

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
MICHAEL C. ORR (ISB No.6720)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-4154
Facsimile: (208) 854-8072

Attorneys for the State of Idaho

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

In Re SRBA	)	Subcase Nos. 36-2551 and 36-7694
	)	
Case No. 39576	)	STATE OF IDAHO'S RESPONSE TO MOTION
	)	TO SET ASIDE PARTIAL DECREES
_____	)	

The State of Idaho ("State"), by and through its counsel of record, herein responds to *Rangen, Inc.'s Motion To Set Aside Partial Decrees*, filed in the above-referenced subcases on January 16, 2015 ("*Motion*"). The *Motion* asks this Court to set aside the partial decrees for water rights 36-2551 and 36-7694 pursuant to Rules 60(b)(5) and/or (6) of the Idaho Rules of Civil Procedure, and issue new partial decrees with amendments that enlarge the "source" and "point of diversion" elements. *Motion* at 1-2. The State requests that this Court deny the *Motion* and award the State reasonable attorney fees for the reasons discussed below.

FACTS

Rangen's *Motion* relies principally on contentions that the partial decrees for water rights 36-2551 and 36-7694 ("Partial Decrees") as interpreted by the Director of the Department of Water Resources ("Director") and this Court do not reflect actual historic diversion and use of water at Rangen's facility. Rangen argues the *Motion* should be granted because Rangen's historical source of water was never limited to the decreed "source"—the Martin-Curren Tunnel—but rather included "all of the spring water that forms the headwaters of Billingsley Creek." *Memorandum In Support Of Rangen, Inc.'s Motion To Set Aside Partial Decrees* (Jan. 16, 2015) ("*Rangen Brief*") at 14. Rangen also argues that the area decreed as the "point of diversion" does not include one of Rangen's historic diversion structures, the "Bridge Diversion." *Id.*

These arguments should sound familiar—Rangen made the same arguments to this Court twice in the last two years. *See Order Denying Motion To File Late Claim; Order Denying Motion To File Amended Notice Of Claim, Subcase No. 36-16977* (Oct. 2, 2013) ("*Order Denying Late Claim*")¹; *Memorandum Decision And Order On Petitions For Judicial Review, Rangen, Inc. v. Spackman et al., Case No. CV-2014-179 (Consolidated Gooding County Case No. CV-2014-179* (Oct. 24, 2014) ("*Delivery Call Order*")². The procedural and factual background for these arguments was set forth in this Court's *Order Denying Late Claim* and *Delivery Call Order*, which are incorporated

¹Exhibit 1 of the *Affidavit Of Michael C. Orr, Subcase Nos. 36-2551 & 36-7694* ("*Orr Aff.*"), filed herewith, is a copy of the *Order Denying Late Claim*.

²Exhibit 1 of the *Affidavit In Support Of Rangen, Inc.'s Motion To Set Aside Late Claims, Subcase Nos. 36-2551 & 36-7694* (Jan. 16, 2015) ("*Rangen Aff.*"), is a copy of the *Delivery Call Order*.

herein by this reference. The most important facts for purposes of the *Motion* are summarized below.

Rangen's SRBA claims for water rights 36-2551 and 36-7694 were based on pre-existing water right licenses. The water sources identified in the licenses and the claims were "springs" that were "tributary to Billingsley Creek," and the legal descriptions for the points of diversion were forty-acre tracts that included the "Bridge Diversion." *Order Denying Late Claim* at 2-3, 8; *Delivery Call Order* at 16. The "source" identified in each claim as recommended by the Department, however, was limited to the "Martin-Curren Tunnel," and the "point of diversion" recommended for each claim was a ten-acre tract that did not include the "Bridge Diversion" (the "Ten-Acre Tract"). *Order Denying Late Claim* at 3, 9; *Delivery Call Order* at 16. Rangen did not object to these recommendations; Rangen also did not object to an amended recommendation for 36-2551 that identified the "Martin-Curren Tunnel" as the "source" and the "Ten-Acre Tract" as the "point of diversion." *Id.* No other party objected either, and in December 1997 the Partial Decrees were issued with the "Martin-Curren Tunnel" as the "source" and the "Ten-Acre Tract" as the "point of diversion." *Order Denying Late Claim* at 3-4, 9; *Delivery Call Order* at 16.

