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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

**Subcase No. 36-07694
Subcase No. 36-02551**

**MEMORANDUM IN SUPPORT OF
RANGEN, INC.'S MOTION TO SET
ASIDE PARTIAL DECREES**

Rangen, Inc. ("Rangen"), by and through its attorneys, submits the following Memorandum in Support of Motion to Set Aside Partial Decrees ("Motion"). The Motion seeks to set aside water rights 36-07694 and 36-02551, and to add to those water rights: (1) a source of water as: Martin-Curren Tunnel, Curran Springs, flows from a concrete box, as well as from various seeps, rivulets, and springs originating and located on the talus slope, or other springs or seeps which are the headwaters of Billingsley Creek; and (2) an additional point of diversion: Township 7S, Range 14E, SW1/4SW1/4NW1/4 Sec. 32.

I. INTRODUCTION

Rangen has filed this Motion to Set Aside Partial Decrees (“Motion”) because of unique and compelling circumstances that are unlikely to be replicated. The Court is familiar with the dispute over the source of the water that supplies Rangen’s Research Hatchery near Hagerman. The Court recently ruled on appeal from an administrative interpretation of Rangen’s Partial Decrees that the decreed source of Rangen’s water rights – the “Martin-Curren Tunnel” – limits Rangen’s rights to the water that comes from the mouth of the tunnel itself and does not include the other spring water that forms the headwaters of Billingsley Creek on Rangen’s property. *See Memorandum Decision and Order on Petitions for Judicial Review*, pp. 11-14 in Twin Falls County Case No. CV-2014-1338 entered on October 24, 2014 (attached as Exhibit 1 to *May Affidavit*) (hereinafter referred to as “*Delivery Call Decision*”). The Court also ruled that Rangen’s decreed point of diversion does not encompass the “Bridge Diversion” which Rangen built in the 1960s and supplies water to Rangen’s large and CTR raceways. *See id.* at pp. 14-15.

There is no dispute that Rangen has diverted and used all of the spring water that forms the headwaters of Billingsley Creek to raise trout at its Research Hatchery for more than fifty years. *See*, Tr., p. 35, lines 19-21 (Oral Argument held on August 28, 2014 in Twin Falls County Case No. CV 2014-1338 and Gooding County Case No. CV 2014-179) (attached as Exhibit 2 to *May Affidavit*). Rangen’s use of the water was permitted, licensed, scrutinized and administered by IDWR for over five decades. It was not until February 2014 -- approximately seventeen years after the Partial Decrees were entered and more than fifty years since Rangen’s use was first permitted -- that the Department interpreted Rangen’s Partial Decrees in a way that limits Rangen’s use of water to that coming from the mouth of the Martin-Curren Tunnel itself and notified Rangen that it was not authorized to use any other spring water or use its Bridge Diversion to divert water

to the large and CTR raceways. Rangen appealed IDWR's interpretation, and that interpretation was recently affirmed by this Court.

The interpretation of Rangen's Partial Decrees is inconsistent with the way IDWR has administered the water for over five decades, prior IDWR investigatory findings, the permits and licenses that were the basis of the Partial Decrees, and Rangen's undisputed actual, historical and beneficial use of water. Rangen has filed this Motion to Set Aside Partial Decrees seeking to amend the Partial Decrees to make them consistent with Rangen's actual, historical and beneficial use. This Motion should be granted because it would be inequitable to allow the prospective application of the Partial Decrees and there are unique and compelling circumstances and relief is necessary to accomplish justice. Otherwise, Rangen will be deprived of the right to use the water it has actually and historically used for over half a century.

II. STATEMENT OF FACTS

1. Rangen is an agricultural company located in Buhl, Idaho. (Tr., Vol. I, p. 53, L. 22 - p. 54, L.14) (all excerpts from the Delivery Call hearing transcript are attached as Exhibit 3 to *May Affidavit*). Its operations include buying and selling commodities (e.g., beans), manufacturing general feeds for land animals, and aquaculture. (*Id.*)

2. Rangen's aquaculture division manufactures fish feed and operates the Rangen Aquaculture Research Center, a cold water trout facility also known as the "Research Hatchery." (*Id.*); (Tr., Vol. I, p. 58, L. 10-11).

