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

RANGEN, INC., Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, Respondents, IDAHO GROUND WATER APPROPRIATORS, INC., FREMONT MADISON IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND THE CITY OF POCATELLO, Intervenors.	Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)

RANGEN, INC.'S OPENING BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF CASE

A. Background.

The spring water shortage that sparked the surface water vs. groundwater disputes over the past twenty years has come to a head. In the Spring of 1993, Alvin and Tim Musser and Butch Morris, their farmer tenant (the "Mussers"), made a water delivery call because the spring water from what is called the Martin-Curren Tunnel in the Hagerman Valley was no longer sufficient to fulfill their water rights. Musser v. Higginson, 125 Idaho 392, 393-94, 871 P.2d 809, 810-11 (1994). The Idaho Department of Water Resources ("IDWR" or the "Department") denied the Mussers' call even though there was no dispute that "[t]he springs which supply the Mussers' water are tributary to the Snake River and hydrologically interconnected to the Snake Plain aquifer (the aquifer)." Id. at 394, 871 P.2d at 811. The Mussers filed suit against IDWR, asking the Court to issue a Writ of Mandate compelling the Department to conjunctively manage their rights. The District Court issued the Writ and the Idaho Supreme Court affirmed.

Nearly twenty years after the Idaho Supreme Court issued the Musser decision, Rangen filed the Petition for Delivery Call that is at issue because the spring water that supplies it Research Hatchery has continued to decline and is insufficient to satisfy Rangen's spring water rights.

B. History of Rangen.

Theodor Rangen started the company in 1925. (Tr., Vol. I, p. 53, L. 13-16). The company was incorporated in 1935 and has been in business for 89 years. (Id.) One family has owned the company for three generations. (Id.) Rangen is an agricultural company. (Tr., Vol. I, p. 53, L. 22 - p. 54, L.14). Its operations include buying and selling commodities (e.g., beans), manufacturing general feeds (e.g., feeds for land animals), and aquaculture. (Id.) Rangen's aquaculture division manufactures fish feed and operates the Rangen Aquaculture Research Center, a cold water trout facility also known as the "Research Hatchery." (Id.); (Tr., Vol. I, p. 58, L. 10-11).

C. History of Research Hatchery.

Rangen built the Research Hatchery in about 1962 and has been raising fish there for 50+ years. (Tr., Vol. II, p. 522, L. 8-10). The facility was built to develop and test Rangen's fish feeds and showcase Rangen's involvement in the aquaculture industry. (Id.) It was a place where Rangen entertained clients from all over the world and brought leading researchers together for conferences and work. (Id.; Tr., Vol. I, p.164, L. 4-11).

The Research Hatchery is located a few miles South of Hagerman. (See, Exh. 1001) Hagerman Valley is perfect for raising trout because the spring water is 59 degrees. (Tr., Vol. VII, p. 1775, L. 19-22). The facility sits on 60+ acres and is situated along a canyon rim. (See, Exh. 1004) A 1986 aerial photograph shows the current configuration of the facility and full raceways. (See, Exh. 1006) Most of the raceways are empty today because of the spring water shortage:

(See, Exh. 1206A)

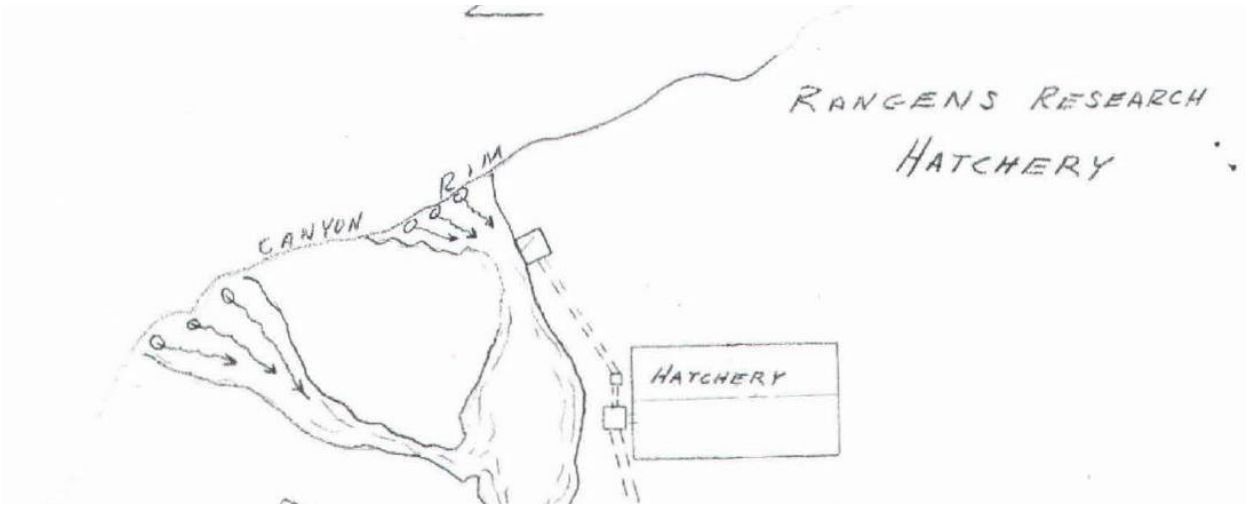
D. Rangen's Water Rights and Water Shortage.

Rangen filed the Petition for Delivery Call at issue on December 13, 2011. (R., Vol. 1, p. 000001-000215) The delivery call was based on Water Right Nos. 36-02551 and 36-07694

because Rangen thought its other rights were being satisfied. The two water rights at issue have a combined diversion rate of 74.54 cfs (48.54 + 26). The following chart summarizes all of Rangen's decreed water rights for the Research Hatchery:

Water Right No.:	**36-00134B**	**36-00135A**	**36-15501**	**36-02551**	**36-07694**
Priority Date:	October 9, 1884	April 1, 1908	July 1, 1957	July 13, 1962	April 12, 1977
Beneficial Use:	Irrigation (0.09 cfs) and Domestic (0.07 cfs)	Irrigation (0.05 cfs) and Domestic (0.05 cfs)	Fish Propagation	Domestic (0.10 cfs) and Fish Propagation (48.54)	Fish Propagation
Diversion Rate:	0.09 cfs	0.05 cfs	1.46 cfs	48.54 cfs	26.0 cfs
Period of Use:	Jan. 1 - Dec. 31 (Domestic) Feb. 15 - Nov 30 (Irrigation)	Jan. 1 - Dec. 31 (Domestic) Feb. 15 - Nov. 30 (Irrigation)	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31

The water that has supplied the Research Hatchery for the past 50 years is spring water that comes from the canyon wall surrounding the facility. There is a diagram in the backfile for Rangen's 1977 water right which depicts the springs as follows:



(See Exh. 1029, p. 2)

The source of Rangen's water rights listed in the Partial Decrees is "Martin-Curren Tunnel" and the identified point of diversion does not consist of a single point, but rather, is described as a ten acre parcel. (Exh. 1026, 1028). A hotly contested legal issue is whether the term "Martin-Curren Tunnel" refers to only a single spring outlet on the canyon rim above the Research Hatchery that has been excavated to enhance water flows (see Exh. 1291 for tunnel mouth photo) or whether that term is a local name for all of the spring water coming from the canyon wall surrounding the Research Hatchery, including the area immediately below the tunnel mouth that has been referred to as the "talus slope." (See, e.g., Exh. 1292, Exh. 1452 (reprinted below on p. 21) and Exh. 3278 (reproduced below on p. 22) for photos of the talus slope) See also Section A of Argument below.

Rangen has been measuring and using the spring water flows since 1966. (See Exh. 1075). The flows have been steadily declining for decades. (See, Exh. 1075). In 2012, Rangen's measurements showed a yearly average flow of 14.1 cfs. (Id.) Over the last ten (10) years, Rangen's average flow of water has been 14.4 cfs. (Id.) Wayne Courtney, Rangen's Executive Vice President, testified that the water measurements for the week of May 1, 2013, showed flows at 11.73 cfs. (Tr., Vol. I, p. 91, l. 15-22). The week before the flows had been 12.44 cfs. (Id.) It

is important to recognize that these measurements include all of the spring water that presently supplies the Research Hatchery including the water emanating from the talus slope, not just the flows from the mouth of the Martin-Curren Tunnel.[1]

E. History of Delivery Call Proceedings.

Rangen has been trying to get more water to the Research Hatchery for more than a decade. Rangen made its first delivery call in September/October 2003. (R., Vol. 1, p. 000082). The Department used its Enhanced Snake Plain Aquifer Model ("ESPAM1" or "Model") to evaluate Rangen's call. (Id.) Based on ESPAM1, the Department determined that Rangen was suffering material injury as a result of junior-priority groundwater pumping and ordered curtailment of some groundwater rights. (R., Vol. 1, p. 000105-000109). The Department amended the Order on March 10, 2004 and then rescinded that Order on March 14, 2005. (R., Vol. 1, p. 000110-000138).

After the Department rescinded its Amended Order on Rangen's 2003 delivery call, the Department issued a Second Amended Order on May 19, 2005, reversing course and determining that Rangen's call was futile. (R., Vol. 1, p. 000139-000173). The Department used ESPAM1.1, a revised version of the model, as the basis for the Second Amended Order. Rangen requested a hearing before the Department on June 3, 2005. (R., Vol. 1, p. 000174-000175). The Department did not convene a hearing. (R., Vol. 1, p. 000006).

On March 31, 2009, Rangen filed another delivery call and requested a hearing. (R., Vol. 1, p. 000176-000190). Again, no hearing was held. (R., Vol. 1, p. 000006).

Since Rangen made its March 31, 2009, delivery call, the Department has continued to make refinements to the Model. In the Petition for Delivery Call at issue, Rangen requested that

[1] If the Court affirms the Director's ruling that the source of Rangen's water is limited to the water that comes from the mouth of the Martin-Curren Tunnel and does not include the rest of the spring water, then none of Rangen's water rights are being satisfied from the present flows.

the Department evaluate the matter using ESPAM2.0, then the latest version of the Model. (R., Vol. 1, p. 000007). Shortly after Rangen filed the Petition, Director Gary R. Spackman ("Director") convened a status conference and informed Rangen and the Idaho Ground Water Appropriators, Inc. ("IGWA") at that time that ESPAM2.0 was not yet ready to be used. (Tr. 20120109 Status Conf., p. 18, L. 15 – p.19, L. 8) Director Spackman then scheduled a series of approximately monthly status conferences to monitor the progress of the Model. (Id. at p. 26, L. 2 – p. 27, L. 22) In June 2012, the Director issued a Scheduling Order setting forth the various discovery deadlines for this matter and setting a hearing to begin on January 28, 2013. (R., Vol. 2, p. 000269-000271)

In June 2012, the parties began an exhaustive discovery process involving multiple site visits, 40 depositions and the production of over twenty-five years of fish production and research records. (R., Vol. 9, p. 001868-001893) On September 26, 2012, IGWA filed a Motion to Continue Hearing. (R., Vol. 3, p. 000627-000634) On October 4, 2012, the Department vacated the hearing that had been scheduled because of the Department's discovery of what it called the "Mud Lake error" in ESPAM2.0. (R., Vol. 5, p. 000877-000879) The Mud Lake error was subsequently corrected and ESPAM2.1 was rolled out for use.

The Director conducted a two week hearing on this matter using ESPAM 2.1 from May 1, 2013 – May 16, 2013. (See, Tr., Vol. I-XII). The Director issued a Final Order on Rangen's Petition for Delivery Call on January 29, 2014 – two years after Rangen filed the Petition at issue. Rangen has timely requested judicial review of some portions of the Final Order and the Director's summary judgment ruling regarding the source/point of diversion of Rangen's water rights.

II. ISSUES PRESENTED ON APPEAL

A. Whether the Term "Martin-Curren Tunnel" is Ambiguous When Viewed in Light of Rangen's Licenses, Historical Beneficial Use and Prior IDWR Determinations.

B. Whether Rangen Can Use the Bridge Dam Since it is Part of a Diversion Structure that Lies Mostly within the Ten Acre Tract Described in the Partial Decrees.

C. Whether the Doctrine of Quasi-Estoppel Precludes the Director from Ruling that Rangen Cannot Divert Any Spring Water that Does Not Emanate from the Mouth of the Martin-Curren Tunnel Based on the Department's Prior Findings and Conduct.

D. Whether there is Substantial Evidence to Support the Director's Adoption of Sullivan' 63/37 Regression Analysis.

E. Where there is Substantial Evidence to Support the Director's Determination that Junior Groundwater Users are Using Water Efficiently and without Waste.