Rangen filed a conjunctive management delivery call on December 13, 2011, seeking curtailment of certain junior water rights alleged to be causing material injury to water rights 36-2551 and 36-7694. *Order Denying Late Claim* at 4; *Delivery Call Order* at 5. Rangen filed a summary judgment motion in the delivery call proceedings on March 8, 2013, seeking a ruling that Rangen "'is not limited only to water from the mouth of the Martin-Curren Tunnel itself'" but was also authorized to divert water from

“the entire spring complex . . . including those springs located outside the ten acre tract point of diversion” described in the Partial Decrees. *Delivery Call Order* at 6 (citation omitted).

“[A]s a precautionary measure in the event the Director disagree[d]” with Rangen’s summary judgment motion, Rangen also filed an SRBA motion for a late claim to the “sources and point of diversion” claimed in Rangen’s summary judgment motion. *Order Denying Late Claim* at 9. The late claim did not seek to set aside or modify the Partial Decrees, but rather was “a new beneficial use claim to supplement its water use under those *Partial Decrees* in the event the Director finds they do not already authorize that use.” *Id.* at 8. This Court denied the motion to file a late claim because Rangen did not establish a meritorious defense or a lack of prejudice to other parties. *Id.* at 5-11.

This Court identified two alternative remedies that remained available to Rangen, however. “[T]he appropriate course of action should [Rangen] choose to pursue one within the confines of the SRBA would be to attempt to move to set aside those *Partial Decrees*,” while “outside the confines of the SRBA, Rangen will have the opportunity to seek judicial review of any final order issued by the Director” in the delivery call proceedings. *Id.* at 9-10 & n. 8.

The Director issued his *Final Order* in the delivery call proceedings on January 29, 2014. *See Petition For Judicial Review*, Case No. CV-2014-1338 (Idaho 5th Jud. Dist., Twin Falls County) (Mar. 24, 2014), at 2-3.³ Rangen and other parties moved for reconsideration, and the Director issued his *Order On Reconsideration* on March 4, 2014. *Id.* at 3. Rangen petitioned this Court for judicial review on March 24, 2014. *Id.* at 1.

³ Exhibit 2 to the *Orr Aff.* is a copy of Rangen’s *Petition For Judicial Review* in Twin Falls County Case No. 2014-1338.

This Court signed the SRBA's *Final Unified Decree* on August 25, 2014.⁴ This Court issued the *Delivery Call Order* on October 24, 2014, and Rangen filed a notice of appeal to the Idaho Supreme Court on December 5, 2014. *Notice Of Appeal*, Case No. CV-2014-1338 (Idaho 5th Jud. Dist., Twin Falls County) (Consolidated Gooding County Case No. CV-2014-179) (Dec. 5, 2014).⁵ Rangen filed a motion to set aside and modify the Partial Decrees on January 19, 2015—twenty-two months after Rangen moved for summary judgment in the delivery call proceedings regarding the “source” and “point of diversion” elements of the Partial Decrees; twenty-one months after Rangen filed a “precautionary” motion for late claim on these elements in the SRBA; fifteen months after this Court informed Rangen that the “appropriate” SRBA filing for such purposes is a motion to set aside the Partial Decrees; and almost five months after this Court signed the *Final Unified Decree*.

ARGUMENT

I. THE *MOTION* IS A COLLATERAL ATTACK ON THE *FINAL UNIFIED DECREE* THAT WOULD UNDERMINE THE FINALITY OF THE SRBA.

A. The *Motion* Should Be Denied As A Collateral Attack.

The *Motion* fails to recognize that with the exception of a few specifically identified claims and subcases—none of which involve the water rights at issue here—the Snake River Basin Adjudication has concluded. The *Final Unified Decree* of August 25, 2014 “is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987,” *Final*

⁴ Exhibit 3 to the *Orr Aff.* is a copy of pages 1-15 of the *Final Unified Decree*. While the *Final Unified Decree* was signed on August 25, 2014, it was docketed one day later, August 26, 2014.