3. The Research Hatchery is located below a canyon rim at the headwaters of Billingsley Creek near Hagerman. *Delivery Call Decision*, p. 3.

4. Rangen has five water rights that supply the Research Hatchery. The following table sets forth the salient details of the rights as decreed:

Right	Source	Purpose and Period of Use	Quantity	Priority	Point of Diversion
36-00134B	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31) Irrigation (03/15 – 11/15)	0.07 cfs 0.05 cfs	10/09/1884	T07S R14E S32 SESWNW
36-00135A	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31)	0.05 cfs	04/01/1908	T07S R14E S32 SESWNW
36-15501	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	1.46 cfs	07/01/1957	T07S R14E S32 SESWNW
36-02551	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31) Domestic (01/01 – 12/31)	48.54 cfs	07/13/1962	T07S R14E S32 SESWNW
36-07694	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	26.0 cfs	04/12/1977	T07S R14E S32 SESWNW

Delivery Call Decision, p. 4. The two rights at issue in this Motion are the 1962 and 1977 rights.

5. Water right 36-02551 was based on a permit and license that was originally filed for in 1962. A copy of the IDWR backfile for water right 36-02551 is attached as Exhibit 4 to *May Affidavit*.

6. Water right 36-07694 was based on a permit and license filed for in 1977. A copy of the IDWR backfile for water right 36-07694 is attached as Exhibit 5 to *May Affidavit*.

7. Rangen has been measuring the flows at the Research Hatchery since 1966. *See* Exhibit 6 to *May Affidavit* for a summary chart of the measurements. Rangen reported those measurements directly to IDWR from 1995 – 2009 and to Water District 36A since 2009 and they have always been accepted. *See* Exhibit 7 to *May Affidavit*, p. 13 at ¶ 1.

8. Rangen does NOT measure water at the mouth of the Martin-Curren Tunnel. Rangen measures flows at two outlets shown as “measurement points” on a diagram of the facility. *See* Exhibit 8 attached to *May Affidavit*.

9. Rangen requested permission from IDWR to measure at the outlets after Gary Funderberg, a state examiner, did his field report for the 1977 water right (36-07694). Lynn Babbington, the manager of the Research Hatchery at the time, wrote to Mr. Funderberg asking him to allow Rangen to measure water flows at the outlets of its Research Hatchery rather than the inlets. Mr. Babbington’s letter stated:

Recently Gary Funderberg, senior water resources agent southern region, made a field examination of our water system so that our license could be issued. At this time he noted that we did not have a measuring device at the inlet. With the terrain and collection system of the water it is not feasible to have a measuring device at the inlet.

All the water is run through steel or concrete ponds and thru a measuring device at the outlet. I would like to request that the measuring device at the inlet be waived.

See Exhibit 5, p. 52.

10. Mr. Babbington testified that it was not possible to have measuring devices at all of the "inlets" because the springs feeding the Research Hatchery were all over the hillside at the head of the facility:

Q. Do you remember what this letter was all about?

A. That was after Gary had been out -- Gary Funderberg had been out and did his field exam and had said that we needed a -- it called for a measurement device at the inlet. *But the inlet was every place on the hillside, so to speak, with many springs, individual springs coming in that it wasn't feasible to measure those.* So I asked if we could measure at the -- at the exit of the ponds.

(Tr., Vol. I, p. 188, L. 20 -- p. 189, L. 6) (emphasis added).

11. The Department entered an order approving Rangen's request to measure at the outlets. See Exhibit 5, p. 30. 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.

Exhibit 5, p. 51.

12. Tim Luke, IDWR's enforcement officer, testified that Rangen diverts and uses not only the water from the mouth of the Martin-Curren Tunnel itself, but also the water from the springs on the talus slope where the tunnel is located. He testified:

Q. Okay. And to be sure, the way Rangen collects water they collect water not only from the Curren Tunnel, but all the spring sources located on the talus slope; correct?

A. Yes.

(Tr., Vol. V, p. 1174, L. 7-12).

13. Mr. Luke testified that no one from the Department has ever told Rangen that it is using water flows that exceed its water rights:

Q. And to be sure, no one from the Department prior to 2003 or after 2003 came to Rangen and said "Gee, based on the way you're measuring water, you're using unappropriated -- or flows that exceed your water rights"; correct?