F. Whether the Director's Application of the Great Rift Trim Line is Arbitrary.

III. ATTORNEY FEES ON APPEAL

As a result of the Department's actions and the decision made by the Director, Rangen has had to retain counsel. For services rendered, Rangen is entitled to attorney fees and costs should it prevail in this action pursuant to Idaho Code § 12-117(1) and pursuant to Rule 54 of the Idaho Rules of Civil Procedure. Section 12-117(1) states:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1). This provision applies to petitions for judicial review. I.C. § 12-117(5)(c). The Director's adverse factual findings addressed below were not reasonable. They were not supported by substantial and competent evidence. His determination of the legal issues was clearly erroneous. As such, Rangen should be awarded reasonable costs and attorney fees incurred in connection with this matter.

IV. STANDARD OF REVIEW

The standard of review for factual matters under the Idaho Administrative Procedures Act is as follows:

> The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. In an appeal from the decision of district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review... The Court may overturn the Board's decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion.. The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary."

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted). Courts review legal issues de novo. Polk v. Larrabee, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000).

V. ARGUMENT

A. The Term "Martin-Curren Tunnel" is Ambiguous when Viewed in Light of Rangen's Licenses, Historical Beneficial Use and Prior IDWR Determinations and Should be Interpreted in Rangen's Favor.

The decreed source of the two water rights at issue is the "Martin-Curren Tunnel; tributary to Billingsley Creek." (Exh. 1026, 1028) The issue is: to what does the name refer? The Director ruled that the term "Martin-Curren Tunnel" unambiguously refers solely to the tunnel in the rock wall above the Research Hatchery and does not encompass any of the other spring water on the talus slope or elsewhere that Rangen has been diverting and beneficially using for 50+ years to

produce fish. (R., Vol. 21, p. 004426-004427). Rangen contends that this ruling was erroneous and that the Court should rule as a matter of law that the term "Martin-Curren Tunnel" is ambiguous when viewed in light of Rangen's licenses, historical beneficial use, the Department's Rules, and IDWR's prior determination that Rangen's water measurements encompass all of the flows available under Rangen's water rights. Rangen contends that the Court should resolve the ambiguity by ruling that the term "Martin-Curren Tunnel" means all of the water that Rangen has put to beneficial use, i.e., the spring water that forms the headwaters of Billingsley Creek.

1. The Court Should Conduct a De Novo Review.

The Idaho Supreme Court has explained that when interpreting water decrees the Courts should use the same interpretation rules applied in contract cases. A&B Irr. Dist. v. Spackman, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). Whether a contract is ambiguous is a question of law. Boel v. Stewart Guar. Title Co., 137 Idaho 9, 13, 43 P.3d 768, 772 (2002) (citing Terteling v. Payne, 131 Idaho 389, 391-92, 957 P.2d 1387, 1389-90 (1998)). Thus, the Court should review this legal issue de novo. Polk v. Larrabee, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000).

2. The Latent Ambiguity Rule.

A contract is ambiguous if it is reasonably subject to conflicting interpretations. Polk v. Larrabee, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000). There are two types of ambiguity that can arise when interpreting contracts – patent and latent. The Idaho Supreme Court explained the two types of ambiguity as follows:

> There are two types of ambiguity, patent and latent. A patent ambiguity is an ambiguity clear from the face of the instrument in question. Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous.
>
> .* * *
>
> **A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.** *Cool*, 139 Idaho at 773, 86 P.3d at 487. **Although parol evidence generally cannot be submitted to**

> **contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears.** *Salfeety v. Seideman* (*In re Estate of Kirk*), 127 Idaho 817, 824, 907 P.2d 794, 801 (1995). Where the facts in existence reveal a latent ambiguity in a contract, the court seeks to determine what the intent of the parties was at the time they entered into the contract. *See Snoderly v. Bower*, 30 Idaho 484, 488, 166 P. 265, 266 (1917) (**"**It is not for the court or jury to make ***a*** contract for the parties, but only to determine what the parties intended the ambiguous terms to mean at the time they entered into the agreement.").

Knipe Land Co. v. Robertson, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) (citations omitted) (emphasis added).

There is a two-step process for addressing a latent ambiguity:

> It will be seen from this rule that the process in explaining latent ambiguity is divided into two parts: First, the introduction of extrinsic evidence to show that the latent ambiguity actually existed, and second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.

Snoderly v. Bower, 30 Idaho 484, 487, 166 P. 265 (1917). The Idaho Supreme Court applied this process in Williams v. Idaho Potato Starch Co., 73 Idaho 13, 20, 245 P.2d 1045, 1048-49 (1952).

In Williams, a well driller agreed to drill a well to supply water to a potato processing plant. The parties' agreement stated that that the well driller would drill a hole "sufficiently straight to accommodate a ten inch pump at a sufficient depth below the water level to insure a continuous flow of water." Id. at 17, 245 P.2d at 1047. The well driller started work on the well and drilled to over 200 feet. He demanded payment for his work, but the potato processer refused to pay claiming that the well was not straight enough to accommodate a water-lubricated pump.

The Idaho Supreme Court found that the testimony at trial demonstrated that the term "ten inch pump" was susceptible to different meanings and that the ambiguity had to be resolved by extrinsic evidence:

> Where a writing contains a reference to an object or thing, such as a pump, and it is shown by extrinsic evidence that there are two or more things or objects, such as pumps, to which it might properly apply, a latent ambiguity arises; *Queen*

> *Insurance Co. v. Meyer Milling Co., 8 Cir., 43 F.2d 885*; *Meinhardt v.White, 341 Mo. 446, 107 S.W.2d 1061*; *Hall v. Equitable Life Assurance Co. of the U. S., 295 Mich. 404,295 N.W. 204*; *Zydel v. Clarkson, 29 Ohio App. 382, 163N.E. 584*; *Koplin v. Franklin Fire Ins. Co., 158 Pa.Super.301, 44 A.2d 877*. See also 32 C.J.S., Evidence, § 961, page 917, and Jones on Evidence, 4th Ed., Vol. 4, Sec. 472, p. 902, wherein the general rule is recognized that parol evidence cannot be received to contradict, vary, add to or subtract from the terms of an unambiguous written agreement, but where it is also recognized that there are some well recognized exceptions to this rule which includes, as does this case, a situation where a latent ambiguity might not appear upon the face of the contract, but lies hidden in the subject to which it has reference: Where such ambiguity is thus disclosed by extrinsic evidence such as was disclosed by the appellant through his testimony, such ambiguity may be removed by the same means, that is, extrinsic evidence to show which type of pump the description related to. Jones on Evidence, 4th Ed., Vol. 4, Sec. 472, p. 902.

Id. at 20, 245 P.2d 1048-49. The evidence in this case demonstrates that the term "Martin-Curren Tunnel" constitutes a latent ambiguity. That ambiguity must be resolved in Rangen's favor by finding that the source of Rangen's water rights includes the spring complex that forms the headwaters of Billingsley Creek.

3. The Water Licenses and Backfile Documents Demonstrate that the Term "Martin-Curren Tunnel" is a Local Name for the Entire Spring Complex that Forms the Headwaters of Billingsley Creek and that Rangen was Authorized to Beneficially Use All Flows.

Tim Luke, the Water Compliance Bureau Chief for the Department, pointed out during his testimony that at one time Rangen's water rights showed that the source was "springs" as opposed to "Martin-Curren Tunnel." (Tr., Vol. 5, p. 1177, L. 22 - p. 1178, L. 6). His testimony evokes the question why did the name change when Rangen's use of the water did not? The answer to that question lies in the Department's backfiles on Rangen's water rights and in IDAPA 37.03.01.060.02.c which provides that in the SRBA surface water sources are supposed to be identified by their name in local common usage if there is no official name on the USGS Quadrangle map.

The Department's backfiles on Rangen's water rights demonstrate that the term "Martin-Curren Tunnel" is the local name for the water that comes out of the tunnel itself as well as all of the spring water that forms the headwaters of Billingsley Creek. Probably the most telling document is the license for water right no. 36-07694, Rangen's 1977 right. The license for the 1977 right describes the source of Rangen's water as "springs" as shown in the following snapshot:

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

License of Water Right No. 36-7694 Priority April 12, 1977 Amount 26.0 cfs

THIS IS TO CERTIFY, that Rangen, Inc.

of Buhl, Idaho, has complied with the terms and conditions of Permit No. 36-7694 issued pursuant to Application for Permit dated April 12, 1977, and has submitted proof to the Department of Water Resources on June 7, 1978, that he has applied water to a beneficial use; an examination by the Department indicates that the works have a capacity for the diversion of 76.0 cfs of water from springs, tributary to Billingsley Creek, and that the permit holder has applied to a beneficial use and established a right to use water as follows:

(See, Exh. 1029, p. 28)

There is an important note, however, at the bottom of the License. The note says that the source of Rangen's water (i.e., "springs") is locally known as the "Curran Tunnel." The following is a snapshot of the note:

Facility Volume = 287,640 cubic feet

A measuring device of a type approved by this Department shall be maintained on the outlet works.

This right when combined with Rt. 36-2551 shall not exceed 76.0 cfs.

Source known locally as Curran Tunnel.

Use of water under this right is subject to policies set forth in the State of Idaho Water Plan, including Policy No. 32F.

(See, Exh. 1029, p. 29) The decision to identify the source of Rangen's water rights the "Martin-Curren Tunnel" in the Partial Decrees makes sense given the note on the 1977 license and the fact that IDWR's Adjudication Rule 37.03.01.060.02.c required that the source of water be identified by the name in local common usage if no official name has been given. The rule states:

> Source of Water Supply. The source of water supply shall be stated at item three (3) of the form.
>
> i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. **If no official name has been given, the name in local common usage should be listed.** If there is no official name, the source should be described as "unnamed stream" or "spring." The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as "ground water."

IDAPA 37.03.01.060.02.c (emphasis added).

There are other backfile documents which also show that Rangen is authorized to use all of the spring flows that form the headwaters of Billingsley Creek and not just water from the mouth of the tunnel itself. The following is a synopsis of the evolution of the source designations over the course of Rangen's water filings:

- Rangen submitted its application to divert 50 cfs of water (eventually decreed as Water Right No. 36-02551) in 1962. (See, Exh. 1027A, p. 32) Rangen's application designated

the source of that water as "the headwaters of Billingsley Creek which is derived from underground springs." (Id.)

- When the State advertised Rangen's application for what is now Water Right No. 36-02551, it designated the source of Rangen's water as the "headwaters of Billingsley Creek." (See, Exh. 1027A, p. 22)
- After Rangen completed the construction of its Research Hatchery, the State Reclamation Engineer advertised its intent to take proof of Rangen's Completion of Works and again described the source of Rangen's water right as the "headwaters of Billingsley Creek." (See, Exh. 1027A, p. 18)
- The Report of Engineer upon Completion of Works described the source as: "Water for ponds comes from a spring which is source of Billingsley creek, a 14" x 400' pipe feeds water from high on the rimrock where the spring emerges to the nursery ponds. A 36" x 1100' pipeline feeds the Research ponds from a lower pond." (See, Exh. 1027A, p. 57) It is evident from this description that Rangen had constructed a diversion structure to beneficially use all of the water at the head of its Research Hatchery – the water emerging from the Martin-Curren Tunnel itself as well as all of the springs around it which fed the lower pond.
- When the State issued a license to Rangen for the 50 cfs of water in 1967, it designated the source as "underground springs, a tributary of Billingsley Creek." (See, Exh. 1027A, p. 29)
- Rangen applied for a supplemental permit to appropriate waters from the same source and using the same diversion structure in April 1977. (See, Exh. 1029, p. 31) The application had a typewritten designation of source as "underground springs". (See id.) The term

"Curran Tunnel" was hand-printed right above the designation. (Id.) A diagram in the Department's backfile showed the diversion of multiple springs flowing from the canyon wall. See id., p. 19.

- After Gary Funderberg, the state examiner, did his field report for the 1977 filing, Lynn Babbington, the manager of the Research Hatchery at the time, wrote to Mr. Funderberg asking him to allow Rangen to measure water flows at the outlets of its Research Hatchery rather than the inlets. Mr. Babbington's letter stated:

> Recently Gary Funderberg, senior water resources agent southern region, made a field examination of our water system so that our license could be issued. At this time he noted that we did not have a measuring device at the inlet. With the terrain and collection system of the water it is not feasible to have a measuring device at the inlet.
>
> All the water is run through steel or concrete \ponds and thru a measuring device at the outlet. I would like to request that the measuring device at the inlet be waived.

(See, Exh. 1029, p. 52) Mr. Babbington explained at the hearing on this matter that it wasn't possible to have measuring devices at all of the "inlets" because the springs feeding the Research Hatchery were all over the hillside at the head of the facility:

> Q. Do you remember what this letter was all about?
>
> A. That was after Gary had been out – Gary Funderberg had been out and did his field exam and had said that we needed a -- it called for a measurement device at the inlet. **But the inlet was every place on the hillside, so to speak, with many springs, individual springs coming in that it wasn't feasible to measure those.** So I asked if we could measure at the -- at the exit of the ponds.

