

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

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

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.*

RECEIVED  
FEB 12 2014  
DEPARTMENT OF  
WATER RESOURCES

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 MOTION FOR  
RECONSIDERATION AND  
CLARIFICATION**

Rangen, Inc., by and through its attorneys, and pursuant to I.C. § 67-5246(4) submits the following Motion for Reconsideration and requests that the Director alter the Final Order Regarding Rangen, Inc.'s Petition for Delivery Call in the following manner:

1. **Find as a matter of law that Rangen's decreed source "Martin-Curren Tunnel" encompasses the entire spring complex that forms the headwaters of Billingsley Creek.** The Director has determined that the source of Rangen's water is limited to the water that flows from the mouth of the Martin-Curren Tunnel itself, and not the entire spring complex that forms the headwaters of Billingsley Creek. The Director

has failed to consider that IDAPA 37.03.01.060.02.c requires that a source in a decree be identified using its name in local common usage if there is no official name. The term “Martin-Curren Tunnel” is the name in local common usage for the water that comes from the mouth of the tunnel itself and the entire spring complex that forms the headwaters of Billingsley Creek. The Department of Water Resources has consistently and correctly interpreted the term “Martin-Curren Tunnel” to encompass the entire spring complex that forms the headwaters of Billingsley Creek. The Director and the Department are precluded by the doctrine of quasi-estoppel from changing this interpretation.

At worst, the term “Martin-Curren Tunnel” is ambiguous. The ambiguity is “latent” because although the term may appear to have a clear meaning on its face, the term loses that clarity when the facts are applied to this case. See Knipe Land Co. v. Robertson, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) (citations omitted). The Director failed to find that the source identified in Rangen’s partial decrees is ambiguous and failed to consider the parol evidence necessary to resolve the latent ambiguity in Rangen’s favor. See Williams v. Idaho Potato Starch Co., 73 Idaho 13, 20, 245 P.2d 1045, 1048-49 (1952). See also Rangen, Inc.’s Closing Brief, § II, B.1 – II.B.3.

2. **Find as a matter of law that Rangen’s Partial Decrees allow the diversion of the springs that form the headwaters of Billingsley Creek.** In deciding the issues pertaining to Rangen’s point of diversion, the Director did not consider IDAPA 37.03.01.060.05.d, the rule that governs how points of diversion are claimed in the SRBA, as that rule existed at the time Rangen’s Partial Decrees were entered. The

Director also did not consider that Rangen has a diversion structure that lies in two different quarter/quarter/quarter sections that sit right next to each other and that the point of diversion set forth in Rangen's Partial Decrees is correct based on IDAPA 37.03.01.060.05.d as that rule existed at the time that Rangen's Partial Decrees were entered. Specifically, the point of diversion identified in Rangen's Partial Decrees is the nearest ten acre tract. As with the source element of Rangen's decrees, the Department of Water Resources has consistently and correctly interpreted the ten acre tract specified in the Partial Decrees to be the *nearest* ten acre tract and to accurately describe Rangen's diversion structure. The Director and the Department are precluded by the doctrine of quasi-estoppel from changing this interpretation.

3. **Find as a matter of law that IGWA and Pocatello have not demonstrated efficient use of water without waste.** The Director has not made any findings with regard to IGWA and Pocatello's efficient use of water. There is no evidence in the record to support Conclusion 59 that ". . . the junior-priority water right holders are using water efficiently and without waste."
4. **Omit conclusions 42 through 46 (references to 10 percent trimline) because they are not necessary to the Director's Opinion.** Based on Conclusions 48 and 49, the Director should eliminate any references to ESPAM 1.1. The 10 percent trimline mentioned in Conclusions 42 through 46, or as otherwise set forth in the findings or conclusions, was based on a conclusion of a prior Director that there was a 10 percent error in the application of ESPAM 1.1. Since there was no objective quantification of any error in ESPAM 2.1, the reference to ESPAM 1.1 and the 10 percent trimline is not necessary or relevant.