A. No, I don't recall that. Not at the hatchery.

(Tr., Vol. V, p. 1160, L. 14-20).

14. Rangen's water rights have been short for years. *See* Exhibit 6. Rangen filed its first delivery call against junior priority ground water pumpers in September of 2003. *Delivery Call Decision*, Exhibit 1 to *May Affidavit*, p. 5.

15. In response to Rangen's first delivery call, the Department sent Cindy Yenter, an IDWR employee and the water master for Water District 130, and Brian Patton, to the Research Hatchery to do a water right review and determine the sufficiency of measuring devices. *See Yenter Memorandum* dated December 15, 2003 (attached as Exhibit 9 to *May Affidavit*). Ms. Yenter submitted her Memorandum to Karl Dreher, then the Director of IDWR.

16. In March of 2004, Director Dreher issued an order curtailing ground water rights in Water District 130 with dates junior to July 13, 1962. *See, Amended Order in the Distribution of Water* dated March 10, 2004 (attached as Exhibit 10 to *May Affidavit*).

17. On May 19, 2005, Director Dreher withdrew the curtailment order after he found that Rangen's call was futile based on the predictions of ESPAM1.1. *See, Second Amended Order in the Distribution of Water* dated May 19, 2005 (attached as Exhibit 11 to *May Affidavit*). As part of his Order, Director Dreher found that the total supply of water available to Rangen under the water rights at issue are those being measured at Rangen's outlets:

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 though the CTR raceways and irrigation return flows.

See id.; *see also* Exhibit 8 for a diagram showing Rangen's measurement points).

18. In December 2011, Rangen renewed its delivery call and requested that Director Gary Spackman evaluate the call using ESPAM2.0. *Delivery Call Decision*, Exhibit 1 to *May Affidavit*, p. 5. While the call was pending an error in the model was discovered and the Department eventually issued ESPAM2.1. *Delivery Call Decision*, Exhibit 1 to *May Affidavit*, p. 7, fn. 1.

19. In March 2013, during the course of the administrative proceeding on Rangen's renewed delivery call, Rangen filed a Motion for Partial Summary Judgment with Director Spackman concerning the source of its water rights. *Delivery Call Decision*, Exhibit 1 to *May*

Affidavit, p. 6. Rangen argued that the term “Martin-Curren Tunnel” as used in the Partial Decrees was a local name for the tunnel itself and the entire spring complex that formed the headwaters of Billingsley Creek. Director Spackman rejected Rangen’s interpretation and held that Rangen’s water rights are limited to the water that comes from the mouth of the tunnel itself. *Delivery Call Decision*, Exhibit 1 to *May Affidavit*, pp. 6-7.

20. Seizing on what it perceived to be an advantage from the Director’s summary judgment ruling, TJ Budge filed an application for permit in the names of seven different ground water districts to appropriate 12 cfs of water from springs on Rangen’s property. *See* Exhibit 12 to *May Affidavit*. A Preliminary Order Issuing Permit was issued over Rangen’s objections on November 18, 2014 for the purpose of “mitigation”. *See* Exhibit 13 to *May Affidavit*. Rangen has filed exceptions to the Preliminary Order. *See* Exhibits 14 and 15 to *May Affidavit*. Those exceptions are still pending before Director Spackman.

21. The Department acknowledged in its Staff Memorandum on Rangen’s renewed delivery call that the source, point of diversion, and priority date in the Partial Decree for water right no. 36-02551 are not the same as shown in the license for the right. *See* Exhibit 7 to *May Affidavit*, p. 31.

	Source	Point of Diversion	Priority Date
License	Underground springs tributary to Billingsley Creek	40 acre tract that includes the tunnel itself and the Bridge Diversion	July 31, 1962
Partial Decree	Martin-Curren Tunnel Tributary to Billingsley Creek	T07S R14E S32 SESWNW	July 13, 1962

IDWR staff could not find any explanation for the changes in the files they reviewed. *See id.*

22. The following is a comparison of the source, point of diversion and priority date on Rangen’s License for water right 36-07694 and the Partial Decree:

	Source	Point of Diversion	Priority Date
License (Exhibit 1029, p. 28)	Springs Note: Source known locally as Curran Tunnel	T07S R14E S32 SWNW	April 12, 1977
Partial Decree (Exhibit 1029, p. 3)	Martin Curran Tunnel	T07S R14E S32 SESWNW	April 12, 1977

