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DEPARTMENT OF  
WATER RESOURCES

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*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 BRIEF IN  
SUPPORT OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
RE: SOURCE**

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 Partial Summary Judgment Re: Source.

**I. PROCEDURAL BACKGROUND AND SUMMARY**

The Intervenors, through the expert witness reports of Charles M. Brendecke, Bern Hinckley and Gregory K. Sullivan, contend that Rangen's water rights at issue are ground water rights (as opposed to surface water) and that Rangen is limited to making a call based only on

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discharge from the mouth of the Martin-Curren Tunnel itself and not the entire spring complex that supplies Rangen's Research Hatchery. The Intervenor's arguments constitute an improper collateral attack on the Partial Decrees that have been entered in Rangen's favor in the SRBA. The Director cannot re-adjudicate the source of Rangen's water rights. Rangen's Partial Decrees establish that the Martin-Curren Tunnel is a surface water right – not ground water. Moreover, the term "Martin-Curren Tunnel" as it is used in Rangen's decree is a local name that refers to the entire spring complex that supplies the Research Hatchery. Because the source of Rangen's water rights cannot be readjudicated, the Director should enter judgment as a matter of law that the source of Rangen's water rights cannot be changed from "Martin-Curren Tunnel; Tributary: Billingsley Creek" to "Ground Water" and that its call is not limited only to water from the mouth of the Martin-Curren Tunnel itself.

## II. FACTS

This Motion addresses the source for Water Right Nos. 36-02551 and 36-07694. Both water rights were based on licenses and were subsequently adjudicated in the Snake River Basin Water Adjudication ("SRBA") resulting in the issuance of Partial Decrees in Rangen's favor.

### A. **Water Right No. 26-02551.**

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 p. 9<sup>1</sup> of *Haemmerle Aff. in Support of Motion for Partial Summary Judgment Re: Material Injury*, Exhibit A.

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.*

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<sup>1</sup> For ease of reference, the page numbers for documents attached to the *Haemmerle Aff.* are the page numbers shown by Adobe Acrobat when the pdf version of the file is opened.

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

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. See Exhibit 1 to *Brody Affidavit in Support of Motion for Partial Summary Judgment Re: Source* (hereinafter referred to as *Brody Aff.*) for a copy of the Partial Decree for Water Right No. 36-15501. 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." See *id.*; see also p. 9 of *Haemmerle Aff.* The only difference between the two rights is the priority date. Water Right No. 36-15501 has a priority date of 7/1/1957. See Exhibit 1 to *Brody Aff.* Water Right No. 36-02551 has a priority date of 7/13/62. See p. 9 of *Haemmerle Aff.*

5. The Department classifies the source of Rangen's water rights as "springs." The following is a snapshot of a Water Right and Adjudication Search for Water Right No. 36-15501 done on March 7, 2013 showing the Department's classification of Rangen's source as "springs":

Options	Basin	Sequence	Suffix	Application Number	Basis	Status	Priority Date	Div. Rate (cfs)	Source	Water Use	Owner
Details											
More Options	Water Right	36	15501		Decreed	Active	07/01/1957	1.46	SPRINGS	FISH PROPAGATION	RANGEN INC

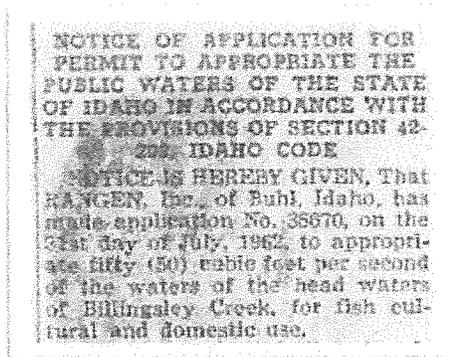
See Exhibit 3 to *Brody Aff.*

6. 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 pp. 74-75 of *Haemmerle Aff.*

7. 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." See p. 74 of *Haemmerle Aff.*

