

RECEIVED

FEB 19 2013

DEPARTMENT OF
WATER RESOURCES

Robyn M. Brody (ISB No. 5678)
Brody Law Office, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780
robynbrody@hotmail.com
Attorney for Rangen, Inc.

J. Justin May (ISB No. 5818)
May, Browning & May, PLLC
1419 W. Washington
Boise, Idaho 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com
Attorneys for Rangen, Inc.

Fritz X. Haemmerle (ISB No. 3862)
Haemmerle & Haemmerle, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com
Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
FOR DELIVERY CALL OF RANGEN,
INC.'S WATER RIGHT NOS. 36-02551
& 36-07694

Docket No. CM-DC-2011-004

**RANGEN, INC'S REPLY IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: MATERIAL INJURY**

Rangen, Inc. ("Rangen"), through its attorneys, submits the following Reply in Support of Motion for Partial Summary Judgment re: Material Injury.

I. BACKGROUND

The American Falls Reservoir District told the Idaho Supreme Court years ago that the petition process set forth in the Department's Conjunctive Management Rules ("CM Rules") improperly placed the burden on the senior water user to prove "material injury." American Falls Reservoir District No. 2 v. Idaho Department of Water Resources, 143 Idaho 862, 873-74, 154 P.3d 433, 444-45 (2007) (hereinafter referred to

as AFRD #2). The Supreme Court explained that the CM Rules as written did not require the senior to prove material injury, but the Court also recognized that the CM Rules could be applied improperly to create such a burden:

A plain reading of the CM Rules does not support that interpretation, particularly in the context of a facial challenge to the Rules. The Rules simply require that a senior who is suffering injury file a delivery call with the Director and allege that the senior is suffering material injury. This is presumably to make the Director aware that such injury is occurring and to give substance to the complaint. Additionally, the Rules ask that the petitioner include all available information to support the call in order to assist the Director in his fact-finding. **Nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume that the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02. While it is possible the Director could apply the CM Rules in an unconstitutional manner, that would be an opportune time for an “as applied” challenge; however now, in the absence of such facts indicating the Director has misapplied the Rules in violation of Idaho law, our analysis is limited to the Rules as written or “on their face,” and the Rules do not permit or direct the shifting of the burden of proof.**

AFRD #2, 143 Idaho at 873-74, 154 P.3d at 444-45 (emphasis added).

Rangen has decrees that provide the company with the right to use 76 cfs of water at its Research Hatchery. For years, the spring flows that are the source of Rangen's rights have been declining and Rangen is presently receiving on average 14-15 cfs of water. Rangen filed the current Petition for Delivery Call in December, 2011. Rangen's Petition sets forth all of the requirements in CMR 40.01. The Petition sets forth the particulars of Rangen's water rights and explains that by reason of junior-priority groundwater pumping from a hydraulically connected source of water Rangen is suffering material injury. Rangen's Petition supplied facility diagrams, photographs, water measurements and expert reports.

Rangen's Petition has been pending for fourteen months. No material injury determination has been made. Even though Rangen does not have the burden of proving "material injury" as recognized by the Idaho Supreme Court in AFRD #2, Rangen filed a Motion for Partial Summary Judgment in an effort to resolve this issue and narrow the scope of the hearing set for May. In response, the Intervenor's contend that summary judgment should not be granted because there are genuine issues of material fact as to whether Rangen "needs" the water to accomplish its beneficial use and whether its water "needs" could be met by alternate means of diversion, conveyance efficiencies or conservation practices. IGWA's Response, p. 2; see also Pocatello's Response, pp. 3-4 and fn 1 which incorporates IGWA's Response by reference. The Intervenor's even go so far as to argue that Rangen's Motion for Partial Summary Judgment violates Rule 11(a)(1) of the Idaho Rules of Civil Procedure. IGWA's Response, p. 6. The Intervenor's' Rule 11 argument is professionally insulting and their interpretation of CM Rule 42 is contrary to Idaho law. If the Department applies CM Rule 42 as the Intervenor's advocate it would result in an unconstitutional application of the CM Rules. The issues of fact that the Intervenor's argue preclude the Director from granting summary judgment are actually defenses that they have the burden of proving by clear and convincing evidence at the hearing in May. Because there is no genuine issue of material fact that Rangen is being materially injured by junior-priority groundwater pumping from a hydraulically connected source, Rangen's Motion for Partial Summary Judgment should be granted. The Intervenor's will have the opportunity to present their defenses at the hearing in May.

II. ARGUMENT

A. **The Intervenor's Have Misconstrued Rule 42.**

Before looking at the Intervenor's alleged "issues of fact," it is important to understand how Rule 42 is written and should be applied under Idaho law. The Intervenor's begin their argument with the statement: "To prevail at summary judgment on the issue of material injury, Rangen must at a minimum prove that there are no genuine issues of material fact concerning the eight material injury factors listed in CM Rule 42." IGWA's Response, p. 3 (emphasis added). Intervenor's Rule 42 does NOT contain eight "material injury" factors. Their characterization of Rule 42 is fundamentally flawed and contrary to the Idaho Supreme Court's ruling in AFRD #2.

