

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 36-02551) Docket No.
AND 36-07694) CM-DC-2011-004
)
(RANGEN, INC.))
_____)

BEFORE

HEARING OFFICER: GARY SPACKMAN

Date: April 3, 2013 - 9:00 a.m.

Location: Idaho Department of Water Resources
322 East Front Street
Boise, Idaho

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

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1 APPEARANCES: 2 3 For Rangen, Inc.: 4 MAY, BROWNING & MAY 5 BY MR. J. JUSTIN MAY 6 1419 West Washington 7 Post Office Box 6091 8 Boise, Idaho 83707 9 -and- 10 HAEMMERLE & HAEMMERLE, PLLC 11 BY MR. FRITZ X. HAEMMERLE 12 Post Office Box 1800 13 Hailey, Idaho 83333 14 -and- 15 BRODY LAW OFFICE, PLLC 16 BY MS. ROBYN M. BRODY 17 Post Office Box 554 18 Rupert, Idaho 83350 19 For City of Pocatello: 20 (Present Telephonically) 21 WHITE & JANKOWSKI, LLP 22 BY MS. SARAH A. KLAHN 23 511 Sixteenth Street, Suite 500 24 Denver, Colorado 80202 25 ///	1 APPEARANCES (Continued): 2 3 For Fremont-Madison Irrigation District: 4 (Present Telephonically) 5 RIGBY, ANDRUS & RIGBY, CHARTERED 6 BY MR. JERRY R. RIGBY 7 25 North Second East 8 Rexburg, Idaho 83440 9 Also Present: 10 Wayne Courtney 11 Joy Kinyon 12 Chris Rangen 13 Deborah Gibson 14 15 16 17 18 19 20 21 22 23 24 25
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1 APPEARANCES (Continued): 2 3 For Idaho Groundwater Appropriators: 4 RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 5 BY MR. THOMAS J. BUDGE 6 MS. CANDICE M. McHUGH 7 101 South Capitol Boulevard, Suite 300 8 Boise, Idaho 83702 9 For Surface Water Coalition: 10 (Present Telephonically) 11 BARKER, ROSHOLT & SIMPSON LLP 12 BY MR. JOHN K. SIMPSON 13 1010 West Jefferson, Suite 102 14 Post Office Box 2139 15 Boise, Idaho 83701-2139 16 For Idaho Department of Water Resources: 17 OFFICE OF ATTORNEY GENERAL 18 IDAHO DEPARTMENT OF WATER RESOURCES 19 BY MR. GARRICK L. BAXTER 20 MR. CHRISTOPHER M. BROMLEY 21 322 East Front Street 22 Boise, Idaho 83720 23 /// 24 /// 25 ///	1 THE HEARING OFFICER: Okay. Let's start. So 2 you're recording? 3 MS. GIBSON: Uh-huh. 4 THE HEARING OFFICER: Okay. Thanks. This is a 5 hearing on some motions for summary judgment in the 6 contested case of the Rangen petition for delivery 7 call. And this is the time and place set for oral 8 argument on the motions for summary judgment. 9 And we ought to identify for the record 10 who's here. And so let's start around the table. 11 We're in the Director's conference room, and it's a 12 little tight. I'm sorry for our circumstances, but we 13 had a conflicting scheduled meeting in our other 14 conference room, so I didn't feel I could preempt them. 15 I guess I could, but it wouldn't be prudent, so... 16 MR. HAEMMERLE: Fritz Haemmerle with Rangen. 17 THE HEARING OFFICER: Okay. 18 MS. BRODY: Robyn Brody, Rangen. 19 MR. MAY: Justin May, Rangen. 20 MR. BROMLEY: Chris Bromley, IDWR. 21 MR. KINYON: Joy Kinyon, Rangen. 22 MR. COURTNEY: Wayne Courtney, Rangen. 23 MR. BAXTER: Garrick Baxter, IDWR. 24 MS. McHUGH: Candice McHugh on behalf of IGWA. 25 MR. BUDGE: And TJ Budge on behalf of IGWA.

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Page 6 1 MS. GIBSON: I'm Deborah Gibson with the 2 Department. 3 THE HEARING OFFICER: Gary Spackman, Director. 4 And then on the phone? 5 MR. RANGEN: Chris Rangen for Rangen, Inc. 6 MR. RIGBY: Jerry Rigby, Fremont-Madison. 7 MR. SIMPSON: John Simpson, Surface Water 8 Coalition. 9 MS. KLAHN: Sarah Klahn, Pocatello. 10 THE HEARING OFFICER: And, Sarah, we understand 11 you're under the weather; is that correct? 12 MS. KLAHN: Yes, Mr. Director. You should be 13 glad I'm not there. 14 THE HEARING OFFICER: Okay. Well, seating is 15 limited here anyway. 16 MS. KLAHN: I'm not well. 17 THE HEARING OFFICER: So you're welcome to 18 participate from afar. 19 MS. KLAHN: Thank you. 20 THE HEARING OFFICER: Okay. Let's talk about 21 timing of argument today and the way in which we want 22 to proceed. I have about two hours set aside for this 23 today, and I would like to finish before 11:00. And 24 I'd like to finish closer to 10:30. 25 So we have three motions for summary	Page 8 1 who were in favor of and 15 for those who want to argue 2 against and divide your time up accordingly, and if 3 people want -- if those who are moving for summary 4 judgment want to reserve some time at the end to 5 respond, then they need to do that out of their 15 6 minutes. 7 Now, do people need a little bit of time to 8 think about how those presentations should go forward, 9 or should we launch? 10 MR. HAEMMERLE: I think that's reasonable. 11 THE HEARING OFFICER: Okay. 12 MR. MAY: Director, I do have one comment -- and 13 Sarah can correct me if I'm wrong here. When you 14 mentioned three summary judgment motions, I believe the 15 third, Pocatello's motion with regard to the 16 interconnection, I do not believe is set up as a 17 summary judgment motion. It's styled differently. And 18 so I just wanted to make that clarification. It's not 19 actually a summary judgment motion. 20 Sarah can correct me if I'm wrong. 21 MS. KLAHN: Travis (sic) is not wrong. It's 22 captioned a "Motion for Declaratory Order." 23 THE HEARING OFFICER: Okay. 24 MS. KLAHN: But I think the proposed logistics, 25 Mr. Director, work the same regardless of the caption.
Page 7 1 judgment, at least that's my understanding. 2 MS. GIBSON: Yes. 3 THE HEARING OFFICER: And if I take an hour and 4 a half and I divide it by three, that gives me 30 5 minutes apiece. And I think we can take a little 6 longer than that because at the end of each of the 7 arguments maybe we can have a little colloquy and talk 8 about some things. But I'd like to be out of here 9 between 10:30 and 11:00. I don't want this to go on 10 all day. I can't have it go on all day. 11 So I guess how do you want to divide your 12 time up, given those constraints? Anybody? 13 MR. HAEMMERLE: Director, the way we have it is 14 that we've broken up the responsibilities. I intend to 15 argue the issue of material injury, Robyn is going to 16 argue the source issue, and Justin is going to argue 17 the interconnection issue. 18 So I suggest we take these up individually, 19 argue them, and then move on motion to motion. 20 THE HEARING OFFICER: Okay. And that's what I 21 assumed, but I'm trying to set some time constraints 22 for it. And one of my initial thoughts is -- and I 23 don't know who else intends to argue either as a 24 proponent or opponent to a particular motion, but I'm 25 thinking if I separate it and said 15 minutes for those	Page 9 1 You have three motions in front of you, and the breakup 2 of the time sounds reasonable to me. 3 THE HEARING OFFICER: Okay. And I assume that 4 the moving party will initiate the argument, and then 5 we'll have response at some point. Okay. Let's press 6 forward. 7 Fritz. 8 MR. HAEMMERLE: Thank you, Director. 9 Director, we have filed two briefs on the 10 issue of material injury. As always as I tell Courts, 11 if you have any questions you wish to ask at any time, 12 please feel free to do so. 13 Director, we come here almost 14 months 14 after filing our petition, and in some degree we feel 15 like we've been treading water since. When we 16 originally filed this motion, I think pretty much our 17 intent was to set the batting order for the first day 18 of the hearing. 19 We believe that after the Director 20 considers this particular motion on the issue of 21 material injury that you will find on Day One of the 22 hearing in this case that the respondent parties will 23 be the ones to call the witnesses, and any defenses 24 they have they'll have to prove those by clear and 25 convincing evidence.

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1 In studying the case law, Director, I think 2 that the senior has initially probably three burdens. 3 We have to produce to you decrees, which we have. We 4 have to produce to you water measurements showing that 5 we're short water. And finally, last but not least, we 6 have to prove hydrologic connection. 7 And so we have in the petition given you 8 our decrees. The decrees are also in my affidavit in 9 support of summary judgment. We have produced to you 10 measurements showing we're not obtaining all the water 11 that we're entitled to under those decrees. Those, 12 likewise, were attached to the petition and as exhibits 13 to Doug Ramsey's affidavit. 14 Finally, Director, hydrologic connection, I 15 think, has been established both as a matter of law and 16 as a matter of fact. I think if you look at 17 Judge Wildman's decision in the A & B case, which I 18 have pertinent portions of that for you to review, I 19 don't think we're any different than what he wrote in 20 his case. 21 And what he said, Director, on page 11 of 22 his petition for rehearing is that "Once it is 23 determined that the senior and junior derive water from 24 a common source, as was the case in the above-mentioned 25 cases, the burden rests on the junior appropriator to	1 So the respondent parties, Director, are 2 arguing a number of things. They're arguing that our 3 beneficial use is different than what was established 4 in our decree. I think they're arguing that Rangen 5 doesn't need all the water that's in our decree, and 6 those types of things that are set forward otherwise in 7 their briefing. 8 Director, those are all defenses. Rangen 9 has been through the SRBA court. Our rights are 10 established. Our beneficial use is established. And 11 there is a presumption by law that we are entitled to 12 those water rights as decreed. 13 Again, under the A & B case, if there's any 14 arguments that we don't need what we're decreed on a 15 permanent or temporary basis, the burden rests with 16 them. 17 So I take it, Director, that on Day One of 18 this hearing, the lineup will be that the respondent 19 parties will show up with their witnesses and present 20 their defenses, because we have, I think, presented all 21 we need to present. We have established all we need to 22 establish. There's nothing more we need to do. The 23 burden rests with them to establish any defenses they 24 wish. 25 And that's pretty much our argument,
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1 prove by clear and convincing evidence that his use 2 will not injure the senior's water rights." 3 So what we have in this particular case is 4 we have intersection shown as a matter of law. We have 5 base one, issue five, general provision five, that 6 establishes interconnection. We have a common 7 groundwater source, which is established by rule. 8 And finally, Director, there hasn't been 9 any debate by any single witness in this case that 10 junior groundwater pumping is in one way or another 11 impacting and hindering Rangen's use of water. Not a 12 single witness has disputed that fact. 13 So once we have established those things, 14 Director, the burden then rests on the junior parties 15 to establish any single defense that they want to 16 establish. 17 I ask that in considering this, Director, 18 that you turn to page 10 of our brief. I don't think 19 you have it before you today, but our opening brief. 20 There's one very important point that was established 21 in the A & B Irrigation case. And that quote is that 22 "Once a decree is presented to an administrative agency 23 or court, all changes to that decree, permanent or 24 temporary, must be supported by clear and convincing 25 evidence."	1 Director. If you have any questions, I'd be happy to 2 answer them. 3 THE HEARING OFFICER: How do we want to proceed? 4 Are there other supporters of the motion that want to 5 argue at this point? 6 Okay. I appreciate your brevity. 7 Who wants to respond? 8 TJ? 9 MR. BUDGE: Yeah, Director, I'll respond on 10 behalf of IGWA. 11 And I think initially we need to point out 12 that what Rangen has asked for is a summary judgment 13 ruling that it is suffering material injury. 14 And what Mr. Haemmerle has argued today is 15 that material injury requires evaluation of only three 16 things: One they've got a decreed rate of diversion; 17 second, they're not receiving their decreed rate of 18 diversion; and third, there's a hydraulic connection. 19 What Rangen is arguing is that depletion to 20 the water supply automatically equals material injury. 21 They're saying the Director does not look at how much 22 water they need for their clear and beneficial use. He 23 does not look at whether they're using water 24 efficiently. He does not look at whether there are 25 alternate means of diversion or conveyance

