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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, TWIN FALLS CANAL COMPANY, and the CITY OF POCATELLO Intervenors.	Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179) **CITY OF POCATELLO'S RESPONSE BRIEF**

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INTRODUCTION

Rangen, Inc. ("Rangen") is a fish research facility that incidentally engages in commercial and conservation fish production. Its water rights relied upon for these purposes arise within the Thousand Springs reach of the Snake River drainage; specifically, Rangen is entitled to rely on the Martin-Curren Tunnel as its decreed source of spring water for fish research and rearing. R. Vol. 15, p. 3176; R. Vol. 21, p. 4219, ¶¶ 15−17. In the course of the delivery call for its decreed water supplies, Rangen learned that it had historically diverted spring water from sources and locations outside of its decreed water supply and decreed point of diversion; it also learned that it routinely under-measured its water supply (both decreed and undecreed sources) by approximately 15%. Finally, although it applied for curtailment of the entire Eastern Snake Plain Aquifer ("ESPA") to satisfy its alleged shortages, ESPA model runs demonstrated that complete curtailment of the aquifer would barely return its water supplies to 2000-era levels. Exh. 3203, p. 51; Exh. 3650, Fig. 2-1, PDF p. 38 of 46. Despite these problems with Rangen's water rights operations, and despite the futility of complete curtailment as demonstrated by ESPA model runs, the Director ordered curtailment of a portion of the aquifer west of the Great Rift to deliver approximately 9 cfs of water to Rangen.

On appeal, Rangen argues for reversal and remand on four topics as outlined in their Opening Brief. The City of Pocatello ("Pocatello" or "City") urges the Court to reject Rangen's arguments on appeal because: 1) the Director properly interpreted Rangen's decreed source of supply and point of diversion; 2) the Director properly accepted a modified regression analysis, taking into account Rangen's systematic under-measurement of the flows at the Rangen spring complex; 3) the Director properly found that junior ground water rights demonstrated "efficient use without waste" as required under Rule 40.03 of the Conjunctive Management Rules ("CMR"); and 4) that the Director properly exercised his discretion to limit curtailment to areas

that would ensure Rangen received the same proportional benefit from curtailment as that extended to other Thousand Springs senior spring rights and approved of by the Supreme Court in *Clear Springs Foods, Inc. v. Spackman*.

Pocatello urges the Court to affirm the Director's January 29, 2014 *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Final Order"), and to reject Rangen's arguments for reversal and remand.

I. RANGEN'S PARTIAL DECREES ARE NOT AMBIGUOUS; NOR IS THERE A "LATENT AMBIGUITY" IN THE PARTIAL DECREES THAT REQUIRES EXPANDING RANGEN'S WATER SUPPLIES AND DIVERSIONS BEYOND THE DECREED ELEMENTS.

The first step of a delivery call is for the Director to interpret the senior's decrees to determine the amounts to which the senior is presumed to be entitled. On appeal, Rangen argues that the Director misinterpreted its partial decrees, which limit Rangen's source of water to amounts arising at the Martin-Curren Tunnel and which limit diversions to a 10-acre tract in the SE1/4 SW1/4 NW1/4 of Section 32, Township 7 South, Range 14 East (the "10-acre tract"). Rangen makes this argument for several reasons: first, and without regard to the limiting language of its partial decrees, Rangen has historically diverted both flows from the Martin-Curren Tunnel and flows associated with springs arising on the talus[1] slope (referred to herein as "lower talus slope springs")[2] below the Martin-Curren Tunnel; second, Rangen has not historically limited its diversions to the 10-acre tract identified as its decreed point of diversion

[1] The term "talus" is a geologic term to describe broken rock or small boulders piled below a cliff or slope. Exhibit 1452 provides a visual of the "talus slope" in question, along with the "Farmers' Box" and "Rangen Box," and the white pipe and metal pipe that divert Martin-Curren Tunnel water within the 10-acre tract. Dr. Brockway's testimony includes mention of the fact that the talus slope was too rough and rocky for him to cross to make certain investigations. Tr. Vol. V, p. 1046:14−25.

[2] Also within, the combination of flows from the Martin-Curren Tunnel and lower talus slope springs is referred to as the "Rangen Spring Complex."

and has historically made diversions at the Lower Diversion, outside of the 10-acre tract.[3] Exhibit 3650, Figure 2-3, on PDF page 31 of 46 provides useful orientation to the Rangen hatchery decreed and undecreed water sources, and decreed and undecreed points of diversion. Appendix C.

Although the partial decrees are plain and the Director found there to be no ambiguity associated with the partial decrees [R. Vol. 15, p. 3176], Rangen has appealed this ruling seeking invocation of the "latent ambiguity" rule and consideration of extrinsic evidence, despite the finding that the decrees are unambiguous. In this way, Rangen hopes to obtain an interpretation of its partial decrees that is more favorable to its operations. However, the Director properly found Rangen's decrees to be unambiguous, and the Court should reject Rangen's arguments.

A. The Director properly found Rangen's partial decrees to be unambiguous.

In response to Rangen's Motion for Summary Judgment, the Director examined Rangen's partial decrees and found that Rangen is entitled only to protection of its partial decrees in the amounts of water arising at the Martin-Curren Tunnel. Rangen's diversion of additional water arising on the lower talus slope, below the tunnel and collected at the Lower Diversion, was not authorized by its partial decrees. Exh. 1026; Exh. 1028; R. Vol. 15, pp. 3176−77.

In his Final Order, the Director again found:

> The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract: SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7S, R14E, Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R 14E. A decree entered in a general adjudication such as the SRBA is conclusive

[3] The term "Bridge Dam" was not used during the hearing, and the actual physical structure to which Rangen is referring is not clear; it may be the "Bridge Diversion" as used by the Director in the Final Order. *See, e.g.*, R. Vol. 21, p. 4191, ¶ 20. Pocatello has used the term "Lower Diversion" or "36-inch Pipe" throughout for clarity, as that term was used by witnesses during the trial. The location of the "Lower Diversion" or "36-inch Pipe" is shown on Exhibit 3650, Figure 2-3 on PDF page 31 of 46.

> as to the nature and extent of the water right. Idaho Code § 42-1420. Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R 14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

R. Vol. 21, p. 4219. The Court should affirm the Director's finding that the partial decrees are not ambiguous.

1. The Director is obligated to administer the senior's decrees pursuant to their terms and conditions.

The Idaho Supreme Court has repeatedly directed the Idaho Department of Water Resources ("IDWR" or "Department") to examine the senior's partial decrees in the context of conjunctive management administration. Indeed, the Director's discretion to conjunctively administer ground water and surface water rights is limited to administration consistent with the senior's decrees. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* ("*AFRD#2*"), 143 Idaho 862, 878, 154 P.3d 433, 449 (2007); *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 514, 284 P.3d 225, 239 (2012).

Rangen's partial decrees limit the source of Rangen's water rights to the Martin-Curren Tunnel. Exh. 1026, 1028. The Director found that there is no ambiguity in the decreed "source" of Rangen's water rights—accordingly, each decree "must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001); R. Vol. 15, p. 3176. The Director is required to give meaning to the plain language in Rangen's decrees, which "must be construed as a whole and given a construction as will harmonize with the facts and the law of the case." *Follett v. Taylor Bros.*, 77 Idaho 416, 424, 294 P.2d 1088, 1093 (1956); *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010); *A&B Irrigation*

Dist., 153 Idaho at 523, 284 P.3d at 248 ("We apply the same rules of interpretation to a decree that we apply to contracts.").

Enforcing the terms and conditions of an unambiguous decree is essential to the administration of water in Idaho.

> Finality in water rights is essential. "A water right is tantamount to a real property right, and is legally protected as such." An agreement to change any of the definitional factors of a water right **would be comparable to a change in the description of property**. . . .
>
> A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (citations omitted) (emphasis added).