The District Court explained in its May 4, 2010 Memorandum Decision and Order on Petition for Review in the A&B Irrigation District case that "material injury" and "using a water right efficiently without waste" are two distinct concepts even though they are treated in conjunction with each other in the CM Rules. See pp. 37-38 of Memorandum Decision and Order on Petition for Judicial Review (May 4, 2010) attached as Exhibit G to Haemmerle Aff.). To understand this point, it is important to look at CM Rule 40.03 which states:

In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a or 040.01b, 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. Under this Rule, the Director has three separate determinations he has to make when regulating water: (1) whether the petitioner is suffering material injury; (2) whether the petitioner is diverting water efficiently and without waste; and (3) whether the respondent junior-priority water right holders are using water efficiently and without waste. These are three distinct inquiries.

Rule 40.03 references Rule 42. Rule 42 is labeled “Determining Material Injury **and Reasonableness of Water Diversions.**” IDAPA 37.03.11.042 (emphasis added).

The Rule states:

Factors the Director **may** consider in determining **whether the holders of water rights are suffering material injury and using water efficiently and without waste** include, but are not limited to the following:

- a. The amount of water available in the source from which the water right is diverted.
- b. The effort or expense of the holder of the water right to divert water from the source.
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- e. The amount of water being diverted and used compared to the water rights.
- f. The existence of water measuring and recording devices.
- g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices;

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

IDAPA 37.03.11.042.01(a)-(h) (emphasis added). When responding to a water call, and in consideration of CMR 42 factors, "the burden is not on the senior water rights holder to re-prove an adjudicated right." AFRD #2, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). The Idaho Supreme Court has held:

While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

Id.

The language emphasized above in Rule 42 makes it clear that the rule applies to both: (1) material injury determinations; and (2) waste determinations. In its opening memorandum, Rangen only addressed the amount of water available in the source, the amount of water it is presently receiving and beneficially using, and the impact of junior-priority groundwater pumping because the remaining factors in this Rule either do not apply (e.g., (d) applies to situations involving irrigation water, not water used for fish propagation) or relate to the issue of waste – a defense that the Intervenors have the burden of proving at the hearing by clear and convincing evidence. See A&B Irr. Dist.

v. IDWR, 153 Idaho 500, 284 P.3d 225, 249 (2012). The Idaho Supreme Court explained in A&B Irrigation District that:

This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; **and it would take more than a theory, and, in fact, clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator**, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five percent of it never returns to the stream, it is pretty clear that not exceeding twenty-five percent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.

A&B Irr. Dist., 284 P.3d at 244 (citing *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904) (emphasis added and in original)). The bottom line is that reading Rule 42 to contain eight material injury factors is contrary to the plain language of the Rule, and would result in unconstitutional burden shifting. See p. 38 of Memorandum Decision and Order on Petition for Judicial Review (May 4, 2010) attached as Exhibit G to Haemmerle Aff.). As such, the Intervenor's legal analysis should be rejected when determining whether Rangen is entitled to partial summary judgment on the issue of material injury.

B. The Intervenor's Alleged Issues of Fact are Defenses that They Bear the Burden of Proving by Clear and Convincing Evidence at the Hearing.

The Intervenor's contend that Rangen's Motion for Partial Summary Judgment cannot be granted because there are genuine issues of material fact with respect to: (1) Rangen's 1977 water right; (2) Rangen's source; (3) whether Rangen "needs" the water it has been decreed; (4) water measurements; and (5) conservation practices such as pump-back options. The Intervenor's arguments are flawed.

1. The Intervenors Cannot Challenge the 1977 Water Right Except in the Context of a Defense Such as Futile Call which Must Be Proven by Clear and Convincing Evidence.

The Intervenors contend that summary judgment cannot be granted because there are genuine issues of material fact as to whether Rangen's 1977 water right was issued in error. The District Court has already held that Rangen's 1977 water right and the partial decree that was entered cannot be challenged except in the context of a defense such as futile call. In 2005, Rangen challenged the Department's ruling that the 1977 water right was issued in error. Rangen filed a Motion for Interim Administration of its 1977 water right alleging that the Department was refusing to administer the right as decreed. See Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration (November 17, 2005) (attached hereto). Although the Court determined that Rangen's motion was premature because the Director of the Idaho Department of Water Resources had not yet clarified the Second Amended Order through administrative proceedings (Rangen requested a hearing on the Second Amended Order, but no hearing was ever granted), the Court explained that Rangen's 1977 right cannot be challenged except in the context of a defense such as futile call:

