

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE 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  <b>ORDER DENYING MOTION FOR SUMMARY JUDGMENT; ORDER REGARDING PRESENTATION OF EVIDENCE</b>
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**PROCEDURAL BACKGROUND**

On June 27, 2014, Rangen, Inc. (“Rangen”), filed *Rangen, Inc.’s Petition for Delivery Call* (“2014 Call”) requesting the Director “find that Rangen has suffered, and will suffer, material injury to Rangen’s 1884 [water right no. 36-134B], 1908 [water right no. 36-135A], and 1957 [water right no. 36-15501] Water Rights as a result of junior-priority ground water pumping in the [Eastern Snake Plain Aquifer (“ESPA”)]. . . .” *2014 Call* at 9. Rangen asked the Director to administer and distribute water in the ESPA in accordance with the prior appropriation doctrine and curtail junior-priority ground water pumping as necessary to deliver Rangen’s water. *Id.* at 9-10.

The cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Cities”) filed the *Coalition of Cities’ Petition to be Designated a Respondent or Alternatively to Intervene* on July 3, 2014. The City of Pocatello (“Pocatello”) filed *City of Pocatello’s Petition to be Designated a Respondent or Alternatively to Intervene* on July 11, 2014. On July 15, 2014, Fremont Madison Irrigation District and Madison Ground Water District filed a *Notice of Appearance*. Idaho Ground Water Appropriators, Inc. (“IGWA”), filed *IGWA’s Petition to Intervene* on July 17, 2014. The Director entered orders designating the Cities and Pocatello as respondents and an order granting IGWA’s petition to intervene on July 23, 2014.

On September 26, 2014, Rangen filed *Rangen, Inc.’s Motion for Summary Judgment* (“Motion”); *Rangen, Inc.’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”). On October 13, 2014, the Cities, Pocatello, and IGWA separately filed responsive documents in opposition to the Motion. *Coalition of Cities’ Response to*

*Rangen, Inc.’s Motion for Summary Judgment (“Cities’ Response”); Pocatello’s Response to Rangen’s Motion for Summary Judgment (“Pocatello’s Response”); and IGWA’s Brief in Opposition to Rangen’s Motion for Summary Judgment (“IGWA’s Response”).*

On October 21, 2014, Rangen filed a *Notice of Withdrawal of Rangen, Inc.’s Petition for Delivery Call as to Water Right Nos. 36-134B and 36-135A*.<sup>1</sup> Rangen filed *Rangen, Inc.’s Reply Memorandum in Support of Motion for Summary Judgment (“Reply”)* and *Rangen, Inc.’s Supplemental Affidavit of J. Justin May in Support of Motion for Summary Judgment (“Supplemental Affidavit”)* on October 24, 2014.

A hearing was held at the Department’s state office in Boise, Idaho on October 29, 2014, wherein oral argument was heard regarding the Motion.

### **FINDINGS OF FACT**

1. In its Motion, Rangen requests the Director enter an order finding Rangen has suffered material injury to water right no. 36-15501 as a result of junior-priority ground water pumping in the ESPA. *Motion* at 1. Rangen also requests the Director enter an order finding the defenses to Rangen’s claim of material injury were previously adjudicated and rejected. *Id.* at 2. Rangen asks the Director to immediately administer and distribute water in the ESPA in accordance with the prior appropriation doctrine and curtail junior-priority ground water pumping as necessary to deliver Rangen’s water. *Id.*

2. In support of its Motion, Rangen points to orders previously issued by the Director in the matter of Rangen’s December 13, 2011, *Petition for Delivery Call (“2011 Call”)* wherein Rangen alleged it is not receiving all the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694, and is being materially injured by junior-priority ground water pumping.