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1 efficiencies. 2 They're arguing that depletion to the water 3 supply alone proves material injury. And that argument 4 is mistaken for a couple reasons. One, when you look 5 at the conjunctive management rules, those aren't the 6 only material injury factors. There's multiple 7 factors. 8 One of the factors is the amount of water 9 being diverted and used compared to the water rights. 10 Another factor is whether they could meet their water 11 needs by using water more efficiently with their own 12 facilities. 13 These factors may or may not have different 14 burdens of proof or different standards of evidence. 15 But these are factors the Director has to consider even 16 if there are no opponents to the delivery call. Even 17 if IGWA wasn't here and Pocatello wasn't here, when the 18 Director gets a call under the conjunctive management 19 rules, he looks at these factors in determining 20 material injury. And you can't say that some factors 21 apply and some factors don't apply. 22 And in fact, this was the main issue that 23 was before the Supreme Court in the AFRD 2 case, as we 24 call it. And in that case the District Court made a 25 ruling. This was the ruling. The Court said -- this	1 decision of Judge Wildman in the A & B case. The issue 2 in that case was the standard of evidence that applies 3 in a delivery call proceeding. And we acknowledge that 4 if the Director is going to find that they don't need 5 their full decreed rate, he's got to have clear and 6 convincing evidence. 7 That does not mean that depletion equals 8 injury. It does not mean the Director doesn't have to 9 take a look at how efficiently they're using water and 10 how they're using water. It just means that for 11 certain parts of this analysis that's the evidentiary 12 standard that applies. 13 And in this case Fritz has said there's no 14 dispute of fact that Rangen's use of water is impacted. 15 That's absolutely false. 16 The expert reports that we have submitted 17 show that Rangen is not raising as many fish as it 18 could with its water supply that it has; that there are 19 efficiencies available to Rangen to improve its water 20 supply; and that Rangen does not need additional water 21 to accomplish its beneficial use, given the way that 22 it's currently operating its facility. 23 So there are absolutely disputes of fact 24 over these factors in Rule 42, and summary judgment is 25 not appropriate because of that.
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1 is on page 877 of the AFRD 2 decision -- "The District 2 Court held that the rules were fatally defective in not 3 containing a presumption that when a junior diverts or 4 withdraws water in times of water shortage it is 5 presumed that there's injury to a senior." 6 The Surface Water Coalition made that 7 argument to the District Court. The District Court 8 accepted it, and the Supreme Court rejected it. It 9 reversed that. 10 And this is what the Supreme Court said: 11 "The presumption under Idaho law is that the senior is 12 entitled to his decreed water right, but there 13 certainly may be some post-adjudication factors which 14 are relevant to the determination of how much water is 15 actually needed." 16 And so in determining injury the Court said 17 you can't just say depletion equals injury. The senior 18 may not need his full decreed rate to accomplish his 19 beneficial use. And in deciding injury, the Director 20 has a duty to go evaluate how they're using water, are 21 they wasting water, are they using it efficiently. 22 And until the Director makes those 23 decisions, he cannot rule as a matter of law that 24 Rangen is suffering material injury. 25 Now, Fritz cited to this statement in a	1 I want to maybe use an analogy to help 2 illustrate what Rangen is arguing. They're saying, 3 "Director, rule as a matter of law that we're being 4 materially injured, and the juniors can then come in 5 and try to disprove that ruling to overturn it in the 6 hearing." 7 That would be like if we were in a trespass 8 case, and the plaintiff says "The defendant has 9 trespassed on my property. He was on my property." 10 And the defendant raises as a defense, "I 11 had permission to be on the property." 12 If there are genuine issues of fact as to 13 whether the defendant had permission, it would be 14 inappropriate for the judge to rule as a matter of law 15 that there had been a trespass. 16 In this case there are genuine issues of 17 disputed fact as to whether Rangen needs its full 18 decreed rate, whether it could meet those needs by 19 utilizing some efficiencies or things like that, and so 20 it's inappropriate for the Director to rule as a matter 21 of law that they're being materially injured. 22 A similar example, if there was a case 23 involving breach of contract and the plaintiff claims 24 that the contract has been breached to their detriment, 25 and the defendant raises as a defense that the contract

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Page 18 1 was never formed for lack of consideration or some 2 other reason, if there are genuine issues of disputed 3 act as to whether the contract was formed, the judge 4 does not rule as a matter of law on summary judgment 5 that there's a breach of contract. 6 And that's exactly what's going on here. 7 There are genuine issues of disputed fact as to how 8 much water Rangen needs, whether they can meet those 9 needs by employing some diversion efficiencies or using 10 water different ways within its system. 11 And the Director cannot rule on material 12 injury until he hears all of the evidence that's going 13 to be presented at the hearing. We're just not at a 14 stage in this case to make that ruling. There's lots 15 of disputes of fact. 16 So we would ask the Director to deny 17 Rangen's motion for summary judgment concerning 18 material injury. 19 THE HEARING OFFICER: Okay. Other arguments in 20 opposition? 21 Sarah? 22 MS. KLAHN: Yes, please, Mr. Director. 23 I would join TJ's arguments regarding the 24 difficulties with Rangen's reading of the case law, 25 specifically AFRD No. 2. So I'm not going to repeat	Page 20 1 amounts are going to be put to the test. 2 So I think that there is maybe a scintilla 3 of procedural basis for what Fritz is asking for, which 4 is basically they want to come into the hearing room on 5 Day One of the trial, they want to toss their decrees 6 on the table. They want to point out what they've 7 asserted as injury, and they want to stop. 8 And then I assume they're done. And they 9 don't call any witnesses, and they don't get to put on 10 any other evidence because they've waived the ability 11 to establish, in the first instance, what it is that 12 their theory of the case is. 13 If their theory of the case is they're 14 entitled to all the water, period, end of discussion, 15 and they would like to just show that by entering their 16 decrees into evidence, the juniors -- Pocatello is fine 17 with that. 18 That means the rest of the hearing, as a 19 procedural matter, belongs to the juniors. And the 20 juniors put on witnesses, and Rangen can cross-examine. 21 But Rangen doesn't get to put on any witnesses. 22 I really don't think that's a very 23 efficient way to run the hearing, number one, because 24 Rangen is essentially giving up the opportunity to tell 25 its own story, which, as I say, I guess if that's how
Page 19 1 those arguments. 2 But I would point out that, number one, 3 Rangen's motion is not captioned as a request for 4 particular procedures at the hearing or as a batting 5 order, as Fritz describes it. It requests a motion for 6 summary judgment that, as a matter of law, it's 7 injured. 8 And I think that fundamentally this goes 9 back to the AFRD No. 2 decision, which, as TJ points 10 out, established only that the senior has a presumption 11 that it's entitled to its decreed amount. In other 12 words, when the Director is considering the facts in 13 the case, he's supposed to be or she's supposed to be 14 looking at the decrees the senior has and comparing 15 them to the evidence presented by the juniors, and the 16 seniors if they feel like presenting evidence, of how 17 much water the senior actually requires for its 18 beneficial uses. 19 And we know that because that's the 20 standard Judge Wildman established -- or articulated, I 21 guess -- I'm not sure he established it. But he 22 articulated what he saw in Idaho law as basically the 23 beneficial-use doctrine, which is, yeah, if you're a 24 senior, go ahead and make your call, but know that the 25 actual uses of water that you're making of the decreed	Page 21 1 they want to run the show, that's fine. 2 But as far as the Department's concerned, 3 the Department does -- as TJ said, the Department has 4 an obligation to look at the facts surrounding the 5 senior's use of the water. I really can't imagine that 6 Rangen wants to give up on showing how it uses its 7 water in contesting what it is that the juniors are 8 saying about the various inefficiencies in its 9 operations, the various ways in which it has avoided 10 maximizing the uses of the water, and the fact that 11 some of the uses it claims frankly are not uses that 12 have been made routinely. 13 So I guess my argument is sort of a 14 pragmatic slash legal argument in the sense that yes, 15 you can go back to the case law and find some scintilla 16 of a basis for what Rangen is proposing, but it doesn't 17 get them to material injury. 18 It only gets them to the statement in AFRD 19 No. 2, which is that the Department is not authorized 20 to readjudicate their decreed amounts. 21 And so I think the better course of action 22 is to deny the motion for summary judgment, to let this 23 proceed in the way that, for example, the A & B 24 delivery call hearing proceeded, with the seniors 25 putting on their case as far as what their evidence of