23. None of the intervenors in Rangen's renewed delivery call (the Idaho Ground Water Appropriators, Inc. ("IGWA"), the City of Pocatello, Fremont-Madison Irrigation District) disputed that Rangen has historically and actually put to beneficial use all of the spring water that forms the headwaters of Billingsley Creek on Rangen's property. *See*, Tr., p. 35, lines 19-21 and p. 65, line 18 p. 76, l. 11 (Oral Argument held on August 28, 2014 in Twin Falls County Case No. CV 2014-1338 and Gooding County Case No. CV 2014-179) (attached as Exhibit 2 to *May Affidavit*). IGWA and the City of Pocatello only claim that Rangen's Partial Decrees do not permit this water use.

24. During the May, 2013 hearing on Rangen's renewed delivery call, Tim Luke testified that Rangen diverts and uses all of the spring water at the head of its Research Hatchery as it always has:

Q. Now, again, the full time you've been observing Rangen, you know that all the water that's collected off the slope goes through their facility? You're aware of that?

A. Yes.

Q. IDWR is aware of that; correct?

A. Yeah. *They're diverting the water the same as they always have. And the water rights used to be -- at one time they didn't say Curran Tunnel. They said springs.*

(Tr., Vol. V, p. 1177, L. 22 - p. 1178, L. 6) (emphasis added).

25. Mr. Luke also testified that IDWR never told Rangen that its water rights are limited to the water that comes from the mouth of the tunnel itself:

Q. And so, Mr. Luke, there's been no purpose or occasion by you or anyone else to say "Rangen, you're using your water rights illegally"? No one's ever done that, have they?

A. No, not to my knowledge.

(Tr., Vol. V, p. 1177, L. 22 – p. 1178, L. 11).

26. The Department informed Rangen on January 31, 2014 that it had to cease and desist its diversion and use of any spring water on its property that does not emanate from the mouth of the Martin-Curren Tunnel itself. *See Cease and Desist Order* (attached as Exhibit 16 to *May Affidavit*). Rangen and the Department entered into an agreement allowing Rangen to continue to divert until otherwise notified by the Department. *See Consent Order and Agreement* dated March 7, 2014 (attached as Exhibit 17 to *May Affidavit*).

III. STANDARD OF REVIEW

A motion to set aside a partial decree is treated the same as a motion to set aside a default judgment and determined in accordance with I.R.C.P. 60(b). *See* AO1 § 14d. Rule 60(b) permits a court to relieve a party from a final judgment or order for the following reasons:

1. mistake, inadvertence, surprise or excusable neglect;
2. newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial;
3. fraud, misrepresentation or other misconduct of an adverse party;
4. the judgment is void;
5. the judgment has been satisfied, released or discharged or *it is no longer equitable that the judgment should have prospective application*; and

6. *any other reason justifying relief from the operation of the judgment.*

I.R.C.P. 60(b) (emphasis added). A motion filed under I.R.C.P. 60(b)(5) or (6) must be made within a "reasonable time."

Rangen has filed its Motion to Set Aside Partial Decrees under Rule 60(b)(5) and (6). Under Rule 60(b)(5), the moving party must show: (1) the judgment is prospective in nature; and (2) it is no longer equitable to enforce the judgment as written. *Rudd v. Rudd*, 105 Idaho 112, 118, 666 P.2d 639, 645 (1983).

To grant a motion for relief under Rule 60(b)(6), there must be a showing of "unique and compelling circumstances." *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). In addition, the moving party must allege detailed facts, which if established, would constitute a meritorious position. *See, e.g., McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993). The meritorious position requirement is founded on the notion that "it would be an idle exercise for a court to set aside a default judgment if there is in fact no justiciable controversy." *McFarland*, 123 Idaho at 934, 854 P.2d at 277 (citations omitted).