3. Rangen did not allege injury to water right no. 36-15501 in the 2011 Call, but Rangen asserts the Director “already made all of the factual and legal determinations necessary” and the Department possesses all of the water measurement information it needs to evaluate the 2014 Call. *Memorandum* at 1. Rangen concludes “[t]here is simply no need for the evidentiary hearing scheduled for November 2014 . . .” *Id.*

#### **Prior Orders Relevant to this Proceeding**

##### **A. Curtailment Order**

4. In the 2011 Call, the Director issued the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 (“Curtailment Order”)*. The Director concluded his material injury determination could only focus on water diverted by Rangen from the Curren Tunnel because the source element on Rangen’s partial decrees issued in the Snake River Basin Adjudication (“SRBA”) for water right

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<sup>1</sup> Because of this filing, arguments regarding water right nos. 36-134B and 36-135A are considered withdrawn and will not be addressed in this order.

nos. 36-02551 and 36-07694 is unambiguously described as “Martin-Curren Tunnel.” *Curtailment Order* at 32-33. However, the Director acknowledged Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located outside the 10 acre tract described on Rangen’s water rights. *Id.* at 32.

5. In the Curtailment Order, the Director explained that CM Rule 42 lists the factors the Director may consider in determining whether Rangen is suffering material injury and using water efficiently and without waste. *Curtailment Order* at 31. The Director determined factors relevant to the proceeding, using CM Rule 42’s lettering identifiers, included: (a) the amount of water available to Rangen from its decreed source; (b) the effort or expense of Rangen to divert water from the source; (c) whether the junior ground water rights affect the quantity and timing of when water is available; . . . (e) the amount of water being diverted and used compared to the water rights; (f) the existence of water measuring devices; (g) [i]whether Rangen’s needs could be satisfied with the user’s existing facilities and water supplies and [ii] the reasonableness of Rangen’s diversions and activities; and (h) whether the senior water right could be met using alternate reasonable means of diversion or alternate points of diversion. *Id.* at 31-32. The Director examined these factors with respect to water right nos. 36-02551 and 36-07694 and concluded Rangen is being materially injured by junior-priority ground water pumping. *Id.* at 32-36.<sup>2</sup>

6. The Cities argue that water right no. 36-15501 was not analyzed in the 2011 Call and, therefore, without examination of that water right and a fully developed record, it would be inappropriate to find material injury on summary judgment. *Cities’ Response* at 13. However, at oral argument on the Motion, counsel for the Cities admitted that, given water right no. 36-15501 is diverted from the same source, point of diversion, and for the same purpose of use as water rights at issue in the 2011 Call (36-02551 and 36-07694), some limit on the presentation of evidence regarding material injury at the hearing on the 2014 Call may be appropriate.

#### B. Notice of Violation

7. Shortly after issuance of the Curtailment Order, on January 31, 2014, the Department issued a *Notice of Violation and Cease and Desist Order* requiring Rangen to cease diverting water from the Bridge Diversion. After a compliance conference, the Department issued a *Consent Order and Agreement* authorizing Rangen to continue diverting water from the Bridge Diversion.

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<sup>2</sup> The Eastern Snake Plain Aquifer Model (“ESPAM”) is a calibrated regional ground water model representing the ESPA. In the Curtailment Order, the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen’s delivery call. In applying ESPAM 2.1, the Director imposed a trim line corresponding with a geological feature referred to as the Great Rift. *Curtailment Order* at 40. ESPAM 2.1 simulations predicted that 9.1 cfs of the decline in the flow from the Curren Tunnel could be attributed to junior-priority ground water pumping west of the Great Rift and in the area of common ground water supply. *Id.* at 35. The Director ordered that holders of junior-priority ground water rights could avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.” *Id.* at 42. The Curtailment Order explained that mitigation provided by direct flow to Rangen “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.*

8. The Cities, IGWA, and Pocatello argue that Rangen's Motion should be denied because Rangen's water supply exceeds its alleged material injury since Rangen is being allowed to divert water from the Bridge Diversion. *Cities' Response* at 3-7, *IGWA's Response* at 4, and *Pocatello's Response* at 5-6.