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1 beneficial use is, relying heavily on the decrees. 2 Travis will correct me if I'm wrong, but 3 that was their theory, and then let the juniors go and 4 then move on from there. 5 And then after you have all the facts, then 6 there can be a determination of whether or not Rangen 7 is materially injured, whether or not it has a need for 8 the amounts of water that it claims that it needs 9 related to its decrees. 10 Now, I don't want to minimize the fact that 11 there's some complications in this. And those arise in 12 the context of the source motion, which is going to be 13 argued next, and in Pocatello's motion on 14 interconnection. So I don't want to discount those. 15 But just in broad terms, we believe the 16 motion for summary judgment on injury that Rangen has 17 filed should be denied and that injury in the final 18 analysis is a question of fact, and they can't get 19 there through decided case law, and furthermore that it 20 would be a bad record, basically, for the Department to 21 be able to make a decision from, even if they were 22 right. 23 So if you have any questions, Mr. Director, 24 I'm happy to answer them. 25 THE HEARING OFFICER: Okay. Thank you.	1 Now, of course, that's not to state that 2 any of the respondent parties give up their defenses if 3 they have those defenses. They can present their 4 defenses on Day One by clear and convincing evidence. 5 If we choose to respond -- I predict we 6 probably will with rebuttal witnesses -- we'll do so. 7 But to save time, Director, I think you need to examine 8 what more do we need to prove. 9 I think that, again, we established our 10 rights in the SRBA. The courts state that there's a 11 presumption that we're entitled to that water. There's 12 nothing else we need to prove with respect to 13 beneficial use. 14 If they believe that our beneficial use is 15 something less, they absolutely have that opportunity 16 to present that at the hearing. And that's all I have, 17 Director. Thank you. 18 THE HEARING OFFICER: Okay. All right. You 19 want some opportunity to reply, TJ, or is that -- I 20 guess I was thinking we'd go through an argument, a 21 counterargument, a rebuttal, and then a reply. 22 MR. BUDGE: That's fine. 23 THE HEARING OFFICER: But if you want to briefly 24 make a statement, TJ, that's fine. 25 MR. BUDGE: Just real quick. There's a
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1 MR. HAEMMERLE: Rebuttal, Director? 2 THE HEARING OFFICER: Sure. Go ahead. 3 MR. HAEMMERLE: I'll be brief. 4 Starting with Ms. Klahn's allegation that 5 if the respondent parties went first that we'd simply 6 be done. Of course, in any standard case, Director, 7 obviously there's a rebuttal opportunity, and we would 8 have that rebuttal opportunity after they presented 9 their defenses. 10 Again, Director, I do point out on page 2 11 of our reply brief where we do cite portions of the 12 AFRD case that state, quote, "Nowhere do the rules 13 state that the senior must prove material injury before 14 the Director will make a finding." 15 We have presented to you our water rights. 16 We have presented to you the measurements. And we have 17 presented you interconnection, which the Department is 18 well aware of. 19 Material injury is defined by your own 20 rules as any hindrance or impact upon the exercise of 21 water right. We have that. Every expert in this case 22 has stated that the use of groundwater pumping is 23 hindering and impacting our right. 24 So Director, really, there's nothing more 25 that we need to prove before you find material injury.	1 difference between an impact on the water flow and an 2 impact on the actual beneficial use of water. And 3 AFRD 2 does make it clear. It says, "If we say the 4 Director wasn't to look at actually how they were using 5 water, their need for water, we would be violating the 6 constitutional requirement that water only be 7 distributed to those using it." 8 So there's a difference here. We 9 acknowledge that pumping is having an impact on the 10 amount of water that comes out of the tunnel. The 11 dispute is over the beneficial use of water. And 12 that's the rub here. That's all I'll say. 13 THE HEARING OFFICER: Okay. Well, at the end of 14 argument, we're under a short time frame, so I think 15 I'll just tell you where I'm going. 16 And looking at the standard that I have to 17 apply in a motion for summary judgment, drawing all 18 inferences in favor of the nonmoving party, Fritz, in 19 my opinion there are genuine issues of fact related to 20 material injury, and I'll deny the motion for summary 21 judgment. Okay. And we'll write that up. 22 Now let's go to the next one. This is a 23 motion about source. Okay. 24 Robyn. 25 MS. BRODY: Thank you, Director.

Page 26 1 Rangen has filed a motion for partial 2 summary judgment asking the Department to declare as a 3 matter of law that Rangen's water right is a surface 4 water right, not a groundwater right. That's part A of 5 the motion. 6 And part B of the motion is that Rangen's 7 water rights are not limited to water that spills from 8 the mouth of the Curren Tunnel itself, but that 9 Rangen's water rights encompass all of the spring flows 10 that are there on Rangen's property and are captured by 11 Rangen's diversion system. 12 We find ourselves in somewhat of a peculiar 13 situation because IGWA took the position 20 years ago 14 in the Musser case, actually told the Supreme Court as 15 a friend of the court when they filed an amicus brief, 16 that Rangen's water, that water coming from the 17 Martin-Curren Tunnel is surface water. 18 And today IGWA comes into this case asking 19 the Director to rule as a matter of law -- or actually 20 not in the -- their posture isn't that it's a summary 21 judgment issue, but they're actually arguing that, no, 22 the water coming from the Curren Tunnel is groundwater. 23 They've taken a 180-degree turn in terms of 24 characterizing what Rangen's water is. 25 From the outset, we think that IGWA should	Page 28 1 Rule 60 tells us that the partial decrees are supposed 2 to say when a right is derived from groundwater. 3 Rangen's right doesn't say that. It says 4 the Martin-Curren Tunnel, tributary to Billingsley 5 Creek. And I keep pointing out the "tributary" part 6 because that's also part of Rule 60. 7 If it's a surface water right, the way that 8 it's supposed to be decreed is by use of the USGS 9 mapping name that it's given, and then it's also 10 supposed to designate a tributary where that water 11 goes. And if there's no USGS name, then the partial 12 decree is supposed to have a local regional identifier. 13 And that's exactly what the Martin-Curren Tunnel is. 14 And I'm going to violate my rule and look 15 behind documents for a minute. I don't think you have 16 to look behind the decree. But if you were to peek 17 behind the decree and take a look at the Department's 18 report on Rangen's water rights, it actually says in 19 the report itself that the Martin-Curren Tunnel was a 20 local regional identifier. 21 Bottom line on the source issue, look at 22 Rule 60, look at the partial decrees. That's all the 23 Department has to do, and you can rule as a matter of 24 law that Rangen's water is surface water and has to be 25 administered that way.
Page 27 1 just be estopped from presenting any evidence regarding 2 the nature of Rangen's source, frankly, that it would 3 be unconscionable for them to present this kind of 4 testimony and this kind of legal positioning. 5 Setting that aside and looking at the 6 substance of the claim, the Director need not look any 7 further than Rangen's partial decrees themselves to 8 figure out whether Rangen's water is surface water or 9 groundwater. 10 The Department as part of the SRBA 11 promulgated an extensive set of adjudication rules, and 12 among those rules is Rule 60. And it actually sets out 13 how the Department labels sources. And then the 14 Department's recommendations about sources are then 15 incorporated into the partial decrees that are entered 16 by the SRBA. 17 We know that Rangen's partial decrees or 18 that the source of their water are surface water 19 because of the way that the partial decrees are 20 written. Rangen's decrees state that the source is the 21 Martin-Curren Tunnel, tributary to Billingsley Creek. 22 If the source of Rangen's water were 23 groundwater, the partial decrees would say that, 24 because when a source is groundwater that's what 25 partial decrees say. That's what the Department's	Page 29 1 The Department doesn't have to look 2 anyplace else, shouldn't look anyplace else, adjudicate 3 it in accordance with what's on the face of those 4 partial decrees. That's part A. 5 Part B is the use of this local regional 6 identifier, the Martin-Curren Tunnel. When you lay 7 out -- first of all, there's no question that it's a 8 local regional identifier. The Department's own report 9 says it's a local regional identifier. 10 When you start looking at Rangen's 11 historical paperwork, its licenses, its permits, 12 correspondence with the Department, it is absolutely 13 clear that Rangen -- and even Rangen's diversion 14 system, that Rangen's water rights on paper and in 15 practice down at the research hatchery capture every 16 bit of spring flow that's there. 17 On page 8 of our opening brief, I was able 18 to cut part of a diagram out of a licensing document 19 out of a backfile, and it actually shows spring flows 20 coming from the talus slope and the canyon rim all 21 flowing into the dam structure that Rangen has. Rangen 22 captures all of this spring flow on its property and 23 puts that water to beneficial use, raising fish. 24 The Department in its Second Amended Order 25 on Rangen's prior delivery call actually recognized in