(Tr., Vol. I, p. 188, L. 20 – p. 189, L. 6). (Emphasis added).

- The Department entered an order approving Rangen's request to measure at the outlets. (See, Exh. 1029, p. 30)
- When asked what he understood the term "Curran Tunnel" to mean, Mr. Babbington explained:

Q. Okay. And take a look now at page 29 of that license. And do you see the note there, the comment, it says, "Source known locally as Curren Tunnel"?

A. Uh-huh.

Q. You have to say "yes."

A. Yes.

Q. Okay. What did you understand was the Curren Tunnel?

A. **The Curren Tunnel was the -- up on the hillside, a tunnel there. But it was known to me to be all of the -- all of the water up there. Whether it be called Curren Tunnel or head of Billingsley Creek or Curren Springs, they were all -- all meant the same thing. It was the -- all the springs that was a source to the hatchery.**

(Tr., Vol. I, p. 190, L. 19 – p. 191, L. 2) (emphasis added).

4. Rangen Has Historically Beneficially Used All of the Spring Water that Forms the Headwaters of Billingsley Creek and IDWR Has Determined that the Use Is Consistent with Rangen's Water Rights.

Not only do the backfiles show that Rangen is authorized to use all of the springs flows that form the headwaters of Billingsley Creek, there is no dispute that Rangen has been using that water to raise fish for more than fifty years. Tim Luke has been out to the Research Hatchery on numerous occasions since 1992. (Tr., Vol. V, p. 1130, L. 22 – p. 1131, L. 2). Luke testified that Rangen diverts and uses not only the water from the mouth of the Martin-Curren Tunnel itself, but also from the springs on the talus slope where the tunnel is located. He testified:

Q. Okay. And to be sure, the way Rangen collects water they collect water not only from the Curren Tunnel, but all the spring sources located on the talus slope; correct?

A. Yes.

Q. And all that water that's taken out of the Curren Tunnel and the talus slope is measured at the two points I just described; correct?

A. Yes.

(Tr., Vol. V, p. 1174, L. 7-15).

Mr. Luke also testified that Rangen diverts and uses the water the same way as it always has:

> Q. Now, again, the full time you've been observing Rangen, you know that all the water that's collected off the slope goes through their facility? You're aware of that?
>
> A. Yes.
>
> Q. IDWR is aware of that; correct?
>
> A. Yeah. **They're diverting the water the same as they always have. And the water rights used to be -- at one time they didn't say Curren Tunnel. They said springs.**

(Tr., Vol. V, p. 1177, L. 22 - p. 1178, L. 6) (emphasis added).

Prior to February 2014, IDWR never told Rangen that it cannot use the spring water from the talus slope:

> Q. And so, Mr. Luke, there's been no purpose or occasion by you or anyone else to say "Rangen, you're using your water rights illegally"? No one's ever done that, have they?
>
> A. No, not to my knowledge.

(Tr., Vol. V, p. 1177, L. 22 – p. 1178, L. 11).

This is not a situation where IDWR has not examined Rangen's water use in detail. The Department investigated Rangen's water use in 2003 when Rangen made its first Delivery Call. Cindy Yenter and Brian Patton were the Department employees who lead the 2003 investigation. (Tr., Vol. III, p. 547, L. 17-25). (See, Exh. 1129 for a copy of Yenter's investigation memo) Yenter explained that as part of the investigation, she and Patton examined how the water traveled through the facility, where the diversions were made, sufficiency of the water supply, and interconnection of the raceways:

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

(Tr., Vol. III, p. 550, L. 19 – p. 548, L. 4).

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

> **The flow measurements that are considered to be representative of the total supply of water available to the Rangen hatchery facilities under water right nos. 36-15501, 36-02551, and 36-07694, consist of the sum for the discharge from raceways designated by Rangen as the "CTR" raceways and the flow over the check "Dam."** The dam is sited upstream for the discharge points from the CTR raceways and downstream from the discharge points from raceways designated by Rangen as the "Large" raceways. The sum of the discharge from the CTR raceways and the flow over the check dam is considered to be representative of the total supply of water available even though that at times some of the flow over the check dam may include water flowing from small springs downstream from the diversion to the Large raceways, water discharged from the Large raceways that was not diverted though the CTR raceways and irrigation return flows.

(See, R., Vol. 1, p. 000140-000173; see, Exh. 1074 for a diagram showing the measurement points discussed above).

In light of Rangen's licenses and historical use and IDWR's prior determinations, this Court should rule as a matter of law that the phrase "Martin-Curren Tunnel" is ambiguous. If a

contract term “loses clarity" when applied to the facts of a particular situation, then there is a latent defect in the instrument which must be resolved using parol evidence. Knipe Land Co. v. Robertson, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) (“A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.”) (citations omitted). In this case, the ambiguity is resolved by looking at parol evidence, particularly the backfile documents that are outlined above.

It is evident from the notes in the license for the 1977 water right and the testimony of Lynn Babbington that the phrase “Martin-Curren Tunnel” is a local identifier used for the spring water that forms the headwaters of Billingsley Creek. There is no dispute that Rangen has beneficially used this spring water to raise trout at its Research Hatchery for fifty years and that the Department previously found that these flows represented the water available under Water Right Nos. 36-02551 and 36-07694. As such, the Court should rule as a matter of law that the term “Martin-Curren Tunnel” is ambiguous and construe the Partial Decrees in Rangen’s favor by finding that Rangen’s water rights encompass the entire spring complex that forms the headwaters of Billingsley Creek. The Director’s ruling on this issue should be reversed.

B. Rangen Can Use the Bridge Dam Because it is Part of a Diversion Structure that Lies Mostly within the Ten Acre Tract.

Rangen’s Partial Decrees identify the point of diversion as: T07S R14E S32 SESWNW (hereinafter referred to as “10 acre tract” or “Eastern Parcel"). The issue to be decided is whether Rangen can use the Bridge Dam at its facility to channel water through a 36” pipe to the Large Raceways even though the Bridge Dam lies just outside the 10 acre tract described in the Partial Decrees. Like the source element, the point of diversion designated on Rangen’s Partial Decrees evolved in accordance with the Department’s Rules although the actual point of diversion remained unchanged. A similar walk through the Department’s backfiles to that performed above

for the source of Rangen's water rights reveals that prior to the decrees the point of diversion for Rangen's water rights has been depicted as the "NW1/4 SW1/4 Section 32." (See e.g., Exh. 1029, p.28). This quarter/quarter section includes all of Rangen's diversion structure including the Bridge Dam. The smaller 10 acre tract designation includes most of Rangen's diversion structure, but not the Bridge Dam.

Shortly after the hearing got started, Director Spackman ruled that Rangen cannot divert water at the Bridge Dam:

> The point of diversion element decreed by the SRBA court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion.

(See, R., Vol. 22, p. 003595) The Director affirmed this ruling in the *Final Order* (R., Vol. 21, p. 004189) and the *Order on Reconsideration* (R., Vol. 22, p. 004427). There are multiple problems with the Director's analysis and it should be reversed as a matter of law since it involves the interpretation of the Partial Decrees.

First, the Director's ruling erroneously equates source with the point of diversion. A water right holder can have a source of water that is not within the tract identified for its point of diversion. Second, the ruling ignores the fact that the Bridge Dam is part of a diversion structure that lies mostly within the 10 acre tract described in the Partial Decrees. Third, the 10 acre tract is the proper legal description for Rangen's diversion structure, including the Bridge Dam, based on IDAPA 37.03.01.060.05.d as it existed at the time Rangen's water rights were decreed. Finally, the Director ignored the evidence that approximately 97 percent of the spring water that supplies Rangen's Research Hatchery emanates from the 10 acre tract and Rangen should be legally entitled to divert it. The Department's ruling concerning Rangen's point of diversion was erroneous as a

matter of law and should be reversed. The Court should find that Rangen's Partial Decrees authorize use of the Bridge Dam to divert water to the Large Raceways.

1. Rangen's Diversion Structure.

The following page is Exhibit 1446C, an aerial photograph prepared by Dr. Chuck Brockway, Rangen's water resource engineer, which shows Rangen's Research Hatchery as it relates to the boundaries of Section 32 (hereinafter referred to as "Water Source Analysis").[2] Exhibit 1446C shows that Rangen's diversion structure straddles two different quarter/quarter/quarter sections that sit next to each other. (See, Exh. 1446C) There is no dispute that Rangen owns all of the property. Part of the diversion structure (the Farmers Box, Rangen Box and talus slope) lies within the 10 acre tract (described as the SESWNW). The end of the pond with the Bridge Dam, however, sits in the Western parcel (actually described as SWSWNW of Section 32).

[2] The Water Source Analysis has been labeled with numbers which correspond to, among other things, various features of Rangen's diversion structure. A legend for the red dots is found on page 3 of Exhibit 1446A which explains the process that Dr. Brockway used for his Water Source Analysis.

F:\PROJECTS\RANGENS INC\ARCVIEW MAPS\RANGENS WATER SOURCES GPS.MXD

0 110 220 440 Feet

RANGEN INC.
WATER SOURCE ANALYSIS
BING AERIAL PHOTOGRAPH

Legend
- Spring Not GPS Located
- GPS Waypoints 2013_04_22
- twnshp
- Sections
- QQ lines

N

BROCKWAY ENGINEERING, PLLC.
ALR -APRIL 24, 2013

Exhibit 1452 provides a starting place for understanding Rangen's diversion structure:

The mouth of the Martin-Curren Tunnel is shown in the upper left corner of this photograph with multiple white pipes coming from it. There is a concrete box at the mouth of the tunnel which the parties have referred to as the "Farmer's Box." The large concrete box in the center of this photograph is called the "Rangen Box."

Exhibit 3278 provides a "bird's eye" view of the Martin-Curren Tunnel and Farmer's Box:

(Exh. 3278). The pipes labeled "Irrigation Pipelines" were used historically for farmer irrigation (e.g., Musser). The 6" White Pipe takes water to Rangen's Hatch House (where eggs and fry are raised), Rangen's Green House (where research is done) and to Rangen's Laboratory. The other two white pipes labeled "Small Raceways" and "Lower" take water further down the talus slope as shown in the next photograph:

(Exh.1453) The concrete structure in this photograph is the Rangen Box shown from above. One of the white pipes from the Farmer's Box feeds water straight into the Rangen Box. The other white pipe diverts water onto the talus slope where it is then channeled downhill.

The following photograph shows the white pipe depositing water onto the talus slope:

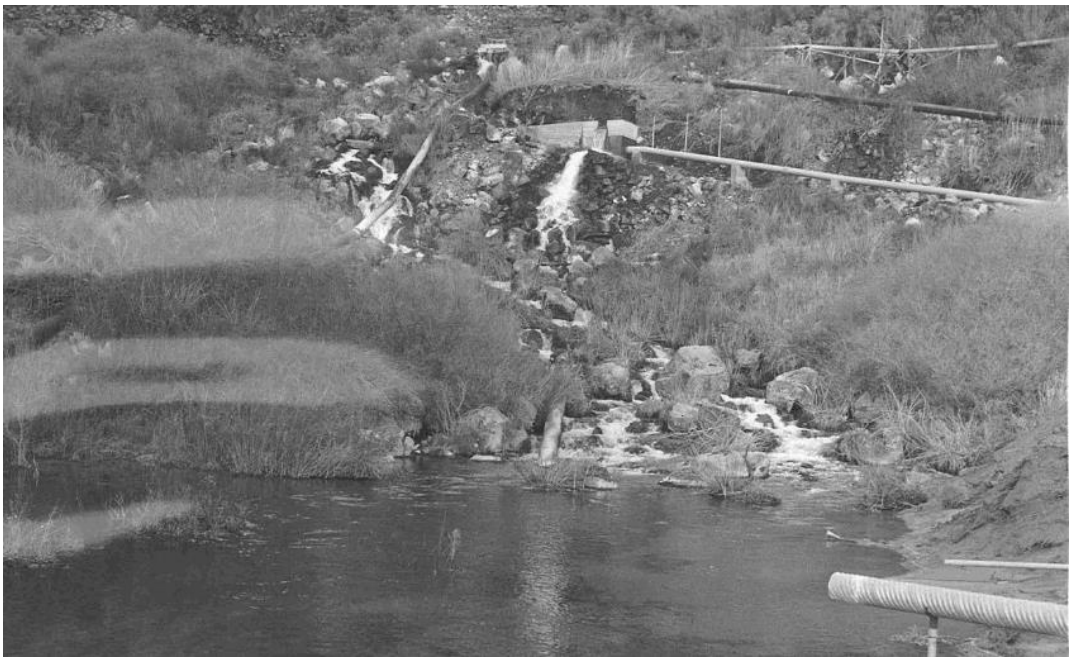
(Exh. 1454) Greg Sullivan, the City of Pocatello's water engineering expert, testified that there is actually a rock wall that channels this water into the Rangen Box. (Tr., 1460, L. 21 – p. 1462, L. 2).