### C. Mitigation Plan Orders

9. On February 11, 2014, IGWA filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("Mitigation Plan") which set forth nine proposals to avoid curtailment imposed by the Curtailment Order. *Mitigation Plan* at 1-4. On April 11, 2014, the Director issued the *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("Mitigation Plan Order") which approved partial mitigation credit for only two Mitigation Plan proposals: (1) IGWA's past and ongoing aquifer enhancement activities (conversions from ground water irrigation to surface water irrigation, voluntary "dry-ups" of acreage irrigated with ground water through the Conservation Reserve Enhanced Program ("CREP") or other cessation of irrigation with ground water, and ground water recharge); and (2) exchange of irrigation water diverted from the Martin-Curren Tunnel by Howard (Butch) and Rhonda Morris (hereafter referred to in the singular as "Morris") with operational spill water from the North Side Canal Company ("Morris exchange agreement"). *Mitigation Plan Order* at 4.

10. The Director granted IGWA 1.2 cfs of transient mitigation credit for the annual period from April 1, 2014, through March 31, 2015, because of its past and ongoing aquifer enhancement activities. *Mitigation Plan Order* at 21. The Director also granted IGWA 1.8 cfs of mitigation credit for the annual period from April 1, 2014, through March 31, 2015, for direct delivery of surface water from the Martin-Curren Tunnel to Rangen via the Morris exchange agreement. *Id.* In total, the Director granted IGWA 3.0 cfs of total annual transient mitigation credit for the annual period from April 1, 2014, through March 31, 2015. *Id.* This was 0.4 cfs less than the 3.4 cfs mitigation requirement for that time period set forth in the Curtailment Order. *Id.* Accordingly, the Director used ESPAM 2.1 to calculate the priority date of junior ground water rights that must be curtailed during the 2014 irrigation season to provide 0.4 cfs to Rangen. The Director determined that ground water rights bearing priority dates junior or equal to July 1, 1983, must be curtailed to provide 0.4 cfs to Rangen. *Id.*

11. To derive the 1.8 cfs of mitigation credit in the Mitigation Plan Order, the twelve average irrigation season flow rates from the Martin-Curren Tunnel for the years 2002 – 2013 were averaged, resulting in a predicted average flow rate for the 2014 irrigation season of 3.7 cfs. *Mitigation Plan Order*. at 9-10. The Director allocated approximately 0.2 cfs<sup>3</sup> to account for senior water rights diverting from the Curren Tunnel and credited the Morris exchange agreement with providing an average flow of 3.5 cfs for 184 days (the number of days Morris irrigates crops), or a total volume of 644 24-hour second feet (3.5 cfs x 184 days). *Id.* at 12-13. Employing an annual time period to evaluate the average benefit, the Director determined IGWA

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<sup>3</sup> The Director allocated 0.14 cfs for Rangen's water right nos. 36-134B and 36-135A and 0.04 cfs for water diverted pursuant to Walter and Margaret Candy's water right no. 36-134A.

is entitled to 1.8 cfs of mitigation credit for the Morris exchange agreement (3.5 cfs x 184 days/365 days). *Id.*

12. On April 25, 2014, Rangen filed *Rangen's Motion for Reconsideration of Order Re: IGWA's Mitigation Plan; Order Lifting Stay; Amended Curtailment Order* ("Motion for Reconsideration"). That same day, IGWA filed a *Petition for Reconsideration and Clarification*.

13. In its Motion for Reconsideration, Rangen challenged the Director's method of determining mitigation credit for the Morris exchange agreement, arguing the Director should have also accounted for Rangen's 1957 water right no. 36-15501 in accounting for senior water rights diverting from the Curren Tunnel. *Motion for Reconsideration* at 2.

14. On May 16, 2014, the Director issued a *Final Order on Reconsideration* ("Order on Reconsideration") denying Rangen's Motion for Reconsideration, but determining some modifications to the Mitigation Plan Order were necessary. *Order on Reconsideration* at 16. Accordingly, the Director issued the *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*. The Director declined to adopt Rangen's suggested computation regarding calculation of mitigation credit for the Morris exchange agreement, stating:

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.[5] cfs before water right no. 36-15501 comes 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.

*Order on Reconsideration* at 3. Rangen argues this statement by the Director "makes it clear that Rangen's 1957 right is not being satisfied and that all of the Martin-Curren Tunnel water is being allocated to Butch Morris' prior rights." *Reply* at 4.