⁵ Exhibit 4 to the *Orr Aff.* is a copy of Rangen's *Notice Of Appeal* in Twin Falls County Case No. 2014-1338.

Unified Decree at 9,⁶ and “is binding against all persons.” *Id.* at 11. “All partial decrees issued by this Court” are set forth in Attachments 2 and 4 to the Final Unified Decree, and are “incorporated [t]herein by reference.” *Id.* at 10. Attachment 2 includes the two water rights that are the subject of Rangen’s *Motion*, water rights 36-2551 and 36-7694. *Id.*, Attachment 2.⁷

In other words, the Partial Decrees are part and parcel of the *Final Unified Decree*—they cannot be set aside, altered, or amended separately or independently from the *Final Unified Decree*. See *id.* at 13 (“Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls”) (underlining added). By definition, any amendment to the Partial Decrees is an amendment to the *Final Unified Decree*.

The *Motion* entirely ignores the *Final Unified Decree*: it is not mentioned or referenced in the Rangen’s *Motion* or the supporting brief. Rangen seeks a change in the *Final Unified Decree* without directly addressing it or even acknowledging that it exists. The *Motion* is, in short, a collateral attack on the *Final Unified Decree*. See Black’s Law Dictionary 278 (8th ed.) (2004) (“**collateral attack**. An attack on a judgment in a proceeding other than a direct appeal.”) (bold in original); *Moyes v. Moyes*, 60 Idaho 601, 609, 94 P.2d 782, 786 (1939) (““The attack upon a judgment is collateral if the action or

⁶ The limited exceptions are specifically identified, *id.* at 9, and none are applicable here. See also *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree, Subcase Nos. 01-00219 et al.* (Aug. 26, 2014) at 1-2 (identifying “the presently pending subcases” over which this Court “retains jurisdiction . . . until such time as a final determination is made and the time for appeal has run”). Exhibit 5 to the *Orr Aff.* is a copy of the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree*.

⁷ Any remaining claims to water rights with priorities pre-dating the commencement of the SRBA were “decreed as disallowed.” *Id.* at 10. The *Final Unified Decree* also “superseded” all rights “based on beneficial uses, licenses, permits, posted notices, and statutory claims.” *Id.* at 11-12.

proceeding has an independent purpose and contemplates some other relief or result than the mere setting aside of the judgment’”) (citation omitted).

B. Granting The Motion Would Undermine The Finality Of The SRBA And Open The Door To Similar Motions By Other Water Right Holders.

While the *Motion* masquerades as an unremarkable filing—similar in form to many other such requests filed before the signing of the *Final Unified Decree*—in substance the *Motion* challenges the finality of the SRBA and calls the *Final Unified Decree* into question. Granting the *Motion* would communicate to other water users that little reliance should be placed upon the *Final Unified Decree*’s provisions that it “is conclusive” as to all claims pre-dating the SRBA, that prior permits and licenses have been “superseded,” and that all non-decreed claims have been “decreed as disallowed.” *Final Unified Decree* at 9-11. Granting the *Motion* would be a clear signal that the *Final Unified Decree* can be ignored, and that any SRBA claim can be re-opened simply by following Rangen’s example, i.e., by asserting that previously issued partial decrees fail to reflect actual historic uses or are inconsistent with previously issued licenses.

Rangen argues these are not concerns because the circumstances of the *Motion* “are unlikely to be replicated.” *Rangen Brief* at 2. This unsupported assertion lacks credibility and is contrary to the record. Rangen admits it filed the *Motion* because Rangen disagrees with how the Director and this Court “interpreted” the Partial Decrees in proceedings on Rangen’s pending delivery call. *See id.* at 13, 14, 16, 18 (citing the “interpretation” of the Partial Decrees as the reason for setting them aside). These are hardly unique or compelling circumstances “that are unlikely to be replicated.” *Id.* at 2. To the contrary, Rangen’s water rights are in an area of basin 36 that was “highly

contested and which currently is and historically has been the subject of water shortages and contested delivery calls.” *Order Denying Late Claim* at 10-11.