The *Partial Decree* issued for 36-07694 is a judgment certified as final pursuant to I.R.C.P. 54(b). To the extent the license, director's recommendation and *Partial Decree* were alleged to be issued in error; those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of prior existing conditions in the context of applying a "material injury" analysis through the application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq.* IDWR's Rules for Conjunctive Management are not elements of a water right nor have they been incorporated into the general provision on connected sources.² See *Connected Sources General Provision; Memorandum Decision and Order of Partial Decree*, Subcase 91-00005 (Feb. 27, 2002). Prior existing conditions might be relevant, however, in explaining why in a particular circumstance a call is futile. See *discussion infra*. In this case, it is not entirely clear why the Director included the conclusion that the *Partial Decree* was issued in error in the *Second Amended Order* or if the conclusion served as the basis for the Director's refusal to administer Rangen's water right.

See Order at p. 8 (attached to Brody Aff.). If the Intervenor want to raise the 1977 right as a defense to Rangen's call, they can do so at the hearing in May. Any alleged issues of fact pertaining to the 1977 right cannot be used to defeat Rangen's Motion for Partial Summary Judgment on material injury.

2. The Intervenor Cannot Challenge Rangen's Decreed Source.

The Intervenor contend that there are genuine issues of material fact as to whether the source of Rangen's water is groundwater or spring water. Specifically, they argue that Rangen's water is groundwater and that Rangen should be required to drill a horizontal well. Rangen's partial decrees list the source of water as "Martin-Curren Tunnel." The Department's Adjudication Rules specify how water sources are to be listed in the claim forms used in the Snake River Basin Adjudication ("SRBA"). Those forms are the basis for the partial decrees that are entered in the SRBA. Rule 37.03.01.060.02.c states:

Source of Water Supply. The source of water supply shall be stated at item three (3) of the form.

i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. If no official name has been given, the name in local common usage should be listed. If there is no official name, the source should be described as “unnamed stream” or “spring.” The first named downstream water source to which the source is tributary shall also be listed. **For ground water sources, the source shall be listed as “ground water.”**

IDAPA 37.03.01.060.02.c (emphasis added).

Rangen’s decree follows the format required for surface water. It describes the source as the “Martin-Curren Tunnel,” the name of the springs in local common usage. Rangen’s decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of the tributary is unique to surface water sources. Rangen’s decrees do not specify the source as “ground water” as required if the source is, in fact, ground water.

The Intervenors are asking the Director to step-in and change the source on Rangen’s decree from the “Martin-Curren Tunnel” tributary to Billingsley Creek to “ground water.” The Intervenors cannot make a collateral attack on Rangen’s decreed source. See Order at p. 8 (attached to Brody Aff.). As such, this is not an issue which precludes the Director from granting Rangen’s Motion for Partial Summary Judgment.

3. Whether Rangen “Needs” the Water is Not a Proper Inquiry.

The Intervenors argue that Rangen’s Motion for Partial Summary Judgment should not be granted because there are genuine issues of material fact as to whether Rangen “needs” the water to accomplish its beneficial use. This is not a proper characterization of the inquiry that must be made. The inquiry that the Director must make is whether Rangen can put the water to beneficial use in a manner that does not

result in waste. Waste is a defense that the Intervenors must raise and prove at the hearing by clear and evidence. Waste is an entirely distinct issue from material injury, and any issues of fact pertaining to waste should not preclude the Director from granting Rangen's Motion for Partial Summary Judgment. See Section A above.

4. Sullivan's Speculation About Rangen's Water Measurements Does Not Preclude Summary Judgment.

The City of Pocatello contends that summary judgment should not be granted because Sullivan, their expert, raises concerns about the accuracy of Rangen's water measurements. The essence of Sullivan's opinion is that Rangen is ". . . significantly under-measuring the flows through the raceways and at the Lodge Dam. The extent of the under-measurement could range from 30 to 40 percent or more." See Sullivan's Rebuttal Report, p. 13 (emphasis added). While Rangen disputes Sullivan's conclusions, even if they are accepted as true, his opinions are not sufficient to raise genuine issues of material fact. It is well understood that the non-moving party's opposition to summary judgment must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. Harpole v. State of Idaho, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998). In addition, where ". . . an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing the motion for summary judgment, but rather the trial judge is free to arrive at the most probable inference to be drawn from uncontroverted evidentiary fact." Read v. Harvey, 141 Idaho 497, 499, 112 P.3d 785, 787 (2005).

