

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,

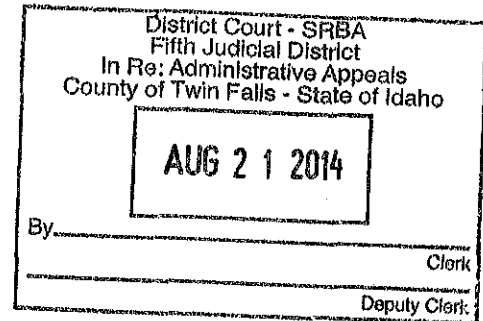
Respondents,

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 POCA TELLO,

Intervenors.

Case No. CV-2014-1338

(Consolidated Gooding County Case
No. CV-2014-179)



RANGEN, INC.'S REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. INTRODUCTION

The proper interpretation of the source and point of diversion described in Rangen's Partial Decrees is probably the most significant legal issue to be decided in this case.¹ If the Director's interpretation is upheld, Rangen will no longer be able to divert a substantial portion of the water that it has used for more than 50 years. Relying upon the Director's interpretation, several of IGWA's groundwater districts propose to condemn Rangen's property, take the water that Rangen has historically used, and then give the water back to Rangen to mitigate the injury caused by junior-priority groundwater pumping. See, Appendix A attached hereto for a copy of Rangen's Reply Brief in Support of Petition for Late Claim. Of course all of this will be done on paper only. No changes to Rangen's diversion structure or facilities are necessary. IGWA proposes that Rangen continue to divert and use water as it has for more than 50 years, but that IGWA be given credit for "mitigation." The practical effect of the Director's interpretation of the phrase "Martin-Curren Tunnel" is that Rangen's water rights will be administratively taken from Rangen and given to IGWA for use as "mitigation."

The Respondents claim that by making the latent ambiguity argument Rangen is trying to "improve its position" or somehow expand its water rights. Their position is not well taken. Rangen does not seek any new rights or to expand its existing rights. Rangen is only seeking an interpretation of its Partial Decrees that is consistent with Rangen's original permits and licenses, prior IDWR investigative findings, and the Company's undisputed beneficial use of the water for the past 50 years.

¹ The other issues have been addressed in Rangen's Opening Brief or Response Brief or will be addressed at oral argument.

II. ARGUMENT

A. The Respondents Have Misstated and Misconstrued the Latent Ambiguity Doctrine.

It is not surprising that Respondents want the Court to interpret the Partial Decrees without regard to intent of the parties, all of the contextual facts concerning Rangen's appropriation and use of the water, and the determinations made by IDWR in connection with Rangen's prior delivery call. There is absolutely no dispute about what the phrase "Martin-Curren Tunnel" was intended to describe. "Martin-Curren Tunnel" was intended to describe the source of water for Rangen's water rights. At the time the decrees were entered, and for decades before that, the source of Rangen's water rights included all of the spring water that forms the headwaters of Billingsley Creek. Respondents urge the Court to ignore all context to find that the decree unambiguously means something different from what was intended.

In arguing against the application of the latent ambiguity doctrine the Respondents have erred in multiple ways: (i) they fail to understand the types of ambiguities that exist; (ii) they have misstated the rule concerning the use of parol evidence; (iii) they fail to recognize that the only way to harmonize the facts and law of this case is to adopt Rangen's interpretation of the Partial Decrees; and (iv) they fail to recognize that any conflicting evidence must be construed in Rangen's favor to avoid what would essentially amount to an administrative forfeiture. The Director erred when he determined that Rangen's water rights are limited solely to water coming from the mouth of the corrugated pipe, and that portion of the Director's Final Order should be reversed.

B. The Term "Martin-Curren" Tunnel Constitutes a Latent Referential Ambiguity.

What is an ambiguity? Dr. Sanford Schane, a linguistics professor at the University of California, San Diego, published an article in the Thomas Jefferson Law Review entitled

"Ambiguity and Misunderstandings in the Law" addressing what constitutes an ambiguity. Schane, Sanford, "Ambiguity and Misunderstandings in the Law, Thomas Jefferson L.R., Vol. 26, No.1 (2002). At the outset of his article Dr. Schane explained that: "Paradoxically enough, the word ambiguity itself has more than one interpretation." Id. at p. 1. He explains that there are basically three types of ambiguities: (i) a lexical ambiguity, an ambiguity where a word has more than one objective, dictionary meaning (Id. at p. 4); (ii) a referential ambiguity caused by uncertainty of reference (Id. at p. 8); and (iii) an ambiguity caused by categorization vagueness such as trying to determine at what point a processed chicken becomes a "manufactured" good under a particular regulation (Id. at p. 10). Dr. Schane goes on to compare and contrast three legal decisions which illustrate the different types of ambiguities that can arise.

The ambiguity in this case is most like the situation in Raffles v. Wichelhaus, 2 Hurl. & C. 906, 159 Eng. Rep. 375, a water cooler case for lawyers. Dr. Schane explains that in Raffles, a buyer agreed to purchase bales of cotton to be shipped from India to Liverpool. Schane, Sanford, "Ambiguity and Misunderstandings in the Law, Thomas Jefferson L.R., Vol. 26, No.1, p. 2 (2002). The contract specified that the cotton was to be shipped on a vessel called the "Peerless." Id. There was nothing ambiguous on the face of the contract. Id. Unfortunately, the parties did not recognize that there were two ships called "Peerless" – one that arrived in Liverpool in October and one that arrived in December. The ambiguity presented by the use of the name "Peerless" was latent in the sense that it only became apparent in the context of the facts of the case; there was nothing on the face of the contract that would tend to demonstrate an ambiguity. Id. at p. 14-15. The seller shipped the cotton on the vessel that was scheduled to arrive in December, and the buyer refused the goods because they did not arrive in October on the Peerless ship he contemplated. Id.

at p. 3. The court determined that there was no meeting of the minds and refused to enforce the contract. Id. at p. 15.

As Respondents acknowledge, “Martin-Curren Tunnel” is a proper name. As such it cannot be interpreted simply by looking at the dictionary definition of its constituent parts. The Respondents contend that the proper name “Martin-Curren Tunnel” refers to a particular known structure, and therefore, Rangen’s Partial Decrees are unambiguous and the Court’s inquiry should end. See e.g., IDWR’s Brief in Response to Rangen’s Opening Brief, p. 13. The Raffles case demonstrates, however, that the use of a proper name does not make a document unambiguous. Disputes as to what a proper name refers can and do arise. Dr. Schane calls these types of ambiguities “referential ambiguities” or the result of “referential indeterminacy.” In this case, the Court’s analysis of the source of Rangen’s water rights should not end simply because one concludes the term “Martin-Curren Tunnel” could refer to a specific structure. The term “Martin-Curren Tunnel” is also used in some contexts to refer more broadly to the spring water that supplies the Research Hatchery. The Court must consider parol evidence to determine what is being referenced depending upon the context in which the term “Martin-Curren Tunnel” is used.

C. The Court Must Consider Parol Evidence to Determine Whether the Term “Martin-Curren Tunnel” When Used to Describe the Source of Rangen’s Water is Ambiguous.

The Respondents misstate Idaho law regarding parol evidence and the identification of latent ambiguity. The Respondents contend that the Court should not look beyond the four corners of Rangen’s Partial Decrees to determine whether they are ambiguous. See e.g., IDWR’s Brief in Response to Rangen’s Opening Brief, p. 14. IDWR argues: “Rangen argues there is a latent ambiguity in the decree and seeks to use evidence outside the four corners of the partial decrees. However, as discussed above, the test for interpreting decrees starts with the face of the decree, not with the evidence outside the decree. Rangen skips this critical first step. If there is no

ambiguity, no further consideration is necessary.” *Id.* Similarly, the City of Pocatello contends that “[b]ecause 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.” *City of Pocatello’s Response Brief*, p 5 (citing *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)). These arguments misstate Idaho law.