The following photograph is a front view of the Rangen Box:

(Exh. 1456) Water can be diverted from the Rangen Box to the Small Raceways using the steel pipe that is coming out of the right side of the concrete structure. Alternatively, water can be allowed to go through the opening and then channeled downhill to a pond that supplies water to the Bridge Dam leading to the Large Raceways. (Tr., Vol VII, p. 1662, L. 25 – p. 1663, L. 6).

The following photograph is an aerial view of the water coming out of the Rangen Box and being channeled down the talus slope to the pond that feeds the Bridge Dam:

(Exh. 1458) The next photograph shows water channeled from the talus slope into the pond:



(Exh. 1017A, p. 9) The Bridge Dam and 36" pipeline that supplies water to the Large Raceways is at the opposite end of the pond. The following photograph shows the Bridge Dam; the 36" pipeline to the Large Raceways is behind the slatted grate on the right side of the photo:

(Exh. 1446D-16)

These photographs show that Rangen has a diversion structure that carries water from the mouth of the Martin-Curren Tunnel to the Large Raceways and picks up additional spring water from Rangen's property along the way. The vast majority of that spring water comes from the 10 acre tract and a small amount of that water comes from the tract next to it. Rangen's diversion structure lies mostly in the 10 acre tract, but the Bridge Dam does not. (See Dr. Brockway's Water Source Analysis discussed below)

2. The Bridge Dam is Encompassed by the Decreed Point of Diversion Under IDWR's Historical Rules.

To analyze the point of diversion issue it is important to consider IDWR's adjudication rules as they existed when Rangen's water rights were decreed. The Department uses its adjudication rules to make recommendations to the SRBA and those recommendations become the foundation for the decrees that are entered. Rangen's Partial Decrees were entered in 1997.

(Exh. 1026, 1028) At that time, the Department had a rule spelling out how points of diversion were to be identified. The rule, in pertinent part, stated:

> **05. Long Claim Form - Minimum Requirements**. Claims filed on the long claim form shall contain the following information:
>
> * * *
>
> d. Location of point of diversion. For claims other than instream flows, the location of the point(s) of diversion shall be listed at item four (4) part (a) of the form. For claims to instream flows for public purposes, the beginning and ending points of the claimed instream flow shall be listed at item four (4) part (b) of the form.(7-1-93)
>
> i. The location of the point of diversion shall be described to nearest forty (40) acre tract (quarter-quarter section) or government lot number, and shall include township number (including north or south designations), range number (including east or west designations), section number, and county. **The location of the point of diversion should be described to the *nearest* ten (10) acre tract (quarter-quarter-quarter section) if that description is reasonably available.** (7-1-93)

IDAPA 37.03.01.060.05.d (emphasis added).

Rangen's diversion structure does not lie entirely within one 10 acre tract. In this case, the nearest 10 acre tract for Rangen's entire diversion structure including the Bridge Dam is the parcel that is described in the Partial Decrees, which encompasses most of the diversion structure except the Bridge Dam. Under the Department's adjudication rules, the Bridge Dam is properly encompassed within the decreed point of diversion and Rangen should be allowed to use it to supply water to the Large Raceways. The Director's ruling to the contrary should be reversed.

3. Rangen's Decrees Should Be Interpreted to Allow the Diversion of 97 Percent of the Spring Water that Flows into the Hatchery Even if Rangen Cannot Use the Bridge Dam.

Even if the Court rejects the arguments above regarding the use of the Bridge Dam, Rangen is still legally entitled to claim as the source of its water 97 percent of the spring water that feeds its Research Hatchery. After the Director's oral ruling at the Prehearing Conference regarding the

source and point of diversion, Dr. Brockway performed a Water Source Analysis to determine how much water emanates from springs in the 10 acre tract and how much water emanates from springs in the Western parcel. (See, Exh. 1446A for a report of the process he used and his findings and Exh. 1446B for a spreadsheet showing his water measurements and water balance calculations) Dr. Brockway went to the Research Hatchery and used a GPS to plot various springs and other features (including pipes). (See, Exh. 1446A, p. 3 for a list of GPS points) He plotted these features on the aerial photograph showing the boundaries of the Eastern and Western parcels. (See, Exh. 1446C for Dr. Brockway's aerial photograph showing the GPS points and Exhibit 1446D for photographs of the GPS sites) Based on his inspection, he determined that much of the spring water that emanates from the 10 acre tract can be identified, but not measured where it emerges because of difficult terrain. (Tr., Vol. V, p. 1046, L. 18 – p. 1047, L. 8). Water emanating from the Western parcel, in contrast, was more easily measured because it flows through pipes which flow into the pond that feeds the Large Raceways. (Id.)

Dr. Brockway asked Rangen personnel to measure the flow of water through the entire facility as they usually do and then he subtracted out the springs flows that came from the Western parcel through the pipes that flow into the pond that feeds the Large Raceways. Id. There was one pipe (GPS point 162) that flowed into the pond that carried spring water from both the Eastern and Western parcels. (Tr., p. 1054, Vol. V, L. 10 – p. 1055, L. 6) Because of the terrain, Dr. Brockway had to make an estimate of how much water came from the Eastern parcel and how much came from the Western parcel. (Id.) He estimated that 20 percent of the water came from the Western parcel. (Id.) Dr. Brockway ultimately concluded that of the 12.44 cfs flowing through the facility on April 22, 2013, 12.06 cfs came from the 10 acre tract that is described as the point of diversion in Rangen's Partial Decrees.

Director Spackman did not consider Dr. Brockway's Water Source Analysis when entering the *Final Order* and *Order on Reconsideration*. If the Court finds that the term Martin-Curren Tunnel is ambiguous and Rangen is not entitled to use the Bridge Dam, the Court should consider the Water Source Analysis and rule as a matter of law that Rangen's Partial Decrees encompass 97 percent of the spring water that supplies the Research Hatchery.

C. The Doctrine of Quasi-Estoppel Precludes the Director From Ruling that Rangen Cannot Divert Any Spring Water that Does Not Emanate from the Mouth of the Martin-Curren Tunnel Based on the Department's Prior Findings and Conduct.

The Court must decide whether the doctrine of quasi-estoppel should be applied to preclude the Director from interpreting Rangen's Partial Decrees in such a way that the source is confined to water emanating from the mouth of the Martin-Curren Tunnel itself. In this case, the Director refused to even consider the application of quasi-estoppel, ruling that the doctrine is generally inapplicable to a governmental agency operating in its sovereign capacity. The Department's interpretation of Sagewillow, Inc. v. IDWR, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) goes too far and should be reversed.

1. Standard of Review.

The Idaho Supreme Court ruled in City of Nampa v. Swayne, 97 Idaho 530, 547 P.2d 1135 (1976) , that the application of estoppel is dependent upon a case by case analysis of the equities involved. 97 Idaho at 534, 547 P.2d at 1139. It is a legal matter over which the Court exercises de novo review. See, e.g., Ticor Title Co. v. Stanion, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007) (holding that collateral estoppel is legal issue over which reviewing court exercises free review).

2. The Doctrine of Quasi-Estoppel Should be Applied to IDWR.

"The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position." Willig v. State Dep't Health &

Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (citing Mitchell v. Zilog, Inc., 125 Idaho 709, 715, 874 P.2d 520, 526 (1994) (emphasis added). Equitable estoppel and quasi estoppel are different. While it is true that equitable estoppel requires a misrepresentation or concealment of fact and detrimental reliance, quasi estoppel does not require those showings. Willig, 127 Idaho at 261, 899 P.2d at 971. The Willig court held: "Quasi estoppel is distinguished from equitable estoppel 'in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient.'" 127 Idaho at 261, 899 P.2d at 971 (quoting Evans v. Idaho State Tax Comm., 97 Idaho 148, 150, 540 P.2d 810, 812 (1975)).

The Department ruled in the *Order on Reconsideration* that Rangen did not cite any case law or provide any argument to support its contention that quasi estoppel should be applied. This is incorrect. The first five pages of the argument section of Rangen's Closing Reply Brief address in detail the law of quasi-estoppel and set forth the facts which support its application in this case. (R., Vol. 20, p. 004035-004039). The Director's *Final Order* did not address the issue of quasi-estoppel so Rangen simply requested that it be addressed on reconsideration.

The Department also rejected Rangen's quasi-estoppel argument based on the proposition that the doctrine generally cannot be invoked against a governmental agency acting in a sovereign capacity. The Department cited Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) to support its position. The Sagewillow Court did not hold that quasi-estoppel generally cannot be invoked against a governmental entity. The Sagewillow Court held that equitable estoppel generally cannot be invoked against a governmental entity. 138 Idaho at 845, 70 P.3d at 683. The Sagewillow Court actually examined the application of quasi-estoppel to IDWR and concluded that the doctrine would not be used against IDWR in that case because the Department had specifically reserved the right to review the validity of the water right at issue

in a later proceeding. Id. The Sagewillow case makes it clear that the doctrine of quasi-estoppel can be invoked against IDWR in the proper case.

Even if there were a rule that quasi-estoppel is generally not applicable to a governmental entity, the Idaho Supreme Court has made it clear that it is not a bright line rule. Justice Ailshie addressed this issue on rehearing in Boise City v. Wilkinson, wherein he explained that:

> We recognize that, as a general rule, the doctrine of estoppel does not apply to municipal corporations, and we are not unmindful of the fact that the courts of many states have absolutely refused to apply it to such corporations. **We are not prepared, however, to announce an unalterable and unexceptionable rule in this state which would inevitably result in perpetrating wrong and injustice in exceptional cases like this. Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exceptions would be to rob such courts of much of their efficacy and power for administering even-handed justice**. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen."

Boise City v. Wilkinson, 16 Idaho 150, 177, 102 P. 148, 157 (1909).

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

(Tr., Vol. III, p. 547, L. 17-25; See also, Exh. 1129 for a copy of Ms. Yenter's investigation memo which is titled "Water Right Review and Sufficiency of Measuring Devices, Rangen Aquaculture.") Yenter and Patton examined how the water traveled through the facility, where the diversions were made, sufficiency of the water supply, and interconnection of the raceways:

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

(Tr., Vol. III, p. 550, L. 19 – p. 548, L. 4).

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

> The flow measurements that are considered to be representative of the total supply of water available to the Rangen hatchery facilities under water right nos. 36-15501, 36-02551, and 36-07694, consist of the sum for the discharge from raceways designated by Rangen as the "CTR" raceways and the flow over the check "Dam." The dam is sited upstream for the discharge points from the CTR raceways and downstream from the discharge points from raceways designated by Rangen as the "Large" raceways. The sum of the discharge from the CTR raceways and the flow over the check dam is considered to be representative of the total supply of water available even though that at times some of the flow over the check dam may include water flowing from small springs downstream from the diversion to the Large raceways, water discharged from the Large raceways that was not diverted though the CTR raceways and irrigation return flows.

((R., Vol. 1, p. 000151; see also, Exh. 1074 for a diagram showing Rangen's measurement points discussed above) Tim Luke, the Department's enforcement officer, testified that numerous IDWR

employees, including himself, have been to the Rangen facility multiple times since the 2003 investigation, and no one has ever informed Rangen that its water usage is outside the scope of the Partial Decrees:

> Q. And so, Mr. Luke, there's been no purpose or occasion by you or anyone else to say "Rangen, you're using your water rights illegally"? No one's ever done that, have they?
>
> A. No, not to my knowledge.

(Tr., Vol. 5, p. 1177, L. 22 – p. 1178, L. 11). Given Rangen's 50 year history of water usage, the Department's order allowing Rangen to measure flows at the outlet because the spring sources were too numerous at the inlets, the Department's 2003 investigation, the Department's 2005 amended findings, and the fact that no one from the Department has ever told Rangen prior to the Director's January 29, 2014 *Final Order* that its water usage was improper, it would be unconscionable for the Department to now change positions and hold that Rangen's water usage is outside the scope of its Partial Decrees.

While Rangen does not have to show any type of detrimental reliance for the doctrine of quasi-estoppel to apply, Rangen has detrimentally relied on the Department's conduct and findings. After the Director's ruling and an application by the North Snake Ground Water District, Magic Valley Ground Water District and others to appropriate the talus slope water, Rangen filed a Late Claim in the SRBA to protect its historical usage of the water in the event of an adverse determination by Director Spackman. The Court denied the late claim on the basis that it was too late. (See, *Order Denying Motion to File Late Claim* attached hereto as Appendix A)

It would be unconscionable to allow the Department to limit Rangen's water rights given the backfiles, Rangen's historical, beneficial use of the water, the Department's investigation in 2003 and findings in 2005, and no subsequent notice that Rangen's historical water usage is

improper. The Department erred when it concluded that quasi-estoppel does not apply and that determination should be reversed.