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1 one of its findings that the representative -- or that 2 the measurements that the Department had were 3 representative of all of the spring flows that were 4 available under Rangen's water rights. 5 And what's interesting about Rangen's 6 measurements is Rangen takes its measurements at the 7 outflow. And in fact you'll find, as I pointed out in 8 the briefing, you'll find a conversation memo from the 9 Department where Rangen was actually permitted to make 10 measurements at the outflows, rather than the inflows. 11 The reason being you can't measure at the inflow where 12 all the water's coming from because it's coming all 13 over the property. It's not just a single point. 14 Now, I know that IGWA has pointed to a .shp 15 file to say "Look, their point of diversion is up here. 16 It's the Curren Tunnel." 17 But the .shp file on its face says that 18 it's not necessarily determinative of what rights are. 19 Rangen doesn't have a single point of diversion in its 20 decree. If you look at its decrees, the point of 21 diversion is a quarter-quarter-quarter section. 22 And when you start looking at what Rangen 23 has actually done and what the Department recognizes 24 and how the Department has allowed Rangen to measure 25 its flows, everything points to the fact that Rangen's	1 them to change their position. This doctrine of quasi 2 estoppel prevents parties from doing that under limited 3 circumstances where it would be so unfair to change the 4 position as to be unconscionable, just to be offensive 5 to consider them changing their position, given what 6 they've done in the past. And I recognize that 7 doctrine. 8 I should point out that the brief that 9 Rangen refers to was filed almost 20 years ago. I may 10 have read that at some time. I don't know. I was not 11 familiar with this footnote that they brought our 12 attention to. 13 So I want to make clear there was no 14 deliberate effort to hide this or to avoid it or 15 anything like that. When I read it in Rangen's brief, 16 it was news to me as well. 17 But I want to explain why that footnote in 18 a brief filed almost 20 years ago in a case that came 19 out before the conjunctive management rules, before 20 Clear Springs, before A & B, before the Surface Water 21 Coalition, why that does not prevent us from arguing 22 that the law today treats the tunnel as a groundwater 23 well. 24 As I mentioned, this happened a long time 25 ago. It was a footnote. That case did not have at
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1 water rights encompass the entire spring flow on the 2 property, and not just water spilling from the Curren 3 Tunnel itself. 4 So with that, unless you have further 5 questions, I'll turn it over to IGWA and Pocatello. 6 THE HEARING OFFICER: Okay. Who wants to argue 7 the response? 8 MR. BUDGE: I'll argue that as well. 9 THE HEARING OFFICER: Okay. TJ. 10 MR. BUDGE: First, let me address this quasi 11 estoppel doctrine. That's the one that Robyn mentions 12 under some circumstances prevents people from changing 13 positions in litigation. And before I discuss the, you 14 know, position change they refer to, it's important to 15 understand the doctrine. It's very common for 16 litigants to change positions. 17 Director, you're probably aware that 18 oftentimes attorneys even plead cases in the 19 alternative. Well, if A, then we argue this; but if 20 not, then if B we argue this. There are changes in law 21 that cause people to change their position. There are 22 changes in fact that cause people to change their 23 position and adapt to the changing environment. 24 So it is not uncommon for attorneys to 25 change their position, and it is not inappropriate for	1 issue whether the Curren Tunnel was a surface or a 2 groundwater right. 3 But in the footnote IGWA's counsel at that 4 time did note that the Court probably should treat the 5 Curren Tunnel as a surface water source. It was a 6 footnote, it was a "probably," it wasn't an issue with 7 the case, it was before the conjunctive management 8 rules, it was before these other cases, and I don't 9 find anything offensive, unconscionable about IGWA 10 taking its current position that under the law of this 11 state the tunnel qualifies as a groundwater well. 12 And so I would urge the Court to consider 13 our arguments in that regard, and also recognize that 14 even if IGWA wasn't here the Director has a duty to 15 look at the law, to administer water based on the law, 16 and would still have to undertake the same analysis. 17 Now, Ms. Brody has highlighted kind of the 18 two parts to their summary judgment motion regarding 19 source. There's three different issues that are tied 20 up in that. And I want to address them independently. 21 The first issue is can the Director change 22 the decree so that the source converts from the 23 Martin-Curren Tunnel to the term "groundwater." 24 And we agree with Rangen. The Director 25 cannot change the decree. We think summary judgment is

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1 appropriate in that regard, and we don't disagree with 2 that. 3 The second issue, can Rangen call for the 4 delivery of water to points of diversion that are not 5 on its decree. Rangen's decree identifies a specific 6 40-acre tract in which its point of diversion is 7 located. The Department maintains a map that pinpoints 8 that point of diversion. I attached that to our brief. 9 That point of diversion is the Martin-Curren Tunnel. 10 If you look at the documents in the 11 Department's backfile, they also identify the 12 Martin-Curren Tunnel as the point of diversion. In my, 13 you know, day-to-day water practice, if somebody's 14 wanting to add a point of diversion or change a point 15 of diversion, they've got to file a transfer 16 application with the Department to do that. 17 What Rangen is asking, Director, is "Allow 18 us to call for the delivery of water to points of 19 diversion that are not on our decree downstream on 20 Billingsley Creek or other spring outlets, let us call 21 for the delivery of water to other points of diversion 22 that we don't have a decreed right to call for as 23 points of diversion." 24 The decree is as binding upon Rangen as it 25 is upon everybody else in this proceeding. And if	1 issue. This is certainly a unique structure. There 2 aren't many of these tunnels around. We don't normally 3 deal with these. 4 Most wells are the kind that you drill 5 vertically with a well drilling machine, and this is 6 the kind that was excavated horizontally. And this 7 requires the Director to say "Well, should this be 8 administered as surface or groundwater?" 9 Were there not this administrative rule, 10 this adjudication rule that Rangen cites to, they would 11 have essentially nothing to stand on. I mean this 12 tunnel meets the statutory definition of a well. 13 But what Rangen is saying is "Well, 14 Director, there's this administrative rule that should 15 tell you to administer it as a surface water source." 16 And I appreciate the logic behind the argument. 17 The problem is that administrative rule 18 contradicts a statutory rule. And the statute in the 19 Groundwater Act says that "Groundwater is all water 20 under the surface of the ground, and that a well is an 21 artificial excavation or opening in the ground more 22 than 18 feet below the land surface." 23 And we've put into evidence the report of 24 Bern Hinckley that explains that this tunnel is 25 300 feet long. Once you get beyond the casing, it's
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1 Rangen made a mistake in identifying the Curren Tunnel 2 at its point of diversion, it's got to live with that 3 mistake, and take whatever action it thinks is 4 appropriate to remedy that mistake. 5 But as it stands, there is a decreed point 6 of diversion. And that's what they get to call for the 7 delivery of water to. 8 Now, there is this kind of underlying issue 9 that Rangen has always measured water at the bottom of 10 its raceways. So it's measured water not only from the 11 tunnel, but also from Billingsley Creek, also from 12 springs in the area, also from irrigation water that 13 comes from the North Side Canal Company. 14 By law Rangen is required -- and we point 15 this out in our brief -- to measure its water at the 16 point of diversion. Rangen has chosen not to do that. 17 The Department has permitted that, right, wrong, or 18 indifferent. 19 But the fact that they've measured their 20 water at somewhere other than what the law requires 21 does not allow them to call for the delivery of water 22 to points of diversion that are not on their decree. 23 Now, the issue as to whether the Curren 24 Tunnel should be administered as a surface or 25 groundwater source. That's a water administration	1 70 feet below the ground. So it meets the statutory 2 definition of a well. 3 So from the Director's perspective, I think 4 he's got to say "Well, do I follow this administrative 5 rule, this adjudication rule, and allow that to tell me 6 to administer the tunnel as a surface water source, or 7 do I follow the statute that tells me that it's a 8 groundwater well?" 9 And we cited in our brief the rule of law 10 that if there's a conflict between a statute and an 11 agency rule, the statute controls. 12 We also cited an Idaho Supreme Court case 13 dealing with water flowing from a tunnel. That held 14 this was groundwater. 15 We also cited a California case, not 16 binding, but instructive, dealing with a horizontal 17 tunnel and treating it as a groundwater well. 18 And we would ask the Director to administer 19 the tunnel as a well. We think this falls within his 20 discretion. As the Supreme Court noted in AFRD 2, 21 adjudications neither address nor answer the questions 22 raised in delivery calls. And this is one of those 23 questions. This is a unique one. We're dealing with a 24 unique structure. 25 But this is one of those circumstances

Page 38 1 where the Director's got to look at the physical nature 2 of the diversion structure and decide should this be 3 administered as a groundwater well or as a natural 4 surface water source of water? 5 Okay. There may be issues of fact involved 6 in this. You can look at the record. But I would 7 certainly urge the Director to not find as a matter of 8 law that it must be administered as a surface water 9 source, and deny the motion for summary judgment on 10 that basis. 11 THE HEARING OFFICER: Okay. Thank you, TJ. 12 Sarah. 13 MS. KLAHN: Thank you. 14 We join IGWA's arguments on this motion, 15 and I'll just make a couple of additional points. 16 And I think TJ said this, but to the extent 17 he didn't say it directly, I want to reiterate that the 18 A & B decision confirmed what we already understood 19 from AFRD No. 2, which is that the bulk of the 20 Director's obligation as a threshold matter in a 21 conjunctive management delivery call is interpretation 22 of decree. 23 And Rangen has basically asked the 24 Department to find as a matter of law that the source 25 of its water at the Curren Tunnel is not groundwater	Page 40 1 And I think they essentially want to live 2 by the decree, and so they should die by the decree 3 too. If they want to live by the decree and argue that 4 it's really surface water, not groundwater, then they 5 also have to live with the fact that the lower talus 6 slope diversion point is not listed in the adjudicated 7 sources, it's not part of the point of diversion. 8 And their luck, I guess, in getting to 9 measure down below and utilize this water that's not 10 part of their adjudicated supply is all well and good, 11 but that doesn't mean they can shut down 1700 cfs of 12 pumping on the ESPA in order to deliver water to that 13 point. 14 So I think we would join IGWA in saying 15 that this motion for summary judgment should be denied, 16 raises compelling questions of fact that should be 17 decided at trial about both of the issues covered in 18 Rangen's motion. 19 If you have any questions, I'm happy to 20 answer them. 21 THE HEARING OFFICER: Thank you. 22 Robyn, reply? 23 MS. BRODY: Just a few points. The first is, 24 Rangen is not relying on a rule, an administrative rule 25 to tell the Department how it should administer
Page 39 1 because it doesn't say "groundwater." 2 That's not the same thing as finding that 3 the source of water is surface water because of 4 something affirmative. They're essentially asking the 5 Department to use a negative to find something which 6 will have lasting consequences for the entire case. 7 And I think there's definitely a question 8 of fact about what kind of water this is, in light of 9 the fact that the decrees are ambiguous, at best, and 10 that is part of what should be decided at trial. 11 On the second issue regarding Rangen's 12 argument that it should be able to include what we call 13 the lower talus slope supply, essentially springs that 14 Rangen collects that come out below the Curren Tunnel 15 as part of its adjudicated water right. There's two 16 problems with this. 17 First of all, as TJ points out, if Rangen 18 was measuring their water in the manner that all other 19 water users in Idaho are required to measure their 20 water, i.e., at the point of diversion, then they'd be 21 measuring at the Curren Tunnel, and they wouldn't have 22 this bootstrap argument that because they've been 23 allowed to measure at the lodge dam for all these 24 years, that somehow or other all of that water belongs 25 to them.	Page 41 1 Rangen's water rights. 2 Rangen is relying upon the partial decrees 3 that were entered into the SRBA and not objected to by 4 anyone. That's what Rangen is asking the Department to 5 rely upon, is what do the decrees say. 6 And it's only by reference to the rule. 7 The only reason that that is in there is to understand 8 how it is that groundwater is decreed versus how 9 surface water is decreed. That's Rangen's position. 10 The second point that I want to make is 11 going to this issue of IGWA's change in position. You 12 know, I understand lawyers pleading things in the 13 alternative, and I understand that you may have to 14 change legal arguments or take different positions at 15 different points in time. 16 But we're talking about something 17 fundamentally different than taking a varying position 18 on how a statute gets interpreted. We're talking a 19 180-degree turn on what they call "hydrogeologic 20 reality." Those are IGWA's words. What's 21 hydrogeologic reality? 22 And they argued that hydrogeologic reality 23 to the Supreme Court was that Rangen's right was 24 surface water. And now they're asking the Department 25 to no, no, find that it's groundwater.