8. 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. See p. 49 of *Haemmerle Aff.*

9. 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." A snapshot of the State's legal notice shows:



P. 64 of *Haemmerle Aff.*

10. 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". The notice showed:

NOTICE OF PUBLICATION

Notice is hereby given that at 10:00 a.m., on the 5th day of September, 1963, at Buhl, County of Twin Falls, State of Idaho, before Eugene H. Christofferson proof will be submitted of the completion of works for the diversion of 50 cubic feet per second of the waters of the headwaters of Billingsley Creek in accordance with the terms and conditions of a certain permit heretofore issued by the State Reclamation Engineer of the State of Idaho.

P. 60 of *Haemmerle Aff.*

11. After Rangen completed the construction of its Research Hatchery, the State Water Rights Clerk sent Rangen a letter informing Rangen that the State would issue Rangen's License to use 50 cfs of surface water upon receipt of the statutory fees:

Upon receipt of the statutory fees, totaling \$22.00, we will issue the Certificate of Completion of Works for 50 c.f.s. and the License and Certificate of Water Right for 50 c.f.s. confirming the right, with priority of July 31, 1952, to the use of surface water from an underground spring of Billingsley Creek with the point of diversion in SW $\frac{1}{4}$  Sec. 32, T. 7 S, R. 14 E, B.M. for fish culture and domestic use in SE $\frac{1}{4}$  Sec. 31, T. 7 S, R. 14 E, B.M.

See p. 81 to *Haemmerle Aff.*

12. 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." See p. 78 of *Haemmerle Aff.* The Certificate showed:

TO ALL WHOM IT MAY CONCERN:

This is to certify that RANGEN, INC. of Buhl, Idaho, County of Twin Falls, and State of Idaho, the holder of Permit No. 30654, issued upon Application No. 36679, bearing date of priority of July 31, 1962, authorizing the diversion of 50.0 second feet of waters of underground springs, tributary of Billingsley Creek,

See *id.*

13. 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 1962

See p. 72 of *Haemmerle Aff.*

**B. Water Right No. 36-07694.**

14. 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. See p. 10 of *Haemmerle Aff.*

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

16. The Partial Decree for Water Right No. 36-07694 does not list the source of Rangen's water right as "Ground Water."

17. 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. See p. 199 of *Haemmerle Aff.* There is a handwritten designation of "Curran Tunnel" written into the source element on the Application for Permit:

<b>STATE OF IDAHO</b>	
<b>DEPARTMENT OF WATER RESOURCES</b>	
<b>APPLICATION FOR PERMIT <span style="float: right;">APPROVED</span></b>	
To Appropriate the Public Waters of the State of Idaho (TYPE OR PRINT IN INK)	
1. Name of applicant	<u>Rangen, Inc.</u> Phone: <u>543-6421</u>
post office address	<u>Buhl, ID</u> <u>CURRAU TUNNEL</u>
2. Source of water supply	<u>underground springs</u> which is a tributary of <u>Billingsley Creek</u>
3. a. Location of point of diversion is	<u>SW</u> ¼ of <u>NW</u> ¼ of Section <u>32</u> Township <u>7S</u> Range <u>14E</u> S.M. <u>Gooding</u> County; additional points of diversion if any: _____