D. There is Not Substantial Evidence to Support the Adoption of Sullivan's Regression Analysis.

Because of the way it is calibrated and designed, ESPAM2.1 only directly predicts how much water would accrue to the entire Rangen spring cell, not just the mouth of the Martin-Curren Tunnel itself. (See, Exh. 3203, p. 10 at ¶ 9). Anticipating that the Director could rule (as he did) that Rangen's water rights are limited to the water that comes from the mouth of the Martin-Curren Tunnel itself, the Department staff developed a linear regression to apportion the water that would accrue as the result of a curtailment between the Martin-Curren Tunnel and the rest of the springs complex. The IDWR staff determined that in the event of a curtailment, 70 percent of the water would accrue to the Martin-Curren Tunnel mouth and 30 percent would accrue to the rest of the spring complex. See id. The Director rejected the IDWR staff's 70/30 regression analysis, and instead, adopted the 63/37 regression analysis put together during the hearing by Greg Sullivan, Pocatello's expert hydrologist, that was actually put together during the course of the hearing.

There was not substantial evidence to support the adoption of Sullivan's regression analysis. The term "substantial evidence" means evidence ". . . that a reasonable mind might accept to support a conclusion." Chisholm v. IDWR, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005) (quoting Jarvis v. Rexburg Nursing Ctr., 136 Idaho 579, 583, 38 P.3d 617, 621 (2001)). A reviewing court is not required to defer to an agency's decision that is not supported by the record. Evans v. Board of Comm. of Cassia County, 137 Idaho 428, 431, 50 P.3d 443, 446 (2002). A decision is clearly erroneous when it is not supported by substantial and competent evidence. Galli v. Idaho County, 146 Idaho 155, 159, 191 P.3d 233, 237 (2008). In this case, the Court should reverse the Director's decision because it is not supported by substantial and competent evidence.

1. Rangen's Water Measurements are Within Industry Standards and Have Been Accepted by IDWR.

The IDWR staff based their regression analysis on the historical measurement data provided by Rangen. This approach was reasonable because Rangen's water measurements are within industry standards and have been accepted by IDWR and the local watermaster.

Rangen has been measuring and recording water flows at the Research Hatchery since 1966. (See, Exh. 1075 for a summary chart of water measurements that Rangen maintains) Rangen has been reporting those flows directly to IDWR since 1995 and the Department has always accepted them. The IDWR staff concluded in their memorandum that:

> Rangen submitted annual water measurement reports directly to IDWR from 1995 through 2009, and to Water District 36A from 2010 to 2012. IDWR has accepted these annual water measurement reports during this period of record understanding that Rangen estimates hatchery diversions or flows using fish raceway check boards as non-standard weir measuring devices.

(See, Exh. 3203, p. 13 at ¶ 1).

Dan Maxwell, a fish culturist at the Research Hatchery, is currently responsible for taking the water measurements. Maxwell went to work at the facility in February, 1992. (Tr., Vol. I, p. 266, L. 16-18). He started taking the measurements in January of 1999. (Tr., p. 268, l. 9-12). Maxwell takes the measurements every Monday. (Tr., Vol. I, p. 270, L. 1-6). In order to measure all of the water that flows through the Research Hatchery and is available for use, Maxwell takes two separate measurements and adds them together. He takes one measurement at the bottom of the top set of the CTR ponds and he takes the other measurement where the water flows over the Lodge Pond dam board. These two locations are shown as "measurement points" on Exh. 1074. (Tr., Vol. I, p. 269, L. 1-5).

He takes the measurements by placing a metal yardstick at the top of the dam boards in both locations and reading the level of the flow as it passes over the dam boards. (Tr., Vol. I, p.

274, L. 18 – p. 275, L. 1). The yardstick is placed so that the face is perpendicular to the water. (Tr., Vol. I, p. 275, L. 4-6). Frank Erwin, the local watermaster, confirmed at the hearing that when Maxwell takes the readings the ruler is somewhat perpendicular to the water flow. (Tr., Vol. I, p. 249, L. 21 – p. 250, L. 4).

Dr. Brockway, a water resources engineer who has been involved in Idaho water since 1954, explained that the ruler method used by Rangen to measure the water flow is called "sticking the weir." (Tr., Vol. IV, p. 920, L. 17-20; p. 930, L. 14-23). "Sticking the weir" is used when a standard staff gauge has not been incorporated into the weir setup. (Tr., Vol. IV, p. 930, L. 24 – p. 931, L. 8). Sticking the weir is a common measurement method that fish producers use in Idaho. (Tr., Vol. IV, p. 931, L. 13-20). Dr. Brockway observed Maxwell taking water measurements and testified that Rangen's flow measurements are accurate and within industry standards. (Tr., Vol. IV, p. 968, L. 17-22).

Frank Erwin, the local watermaster, also testified that he observed Maxwell taking water measurements at the Rangen Hatchery and did not have any issues with the way it was done:

> Q. And have you ever watched him measure water out at the facility?
>
> A. Yes, I have.
>
> Q. And did you ever take issue with the way that Mr. Maxwell measures water out at Rangen's facility?
>
> A. No, I haven't. I think he does a good job.

(Tr., Vol. I, p. 244, L. 16-22).

In fact, Mr. Erwin testified that Maxwell was actually better at taking the measurements than he is:

> Q. (BY MS. BRODY): Did you ever have occasion to consider how well Mr. Maxwell reads the ruler measurements?

A. Yes. I think he does a good job.

Q. And have you ever compared his ability to read the ruler compared to your own?

A. I would put it this way: I think he probably does a little better job at it than I would be able to do.

Q. Rangen sends you annual reports of their water measurements; correct?

A. Yes.

Q. And have you ever taken issue with any of the measurements that Rangen has sent you?

A. No, I haven't.

(Tr., Vol. I, p. 245, L. 11-19).

After reading the water flow level on the ruler, Maxwell records the water measurements to the nearest 1/8 inch on a notepad. (Tr., Vol. I, p. 279, L. 3-10). (See, Exh. 1095 for a sample of a weekly measurement notepad) He then takes the water measurements and converts them to cubic feet per second using a rating table or conversion chart. (Tr., Vol. I, p. 279, L. 11-23; see also, Exh. 1068 for the conversion chart Maxwell has used since he started taking measurements in 1999). He records the results on a chart such as Exh. 1094.

Douglas Ramsey, a Research Scientist at the Rangen Hatchery, then records Maxwell's converted measurements in the computerized spreadsheet that was admitted as Exhibit 1075. (Tr., Vol. III, p. 620, L. 14 – p. 624, L. 6) Exhibit 1075 demonstrates that Rangen's spring flows have been steadily declining for decades and that Rangen is presently receiving only a small fraction of the water that is allowed under its Partial Decrees.

Open channel water measurements are deemed acceptable if the measurements are within 10percent of measurements taken by IDWR. In this case, IDWR has historically accepted

Rangen's measurements because those measurements are within the acceptable +/-10 error range. The IDWR staff concluded:

> Although the raceway check boards are not considered standard measuring devices, IDWR accepts measurements using these structures at Rangen and many hatcheries in the area because IDWR's standards allow an accuracy of +/-10 percent for open channel measuring devices when compared to measurements using standard portable measuring devices. Rangen likely under-measures actual flows, but an error up to -10% is acceptable pursuant to IDWR's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices.*

(See, Exh. 3203, p. 13, 58-65) In fact, Rangen's measurements are well within the +/- 10 percent margin. The IDWR staff concluded:

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

(Id., p. 60, f/n 12) It is important to recognize that under-measurement of spring flows actually favors the groundwater users – not Rangen. The IDWR staff explained in their memo that:

> Systematic under-measurement of discharge at the Rangen spring complex would be expected to result in lower model predictions of discharge and response curtailment at the Rangen spring cell. This would favor the groundwater users, not Rangen.

(Exh. 3072, p. 13 at ¶ 5 and p. 65)

Cindy Yenter also concluded that Rangen's measurement techniques are acceptable when she investigated Rangen's 2003 delivery call. (Tr., Vol., III, p. 569, L. 23 – p. 570, L. 2). Ms. Yenter's 2003 investigation memo stated that:

> It seems reasonable to conclude that, while Rangen's measuring techniques for the hatchery raceways may not be absolutely correct, they are fairly consistent and are resulting in reported measurements which are no more than about 10 percent lower than actual flows.

(See, Exh. 1129, p. 4) At the hearing, Yenter explained that if she went out and made an ***excellent to good*** open-channel measurement, it would have an accuracy rating of around ± 5percent. (Tr., Vol. III, p. 606, L. 6-25). Yenter believes that Rangen's measurements fall within a 5-10 percent accuracy range. Id.

Of the 7.7 percent to 6.31 percent reported margin of error discussed in the IDWR Staff Memo, IDWR concluded that less than 2 percent of the error was attributable to actual measurement error. Most of the error was attributable to using different weir coefficients and rating tables. When the same rating tables were used, IDWR concluded that there was less than 2 percent error:

> When using the IDWR head measurements from November 25, 2003 with the Rangen discharge table, the flow at the Large raceways is 16.9 cfs and the flow at the CTR raceways is 16.2 cfs. The Yenter memo states that Rangen staff measured 16.6 cfs and 15.9 cfs at the Large and CTR raceways respectively on November 24, 2003, a difference of only 0.3 cfs between IDWR and Rangen when using the Rangen discharge table, or a difference of less than 2 percent at each set of raceways. The relatively minor differences between the IDWR and Rangen measurements when using the Rangen discharge tables indicates that the differences in flow measurements between IDWR and Rangen on November 25th and 24th, 2003, was due mostly to the use of different weir equations or rating tables, rather than differences in head measurements.

(See, Exh. 3203, p.61)

The bottom line is that Rangen has been taking and recording water measurements for over fifty years at the Research Hatchery. Those methods used have been observed and investigated by IDWR and the watermaster and they have found them to be within industry standards and have accepted Rangen's measurements. It was reasonable for the IDWR staff to use those measurements to develop its regression analysis.

2. Sullivan's "Evolving" Opinions.

There was no rational basis for the Director to reject the 70/30 regression analysis developed by IDWR staff in favor of the 63/37 regression analysis done by Greg Sullivan. Sullivan

first testified during the hearing that he did a regression analysis to determine how to apportion the accrual of water between the mouth of the Martin-Curren Tunnel itself and the rest of the spring complex and determined that the proper apportionment ratio was 75/25. (Tr., Vol. VI, p. 1365, L. 21 - p. 1367, L. 4) He testified that Dr. Brendecke, IGWA's expert, had done the same type of analysis and came up with a substantially similar result. (Id.) He also testified that he when he came up with the 75/25 ratio he based it on the measurements reported by. (Tr., Vol. XII, p. 2828, L. 20-23).

On the last day of the hearing Sullivan came back with a **new opinion** of the proper ratio. He testified that after the Director asked him if the ratio would change if Rangen under-measured its flows he did a new regression analysis and determined that the proper ratio is actually 63/37 because Rangen under-measures the flows through its facility by 15 percent. (Tr., Vol. XII, p. 2794, L. 22 – p. 2795, L. 6; p. 2797, L. 22 – p. 2798, L. 10). The Director rejected the IDWR staff's 70/30 ratio, and instead, adopted Sullivan's revised 63/37 ratio. The Director's decision was erroneous for several reasons.

The first problem with the adoption of Sullivan's analysis is his ever-evolving opinions concerning the error rate in Rangen's measurements. Even though he never took a single water measurement and never compared his own measurements to those taken by IDWR or Rangen, Sullivan testified at the hearing that Rangen's measurements were under-measured by 15 percent. (Tr., Vol. VII, p. 1606, L. 15-18). This is in stark contrast to the position he took during his deposition and in his export reports where he asserted that Rangen's measurements were in error by 30 to 40 percent. (Tr., p. 1607, L. 21-25; p. 1608, L. 1-5). When questioned about the change of opinion, Sullivan testified that his opinions had "evolved." (Tr., p. 1608, L. 6-7). Sullivan's opinions "evolved" in the sense that he stopped disputing the accuracy of the head measurements

taken by Rangen and the "sticking the weir" method used to take those measurements (Tr. p. 1588, L. 14-22) and, instead, disputed the weir coefficient and ratings tables used by Rangen. (Tr., p. 1588, L. 12-13).

The next problem with Sullivan's analysis is his reliance on unreliable USGS data that the IDWR staff considered and rejected. The Department considered and rejected the use of USGS data in evaluating Rangen's measurements because USGS had subjectively rated its measurements as fair or poor. The IDWR staff stated:

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

(See, Exh. 3203, p. 65).