### **Measurements of Flow from the Curren Tunnel**

15. Exhibit 3 attached to the *May Affidavit* provides the Department's measurements of discharge from the mouth of the Martin-Curren Tunnel between January 1, 2014, and June 4, 2014.

16. Exhibit 1 to the *Supplemental Affidavit* is an email exchange between counsel for the Department and counsel for Rangen explaining issues with the Department's measurement equipment in the Curren Tunnel resulted in installation of a new pressure transducer on March 5, 2014, and providing a measurement for August 22, 2014, that was not included in Exhibit 3 attached to the *May Affidavit*.

17. The total flow available from the Curren Tunnel source is the sum of tunnel discharge measured by the Department and flow in the six-inch PVC pipeline Rangen built to divert water from inside the tunnel. *Curtailment Order* at 11. Rangen began submitting flow data for the six-inch PVC pipe to the Department in 1996. *Id.* The Department’s measurements of discharge from the mouth of Curren Tunnel do not include flow in the six-inch PVC pipe.

18. The Cities, Pocatello, and IGWA contend the data regarding measurement of Martin-Curren Tunnel water presented by Rangen in support of its Motion are incomplete, inaccurate, and insufficient to support a determination of material injury to water right no. 36-15501 on summary judgment. *Cities Response* at 15, *Pocatello’s Response* at 6-7; *IGWA’s Response* at 3.

## CONCLUSIONS OF LAW

### Idaho Law

1. “Summary judgment must 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).” *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 154 Idaho 6, 8, 293 P.3d 630, 632 (2012). 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*, 153 Idaho 593, 596, 288 P.3d 810, 813 (2012).

2. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

3. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the respective priority of the rights subject to applicable Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. *See* Idaho Code §§ 42-602 and 607.

## CM Rules

4. In accordance with chapter 52, title 65, Idaho Code, rules regarding the conjunctive management of surface and ground water were adopted by the Department, effective October 7, 1994. IDAPA 37.03.11. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

5. The CM Rules “give the Director the tools by which to determine ‘how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].’” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (citations omitted).

6. Generally, junior-priority ground water users are entitled to a hearing prior to curtailment. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). Any hearing will determine whether the senior-priority water right holder is suffering material injury and whether both the senior-priority and junior-priority water right holders are diverting and using water efficiently without waste. IDAPA 37.03.11.040.03.

7. The burden is not on the senior-priority water right holder to re-prove an adjudicated water right. *American Falls*, 143 Idaho at 878, 154 P.3d at 449. In a delivery call, the Director must give a decree proper legal effect by establishing a presumption that the senior is entitled to his decreed quantity. *Id.* However, there may be some post-adjudication factors which are relevant to the determination of how much water is actually needed by the senior. *Id.* A determination in a delivery call proceeding that less than the decreed amount is needed must be supported by clear and convincing evidence. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

8. Beneficial use acts as a measure and limit upon the extent of a water right. *In Matter of Distribution of Water to Various Water Rights Held By or For The Benefit of A & B Irrigation Dist.*, Docket Nos. 38191, 38192, 38193, slip op. at 14 (Idaho Dec. 17, 2013). A person claiming a right under a decree is not entitled to the use of more water than can be beneficially used. *Id.* 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.” *In the Matter of the Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area*, Memorandum Decision and Order on Petition for Judicial Review, Minidoka Dist. Court Case No. 2009-000647 at 31-32 (May 4, 2010) (Hon. E. Wildman).

9. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. Idaho Code § 67-5251(5); IDAPA 37.01.01.600. "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *American Falls*, 143 Idaho at 880, 154 P.3d at 451. This discretion is not unfettered, nor is it to be exercised without judicial oversight. *Id.* The courts determine whether the exercise of discretion is being properly carried out. *Id.*

### **Material Injury**

10. In considering a petition for delivery call, the Director must first determine whether the holder of a senior water right is suffering material injury and using water efficiently and without waste. 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). Material injury requires impact upon the exercise of a water right. *Clear Springs Foods*, 150 Idaho at 811, 252 P.3d at 92.