2. Rangen's partial decrees do not contain a latent ambiguity.

Despite the robust legal basis for limiting seniors to the plain terms of their decrees, Rangen seeks to invoke the "latent ambiguity rule" to permit examination of parol evidence that Rangen suggests provides a basis to expand the decreed source of the "Martin-Curren Tunnel" from springs arising within the physical structure located on the talus slope above its facility to mean "the spring water that forms the headwaters of Billingsley Creek." Rangen's Opening Brief at 9−10. Because the decrees were found to be unambiguous, the rule in Idaho is that parol (extrinsic) evidence may not be submitted to contradict the plain terms of a written agreement that is unambiguous on its face. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). Under certain circumstances, not present here, the latent ambiguity rule provides a narrow legal exception to allow examination of parol evidence in the context of a contract or, perhaps by extension, a decree. However, as the record reflects, the Director

declined to find a "latent ambiguity," and in fact there is no "latent ambiguity" associated with the term "Martin-Curren Tunnel." The application of the rule in this instance would be contrary to the circumstances under which Idaho courts have found a latent ambiguity. *Id.*

Throughout its Opening Brief, Rangen argues that the latent ambiguity arises because the backfile license documents use terms such as "springs" or "springs headwaters of Billingsley Creek" to describe the source of the licensed water supply, while the partial decrees as well as the water rights claims documents use the term "Martin-Curren Tunnel."[4] Even if Rangen's extrinsic evidence is considered, its argument fails on the merits, as Rangen does not demonstrate any ambiguity in the elements of the water right claimed and for which Rangen obtained a decree in the Snake River Basin Adjudication ("SRBA"). The Idaho Supreme Court has not directed the Department to examine the licenses that preceded the partial decrees, nor is it the Director's job to allow seniors to improve their positions by arguing about the inconsistencies between the terms of licenses and decrees. In fact, quite the contrary: seniors are limited to relief consistent with the terms of their decrees and re-adjudication, whether sought by juniors or seniors in the context of a delivery call is not within the Director's discretion. *AFRD#2*, 143 Idaho at 877−78, 154 P.3d at 448−49.[5]

In asking for consideration of extrinsic evidence under the "latent ambiguity rule," Rangen steers clear of its own SRBA claims prepared by *Rangen*[6] which on their face conflict

[4] At trial, Rangen introduced into evidence the backfiles for its partially decreed water rights and questioned Lynn Babbington, a former Rangen manager, regarding his recollections of a 36 year old field report filed by IDWR staff contained in the backfile for the 36-07694 water right, which was licensed in 1977.

[5] Even if there were a latent ambiguity, it would seem to cut against Rangen's arguments: the general terminology of "springs" or "springs headwaters to Billingsley Creek" could be subject to multiple definitions and is arguably ambiguous; by contrast, the ambiguity is resolved in Rangen's partial decree and claims documents which employ the specific terminology of "Martin-Curren Tunnel."

[6] Rangen's SRBA water right claims, while originally present in the backfiles and produced by the Department in the litigation below, are not in the administrative record. The claims are attached hereto as Appendices A and B. The Court may take judicial notice of the claims pursuant to Idaho Rule of Evidence 201(d). If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the

with Rangen's arguments that seek to expand its decreed source of water. Rangen specifically claimed the Martin-Curren Tunnel as the source of its water rights in the SRBA court, and now must be held to the language of its partial decrees based on Rangen's claimed source. *See Haener v. Ada County Highway Dist.*, 108 Idaho 170, 697 P.2d 1184 (1985) (in the case of an ambiguous contract, the contract is to be construed against the drafting party). Given the claims were prepared by Rangen, they provided evidence of Rangen's intent at the time of its partial decrees. *See Knipe Land Co.*, 151 Idaho at 455, 259 P.3d at 601 ("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."). Further, it is not clear why—far from being a latent ambiguity—Rangen's own claims filed in the SRBA court which request adjudication of the Martin-Curren Tunnel water source should not be considered an admission of a party opponent.

Simply put, the term "Martin-Curren Tunnel" does not "lose clarity" simply because the Director has interpreted the term contrary to Rangen's preferred meaning. *Black v. Fireman's Fund Am. Ins. Co.*, 115 Idaho App. 449, 453, 767 P.2d 824, 828 (1989) ("disagreement [over meaning of terms] does not automatically create an ambiguity," nor "because a dispute exists over the application of the language to a certain fact pattern"). Indeed, in order to find that the term "Martin-Curren Tunnel" is ambiguous, the Director must find that Rangen's interpretation of that term—*i.e.*, "the spring water that forms the headwaters of Billingsley Creek"—is reasonable. *Potlatch Educ. Ass'n*, 148 Idaho at 633, 226 P.3d at 1280. Rangen's decision to build and operate a point of diversion outside of the 10-acre tract that is its decreed point of

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party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d) (emphasis added). "Judicial notice may be taken at any stage of the proceeding." IRE 201(f).

diversion, to divert water supplies not requested for adjudication in its claims in the SRBA court, does not establish that such works or operations are permitted under Rangen's partial decrees, or that Rangen's partial decrees contain a latent ambiguity. There is no basis to conclude that Rangen's interpretation is reasonable, and Rangen's efforts to obtain such an interpretation to retroactively justify Rangen's operations is not supported by the law.

Rangen relies on the Idaho Supreme Court's analysis in *Williams v. Idaho Potato Starch Co*. in error. Rangen's Opening Brief at 10−11. In *Williams*, the Court found that the term "a ten inch pump" contained a latent ambiguity because the contract made "no reference to what type of pump" the parties intended, and the record contained evidence that "at least three pumps" would qualify under the terms of the contract. *Williams v. Idaho Potato Starch Co*., 73 Idaho 13, 19−20, 245 P.2d 1045, 1048 (1952). The Court's reasoning was based on the fact that "there are two or more things or objects, such as pumps, to which [the term] might properly apply." *Id.* at 20, 245 P.2d at 1049. Here, unlike in *Williams*, there is only one tunnel that this term can possibly apply—there are not two "tunnels" in question. Further, the term "tunnel" is not ambiguous—it is defined as "[a] passage under the ground or under the water," or "[a] passage through or under a barrier." WEBSTER'S II NEW COLLEGE DICTIONARY 1187 (1999). Under no conceivable use could the word "tunnel" mean "the spring water that forms the headwaters of Billingsley Creek."

Further, interpreting the source of Rangen's water rights as the Martin-Curren Tunnel does not result in an "absurdity" that would indicate a latent ambiguity. *Knipe Land Co.*, 151 Idaho at 456, 259 P.3d at 602. Indeed, to interpret the decree as permitting Rangen to divert water from sources other than the "Martin-Curren Tunnel" would result in patent absurdity and inconsistency with the other terms of its partial decrees—the Martin-Curren Tunnel is the source

of water that can be physically diverted using structures within Rangen's decreed point of diversion, Rangen's 10-acre tract. Exh. 1026, 1028. The Martin-Curren Tunnel is identified as the source of Rangen's water rights, and the Tunnel is located within the 10-acre tract. The terms of Rangen's partial decrees should be read in harmony; therefore, the reasonable interpretation of Rangen's partial decrees is that Rangen may divert water from the Martin-Curren Tunnel using structures within the 10-acre tract.

B. Rangen's partial decrees require Rangen to divert its decreed source of water within the described 10-acre tract.

Rangen also argues that its decreed point of diversion is not a limitation on its operations, and that it may divert water from other locations outside of the described 10-acre tract. Rangen's Opening Brief at 19. Of Rangen's three means of physical diversion, only the 6-inch white pipe ("White Pipe") and 12-inch steel pipe ("Steel Pipe") carry water diverted from the Martin-Curren Tunnel. Exh. 3651; Exh. 1452; Ramsey, Tr. Vol. III, pp. 707:23−708:16. Further, only the White Pipe and Steel Pipe divert water within the 10-acre tract decreed point of diversion. A summary of Rangen's diversion practices (both consistent with and inconsistent with its decrees) is provided in Mr. Sullivan's testimony [Tr. Vol. V, pp. 1345−47] and Exhibit 3651.