As this Court is aware, conjunctive management delivery call proceedings often involve disputes over the nature and extent of the various parties’ water rights as decreed by this Court.⁸ Granting Rangen’s *Motion* would open the door to analogous motions by parties in conjunctive management delivery call proceedings whenever they disagree with the “interpretation” of partial decrees by the Director or this Court; even when, as in this case, the controlling language is “plain and unambiguous,” *Delivery Call Order* at 16-17, and was recommended and decreed without any objection or appeal by the water right holder. *Id.* at 17; *Order Denying Late Claim* at 3-4. Other parties to contested conjunctive management delivery calls would conclude they too can ignore the *Final Unified Decree* and seek changes in their partial decrees to conform to their subjective beliefs of what the plain language means, or how the water rights should have been decreed; to address differences between the partial decrees and pre-existing (and now superseded) licenses; or to re-visit questions of historical water use and administration that could have and should have been raised previously.

This is confirmed by the transcript of this Court’s hearing on judicial review of the Director’s order in Rangen’s delivery call proceeding. During that hearing the Idaho Ground Water Appropriators, Inc. (“IGWA”) represented it believes Rangen’s water rights and/or IGWA members’ water rights should have been recommended and decreed to reflect IGWA’s view that historically spring users had no right to call against ground

⁸ See, e.g., *In The Matter Of Distribution Of Water To Various Water Rights Held By Or For A&B Irrigation District, et al.*, 155 Idaho 640, 315 P.3d 828 (2013); *A&B Irrigation District v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007).

water users when flows at Murphy meet the minimum flows established by the Idaho Water Resource Board to implement the Swan Falls settlement. *See Transcript On Appeal, In The Matter Of The Distribution Of Water To Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc. v. IDWR et al.)*, Supreme Court No. 42772, at 39-40.⁹ IGWA would certainly seek to raise such matters if Rangen's *Motion* were granted, and/or would move to set aside IGWA members' water rights as inconsistent with historic water uses and administration. As IGWA's counsel stated: "I know a number of water users who would gladly take that opportunity. That would certainly open a Pandora's box for water administration, undermine the stature of the decree issued by this court." *Id.* at 41.

These risks are not limited to conjunctive management, but would also arise in other administrative contexts. Granting the *Motion* would mean that a water right holder can ignore the *Final Unified Decree* and seek direct modification of a partial decree whenever she or he disagrees with how the Director or the watermaster "interprets" the partial decree in distributing water among appropriators. *See* Idaho Code § 42-602 (providing the director of the department of water resources has "direction and control of the distribution of water from all natural water sources within a water district," that the Director "shall distribute water . . . in accordance with the prior appropriation doctrine," and that distribution "shall be accomplished by watermasters as . . . supervised by the director.").

Thus, granting the *Motion* would not only undermine the finality and authority of the *Final Unified Decree*, but would also mean that water rights holders can "go straight to the courthouse" whenever they disagree with water distribution decisions, "by the simple expedient" of filing a motion to set aside and modify their partial decrees. *Am.*

⁹ Exhibit 2 to the *Rangen Aff.* is a copy of the transcript.

Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 871, 154 P.3d 433, 442 (2007). This would impermissibly “excuse” a water right holder from the requirement of exhausting administrative remedies and seeking judicial relief via the judicial review provisions of the Idaho Administrative Procedures Act. *Id.*

II. THE *MOTION* WAS NOT FILED “WITHIN A REASONABLE TIME.”

The *Motion* seeks relief under Rule 60(b) but Rangen did not file the *Motion* “within a reasonable time.” I.R.C.P. 60(b). Rangen had clear notice—directly from this Court—that it needed to file the *Motion* long before the *Final Unified Decree* was signed, and yet failed to do so. Rangen’s arguments that it was diligently pursuing its delivery call are irrelevant and unavailing with respect to whether Rangen made its SRBA filing “within a reasonable time.”

A. Despite Clear Notice And Ample Opportunity, Rangen Did Not File the Motion Until Long After The Final Unified Decree Was Signed.