See *id.*

18. On January 29, 1979, IDWR 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

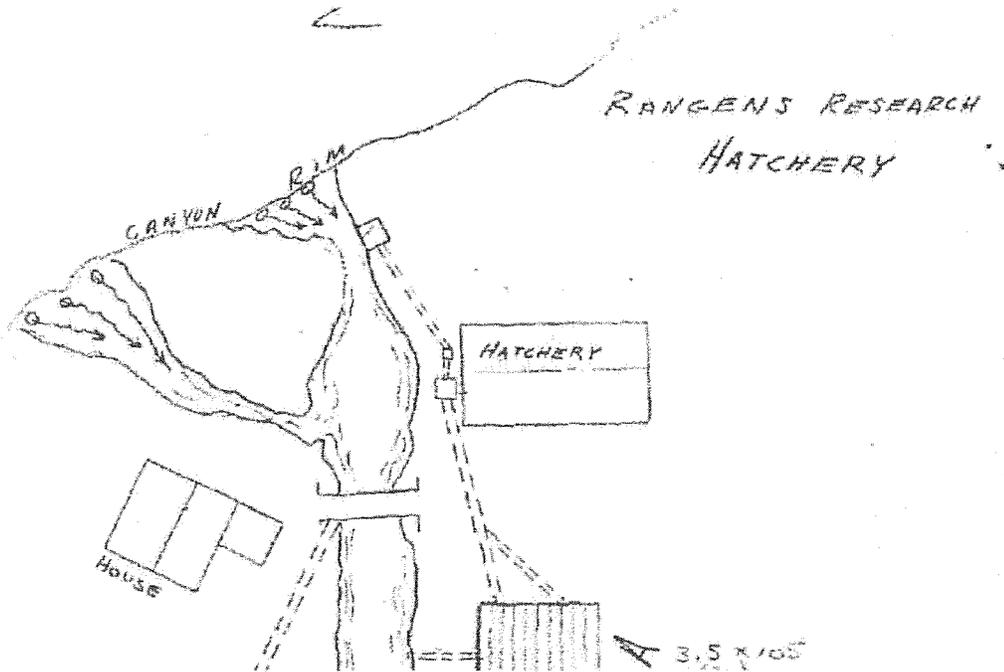
LYN BADING?  
537 #191

1. Name of permit holder Rangen, Inc.  
Post office address Bull, 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

See p. 183 of *Haemmerle Aff.*

19. 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:



See p. 187 of *Haemmerle Aff.*

20. The Department of Water Resources issued a License to Rangen for Water Right No. 37-7694 on September 19, 1985. See pp. 197-97 of *Haemmerle Aff.* 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 <u>RANGEN, INC.</u>			
of <u>Buhl, Idaho</u> , has complied with the terms and conditions of Permit			
No. <u>36-7694</u> issued pursuant to Application for Permit dated <u>April 12, 1977</u> ,			
and has submitted proof to the Department of Water Resources on <u>June 7, 1978</u> ,			
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 <u>76.0 cfs</u> of water from <u>springs</u> ,			
tributary to <u>Billingsley Creek</u> , and that the permit holder has applied to a beneficial use and			
established a right to use water as follows:			
<u>Beneficial Use</u>	<u>Period of Use</u>	<u>Rate of Diversion</u>	<u>Annual Volume</u>
<u>Fish Propagation</u>	<u>from January 1 to December 31</u>	<u>at 26.0 cfs</u>	<u>and N/A</u>

See p. 196 of *Haemmerle Aff.*

21. 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:

<p><b>CONDITIONS OF APPROVAL</b></p> <p>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.</p> <p>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.</p> <p>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.</p> <p>Facility Volume = 287,640 cubic feet</p> <p>A measuring device of a type approved by this Department shall be maintained on the outlet works.</p> <p>This right when combined with Rt. 36-2551 shall not exceed 76.0 cfs.</p> <p>Source known locally as Curran Tunnel.</p> <p>Use of water under this right is subject to policies set forth in the State of Idaho Water Plan, including Policy No. 32F.</p>
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See p. 197 of *Haemmerle Aff.*

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

22. The actual and historical diversion of water by Rangen under Water Right Nos. 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, as well as water from springs on what the experts are calling the "talus slope" where the Tunnel mouth and concrete box are located. See paragraphs 8 and 19 above.

23. The Partial Decrees for Water Right Nos. 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. 37-07694 (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. See p. 2 of Notice of Claim to Water Right Acquired Under State Law attached as Exhibit 2 to *Brody Aff.* The claim remarks for Water Right No. 36-07694 state that the "source is known locally as Curran Tunnel." See *id.*

24. 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.