Despite this geographical limitation on its point of diversion, Rangen collects water from spring flow arising on the talus slope below the Martin-Curren Tunnel and delivers it to the Large Raceways and CTR raceways by means of the 36-inch Pipe. In its Opening Brief, Rangen argues that the Lower Diversion (or the "Bridge Dam") where water is diverted into the 36-inch Pipe is "close enough" to the 10-acre tract to be counted as a lawful point of diversion; further, that spring flows arising below the Martin-Curren Tunnel but within the 10-acre tract should be considered a lawful source of water to be diverted at the Lower Diversion. Rangen argues that 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." Rangen's Opening Brief at 20.

Rangen is referring to an analysis performed by Dr. Charles Brockway, claiming to determine how much water emanates from the springs in the 10-acre tract designated as Rangen's point of diversion. The Director considered and rejected this evidence:

> First, Dr. Brockway's argument ignores the fact that the source listed on the water rights is the Curren Tunnel. Setting aside that impediment for discussion purposes, Dr. Brockway's suggestion that a spring itself constitutes a point of diversion is contrary to Idaho water law. Idaho water law generally requires an actual physical diversion and beneficial use for the existence of a valid water right. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). The only recognized exception to this rule is for instream beneficial uses of water. *Id.* Taken to its logical conclusion, Dr. Brockway's argument means that any water user could claim as his point of diversion the highest headwater of the state and then argue for protection up to the water source. This troublesome outcome underscores the problem of Dr. Brockway's argument and diminishes the credibility of his testimony.

R. Vol. 21, p. 4219.

Further, evidence in the record demonstrates that Dr. Brockway's analysis was technically flawed. Dr. Brockway did not measure springs either from within or without the 10-acre tract, but only the discrete pipes identified on his map, Exhibit 1446C. On cross-examination, Dr. Brockway admitted he did not measure any spring flows at all—whether within the 10-acre tract *or* outside of it. Brockway, Tr. Vol. V, pp. 1046:14−1047:8, 1058:14−16. In testimony involving Exhibits 1446A−C, Dr. Brockway concluded that all but one of the springs he identified arise below the Martin Curren Tunnel—in other words, at sources other than the decreed source. Brockway, Tr. Vol. X, pp. 2351:24−2352:12. Rangen's own evidence

demonstrates that the water diverted at the Lower Diversion is water that arises outside of the Martin-Curren Tunnel, and is diverted at a point outside of the 10-acre tract.[7]

"Source" and "point of diversion" are distinct statutory elements of a water right. I.C. § 42-1411(2) ("The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law: . . . (b) the source of water; . . . (e) the legal description of the point(s) of diversion; . . . ."). Indeed, the Idaho Supreme Court recently affirmed that "the source of water and the point of diversion [are] separate elements." *City of Pocatello v. State*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012). *See also A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 750, 118 P.3d 78, 82 (2005) ("The director of the IDWR is charged with determining the source of water rights as each new application is filed."). The decreed "source" of Rangen's water rights is the Martin-Curren Tunnel. However, Rangen seeks a ruling from this Court that would interpret its "source" as any spring water that arises *within* the 10-acre tract which is its decreed point of diversion, but below or outside of the Martin-Curren Tunnel. Rangen seeks this re-adjudication of its existing partial decrees in order to validate Rangen's historical reliance on undecreed sources of water (springs arising outside of the Martin-Curren Tunnel) and diversions made of the undecreed sources of water at an undecreed point of diversion (the Lower Diversion). In addition to flying in the face of the imprecation against using a delivery call to re-adjudicate decreed rights, Rangen's argument conflates the concepts of "source" and "point of diversion," which the Idaho Supreme Court has repeatedly found to be distinct elements of a water right. *City of Pocatello*, 152 Idaho at 839, 275 P.2d at 854.

[7] As shown on Exhibit 1452, Rangen spills a portion of the Martin-Curren Tunnel flow that is collected in the Rangen Box rather than taking it through the Steel Pipe. However, Mr. Sullivan testified that the spillway at the Rangen Box could be blocked so that Rangen could divert all of the Martin-Curren Tunnel water within its decreed 10-acre tract. Tr. Vol. VII, pp. 1653:22−1654:7; Exh. 1452.

The identification of the source of a water right in a partial decree prevents a water user from expanding its water right beyond that source:

> The naming of the source in a water right provides information that may be relevant in many ways. Naming the source provides notice to potential future (junior) appropriators that there are senior appropriations of the waters from that source. Additionally, **identifying the source in a license or decree prevents the water users from changing to a different source that may still lie within the legal description of the point of diversion** . . . .

Memorandum Decision and Order on Motion for Summary Judgment [and] Order Setting Scheduling Conference at 12, In Re SRBA Case No. 39576, Subcase 63-08447, Aug. 28, 2007 (emphasis added).

Rangen's diversions must be limited to its decreed source—the Martin-Curren Tunnel—and necessarily cannot include other water arising within the legal description of its decreed point of diversion. Rangen's diversion should also be limited to its decreed point of diversion—that is within the described 10-acre tract. The Director's decision should be affirmed as a matter of law and because there is substantial evidence in the record to support his conclusion.

C. The Director is not estopped from interpreting Rangen's partial decrees.

Rangen has historically measured its diversions below the fish hatchery, and not at the Martin-Curren Tunnel. Rangen relies on the Department's past reluctance to require Rangen to measure at its decreed point of diversion in an attempt to expand the sources encompassed by its partial decrees. The Department's past actions, or lack thereof, do not alter the terms of Rangen's partial decrees.

"The doctrine of quasi-estoppel 'prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken.'" *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006) (emphasis added) (citation omitted). "It is based upon

the broad equitable principle which courts recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another." *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). "Quasi-estoppel is essentially a last-gasp theory . . . ." *Schoonover v. Bonner County*, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988).

Simply put, quasi-estoppel does not apply in this matter because the Director did not previously decide whether Rangen has "the right to divert the entire spring complex" outside of its decreed water rights. Rangen's Opening Brief at 32. The question of whether Rangen could divert water in a manner inconsistent with its decrees was not an issue litigated in the prior delivery call matter before the Department. Indeed, if the Director had answered that question, *Rangen's Motion for Partial Summary Judgment Re: Source* [R. Vol. 13, pp. 2566−2614]—in which Rangen asked the Director, for the first time, to determine whether its diversion of lower talus slope water at the Lower Diversion was permitted under its decree—would have been unnecessary. Accordingly the Department is not estopped from finding that the source of Rangen's water rights is limited to the Martin-Curren Tunnel. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) ("Collateral estoppel only applies to issues actually litigated and decided in the prior proceeding.").

Rangen claims that "the Department recognized in paragraph 54 of its findings in the *Second Amended Order* issued May 19, 2005 that Rangen is legally entitled to appropriate water from the spring complex that forms the headwaters of Billingsley Creek." Rangen's Opening Brief at 33. In the prior litigation no party requested, and the Director did not address, whether Rangen was entitled to divert water outside of its decreed terms. As such, there was no change in position by the Department. *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 723,

302 P.3d 341, 348 (2012) ("a plaintiff must at least allege, among other things, a promise or representation by the party to be estopped"). There is no evidence that the Department ever agreed that Rangen was entitled to divert and call for water outside of its decreed water rights.

It is important to note that there are no published cases in which the doctrine of quasi-estoppel has been applied against a governmental entity by an Idaho court. In general, estoppel may not "be applied against the state in matters affecting its governmental or sovereign functions." *Floyd v. Bd. of Comm'rs of Bonneville County*, 137 Idaho 718, 727, 52 P.3d 863, 872 (2002) (quasi-estoppel claim). *See also Sagewillow*, 138 Idaho at 845, 70 P.3d at 683 ("Equitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity" and requires "false representation or concealment of a material fact with actual or constructive knowledge of the truth.").