Courts have characterized Rule 60(b)(6) as "a grand reservoir of equitable power to do justice in a particular case." *See e.g., Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 579 (10th Cir. 1996). The rule "seek[s] to strike a delicate balance between countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983) (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981); *see also Gordon v. Gordon*, 118 Idaho 804, 806, 800 P.2d 1018, 1020 (1990) (stating "motions under Rule 60(b) involve a nice balance between the interest in finality and the desire to achieve justice"). The decision to grant or deny a Rule 60(b) motion rests in the sound

discretion of the trial court. *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.3d 849, 851 (1979). Where the trial court “applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion. *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010).

IV. ARGUMENT

A. Rangen has a Meritorious Position.

The source and point of diversion Rangen wishes to add to the water rights have been used by Rangen under its permits and licenses since 1962. The source and point of diversion Rangen seeks to add were encompassed within the permits and licenses for water rights 36-2551 and 36-7694. The licenses and permits represented real property rights to Rangen after they were issued. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45; *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981); *Board of Directors v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943). IDAHO CONS. Art XV, Sections 3 and 4.

After the rights were decreed in 1997, Rangen continued to use the source and the point of diversion stated in this Motion with the express knowledge and permission of the Department. All told, Rangen has been using the source and point of diversion continuously since 1962. It was not until 2014 that the Director ruled, in Rangen's Water Delivery Call, that the Rangen was not entitled to use the source or point diversion it has been using for over fifty years. Based on the permits and licenses issued by the Department, Rangen use of its water rights constituted Constitutionally protected real property rights, which the Department took away after fifty years of use. Rangen has a meritorious case to bring this Motion.

B. Rangen's Partial Decrees Should be Set Aside Under I.R.C.P. 60(b)(5) Because it is No Longer Equitable that the Decrees Should Have Prospective Application.

Rangen has asserted two separate grounds for setting aside the Partial Decrees. The first basis for setting aside the Partial Decrees is found in I.R.C.P. 60(b)(5). As explained previously, the two requirements to set aside a judgment under this rule are: (1) the judgment must be prospective in nature; and (2) it must no longer be equitable to enforce the judgment as written. *Rudd v. Rudd*, 105 Idaho 112, 118, 666 P.2d 639, 645 (1983).

The Idaho Supreme Court has explained that there is no definitive test for what constitutes a “prospective” judgment under Idaho law. *Meyers v. Hansen*, 148 Idaho 283, 290, 221 P.3d 81, 88 (2009). The *Meyers* Court looked at the analog test under federal law and concluded that a prospective judgment is one that “. . . is susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance.” *See id.*

A partial decree in the SRBA does not simply determine a right that existed in the past – it determines a right that will be exercised in the future. These rights are not cast in stone, and, in fact can be forfeited depending on use or non-use and can be altered through private contracts (e.g., assigning water rights) and administrative proceedings (e.g., change in place of use, point of diversion, or even nature of beneficial use). A partial decree only captures one snap shot in time and is subject to all kinds of future alterations. Because a partial decree has a “prospective” or “future” application, a partial decree can be set aside under I.R.C.P. 60(b)(5).

In this case, the Partial Decrees at issue should be set aside because it would no longer be equitable to enforce them based on the interpretation recently adopted by Director Spackman and affirmed by the Court. This Court has actually set aside partial decrees under I.R.C.P. 60(b)(5) because they did not “accurately reflect the actual historical use of water.” *See Special Master Report and Recommendation on Motions to Set Aside Partial Decrees*, In re SRBA Subcase No.

41-00013A (April 29, 2002) (hereinafter referred to as “*Weston-Spillett Order*” and attached as Exhibit 20 to *May Affidavit*). This Court explained:

The Westons and Spillets also showed meritorious defenses to set aside the Partial Decrees. Simply put, as all the parties agreed, the Partial Decrees do not accurately reflect the actual historical use of water from the South Fork of Rock Creek. The Partial Decrees leave the amounts of water historically used in two ditches 15 inches short of water. Under these circumstances, the Westons and the Spillets have shown “it is no longer equitable that the [Partial Decrees should have prospective application.”

Id. at p. 7. This Court reasoned that by setting aside the Partial Decrees it would provide the Director of IDWR a second opportunity to fulfill his statutory duty “to assure that claims to water rights acquired under state law are accurately reported” *See Weston-Spillett Order*, p. 8 (quoting I.C. § 42-1401B).