Sullivan does not give the opinion that Rangen is receiving all of the amounts decreed under its rights. Sullivan speculates that Rangen's measurements "could" be off by 30-40 percent or more. Offering the opinion that the measurements "could" be off by

this percentage, does not defeat summary judgment. An opinion has to be anchored in something more than speculation. Harpole v. State of Idaho, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998). Moreover, even if Rangen's measurements were off by the 40 percent that Sullivan claims it "could" be and this fact were to be accepted as uncontroverted for purposes of this motion, the only reasonable inference that can be drawn is that Rangen is still being materially injured by junior-priority groundwater pumping. Rangen's current flows average between 14-15 cfs. If these measurements were off by 40%, it would mean that the spring flows are, on average, between 19.6 – 21 cfs. Rangen's water rights, even without the 1977 right which the Intervenor contend should not have been issued, entitle Rangen to 50 cfs of water. This means that even if one were to accept Sullivan's opinions, Rangen is still receiving only about 40 percent of the water to which it is entitled even without the 1977 right. This is material injury and summary judgment should be granted in favor of Rangen on this issue.

5. Any Argument Concerning Conservation Practices is a Defense that Must be Proven by the Intervenor at Hearing by Clear and Convincing Evidence

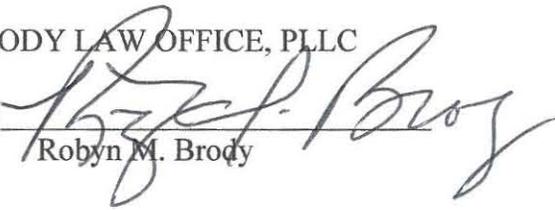
The Intervenor's final argument is that summary judgment should be denied because there are genuine issues of material fact as to whether Rangen's means of diversion are reasonable. Specifically, they argue that Rangen is not delivering all available first use water to its raceways and ought to use a pump system to accomplish this. The inefficient use of water falls under the rubric of waste. Waste is a defense that the Intervenor must prove by clear and convincing evidence at trial. Waste has no impact on whether Rangen's Motion for Partial Summary Judgment can be granted.

III. CONCLUSION

Rangen's Motion for Partial Summary Judgment is limited in scope. It seeks one determination -- that Rangen is suffering material injury as a result of junior-priority groundwater pumping from a hydraulically connected source. The "issues of fact" that the Intervenor has raised are really defenses related to futile call and waste. Rangen has established material injury as a matter of law and its Motion for Partial Summary Judgment should be granted. The Intervenor can present their waste and futility arguments at the hearing in May.

DATED this 18th day of February, 2013.

BRODY LAW OFFICE, PLLC

By: 

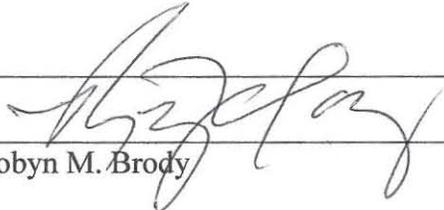
Robyn M. Brody

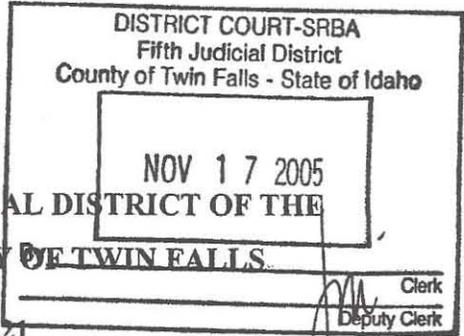
CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 18th day of February, 2013 she caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

<p>Original: Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input checked="" type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>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</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>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</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI Kittredge Building, 511 16th Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson, L.L.P.</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p>

<p>195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 Facsimile: (208) 735-2444 ttt@idahowaters.com jks@idahowaters.com</p>	<p>E-Mail <input checked="" type="checkbox"/></p>
<p>C. Thomas Arkoosh Arkoosh Eiguren P.O. Box 2900 Boise, ID 83702 Tom.arkoosh@aelawlobby.com</p>	<p>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"/></p>
<p>W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p>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"/></p>
<p>Jerry R. Rigby Hyrum Erickson Robert H. Wood Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com</p>	<p>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"/></p>


 Robyn M. Brody



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: 92-00021
) (Interim Administration)
) ORDER ON MOTION TO ENFORCE
) ORDER GRANTING STATE OF
) IDAHO'S MOTION FOR INTERIM
) ADMINISTRATION
)

Holding: Court has jurisdiction to enforce its own orders. Basis for Director's Order is ambiguous. The Director is in the best position to clarify any ambiguity through the administrative process, not this Court. Rangen's Motion is premature until such time as the basis for the Director's Order has been clarified, and it is clear at that time, that the Director acted in violation of this Court's Order. In the exercise of discretion, Court is cautious not to set precedence for "reviewing" administrative decisions under the ostensible purpose of enforcing compliance with orders granting interim administration.

I. APPEARANCES

Jeffrey C. Fereday, Michael C. Creamer, Brad V. Sneed, Givens Pursley LLP, Boise, Idaho, for Idaho Ground Water Appropriators, Inc.