While Rangen claims that it has relied upon the Department's lack of action to continue to divert water from the lower talus slope [Rangen's Opening Brief at 34], Rangen has not *changed* its position to its detriment—Rangen has always diverted water from its undecreed points of diversion, well before the Director issued the *Second Amended Order* on May 19, 2005. Accordingly, Rangen did not detrimentally rely on the Department's prior ruling, which, as explained above, does not even address the issue of Rangen's illegal diversions.

Furthermore, any actions by the Department, or lack thereof, do not operate to revise the decreed elements of Rangen's water rights. Other water users, such as Pocatello, are bound by the terms of Rangen's partial decrees, and only those terms found therein, which represent adjudications on the merits of Rangen's water rights. I.C. § 42-1420(1); *A&B Irrigation Dist.*, 153 Idaho at 515, 284 P.3d at 240. Rangen's illegal points of diversion are just that, and cannot

be "papered over" simply because the Department did not previously independently investigate whether Rangen is diverting from locations inconsistent with its decree.

II. SULLIVAN'S REGRESSION ANALYSIS RELIED ON BY THE DIRECTOR TO LIMIT RANGEN'S BENEFIT FROM CURTAILMENT IS BASED ON SUBSTANTIAL EVIDENCE.

Rangen argues that it was not "rational" for the Director to adopt Mr. Sullivan's regression analysis, which determines that 63% of the water accruing to the Rangen Spring cell as a result of curtailment will show up at the Martin-Curren Tunnel, and that Mr. Sullivan's opinions do not provide "substantial evidence" to support the Director's findings. Rangen's Opening Brief at 40. Instead, Rangen endorses the Department's regression analysis, which predicts that 70% of the increase in water flows accruing to Rangen spring complex from curtailment will accrue to the Martin-Curren Tunnel. The Department's regression analysis relied on a comparison of Department's records of Martin-Curren Tunnel discharge with Rangen's records of discharge for the entire Rangen spring complex (the sum of flows in the CTR raceways and the flow measured at the Lodge Dam) [R. Vol. 21, p. 4195, ¶ 33] and at the time of the Staff Memo disclosure [Exh. 2131], IDWR did not have the benefit of Mr. Sullivan's opinions (disclosed pursuant to the scheduling order, and subsequent to the IDWR Staff Memo) that demonstrated Rangen's flow measurements for the entire Rangen spring complex understated the actual flow by an average of 15.9% because of Rangen's reliance on a faulty rating table. Rangen's arguments on this point misperceive the nature of the "substantial evidence" test, and seek to benefit from Rangen's long-standing systematic under-measurement of water flows associated with the Rangen spring complex.

A. Evidence of Rangen's flow-related measurement problems is replete and long-standing.

The dispute underlying Rangen's appeal of the Director's reliance on Mr. Sullivan's regression analysis involves water measurement generally. In addition to the summaries of water measurement evidence and testimony in the remainder of this subsection, the direct testimony of IDWR employee Mr. Tim Luke (Tr. Vol. V, pp. 1133−44; R. Vol. 21, pp. 4194−98) provides substantial background for purposes of understanding the issues associated with accuracy in water measurement.

1. Principles of water measurement.

a. Head measurement.

Water measurement using a standard weir[8] involves two steps. First, the "head" or energy of water behind a structure like a weir is determined by measuring the depth of flow where the velocity is relatively low. The second step is to convert the head measurement to flow using either a standard weir equation or a rating table generated from a weir equation or derived empirically in the field. Sullivan, Tr. Vol. VI, p. 1380:10−16.

An accurate head measurement can be obtained by measuring at a standard distance behind the weir. Measuring head at an appropriate distance behind the weir is important to ensure that the energy in the flow of water is potential (elevation head) rather than kinetic (velocity head); as the water approaches the weir and picks up speed, more of the energy is converted to kinetic energy. By contrast, measuring head at a location too close to the weir—in other words where more of the energy is kinetic rather than potential—can result in systematic under-measurement of the head and therefore the flow. *Id.* at 1386:9−1387:20, 1433:6−8.

[8] The standard weir equation is: Q = C x L x H1.5 where Q = flow (cfs), C = weir coefficient, L = weir length (feet), H = head over weir (feet). *See* Exh. 3345, p. 19; Exh. 3325, Fig. 1-2a, PDF p. 38 of 80.

b. Converting head measurement to a rate of flow.

Rangen converts head measurements to a flow rate in cubic feet per second using a "rating table." Rating tables must be calibrated using a portable standard measuring device or current meter in order to result in reliable measurements. Inaccurate or uncalibrated rating tables will result in unreliable measurements. Yenter, Tr. Vol. III, p. 581:2−7.

c. Dispute with Rangen's measurements arises from its conversion from head to flow.

There is no dispute regarding the adequacy of Rangen's head measurements. Rangen makes head measurements at the wooden damboards in the CTR raceways and wooden damboards at the Lodge Dam in Billingsley Creek using a method described by Dr. Brockway as "sticking the weir." Brockway, Tr. Vol. IV, pp. 996:15−997:12. By placing the ruler on the damboard and turning the ruler into the flow of the water ("sticking the weir"), the flow of the water is slowed as it runs up the face of the ruler and the potential energy that would be present at a standard distance upstream from a standard measuring device can instead be approximately measured at the damboard. Sullivan, Tr. Vol. VI, pp. 1387:1−1388:4; Yenter, Tr. Vol. III, p. 590:11−23. The parties agreed that "sticking the weir" to measure head over wooden damboards was a "nonstandard" measuring device; there was also no dispute that these nonstandard measuring devices did not conform to IDWR's water measurement guidelines. Exh. 2131; Luke, Tr. Vol. V, pp. 1133:3−1135:7.

What is disputed is the second step in flow measurement, and that is how Rangen's head measurements are converted into a rate of flow. Rangen converts its head measurements to rate of flow by use of a faulty rating table. Rangen's own expert, Dr. Brockway, first flagged the problem with Rangen's rating table in his expert report by identifying two "step functions" at H

equals .18 feet and .32 feet for "no apparent reason." Exh. 1284, PDF p. 40 of 63.[9] Step functions are unusual in a rating table. Sullivan, Tr. Vol. VI, p. 1378:16−21. A rating table with step functions suggests that the weir coefficient is not consistent throughout all flows. *See* Exh. 3325, Figs. 1-3, 1-4, 1-5, 1-6. No witness was able to identify the origins of the rating table, or to establish that it had been rated or calibrated consistently with IDWR's water measurement guidelines. Brockway, Tr. Vol. IV, p. 1004:16−23; Maxwell, Tr. Vol. II, p. 310:5−7.[10]

2. Mr. Sullivan's comparison of Rangen measurement data with USGS flow data.

In light of the unknown origin and problems with Rangen's rating table, and the overall measurement uncertainty regarding Rangen's actual available water supply, Mr. Sullivan performed an evaluation of Rangen measurements against those collected by USGS below the Rangen hatchery in the channel of Billingsley Creek using a current meter.[11] Exh. 3358; Sullivan, Tr. Vol. VI, pp. 1414:14−1416:6. The USGS has measured the flow in Billingsley Creek at the bridge immediately below the Rangen Hatchery at least once or twice per year in the spring and/or fall, since 1970. Exh. 3650, Fig. 2-3, PDF p. 31 of 46; Sullivan, Tr. Vol. VI, pp. 1417:20−1418:15.

The results of Mr. Sullivan's analysis of the USGS and Rangen flow data showed a consistent and systematic under-measurement of Rangen's flows averaging 15.9% based on comparison of 45 measurements made by the USGS between 1980 and 2013. Sullivan, Tr. Vol. VI, pp. 1428:12−1430:2; Exh. 3345, Fig. 2-4. In addition to evaluating the extent of under-

[9] Mr. Sullivan's analysis confirmed the existence of step functions in the rating table. *See* Exh. 3325, Figs. 1-3, 1-4, 1-5, 1-6.