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1 The reality hasn't changed. And that's why 2 it's not conscionable to allow them to make this sort 3 of argument. They provided not only a brief to the 4 Idaho Supreme Court saying that the Martin-Curren 5 Tunnel water was surface water, they provided an expert 6 affidavit saying that it was surface water. 7 They didn't object in the SRBA to how 8 Rangen's right was decreed, and yet now want to come in 9 and say, no, the decrees ought to say groundwater. 10 Rangen's rights are surface water, and they're entitled 11 to divert and use all of the spring water that comes 12 onto their property. And that's what we're asking the 13 Department to find as a matter of law. 14 Thank you. 15 THE HEARING OFFICER: Okay. Any further reply 16 here, TJ? 17 MR. BUDGE: Just real briefly. 18 I don't believe that's what the affidavit 19 says that was attached to the brief years ago. And 20 while hydrogeologic reality hasn't changed, our 21 understanding of it certainly has. So until this case, 22 we didn't know how deep the tunnel was. We didn't know 23 how far under the land surface it was. There's been a 24 lot of changes in the law. 25 And that's why it's not unconscionable for	1 carries great weight in determining where that right is 2 diverted. 3 And I'm a little concerned, Robyn, in the 4 argument that the Department ought to take the decree 5 and what it says on its face, and then a 6 counterargument that all of the other springs that are 7 not identified are sources that Rangen is also entitled 8 under the decree to divert. 9 I think there are factual issues mixed in 10 with what we're talking about. And so I'm not sure 11 that I'm ready to rule one way or another, and it's 12 probably an evidentiary matter that needs to come in 13 and be heard at the hearing. 14 But I guess I want to set a benchmark right 15 now that at least in looking -- if I determine that 16 this is a surface water right, then I think all of 17 those other standards may also apply to the right, 18 including the specificity of the source and what's 19 named. 20 And if the other springs are not 21 identified, it seems to me that that may be some 22 impediment to the delivery call. But I guess my take 23 is that on that particular issue a determination on 24 summary judgment is not warranted and that there are 25 factual issues that may come in on that particular
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1 us to take the changes in the law, our changes in 2 what's really going on, you know, our increased 3 understanding and say based on what we know now, we 4 think this is what qualifies as a well. 5 That's all. 6 THE HEARING OFFICER: Okay. Sarah, I didn't 7 give you a chance last time. 8 Do you have anything else? 9 MS. KLAHN: No, your Honor. Thank you. 10 THE HEARING OFFICER: Okay. Thanks. 11 All right. Let me just talk about this a 12 little bit. And my inclination is to determine that 13 the source is surface water, but I guess I'm not there 14 yet. I want to go back. I want to read the briefs. I 15 want to look at the case law and look at some of the 16 other quoted reference material. 17 But I guess I'm inclined to determine that 18 it's surface water, given the past interpretations and 19 what the decree says. 20 So now on the second issue, I guess I have 21 some real concerns if the water right is characterized 22 as surface water, my experience has been practically 23 that surface water sources are specifically identified 24 and that the location of those surface water sources is 25 a locational tool, but the specific name of the source	1 issue, or factual matters that may be presented with 2 respect to that factual issue. 3 Okay. So I haven't given you clear 4 direction, but I want to look at what we have. 5 Okay. Last, and I think this is the City 6 of Pocatello's motion for, and I think this is for 7 declaratory determination or a declaratory order. 8 And, Sarah, I think you would lead here. 9 MS. KLAHN: That's right. And thank you. 10 THE HEARING OFFICER: Okay. 11 MS. KLAHN: Let me just say a few preliminary 12 words about kind of the nature of the relief we're 13 seeking. You know, we've been involved in these 14 delivery call cases, Pocatello has, for eight years 15 now. And like everyone else who's been involved in 16 these cases for that long, we've learned along the way 17 what the legal issues are that the courts and the 18 Department understand to be the framework of these 19 conjunctive management delivery calls. 20 And the A & B case presented for the first 21 time this issue of what obligation the senior has to 22 interconnect -- essentially to create a reasonable 23 means of diversion of its water supply in, the way the 24 Supreme Court puts it, in advance of seeking 25 curtailment of juniors.

Page 46 1 And we're faced with sort of this dilemma. 2 And ideally, Mr. Director, we would have waited for a 3 judgment on the source issue prior to filing this, 4 because we realize there's some inconsistency between 5 arguing on the one hand that the lower talus slope's 6 water supply is not part of Rangen's adjudicated water 7 right, and on the other hand arguing that they have an 8 obligation to interconnect that in order to be 9 efficient. 10 But given the timing and the compressed 11 nature of the proceedings, we thought an order as a 12 matter of law, not as a matter of fact, but as a matter 13 of law about what the senior's obligation is, Rangen in 14 this case, to show that it's taken steps to 15 interconnect its water supplies or that it's not 16 technically or financially feasible to do so. 17 So that's the backdrop for this. And we're 18 not seeking a ruling today -- just to make sure we're 19 clear here. We're not seeking a ruling that Rangen has 20 to interconnect. We're not seeking a ruling that their 21 means of diversion is per se inefficient. Obviously, 22 that's what we assert, and that's what our evidence 23 will demonstrate. But we're looking more at the first 24 step of that, which is what does Rangen have an 25 obligation to show in relation to its means of	Page 48 1 slope supply is technically part of their adjudicated 2 water right. Two-thirds of the water they've been 3 using they only put through the large raceways and the 4 CTR raceways. 5 The water supply appears to be situated 6 elevationally so that it can be actually run by gravity 7 to the small raceways. And the small raceways, your 8 Honor, are the location that Rangen's witnesses have 9 repeatedly identified as being among the most 10 critically water-short. 11 So they have the makings of a way to make 12 their water delivery system more efficient, to use more 13 of their water through their facility, and instead of 14 requiring juniors to curtail 1700 cfs of pumping so 15 that they can get an additional amount of water at the 16 Curren Tunnel. 17 We're seeking a ruling today that in light 18 of the fact that it's undisputed that two-thirds of the 19 water is not made available to what Rangen describes as 20 the most critically water-short structure on the 21 facility, that Rangen has a legal obligation to show 22 that it has taken reasonable steps to interconnect. 23 Our legal basis for that is the A & B 24 decision, which affirms the Director's discretion to 25 make this sort of determination based on the
Page 47 1 diversion. 2 So that's my sort of preliminary -- I guess 3 the preliminary thinking about what was behind this 4 motion. And the motion itself is very simple. It is 5 undisputed that Rangen uses approximately -- well, it 6 depends on the season of year because their water 7 supply is seasonal, just like the other spring users. 8 The hydrograph peaks in the fall and winter and goes 9 down in the summer, but that their use of the water is 10 limited to basically splitting up the two water sources 11 that they do put through their raceways. 12 So the Curren Tunnel water is used 13 throughout the facility. It comes in at the top of the 14 facility. It is made available to the greenhouse and 15 hatch house, which are the small fish or research 16 facility areas, and it's also made available to the 17 small raceways. 18 And after use in those facilities, it can 19 be routed down through the large raceways to the CTR 20 raceways. And this is consistent with what we 21 understand the operation of other hatcheries to be and 22 what the experts have stated is consistent. 23 What's not consistent is that two-thirds of 24 their water supply that they've been using -- again, 25 leaving aside the question of whether that lower talus	Page 49 1 conjunctive management rules, and it's also Schodde, 2 which states that the senior cannot demand the entire 3 flow of the stream, in this case the entire aquifer, in 4 order to make its means of diversion work. 5 The fact of the matter is if Rangen hooked 6 up its small raceways to the two-thirds of the water 7 that's currently not available to them, whatever 8 shortage they're claiming would decrease. Now, it's 9 true they would not obtain their full decreed amount, 10 but that's a separate issue. 11 And as we stated in our brief, we expect to 12 put on evidence that demonstrates they've never 13 received, never used, and do not require their full 14 decreed amount. The first step, however, is for the 15 senior to be able to show that his means of diversion 16 is reasonable, and in this case that requires 17 interconnection. 18 If you have any questions, I'm happy to 19 answer them. 20 THE HEARING OFFICER: Okay. Thanks, Sarah. 21 Justin. 22 MR. MAY: Do we want to have -- I don't know 23 whether IGWA has something to add to it or not. 24 THE HEARING OFFICER: Sure. 25 MR. BUDGE: Just a couple things.

1 THE HEARING OFFICER: Thanks.
 2 MR. BUDGE: I'll be real quick. But I think
 3 it's also important to recognize why the law requires
 4 people to maximize use of what they've got and use
 5 water efficiently.

6 And maybe it's worth remembering the
 7 contrast between surface water administration and
 8 conjunctive administration.

9 In surface water you shut off the junior
 10 and most or all of the water gets to the senior. It's
 11 a relatively efficient way to administer water.

12 But in the conjunctive management context,
 13 when you go to the step of curtailment, you curtail a
 14 whole bunch of water that just doesn't get to the
 15 senior. It's a very inefficient and wasteful way to
 16 administer water.

17 And so that, I think, is why the
 18 conjunctive management rules tell the senior, "You need
 19 to make the best use of what you've got before you look
 20 to shut off a whole bunch of juniors," and why the
 21 Supreme Court in A & B and elsewhere have reaffirmed
 22 that, you know, before you're going to take the drastic
 23 measure of shutting down tens of thousands of acres, or
 24 whatever the case may be, to get a tiny traction of
 25 that amount to you, you need to do the best with what

1 you got and make sure you can't meet your water needs
 2 by interconnecting or whatever.

3 I agree with Sarah that we'll put on
 4 evidence that Rangen could and should interconnect.
 5 But for the purposes of their motion, I think the law
 6 is quite settled that, yes, they've got to take
 7 whatever reasonable measures the Director determines
 8 before they look to shut off junior rights.

9 That's all I have to say in that regard.

10 THE HEARING OFFICER: Okay. Thanks.
 11 Justin.

12 MR. MAY: Thank you, Mr. Director.

13 As I understand Pocatello's motion, it is
 14 not just that the Director can consider reasonable
 15 means of diversion. Pocatello's motion is styled as an
 16 order that there is a precondition of some kind upon
 17 Rangen's ability to make a call.