Daniel V. Steenson, Ringert Clark Chartered, Boise, Idaho, for John W. Jones, Jr. and Deloris D. Jones, Blue Lakes Trout Farm, Inc., Billingsley Creek Ranch, Buckeye Farms, Inc., and Western Legends LLC ("Spring Users").

Travis L. Thompson, John K. Simpson, Barker, Rosholt and Simpson, LLP, Twin Falls, Boise, Idaho, for Twin Falls Canal Company and Clear Springs Foods, Inc.

W. Kent Fletcher, Fletcher Law Office, Burley, Idaho, for Minidoka Irrigation District.

David Gehlert, Gail McGarry, United States Department of Justice, Denver, Colorado, for United States of America.

James Tucker, Idaho Power Co., Boise, Idaho, James S. Lochhead, Adam T. DeVoe, Brownstein Hyatt & Farber, P.C., Denver, Colorado, for Idaho Power.

II. PROCEDURAL HISTORY

- A. On November 19, 2001, the State of Idaho filed a *Motion for Order of Interim Administration and Motion for Order Expediting Hearing* in Basins 35, 36, 42 and 43 pursuant to I.C. § 42-1417.
- B. On January 8, 2002, this Court issued an *Order Granting Interim Administration* authorizing the Idaho Department of Water Resources (IDWR) to undertake interim administration in Basin 35, 36, 41, and 43. Soon after, in accordance with Title 42, Chapter 6, Idaho Code, the Director of IDWR (Director) created Water District No. 120 and Water District No. 130. Over the next two years, the Water Districts' boundaries were revised to include a portion of Basin 37 and a portion of Basin 29.
- C. The movant in this matter, Rangen, Inc. (Rangen), holds water right nos. 36-15501, 36-02551, and 36-07694, all of which have been partially decreed in the SRBA. The source of these water rights is the Curran Spring, part of the Malad Gorge reach discharging into the Thousand Springs complex.
- D. Rangen made delivery calls on its water rights on September 23, 2003, and October 6, 2003. The Director responded with an order dated February 25, 2004 and an amended order dated March 10, 2004. On March 10, 2004, Rangen, the State of Idaho, and parties to the contested case resulting from Rangen's request for administration executed the *Eastern Snake Plain Aquifer, Mitigation Recovery, and Restoration Agreement for 2004*. Pursuant to the *Agreement*, pending delivery calls were stayed until March 15, 2005. On March 14, 2005, the Director rescinded the March 10, 2004, *Amended Order*. After the *Agreement* expired and the stay was lifted, the Director issued a *Second Amended Order* on May 19, 2005, in response to Rangen's calls.
- E. On June 3, 2005, Rangen filed with IDWR *Rangen, Inc.'s Petition Requesting Hearing on Second Amended Order of May 19, 2005 and Requesting Appointment of an Independent Hearing Officer* requesting a hearing on the *Second Amended Order*.

F. On August 24, 2005, Rangen, by and through its counsel of record, filed with this Court a *Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* alleging that IDWR was not administering Rangen's water right 36-07694 according to the partial decree. Rangen was joined in its motion by Minidoka Irrigation District, Twin Falls Canal Company, Clear Springs Foods, Inc. *et al.*, various "spring users," Idaho Power, and, in some respects, the United States of America. The *Motion* was opposed by the State of Idaho and Idaho Ground Water Appropriators, Inc.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Rangen's Motion was heard on October 14, 2005. The parties did not request any additional briefing in this matter and the Court requires none. Therefore the matter is deemed fully submitted for decision following business day, October 17, 2005.

IV.

DISCUSSION

A. Issue raised in *Motion*.

At issue are the Director's findings of fact in the *Second Amended Order*, which provide:

62. Water right no. 36-07694 was licensed on September 19, 1985, and has an authorized diversion rate of 26.00 cfs. The authorized diversion rate, as licensed, was not based on measurements of the amount of water actually diverted and applied to beneficial use. Rather, the authorized diversion rate was based on an estimate (not an actual measurement) made by George Lemon, a former watermaster for Water District No. 36A, of the discharge from the Curran Spring at or near its seasonal maximum flow in October of 1972. This estimate of the discharge from the Curran Spring was made nearly 5 years before the application for permit to appropriate water was filed for water right no. 36-07694.

63. Based on available records, there was not water available for appropriation at the time or subsequent to the date of appropriation for water right no. 36-07694. Therefore, the Department erred in licensing water right no. 36-07694, and should not have recommended this right for decree in the SRBA. Nonetheless, since the SRBA District Court decreed water right no. 36-07694, Rangen may be entitled to divert water under this right when such water is physically available. However, because water

was not available to appropriate on the date of appropriation for right no. 36-07694, Rangen may not be entitled to have a delivery call recognized against junior water rights.