In addition, the USGS measurements are not taken at the same place as the Rangen measurements and likely include water that is not measured or used in the Research Hatchery. Exhibit 1446C shows that there are two additional sources of water that are not included in the Rangen measurements. Those additional water sources are identified as points 188 and 189 on Exhibit 1446C. The two additional sources of water are located on the east side of a culvert which conveys water from one side of a road to another. Sullivan testified that USGS measurements are sometimes taken on the east side of the culvert and sometimes on the west side. (Tr., Vol. VII, p. 1599, L. 19-23). Because of these additional sources of water coming into the channel below the point where Rangen measures its flows, comparing Rangen's water measurements to USGS measurements is truly an "apples and oranges" comparison.

Finally, the weir coefficient Sullivan "extrapolated" from the USGS measurements is entirely different than the "hybrid" weir coefficient Sullivan created and advocated for in his expert

reports. Before Sullivan's measurement conclusions were rejected by the Department in the IDWR staff memo (see, Exh. 3203, p. 58-63), Sullivan contended the proper weir coefficient for Rangen was 3.32, at heads exceeding 3 3/8ths inches. (See, Exh. 3128, Table 1-5) Within a hundredth of a decimal point, this is the very same weir coefficient used by Rangen until at least 1999.

There is not substantial and competent evidence to support the adoption of Sullivan's 63/37 regression analysis. The USGS data he used to develop the regression analysis was considered and rejected by the IDWR staff. USGS itself rated its measurements fair to poor. Rangen's measurements, on the other hand, are within the range of accuracy required by IDWR and have been accepted by the Department. No rational fact finder would reject the regression analysis done by the IDWR staff using Rangen's measurements in favor of an ever-evolving regression analysis built upon USGS data that has been rejected by the Department. The reality is that Sullivan first determined that if there were no error in Rangen's measurements, the proper ratio would be 75/25. Assuming a 15 percent under-measurement error he concluded that the ratio should be 63/37. The ratio developed by the IDWR staff is 70/30 and their estimated under-measurement rate is 6-7 percent. The staff's ratio is half way between Sullivan's two ratios just as their under-measurement of 6-7 percent estimate is half way between Sullivan's assumptions of no error and a 15 percent under-measurement. A rational fact finder would not have adopted Sullivan's second regression analysis over the IDWR staff's analysis. Because there is not substantial and competent evidence to support Sullivan's regression analysis, that portion of the Director's *Final Order* should be reversed.

E. There is Not Substantial Evidence to Support the Director's Determination that Junior Groundwater Users are Using Water Efficiently and without Waste.

Conjunctive Management Rule 40.03 states that the Director ***will*** consider whether the junior-priority groundwater pumpers are using water efficiently and without waste when evaluating Rangen's Petition for Delivery Call. Evidence of efficient use is a prerequisite for any junior user that wants to be excluded from curtailment. The rule states in relevant part:

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

IDAPA 37.03.11.040.c. The Director concluded in the *Order on Reconsideration* that IGWA and Pocatello carried their burden under this rule. There is not substantial evidence to support the Director's conclusion, and it should be reversed.

The Director ruled that IGWA carried its burden under CM Rule 40.03 based on the testimony of Lynn Carlquist, the chairman of the North Snake Groundwater District, and Tim Deeg, the chairman of IGWA. The Director began his analysis by pointing to the portions of the transcript where Carlquist testified that he and nearly 100 percent of the other farmers in his area use sprinkler irrigation. While sprinkler irrigation (as opposed to flood irrigation) has certainly become standard industry practice, sprinkler use does not mean that farmers are using water efficiently and without waste. To evaluate the efficient use of water and the use of water without waste requires the introduction of evidence such as:

- Water usage compared to crops in the field or other permitted uses
- Sprinkler package maintenance and replacement practices
- Cultivation practices, including information such crop selection, seed choice, crop rotations and use of cover crops and mulch

This type of information was not introduced because IGWA and its groundwater districts simply do not have it.

Carlquist testified that the North Snake Groundwater District does not do anything to evaluate the efficiency of its farmers:

> Q. The North Snake Groundwater District does not do anything to evaluate the efficiency of its farmer members; does it?
>
> A. No.

(Tr., Vol. VII, p. 1726, L. 20-23). Likewise, he testified that the Groundwater District does not do anything to evaluate whether its groundwater pumpers are using water without waste:

> Q. The North Snake Groundwater District does not do anything to assess, or evaluate whether its ground water pumpers are using water without waste?
>
> A. No.

(Tr., Vol. VII, p. 1727, L. 4-7). While the North Snake Groundwater District has hired Brian Higgs, a hydrographer, to measure groundwater use within the District every three years (see, Tr., Vol. VII, p. 1715, L. 6-21), Carlquist explained that the District itself makes no assessment concerning whether its pumpers are using their water within their legal rights:

> Q. Does the District, itself, have any information, or assess whether a groundwater pumper within the boundaries of the district, is using water within their legal rights?
>
> A. No, we don't maintain anything like that.

(Tr., Vol. VII, p. 1728, L. 1-5). Timothy Deeg, the president of IGWA, likewise testified that IGWA does not monitor the efficiency of its members' groundwater systems:

> Q. IGWA does not monitor the efficiency of its individual members irrigation systems?
>
> A. No, it does not.

(Tr., Vol. VIII, p. 1763, L. 7-9).

The Director appears to have concluded based on Deeg's testimony that farmers will only pump what is necessary to get by because of the costs involved. (R., Vol. 22, p. 004428) This is an erroneous conclusion with no rational basis. How much is too much to pump? The answer to that question varies depending on the farmer and the farmer's business operation. A broad generalization that cost is a disincentive to pump does not equate to the efficient use of water or the use of water without waste. The record developed after two weeks of hearing simply does not provide the basis for the Director or a rational fact finder to conclude that IGWA's members are using water efficiently and without waste.

The Director also concluded that Pocatello carried its burden of demonstrating the efficient use of water without waste based on the testimony of Justin Armstrong. The Director cited Armstrong's testimony at pages 1104-1107 as the basis for his conclusion. (R., Vol. 22, p. 004428) The testimony the Director relied on is nothing more than the evidence concerning how much water the City of Pocatello's wells produced – not evidence of efficiency or conservation. For example, Armstrong testified:

Q. Okay. So let's look at the airport wells.

And again, this is a system that's disconnected from the City's culinary system; correct?

A. That's correct.

Q. Okay. What's the total production shown here, on average?

A. Total on average is 3,588 acre feet.

(Tr., Vol. V, p. 1105, L. 25 – p. 1106, L. 6). Contrary to the Director's conclusion, Armstrong did not address how the City of Pocatello uses water or how its use is efficient or without waste.

The bottom line is that there is not substantial, competent evidence in the record to support the Director's conclusion that junior-priority groundwater users and the City of Pocatello are using water efficiently and without waste. As such, the Director's ruling should be reversed.

F. The Director's Imposition of the Great Rift Trimline was Arbitrary.

The Director correctly concluded that ESPAM2.1 is the best available science to evaluate Rangen's Petition for Delivery Call. (R., Vol. 21, p. 004175-004178) The Director erred, however, when he disregarded impact of junior-priority groundwater pumping across the Eastern Snake Plain Aquifer and drew a line at the Great Barrier Rift. He concluded that junior-priority groundwater pumpers east of the Great Rift should be excluded from Rangen's delivery call even though collectively they have an injurious impact on the water received at the Martin-Curren Tunnel. The Director's line was arbitrary in that it has no scientific basis and it is contrary to Idaho law which requires the water resources of this state to be managed conjunctively. "An action is **capricious** if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." American Lung Ass'n of Idaho/Nevada v. State, Department of Agriculture, 142 Idaho 544, 130 P.3d 1062 (2006) citing Enterprise, Inc. v. Nampa City, 96 Idaho 734, 536 P.2d 729 (1975). Because the Director's Great Rift Trimline was arbitrary, it is not entitled to the Court's deference and should be reversed.

The Idaho Supreme Court reiterated in Clear Springs v. Spackman, 150 Idaho 790, 808, 252 P.3d 85, 103 (2011) that ". . . hydrologically connected surface and ground waters must be managed conjunctively." 150 Idaho at 809, 252 P.3d at 104 (citing Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994)); see also Basinwide Issue No. 5, Connected Sources General Provision (Conjunctive Management), Memorandum Decision and Order of Partial Decree (Subcase No. 91-00005) (February 27, 2002). When there is a shortage, junior groundwater users

have the burden of proving by clear and convincing evidence that their out-of-priority use does not injure the seniors. See A&B Irr. Dist. v. IDWR, 153 Idaho 500, 514, 284 P.3d 225, 249 (2012).

The Great Rift Trimline imposed by the Director excuses junior-priority groundwater users from Rangen's delivery call despite the Director's determination that pumping under those junior-priority groundwater rights reduces the flow of water available to Rangen's senior water rights. The Director's decision to exclude certain junior ground water rights was based on supposed discretion requiring him to "consider the diminishing benefits of curtailment beyond the Great Rift." (R., Vol. 22, p. 004431). The Director determined that curtailment was not "justified" and ignored the relative priority of the water rights because "[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." (R., Vol. 21, p. 004197)

The Director does not have the discretion to determine whether the curtailment of certain water rights is economically "justified." The Director relies upon Clear Spring Foods v. Spackman, 150 Idaho 790, 808, 252 P.3d 85, 103 (2011), as the source of this perceived discretion. This reliance is misplaced. In Clear Springs, the Idaho Supreme Court held only that the Director has some discretion in the use of the model to decide "whether [junior appropriators] were causing material injury to the Spring Users' water rights." Clear Springs, 150 Idaho at 803, 252 P.3d at 98. The Court specifically rejected the economic balancing engaged in by the Director in this case. "A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm." Id. at 84. The balancing that the Director engaged in is contrary to Idaho Code § 42-233a and Article XV, § 3 of the Idaho Constitution. See id.

In addition to the economic considerations primarily driving the imposition of the Great Rift Trimline, the Director stated that "[i]n addition, there is uncertainty in the model." (R., Vol. 21, p. 004197 at ¶ 55) There are at least two problems with the use of uncertainty as a means to exclude junior groundwater user from curtailment.

First, this use of uncertainty flips the appropriate burden of proof. There is no uncertainty or reasonable dispute that the area excluded by the Great Rift Trimline is hydraulically connected to the Rangen spring. Any uncertainty is related solely to the precise quantity of water that would result from curtailment. As noted above once such a connection exists junior-priority groundwater users have the burden of proving by clear and convincing evidence that their out-of-priority use does not injure the seniors. Given this burden any uncertainty regarding the precise quantity of the water that would result from curtailment must be resolved in favor of the senior user.

Second, there is no scientific basis for application of arbitrary "uncertainty" to the use of ESPAM2.1. There was no testimony from any of the water experts who testified in this matter proposing the use of a trimline. All the experts who testified agreed with Dr. Brendecke, IGWA's expert hydrologist, that a trimline has nothing to do with model uncertainty. (See Brendecke's paper entitled "Comments on Trim Line and Model Uncertainty," Exh. 1369) Even the IDWR staff acknowledged in their memo that a trimline has no scientific basis, but is rather, a policy decision. (See Exh. 3203, p. 5)

Given the distributed nature of the impact from ground water pumping, conjunctive management is impossible if the collective impact of junior ground water pumping is ignored. In other words, a junior ground water pumper's impact upon any particular spring will in most cases be a relatively small percentage of the quantity that user pumps. This case provides a clear example of the problem. There is no dispute that junior-priority ground water pumping across the ESPA

causes a significant reduction in the discharge from Rangen's spring water flows. The best prediction of that reduction is 17.9 cfs – the amount predicted by ESPAM2.1. The fact remains that ESPAM2.1 represents the "best available science" for determining the impact of junior-priority groundwater pumping on the Rangen spring cell. See, testimony of Dr. Brockway (Tr., Vol. X, p. 2340, L. 25 - p. 2341, L. 8); Bern Hinckley (Tr., Vol. X, p. 2487, L. 21-24); Dr. Brendecke (Tr., Vol. XII, p. 2793, L. 11-14); Dr. Wylie (Tr., Vol. XII, p. 2950, L. 3-9); Greg Sullivan (Tr., Vol. VII, p. 1642, L. 2-15); and Bryce Contor (Tr., Vol. XII, p. 2893, L. 20-22). Drawing a line at the Great Rift is not tied to any scientific principal and is certainly not supported by clear and convincing evidence that the junior-priority groundwater pumping east of that line does not injure Rangen. Because the Great Rift Trimline is arbitrary, the Director's imposition of it should be reversed.

G. Rangen's Substantial Rights Have Been Prejudiced by the Director's Order.

Under Section 67-5279(4), a Petitioner can prevail only if it shows that a substantial right has been prejudiced by an administrative decision. In this case, the Director's decision deprives Rangen of the right to use water that it has lawfully put to beneficial use over the last fifty years. The decision also deprives Rangen of the right to use the Bridge Dam to get water to its Large Raceways. There is no doubt that the Director's decision prejudices Rangen's legal rights and should be reversed for the reasons set forth above.