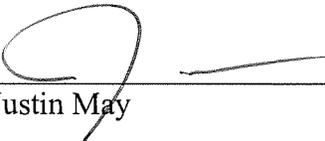
5. **The conclusions that Rangen received 63% of its entitled flows from the Martin-Curren Tunnel are not supported by substantial evidence in the record as a whole and, based on Rangen's Decrees, is not supported as a matter of law or fact.** Conclusions 21 and 22 are not supported by substantial evidence on the record as a whole. The conclusion that 63% percent of Rangen's flows come from the Martin-Curren Tunnel was based on the opinion of Greg Sullivan that Rangen's flow measurements were under-reported by 15.9%. This alleged measurement error was based his use of USGS flows. Sullivan's reliance on USGS flows is not supported by substantial evidence, and in particular, is not supported by the IDWR Staff opinion. Sullivan provided another regression analysis showing that Rangen receives 75% of its flows from the Marin Curren Tunnel. This regression was based on the assumption that there was no error in Rangen's reported flows. Based on IDWR's staff conclusions that the measurement error was only 6 to 7%, the substantial evidence is that Rangen receives more than 63% of flows from the Martin-Curren Tunnel.
6. **Finding 51 is not supported by substantial evidence in the record as a whole (Weir Coefficient).** Finding 51 that Greg Sullivan determined that the weir coefficient was 3.62 does not appear to support any legal conclusion, and therefore, is not necessary to the Director's Decision. Based on evidence in the record, the correct weir coefficient should be 3.33. Otherwise, the finding is not supported by substantial evidence in the record as a whole.
7. **Articulate the basis for the amounts designated in the mitigation phase-in.** Rangen requests that the Director clarify the Final Order by articulating how he

determined how much mitigation water must be delivered each year of the five-year phase-in. Specifically, his basis for concluding: Year One – 3.4 cfs; Year Two – 5.2 cfs; Year Three – 6.0 cfs; Year Four – 6.6 cfs; Year Five – 9.1 cfs.

By filing this Motion for Reconsideration, Rangen does not otherwise waive or surrender any issue which it is entitled to file under Petition for Judicial Review.

DATED this 12th day of February, 2014.

MAY, BROWNING & MAY, PLLC

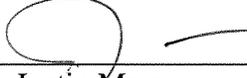
By:   
\_\_\_\_\_  
J. Justin May

## CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 12<sup>th</sup> day of February, 2014 he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

<p><b>Original:</b>          Director Gary Spackman          Idaho Department of Water          Resources          P.O. Box 83720          Boise, ID 83720-0098  <a href="mailto:deborah.gibson@idwr.idaho.gov">deborah.gibson@idwr.idaho.gov</a></p>	<p>Hand Delivery <input checked="" 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>Garrick Baxter          Chris Bromley          Idaho Department of Water          Resources          P.O. Box 83720          Boise, Idaho 83720-0098  <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>  <a href="mailto:chris.bromley@idwr.idaho.gov">chris.bromley@idwr.idaho.gov</a>  <a href="mailto:kimi.white@idwr.idaho.gov">kimi.white@idwr.idaho.gov</a></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>Randall C. Budge          TJ Budge          RACINE, OLSON, NYE, BUDGE          &amp; BAILEY, CHARTERED          201 E. Center Street          P.O. Box 1391          Pocatello, ID 83204  <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a>  <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</a></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>Sarah Klahn          Mitra Pemberton          WHITE &amp; JANKOWSKI          Kittredge Building,          511 16th Street, Suite 500          Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></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>Dean Tranmer          City of Pocatello          P.O. Box 4169          Pocatello, ID 83201  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></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>John K. Simpson  Travis L. Thompson  Paul L. Arrington  Barker Rosholt &amp; Simpson, L.L.P.  195 River Vista Place, Suite 204  Twin Falls, ID 83301-3029  Facsimile: (208) 735-2444  tlt@idahowaters.com  jks@idahowaters.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>C. Thomas Arkoosh  ARKOOSH LAW OFFICES  802 West Bannock, Suite 900  Boise, ID 83701  <u>Tom.arkoosh@arkoosh.com</u></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 &amp; 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>


---

J. Justin May