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

IN THE MATTER OF DISTRIBUTION OF WATER)	Docket No. CM-DC-2014-004
TO WATER RIGHTS HELD BY RANGEN, INC., )	
WATER RIGHT NOS. 36-00134B, 36-00135A, )	<b>CITY OF POCATELLO’S</b>
AND 36-15501 )	<b>RESPONSE TO RANGEN’S</b>
)	<b>MOTION FOR SUMMARY</b>
)	<b>JUDGMENT</b>
)	

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The City of Pocatello (“City” or “Pocatello”), by and through its attorneys White and Jankowski, LLP, hereby submit this Response to Rangen’s Motion for Summary Judgment (“Motion”) and Memorandum in Support of Motion for Summary Judgment (“Memorandum”), September 26, 2014. Pocatello requests that Rangen’s Motion be denied and the delivery call dismissed for the reasons stated within.

**STANDARD OF REVIEW**

A motion for summary judgment can only be granted “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). “At all times, the moving party has the burden of establishing the lack of a genuine issue of material fact.” *Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002). “When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party.” *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002); *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007).

### **ARGUMENT**

Rangen’s Motion asks for curtailment and administration of wells on the ESPA on the grounds that “Rangen has suffered, and will suffer, material injury to Rangen’s 1884, 1908 and 1957 Water Rights” and that “the defenses to Rangen’s claim of material injury were previously adjudicated and rejected [in Rangen’s 2011 Delivery Call<sup>1</sup>]”. Motion at 1-2. Rangen’s conclusory assertions about what was determined in the 2011 Delivery Call are without merit. That proceeding involved two different water rights that Rangen holds to the Martin-Curren Tunnel – water right nos. 36-02551 and 36-07694, decreed for fish propagation only – and Rangen’s basis for claiming injury and the junior ground water users’ defenses to those claims are distinct from the case at hand. As discussed below and as supported by the attached affidavit, the “undisputed facts” listed in Rangen’s Memorandum are in fact disputed and summary judgment is not proper. As a result, Pocatello requests that the Director deny Rangen’s Motion and dismiss the delivery call, as Rangen’s allegations of injury are without support.

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<sup>1</sup> As described in Rangen’s Motion, Rangen previously filed and the parties litigated a delivery call involving Rangen’s fish propagation facilities in case no. CM-DC-2011-004. That proceeding will be referred to herein as the “2011 Delivery Call”.

**A. The 2011 Delivery Call found Rangen was injured with regard to fish propagation uses associated with water right nos. 36-02551 and 36-07694, and did not determine any facts related to domestic or irrigation uses, which are the limited decreed purposes for Rangen’s 1884 and 1908 water rights.**

Rangen’s delivery call in the above-captioned matter alleges injury regarding water right no. 36-00134B (“1884 water right”), no. 36-00135A (“1908 water right”), and no. 36-15501 (“1957 water right”). Rangen’s Petition for Delivery Call, June 27, 2014 (“Petition”). Rangen has articulated no factual basis to apply the Director’s findings regarding injury and beneficial use in the 2011 Delivery Call to the 1884 and 1908 water rights at issue in this matter<sup>2</sup>. Affidavit of A. Welsh at ¶8, October 13, 2014, attached hereto.

As described in Rangen’s Memorandum, its 1884 and 1908 water rights are decreed for domestic and irrigation use. Memorandum at 3. The Director’s examination of Rangen’s use of water in the 2011 Delivery Call was limited to Rangen’s claim of injury to water rights decreed for fish propagation. See *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* at FOF ¶¶61-66, dated January 29, 2014, attached to Rangen’s Motion as Exhibit 1 (“2014 Final Order”). The Director’s findings regarding the reasonableness of Rangen’s use are also limited to fish propagation. *Id.* at COL ¶30 (“Rangen is beneficially using water by raising fish to satisfy its contract with Idaho Power and to sell fish on the open market. IGWA and Pocatello have failed to show, by clear and convincing evidence, that Rangen's water use is unreasonable.”) In fact, in the 2014 Final Order the Director made no findings related to Rangen’s irrigation or domestic uses<sup>3</sup>; further, in 2011 Rangen made no allegations of injury to the 1884 and 1908 water rights or to domestic and irrigation uses. Petition for Delivery Call, CM-DC-2011004, Dec. 13, 2011. Therefore Rangen’s

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<sup>2</sup> Pocatello also contests that these findings can be applied to the 1957 water right. See Section B.

