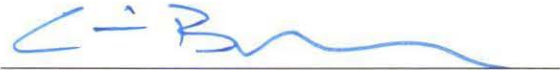
DATED this 13th day of October, 2014.

Williams, Meservy & Lothspeich, LLP



ROBERT E. WILLIAMS

McHugh Bromley, PLLC



CHRIS M. BROMLEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 13th day of October, 2014, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720 deborah.gibson@idwr.idaho.gov	Via US Mail, Postage Paid Via Electronic Mail
Deputy Attorney General Attn: Garrick L. Baxter IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 Fax: 208-287-6700 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Via US Mail, Postage Paid Via Electronic Mail
J. Justin May MAY BROWNING & MAY, PLLC 1419 W Washington Boise, ID 83702 Fax: (208) 342-7278 jmay@maybrowning.com	Via US Mail, Postage Paid Via Electronic Mail
Robyn M. Brody ATTORNEY AT LAW PO Box 554 Rupert, ID 83350 Fax: (208) 434-2780 robynbrody@hotmail.com	Via US Mail, Postage Paid Via Electronic Mail
Fritz X. Haemmerle HAEMMERLE & HAEMMERLE, PLLC PO Box 1800 Hailey, ID 83333 Tel: (208) 578-0520 Fax: (208) 578-0564 fxh@haemlaw.com	Via US Mail, Postage Paid Via Electronic Mail

<p>Randall C. Budge Thomas J. Budge RACINE OLSON NYE BUDGE & BAILEY CHARTERED PO Box 1391 Pocatello, ID 83204-1391 Fax: (208) 232-6109 rcb@racinelaw.net tjb@racinelaw.net</p>	<p>Via US Mail, Postage Paid Via Electronic Mail</p>
<p>Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 SarahK@white-jankowski.com MitraP@white-jankowski.com</p>	<p>Via US Mail, Postage Paid Via Electronic Mail</p>
<p>Jerry R. Rigby RIGBY, ANDRUS & RIGBY LAW, PLLC PO Box 250 Rexburg, ID 83440-0250 Tel: (208) 356-3633 Fax: (208) 356-0768 jrigby@rex-law.com</p>	<p>Via US Mail, Postage Paid Via Electronic Mail</p>
<p>A. Dean Tranmer POCATELLO CITY ATTORNEY'S OFFICE PO Box 4169 Pocatello, ID 83205 Tel: (208) 234-6148 Fax: (208) 239-6986 dtranmer@pocatello.us</p>	<p>Via US Mail, Postage Paid Via Electronic Mail</p>


CHRIS M. BROMLEY