The Idaho Supreme Court recently explained that latent ambiguity cases are an exception to the general parol evidence rule:

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). There is actually a two-step process for addressing a latent ambiguity and both steps involve the introduction and consideration of parol evidence:

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 Respondents’ arguments against the consideration of parol evidence in this case are a fundamental misstatement of Idaho law.

D. The Only Way to Harmonize the Facts and Laws of this Case is to Adopt Rangen’s Interpretation of the Partial Decrees.

While Rangen generally disagrees with the Respondents' characterization and application of Idaho's latent ambiguity rule, there are two places where Rangen and the Respondents do agree:

- the Partial Decrees must be construed as a whole and given a construction that will harmonize with the facts and the law of the case. See, City of Pocatello's Response Brief, p. 4.
- If there is a latent ambiguity the Court must seek to determine intent. See id. at p. 7.

The only way to construe the Partial Decrees and harmonize the facts and law in this case is to adopt Rangen's argument that the term "Martin-Curren Tunnel" is ambiguous and when used in the context of the source of Rangen's water find that it refers not only to the spring water from the mouth of the tunnel itself, but also to all of the other spring water that forms the headwaters of Billingsley Creek.

The designated source of water on Rangen's Partial Decrees is: "Martin-Curren Tunnel; tributary to Billingsley Creek." To what does this name refer when used in the context of defining the source of Rangen's water? To answer this question the Court should begin with the testimony of Lynn Babbington, the only person who testified who was actually involved with the filings on Rangen's water rights and a man who managed the facility for nearly twenty years. While IDWR has described Mr. Babbington's testimony as "mixed," his testimony actually drives home the point that Rangen has been trying to make:

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).

Mr. Babbington makes the point that the term “Martin-Curren Tunnel” refers to two different things depending upon the context in which the term is used. He makes the point that Martin-Curren Tunnel means the hole in the hillside, but it also means all of the spring water at the head of the Research Hatchery when talking about where Rangen’s water comes from. IDWR tries to justify the Director’s decision by arguing that the witnesses who testified were not confused as to what was meant by the term “Martin-Curren Tunnel.” While that is generally an accurate statement, it was because the context in which the term was being used was understood from the questions that were being asked and the discussion that was taking place and because those who testified understood that the meaning of “Martin-Curren Tunnel” was a hotly debated legal issue so precision was important. Lonny Tate, one of Rangen’s fish culturists who has worked at the Research Hatchery for nearly 35 years, actually asked for clarification of IGWA’s use of the term “Martin-Curren Tunnel” when it was unclear from the context. The exchange between IGWA’s attorney and Mr. Tate went as follows:

Q: Do you measure the flow that comes out of the Curren Tunnel?

A: Classify “the Curren Tunnel.”

Q: It may be easiest, Justin –

Well, I’m speaking of the actual physical tunnel in the hillside that has
the -

A: The culvert?

Q: The culvert, yeah.

A: No.

(Tr., Vol. 4, p. 883, l. 23 – p. 884, l. 6) (emphasis added). Mr. Tate's question was not argumentative, but instead was a legitimate clarification and IGWA's counsel responded by giving Mr. Tate more context so that he could understand to what counsel was referring.

The testimony of Mr. Babbington and Mr. Tate make it clear that the term "Martin-Curren Tunnel" can reasonably be interpreted to refer to different things depending on the context. This same point can be made when looking at Rangen's backfiles. The source of Rangen's water has been described in different ways throughout its 50+ year history. See Exh. 1027A for the backfile on Water Right No. 36-02551 and Exh. 1029 for the backfile on Water Right No. 36-07694. For example, some of the documents in these files describe the source of Rangen's water as: "headwaters Billingsley Creek" (p. 5 of Exh. 1027A), "Billingsley Cr." (p. 8 of Exh. 1027A), "waters of Billingsley Creek" (p. 12 of Exh. 1027A), "Billingsley Creek (head) Curran Tunnel (p. 24 of Exh. 1029), "underground springs" (p. 15 of Exh. 1029), and "springs" (p. 28, Exh. 1029) (see also, R., Vol. 13, p. 002608). As pointed out in Rangen's Opening Brief, the license for Water Right No. 36-07694 identifies the source of Rangen's water as "springs" and then contains a note which states that the source is locally known as the "Curran Tunnel." (See, p. 29 of Exh. 1029). Director Dreher referred to the source of Rangen's water as the "Curran Spring" throughout the Second Amended Order on Rangen's first delivery call. (See e.g., R., Vol. 1, ¶ 55 on p. 000151). Although the language that is used is different, each of these documents is describing the same thing.

While there certainly has not been consistency on the name given to Rangen's source, none of the Respondents challenge the fact that over the past 50+ years Rangen has actually diverted

and put to beneficial use all of the spring water that forms the headwaters of Billingsley Creek. See testimony of Tim Luke wherein he stated that Rangen is diverting water as it always has (Tr., Vol. V, p. 1177, L. 22 - p. 1178, L. 6). There is also no dispute that in 1978, long before the dispute over the source of Rangen's water rights was manufactured, Rangen actually applied for, and was granted, special permission to measure the water at its outlets rather than at its inlet because it was impossible to measure all of the various spring water coming in at the springs themselves. (See, pp. 30, 51-52 of Exh. 1029). If the source of Rangen's water was limited to the mouth of the Martin-Curren Tunnel Rangen simply could have taken a single measurement at the mouth of the tunnel.

The Department investigated the source of Rangen's water in connection with its first delivery call and concluded that Rangen's water measurements at the outlets are representative of the total flows available under Rangen's water rights. (Tr., Vol. III, p. 550, L. 19 – p. 548, L. 4). While IGWA seems to imply that the results of Cindy Yenter and Brian Patton's investigation should be discounted because it was aimed at measurement protocol (see, IGWA's Response to Rangen's Opening Brief, p. 14), their investigation actually included a water right review. The subject line of the investigative memo states: "Water Right Review and Sufficiency of Measuring Devices, Rangen Aquaculture." (See, Exh. 1129). Yenter explained how she went about the investigation:

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).

When you consider Lynn Babbington's testimony, Lonny Tate's testimony, all of the inconsistent ways of naming Rangen's source over the past 50 years, and the results of IDWR's investigation after the 2003 delivery call, the term "Martin-Curren Tunnel" as used in the Partial Decrees to describe Rangen's source is no longer clear. How can the facts and the law be reconciled with the name that has been given?

The only way to harmonize the facts and the law is to conclude that there is a latent referential ambiguity and that when used in the context of describing Rangen's water source the term "Martin-Curren Tunnel" means not only the water coming from the mouth of the corrugated pipe, but all of the spring water that forms the headwaters of Billingsley Creek which Rangen has been using for 50+ years.² That interpretation is consistent with the evidence and best reflects the intent of Rangen and IDWR when the Partial Decrees were entered. The parties intended that the Partial Decrees reflect Rangen's actual, historic beneficial use of the water – not only a fraction of it. While Pocatello makes much of the fact that Rangen has not cited the SRBA claim forms (they are actually not part of the backfiles or administrative record) these documents actually support Rangen's position. No reasonable water user would intentionally submit a claim form that reflects only part of its actual beneficial use of water. If you start with the general notion that Rangen and IDWR intended that the Partial Decrees reflect Rangen's actual beneficial use, then the claim

² IGWA contends that the Court should not find that the term "Martin-Curren Tunnel" is ambiguous because to do so would create confusion as to the source of other rights that show the Martin-Curren Tunnel as their source. None of those rights were actually examined or put at issue in this case so any alleged confusion is just speculative.

forms and the Partial Decrees have to be interpreted in a way that comports with that notion. Certainly neither of the parties intended to create an administrative forfeiture which is exactly what has happened as a result of the Director's ruling. This is an unjust result and is unsupported by Idaho law and the facts of this case. To the extent any conflicting evidence exists, the Court should construe the evidence in Rangen's favor because to do otherwise would result in a deprivation of Rangen's water rights. See, Alumet v. Bear Lake Grazing Co., 119 Idaho 946, 951 812 P.2d 253, 258 (1991) (holding that the law abhors forfeitures). The Director's ruling on the source of Rangen's water rights was erroneous as a matter of law and should be reversed.

III. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that the Director's ruling limiting Rangen's water rights to the water coming from the mouth of the Martin-Curren Tunnel be reversed.

DATED this 21st day of August, 2014.

BRODY LAW OFFICE, PLLC

By 

for Robyn M. Brody

HAEMMERLE & HAEMMERLE, PLLC

By 

for Fritz X. Haemmerle

MAY, BROWNING & MAY, PLLC

By 

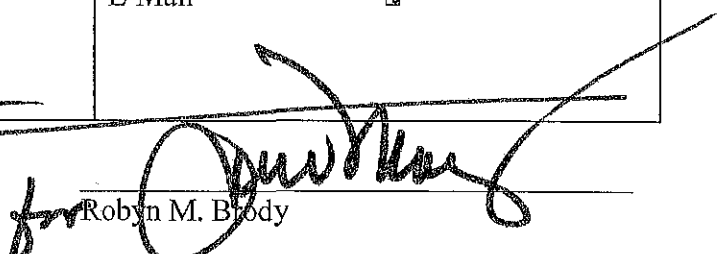
for J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 21st day of August, 2014 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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for 
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APPENDIX A

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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

In Re SRBA

Case No. 39576

Subcase No. 36-16977

RANGEN, INC.'S REPLY BRIEF IN
SUPPORT OF MOTION FOR LATE
CLAIM

COMES NOW, Rangen, Inc. ("Petitioner" or "Rangen"), by and through its attorneys of record, Robyn M. Brody of Brody Law Office, P.L.L.C.; J. Justin May of May, Browning & May, P.L.L.C.; and Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and hereby submits this Brief in Support of Rangen's Motion for Late Claim.

I. PROCEDURAL BACKGROUND AND SUMMARY

This Motion for Late Claim ("Claim") is being filed for several reasons. As set forth in the *Affidavit of Fritz X. Haemmerle in Support of Motion to File Late Claim*, Rangen has two

RANGEN INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO FILE LATE CLAIM- 1

APPENDIX A TO RANGEN, INC'S REPLY BRIEF

decreed water rights which are at issue -- water rights 36-02551 and 36-07694. These rights recognize the right to divert water for fish propagation purposes, and are based on licenses issued by the Idaho Department of Water Resources ("Department"). Water right 36-02551 was based on a license/permit that was originally filed for in 1962. Water right 36-07694 was based on a license/permit filed for in 1977. As permitted and licensed, the rights gave Rangen the right to divert spring water tributary to Billingsley Creek from a forty (40) acre parcel designated as T7S R14E S32 SW1/4NW1/4. The licenses authorized Rangen to divert the headwaters of Billingsley Creek. In 1997, the two water rights were decreed in the Snake River Basin Adjudication ("SRBA").

Since water rights 36-02551 and 36-07694 were permitted, licensed and decreed, Rangen has diverted all of the spring water that forms the headwaters of Billingsley Creek, including the spring water from the mouth of the Martin-Curren Tunnel itself and what has been called the "talus slope" where the mouth of the tunnel is located. The Department has always recognized Rangen's right to do so. This fact is illustrated by the Department's 2003 Water Right Review (done by Cindy Yenter and Brian Patton), how the Department has allowed Rangen to divert and measure its water and the findings of fact made by the Department in connection with Rangen's 2003 water delivery call. The reality is that Rangen's property contains many springs. It would be impossible to measure every single spring. Recognizing this reality, the Department has consistently allowed Rangen to measure the spring water as it leaves Rangen's Research Hatchery. The water which enters Rangen's facility, from the time the rights were permitted, has always included all of the spring water which forms the headwaters of Billingsley Creek.

During Rangen's current water delivery call which was filed in December 2011 and went to hearing in May, 2013, Department Docket CM-DC-2011-004 ("*Current Delivery Call*"), an issue arose as to Rangen's source and point of diversion. On April 22, 2013, for the first time, Director Spackman ruled that Rangen cannot divert water from any source outside the ten-acre tract that is defined in its Partial Decrees (the Partial Decree defines the point of diversion as the SESWNW of Section 32). *Order Granting in Part and Denying in Part IGWA's Petition for Reconsideration and Clarification*, at ¶¶ 12 and 13 (hereinafter "*Director's Order*"). This ruling would preclude Rangen from diverting spring water that comes from the adjacent ten (10) acre parcel (SWSWNW of Section 32) which was included in the permits and licenses for water rights 36-02551 and 36-07694.

In the same *Director's Order*, the Director went further and ruled that even though Rangen's point of diversion in its Partial Decrees is a ten acre tract, there was a material issue of fact as to whether Rangen had a right to divert all of the spring water from that parcel. He held that there was a material issue of fact as to whether Rangen was entitled to divert only that water which actually came out of the mouth of the "Martin-Curren Tunnel," the source listed on Rangen's Partial Decrees. Whatever ruling is ultimately decided on the source element, Rangen expects that this issue will be part of the likely appeal after the Director issues his Order on Rangen's Current Water Call.¹

Seizing what it perceived to be an opportunity created by the *Director's Order*, the Idaho Ground Water Appropriator's ("IGWA") filed for a permit to claim all the water which is not actually diverted out of the mouth of the Martin Curren Tunnel itself and informed the Department that it intended to condemn Rangen's property to gain access to the water. IGWA

¹ The hearing was held on Rangen's Current Delivery Call from May 1, 2013 – May 16, 2013. Final post-trial reply briefs are due on July 19, 2013.

asked that its permit not be acted upon for a period of one year. This is the very same water that Rangen has been lawfully diverting and beneficially using since 1962. It is the same water that Rangen has been using with full knowledge and approval of the Department since 1962. To allow IGWA to claim water Rangen has historically and lawfully been using would create a massive injustice and should be avoided by this Court.

To protect its interest in the event IGWA actually proceeds on its application, Rangen has filed this Late Claim. The Late Claim was filed to protect Rangen's historic and actual beneficial use of all water diverted from the spring complex that feeds Rangen's Research Fish Facility. Rangen realizes that many of the issues relating to this Late Claim will be decided on the likely and ultimate appeal of its *Current Delivery Call*. However, Rangen also realized that time was of the essence and there was limited time to file a Late Claim to the water under this Court's most recent *Order Establishing Deadline for Late Claims Filings in Basins 01, 02, 03, 31, 34, 35, 35, 37, 41, 45, 47, and 63* ("*Order Setting Deadlines*").

The Court has three options. Recognizing the surprise created by the *Director's Order*, the Court could allow Rangen to proceed with its Late Claim. The Late Claim would allow Rangen to obtain a water right which has been beneficially used since 1962 and recognized by the Department as a proper and lawful use. Alternatively, the Court could interpret Rangen's current Partial Decrees for 36-02551 and 36-07694 such that the source and point of diversion includes all water from the springs which form the headwaters of Billingsley Creek (Rangen has argued to the Director that Rangen's Partial Decrees should be interpreted in this manner). Such a ruling would necessarily state that Rangen's current decrees include Rangen's right to divert water as described in the original permits and licenses for water rights 36-02551 and 36-07694. This would obviate the need for a Late Claim. Finally, the Court could stay this Motion and

await the likely appeal of Rangen's Current Delivery Call, wherein most of the issues raised in this Motion will be decided. Again, a decision on appeal could determine whether a Late Claim is actually needed.