<sup>3</sup> Indeed, none of the Director’s findings cited by Rangen in paragraphs 13 – 18 of its Memorandum apply to the water rights at issue in this proceeding.

Motion does not establish that “Rangen is beneficially using water” for decreed uses for the 1884 and 1908 water rights as an undisputed fact. Memorandum at 6, ¶14.

Before the Director can make findings of injury in this matter, he must make an examination of beneficial use (if any) of the 1884 and 1908 water rights in compliance with Rangen’s decrees. “Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42.” Director’s *Amended Order* at 43, Surface Water Coalition Delivery Call, May 2, 2005. To wit:

Beneficial use acts as a measure and limit upon the extent of a water right. A person claiming a right under a decree is not entitled to the use of more water than can be beneficially used. The wasting of water is both contrary to Idaho law and is a recognized defense to a delivery call. “Neither the Idaho Constitution, nor statutes, permit . . . water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.” *American Falls*, 143 Idaho at 880, 154 P.3d at 451. Simply put, a water user has no right to waste water. If more water is being diverted than can be put to beneficial use, the result is waste. Consequently, Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use.

2014 Final Order at 31 (internal citations and quotations omitted).

In order to evaluate injury to the water rights at issue in this matter, the Director must make findings<sup>4</sup> regarding, *inter alia*, whether Rangen is beneficially using its 1908, 1884 and 1957 water rights consistent with the terms and limitations of its decrees, “using water efficiently and without waste,” (CMR 42.01), whether Rangen is “employing reasonable diversion and conveyance efficiency and conservation practices” (CMR 42.01.g), how Rangen’s irrigation rights are used (CMR 42.01.d), whether Rangen has used reasonable effort and expense to divert these water rights, and whether these rights and uses are being accurately measured and accounted for. Rangen’s Motion does not establish undisputed facts to support a favorable

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<sup>4</sup> In the 2011 Delivery Call, the Director did not consider certain CMR factors that are relevant when a senior user places a call for an irrigation right. Indeed, the Director expressly excluded CMR factors “solely relevant to other beneficial uses, such as irrigation” from its consideration. 2014 Final Order at 31-32, COL ¶14.

finding on these factors, and therefore must be denied.

**B. Evaluation of injury to Rangen’s 1957 water rights requires consideration of all sources of physical supply, and based on existing operations Rangen’s 1957 water right is not short of water.**

Rangen claims, based on a paper allocation<sup>5</sup> of flow to all existing Martin-Curren Tunnel water rights, that “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.” Memorandum at 5, ¶9. However, Rangen’s Motion does not address the physical reality of its current (and future) reliance on the supply of water at the Bridge Diversion available to, and indeed used by, Rangen in its fish propagation facilities. Although the Director found that Rangen was limited to reliance on the Curren Tunnel to satisfy the water rights in dispute in the 2011 Delivery Call, pursuant to a March 7, 2014 *Consent Order and Agreement* Rangen is permitted to divert water from the “head gate at the Bridge Diversion” on an indefinite basis. Thus, the fish propagation uses associated with its 1957 water right are currently being satisfied by Rangen’s use of water diverted at the Bridge Diversion.