The bulk of Rangen’s briefing is devoted to its now-familiar contentions “that Rangen has historically and actually put to beneficial use all of the spring water that forms the headwaters of Billingsley Creek on Rangen’s property.” *Rangen Brief* at 9. Rangen made the same arguments to this Court on two previous occasions—in 2013 when Rangen filed a motion for a late claim, and more recently in judicial review proceedings on Rangen’s delivery call—and in both cases this Court determined that the problem was not the Partial Decrees but rather Rangen’s lack of diligence in the SRBA. As this Court stated in the *Order Denying Late Claim*:

- No objections to the recommendations [for 36-2551 and 36-7694] were filed by any party. . . . No objections were filed to the *Amended Director’s Report* [for 36-2551]. . . . Since the recommendations for claims were unopposed, the elements of the *Partial Decrees* matched the recommendations for the claims.

Rangen did not appeal from the issuance of any of the *Partial Decrees* and the time for appeal has long expired.¹⁰

- Rangen had more than ample opportunity to file the instant beneficial use late claim in the SRBA. . . . it certainly had the notice and opportunity to do so before this Court closed the basin to late claims.¹¹
- The fact that Rangen is bound by the terms of its *Partial Decrees* in the present delivery call proceeding before the Department should not be a surprise to Rangen.¹²

The *Delivery Call Order* repeated this Court's determinations that Rangen had had ample notice and opportunity in the SRBA to address issues regarding the "source" and "point of diversion" elements. This Court also stated "it was Rangen's responsibility" to do so:

- If Rangen believed that the ten-acre tract identified in its *Partial Decrees* inadequately described its historic points of diversion, or that its *Partial Decrees* inadequately described its water source, it was Rangen's responsibility to raise those issues at the proper time, and in the proper venue – the SRBA.¹³
- It is clear that Rangen believes the facially plain language of its *Decrees* does not accurately reflect its historic use of water under those rights. However, if Rangen disagreed with how its water rights were recommended and ultimately decreed, it had an opportunity and responsibility to voice such concerns in the appropriate forum – the SRBA.¹⁴
- Rangen's attempt to point this Court to extrinsic evidence of its historic use of water and its prior licenses . . . is an attempt to now raise issues that should have been raised and litigated in the SRBA.¹⁵

¹⁰ *Order Denying Late Claim* at 3-4.

¹¹ *Order Denying Late Claim* at 6.

¹² *Order Denying Late Claim* at 7.

¹³ *Delivery Call Order* at 15.

¹⁴ *Delivery Call Order* at 17.

¹⁵ *Delivery Call Order* at 17.

Moreover, this Court's *Order Denying Late Claim* explicitly put Rangen on notice that the correct procedure to address the perceived problem in the Partial Decrees was to file a motion to set them aside. Rangen admitted the 2013 late claim was "a second attempt in the SRBA" to claim the "sources" and "points of diversion" that Rangen asserted it had already claimed. *Order Denying Late Claim* at 9. This Court stated "[i]t is important to note that Rangen has not moved to set aside the *Partial Decrees* it fears the Director may interpret unfavorably," *id.* at 8, and held the motion for a late claim was "an impermissible collateral attack on its previously issued *Partial Decrees*." *Id.* at 10. This Court also recognized that "Rangen is only filing the late claim as a precautionary measure," and identified the proper SRBA procedure for this purpose: "the appropriate course of action should [Rangen] choose to pursue one within the confines of the SRBA would be to attempt to move to set aside those *Partial Decrees*." *Id.* at 9 (underlining added).¹⁶

In short, almost two years ago Rangen filed a motion with this Court seeking to address the same asserted shortcomings in the Partial Decrees that the *Motion* seeks to address; and the earlier motion relied on the same arguments of actual historic use and prior licenses that the *Motion* relies on. In addressing those arguments, this Court specifically stated that "the appropriate course of action" was the filing of a motion in the SRBA "to set aside those *Partial Decrees*." *Id.* And yet Rangen filed no such motion for another fifteen months—almost five months after the *Final Unified Decree* was signed.¹⁷

¹⁶ This Court also noted: "Of course outside the confines of the SRBA, Rangen will have the opportunity to seek judicial review of any final order issued by the Director." *Id.* at 10 n.8.

¹⁷ This Court denied Rangen's motion to file a late claim on October 2, 2013, and signed the *Final Unified Decree* on August 25, 2014. Rangen filed the *Motion* on January 16, 2015.