Second Amended Order at p.14-15. The Director's conclusions of law also provide:

27. Based on available records, there has never been water available for water right 36-07694 (See Finding 63). The exercise of junior priority ground water rights cannot reduce the quantity of water available for water right no. 36-07694 since water has never been available anyway. Therefore, there is no material injury to water right no. 36-07694 caused by the diversion and use of ground water under junior priority rights. Even if water had been available at one time to partially or completely satisfy water right no. 36-07694, the delivery call would still be futile and no material injury would be found. See Conclusion 25.

Id. at 29.

Among other things, the Director concluded in his *Second Amended Order* that water right 36-07694 was licensed and subsequently decreed in error. This conclusion was based on a reexamination of historic spring flow levels at the time the water right was appropriated. Rangen alleges that the Director effectively re-adjudicated water right 36-07694. Rangen asserts that in administering adjudicated water rights, the Director cannot look behind the face of the decree at conditions in existence at the time the right was appropriated to determine how the right should be administered. Rangen seeks an order from this Court enforcing its *January 8, 2002, Order*, which permitted IDWR to administer water rights in accordance with the director's reports or partial decrees as provided by Idaho Code § 42-1417. Rangen's *Motion* only pertains to this particular part of the Director's *Second Amended Order*. Rangen's *Motion* does not put at issue any other basis which may also, or alternatively, support the Director's determination, such as futile call, material injury or the overall application of IDWR's administrative rules on conjunctive management. The various Spring Users appear in support of Rangen's *Motion*.

The State of Idaho in briefing and at oral argument acknowledged that that the Director may not look behind the face of the partial decree in administering water rights. However, the State argues that the Director's findings and conclusion that the water right was issued in error are merely dicta and did not serve as the basis for the *Second Amended Order* and the refusal to deliver Rangen's water right. The State has also raised

the issue of this Court's jurisdiction in accordance with the limitations imposed by I.C. § 42-1401D, which limits the jurisdiction of the SRBA Court regarding review of an agency action of IDWR, and I.C. § 67-5271 of the *Idaho Administrative Procedure Act*, Chapter 52, Title 67, Idaho Code, which requires the exhaustion of administrative remedies prior to seeking review of an agency action.

B. Jurisdiction over Rangen's Motion is proper in the SRBA Court.

Idaho Code §42-1401D does not deprive this court of jurisdiction to enforce its own orders. That statute was enacted in response to the decision in *Sagewillow, Inc. v. Idaho Department of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000) (Sagewillow I). The statute provides as follows:

42-1401D Jurisdictional limitation. Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter. Venue and jurisdiction over any such action pending on the effective date of this section [March 2, 2001], or initiated subsequent thereto, shall be in the district court as authorized under the provisions of section 67-5272, Idaho Code, without regard to any other provision of law.

In *Sagewillow, Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003) (Sagewillow II), the Idaho Supreme Court explained the statute as follows:

In response, the legislature enacted Idaho Code § 42-1401D to provide that judicial review of Department actions that are subject to review under the Idaho Administrative Procedure Act shall not be heard in the Snake River Basin Adjudication district court, but shall be heard in the district court authorized by Idaho Code § 67-5272. Ch. 31, § 2, 2001 Idaho Sess.Laws 47, 48.

Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003). All that is prohibited is review by this Court of IDWR decisions under the *Administrative Procedure Act*. In an appropriate case, therefore, this Court would have jurisdiction to enforce its own orders not involving review of IDWR's actions under the *Administrative Procedure Act*.

Idaho Code § 42-1417 allows any party to the adjudication to motion the Court to permit water rights to be administered on an interim basis pending the entry of a final unified decree in the SRBA. The statute, upon order of the Court, authorizes the distribution of water rights within a water district on an interim basis in accordance with either the director's reports or the superceding partial decrees. IDWR has been administering water rights in Water District 130 pursuant to this Court's January 8, 2002, *Order Granting Interim Administration (Order)*.

The decision to permit administration on an interim basis pending the entry of a superceding final unified decree is not an agency action but rather an action of this Court. The Court's *Order* specifically authorized interim administration pursuant to director's reports or partial decrees. This Court has jurisdiction over the orders it issues during the pendency of the SRBA for two reasons. First, a court retains jurisdiction to enforce its unsuperceded judgments. I.C. § 1-1603 (4) (court vested with power to enforce its judgments and orders). Secondly, the Court's *Order* was not certified as final pursuant to I.R.C.P. 54(b). Within the overall context of the SRBA the *Order* is still considered interlocutory. A court is free to change an order pending entry of a final judgment or in the case of the SRBA, a partial decree. *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994) (court may reconsider legal rulings before a final judgment is entered).¹ Therefore, to the extent that compliance with a term or condition of this Court's *Order* is clearly at issue, the matter is properly brought before this Court. If for example, IDWR administered water rights according to an old decree, such as the *New International Decree*, rather than according to superceding partial decrees issued in the SRBA, IDWR would be clearly acting contrary to this Court's orders. At the other extreme, issues pertaining to the manner in which IDWR carries out its administrative functions do not directly implicate the terms and conditions of this Court's *Order* and