See p. 219 of *Haemmerle Aff.* Pursuant to this request, the Department allowed Rangen to place the measuring device at the outlet. See p. 198 of *Haemmerle Aff.*

25. Consistent with Rangen's historical appropriations and point of diversion, the Department recognizes 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. *Maxwell Aff. in Support of Motion for Partial Summary Judgment Re: Material Injury*, ¶¶ 3-6; *Ramsey Aff. in Support of Motion for Partial Summary Judgment Re: Material Injury*, ¶ 3; see also, Exhibit A to *Maxwell Aff.* for a sketch showing these measurement points. 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 ¶ 54 on p. 302 of *Haemmerle Aff.* (quoting Second Amended Order of May 19, 2005, in the Matter of Distribution of Water).

26. 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, the flows from the concrete box as well as springs that flow into the upper diversion pond.

### **III. ISSUES**

- (1) Can the Director change Rangen's decreed water source from "Martin-Curren Tunnel; Tributary: Billingsley Creek" to "Ground Water;" and
- (2) Can the Intervenor limit Rangen's call to water from the mouth of the Martin-Curren Tunnel itself?

### **IV. STANDARD OF REVIEW**

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). When a court or other tribunal assesses a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. See *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). Likewise, all reasonable inferences which can be drawn from the record must be drawn in the nonmovant's favor. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct.App.1994). The burden of proving the absence of an issue of material fact rests upon the moving party.

However, "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *M&H Rentals, Inc. v. Sales*, 108 Idaho 567, 570, 700 P.2d 970 (Ct.App. 1985). "[A] nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment." *Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485 (2009).

## V. ARGUMENT

### A. **The Director Cannot Change Rangen's Decreed Source.**

The Intervenors are asking the Director to step-in and change the source on Rangen's Partial Decrees from the "Martin-Curren Tunnel; tributary to Billingley Creek" to "Ground Water." The Director cannot change Rangen's decreed source.

Section 42-1420(1) of the Idaho Code makes it clear that a decree entered in a general adjudication is conclusive. It states in relevant part: "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system . . . ." I.C. § 42-1420(1); see e.g., In Re Snake River Basin Water System, 115 Idaho 1, 7, 764 P.2d 78, 84 (1988) (A decree entered in a "general adjudication" is "one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated."). The Idaho Supreme Court has explained that finality in water rights is essential and that making a change to a water right is tantamount to changing a description of real property:

Finality in water rights is essential. "A water right is tantamount to a real property right, and is legally protected as such." Crow v. Carlson, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. Olson v. Idaho Dept. of Water Resources, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983).

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

In this case, the SRBA adjudicated and decreed the source of Rangen's water rights when it entered the Partial Decrees in Rangen's favor. See pp. 9-10 of *Haemmerle Aff.* The decreed source of the two rights at issue is the "Martin-Curren Tunnel; tributary to Billingsley Creek." See *id.* This determination is final and cannot be attacked. In fact, both Partial Decrees that were entered contain Rule 54(b) certifications. See pp. 9-10 of *Haemmerle Aff.* The Partial Decrees were entered nearly 16 years ago. The time for any challenge has long passed.

The Partial Decrees that were entered make it clear that the Martin-Curren Tunnel is surface water – not ground water. Rangen’s Partial Decrees follow the standard SRBA form. The form is based on the Director’s Report filed by the Department. Section 42-1401(B) of the Idaho Code explains the role that the Department played in the SRBA. It states in relevant part:

(1) the Director’s role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

I.C. § 42-1401B(1). To fulfill its role as an independent expert and technical assistant, the Department was required to file a Director’s report on the Snake River Basin which included determination of the following elements of the water rights within the basin:

- (a) the name and address of the claimant;
- (b) **the source of water;**
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) legal description of the place of use; . . .

- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

Idaho Code § 42-1411 (emphasis added).