Under the CMR, the total physical supply available to Rangen is relevant in evaluating injury. CMR 42.01.g (Director may consider the senior’s “existing facilities and water supplies”). Rangen argues that the juniors’ defenses to its delivery call have already been “adjudicated and rejected”; however, in the previous delivery call, the Director determined that Rangen’s 36-02551 and 36-07694 water rights are limited to the Martin-Curren Tunnel. New facts regarding Rangen’s total physical supply are before the Director today, and Rangen’s

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<sup>5</sup> Pocatello also disputes the accuracy of the Rangen’s allocation of the flows at the Tunnel on a “pro rata” basis, as some of the water users entitled to certain Martin-Curren Tunnel water rights are not currently diverting because of substitute supplies that are provided via the Sandy Pipeline. *Cf.* Memorandum at ¶ 9 with *Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 22, 2014; Amended Curtailment Order* at 12, May 16, 2014, attached as Exhibit 2 to Rangen’s Motion.

continued and future reliance (with IDWR authorization) on the Bridge Diversions ensures no shortage to its 1957 fish propagation right.

Further, both Rangen and IGWA have filed permit applications for the water that Rangen diverts at the Bridge Diversion. IGWA's claim to this water is for the purposes of providing Rangen mitigation water. Whether Rangen or IGWA is granted a permit for this water, Rangen will be the beneficiary and will be able to rely on water diverted at the Bridge Diversion in the future. Rangen's evidence in support of its "undisputed material facts" does not support a finding of injury to the 1957 water rights.

**C. Rangen cannot seek summary judgment on the strength of its Martin-Curren Tunnel flow measurements that are facially inadequate and have not been subject to scrutiny by the Director.**

Under CMR 42.01.g, a, e and f, the Director is required to examine the physical supply of water available to Rangen; this examination requires the Director to scrutinize *whether* the Martin-Curren Tunnel water relied upon by Rangen is being properly measured and recorded. While measurement issues in the 2011 Delivery Call were paramount to resolution of the issues in that case, the Director focused on the faulty rating table used to measure water at the bottom of the Rangen fish hatchery; the 2011 Delivery Call did not scrutinize the measurements at the Curren Tunnel. 2014 Final Order at COL ¶¶19-22. Due to the focus on the measurement problems lower in the Rangen Hatchery, the Director has not previously been called upon to determine the accuracy of the historical measurements or the measuring devices at the Curren Tunnel. Numerous problems exist.

Pocatello disputes the accuracy of the measurements attached to Rangen's Motion as undisputed evidence of the amount of water available to Rangen's water rights. As a starting point, the measurements asserted by Rangen as the basis for summary judgment are technically inadequate, at times rated as "poor" by the Department, and thus unreliable for assessing

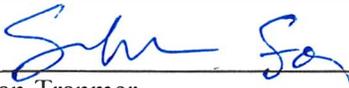
shortage. Affidavit of A. Welsh at ¶¶4-5, October 13, 2014. Further, the Director determined in the 2011 Delivery Call that “[t]he sum of the tunnel discharge and flow in the 6-inch PVC pipe represents the flow available from the Curren Tunnel source.” FOF 54, Ex. 1 to Rangen’s Memorandum. However, flow measurements from the 6-inch PVC pipe are not included in the measurements relied on in Rangen’s Motion, and accordingly Rangen’s estimates do not accurately reflect the water supply available to Rangen, particularly for purposes of its domestic and irrigation rights, supplied solely by the 6-inch PVC pipe. Affidavit of A. Welsh at ¶¶6-9. Further, the accuracy of the measuring device on the 6-inch PVC pipe was not determined in the 2011 Delivery Call. *Id.* Accordingly Pocatello disputes the accuracy of the Martin-Curren Tunnel measurements relied upon by Rangen in its Motion. Rangen’s measurement problems create a dispute of fact and should be the basis of dismissing the delivery call altogether.

#### **RELIEF REQUESTED**

WHEREFORE, Pocatello requests that the Director deny Rangen’s Motion because there are genuine issues of material fact in dispute and dismiss the above-captioned matter as Rangen’s allegations of injury are without factual support.

Respectfully submitted this 13th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of October, 2014, a true and correct copy of the foregoing **City of Pocatello's Response to Rangen's Motion for Summary Judgment** for **IDWR Docket No. CM-DC-2014-004** was served on the following by the method indicated below:

  
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