¹ An issue pertaining to this Court's jurisdiction was raised in the context of the stipulated agreement entered with respect to the federal claims brought under the Wild and Scenic Rivers Act. In those subcases concerns raised by this Court with respect to continuing jurisdiction were distinguishable in several respects. The *Orders of Partial Decree and Partial Decrees* at issue were certified as final pursuant to I.R.C.P. 54(b). The continuing jurisdiction provision was intended to extend beyond the pendency of the SRBA and the entry of a final unified decree. The terms of the stipulation also exceeded beyond merely defining the elements of a water right and specifically addressed how water rights within the water district would be administered.

jurisdiction over those actions or review of those actions may not be “bootstrapped” in under the purview of the Court’s *Order*.

In this case, it is alleged that the Director is acting in contravention of the Court’s *Order* by administering Rangen’s water right according to spring flows existing at the time the right was appropriated as opposed to the right’s decreed elements. Therefore, the terms of this Court’s *Order* permitting interim administration are directly implicated and jurisdiction over the matter is proper.

C. Although jurisdiction is proper, Rangen’s *Motion* is premature until the basis for Director’s *Second Amended Order* has been clarified through administrative proceedings.

After reviewing the Director’s *Second Amended Order*, reading the briefing submitted and hearing the arguments of counsel, it appears that the basis of the Director’s *Second Amended Order* is somewhat ambiguous. Rangen argues that the Director simply refused to administer the water right because the *Partial Decree* and the license which formed the basis for the recommendation were issued in error. Refusal to administer Rangen’s water right on that basis would be contrary to this Court’s *Order* and Idaho law. A partial decree in the SRBA is conclusive as to the nature and extent of the water right. I.C. § 42-1401A (5) and I.C. § 42-1420. In *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998), the Idaho Supreme Court specifically addressed the significance of a partial decree in the SRBA in the context of whether to include a general provision in a partial decree.

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 the 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.

Id. at 16, 951 P.2d at 947 (internal citations omitted).

The *Partial Decree* issued for 36-07694 is a judgment certified as final pursuant to I.R.C.P. 54(b). To the extent the license, director's recommendation and *Partial Decree* were alleged to be issued in error; those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of prior existing conditions in the context of applying a "material injury" analysis through the application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq.* IDWR's Rules for Conjunctive Management are not elements of a water right nor have they been incorporated into the general provision on connected sources.² See *Connected Sources General Provision; Memorandum Decision and Order of Partial Decree*, Subcase 91-00005 (Feb. 27, 2002). Prior existing conditions might be relevant, however, in explaining why in a particular circumstance a call is futile. See *discussion infra*. In this case, it is not entirely clear why the Director included the conclusion that the *Partial Decree* was issued in error in the *Second Amended Order* or if the conclusion served as the basis for the Director's refusal to administer Rangen's water right.

The State argues that the Director's references to the conditions as they existed at the time the water right was appropriated were merely dicta and did not serve as a basis for the Director's *Second Amended Order*. Rangen has three separate water rights originating from the same source, each with a different priority date. Water right 36-15501 was decreed with a priority date of July 1, 1957; water right 36-02551 was decreed with a priority date of July 13, 1962 and water right 36-07694 was decreed with a priority

² In the Basin-Wide Issue 5 proceedings, then Presiding Judge Roger S. Burdick specifically rejected the inclusion of the language "shall be administered conjunctively" in the general provision recommended to define the relationship between ground and surface water for purposes of administration. See *discussion Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits*, Subcase 91-00005 (Basin-Wide Issue 5) pp. 28-30 (July 2, 2001). The concern was that the term "conjunctively" could be construed to refer to (and thus incorporate into a partial decree) IDWR's rules on conjunctive management. *Id.* There was additional concern that the term could be construed a term of art or concept used to describe the combined administration of ground and surface water sources in a manner other than in accordance with the prior appropriation doctrine, as opposed to giving the term its plain ordinary meaning. *Id.*

date of April 12, 1977. The State of Idaho argues that the Director specifically concluded that based on the ground water model:

[T]he delivery call against ground water rights junior in priority to July 13, 1962, to supply water right no. 36-02551 is futile because an insignificant quantity of water would accrue to the entirety of the Thousand Springs to Malad Gorge spring reach (*see* IDAPA 37.03.11.010.08), and since the diversion and use of ground water under rights junior in priority to July 13, 1962, do not significantly affect the quantity of water available for water right no. 36-02551, there is no material injury to water right no. 36-02551 (*see* IDAPA 37.03.11.042.01.c).