18 Now, it's styled or described based upon
 19 the conjunctive management rules reference to
 20 reasonable diversion. But it is in fact an attempt to
 21 put in a preconditioned and an additional step to the
 22 call beyond just showing material injury that Fritz
 23 talked about earlier, but an additional step of first
 24 showing interconnection. And the basis for that is
 25 A & B.

1 And from our standpoint -- and I think it's
 2 pretty clear from the A & B decision -- that A & B is
 3 unique. The A & B system is unique in Idaho. There
 4 will likely not be another case that would come up that
 5 would have similar issues to A & B in terms of
 6 interconnection.

7 The basis for the A & B decision itself was
 8 that the decree in that case and the license in that
 9 case was put together in the way that it was so that
 10 A & B would have the flexibility to move water around
 11 within its system.

12 There were, I believe, 177 different wells
 13 servicing a broad range of users in a broad area. And
 14 the decree itself and the license was put together in a
 15 way so that A & B would have the flexibility to move
 16 the water around and service all of those users.

17 And if you look at the A & B --
 18 particularly the early decision, I believe it is in the
 19 actual Hearing Officer's decision, they talk about
 20 requiring A & B to maximize the use of that flexibility
 21 to interconnect.

22 And so it's a unique case that simply
 23 doesn't have any application, outside of A & B frankly,
 24 in terms of being a separate obligation before you can
 25 even file a call of proving that your entire system is

1 interconnected, as much as it can be.

2 Frankly, you know, the way that it's
 3 attempted to be used here would be used in any
 4 particular case. And there just is no requirement in
 5 Idaho law that you show that the entire system that
 6 you've got is interconnected in some fashion prior to
 7 making a call, at least as a threshold.

8 With regard to the reasonableness of the
 9 diversion and if in fact there would be some reason for
 10 Rangen to interconnect the system in order to make
 11 their diversion reasonable, Pocatello, or for that
 12 matter IGWA, or other parties in the case, are free to
 13 argue as a defense. And as has been pointed out, the
 14 Director can consider, when looking at defenses to
 15 Rangen's call, can consider whether or not Rangen's
 16 diversion is reasonable.

17 But that's not the same thing as a
 18 requirement to interconnect. In other words, Rangen's
 19 diversion system in this case could be, and in fact is,
 20 completely reasonable without any further
 21 interconnection. Rangen's system is interconnected.

22 What we're talking about in this case is
 23 taking water that flows into the system lower and
 24 pumping it up higher so that it can go to different
 25 portions of the facility.

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1 All of the water, as Ms. Klahn mentions, 2 that is collected higher up in the system does go 3 through and services the large and the CTR raceways. 4 What we're really getting at here -- and if 5 you look at page 6 of the reply brief, Pocatello has a 6 statement in there where they indicate that we missed 7 the point. And their purpose is to ensure that the 8 senior is beneficially using the water it has, that it 9 needs more water, and that it is not wasting water. 10 And I would essentially agree that that's 11 where they're trying to get to. Okay? And they 12 certainly have the ability, as we've mentioned many 13 times, to raise those as defenses with the appropriate 14 burden of proof. 15 But with regard to this specific issue of 16 interconnection, they've got to show some reason in 17 this case. The reality is the way that Rangen's 18 facility is constructed, they raise fish in four 19 different areas, essentially: They have a greenhouse 20 and a hatch house, they have small raceways, they have 21 large raceways, and they have CTR raceways. 22 And each of those areas of the facility is 23 used to raise fish at different times for different 24 things. They do research in different areas of the 25 facility. They raise fish of different sizes that then	1 the water has been used as much as it can, however it 2 goes through the facility. If you were to take water 3 that had not been yet used in the large raceways and 4 run it first through the greenhouse or the small 5 raceways and then put it into the large raceways, it 6 depletes what you can do with it in the large raceways. 7 And so it's actually counterproductive to do what 8 Pocatello is suggesting. 9 The amount of water that's available, based 10 upon the configuration right now, in the small raceways 11 and the greenhouse is proportional to the amount of 12 water that's used in the facility, kind of in the same 13 way that they need the water in those particular areas. 14 You raise smaller fish in the small 15 raceways. You raise bigger fish in the large raceways, 16 and on down. There is not in Rangen's facility, and no 17 one has suggested, a time when Rangen has more water 18 than it can use in the large raceways and the CTRs when 19 it needs extra water in the small raceways beyond what 20 it's used for. 21 And so Pocatello is going to have to show 22 some reason why it makes sense to actually pump in the 23 way that they are. And there's no basis for you as the 24 Director to impose some kind of obligation upon Rangen 25 before it can even make its call to come in and kind of
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1 get moved through the facility. 2 And the requirements for water in the 3 different areas of the facility at a given time depend 4 upon how much water's available in the facility as a 5 whole and what different life cycles of fish you've got 6 going on in the facility at any particular point. 7 And what Pocatello has not done at all in 8 this case is shown that it would be useful at all for 9 Rangen to take water that's being used in the large 10 raceways and the CTRs and move it up higher in the 11 facility and use it in the small raceways. 12 And frankly, as you'll see when this gets 13 to trial, and we've cited to the expert reports in our 14 briefing, it would be counterproductive, because the 15 water, wherever it enters the facility, whether it just 16 starts out in the large raceways or it starts out in 17 the greenhouse or it starts out in the small raceways, 18 is used multiple times. 19 There are multiple sets of small raceways. 20 There are multiple sets of large raceways. There are 21 multiple sets of CTR raceways. And each time you run 22 water through one of those sets, it depletes the 23 oxygen. It increases the waste products in the water. 24 And so by the time the water leaves the 25 facility, as Mr. Smith indicated in his expert report,	1 prove a negative as to why that's not appropriate. 2 Rangen beneficially uses all the water that 3 enters that facility. The way that it's configured 4 right now recognizes the amount of water that's 5 necessary, given the overall flow and the life cycle of 6 the fish at any given point. And there's frankly no 7 reason to do the type of system that Pocatello is 8 suggesting. 9 I'd like to make one kind of final point 10 here, that Pocatello has suggested that the -- tried to 11 emphasize that the place that Rangen is most short and 12 the thing that it's complaining about most is the small 13 raceways. And that simply is not correct. 14 Rangen is short of water throughout the 15 entire facility. It is short of water in the small 16 raceways. Many of them are empty. It is short of 17 water in the large raceways. Many of them are empty. 18 It is short of water in the CTRs. They have empty 19 raceways there. 20 And so to suggest that somehow any problem 21 would be alleviated simply by putting water into the 22 small raceways is simply incorrect. 23 Unless you have any other questions, that's 24 all I've got. 25 THE HEARING OFFICER: Okay. Thanks, Justin.

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1 Sarah, reply? 2 MS. KLAHN: Thank you. 3 I've got one, two, three -- I've got five 4 points to make in response to Justin. I'll start with 5 his last point, which is that Rangen asserts they're 6 short of water throughout their facility. 7 This was the same type of argument A & B 8 made about the problem of interconnection of its well 9 systems. Remember A & B's theory was that they were 10 entitled to .88 at each well, and their theory was if 11 they had to interconnect from a water-long well to a 12 water-short well that that would only lead to 13 additional shortages. And this is the same issue. 14 It's just stated -- Justin's just stating it slightly 15 differently. 16 Essentially Rangen says "Because we have 17 empty raceways" -- we'll leave aside for the moment 18 their own decision to have empty raceways, based on 19 their own decision about how they want to raise their 20 fish, that because of that, somehow or other 21 interconnection doesn't make sense. 22 Our motion or memo in support of our motion 23 lays out in the undisputed facts that Rangen has water 24 available from the lower talus slope supply that could 25 be made available to small raceways in the amounts	1 or raise the ammonia levels in the water. And as we 2 told you in our reply brief, we've been trying to get 3 water-quality data to determine whether that could be 4 an issue, whether it could be an issue, from Rangen 5 since August of 2012, for almost eight months. 6 We've asked in discovery. We've asked in 7 depositions. We've asked their expert. Nobody has any 8 concern -- nobody has any expressed concerns about 9 oxygen deprivation from the water use in the large 10 raceways or the CTR raceways. 11 Now, Mr. Kinyon, who's not an expert, who's 12 a lay witness, did testify that there are concerns with 13 oxygen levels in the small raceways at certain times of 14 the year. 15 Well, okay. Fine. We don't have any data 16 to support that. They don't routinely collect this 17 data. 18 So this is all argument. There's no facts 19 behind it. And it doesn't rise to the level of showing 20 that the interconnection we're asserting is necessary 21 before they can seek curtailment of juniors is somehow 22 infeasible. 23 The third point is this idea that somehow 24 or other this is our burden to show. And we 25 acknowledge that the A & B decision established that
Page 59	Page 61
1 of -- I think the number is between 9 and 12 cfs. It's 2 one of the paragraphs in the motion. At the small 3 raceways the amount available is between 1 and 12 cfs, 4 I believe. And the total supply -- or sorry, the total 5 capacity of the small raceways is about 10 cfs. 6 Plainly, if they made the water available 7 from the lower talus slope to the small raceways, they 8 would have a full supply for the small raceways. So it 9 simply isn't credible to say, "Well, we're short 10 everywhere, but we can't possibly be required to take 11 water we already have and that we're not fully using 12 and put it through the small raceways." 13 And that leads me to my second point, which 14 is the suggestion that somehow or other if they 15 actually were forced to put all of their first-use 16 water through the entire set of small, large, and CTR 17 raceways, as every other hatchery in the Magic Valley 18 does, as far as we know, and as their own expert 19 testified, he is unaware of any other hatchery that 20 does not make available all of its first-use water at 21 the top of its facility. If they're making water 22 available throughout the facility, they're going to be 23 able to grow more fish, period. 24 Now, there's this allegation that somehow 25 or other this is going to deprive the water of oxygen	1 insofar as a determination in a delivery call will 2 modify temporarily or permanently, I think was the word 3 of the Supreme Court, a decree, the juniors bear burden 4 of showing by clear and convincing evidence that those 5 modifications should occur. 6 So for example, after we put on our 7 evidence about Rangen's history of water use and their 8 failure to use all of their water, there may be a 9 finding by the Director at that point that they don't 10 require all of their water. And we understand we need 11 to show that by clear and convincing evidence. 12 However, the AFRD No. 2 case is very clear 13 that the reasonableness of a diversion is not part of a 14 decree. So this is not something that is part of 15 temporary or permanent modification of a decree. This 16 is an administrative decision about how the senior 17 needs to operate in advance of seeking curtailment of 18 juniors. 19 And the last point is Justin suggested that 20 what we're really seeking here is another step in the 21 process, that somehow or other we want this finding to 22 create another -- I don't know, like a preliminary 23 finding, a preliminary determination. 24 That is not what we're seeking. And I want 25 to reiterate that. This is about -- and that's why our

1 arguments, I hope, in our briefs are very carefully
2 framed to say before seeking curtailment of juniors.
3 We acknowledge if the seniors want to file
4 a delivery call with the Director and they want to give
5 them their decrees and assert that they're short, as a
6 threshold matter to start a delivery call case, that's
7 probably enough to start the process to get a contested
8 case going.