There is no dispute that Rangen has used the spring water at the head of its Research Hatchery to raise fish for more than fifty years. Rangen applied for permits, constructed the raceways, and put the water to beneficial use through the Bridge Diversion as required by Idaho law. Licenses were issued. When the interpretation of Rangen’s Partial Decrees came before this Court for judicial review on August 28, 2014, it was telling that none of the parties argued against Rangen’s claim that it has actually and historically used all of the spring water that forms the headwaters of Billingsley Creek to raise fish for the past fifty years. In fact, IGWA admitted:

There isn't any dispute, as Ms. Brody said, that Rangen has been diverting water from Billingsley Creek for a long time. There's no dispute about that.

See, Tr., p. 35, lines 19-21 (Oral Argument held on August 28, 2014 in Twin Falls County Case No. CV 2014-1338 and Gooding County Case No. CV 2014-179) (attached as Exhibit 2 to *May Affidavit*).

The Partial Decrees entered in the SRBA were not supposed to change actual and historical beneficial use. To the contrary, the water rights that were recommended by IDWR and entered by

the Court were supposed to reflect actual and historical beneficial use. *See* I.C. § 42-1401B. Moreover, as previously indicated, the licensed rights represented real property rights which should have been protected by the Department. For nearly twenty years after the Partial Decrees were entered in Rangen's favor, Rangen used and the Department administered Rangen's water rights exactly as they always had since 1962. No one ever told Rangen that its use of the spring water was improper even when Rangen's water rights were scrutinized by Cindy Yenter and Brian Patton in connection with Rangen's September 2003 delivery call.

It was not until Rangen received IGWA's expert report in January 2013 in Rangen's renewed delivery call action that anyone raised an issue related to the source of Rangen's water rights. Rangen was confident in the Partial Decrees that were entered and filed a Motion for Partial Summary Judgment on the source issue to resolve the matter ahead of the May, 2013 delivery call hearing. *Delivery Call Decision*, Exhibit 1 to *May Affidavit*, p. 6. On April 3, 2013, Director Spackman held a hearing on Rangen's Motion for Partial Summary Judgment and other dispositive motions. Rangen learned for the first time at that hearing that Director Spackman was taking issue with the source of Rangen's water rights as decreed and the issue would have to be addressed at the evidentiary hearing in May 2013. *See, Transcript of Dispositive Motions Hearing* held on April 3, 2013 (attached as Exhibit 18 to *May Affidavit*).

That very same day, TJ Budge, the attorney for IGWA, filed an application for a permit to appropriate Rangen's spring water on behalf of seven different groundwater districts. *See* Exhibit 12 to *May Affidavit*. The groundwater districts requested that the hearing on the application be

delayed. *See*, letter requesting a delay in processing, dated April 3, 2013 (attached as Exhibit 19 to *May Affidavit*).¹

It took over eight months for Director Spackman to issue an opinion on Rangen's renewed delivery call and the source of Rangen's water rights. On January 29, 2014, the Director entered an order finding that Rangen's water rights were restricted to the water coming from the mouth of the Martin-Curren Tunnel itself and that the Bridge Diversion was not within the decreed point of diversion. *Delivery Call Decision*, Exhibit 1 to *May Affidavit*, pp. 10, 14-15. On January 31, 2014, the Director issued a Cease and Desist Order giving Rangen 24 days to stop diverting any water other than that coming from the mouth of the Martin-Curren Tunnel itself and to dam up the bridge diversion that provides water to the large and CTR Raceways. *See* Exhibit 16 to *May Affidavit*. Rangen and the Department subsequently entered into an agreement allowing Rangen to continue to divert the talus slope spring water until further notice by the Department. *See* Exhibit 17 to *May Affidavit*.

Rangen's Partial Decrees have now been interpreted by the Department and the Court in a manner which deprives Rangen of its actual and historical beneficial use of water for over half a century. Given this interpretation and the groundwater districts subsequent attempt to appropriate the water, it would be inequitable to allow the Partial Decrees to remain in place unaltered. As such, Rangen respectfully requests that its Motion to Set Aside Partial Decrees be granted.