11. CM Rule 42 lists the factors the Director may consider in determining whether Rangen is suffering material injury and using water efficiently and without waste.

12. As the Director determined in the 2011 Call, factors listed in Rule 42 solely relevant to other beneficial uses, such as irrigation, should not be considered in this delivery call. The factors relevant in this proceeding, using CM Rule 42's lettering identifiers, include: (a) the amount of water available to Rangen from its decreed source; (b) the effort or expense of Rangen to divert water from the source; (c) whether the junior ground water rights affect the quantity and timing of when water is available; . . . (e) the amount of water being diverted and used compared to the water rights; (f) the existence of water measuring devices; (g) [i]whether Rangen's needs could be satisfied with the user's existing facilities and water supplies and [ii] the reasonableness of Rangen's diversions and activities; and (h) whether the senior water right could be met using alternate reasonable means of diversion or alternate points of diversion.

13. At oral argument on the Motion, the parties acknowledged that, given the source, point of diversion, and purpose of use for fish propagation of water right 36-15501 are identical to water rights at issue in the 2011 Call, some limitation on the presentation of evidence in the 2014 Call may be appropriate.

### **Presentation of Evidence Regarding CM Rule 42 Factors Relevant to this Proceeding**

#### **A. Source of Rangen's Water Supply**

14. Water right nos. 36-02551 and 36-07694 at issue in the 2011 Call authorize a total, cumulative diversion of 74.54 cfs for fish propagation. The source for these water rights is identified as Martin-Curren Tunnel and the point of diversion is described to the 10 acre tract: T07S R14E S32 SESWNW.

15. In the 2011 Call, the Director determined that, because the SRBA partial decrees for water right nos. 36-02551 and 36-07694 identify the source of the water as the Martin-Curren Tunnel, Rangen is limited to only water discharging from the Curren Tunnel. In addition, because the SRBA decrees list the point of diversion as T07S R14E S32 SESWNW, Rangen is restricted to diverting water that emits from the Curren Tunnel in the authorized 10-acre tract.

16. In this delivery call proceeding, the SRBA partial decree for water right no. 36-15501 authorizes a total diversion of 1.46 cfs for fish propagation. The source and point of diversion are identical to those identified for water rights at issue in the 2011 Call.

17. In accordance with the Director's determination in the Curtailment Order with respect to water right nos. 36-02551 and 36-07694, Rangen is limited to only water discharging from the Curren Tunnel and diverted in T07S R14E S32 SESWNW pursuant to water right no. 36-15501. There is no need for presentation of evidence regarding the source of Rangen's water supply for water right no. 36-15501.

B. Whether Junior Ground Water Rights Affect the Quantity and Timing of When Water is Available

18. In the Curtailment Order, the Director concluded "as a result of declining spring flows, Rangen has been hindered in its ability to exercise its water rights from the Curren Tunnel." *Curtailment Order* at 36. The Director also concluded that ESPAM 2.1 is the best available science for simulating the impacts of ground water pumping. *Id.* at 37. ESPAM 2.1 simulations established that "[g]round water diversion have reduced the quantity of water available to Rangen for beneficial use of water pursuant to its water rights." *Id.* Using ESPAM 2.1, the Director determined 9.1 cfs of the decline in flow from Curren Tunnel that can be attributed to junior-priority ground water pumping west of the Great Rift and in the area of common groundwater supply. *Id.*

19. The Director concludes there is no need for additional evidence on the question of *whether* pumping by the junior ground water users has caused decline in flow from the Curren Tunnel. Furthermore, there is no need for additional evidence on the question of whether ESPAM 2.1 is the best science available and whether ESPAM 2.1 should be used to determine the amount of decline attributable to junior ground water pumping. However, evidence may be presented at hearing in this matter regarding the extent of the decline that is attributable to junior ground water pumping using ESPAM 2.1.

20. The Director determined in the Curtailment Order that, if curtailment of ground water pumping results in an increase in the total flow of the spring complex in the Rangen model cell, 63% of that benefit will be realized at the Curren Tunnel. *Curtailment Order* at 23. The Director concludes there is no need for additional evidence regarding the percent of flow that will accrue to the Curren Tunnel as a result of curtailment versus the total spring flows in the Rangen model cell. The percentage that will be used to compute the quantity of water accruing to the Curren Tunnel as a result of curtailment is 63%.