9 What we're saying is that in advance of
10 curtailment of the juniors, which obviously isn't going
11 to happen anyway, unless the Director finds that
12 there's injury. But in advance of that, the senior has
13 the obligation to show.

14 We're arguing that at trial Rangen bears
15 this burden. They're the senior. They're the one that
16 understands their system. And for them to suggest that
17 the juniors have to come in -- and particularly after
18 the efforts we've gone through to obtain information
19 about their system, which have been incredibly
20 expensive and difficult, that somehow or other we bear
21 the burden of coming in and showing that their system
22 is unreasonable.

23 I don't think that that's consistent with
24 Idaho law, and it isn't even practical. We are
25 certainly prepared to show that based on the facts

1 we've been able to get out of them that their means of
2 diversion are extremely unreasonable.

3 But at the end of the day, this motion is
4 about asking the Department to find that establishing
5 that their means of diversion are reasonable,
6 essentially that they've interconnected in this case,
7 or that it's technically or financially infeasible to
8 do so, that's their burden. And that's what we're
9 seeking here.

10 If you have any questions, Mr. Director,
11 I'm happy to answer them.

12 THE HEARING OFFICER: Thanks, Sarah.

13 TJ.

14 MR. BUDGE: I have nothing further. Thank you.

15 THE HEARING OFFICER: Okay. Justin, any
16 response?

17 MR. MAY: I just want to make it clear that
18 Rangen's position is that it is fully utilizing water.
19 Wherever it comes in, it is fully utilizing it. And
20 the raceways are used for different things during
21 different life cycles of the fish.

22 And so the suggestion that something would
23 be alleviated simply by putting water in the small
24 raceways if you don't also have an overall increase of
25 water in the facility is simply false.

1 You would maybe be able to raise more small
2 fish. For instance, you'd have the small raceways
3 filled if you chose to do that and you'd raise small
4 fish, and then you'd have nowhere to put them. You
5 couldn't move them lower in the facility because you've
6 already used all of the oxygen in the facility, and
7 you're left with a bunch of small fish that you have
8 nothing left to use. So this suggestion that somehow
9 the water is not being fully utilized is simply not
10 correct.

11 And -- well, that's all I have.

12 THE HEARING OFFICER: Okay. Thanks.

13 All right. Sarah, I want to look and read
14 the exact language of what the motion seeks. And it
15 says that "Pocatello seeks a declaratory order that as
16 a matter of law Rangen has a legal duty to show the
17 Director it has made reasonable efforts to maximize
18 interconnection of its diversion conveyance system or
19 show that interconnection is financially or technically
20 infeasible before it can request curtailment of junior
21 water users."

22 And the subject of interconnection is
23 related to the reasonableness of the diversion. And
24 the A & B case and the reasonableness of the diversions
25 by A & B was really factually driven. In other words,

1 it depended specifically on how the decree was issued,
2 the general way in which it was issued, all of the
3 points of diversion being a part of that decree and
4 included as a whole.

5 It wasn't split up in different systems.
6 And so it also had to do with the way in which A & B
7 was operating and all of those factual matters.

8 And I think this particular issue depends
9 on facts that will be presented at the hearing
10 regarding the reasonableness of the diversion. And the
11 issue of interconnection can be raised, but I'm not
12 prepared to issue an order declaring that there is this
13 obligation on the part of Rangen at this particular
14 time. And I'll issue an order so finding.

15 Okay. Other matters we need to talk about
16 today?

17 TJ.

18 MR. BUDGE: We had just a couple procedural
19 matters, and we're hoping to kind of expedite the
20 hearing and make things move smoother.

21 THE HEARING OFFICER: Okay.

22 MR. BUDGE: One of them would just be having
23 exhibits premarked. And we thought that we could
24 assign numbers by thousands. We left our notes. But
25 we were thinking the 1,000s could be --

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Page 66 1 Was it Rangen? 2 MS. McHUGH: Yeah. 3 MR. BUDGE: -- and 2000s IGWA or -- in any case, 4 each party would have a set of a thousand numbers, and 5 they could premark their exhibits so at the hearing 6 we're not spending time marking exhibits. 7 I don't know if you guys have an aversion 8 to -- 9 MR. HAEMMERLE: A wise idea, Director. We think 10 we can come up with some kind of agreement to mark 11 exhibits. 12 MR. BUDGE: Okay. 13 THE HEARING OFFICER: I'm amenable to any of 14 those suggestions. 15 MS. KLAHN: Can I raise a related matter while 16 we're talking about exhibits? 17 The scheduling order describes an exchange 18 of exhibit lists and witness lists, but it doesn't ever 19 designate when copies of exhibits have to be exchanged. 20 And that would also seem to be a hearing efficiency 21 that we could do where we could agree on a date. 22 It doesn't have to be April 15th, but maybe 23 a week before the hearing, to send either CDs or paper 24 copies of exhibits that we've got on our exhibit lists 25 so that each party has copies already. And that would	Page 68 1 occur, because, you know, it's likely that we'll want 2 to call Department witnesses. 3 THE HEARING OFFICER: Okay. Well, let's finish 4 the discussion about the first issue if we can. 5 So do the parties expect or want the 6 Department or the Director to issue an order requiring 7 that exchange, or can it be accomplished informally? 8 It seems to me based on the discussion that everybody's 9 agreed that informally exchange will occur. And you'll 10 agree on a scheme for marking and numbering the 11 exhibits. 12 MR. HAEMMERLE: We can do that informally. 13 MS. McHUGH: Yes. 14 THE HEARING OFFICER: Okay. All right. And I'm 15 happy, if you come up with a numbering scheme or some 16 sort of order of the way in which you number those 17 exhibits, I'm fine with it. 18 I've typically in the past identified, you 19 know, petitioner's and objector's or protestant's or 20 whatever, but we have enough parties here that maybe 21 some series of numbers, as you suggest, TJ, might be 22 best. 23 Okay. Now on to your issue of Department 24 witnesses. I guess I hadn't thought much about it, but 25 they certainly are available to be called.
Page 67 1 also save some logistical mess at the hearing. 2 MR. HAEMMERLE: That makes sense, Director, to 3 have them, I think, a week before. 4 MR. MAY: And just to raise it, I would think 5 around at that time -- and we can talk about this 6 later -- we probably ought to have a meeting to see 7 what we can all stipulate to in terms of exhibits to 8 try and make it go a little more smoothly. I don't 9 know if you guys have any thoughts on that. 10 MS. McHUGH: That's an idea. 11 MS. KLAHN: I'm sorry. I didn't hear Travis. 12 What did you say? 13 MR. MAY: This is Justin, Sarah. 14 I was just saying that along with that 15 exchange it might make sense for us to sit down or talk 16 on the phone about the possibility of stipulating to 17 some of those exhibits as well. 18 MS. KLAHN: I agree. 19 THE HEARING OFFICER: And the stipulation is of 20 great value to me and to all of us in the efficiency of 21 presentation. 22 MR. HAEMMERLE: Director, another issue I think 23 we wanted to talk about was calling of Department 24 witnesses. I don't know if you have any kind of 25 expectation how that might occur, how that should	Page 69 1 And I guess maybe I'd ask you, Garrick, how 2 you think those witnesses ought to be presented. 3 Do we want them presented at the outset and 4 be made available, or should the parties then identify 5 those Department witnesses that they'd like to examine? 6 And if that's the case, do we want to have a general 7 presentation through examination by counsel, at least 8 presenting that evidence, rather than it coming in in a 9 narrative form? I guess I just ask the question, and 10 maybe of everybody. 11 But, Garrick, I want to engage you here in 12 the discussion. 13 MR. BAXTER: I think the way we have framed 14 Department participation up until this point has been 15 responding to arguments raised by the parties. So I 16 don't know if having the Department staff come up first 17 would make sense. 18 MS. McHUGH: And I guess, to weigh in on that, I 19 would agree with that and would suggest that it makes 20 sense for the parties to identify what Department 21 witnesses they would call in their own case. 22 And then if the Department feels like it 23 may want to examine them in -- to put in evidence in 24 the record or information on the staff memo or 25 something in response to the parties, I guess we'd have