Rangen could have and should have filed a motion to set aside the Partial Decrees promptly after being notified by this Court of “the appropriate course of action . . . within the confines of the SRBA.” *Id.* A reasonably diligent water user, having received such clear guidance from this Court, would certainly have acted much sooner, and undoubtedly before entry of the *Final Unified Decree*. The *Motion* was not filed “within a reasonable time.” I.R.C.P. 60(b).

B. Rangen’s Arguments That The *Motion* Was Timely Lack Merit.

Rangen argues the *Motion* was timely for a variety of reasons, none of which have merit. Rangen asserts that because it “timely appealed the [Director’s delivery call] order to the SRBA and the SRBA affirmed the [Director’s] ruling . . . it would be unjust to rule that Rangen cannot set aside its Partial Decrees.” *Rangen Brief* at 19. This argument fails because judicial review of the Director’s orders under the Idaho Administrative Procedures Act is not an SRBA proceeding, Idaho Code §§ 42-1401D, 67-5270, and the pendency of separate judicial review proceedings did not excuse Rangen from meeting SRBA deadlines. *See Order Denying Late Claim* at 9-10 & n. 8 (distinguishing “the appropriate course of action” available to Rangen “within the confines of the SRBA” vis-à-vis seeking judicial review of the Director’s order “outside the confines of the SRBA.”). The only exceptions to the *Final Unified Decree* are identified within it and in the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree*. Neither recognizes any exceptions for judicial review proceedings or administrative appeals. Moreover, Rangen was fully aware of the potential need to make a separate filing “within the confines of the SRBA” during the pendency of its delivery call proceedings. *Order Denying Late Claim* at 9.

Rangen also argues the *Motion* was timely because in some SRBA subcases partial decrees were set aside and amended “many years after the Partial Decree was entered.” *Rangen Brief* at 19. The cited subcases are distinguishable because in all of them the motion to set aside the partial decree was filed before the signing of the *Final Unified Decree*. See *id.* at 17, 19-20 (citing subcase nos. 21-00014, 21-00015, 21-02153, 21-02159, 21-04006, 21-04007, 21-04008, 21-07151, 02-02033, 02-00083, 43-192, and 22-13739).¹⁸ Rangen’s *Motion*, in contrast, was filed well after the signing of the *Final Unified Decree*.

Rangen further argues the *Motion* was timely because “[t]here was no issue as to the source of Rangen’s water rights or its point of diversion until January 2013.” This argument simply confirms that the *Motion* was not filed “within a reasonable time.” I.R.C.P. 60(b). Rangen has effectively admitted having actual notice and ample opportunity to file a motion to set aside the Partial Decrees long before the signing of the *Final Unified Decree*, and two years prior to actually filing the *Motion*.

There is also no merit in Rangen’s previous assertion to this Court that “the adjudication will not be over” upon entry of the *Final Unified Decree* “since there will always be disputes to resolve and claims to adjudicate.” *Rangen, Inc.’s Supplemental Post-Hearing Brief In Support Of Motion To File Late Claim, Subcase No. 36-16977* (Aug. 26, 2013) (“*Rangen Late Claim Brief*”) at 4.¹⁹ This argument incorrectly presumes the SRBA will remain pending indefinitely to address all future water “disputes” and

¹⁸ *Order Setting Aside Partial Decrees; Order Of Amended Partial Decrees, Subcase Nos. 21-00014, 21-00015, 21-02153, 21-02159, 21-04006, 21-04007, 21-04008, and 21-07151* (Mar. 4, 2014); *Order Setting Aside Partial Decrees; Order Amending Partial Decrees For Irrigation Delivery Entity Using Digital Boundary Description; I.C. §§42-202B(2), 42-219(2), 42-1411(2)(h), Subcase Nos. 02-00083 and 02-02033* (Mar. 4, 2014); *Order Setting Aside And Amending Partial Decree, Subcase No. 43-00192* (Oct. 29, 2010); *Order Of Partial Decree For Irrigation Delivery Entity Using Digital Boundary Description; I.C. §§42-202B(2), 42-219(2), 42-1411(2)(h), Subcase No. 22-13739* (Oct. 1, 2012).