C. There are Unique and Compelling Circumstances Justifying Rangen's Motion for Relief.

¹ On November 18, 2014, a hearing officer for the Department entered a Preliminary Order Issuing Permit granting the groundwater districts' application for "mitigation purposes". *See* Exhibit 13 to *May Affidavit*. The groundwater districts have every expectation of "giving" Rangen the same water the company has been using for the past fifty years to raise fish as mitigation for the damage caused by junior-priority groundwater pumping. Rangen has filed exceptions to the Preliminary Order that have not yet been ruled on by the Director. *See* Exhibits 14 and 15 to *May Affidavit*.

Rangen also claims that its Motion to Set Aside Partial Decrees should be granted under I.R.C.P. 60(b)(6). To grant a motion under Rule 60(b)(6), there must be a showing of “unique and compelling circumstances.” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). In addition, the moving party must allege detailed facts, which if established, would constitute a meritorious position. *See, e.g., McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993).

This Court has granted Motions to Set Aside Partial Decrees where the decrees are not consistent with actual and historical beneficial use. For example, the Idaho Department of Water Resources and Idaho Department of Fish and Game recently filed a Motion to Set Aside eight Partial Decrees pertaining to the Sand Creek Wildlife Management Area. *See Motion to Set Aside Partial Decrees*, In re SRBA Subcase Nos. 21-00014, 21-00015, 21-02153, 21-02159, 21-04006, 21-04007, 21-04008, and 21-07151 (hereinafter referred to as “*Sand Creek* case”) (the partial decrees, pleadings and amended partial decrees for the *Sand Creek* case are attached as Exhibit 21 to the *May Affidavit*). The Partial Decrees in the *Sand Creek* case contained various errors in the source, quantity, period of use, point of diversion, place of use, and purpose of use. *See Supplemental Memorandum of Authority in Support of Motion to Set Aside Partial Decrees*, p. 2. During the hearing on the Motion to Set Aside Partial Decrees, the Special Master asked the parties to submit additional briefing regarding the applicability of I.R.C.P. 60(b)(6). After the briefing was submitted, the Special Master recommended that the Partial Decrees be set aside and amended Partial Decrees be entered. *See Special Master's Report and Recommendation* in Exhibit 21 to *May Affidavit*. This Court adopted the Special Master's recommendation. *See, Order Setting Aside Partial Decrees* in Exhibit 21 to *May Affidavit*.

This Court also set aside the Partial Decree in a case where it contained errors related to the quantity of water and the number of irrigated acres. *See, Motion to Set Aside Partial Decree*

and Memorandum in Support Thereof, In Re SRBA Subcase No. 43-192 (hereinafter referred to as the “*Lloyd case*”) (the partial decree, pleadings and amended partial decree for the *Lloyd case* are attached as Exhibit 22 to the *May Affidavit*) . Mr. Lloyd brought a Motion to Set Aside Partial Decree under I.R.C.P. 60(b)(5) and 60(b)(6) after he learned that his Partial Decree was for .62 cfs of water to irrigate 31.1 acres instead of .80 cfs to irrigate 45 acres. The special master recommended that the Partial Decree be set aside and that an amended Partial Decree be entered. *See, Special Master Report and Recommendation* entered on September 15, 2010 (attached in Exhibit 22 to *May Affidavit*). The Court adopted the Special Master’s Recommendation. *See, Order Setting Aside and Amending Partial Decree* entered October 29, 2010 (attached in Exhibit 22 to *May Affidavit*).

In this case there is merit to Rangen’s position that the Partial Decrees do not reflect Rangen’s actual and beneficial use of water because of the Director’s recent interpretation of the source of Rangen’s water rights and its right to use the Bridge Diversion. As explained above, there is no dispute from the Department or the Intervenors in Rangen’s delivery call that Rangen has been diverting and using all of the spring water that forms the headwaters of Billingsley Creek to raise fish for more than 50 years and that it uses the Bridge Diversion to channel water to the large and CTR Raceways.