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Page 70 1 to figure out how that happens, but... 2 MS. BRODY: But I guess -- I'm sorry. 3 MR. HAEMMERLE: Director, clearly the 4 Department, through their staff memo, has weighed in on 5 many issues that you're going to have to decide with 6 respect to running of the model, water-measurement 7 issues, and the like. Nearly every issue that's been 8 identifiable, the Department has weighed in on. 9 So you know, we think it's fair to identify 10 witnesses and work with Garrick to do that. But, you 11 know, we think we should be free to call any of the 12 Department witnesses we think we need to in our 13 case-in-chief, or otherwise in rebuttal. 14 THE HEARING OFFICER: And I agree, you should be 15 able to call the Department witnesses. That's not in 16 dispute. I think what we're talking about is how those 17 witnesses are called and how they're examined. 18 And I guess what I'm hearing in the 19 discussion, unless you want to suggest a different way 20 of examining the Department witnesses, Fritz, is that 21 in the presentation -- or, IGWA, in the presentation of 22 your evidence that you indicate that you want to call 23 those witnesses, and I'm assuming based on the 24 discussion that they would then be called as your 25 witness.	Page 72 1 Hearing Officer wants to talk about other issues. 2 So... 3 MS. McHUGH: And that, I think, would be my 4 expectation at the end. Okay. 5 THE HEARING OFFICER: Okay. 6 MS. McHUGH: One other, while we're talking 7 procedurally, is the protective order. We have a 8 protective order in this case. I have no answer on how 9 we want to handle the hearing and exhibits and 10 examination and testimony that may be subject to the 11 protective order. I don't know. I've never had an 12 experience with that, especially in a public agency. 13 So I think it probably can't be resolved 14 talking about it today, but I think we need to talk 15 about how that works. Right now all the depositions of 16 Rangen's employees have been designated as 17 confidential. 18 If we were to use those depositions for 19 some reason at the hearing, we'd need to figure that 20 out. And then several exhibits are confidential. So I 21 think we need to come up with a way to handle that. 22 It's just food for thought. I don't know 23 that we have an answer today how to go. But we do need 24 to think about how that works. 25 MS. BRODY: Yeah. And it does get interesting
Page 71 1 MS. McHUGH: Yes. 2 THE HEARING OFFICER: And probably -- I don't 3 know whether you'd want to consider them an adversarial 4 witness. 5 MS. McHUGH: I wouldn't. 6 THE HEARING OFFICER: But I assume that it 7 wouldn't take that route and examine them regarding the 8 staff memorandum that they prepared. That's what I'm 9 hearing from the discussion. 10 MR. HAEMMERLE: Yeah, Director. I think it 11 would be fair for us to perhaps with two weeks' notice 12 give the Department notice of who we intend to call as 13 witnesses so they have ample time to, I think, 14 coordinate their schedules. And I think, if you allow 15 us, we can work with Garrick to accomplish that. 16 THE HEARING OFFICER: Okay. Is that reasonable? 17 MR. BAXTER: My only additional comment is to 18 make it clear to the parties -- and I've seen you do 19 this in previous hearings, where you identify an issue 20 that you specifically want staff to come in and testify 21 as to a particular issue or to provide further 22 information, if you haven't felt the parties have 23 addressed all the issues that you were concerned about. 24 So I just think make the parties aware that 25 that has happened in the past and that sometimes the	Page 73 1 because even what you might think is a simple issue, 2 for example, like a diagram of Rangen's facility, 3 because it's a food source there are all kinds of 4 security bioterrorism kind of stuff. 5 And so understanding that all this stuff 6 gets put on the web, you know, becomes concerning to 7 Rangen for sure. 8 MS. KLAHN: Well, I think there's some -- you 9 know, for example, the diagram you're talking about is 10 available in about ten different formats in the water 11 rights backfile. So there are things that have been 12 marked confidential in this case which are arguably 13 excessive, but it's not necessary to unring that bell 14 right now. 15 In my experience, the way these things 16 work -- and this is certainly something -- I agree with 17 Candice. We've got to think about it. But in my 18 experience in other cases, if you are under a 19 confidentiality order, then the record gets sealed, and 20 it's sealed all the way up. Sealed to the District 21 Court. Sealed to the Supreme Court. 22 And, you know, it raises all kinds of 23 issues for Rangen, who's asserting this 24 confidentiality, as far as how the Supreme Court can 25 even rule on this stuff, since I think it is understood

Page 74 1 that their rulings are going to be public. 2 But I mean I think that's probably what we 3 end up having to do. But I think the Department has to 4 examine its own statutory authorities as far as being a 5 public agency and taking tax dollars to conduct a 6 hearing that essentially has to be, you know, like a 7 terrorism hearing or something like that. But 8 that's -- you know, as I say that's my experience. You 9 just seal the whole record and you send it up, so... 10 MS. McHUGH: Anyway, we can follow up as 11 parties. We don't need an order from the Director on 12 that. But I think it's just something we need to work 13 out sooner than later so we have an idea, and then can 14 maybe talk to the Department about what they can do or 15 not do. 16 The other thing before that I think should 17 be on the record, because I'd like the Department to 18 weigh in is the court reporter. We had talked at some 19 point about having a court reporter and the parties 20 splitting the fee and the daily fee and whatever. 21 In the past the Department has like a flat 22 rate it throws in on what it would cost to have a 23 clerk, I think, there. And I just wanted to confirm 24 that that could still be the same arrangement or if 25 there's any concern about that. So then everybody kind	Page 76 1 way to share it. We'll figure that out. 2 MS. McHUGH: Okay. And M&M is familiar with how 3 to do that, and so we can just get an idea of what 4 we've done in the past, and see if that works for 5 everybody. 6 THE HEARING OFFICER: We'll commit to follow the 7 same kinds of arrangements that have been employed in 8 the past. 9 MR. HAEMMERLE: Director, I do suggest that you 10 provide some person with some technical know-how beyond 11 my own. So everyone seems to be very savvy with 12 computer devices, exhibits, so provide somebody we can 13 talk to on how to do that and who we should coordinate 14 with. 15 THE HEARING OFFICER: On how to do what? 16 MR. HAEMMERLE: Perhaps electronic exhibits, 17 those kinds of things. 18 MS. McHUGH: That's a good question. 19 MR. BROMLEY: In the other call proceedings, 20 we've had the monitor, you know, the video monitor 21 available to put things on the screens, and that's 22 worked fine. 23 If you can premark exhibits, then we have 24 CDs. That's worked out well in the past. And then the 25 conference rooms are all wired for shooting stuff up on
Page 75 1 of -- 2 MR. HAEMMERLE: We've grown so comfortable 3 having Jeff here. We'd miss him if he wasn't. 4 MS. McHUGH: I know. He's part of the family. 5 MR. BROMLEY: I can weigh in on that, since I've 6 been part of all these delivery call hearings the 7 Department has had. 8 Yeah, in the Clear Springs/Blue Lakes 9 delivery call, we recorded it and paid for somebody to 10 record it. And the transcript turned out to be a 11 complete disaster because it was transcribed after the 12 fact. 13 And then in A & B and in the Surface Water 14 Coalition we had Jeff and M&M come in and transcribe 15 it, and that worked very well. And what the Department 16 historically paid was the costs, which we're 17 statutorily required to do, is to have somebody run the 18 recorder. And to do it differently I think would be 19 unwise. 20 MR. HAEMMERLE: I would say that given the costs 21 that are involved in this case, the cost of having the 22 court reporter and you, Director, having a good record 23 is minimal. So I think we can agree to that. 24 MS. McHUGH: Okay. 25 MR. HAEMMERLE: We'll have to figure out some	Page 77 1 screens. 2 MR. HAEMMERLE: I like paper myself, Director. 3 But I know there's lawyers that like electronic. So 4 maybe we can work with Chris or somebody who can set us 5 up prior to the hearing. 6 THE HEARING OFFICER: We have staff here if we 7 know what the needs are. 8 MR. HAEMMERLE: Okay. 9 MR. BROMLEY: Yeah, you just need to identify 10 what it is you want to do. But all the conference 11 rooms have projectors, and we've done that in the other 12 call proceedings. Some exhibits just don't lend 13 themselves to a small 8 1/2 by 11. You need to make 14 them bigger. And sometimes it's easier to have it up 15 on the screen. 16 MS. McHUGH: Okay. 17 MR. BUDGE: Director, I know we're short on 18 time, but one other idea we had yesterday was more of a 19 logistical. There's a lot of witnesses from different 20 states. And rather than try to have them all kind of 21 all on call during the whole two weeks, one idea we had 22 is the case can kind of be broken up by subject. 23 One being how Rangen uses water, diverts 24 water, measures water, what's going on on the ground 25 there; and then the other relates more to the model and

1 some of the technical stuff.

2 So one idea we had -- and we haven't talked
3 to these folks about it -- is maybe dedicating the
4 first week to all the Rangen stuff, and then all their
5 witnesses can come and ours that deal with that can
6 come and plan on the first week.

7 And then the second week the technical
8 engineers and stuff could plan on that being their week
9 so we're not trying to have everybody available for the
10 entire two weeks.

11 And I don't know what thoughts you have
12 about that, Fritz.

13 MR. HAEMMERLE: Yeah, you know, TJ, I think
14 that's a sound approach. You know, I think we need to
15 coordinate with witnesses so, you know, we have some
16 idea within a couple days who's going to be called so
17 it helps, I think, both of our preparation. So I think
18 certainly -- I can't conceptualize exactly how that
19 might work, but I think we can work with you on that
20 issue definitely.

21 MS. McHUGH: Is there any objection from the
22 Department from that standpoint, I guess? One of the
23 reasons we're bringing it up before you, or preference.

24 THE HEARING OFFICER: No. I think if the
25 parties can agree on an order of presentation -- and I

1 different times if they had two different subject areas
2 in which they were presenting evidence and opinions on.
3 And I think that makes sense as far as the presentation
4 part goes.

5 MR. HAEMMERLE: Reasonable minds will prevail.

6 MS. McHUGH: Yeah. So I think that is all of
7 our procedural stuff that we wanted to talk about.

8 THE HEARING OFFICER: Okay. Anything else?

9 Okay. Thanks to everybody.

10 (Hearing concluded at 10:46 a.m.)

11 -oOo-

1 assume the parties will keep in mind in agreeing on
2 some arrangement that at least the way in which the
3 evidence comes in will have some logical progression so
4 it's not so scattered that the Hearing Officer and
5 others and Jeff can't make sense of it.

6 MR. BROMLEY: Cindy Yenter is the only
7 Department witness that needs to travel. And I did
8 touch base with Cindy last week -- or she may have
9 actually asked me first. But she does have some times
10 that are better than others. So to the extent you can
11 coordinate Cindy specifically, that would be helpful.

12 MS. McHUGH: I think --

13 MS. KLAHN: Chris, we can take -- I mean we've
14 done this before. We can take Department witnesses out
15 of order. You know, we may have a preferred lineup,
16 but if Cindy or -- you know, as I recall last time I
17 think we took Sean and Rick Raymondi out of order in
18 A & B or something like that. There are -- we're
19 certainly willing to accommodate the Department
20 witnesses' schedules.

21 MR. BROMLEY: Thanks.

22 THE HEARING OFFICER: Okay.

23 MS. McHUGH: And just to comment on the logical
24 presentation of the evidence, I think that it may be
25 necessary that some witnesses would be called at two

REPORTER'S CERTIFICATE

2 I, JEFF LaMAR, CSR No. 640, Certified Shorthand
3 Reporter, certify:

4 That the foregoing proceedings were taken before
5 me at the time and place therein set forth, at which
6 time the witness was put under oath by me.

7 That the testimony and all objections made were
8 recorded stenographically by me and transcribed by me
9 or under my direction.

10 That the foregoing is a true and correct record
11 of all testimony given, to the best of my ability.

12 I further certify that I am not a relative or
13 employee of any attorney or party, nor am I financially
14 interested in the action.

15 IN WITNESS WHEREOF, I set my hand and seal this
16 9th day of April, 2013.

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JEFF LaMAR, CSR NO. 640

Notary Public

Eagle, Idaho 83616

My commission expires December 30, 2017

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