¹⁹ Exhibit 6 to the *Orr Aff.* is a copy of the *Rangen Late Claim Brief*.

“claims.” The SRBA is a “general stream adjudication” under the Idaho Code, *Final Unified Decree* at 6; Idaho Code § 42-1406A (uncodified), and a general stream adjudication concludes with the entry of a “final decree.” Idaho Code §§ 42-1412(8), 42-1413. The *Final Unified Decree* satisfied this requirement; it is the SRBA’s “final decree.” *Final Unified Decree* at 6.²⁰

It was always recognized that the SRBA would have an endpoint. *See, e.g., Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, And Disallowal Of Unclaimed Water Rights, Basin-Wide Issue 16, Subcase No. 00-92099* (Feb. 13, 2013) at 2 (“Completion of claims taking in individual basins is an essential first step to completion of the SRBA. Without it, completion of the SRBA will not occur.”).²¹ The fact that “there there will always be disputes to resolve and claims to adjudicate,” *Rangen Late Claim Brief* at 4, does not mean the SRBA will or must continue indefinitely. Future water claims and disputes will not require resolution via a general stream adjudication. Future appropriations will be established, rather, through administrative permitting and licensing procedures; and judicial relief from the Director’s final orders on such matters, or on water distribution questions, will be available in judicial review proceedings under the Idaho Administrative Procedures Act. Idaho Code §§ 67-5270—67-5279.²²

²⁰ As previously discussed, the *Final Unified Decree* and the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree, Subcase Nos. 01-00219 et al.* identify a few specific exceptions, but none of the exceptions applies to Rangen’s Motion.

²¹ Exhibit 7 to the *Orr Aff.* is a copy of pages 1-4 of the *Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, And Disallowal Of Unclaimed Water Rights.*

²² The completion of the SRBA will not prevent this Court from hearing petitions for judicial review of final orders of the Director. Idaho Code §§ 42-1401D, 67-5270; *Administrative Order Adopting Procedures For The Implementation Of The Idaho Supreme Court Administrative Order Dated December 9, 2009, Re: Rules Of Procedure Governing Petitions For Judicial Review Or Actions For Declaratory Judgment From The Idaho Department Of Water Resources* (Idaho 4th Jud. Dist., Twin Falls County) (Jul. 1, 2010). Further, there is no merit in Rangen’s argument that a “Summary Supplemental Adjudication” is

III. GRANTING THE *MOTION* WOULD PREJUDICE OTHER WATER RIGHT HOLDERS.

This Court in denying Rangen's 2013 motion for late claim stated that "when undertaking a Rule 55(c) good cause analysis, 'prejudice to the other parties is the factor on which the court places significant emphasis.'" *Order Denying Late Claim* at 10 (citation omitted). The question of prejudice to other parties is even more important to Rangen's current *Motion*, which seeks relief under Rule 60(b). *See Dorton v. Keane*, 153 Idaho 371, 375, 283 P.3d 118, 122 (Ct. App. 2012) (stating "the required *good cause* showing" under Rule 55(c) is "'lower or more lenient than that required' . . . under Rule 60(b).") (italics in original; citation omitted).

This Court's reasoning in denying Rangen's 2013 late claim motion confirms that granting the current *Motion* would significantly prejudice other water right holders. "In determining prejudice to other parties the Court weights several factors." *Order Denying Late Claim* at 10. Of "particular importance" are: (1) whether the basin in question is a completed basin; (2) the extent to which existing users have relied upon the basin being closed; and (3) if interim administration according to decreed rights is in effect. *Id.* This Court determined that claims-taking in Basin 36 was closed; that interim administration was in effect; and that the relevant area of Basin 36 had been "highly contested" and