II. FACTS

A. Water Right No. 36-02551.

1. The Partial Decree entered in the SRBA for Water Right No. 36-02551 grants Rangen the right to use 48.54 cfs of water for year-round fish propagation at its Research Hatchery. *See, Haemmerle Second Aff.*, Exh. 1.

2. The Partial Decree for Water Right No. 36-02551 describes the source of the water as: "Source: Martin-Curren Tunnel; Tributary: Billingsley Creek". *Id.*

3. The Partial Decree for Water Right No. 36-02551 does not list the source of Rangen's water right as "Ground Water." *Id.*

4. Water Right Nos. 36-02551 and 36-15501 are companion rights. Water Right No. 36-02551 is for 48.54 cfs of water and Water Right No. 36-15501 is for 1.46 cfs of water. *Id.*; see Decree for 36-07694. The two rights together are for a total flow of 50 cfs to be used for year-round fish propagation. The source for both rights set forth in the Partial Decrees is identical – "Martin-Curren Tunnel; tributary to Billingsley Creek." *Id.* The only difference between the two rights is the priority date. Water Right No. 36-15501 has a priority date of 7/1/1957. Water Right No. 36-02551 has a priority date of 7/13/62.

5. Rangen obtained the right to use 50 cfs of water (the combined amount for Water Right Nos. 36-15501 and 36-02551) through the permit process. The State Reclamation Engineer received Rangen's Application for Permit to Appropriate the Public Waters of the State of Idaho on July 31, 1962. *See, Haemmerle Second Aff.*, Exh. 1.

6. Rangen's Application stated that the source of the water supply for the right was: "the headwaters of Billingsley Creek which is derived from underground springs." *Id.*

7. The survey submitted in connection with Rangen's Application for 36-02551 showed that Rangen's point of diversion is downstream of the "mouth of cave" (a handwritten note on the survey describing the Martin-Curren Tunnel itself), the concrete box and what is described by the experts as the talus slope. *Id.*

8. The State Reclamation Engineer advertised Rangen's Application in August, 1962 and described the source of Rangen's water as the "headwaters of Billingsley Creek." *Id.*

9. After Rangen completed the construction of its Research Hatchery and began to divert water, 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." *Id.*

10. On April 26, 1967, after receiving the statutory fees, the State issued Rangen a Certificate of Completion of Works authorizing the diversion of 50.0 cfs of water from "underground springs, tributary to Billingsley Creek." *Id.* The Certificate showed:

TO ALL WHOM IT MAY CONCERN:
This is to certify that <u>RANGEN, INC.</u>
of <u>Butt</u> , County of <u>Blaine, Falla</u> , and State of
<u>Idaho</u> , the holder of Permit No., <u>30654</u> , issued upon
Application No. <u>30620</u> , bearing date of priority of <u>July 31, 1962</u> , authorizing the
diversion of <u>50.0</u> second feet of waters of <u>Underground Springs</u>
to <u>Butt</u> of <u>Billingsley Creek</u> .

11. At the same time the Certificate of Completion of Works was issued, the State also issued Rangen a License and Certificate of Water Right. The source listed on the License is "underground springs" tributary to Billingsley Creek. A snapshot of the License shows:

License and Certificate of Water Right

Water License No. 30654 Priority July 31, 1962 Amount 50.0 c.f.s.

THIS IS TO CERTIFY that RANGEN, INC.

of Buhl, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated July 31, 1962; that Permit No. 30654 was issued under said application; that Certificate of Completion of Works, with a carrying capacity of 50.0 second feet, was issued thereunder on April 26, 1967, showing that said works were completed on the 27th day of July, 1963; and that on the 2nd day of September, 1964, RANGEN, INC.

of Buhl, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of a right to the use of the waters of underground springs, a tributary of Billingsley Creek, for the purpose of fish cultural and domestic use, under Use Permit No. 30654 of the Department of Reclamation, and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 14 of Licenses, at Page 8804, on the 26th day of April, 1967. The right hereby confirmed dates from July 31, 1962.

Id.

B. Water Right No. 36-07694.

12. The Partial Decree entered in the SRBA for Water Right No. 36-07694 grants Rangen the right to use 26 cfs of water for year-round fish propagation at its Research Hatchery.

Id., Exh. 2.

13. The Partial Decree for Water Right No. 36-07694 describes the source of the water as: "Source: Martin-Curren Tunnel; Tributary: Billingsley Creek". *Id.*

14. Rangen first obtained the right to use Water Right No. 36-07694 through the permit process. Rangen's Application for Permit for water right 36-07694, in type, identifies "underground springs which are tributary to Billingsley Creek" as the source of Rangen's water.

Id., Exh. 2. There is a handwritten designation of "Curran Tunnel" written into the source element on the Application for Permit:

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR PERMIT **APPROVED**

To Appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

1. Name of applicant Rangen, Inc. Phone: 543-6421
post office address Buhl, ID
CURRAN TUNNEL
2. Source of water supply underground springs which is a tributary of Billingsley Creek
3. a. Location of point of diversion is SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 32 Township 7S
Range 14E B.M. Gooding County; additional points of diversion if any: _____

Id.

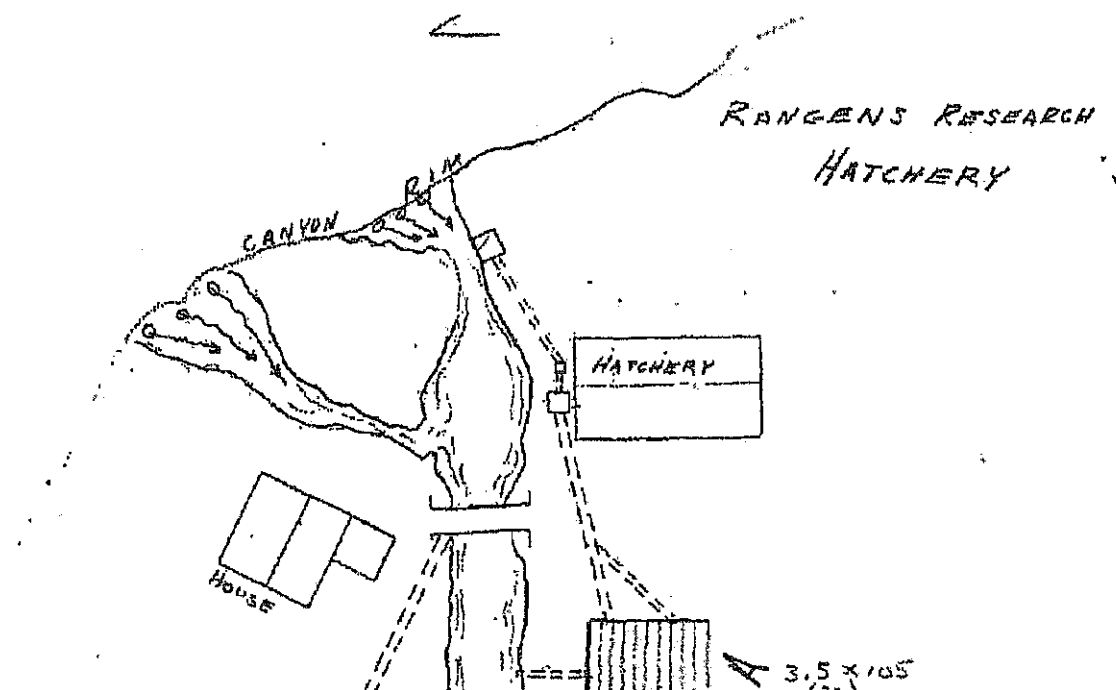
15. On January 29, 1979, the Department conducted a field examination to substantiate Rangen's use of Water Right No. 36-07694. The Department checked a box identifying the source of Rangen's Water Right as "surface water" (the box for Groundwater was not checked) and identified the name of the source as underground springs tributary to Billingsley Creek. The Field Report stated:

DEPARTMENT OF WATER RESOURCES
FIELD REPORT

1. Name of permit holder Rangen, Inc. *KYN BADING 537-4191*
Post office address Buhl, Box 706 Phone 543-6421
Person to contact _____ Phone _____
2. Source of water supply: Groundwater ☐ Surface water ☒ underground springs
(name spring, stream, etc.)
Tributary to Billingsley Creek

Id.