For nearly seventeen years after Rangen’s Partial Decrees were entered (December 1997 until April 3, 2013) IDWR continued to administer Rangen’s water rights exactly as it had since Rangen first built the facility in the 1960s and even after the water rights were scrutinized in connection with Rangen’s 2003 delivery call. It was only during Rangen’s renewed delivery call that the Department interpreted Rangen’s decrees in a manner which is not consistent with the actual and historical beneficial use. On the same day that the Director articulated a preliminary

ruling on the source matter, seven groundwater districts seized the opportunity to file an application for a permit to appropriate the water so that they could then “give” the water back to Rangen as mitigation for the injury they cause with junior-priority ground water pumping. Rangen continued to litigate the interpretation of its Partial Decrees, and it wasn’t until January 29, 2014 that Director Spackman entered a final order on the interpretation of Rangen’s source and point of diversion. Rangen timely appealed the order to the SRBA and the SRBA affirmed the ruling on October 24, 2014. Under these circumstances, it would be unjust to rule that Rangen cannot set aside its Partial Decrees. Such a ruling would deprive Rangen of the water it has used for fifty years and could actually result in the water being appropriated by seven groundwater districts for “mitigation” purposes even though they have no ability to perfect the right and there is no such beneficial use. This is a unique and compelling set of circumstances that is unlikely to be replicated, and because there is merit to Rangen’s underlying position that it is entitled to the water at issue, Rangen’s Motion to Set Aside Partial Decrees should be granted.

D. Rangen’s Motion to Set Aside Partial Decrees Has Been Made within a Reasonable Time.

Rule 60(b) requires the moving party to bring a motion under subsections 5 or 6 within a reasonable time. IDWR addressed this standard in its *Supplemental Memorandum of Authority in Support of Motion to Set Aside Partial Decrees* in the *Sand Creek* case. IDWR explained that “[g]iven the long timeframes encountered in the SRBA, it is not unusual that a motion to set aside be granted years after the partial decree is issued.” *Supplemental Memorandum*, p. 10. Indeed, in the *Sand Creek* case, the partial decrees were entered more than six years before the Motion to Set Aside Partial Decree was filed on August 26, 2013. In a footnote, IDWR noted multiple other examples of cases where a Motion to Set Aside a Partial Decree was filed and granted many years after the Partial Decree was entered:

Subcase No.	Date Partial Decree Entered	Date Motion to Set Aside Partial Decree Filed	Date Order Granting Motion to Set Aside Partial Decree
2-02033 and 2-00083	May, 2009	January, 2013	June, 2013
Lloyd Case (43-192)	June, 2002	February, 2010	October, 2010
22-13739	January, 2009	February, 2012	August, 2012

In this case, Rangen's Partial Decrees were entered in December 1997. Nearly seventeen years have gone by since that time without a challenge because IDWR has never interpreted Rangen's Partial Decrees in an adverse manner before now. This is not a situation where the Department has not examined Rangen's rights. In fact, the Department sent investigators to scrutinize Rangen's water rights and the sufficiency of measuring devices in December 2003 when Rangen made its first delivery call. Even after that site visit and many others Rangen continued to use the spring water that forms the headwaters of Billingsley Creek as it had always done, and, in fact, IDWR confirmed that Rangen's outlet measurements were representative of the flows available under Rangen's water rights.

There was no issue as to the source of Rangen's water rights or its point of diversion until January 2013 when Rangen received IGWA and Pocatello's expert reports and then filed a Motion for Partial Summary Judgment Re: Source in an effort to eliminate the issue at the hearing in May 2013. The Director made a preliminary verbal ruling on the source issue on April 3, 2013, and that same day seven ground water districts filed their own permit to appropriate the water. Rangen continued to litigate the issues pertaining to source and point of diversion and the Director issued a final written order on the matter on January 29, 2014. Rangen timely filed a Motion for Reconsideration followed by an appeal to this Court. This Court affirmed the Director's decision on October 24, 2014. Rangen filed this Motion to Set Aside Partial Decrees less than three months

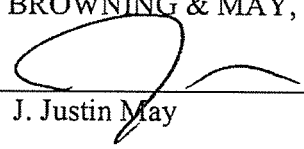
later. Under these circumstances, Rangen's Motion to Set Aside Partial Decrees was filed within a reasonable period of time.

V. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that its Motion to Set Aside Partial Decrees be granted and that Rangen be given the opportunity to file late objections to the source and point of diversion elements in the Director's Reports pertaining to the water rights at issue.

DATED this 16 day of January, 2015.

MAY, BROWNING & MAY, PLLC

By: 

J. Justin May

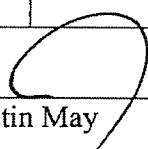
CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 16 day of January, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by the method indicated:

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Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery ☒ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☐

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