The Department has promulgated an extensive set of rules governing its role in the adjudication process. See IDAPA 37.03.01 (Adjudication Rules). The Department's Adjudication Rules actually specify how water sources were to be listed in the claim forms used in the SRBA. The claim forms were the basis for the partial decrees that were 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 Partial Decrees follow the IDWR format required for surface water. They describe the source of Rangen's water as the "Martin-Curren Tunnel" – the name of the springs in local usage. Rangen's Partial Decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of a tributary is unique to surface water sources. It is important to recognize that Rangen's Partial Decrees do **not** specify the source as "Ground Water" as required if the source is, in fact, ground water. To replace the designation of "Martin-

Curren Tunnel; tributary to Billingsley Creek” with the designation of “Ground Water” would be to a change to the Partial Decrees entered in the SRBA. This is improper.

While it is not necessary or proper to go beyond the Partial Decrees to determine that Rangen’s water rights are surface water rights – not Ground Water – the evidence outside the Partial Decrees supports Rangen’s position. The License for Water Right No. 37-07694 contains a note that the “springs” identified as the source of that water are locally known as the “Curran Tunnel.” See ¶ 21 above. The SRBA claim form prepared by the Department for that right also states that the source is known locally as the “Martin-Curren Tunnel.” See p. 2 of Notice of Claim to Water Right Acquired Under State Law attached as Exhibit 1 to *Brody Aff.* The Department classifies the Martin-Curren Tunnel as “springs” as evidenced by the results of the Water Right and Adjudication Search done on Water Right No. 36-15501 on March 7, 2013. See Exhibit 2 to *Brody Aff.* Water Right No. 36-15501 is the companion right to Rangen’s 1962 water right for 48.56 cfs of water. Both rights show “Martin-Curren Tunnel; tributary to Billingsley Creek” as the source of those rights. The Department’s search results show that it classifies the Martin-Curren Tunnel as “springs.” See ¶ 5 above.

Once again, the entire purpose of SRBA was to conclusively resolve the rights of all claimants in a single “general adjudication.” I.C. § 42-1420(1); see e.g., In Re Snake River Basin Water System, 115 Idaho 1, 7, 764 P.2d 78, 84 (1988). The Partial Decrees entered in the SRBA conclusively established that the source of Rangen’s water rights at issue is the “Martin-Curren Tunnel; tributary to Billingsley Creek.” If the source of Rangen’s Water Rights were ground water as the Intervenor contend then Rangen’s Partial Decrees would show the source as “Ground Water.” The Director cannot substitute “Martin-Curren Tunnel; tributary to Billingsley

Creek” with “Ground Water.” As such, the Director should enter summary judgment in Rangen’s favor on this issue.

**B. The Intervenors Cannot Limit Rangen’s Delivery Call to Water from the Mouth of the Tunnel Itself.**

The Intervenors also contend that Rangen’s demand for water is limited to the amount that would flow through the mouth of the Martin-Curren Tunnel itself and not the springs complex that supplies the Research Hatchery. The Intervenors’ position is contrary to the Partial Decrees that have been entered and Rangen’s actual appropriation, diversion and long-recognized historical use of the spring water flowing from the canyon wall surrounding the Research Hatchery.

As explained above, the term “Martin-Curren Tunnel” as used in Rangen’s Partial Decrees is the local name for the spring complex that supplies Rangen’s Research Hatchery. Rangen submitted its application to divert 50 cfs of water in 1962. See ¶ 6 above. Rangen’s application designated the source of that water as “the headwaters of Billingsley Creek which is derived from underground springs.” See ¶ 7 above. The survey accompanying the application showed that Rangen intended to build a dam structure well below the “mouth of cave” (e.g., the Martin-Curren Tunnel itself), the concrete box and the talus slope; the dam structure would capture the spring water flowing from the canyon wall surrounding the Research Hatchery. See Survey above in ¶ 8. When the State advertised Rangen’s application and completion of works, it designated the source of Rangen’s water as the “headwaters of Billingsley Creek.” See ¶¶ 10-11 above. When the State issued a license to Rangen for the 50 cfs of water in 1967, it designated the source as “underground springs, a tributary of Billingsley Creek.” See ¶ 13 above.