16. There is a diagram in the backfile of Water Right No. 36-07694 which shows the diversion of multiple springs flowing from the canyon wall surrounding Rangen's Research Hatchery:



Id.

18. On September 19, 1985, the Department of Water Resources issued a License to Rangen for Water Right No. 36-7694. *Haemmerle Second Aff.*, Exh. 2. The License describes the source of Rangen's water right as "water from springs, tributary to Billingsley Creek." A snapshot of the License shows:

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:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
Fish Propagation	from January 1 to December 31	at 26.0 cfs and	N/A

Id.

19. A note on the License shows that the source identified in the License (i.e. "springs") is known locally as the "Curran Tunnel." A snapshot of the notes to the License shows:

CONDITIONS OF APPROVAL

a. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho Law. This right may be forfeited by five years of non-use.

b. The right to the use of the water hereby confirmed is restricted and appurtenant to lands or place of use herein described, and is subject to all prior water rights, as provided by the laws of Idaho.

c. Any water right confirmed in this license for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this license and shall not give rise to any right or claim against any future rights to the use of water other than hydropower, within the State of Idaho initiated later in time than the priority of this license.

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.

Id.

C. Rangen's Actual and Historical Diversion of Water.

20. The actual and historical diversion of water by Rangen under 36-02551, 36-15501 and 36-07694 has always included water from the Martin-Curren Tunnel itself, water from the concrete box shown in the original survey (see paragraphs 8 and 19 above), as well as water from

springs on what the experts are calling the "talus slope" where the Tunnel mouth and concrete box are located.

21. The Partial Decrees for 36-02551 and 36-07694 identify the "source" of the water as the "Martin-Curren Tunnel." This nomenclature is consistent with the note on the License for Water Right No. 36-07694 (see paragraph 21 above) and the remarks contained in the claim file for Water Right No. 36-07694 because "Martin-Curren Tunnel" is a local identifier for the spring complex. *Id.*, Exh. 2, *infra* ¶ 21. The claim remarks for Water Right No. 36-07694 state that the "source is known locally as Curran Tunnel."

22. Rangen has a diversion structure that begins at the mouth of the Martin-Curren Tunnel itself, continues down the talus slope, channels water into a pond which then supplies water through a 36" concrete pipeline to the Large Raceways. Rangen's diversion structure captures the spring water that forms the headwaters of Billingsley Creek, and Rangen has been using those waters to produce fish for fifty or more years.

23. The below in photograph provides a starting place for understanding Rangen's diversion structure:

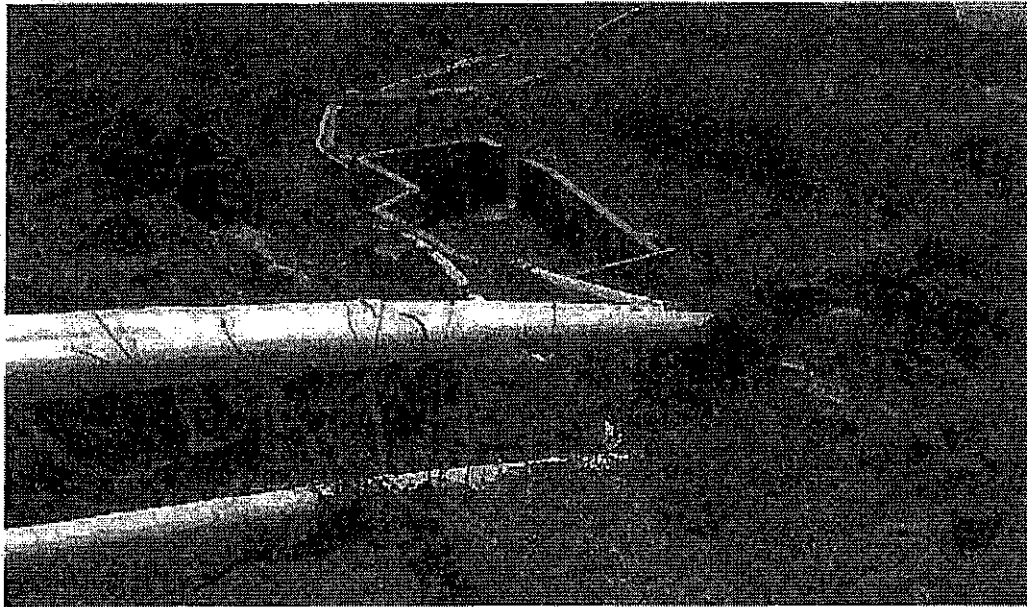


The mouth of the Martin-Curren Tunnel is shown in the upper left corner of the photograph with multiple white pipes coming from it. There is a concrete box at the mouth of the tunnel which the parties have referred to as the "Farmer's Box." The concrete structure shown in the middle of the photograph has been referred to as the "Rangen Box." *Kinyon Aff.*, ¶ 5.

24. The next photograph provides a closer view of the Martin-Curren Tunnel and the Farmer's Box:



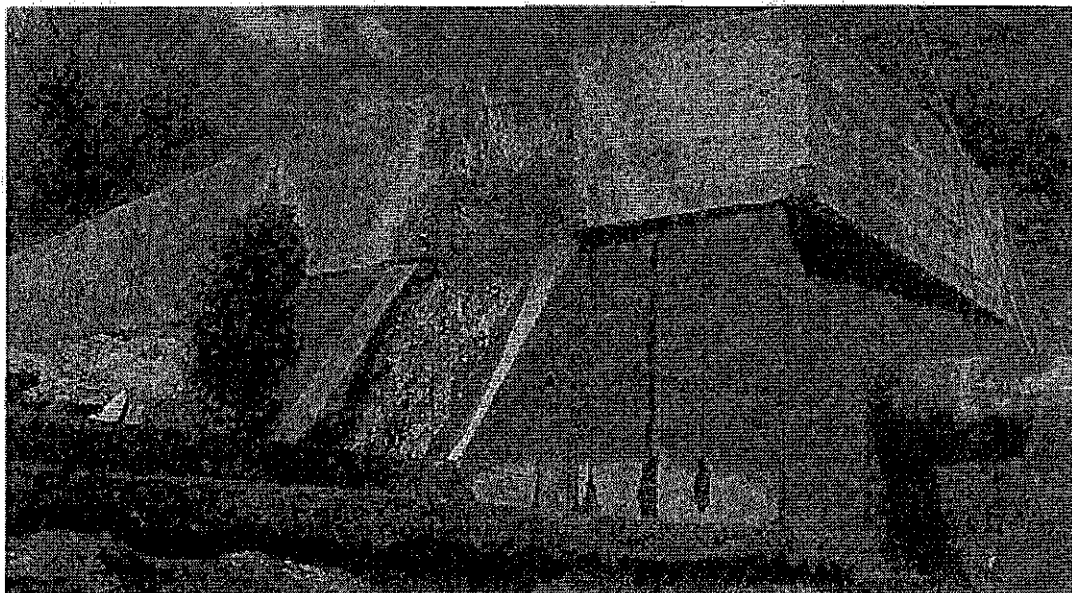
The pipes labeled "Irrigation Pipelines" were used historically for farmer irrigation. The 6" White Pipe takes water to Rangen's Hatch House (where eggs and fry are raised), the Green House (where research is done) and to the Laboratory. The other two white pipes labeled "Small Raceways" and "Lower"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



Id., ¶¶ 5, 6 and 7.