[10] IDWR's water measurement guidelines provide that flow measurements made with a nonstandard measuring device are adequate if that device "is rated or calibrated against a set of flow measurements using an acceptable open channel current meter" or "standard portable open channel [measuring] device[]. Exh. 2131, p. 2; Luke, Tr. Vol. V, pp. 1135−36.

[11] A current meter measures the flow of water directly by measuring the velocity. No rating table is required when this method is used. Brockway, Tr. Vol. IV, pp. 994:17−995:10.

measurement by Rangen, Mr. Sullivan derived a weighted average weir coefficient for the Rangen facilities by solving the standard weir equation for the weir coefficient using the USGS flow measurements and Rangen head measurements made nearest in time (within a few days). Sullivan, Tr. Vol. VI, pp. 1438:21−1439:14.[12] The weighted average weir coefficient determined by Mr. Sullivan was 3.62. This coefficient is significantly greater than the coefficients testified to by Rangen's experts (either 3.06, which was Dr. Brockway's first position or [Exh. 1284, p. 9; Exh. 1285], 3.09 *or* 3.33, his later position [Tr. Vol. V, pp. 1079−81]). It is, however, similar to the weir coefficient of 3.68 that Dr. Brockway calculated as appropriate for the Rim View Hatchery, which also measured flow over dam boards using the "stick the weir" method similar to Rangen. Tr. Vol. IV, pp. 1007:4−1009:6.

As the record cites in the prior section demonstrate, there is substantial evidence for Rangen's routine under-measurement of its water flows, including testimony by Rangen's own expert.[13] Indeed, there is no dispute that Rangen's flow measurements understate the actual flow—the only argument is whether the problems with Rangen's flow measurements are legally significant. The Director evaluated all of the evidence and found:

> based on clear and convincing evidence, that Rangen's use of a nonstandard measuring device with an inaccurate rating curve has resulted in under-reporting of flows at the CTR raceways and Rangen's lodge pond dam.

R. Vol. 21, p. 4198, ¶ 52. The Director's finding that Rangen routinely under-reports flow data was not appealed by Rangen.

[12] Mr. Sullivan's analysis to develop the weighted average weir coefficient was the same one used by Dr. Brockway to develop the Rim View weir coefficient. Sullivan, Tr. Vol. VI, p. 1435:4−13.

[13] As well as Mr. Luke, the IDWR staff member responsible for the measurement portions of the IDWR Staff Memo, who testified at trial that he had reviewed Mr. Sullivan's final opinions and that he "didn't disagree" with Mr. Sullivan's under-measurement analysis showing Rangen routinely under-measures flows by 15.9%. Luke, Tr. Vol. V, pp. 1153−54.

B. The use of a regression to apportion curtailment accruals to the Martin-Curren Tunnel is undisputed.

In addition to the analysis of Rangen's under-measurement, Mr. Sullivan conducted the same type of regression analysis found in the IDWR Staff Report[14] to separate out the effects of curtailment between the Martin-Curren Tunnel and the lower talus slope springs. Mr. Sullivan's original analysis, based on the uncorrected flow data reported by Rangen, showed that approximately 75% of increased spring flow at the Rangen model cell would be expressed at the Martin-Curren Tunnel. The Director questioned Mr. Sullivan about how the results of the analysis would change if the historical Rangen flow data was corrected for the historical 15.9% under-measurement. Mr. Sullivan replied that he expected the percentage of flow from curtailment expressed at the Martin-Curren Tunnel would decrease if the analysis was repeated with Rangen flow data corrected for the historical under-measurement, but that he would have to perform the analysis to confirm this. Tr. Vol. VII, pp. 1663−68, specifically p. 1668:13−25.

At the Director's request, Mr. Sullivan repeated the analysis using the historical Rangen flow data corrected for the 15.9% under-measurement. The revised results showed that approximately 63% of the effects of curtailment to the model cell containing the Rangen Spring would be expressed at the Martin-Curren Tunnel. Rangen deposed Mr. Sullivan prior to his testimony on the last day of trial regarding the analysis requested by the Director. On the last day of trial, Mr. Sullivan testified to his revised analysis. Exhibit 3654 was admitted into evidence, reflecting Mr. Sullivan's testimony and analyses in response to the Director's questions earlier in the hearing and substantiating his opinion that 63% of the water accruing to the Rangen spring cell from curtailment will show up at the Martin-Curren Tunnel.

[14] Mr. Sullivan's analysis looked at a longer study period and more refined flow data.

Rangen objected to the admission of Exhibit 3654 and related testimony. In over-ruling the objection the Director noted:

> Okay.··The adjustment to the measured flows [reflected in Exhibit 3654] is a mathematical process that I could have -- you know, they're numbers that I could have computed myself, acknowledging the fact that Ms. Klahn stated that it's not rocket science. I could have computed that myself and probably gone through the development of the regression [reflected in Exhibit 3654] -- the adjusted corrected regression line. And that's all data and information that's in the record.
>
> . . . .
>
> And I'll accept -- I will accept Exhibit[] 3654 . . . into evidence.

Tr. Vol. XII, p. 2812:11−24. The Director accepted Mr. Sullivan's evidence and testimony and found that of the 14.4 cfs of increased flow that would eventually accrue to the Rangen model cell from curtailment at steady-state, 9.1 cfs (63%) would accrue at the Martin-Curren Tunnel. In the Final Order the Director found:

> Historically, the total spring complex discharge is the sum of the flow in Rangen's CTR raceways, Rangen's lodge pond dam, and irrigation diversions from the Farmers' Box. As described in Section V above, Rangen's use of a nonstandard measuring device with an inadequate rating curve has resulted in under-reporting of flows at the CTR raceways and Rangen's lodge pond dam.
>
> In Pocatello Exhibit 3650, Figure 1, Pocatello's expert witness Greg Sullivan plotted data for measured Curren Tunnel flow rates on the "y" axis and data for measured total spring flows on the "x" axis, and performed a linear regression of the data. The resulting regression line represents the historic relationship between Curren Tunnel flow and total flow in the spring complex. The slope of the regression line in Exhibit 3650, Figure 1 is the coefficient 0.7488 associated with the "x" variable and represents the change in flow at Curren Tunnel corresponding to a 1 cfs change in total spring complex flow. The increase in flow at Curren Tunnel resulting from curtailment can be computed by multiplying the predicted increase in total spring flow from ESPAM 2.1 by 0.7488. *Id.*, p. 7. This analysis used flow data reported by Rangen, and predicts that approximately 75% of curtailment benefits accruing to the model cell would accrue to Curren Tunnel. Because this analysis used Rangen's under-reported flow data, the Director finds, based upon clear and convincing evidence, that the slope of the regression line is too high.
>
> Sullivan plotted another regression line using adjusted data. Pocatello Ex. 3654, Fig. 1. Data values that were under-reported were "corrected for the historical 15.9% under-measurement of flows by Rangen by multiplying the

> reported flows by a factor of 1.189 (computed as 1/[1-0.159]).” *Id.*, Fn. 2. The slope of Sullivan’s alternative regression line is 0.6337, which is the coefficient associated with the “x” variable. This analysis predicts that approximately 63% of curtailment benefits accruing to the model cell would accrue to Curren Tunnel. Because there is uncertainty about the accuracy of the USGS measurements used by Sullivan to adjust the under-reported data, the slope of this regression line may be too low or too high.
>
> There are two reasons why the Director should apply the 63% proportion to determine the increase in Curren Tunnel flow from the total simulated increase in flow to the Rangen model cell. First, all parties agree that the data used to calculate the 75% proportion were under-reported. The alternative regression line plotted by Sullivan is a credible method to correct the under-reported data. Second, applying a 75% proportion to determine the increase in the Curren Tunnel flow may result in Rangen benefiting from its own under-reporting of flows if mitigation by direct flow to Rangen is provided in lieu of curtailment.