C. Existing Facilities and Reasonableness of Water Use

21. In the Curtailment Order, the Director rejected suggestions that Rangen should modify the way it conducts research and raises fish at the Rangen Facility. The Director concluded Rangen's fish study processes are reasonable and Rangen is beneficially using water by raising fish to satisfy its contract with Idaho Power to sell fish on the open market. *Curtailment Order* at 34-35. The Director concluded Rangen's water use is reasonable. *Id.*

22. Because the source, point of diversion, and purpose of use for water right no. 36-15501 for fish propagation are identical to those for water rights at issue in the 2011 Call, the Director concludes there is no need for presentation of evidence in this matter with respect to the reasonableness of Rangen's water use pursuant to water right no. 36-15501.

D. Alternate Reasonable Means of Diversion or Alternate Points of Diversion; Effort or Expense to Divert Water from the Source; Reasonableness of Diversions by Junior-Priority Water Right Holders

23. In the 2011 Call, the Director rejected arguments that Rangen's needs could be met using alternate means of diversion and concluded that Rangen employs reasonable diversion and conveyance efficiency and conservation practices in diverting water from the Curren Tunnel. *Curtailment Order* at 36. The Director also concluded that, because Rangen's method of diversion is reasonable, the effort and expense by Rangen to divert water from the Curren Tunnel is also reasonable. *Id.*

24. Because the method of diversion for the water right at issue in this delivery call proceeding is identical to that for water rights at issue in the 2011 Call, the Director concludes there is no need for presentation of evidence in the 2014 Call regarding the reasonableness of Rangen's method of diversion or effort and expense to divert water from the Curren Tunnel.

25. In the Curtailment Order, the Director concluded "the junior-priority water right holders are using water efficiently and without waste." The Director concludes there is no need for presentation of evidence in the 2014 Call regarding the reasonableness of diversions by junior-priority water right holders.

E. Water Supply from Billingsley Creek

26. CM Rule 42.01.g explains the Director may consider, in a material injury determination, "[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facility and water *supplies*. . . ." IDAPA 37.03.11.042.01.g (emphasis added).

27. The Cities, IGWA, and Pocatello cite to CM Rule 42.01.g in support of their argument that Rangen's Motion should be denied because Rangen's water *supply* exceeds its alleged material injury because Rangen is being allowed to divert water from the Bridge Diversion.

28. CM Rule 42.01. refers to the “user’s . . . water supplies . . .” The reference infers ownership of some right to the supply of water. The phrase “user’s water supplies” more appropriately means other sources from which the calling party has the right to divert water. Examples are storage water held in reservoirs or supplemental ground water. In the Director’s Curtailment Order, the Director determined Rangen did not hold a water right for water diverted at the Bridge Diversion. At present, Rangen has no water right to divert water at the Bridge Diversion, and is diverting water only pursuant to the Consent Order and Agreement. The Director’s permission allowing Rangen to use the Bridge Diversion may be revoked at the Director’s discretion at any time. Furthermore, while both Rangen and IGWA have filed permit applications for the water that Rangen diverts at the Bridge Diversion, a hearing only recently concluded on those applications and a decision has not been issued. The Director will not consider water Rangen diverts from Billingsley Creek in a material injury analysis related to water right no. 36-15501.

F. Amount of Water Being Diverted; Amount of Water from the Decried Source; Existence of Water Measuring Devices

29. The total flow available from the Curren Tunnel source is the sum of tunnel discharge measured by the Department and flow in six-inch PVC pipeline Rangen built to divert water from inside the tunnel.

30. Rangen attached Exhibit 3 to the *May Affidavit* and Exhibit 1 to the *Supplemental Affidavit* which provide the Department’s measurements of water discharging from the mouth of the Martin-Curren Tunnel between January 1, 2014, and June 4, 2014, and one measurement from August, 2014. These measurements do not include flow in the six-inch PVC pipe.