Second Amended Order at 28. The State argues that because water rights 36-02551 and 36-07694 are derived from the same source, if a delivery call is futile for 36-02551 with a July 13, 1962, priority, by implication a delivery call for 36-07694 with a junior priority of April 12, 1977, would also be futile. This Court agrees generally with the analysis; however, this Court is not making implied findings or conclusions on behalf of the Director. In addition, to the extent the Director is relying in part on a re-examination of the underlying validity of Rangen's water right as a basis for his determination, this point should be clarified by the Director, since other similarly situated parties are participating in Rangen's *Motion*.

Another plausible interpretation of the Director's *Second Amended Order* is that the references to the existing conditions were included to explain why the call for water right 36-07694 was futile. If, for example, spring flows were declining at the time the water right was appropriated as a result of changes in irrigation delivery practices on the Eastern Snake River Plain, the Director's conclusion may explain why curtailment of water rights on the Eastern Snake River Plain would not result in resumption of flows to the source of the springs. If some of the source historically supplying the spring flow was in excess of naturally occurring flows and created by irrigation practices no longer in use, curtailing water users on Eastern Snake River Plain may not result in the resumption of spring flows. In such a case a call would be futile. In that case, the Director's conclusion is not a re-examination of an element of the underlying water right but instead an explanation as to why the curtailment of juniors would be futile.

Because there are multiple explanations regarding why the Director may have included the conclusion that the *Partial Decree* for Rangen's water right was issued in error, and because it is unclear the extent, if any, to which the Director relied on the conclusion, the Court finds the *Second Amended Order* to be ambiguous for purposes of Rangen's *Motion*. The purpose of Rangen's *Motion* is to enforce the terms of this Court's *Order*, not have this Court engage in a *de facto* administrative review of the underlying basis for the Director's action.

V. CONCLUSION

In sum, at this stage in the administrative proceedings, the basis for the Director's *Second Amended Order* is ambiguous. Rangen has already invoked the administrative process and has not exhausted its administrative remedies to the point where the basis for the Director's *Second Amended Order* can be clarified. The Director is in the best position to clarify the basis for his *Second Amended Order*, not this Court. Accordingly, Rangen's *Motion* is premature at this time. Once the Director has been given the opportunity to respond to the issues raised by Rangen and clarify the basis for his *Second Amended Order*, it may then be appropriate for Rangen to come back into this Court, if Rangen determines that its *Partial Decree* is being disregarded in contravention of this Court's *January 8, 2002, Order*.

Prior to the entry of a final unified decree all administration in the Snake River Basin will be pursuant to orders of interim administration pursuant to I.C. § 42-1417. In an abundance of caution and in the exercise of its discretion, this Court is reluctant to set a precedence for "reviewing" the Director's decisions every time there is a dispute concerning administration under the ostensible purpose of enforcing compliance with its various orders granting interim administration. The SRBA Court is not the proper forum for hearing such disputes unless it is clear that the Director has acted in violation of one of this Court's orders. In this case, the basis for the Director's conclusion is not entirely clear.

VI.
ORDER

Based upon the foregoing, Rangen's *Motion* to have this Court enforce its *Order Granting Interim Administration* issued January 8, 2002, is premature at this time and is therefore **Denied**.

Dated November 17, 2005



John M. Melanson
Snake River Basin Adjudication
Presiding Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ENFORCE ORDER GRANTING STATE OF IDAHO'S MOTION FOR INTERIM ADMINISTRATION was mailed on November 17, 2005, with sufficient first-class postage to the following:

INTERIM ADMINISTRATION

BILLINGSLEY CREEK RANCH
BLUE LAKES TROUT FARM INC.
BUCKEYE FARMS, INC.
JOHN W JR JONES
WESTERN LEGENDS, LLC

Represented by:
DANIEL V. STEENSON
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

RANGEN, INC

Represented by:
J JUSTIN MAY
PO BOX 6091
BOISE, ID 83707
Phone: 208-429-0905

IDAHO POWER COMPANY

Represented by:
JAMES C. TUCKER
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707
Phone: 208-388-2200

IDAHO POWER COMPANY

Represented by:
JAMES S LOCHHEAD
ADAM T DEVOE
BROWNSTEIN HYATT & BARBER PC
410 17TH STREET, 22ND FL
DENVER, CO 80202
Phone: 303-223-1100

CLEAR SPRINGS FOODS INC

Represented by:
JOHN K. SIMPSON
205 N 10TH ST, STE 520
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

IDAHO GROUND WATER

Represented by:
MICHAEL C. CREAMER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

TWIN FALLS CANAL COMPANY

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
TWIN FALLS, ID 83301-6167
Phone: 208-733-0700

UNITED STATES OF AMERICA

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

MINIDOKA IRRIGATION DISTRICT

Represented by:
W. KENT FLETCHER
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098