R. Vol. 21, p. 4210, ¶¶ 99−102.

The record contains substantial evidence of routine under-measurement of flow data by Rangen; the adjustment to the regression analysis for purposes of calculating the flows at the Martin-Curren Tunnel as a result of curtailment is, as the Director stated, “a mathematical process.” There is substantial evidence for Mr. Sullivan’s regression analysis adopted by the Director, and Rangen’s arguments to the contrary should be rejected.

C. Rangen’s arguments insinuate that the Director’s decision to rely on Mr. Sullivan’s analyses was not “rational” because the analyses were not reliable; similarly, the criticism of Mr. Sullivan’s reliance on the USGS data collected below Rangen is without basis.

Rangen’s arguments that Mr. Sullivan’s opinions “evolved” and therefore are unreliable misperceives the nature of complex litigation, in which discovery results in a step-wise understanding of facts as provided by opposing parties or as analyzed by experts; further, it ignores its own experts’ changes in position during the course of the litigation. Mr. Sullivan’s

opinions "evolved" in much the same way that Dr. Brockway's opinions "evolved"—in response to new information obtained during the course of discovery.[15]

Mr. Sullivan was originally concerned that Rangen was improperly measuring the head over the damboards in the CTR raceways and at the Lodge Dam because the method identified by Dr. Brockway as the "stick the weir" method is not well known outside of hatcheries. However, based on additional disclosure of information by Rangen, review of professional literature, and deposition testimony by Ms. Yenter and Dr. Brockway, Mr. Sullivan accepted the accuracy of the head measurements based on the "stick the weir" method as described in his response to the IDWR Staff Memo. Exh. 3345. Therefore, and despite the many pages spent on this subject in Rangen's Opening Brief.[16] following discovery and prior to trial, the parties agreed that the accuracy of Rangen's ***head*** measurements was not disputed.

However, the method by which Rangen converts its head measurements to rates of flow *was* in dispute from the beginning of the case, and through trial. Mr. Sullivan originally approached the Rangen rating table problem by developing a hybrid weir coefficient, which attempted to rectify the unexplained "step functions" in the Rangen rating table. However, after the Staff Memo identified the existence of the USGS flow measurement data made below the Rangen facility, and after Rangen was finally persuaded to part with its copies of the USGS flow measurement data, Mr. Sullivan instead made his comparison of the USGS data against the

[15] Experts are obligated to change their positions based on information subsequently obtained in discovery. And, given the step-wise course of discovery, such changes are not uncommon during litigation despite Rangen's suggestion that initial opinions are suspect unless they remain unchanged throughout the course of litigation. For example, Dr. Brockway's original expert report in this matter vigorously asserted that Rangen relied on a weir coefficient of 3.09 (rather than 3.33, as the Staff Memo found) based on Dr. Brockway's flow measurement analyses performed over 40 years ago for Rim View Hatchery. At deposition, Dr. Brockway produced information that changed his position and opinions, because he had "mis-remembered" what he did for Rim View in the past. Tr. Vol. V, pp. 1077−80.

[16] *See* pages 36 to 40, which all relate to Rangen's measurement of head using the "stick the weir" method; Rangen's brief does not mention that the dispute between the parties ultimately related to Rangen's conversion of head to rate of flow using the faulty rating table.

Rangen flow data to derive his 15.9% average under-measurement of Rangen's spring complex flows and to derive his revised weir coefficient of 3.62.

Rangen engages in similar stone-throwing regarding the USGS data relied upon by Mr. Sullivan, arguing that it was of insufficient quality and suggesting that irrigation return flows make the comparison suspect. The USGS is the nation's pre-eminent water measurement agency. As Mr. Sullivan testified (and as the Director found [Tr. Vol. VI, pp. 1419:19−1420:21]), most of the USGS measurements were rated "good/fair." The USGS ranks measurements as "good" if the accuracy is within 5% and "fair" if the accuracy of the measurement is within 8%. Exh. 3345. Similarly, on the issue of comparability, Mr. Sullivan testified and the Director agreed, the USGS measurements were made outside of the irrigation season, so the presence of irrigation return flows at the USGS measurement location below Rangen is irrelevant to evaluating the comparability of the data. R. Vol. 21, p. 4198, ¶ 49.

In summary, Mr. Sullivan's regression analysis was developed in response to information received during discovery and provides a substantial and reliable basis for the Director's findings of fact and conclusions of law regarding the proportion of flows Rangen could expect to see at the Martin-Curren Tunnel based on curtailment.

III. THE DIRECTOR HAD SUBSTANTIAL EVIDENCE TO CONCLUDE JUNIORS WERE USING WATER EFFICIENTLY AND WITHOUT WASTE.

Rangen argues that the junior ground water users that were parties to this case failed to demonstrate that they were using water efficiently and without waste, pursuant to CMR 40.03. Rangen's arguments are without basis.

Rule 40.03 provides:

> **Reasonable Exercise of Rights.** In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b, the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using

> water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

IDAPA 37.03.11.040.03.

The Director identified the testimony that formed the basis for his findings that juniors were "efficiently [using water] without waste." The testimony identified by the Director is not inconsistent with the nature of the evidence the Director has used in the context of determining that senior water rights are using water reasonably without waste. For example, the current IDWR Methodology Order allows the Director to rely simply on diversions made by senior water rights as a basis to determine that the senior requires the water it historically diverted, without a more detailed analysis of whether the water was necessary for beneficial use, or whether it was wastefully applied.[17] *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, Docket No. CM-DC-2010-001 (June 23, 2010).

Justin Armstrong, Pocatello's water superintendent testified that the City serves over 16,000 customer accounts, and delivers water for commercial, industrial, irrigation, and culinary beneficial uses. Tr. Vol. V, p. 1098:12−19. Exhibit 3314, prepared by Spronk Water Engineers, Inc. identifies Pocatello's water rights. Mr. Armstrong testified that the City relies on its groundwater rights for all its culinary uses, and that its Airport wells rely on groundwater for the biosolids program. Tr. Vol. V, pp. 1102:23−1103:9, 1111:17−1112:6. Accordingly, there is substantial evidence in the record that Pocatello puts its water rights to beneficial use without waste.

[17] Pocatello notes that it opposes this cursory analysis of efficiency and reasonable use without waste, as demonstrated in its papers filed recently in the Methodology appeal; however, until the Department adopts a different approach for efficiency and reasonable use analyses with regard to seniors, the same approach should apply against all water rights, regardless of priority.

The testimony identified by the Director as the basis for his findings was subject to cross-examination by Rangen's counsel and there are no allegations that Pocatello wastes water. Rangen declined to raise these issues directly. Under Idaho law, water users are presumed to be entitled to their decreed amounts, and a delivery call is not an opportunity for re-adjudication of partial decrees. The standard identified in CMR 40.03 is not self-executing—in other words, if Rangen is entitled to the presumption that it is entitled to its decreed amount, so is Pocatello. Contrary to Rangen's suggestion, the fact that Pocatello's decrees are junior in priority creates no additional burden on Pocatello to show it requires its water supplies and is using them reasonably.

IV. THE DIRECTOR'S IMPOSITION OF A CURTAILMENT TRIM LINE EAST OF THE "GREAT RIFT" IS CONSISTENT WITH THE AGENCY'S DISCRETION.

Rangen argues that the Director's curtailment trim line east of the "Great Rift" is arbitrary, and that it erroneously relied on economic justification. Rangen's arguments should be rejected.

As the Director explained in the Final Order, and again in the March 4, 2014 Order on Reconsideration, the imposition of the trim line in Rangen's delivery call was intended to provide the same proportional benefits to Rangen that the Clear Springs trim line provided to the calling party in the Clear Springs Foods and Blue Lakes delivery calls. *See, e.g.,* R. Vol. 22, pp. 4464−65. The Idaho Supreme Court confirmed the application of a trim line in the *Clear Springs* case as:

> within the outer limits of [the Director's] discretion and consistently with the legal standards applicable to the available choices, and [the Director] reached his decision through an exercise of reason.