25. 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.

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



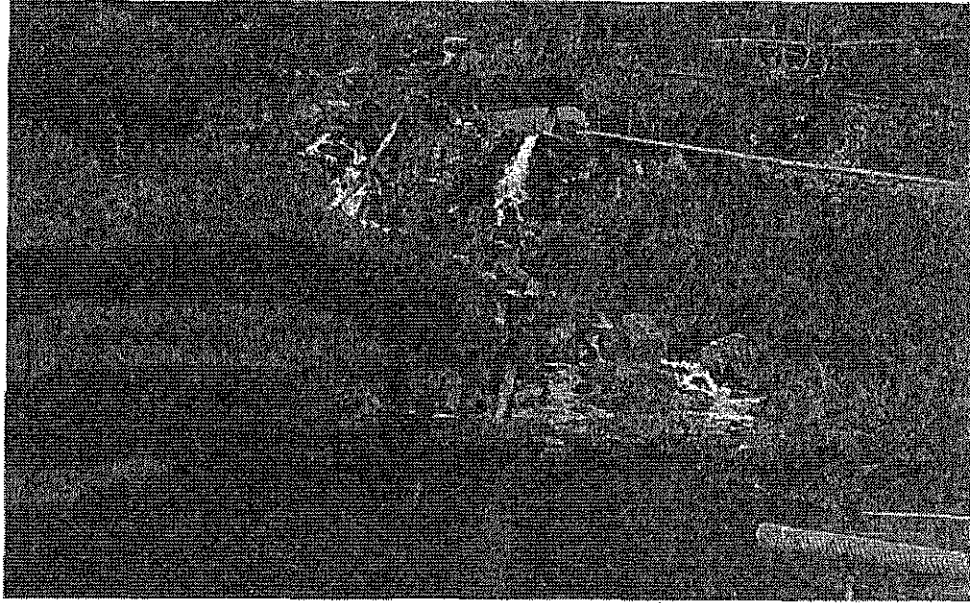
Water can be diverted from the Rangen Box to the Small Raceways using the steel pipe that is coming out of the right side of the concrete structure. Alternatively, water can be allowed to go through the opening and then channeled down to a pond that supplies water to a dam structure leading to the Large Raceways. *Id.*, ¶ 8.

27. 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 that goes to the dam structure:



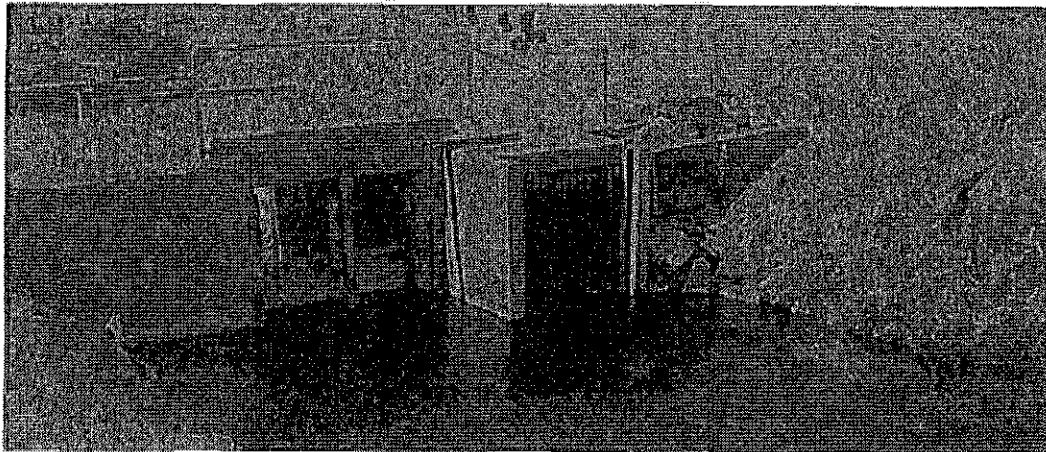
Water is channeled down the talus slope to a pond that forms the headwaters of Billingsley Creek. *Id.*, ¶ 9.

28. The following photograph shows water channeled from the talus slope into that pond:



Id., ¶ 10.

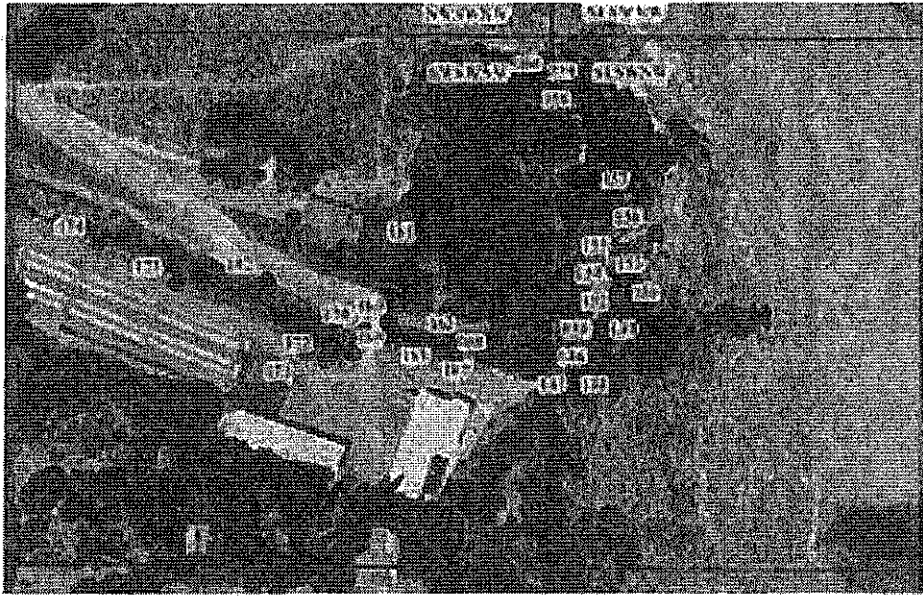
29. There is a dam structure and 36" pipeline at the opposite end of the pond. The following photograph shows the dam and pipeline to the Large Raceways:



Id., ¶ 11.

30. The next photograph is an aerial photograph of Rangen's Facility and shows Rangen's Research Hatchery as it relates to the boundaries of Section 32. The photograph shows

that Rangen's diversion structure lies in two different quarter/quarter/quarter sections that sit next to each other:



The Farmers Box, Rangen Box and talus slope sit in the 10 acre tract or Eastern parcel. The end of the pond with the dam, however, sits in the Western parcel (actually described as SWSWNW of Section 32). *Id.*, ¶ 12.

D. The Department Has Consistently Recognized Rangen's Right to Beneficially Use All Spring Water that Forms the Headwaters of Billingsley Creek.

31. The Department recommended that a measuring device be used to monitor the flows under Water Right No. 36-07694. Given that the source of water was multiple "springs flowing into Billingsley Creek" collecting into the Upper Pond, the Department allowed the measuring device to be placed at the outlet, instead of the inlet. A Conversation Memorandum dated January 2, 1979, in the file for 36-07694 reads:

In talking with Gary [Funderberg] this date he stated that the p.d. for this permit came directly from springs flowing into Billingsley Creek and it was not economically feasible to try [and] put a measuring device at the inlet works especially as there are no users above him. Therefore, he recommended the

measuring device be moved from the inlet works to but still required for the outlet works.