31. While Rangen asserts the Department has in its possession all the data it needs regarding discharge of water from the Curren Tunnel to find material injury to water right no. 36-15501 on summary judgment, Rangen has not provided, and the Department does not possess data regarding flow in the six-inch PVC pipe for 2014. In addition, except for the one measurement taken in August identified in Exhibit 1 to the Supplemental affidavit, Curren Tunnel flow data after June 2014 is not in the record. Finally, the parties dispute the accuracy of measurement data provided by Rangen in support of its Motion due to issues with the Department’s measurement equipment in the Curren Tunnel which resulted in installation of a new pressure transducer on March 5, 2014.

32. The Director must construe all disputed facts and make all reasonable inferences in favor of the nonmoving party on summary judgment. The Director cannot assume, based on incomplete data of discharges from the Martin-Curren Tunnel provided by Rangen in support of its Motion, that Rangen’s ability to divert water that discharges from the Curren Tunnel and is diverted in the 10-acre tract has diminished sufficiently that water right no. 36-15501 has been materially injured. Because there are genuine issues of material fact concerning this issue, the Director cannot find, as a matter of law, that Rangen is entitled to summary judgment and must deny Rangen’s Motion.

## Defenses to Rangen's Claims of Material Injury

33. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call. *American Falls*, 143 Idaho at 878, 154 P.3d at 449. Any defense raised, such as waste or futile call, must be proven by clear and convincing evidence. *A&B Irr. Dist.*, 153 Idaho at 517, 284 P.3d at 242.

34. The Curtailment Order is currently on appeal in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-1338. Judge Wildman issued his *Memorandum Decision and Order on Petitions for Judicial Review* ("Memorandum Decision") on October 24, 2014, which affirmed the Director on a number of issues, but held the Director erred by applying a trim line to reduce the zone of curtailment. *Memorandum Decision* at 28. The Memorandum Decision is not yet final. However, given this Memorandum Decision, the Director will not enter an order finding the defenses to Rangen's claim of material injury were previously adjudicated and rejected and will not limit the presentation of evidence regarding a trim line or futile call.

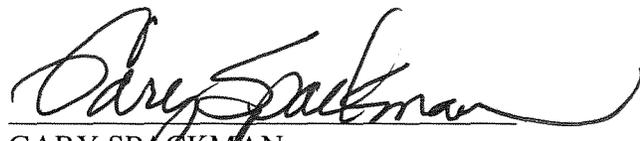
### ORDER

Based upon and consistent with the foregoing, the Director hereby ORDERS that Rangen's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Rangen's request for an order limiting presentation of evidence regarding defenses to Rangen's claim of material injury to water right no. 36-15501 is DENIED.

IT IS FURTHER ORDERED that there is no need for presentation of evidence at the hearing in this matter regarding: (a) the source of Rangen's water supply, (b) whether pumping by the junior ground water users has caused decline in flow from the Curren Tunnel, (c) whether ESPAM 2.1 is the best science available, (d) whether ESPAM 2.1 should be used to determine depletions to spring flows attributable to junior ground water pumping, (e) the percent of flow accruing to the Curren Tunnel as a result of curtailment versus the total spring flows in the Rangen model cell, (f) the reasonableness of Rangen's water use pursuant to water right no. 36-15501, (g) the reasonableness of Rangen's method of diversion or effort and expense to divert water from the Curren Tunnel, (h) the reasonableness of the use of water by junior-priority water right holders, and (i) Rangen's use of water from the Bridge Diversion.

Dated this 3<sup>rd</sup> day of November 2014.

  
GARY SPACKMAN  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 3<sup>rd</sup>, 2014, I served a true and correct copy of the *Order Denying Motion for Summary Judgment; Order Regarding Presentation of Evidence* on the persons listed below by the method indicated.

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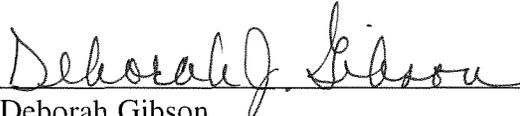
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