Clear Springs Foods Inc. v. Spackman, 150 Idaho 790, 871, 252 P.3d 71, 98 (2009). The *Clear Springs* Court did not specifically approve of or otherwise limit the trim line to 10%; instead, the

Court approved the Director's decision-making in that case. As the Director's Final Order and Order on Reconsideration explains, the technical basis for the trim line in the Rangen delivery call is the same as that used in the Clear Springs delivery call. R. Vol. 21, pp. 4224−28.

The Clear Springs delivery call involved application of an earlier version of the Eastern Snake Plain Aquifer Model ("ESPAM"). Under version 1 of the model, curtailment benefits could only be estimated on the basis of river reaches.[18] Thus, the modeled benefits to the Clear Springs Foods and Blue Lakes senior spring water rights from curtailment of junior ground water rights within the 10% trim line were also predicted to accrue to numerous other springs (both junior and senior) that were not parties to the delivery call. Without the trim line in the Clear Springs delivery call, the calling parties would have received 6.9% of the benefits accruing to the Devil's Washbowl to Buhl reach; with the 10% trim line, curtailment was limited to areas where the calling party would receive at least received 0.69% (6.9% of 10%) of the benefits of curtailing particular acres. R. Vol. 21, p. 4225, ¶ 45; R. Vol. 22, p. 4464.

Under the new version of the ESPAM, version 2.1, the modeled benefits accrue to particular spring cells instead of to reaches of the river. The trim line delineated by the Great Rift limits the areas subject to curtailment to those where at least 0.63% of the curtailed use benefits Rangen. In this regard, the benefit to Rangen is analogous to the benefit to Clear Springs (0.63% benefit versus 0.69%). R. Vol. 22, p. 4465.

Rangen argues that the trim line is arbitrary because it "reduces the flow of water available to Rangen's senior water rights." However, as noted above, the amount of water Rangen receives from curtailment (or mitigation) in this delivery call is consistent with the proportional amounts previously provided to springs users in the prior Thousand Springs

[18] Indeed, it was the earlier version of the model that resulted in the Director finding Rangen's delivery call was futile. R. Vol. 1, p. 181, ¶ 84.

delivery calls—in other words, the Director is not obligated to curtail in a manner that squeezes every possible drop out of the juniors.

Rangen acknowledges the Idaho Supreme Court's ruling in *Clear Springs* that the Director has "discretion to decide whether [juniors] were causing material injury," but goes on to argue that the Director's decision to impose the Great Rift trim line was based solely on economic justification, contrary to the ruling in *Clear Springs*. This is wrong for two reasons: first, the issue before the court in *Clear Springs* involved the Idaho Ground Water Appropriators' ("IGWA") argument that *no* curtailment was justified absent a demonstration that the juniors would not suffer economic damage, an argument thoroughly rejected by the Idaho Supreme Court. *Clear Springs*, 150 Idaho at 803, 252 P.3d at 84 ("A delivery call cannot be *denied* on the ground that curtailment of junior appropriators would result in substantial economic harm.") (emphasis added). Second, the Director's determination relied on the geologic reality that the Great Rift creates a significant geologic barrier, reducing the benefit to Rangen from curtailment of areas east of the Great Rift; the level of uncertainty associated with predicted accruals from curtailment east of the Great Rift is also higher than west of the Great Rift. R. Vol. 21, p. 40, ¶¶ 54, 55.

In making these determinations, the Director heard evidence from witnesses, including Mr. Sullivan and Mr. Contor, regarding the minimal amounts of water that would accrue to Rangen's spring cell as a result of curtailing wells in the vicinity of Pocatello and the Fremont-Madison Irrigation District. Mr. Sullivan testified Rangen would receive a rate of flow that was less than that associated with a garden hose; Mr. Contor testified to an even smaller volume of water. Sullivan, Tr. Vol. VII, pp. 1481:1−10, 1482:15−1484:15; Exh. 3650, Fig. 8-2, PDF p. 41 of 46; Contor, Tr. Vol. XII, p. 2855:5−23. While the Idaho Supreme Court has flatly rejected an

economic balancing test, as argued by IGWA in *Clear Springs*, it has embraced the idea of "full economic development" and "optimum development" as goals consistent with conjunctive administration. *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90. The Director's Great Rift trim line is anchored in solid technical evidence, and is consistent with the Thousand Springs trim line confirmed by the *Clear Springs* Court. The fact that his rationale included discussion of why the trim line was also consistent with Idaho law and policy does not make it arbitrary or capricious, and Rangen's arguments should be rejected.

CONCLUSION

Rangen's appeal raises no issues for reversal or remand. Based on the evidence and testimony in the record, as well as the Director's proper exercise of agency discretion in this matter, as well as the arguments presented herein, Pocatello respectfully requests that the Court affirm the Director's Final Order in all respects.

Respectfully submitted, this 8th day of August, 2014.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By_____
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By_____
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Response Brief** for **SRBA Case No. CV-2014-1338 [Consolidated Gooding County Case No. CV-2014-179]** upon the following by the method indicated:

Sarah Klahn, White & Jankowski, LLP

SRBA District Court 253 – 3rd Ave North PO Box 2707 Twin Falls ID 83303-2707	____ U.S. Mail, Postage Prepaid ____ Hand Delivery __X__ Overnight Mail – Federal Express ____ Facsimile 208-736-2121, Phone 208-736-3011 ____ Email
J. Justin May May Browning 1419 W Washington Boise ID 83702 jmay@maybrowning.com	__X__ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile – 208-342-7278 __X__ Email
Robyn Brody Brody Law Office PO Box 554 Rupert ID 83350 robynbrody@hotmail.com	__X__ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile - 208-434-2780 __X__ Email
Fritz Haemmerle Haemmerle & Haemmerle PO Box 1800 Hailey ID 83333 fxh@haemlaw.com	__X__ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile – 208-578-0564 __X__ Email
Randall C. Budge Thomas J. Budge Racine Olson Nye Budge & Bailey 201 E Center St / PO Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	__X__ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile – 208-232-6109 __X__ Email
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Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us	_X_ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile – 208-234-6297 _X_ Email
Jerry Rigby Rigby Andrus & Rigby Law Attorneys at Law 25 North Second East Rexburg ID 83440 jrigby@rex-law.com	_X_ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile 208-356-0768 _X_ Email
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com jf@idahowaters.com	_X_ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile 208-735-2444 _X_ Email
W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org	_X_ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile 208-878-2548 _X_ Email

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: **A36-07694**
Date Received: 7/27/1988
Receipt No: 500134
Received By: SCC

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: RANGEN, INC. 208-543-6421
   Address: P.O. BOX 706
   BUHL, ID 83316

2. Date of Priority: APR 12, 1977

3. Source: CURRAN TUNNEL Trib. to: BILLINGSLEY CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
07S	14E	32	SW NW		GOODING

5. Description of diverting works:
   CONCRETE DAM WITH STEEL PIPELINES.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
FISH PROPAGATION	01/01	12/31	26.000		

7. Total Quantity Appropriated is:
   26.000 C.F.S. (and/or) A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
07S	14E	31	SE NE		FISH	
		32	SW NW		FISH	

11. Place of use in counties: GOODING

MICROFILMED
FEB 04 1993

APPENDIX A

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A36-00134B, A36-00135A, A36-02551

14. Remarks:
FACILITY VOLUME = 287,640 CUBIC FEET. SOURCE KNOWN LOCALLY AS CURRAN TUNNEL. THIS RT. WHEN COMBINED WITH RT. 36-2551 SHALL NOT EXCEED 76.0 CFS. A MEASURING DEVICE OF A TYPE APPROVED BY THIS DEPT. SHALL BE MAINTAINED ON THE OUTLET WORKS.