VI. CONCLUSION

Through the relief requested Rangen is asking the Court to show the Department that conjunctive management is "fact" -- not "fiction."[3] The spring water dispute that started twenty

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

years ago with the Mussers has to be settled using conjunctive management principles. While the application of conjunctive management is harsh, it is the law. These harsh realities have been felt and understood by surface water users since the prior appropriation doctrine was adopted in Idaho's Constitution. Rangen respectfully requests that the portions of the Director's decision identified above be reversed and that this case be remanded with instructions to the Director to enforce the curtailment order unless approved mitigation plans are put in place to provide Rangen with suitable replacement water.

DATED this 11th day of July, 2014.

BRODY LAW OFFICE, PLLC

By _____
Robyn M. Brody

HAEMMERLE & HAEMMERLE, PLLC

By _____
Fritz X. Haemmerle

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By _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 11th day of July, 2013 she caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

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Robyn M. Brody

APPENDIX A

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

In Re SRBA	)	**Subcase Nos. 36-16977**
	)	
Case No. 39576	)	
	)	**ORDER DENYING MOTION TO FILE LATE CLAIM**
	)	
	)	**ORDER DENYING MOTION TO FILE AMENDED NOTICE OF CLAIM**
	)	
_____	)	

I.
PROCEDURAL BACKGROUND

1. On October 12, 2012, this Court entered its *Order Establishing Deadline for Late Claim Filings* in basin 36 ("*Deadline Order*").[1] It directed that except for *de minimis* domestic and stockwater uses and late claims required to resolve litigation pending in the SRBA, the last date to file a *Motion to File Late Claim* in basin 36 "shall be January 31, 2013."

2. The Court subsequently entered an *Order Closing Claims Taking* in basin 36, closing the basin to the filing of late claims in accordance with the *Deadline Order* ("*Closure Order*").[2]

3. On April 19, 2013, Rangen, Inc. ("Rangen") filed a *Motion to File Late Claim* in the above-captioned matter. The claim asserts the right to divert 50 cfs for fish propagation from the "Martin-Curren Tunnel, Curran Springs, flows from a concrete box as well as from various seeps, rivulets, and springs originating and located on the talus slope, or other springs or seeps

[1] *Order Establishing Deadline for Late Claim Filings in Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63*, SRBA main case no. 39576, SRBA subcase no. 00-92099 (Oct. 12, 2012).

[2] *Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, and Disallowal of Unclaimed Water Rights*, SRBA main case no. 39576, SRBA subcase no. 00-92099 (Feb. 13, 2013).

which are the headwaters to Billingsley creek." The claimed point of diversion is T7S R14E S32 SWSWNW in Gooding County, Idaho. The claim is based on beneficial use and seeks a priority date of July 13, 1962.

4. On April 26, 2013, Rangen filed a *Motion to File Amended Notice of Claim*, seeking to amend its late claim to add the following point of diversion: T7S R14E S32 SESWNW in Gooding County, Idaho.

5. On May 15, 2013, *Responses* in opposition to the *Motion to File Late Claim* were filed by the City of Pocatello and the Ground Water Districts.[3] Rangen filed a *Reply* on June 28, 2013, and the Ground Water Districts subsequently filed a *Response* to the *Reply*.

6. A hearing on the *Motion to File Late Claim* and the *Motion to File Amended Notice of Claim* was held on August 19, 2013. At the hearing, counsel for Rangen requested the opportunity to file a post-hearing brief, which the Court granted. Rangen's post-hearing brief was filed on August 26, 2013. Responses were subsequently filed by the City of Pocatello and the Ground Water Districts. The last of the post-hearing briefing was received on September 3, 2013. Therefore, this matter is deemed fully submitted for decision on the next business day or September 4, 2013.

II.
HISTORICAL BACKGROUND

Consideration of the legal issues and arguments presented in this matter requires a brief history of certain of Rangen's water rights.

A. Prior licenses.

Prior to the commencement of the SRBA, Rangen held water right license numbers 30654 and 36-7694. Under license 30654, Rangen was authorized to divert 50 cfs from "underground springs, a tributary to Billingsley Creek" for fish cultural and domestic use with a priority date of July 31, 1962. Under license 36-7694, Rangen was authorized to divert 26 cfs from "springs tributary to Billingsley Creek" for fish propagation with a priority date of April 12,

[3] The term "Ground Water Districts" refers collectively to the following parties: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District and North Snake Ground Water District

1977. The point of diversion under both licenses was identified as the following forty acre tract located in Gooding County, Idaho: T7S R14E S32 SWNW (hereinafter, "Forty Acre Tract").

B. SRBA claims, recommendations and *Partial Decrees*.

Rangen timely filed claim numbers 36-2551 and 36-7694 in the SRBA. The bases for the claims were prior license numbers 30654 and 36-7694 respectively. The elements claimed by Rangen in its SRBA claims matched the elements of the prior licenses except with respect to source, which Rangen identified in the claims as "Curran Tunnel." On November 2, 1992, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") issued his *Director's Report, Part I, Reporting Area 3 (Basin 36)*, which included recommendations for the claims. The claims were recommended with the following elements:

Right	Source	Purpose and Period of Use	Quantity	Priority	Point of Diversion
36-2551	Martin-Curren Tunnel	Fish Propagation (01/01 – 12/31) Domestic (01/01 – 12/31)	50.0 cfs	07/13/1962	T07S R14E S32 SESWNW
36-7694	Martin-Curren Tunnel	Fish Propagation (01/01 – 12/31)	26.0 cfs	04/12/1977	T07S R14E S32 SESWNW

A review of the recommendations shows that they diverged from the claims in two material respects. First, the Director recommended the source of the claims as "Martin-Curren Tunnel," as opposed to the claimed source of "Curran Tunnel." Second, the Director recommended the point of diversion as the following ten acre tract located in Gooding County, Idaho: "T07S R14E S32 SESWNW" (hereinafter, "Ten Acre Tract"), as opposed to the Forty Acre Tract claimed by Rangen. No objections to the recommendations were filed by any party. However, because of proceedings in related contested subcase numbers 36-134B and 36-135A, water right claims 36-2551 and 36-7694 were initially withheld from partial decree.

As part of the settlement process in subcase numbers 36-134B and 36-135A, the Department filed an *Amended Director's Report* with respect to water right claim 36-2551. In the *Amended Director's Report*, the Department recommended that part of water right claim 36-2551 be partially decreed separately in the SRBA as beneficial use claim 36-15501. Specifically, the Director recommended that 1.46 cfs of claim 36-2551 be decreed as beneficial use claim 36-15501, with a priority date of July 1, 1957. Thus, the recommended quantity for water right claim 36-2551 was reduced to 48.54 cfs. However, the source of the claims remained recommended as "Martin-Curren Tunnel" and the point of diversion remained recommended as the Ten Acre Tract. No objections were filed to the *Amended Director's Report*.

In December of 1997, *Partial Decrees* were issued for water rights 36-2551, 36-15501, and 36-7694. The *Partial Decrees* were entered in the name of Rangen with the following elements:

Right	Source	Purpose and Period of Use	Quantity	Priority	Point of Diversion
36-2551	Martin-Curren Tunnel	Fish Propagation (01/01 – 12/31) Domestic (01/01 – 12/31)	48.54 cfs	07/13/1962	T07S R14E S32 SESWNW
36-15501	Martin-Curren Tunnel	Fish Propagation (01/01 – 12/31)	1.46 cfs	07/01/1957	T07S R14E S32 SESWNW
36-7694	Martin-Curren Tunnel	Fish Propagation (01/01 – 12/31)	26.0 cfs	04/12/1977	T07S R14E S32 SESWNW

Since the recommendations for claims were unopposed, the elements of the *Partial Decrees* matched recommendations for the claims. Rangen did not appeal from the issuance of any of the *Partial Decrees* and the time for appeal has long expired.

C. Administrative proceeding before the IDWR concerning Rangen's delivery call.

On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department in IDWR Docket No. CM-DC-2011-004. The *Petition* seeks the curtailment of certain junior water right users who Rangen asserts are causing material injury to its *Partial Decrees* for water rights 36-2551 and 36-7694. In the context of the delivery call, issues have arisen regarding the proper interpretation of the source and point of diversion elements of Rangen's *Partial Decrees*. As set forth above, Rangen's *Partial Decrees* identify their source as "Martin-Curren Tunnel," and their point of diversion as the Ten Acre Tract. Rangen alleges that the Martin-Curren Tunnel is part of a greater springs complex that supplies water to its facilities. The source issue presently before the Director is whether Rangen's ability to call for delivery of water under its *Partial Decrees* is limited only to water from the greater springs complex that flows through the mouth of the Martin-Curren Tunnel. The point of diversion issue presently before the Director is whether Rangen's ability to call for delivery of water under its *Partial Decrees* is limited to water from the greater springs complex diverted in the Ten Acre Tract.

It is undisputed in this matter that Rangen's *Motion for Late Claim* is being filed as a result of certain findings and anticipated findings of the Director in the administrative proceeding. Rangen admits that the *Motion for Late Claim* is an attempt to protect its alleged historic water use by supplementing the use identified in its *Partial Decrees* in the event the Director interprets their source and point of diversion elements in an unfavorable way. As of the

date of the issuance of this *Order*, Rangen's *Petition for Delivery Call* is pending unresolved before the Department.[4]

III.
ANALYSIS

Pursuant to *SRBA Administrative Order 1, Rules of Procedure, § 4d(2)(d)*, motions to file a late notice of claim are reviewed under the criteria set forth in Idaho Rule of Civil Procedure 55(c). Rule 55(c) provides that the entry of a default can be set aside for good cause shown. The primary considerations in determining good cause are: (1) whether the default was willful; (2) whether a meritorious defense has been presented; and (3) whether setting aside the default would prejudice the opponent. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993). For the reasons set forth below, the Court finds that Rangen has failed to present a meritorious defense and has also failed to establish a lack of prejudice to other parties resulting from the *Motion*.

A. Rangen has failed to establish a meritorious defense.

The Court finds that Rangen has failed to establish a meritorious defense in support of its *Motion to File Late Claim* because (1) Rangen has failed to comply with this Court's *Deadline* and *Closure Orders*, and (2) Rangen's late claim is an impermissible collateral attack on its *Partial Decrees*. Each will be address in turn.

i. Rangen has failed to comply with this Court's *Deadline* and *Closure Orders*.

Recognizing that the taking of claims in basin 36 must at some point come to an end, this Court closed the basin to the filing of late claims as of January 31, 2013. *See infra, Deadline Order* and *Closure Order*. The only exceptions are: (1) late claims for deferrable *de minimis* domestic and stockwater uses; and (2) late claims required to resolve litigation pending in the SRBA at the time of basin closure. *Id.* Rangen's *Motion to File Late Claim* was filed on April 19, 2013, and does not fall into one of the two recognized exceptions to the *Deadline* and

[4] The parties have informed the Court that hearing on Rangen's *Petition for Delivery Call* took place before the Director from May 1, 2013 through May 16, 2013. The Director has not issued his final order in the administrative proceeding as of the issuance date of this *Order*.

Closure Orders.[5] Notwithstanding, Rangen argues that it has a meritorious defense in support of its *Motion*. This Court disagrees.

The record reflects that Rangen had more than ample opportunity to file the instant beneficial use late claim in the SRBA. The *Director's Report* for claims timely filed in basin 36 was issued on November 2, 1992. Therefore, Rangen had from November 2, 1992 until January 31, 2013 to file a late claim for the beneficial use at issue here had it so desired. Rangen also had ample notice of the requirement to file its claims in the SRBA. The *Deadline Order* found that the claimants in basin 36 "received extensive first-round and second-round *Notice of Filing Requirements* in the SRBA." *Deadline Order*, p.2; I.C. § 42-1408. In addition, the *Deadline Order* itself was issued and served by standard docket procedure as an additional courtesy to the parties, and gave notice that January 31, 2013 would be the last date on which to file late claims in basin 36. Therefore, the Court finds that had Rangen wished to file the instant beneficial use claim in the SRBA it certainly had the notice and opportunity to do so before this Court closed the basin to late claims.

Rangen acknowledges the plain language of the *Deadline* and *Closure Orders*, but asserts that it should be relieved from those *Orders* pursuant to Idaho Rule of Civil Procedure 60(b)(1)(2) & (5) in the event it receives an unfavorable interpretation of its *Partial Decrees* from the Director in the delivery call proceeding.[6] The decision to grant or deny a request for relief from an order or judgment under Rule 60(b) is committed to the sound discretion of the trial court. *Waller v. State, Dept. of Health and Welfare*, 146 Idaho 234, 237–38, 192 P.3d 1058, 1061–62 (2008).