Rangen applied for a supplemental permit to appropriate waters from the same source and using the same diversion structure in April 1977. See pp. 199 – 202 of *Haemmerle Aff.* The application had a typewritten designation of source as “underground springs”. The term Curran Tunnel was hand-printed right above the designation. See p. 199 of *Haemmerle Aff.* The field report issued for this right shows that the Department considered the source of Rangen’s right to be surface water (see ¶ 18 above) and a diagram in the Department’s backfile shows the diversion of multiple springs flowing from the canyon wall (see ¶ 19). The Department actually entered an order allowing Rangen to place a measuring device at Rangen’s **outlet** works because it was not economically feasible to place a measuring device at the inlet works where there were multiple springs feeding the point of diversion. See ¶ 24 above. When the State issued the license for this right, it designated the source as “water from springs, tributary to Billingsley Creek” (see ¶ 20 above) and entered a note that the source (i.e., springs) is known locally as “Curran Tunnel” (see ¶ 21 above).

The Department recognizes that Rangen is legally entitled to appropriate water from the entire spring complex that feeds the head of its Research Hatchery as evidenced by its findings in the Second Amended Order issued on May 19, 2005. 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.

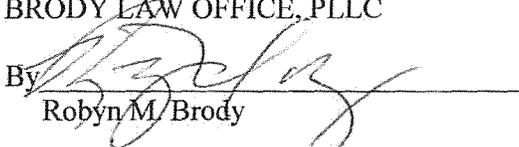
See ¶ 54 on p. 302 of *Haemmerle Aff.* (quoting Second Amended Order of May 19, 2005, in the Matter of Distribution of Water). The flow measurements made by Rangen take into consideration all of the spring water flowing onto its property – not just those from the mouth of the Martin-Curren Tunnel itself. Because Rangen’s historical appropriations, point of diversion and use of water includes water from the entire spring complex at the head of its Research Hatchery, the Intervenor’s attempt to restrict Rangen’s delivery call to water that would flow through the mouth of the Martin-Curren Tunnel itself should be rejected. Rangen is entitled to judgment as a matter of law on this issue.

**VI. CONCLUSION**

For the foregoing reasons Rangen respectfully requests that its Motion for Partial Summary Judgment Re: Source be granted and that the Director enter an Order as a matter of law that Rangen’s decreed source for Water Right Nos. 36-02551 and 36-07694 cannot be changed from “Martin-Curren Tunnel; Tributary: Billingsely Creek” to “Ground Water” and that Rangen’s delivery call is not limited to water that would flow from the mouth of the Martin-Curren Tunnel itself.

DATED this 8<sup>th</sup> day of February, 2013.

BRODY LAW OFFICE, PLLC

By   
Robyn M. Brody

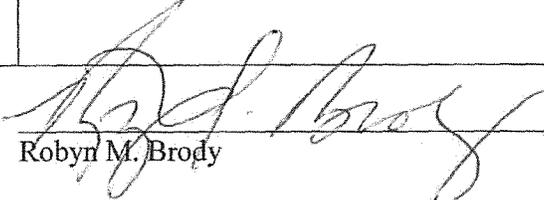
**CERTIFICATE OF SERVICE**

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 8th day of March, 2013 she 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:

<b>Original:</b>	Hand Delivery	<input checked="" type="checkbox"/>
Director Gary Spackman	U.S. Mail	<input type="checkbox"/>
Idaho Department of Water	Facsimile	<input type="checkbox"/>

Resources P.O. Box 83720 Boise, ID 83720-0098 <u>Deborah.Gibson@idwr.idaho.gov</u>	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 <u>garrick.baxter@idwr.idaho.gov</u> <u>chris.bromley@idwr.idaho.gov</u>	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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