15. Basis of Claim: LICENSE

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 0

For Organizations:

I do solemnly swear or affirm that I am Vice President (Title) of Rangen, Inc. (Organization), that I have signed the foregoing document in the space below as Vice President (Title) of Rangen, Inc. (Organization) and that the statements contained in the foregoing document are true and correct.

Christopher Rangen
Signature of Authorized Agent

Vice President Rangen
Title and Organization

July 27, 1988
Date

MICROFILMED
FEB 04 1993

State of Idaho)
) SS.
County of Twin Falls)

Subscribed and sworn (or affirmed) before me this 27 day of July 19 88

Allen B Pierce
Notary Public

Seal

Residing at Twin Falls

My Commission Expires 2/20/93

MICROFILMED
FEB 04 1993

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: **A36-02551**
Date Received: 7/27/1988
Receipt No: 5001134
Received By: SCC

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: RANGEN INC. 208-543-6421
   Address: P.O. BOX 706
   BUHL, ID 83316

2. Date of Priority: JUL 31, 1962

3. Source: CURRAN TUNNEL Trib. to: BILLINGSLEY CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
07S	14E	32	SW NW		GOODING

5. Description of diverting works:
   CONCRETE DAM WITH STEEL PIPELINES

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
FISH PROPAGATION	01/01	12/31	50.000		
DOMESTIC	01/01	12/31	0.100		

7. Total Quantity Appropriated is:
   50.000 C.F.S. (and/or) A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:
   D/ 3 HOUSES, 2 OFFICES, H/ 62 PONDS

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
07S	14E	31	SE NE		FISH	
			SE NE		DOMEST	

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JAN 28 1993

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
07S	14E	32	SW	NW		FISH	
			SW	NW		DOMEST	

11. Place of use in counties: GOODING

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A36-00134B, A36-00135A, A36-07694

14. Remarks:
FISH PONDS ARE THRE BASIC SIZES; 3-1/2'X 100'X 3-1/2',
8'X 100'X 4', 16'X 180'X 4'.

15. Basis of Claim: LICENSE
Water Right Number: 30654

MICROFILMED
JAN 2 8 1993

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ____ do not ✓ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 0

For Organizations:

I do solemnly swear or affirm that I am Vice President of Rangen, Inc., that I have signed the foregoing
Title Organization
document in the space below as Vice President of Rangen, Inc. and that the statements contained in the
Title Organization
foregoing document are true and correct.

Christopher Rangen
Signature of Authorized Agent

Vice President, Rangen, Inc.
Title and Organization

July 27, 1988
Date

State of Idaho)
) SS.
County of Twin Falls)

Subscribed and sworn (or affirmed) before me this 27 day of July 19 88

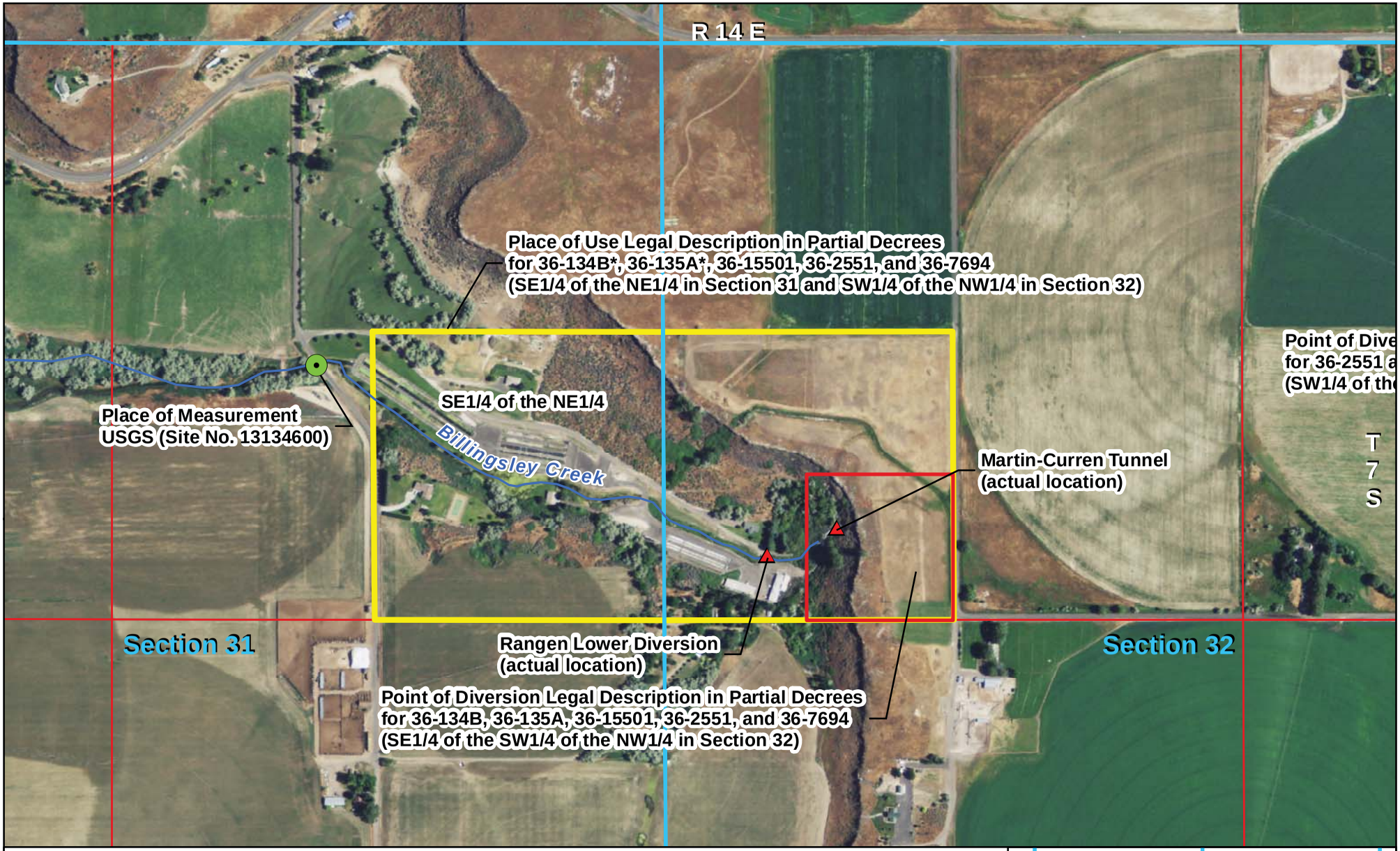
Alan B. Rueer
Notary Public

Seal

Residing at Twin Falls

My Commission Expires 2/20/93

MICROFILMED
JAN 28 1993



*The place of use for 36-134B and 36-135A in the partial decrees includes the SW/4 of the NE/4 in Section 31.
Source:
IDWR GIS files (wr_pou and idhydro).
Partial Decrees and Licenses for Rangen Inc
PLSS GIS files for Gooding County, ID (BLM)
2011 USDA NAIP aerial photo for Gooding County, ID
USGS personal commications (March 2013).

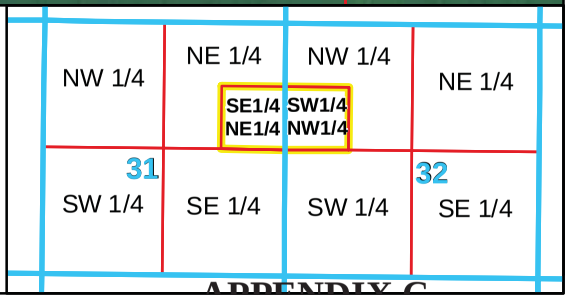
Spronk Water Engineers, Inc.
1000 Logan Street Denver, CO 80203

Figure 2-3

Points of Diversion and Place of Use
1962 and 1977 Water Rights
Rangen Inc.

400 200 0 400 800 Feet

155.02.POC / hw / 4/26/2013



APPENDIX C