Rule 60(b)(1) applies in cases of "mistake, inadvertence, surprise, or excusable neglect." Rangen argues that if the Director finds that its *Partial Decrees* for water right numbers 36-2551,

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[5] The *Deadline* and *Closure Orders* provided a claims taking deadline of January 31, 2013 "except for *de minimis* domestic and stockwater uses and late claims required to resolve pending litigation on the date of this *Order* in the SRBA." *Deadline Order*, p.4; *Closure Order*, p.3. The term "pending litigation was further defined to mean "an active, related subcase(s) pending at the time of the basin closure deadline wherein an additional late claim(s) is required to resolve the related water right(s)." *Id.* The administrative proceeding before the Department does not satisfy or qualify for the pending litigation exception set forth in the Court's *Deadline* and *Closure Orders*.

[6] Rangen's *Motion to File Late Claim* states that it is "filed pursuant to I.R.C.P. 60(b)(1)(2)(3)(5) and (6)." However, Rangen's briefing and oral argument only addresses Rule 60(b)(1)(2) and (5). Therefore, the Court does not address Rule 60(b)(3) and (6). *See e.g., KEB Enterprises, L.P. v. Smedley*, 140 Idaho 746, 754, 101 P.3d 690, 698 (2004) (providing that courts will not address issues cited that "are not supported by propositions of law, authority or argument").

36-7694 and 36-15501 do not authorize Rangen to call for delivery of (1) water from the greater springs complex that does not flow into the Martin-Curren tunnel and/or (2) water originating in the greater springs complex diverted outside of the Ten Acre Tract, the ruling would constitute surprise. The fact that Rangen is bound by the terms of its *Partial Decrees* in the present delivery call proceeding before the Department should not be a surprise to Rangen. A partial decree entered in the SRBA is conclusive as to the nature and extent of that water right. I.C. § 42-1401A(5) and I.C. § 42-1420. In 2002, this Court authorized the interim administration of water in basin 36 in accordance with the *Director's Reports* and the *Partial Decrees* that have superseded the *Director's Reports* in that basin.[7] Therefore, it is of no surprise that the Department has and will continue to administer water in basin 36 pursuant to the terms of the *Partial Decrees* entered in that basin. If a dispute exists between Rangen and the Department regarding the proper interpretation of the terms of its *Partial Decrees,* Rangen is not without remedy. To the contrary, it may seek judicial relief at the appropriate time in the form of judicial review.

Rule 60(b)(2) applies in cases of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The Idaho Supreme Court has directed that under the rule, "a motion for newly discovered evidence will not be granted if the evidence was not in existence at the time of trial." *Vanderwal v. Albar, Inc.*, 154 Idaho 816, 823, 303 P.3d 175, 182 (2013). Further that "facts which occur subsequent to trial are not considered newly discovered evidence." *Id.* Rangen argues that the dispute between itself and the Department regarding the proper interpretation of its *Partial Decrees* constitutes newly discovered evidence. Specifically, Rangen relies upon (1) the Director's *Order Granting in Part and Denying in Part Rangen Inc.'s Motion for Partial Summary Judgment Re: Source* issued in the administrative proceeding on April 22, 2013, and (2) an anticipated unfavorable final order of the Director in that proceeding. Since this alleged newly discovered evidence was not in existence at the time the *Deadline* and *Closure Orders* were entered by this Court, it does not satisfy Rule 60(b)(2). Rangen's argument for relief under Rule 60(b)(2) is therefore unavailing.

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[7] *Order Granting State of Idaho's Motion for Order of Interim Administration*, SRBA subcase no. 92-00021 (Jan. 8, 2002).

Rule 60(b)(5) applies when the judgment or order at issue "has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rangen argues that if the Department interprets its *Partial Decrees* in an unfavorable manner in the delivery call proceeding, it will essentially reverse or vacate the way in which it has historically administered and/or treated Rangen's water rights. However, Rangen fails to point to the reversal of any "prior judgment" on which the *Deadline* or *Closure Orders* are based which would justify relief from those orders. Furthermore, the Idaho Supreme Court has directed that for the purposes of Rule 60(b)(5), "there is a reversal only when an appellate court overturns a lower court's decision in the same case." *Stuart v. State*, 128 Idaho 436, 437, 914 P.2d 933, 934 (1996). Such is not the case here. Therefore, Rangen has failed to satisfy Rule 60(b)(5).

This Court in an exercise of its discretion finds that Rangen has failed to set forth grounds justifying relief from this Court's *Deadline* and *Closure Orders* under Rule 60(b)(1), (2) or (5). It follows that those *Orders* preclude the filing of Rangen's instant late claims. Given the plain language of the *Deadline* and *Closure Orders*, and the fact that the record shows that Rangen had both ample notice of the requirements to file its claims in the SRBA and ample opportunity to file a late claim in the SRBA, this Court finds that Rangen has failed to establish a meritorious position under Rule 55(c) in support of its *Motion.*

ii. Rangen's late claim is an impermissible collateral attack on its *Partial Decrees*.

It is important to note that Rangen has not moved to set aside the *Partial Decrees* for the water rights it fears the Director may interpret unfavorably. Instead, Rangen has chosen to file a new beneficial use claim to supplement its water use under those *Partial Decrees* in the event the Director finds they do not already authorize that use. Rangen's late claim seeks the authorization to divert water from sources located in the Forty Acre Tract. Rangen previously claimed the same Forty Acre Tract point of diversion in the SRBA in conjunction with its claims for water rights 36-2551 and 36-7694. Ultimately, the Forty Acre Tract point of diversion was not recommended by the Department and the two rights were decreed with the Ten Acre Tract point of diversion. Rangen asserts its late claim is not a collateral attack on the *Partial Decrees* previously entered for water rights 36-2551 and 36-7694 because the late claim is based on a

beneficial use theory whereas the decreed rights are both based on prior licenses. For reasons explained below, this Court disagrees.

Generally, "final judgments, whether right or wrong, are not subject to collateral attack." *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012) Rangen's claims for 36-2551 and 36-7694 were both based on prior licenses. Both licenses authorized the right to divert from sources located in the Forty Acre Tract, which includes the Ten Acre Tract in its entirety. Rangen's SRBA claims also claimed the Forty Acre Tract as the point of diversion. The Department fully examined both of Rangen's claims. As a result of examination, although not claimed as such, a portion of water right claim 36-2551 was split and recommended as a separate beneficial use claim with an earlier priority date under water right claim number 36-15501. Further, despite Rangen's claims for the Forty Acre Tract point of diversion, the Department only recommended the Ten Acre Tract point of diversion. The same Ten Acre Tract was also recommended for 36-15501. Rangen did not object to the recommendations. Because objections were not filed, the basis for the Department's recommendations with respect to point of diversion is unknown. Ultimately, the rights were all partially decreed as recommended and the *Partial Decrees* were Rule 54(b) certified as final judgments.

Rangen admits that the instant late claim is a second attempt in the SRBA to claim the right to divert water from a point of diversion and source it asserts it already claimed when it filed claim numbers 36-2551 and 36-7694. In fact, Rangen has represented in this proceeding, and takes the position in the administrative proceeding currently pending before the Department, that the *Partial Decrees* entered for water rights 36-2551 and 36-7694 already include the right to divert water from the sources and point of diversion it now seeks in the instant late claim. Rangen is only filing the late claim as a precautionary measure in the event the Director disagrees. Accordingly, this Court finds Rangen's water right claims associated with its fish propagation facilities were already adjudicated in full in the SRBA. The late claim procedure was not intended to give claimants a second bite at the apple.

The interpretation of the previously issued *Partial Decrees* for water right claims 36-2551, 36-7694 and 36-2551 is the real issue. To the extent Rangen receives an unfavorable interpretation from the Director, the appropriate course of action should it choose to pursue one within the confines of the SRBA would be to attempt to move to set aside those *Partial Decrees* and file late objections to the Department's recommendations regarding source and point of

diversion.[8] Simply permitting the filing of a new late claim for the additional sources and points of diversion based on a new legal theory circumvents the I.R.C.P. 60(b) standard for setting aside a partial decree as well as undermines any finality in a partial decree. Therefore, the Court finds Rangen has failed to establish a meritorious position under Rule 55(c) in support of its *Motion* because its late claim is an impermissible collateral attack on its previously issued *Partial Decrees*.

B. Rangen has failed to establish a lack of prejudice to other parties.

The Court has previously noted that when undertaking a Rule 55(c) good cause analysis, "prejudice to other parties is the factor on which the court places significant emphasis." *Order Denying Motion to File Late Notice of Claim*, SRBA subcase no. 27-12216, p.6 (March 29, 2011). In determining prejudice to other parties the Court weighs several factors. *Id.* The factors that are of particular importance to this case include: (1) whether the particular basin in which the late claim is asserted is a completed basin; (2) the extent to which existing users have relied upon the basin being completed; and (3) if interim administration according to decreed rights is in effect.

The single most important factor here is that basin 36 has been closed to the type of late claim Rangen seeks to file via Court order. Additionally, basin 36 is a completed basin, meaning that all claims that were timely filed in the basin have been fully adjudicated. Allowing the instant late claim to come in at this point in time, in contravention of the *Deadline* and *Closure Orders*, would seriously disrupt the finality of process intended by those *Orders*. Basin 36 was one of the earliest basins to be reported on by the Director, with the *Director's Report* for claims timely filed being filed on November 2, 1992. The vast majority of the timely filed claims in the basin were adjudicated, and resulting *Partial Decrees* issued, in the 1990's. And interim administration has been authorized in basin 36 according to decreed rights since 2002. Thus, at the time Rangen filed its *Motion for Late Claim* on April 13, 2013, water users certainly were justified in relying upon the basin being completed. To allow the instant late claim to proceed at this stage, in an area of basin 36 that is highly contested, and which currently is and historically

[8] Of course outside the confines of the SRBA, Rangen will have the opportunity to seek judicial review of any final order issued by the Director in IDWR Docket No. CM-DC-2011-004.

has been the subject of water shortages and contested delivery calls, would prejudice other parties to the SRBA.

Additionally, permitting the late claim to proceed at this stage may potentially require setting aside the *Partial Decrees* for Rangen's overlapping water rights 36-134B, 36-135A, 36-2551, 36-7694 and 36-15501 and reopening those subcases to further litigation to the prejudice of the objecting parties in this case. Consideration of Rangen's instant late claim by the Department may require changes to the *Partial Decrees* entered for Rangen's other water rights, including but not limited to changes in the elements of those rights and/or the inclusion of a combined use remark in those rights. Further, the Court notes that objections to 36-134A and 36-134B were settled pursuant to the *Standard Form 5* stipulation process. Any necessary changes to these rights have the potential to undo the settlements entered on those subcases. Given the foregoing, the Court finds that Rangen has failed to establish a lack of prejudice to other parties resulting from its *Motion for Late Claim.*

C. Rangen's request that this Court interpret its *Partial Decrees.*

As an alternative to ruling that Rangen is entitled to proceed with its late claim, Rangen asserts that the Court should interpret its *Partial Decrees* for water right numbers 36-2551 and 36-7694 "to allow for the diversion and use of all of the spring waters that form the headwaters of Billingsley Creek, not just the water that emanates from the mouth of the Martin-Curren Tunnel itself and not just the water coming from the ten (10) acre tract described as the point of diversion in the Partial Decree." *Rangen's Reply Brief in Support of Motion for Late Claim*, p.29. The Court finds that issue is not properly before this Court in this proceeding.

Rangen has already invoked the administrative process in IDWR Docket No. CM-DC-2011-004. As part of that process, a dispute has arisen between Rangen and the Department regarding the correct interpretation of certain terms in Rangen's *Partial Decrees*. However, the Director has not issued a final order in that matter, and Rangen has yet to exhaust its administrative remedies to the point where it can seek judicial review. Additionally, Idaho Code § 42-1401D places jurisdictional limitations on this Court's ability to review, in the SRBA, an agency action of the Department which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code. Therefore, this Court is precluded from

reviewing any interpretation made by the Director in the delivery call proceeding in this SRBA proceeding.

With respect to subcases number 36-2551 and 36-7694, final judgments in the form of Rule 54(b) Certificates were entered in SRBA in 1997. Rangen has made no motion to the Court to reopen those subcases for further consideration of any kind. Therefore, the sole issue presently before the Court in this subcase is whether Rangen should be allowed to proceed with its late claim in the above-captioned matter.

D. ***Motion to File Amended Notice of Claim.***

Since Rangen's *Motion to File Late Claim* is denied for the reasons set forth above, its subsequent *Motion to File Amended Notice of Claim* is likewise denied.

IV.

ORDER

THEREFORE, BASED ON THE FORGOING, THE FOLLOWING ARE ORDERED:

1. Rangen's *Motion to File Late Claim* **is hereby denied.**
2. Rangen's *Motion to File Amended Notice of Claim* **is hereby denied.**

DATED: October 2, 2013

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: October 2, 2013.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO FILE LATE CLAIM / ORDER DENYING MOTION TO FILE AMENDED NOTICE OF CLAIM was mailed on October 02, 2013, with sufficient first-class postage to the following:

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