Haemmerle Second Aff., Exh. 2.

32. Consistent with Rangen's historical appropriations and point of diversion, and after Rangen filed its first water call in 2003, the Department recognized Rangen's water flows as being represented by the sum of discharges from the flow through the "CTR" raceways added to the flow over the Lodge Pond dam board. The location of the measurements for Rangen's water flows are well-established and have been previously recognized by the Department as follows:

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 through the CTR raceways and irrigation return flows.

See, Haemmerle First Aff., (Second Amended Order of May 19, 2005, in the Matter of Distribution of Water, ¶ 54). (Emphasis added).

33. The measuring points acknowledged by the Department in the *Second Amended Order* take into account all water diverted by Rangen. The water includes water from the Martin-Curren Tunnel itself and the other springs that form the headwaters of Billingsley Creek.

34. Since at least 1992, the Department has had many opportunities to review how Rangen diverts and uses its water rights. During the hearing on Rangen's Current Water Call, Tim Luke, the Department's chief enforcement person, testified that the Department has never

questioned Rangen's diversion of all of the spring water that forms the headwaters of Billingsley Creek, including and that the Department has always acknowledged Rangen's right to measure and report all the water which enters its facility under water rights 36-02551 and 36-07694. *See, Haemmerle Second Aff.*, Exh. 3 (Testimony of Tim Luke and Cindy Yenter).

III. ARGUMENT

A. The Late Claim Should be Allowed.

On October 12, 2012, the SRBA Court entered its *Order Setting Deadlines*. The deadline to file a late claim under the Order was January 30, 2013. Rangen's Late Claim was filed after January 30, 2013, but Rangen was not aware that it had to file a Late Claim until the Director issued his *Director's Order* on April 22, 2013. This was the first time after more than fifty years of beneficial use and Department scrutiny that Rangen learned it might not be entitled to divert all of the spring water which it has historically put to beneficial use. Given these circumstances, Rangen's Late Claim should be allowed.

The Court has allowed other Late Claims to proceed after the January 30, 2013 deadline. *See e.g.*, Subcase 31-02049 (irrigation claim, Notice of Claim filed February 1, 2013); 31-12314 (groundwater irrigation claim Notice of Claim filed February 27, 2013). *See, Haemmerle Second Aff.*, Exh. 4.

1. There are IRCP 60(b) reasons to allow the Late Claim to proceed.

The SRBA Court has historically allowed parties to pursue late claims provided the reason for filing the claim falls within an I.R.C.P. 60(b) factor. Rule 60(b) provides:

(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, Grounds for Relief From Judgment on Order. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment 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; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to: (i) entertain an independent action to relieve a party from a judgment, order or proceeding, or (ii) to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in said action, or (iii) to set aside a judgment for fraud upon the court.

In this case, the factors under Rule 60(b)(1) and (2) favor Rangen being able to proceed with this Late Claim. First and foremost, the "surprise" and other factors under Rule 60(b)(1) apply. Since the rights were permitted and decreed, Rangen has been historically and actually using spring water from the entire forty (40) acre tract of land forming the headwaters of Billingsley Creek. The Department has historically recognized this use.

Second, the Rule 60(b)(2) factor applies. The fact that the Department has changed and altered its interpretation of 36-02551 and 36-07694 constitutes newly discovered evidence, and there was no way Rangen could have been aware of this new interpretation in time to retry rights 36-02551 or 36-07694.

Third, the Rule 60(b)(5) factors apply. By changing its long-standing position with respect to rights 36-02551 and 36-07694, the Department has essentially reversed or vacated the prior decrees, at least with respect to recognizing Rangen's lawful right to beneficially use all the water coming that forms the headwaters of Billingsley Creek. To avoid the obvious inequity of

this new prospective application of rights 36-02551 and 36-07694, the Court should grant the Motion to File Late Claim.

For the very first time, on April 22, 2013, within the context of *Rangen's Current Delivery Call*, Rangen learned that there is an issue with respect to Rangen's actual and historic use, which has been previously recognized under its permits, licenses and decrees under water rights 36-02551 and 36-07694. The Department's change in position qualifies as newly discovered evidence (if not information) and to the extent Rangen has not previously filed for this right, it can be excused from not previously proceeding with this claim because the Department's position is an "about-face" from its prior position.

2. There is No Prejudice Allowing the Late Claim to Proceed.

Rangen has been using and diverting all of the spring water that forms the headwaters of Billingsley Creek since 1962. The Department has administered Rangen's water rights consistent with the position that Rangen is, in fact, entitled to do so. *See*, Section III(B), *infra*. Only as of April 22, 2013, has there been an issue with respect to Rangen's ability to divert the spring water. Recognizing the historic and actual use by Rangen since 1962 would not prejudice any party and certainly there is no prejudice caused by the filing of a Late Claim a little more than 60 days past the deadline set by the Court. The only party who would be prejudiced at this point is Rangen because its historic and actual beneficial use of more than fifty plus years would no longer be recognized if the Late Claim is not allowed to proceed and it is found by the Department and/or this Court that Rangen's current decrees do not allow it to legally divert the water it has been using. Furthermore, it would provide a windfall to IGWA who has now filed for a permit on the very same water Rangen has been using and diverting, with the blessing of the Department, for the last fifty plus years.

3. Any Delay in Bringing this Action Was Not Willful.

Generally, “[a] willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, or inadvertently. A willful act differs essentially from a negligent act. The one positive and the other negative.” *Order on Permissive Review and Order of Recommitment, (Bedke II)*, at 8. In this case, there is simply no way to find that Rangen’s conduct bringing this claim was willful, let alone based on any kind of neglect. Again, up until April 22, 2013, when the Director entered his Director’s Order, Rangen did not know that it not have the right to divert the spring water it has been using for more than 50 years.

B. As an Alternative to the Late Claim, the Court Should Interpret Rangen’s Current Decrees to Encompass its Historic and Actual Beneficial Use of Water Under 36-02551 and 36-07694.

As an alternative to ruling that Rangen is entitled to proceed with a Late Claim, the Court could, and should, interpret the Partial Decrees for 36-02551 and 36-07694, to allow for the diversion and use of the 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 Decrees. Given how the rights are expressly decreed versus how the water rights have been administered by the Department, there is a latent ambiguity in the decrees that needs to be resolved.

The Idaho Supreme Court has explained that when interpreting decrees it uses the same interpretation rules it applies in contract cases. *A&B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). The Court recently explained that there are two types of ambiguities that can appear when interpreting contracts:

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 the latent ambiguity rules in *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-49 (1952). In that case, 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 processor 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, 163 N.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.

1. Existence of latent ambiguity.

Thus far, and before the Director's Order issued on April 22, 2013, the Department has interpreted Rangen's use of water in one way. That interpretation is as follows: (1) that Rangen is entitled to divert all spring water which forms the headwaters of Billingsley Creek; and (2) that the description "Martin Curren Tunnel" as the source in the decrees is simply a regional identifier which includes the water coming from the mouth of the tunnel itself and the entire spring complex that forms the headwaters of Billingsley Creek.

The phrase "Martin-Curren Tunnel" and the point of diversion description, however, "lose clarity" when examined in light of the fact that IGWA and Pocatello now contend that Rangen has no right to any water except the flow from the mouth of the tunnel itself. This allegation is made in direct contrast to the undisputed fact that Rangen has beneficially used the water that forms the headwaters of Billingsley Creek for fifty plus years and IDWR determined in 2005 that the flows available under Rangen's water rights are those historical flows. Clearly, the terms of Rangen's decrees are subject to two different and contrasting interpretations.

If a 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). The important parol evidence the Court should consider to resolve the ambiguity is how the Department has treated and administered Rangen's water rights post decree, and how the rights were permitted and licensed as evidenced by the backfiles for each water right.

2. The source.

There is no dispute that Rangen has been using the spring water that forms the headwaters of Billingsley Creek to raise fish for more than fifty years. In the beginning, Rangen submitted its application to divert 50 cfs of water (eventually decreed as Water Right No. 36-02551) in 1962. Rangen's application designated the source of that water as "the headwaters of Billingsley Creek which is derived from underground springs." When the State advertised Rangen's application, it designated the source of Rangen's water as the "headwaters of Billingsley Creek."

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."

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." It is evident from this description that Rangen had constructed a diversion structure to beneficially use all of the water coming from the head of its Research Hatchery – the water emerging from the Martin-Curren Tunnel itself as well as all of the springs around it that 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." The term "Martin-Curren Tunnel" was never mentioned in the backfile for water right 36-02551.

Under water right 36-07694, Rangen applied for a supplemental permit to appropriate waters from the same source and using the same diversion structure in April 1977. The application had a typewritten designation of source as "underground springs." The term "Curran Tunnel" was hand-printed right above the designation. A diagram in the Department's backfile showed the diversion of multiple springs flowing from the canyon wall.

After Gary Funderberg, the state examiner, did his field report, Mr. Babbington, Rangen's Facility Manager, wrote to him asking him to allow Rangen to measure water flows at the outlets of its Research Hatchery rather than the inlets:

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.

During the hearing on the Current Delivery Call, Mr. Babbington explained that it wasn't possible to have measuring devices at all of the "inlets" because the springs were all over the hillside at the head of the Research Hatchery:

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.

Haemmerle Second Aff., Exh. 3 (Babbington Tr., p. 188, l. 20 -- p. 189, l. 6). (Emphasis added).

The Department entered an order approving the request.

When the State issued the license for water right 36-07694, it designated the source as "water from springs, tributary to Billingsley Creek" and entered a note that the source (i.e., springs) is known locally as "Curran Tunnel". 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.

Id. (Luke Tr., p. 190, l. 19 – p. 191, l. 2). (Emphasis added).

Subsequently, in 1997, the water rights were decreed naming the source as the “Martin Curren Tunnel.” The fact that the source in the decrees names the Tunnel did not change the Department’s long-standing position that Rangen had a right to divert all of the spring water forming the headwaters of Billingsley Creek, including water coming from the Tunnel itself. The name is simply a regional identifier used as a shorthand way of describing all of the spring water that forms the headwaters of Billingsley Creek.

Tim Luke is a Water Compliance Bureau Chief for the Department testified during the hearing on the *Second Water Call*. *Id.* (Luke Tr., p. 1129, l.23 - p. 1130, l. 3). He has been out to the Rangen’s Research Hatchery on numerous occasions since 1992. *Id.* (Luke Tr., 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, 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.

Id. (Luke Tr., p. 1174, l. 7-15).

Luke 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.

Id. (Luke Tr., p. 1177, l. 22 - p. 1178, l. 6) (emphasis added).

IDWR has never told Rangen that it is not within its rights to 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.

Id. (Luke Tr., p. 1177, l. 22 - p. 1178, l. 11).

This is not a case where IDWR has not examined Rangen's water use. Rangen's water use was investigated during Rangen's *First Water Call*. It is very important for this Court to consider the result of that investigation which further upheld Rangen's ability to divert all the water from the talus slope. The Department investigated Rangen's water use in 2003 when Rangen made its *First Delivery Call*. At the Director's request, Cindy Yenter and Brian Patton were the Department employees who lead the 2003 investigation. *Id.* (Yenter Tr., p. 547, l. 17-25). Ms. Yenter explained that as part of the investigation, she and Mr. 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.

Id. (Yenter Tr., p. 550, l. 19 -- p. 551, l. 12).

On May 19, 2005, following Ms. Yenter's investigation, the Department recognized in paragraph 54 of its findings in the *Second Amended Order* issued, 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 through the CTR raceways and irrigation return flows.

Haemmerle First Aff., (Second Amended Order dated May 19, 2005).

The lack of clarity and consistency pertaining to the name "Martin-Curren Tunnel" is also evident in the pre-printed flow measurement forms that IDWR has provided to Rangen over the years. Rangen receives two forms each year on which it is to report its water measurements. At various times, those forms have a pre-printed designation of the "source" as follows: "Martin

Curren Tunnel," "Springs," and Springs/Curren Tunnel." After 2006, the Department appears to have eliminated the description of the source on the forms.

Mr. Luke pointed out during his testimony that at one time Rangen's water rights showed that the source was "springs." *Id.* (Luke Tr., p. 1177, l. 22 - p. 1178, l. 6). His testimony evokes the question why was it changed? The answer to that question lies 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:

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 or common 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.

It is evident from the testimony at the hearing on the Current Delivery Call that the phrase "Martin-Curren Tunnel" is a local identifier used to identify the spring water that forms the headwaters of Billingsley Creek. There is no dispute that Rangen has beneficially used this spring water for fifty years to raise trout at its Research Hatchery and that the Department previously found that these flows represented the water available under Water Right Nos. 36-02551 and 36-07694.

As such, this Court could interpret the decreed source that being the "Martin Curren Tunnel," encompasses the spring complex that forms the headwaters of Billingsley Creek. Such an interpretation would be consistent with how the water rights under 36-02551 and 36-07694 were perfected, historically used and administered by the Department.

3. Point of Diversion

Like the source element, the point of diversion elements loses clarity when considering how Department rules required the point of diversion to be claimed and decreed in the SRBA. As explained above, 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. At that time, the Department had a rule spelling out how points of diversion were to be identified. The rule 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).

As explained above in detail, Rangen has a diversion structure that begins at the mouth of the Martin-Curren Tunnel itself, continues down the talus slope, channels water into a pond that then supplies water through a 36" concrete pipeline to the Large Raceways. This diversion structure spans two different ten (10) acre parcels. This was actually described by a forty (40) acre parcel described in the permits/licenses for each right. Under the aforementioned rule,

however, the point of diversion was described to the nearest ten (10) acre parcel as required under the rule. The nearest ten (10) acre tract described is where the mouth of the Martin-Curren Tunnel itself is located.

To the extent that the decrees only describe a ten (10) acre tract, it does not change the fact that application of the rule does not prevent the right holder from diverting the water it is historically entitled to divert. Again, the rule only requires a description to "nearest" ten (10) acre parcel where water is diverted. In this case, Rangen's diversion structure begins in the tract described in its decrees and continues over to the neighboring parcel. This description is appropriate given the Department's rules at the time Rangen's water rights were decreed.

4. Summary

For fifty or more years, Rangen has been diverting all of the spring water from the headwaters of Billingsley Creek – not just water from the mouth of the Martin-Curren Tunnel itself. For fifty or more years, both before and after the decrees were issued, the Department has been aware of Rangen's diversions and sanctioned those diversions. This is not a case where Rangen's use was reviewed by the Department for the first time during the most recent water call. Rangen's water use was studied and scrutinized during the *First Water Call* in 2003. Department officials were well aware that Rangen diverted all spring water forming the headwaters of Billingsley Creek. Recognizing the inability to measure each of the many springs, the Department allowed Rangen to measure its water at the outlet of the facility. To now deny this historic water usage would be a manifest injustice.

VI. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that its Motion to File Late Claim be granted.

DATED this 28 day of June, 2013.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By


Fritz X. Haemmerle

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 28th day of June, 2013 he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Garrick Baxter Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 101 South Capitol Blvd, Ste 300 Boise, ID 83704-1391 Fax: 208-433-0167 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
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