an SRBA proceeding. *See Rangen, Inc.'s Supplemental Post-Hearing Brief In Support Of Motion To File Late Claim, Subcase No. 36-16977* (Aug. 26, 2013) at 4 (citing Idaho Code § 42-1424(2)-(3)). This Court has explained the distinctions between a "summary supplemental adjudication" and a general stream adjudication such as the SRBA. *Memorandum Decision And Order On Challenge, Subcase Nos. 01-217, 01-218, 01-4024 and 01-4025 (Minidoka Power Rights); Subcase Nos. 01-2068 and 01-4054 (Palisades Power Rights)* (Feb. 9, 2011) at 11-13, 16-18; *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P.(e), Subcase Nos. 01-217, 01-218, 01-4024 and 01-4025 (Minidoka Power Rights); Subcase Nos. 01-2068 and 01-4054 (Palisades Power Rights)* (May 17, 2011) at 3-12; *see also Mays v. Dist. Court of Sixth Judicial Dist. in & for Butte Cnty.*, 34 Idaho 200, 200 P. 115, 115-16 (1921) ("The right established by [a summary supplemental adjudication] decree shall not be deemed adjudicated, but prima facie merely, and may be attacked by suit brought in a court of competent jurisdiction, at any time, by any person deeming himself aggrieved thereby.").

“currently is and historically has been the subject of water shortages and contested delivery calls.” *Id.* at 10-11. This Court also determined that granting the late claim “may potentially require setting aside the *Partial Decrees* for Rangen’s overlapping water rights 36-134B, 36-135A 36-2551, 36-7694 and 36-15501 and reopening those subcase to further litigation,” and that “changes to these rights have the potential to undo the settlements” in subcases 36-134A and 36-134B. *Id.* at 11. Thus, this Court concluded other parties and water rights holders would be prejudiced by granting Rangen’s late claim motion. *Id.*

The same analysis applies with even more force to Rangen’s current *Motion*. It is not just Basin 36 that has completed—with the exception of a few subcases and issues not relevant to the *Motion*, the SRBA as a whole has completed. *See Final Unified Decree* at 9 (“This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987”). Administration is not simply “interim” but rather is final. *See id.* at 13 (“The decreed water rights shall be administered . . . in accordance with this Final Unified Decree”). The subject area of Basin 36 is still experiencing “water shortages and contested delivery calls,” *Order Denying Late Claim* at 11, and this Court’s judicial review decision for Rangen’s delivery call is on appeal to the Idaho Supreme Court.²³ Granting the current *Motion* would also carry the same potential risks of reopening other water rights and undoing settlements that were present with respect to Rangen’s 2013 motion for late claim. *Id.* at 10-11. This Court’s conclusion that

²³ Rangen, IGWA, and the City of Pocatello appealed to the Idaho Supreme Court this Court’s decision on judicial review of the Director’s resolution of Rangen’s delivery call—a decision this Court issued long after signing the *Final Unified Decree*. Granting the *Motion* would potentially disrupt the appeals by changing part of the basis on which this Court’s judicial review decision was made and the appeals were filed.

granting Rangen's 2013 motion for late claim would have prejudiced other water right holders applies with equal or greater strength to Rangen's current *Motion*.

IV. RANGEN'S ARGUMENTS FOR RELIEF UNDER RULE 60(b)(5) LACK MERIT.

Rangen's request to set aside the Partial Decrees under Rule 60(b)(5) because "it would be inequitable to allow the Partial Decrees to remain in place unaltered," *Rangen Brief* at 16,²⁴ requires showing: (1) that the *Final Unified Decree* is prospective in nature; and (2) that it is no longer equitable to enforce the *Final Unified Decree* as written. *Meyers v. Hansen*, 148 Idaho 283, 289, 221 P.3d 81, 87 (2009). Rangen has completely failed to meet these requirements because as previously discussed Rangen's *Motion* does not address or even reference the *Final Unified Decree*—Rangen focuses entirely on the Partial Decrees as if they are separate from and independent of the *Final Unified Decree*. Moreover, as discussed below, even Rangen's arguments regarding the Partial Decrees fail to meet Rule 60(b)(5) standards.

A. Partial Decrees Are Not "Prospective" Judgments For Purposes Of Rule 60(b)(5).

Rangen's argument that a partial decree is a "prospective" judgment within the meaning of Rule 60(b) relies upon the Idaho Supreme Court's statement in *Meyers* that a "prospective judgment" is one that "is susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance." *Id.*; *Rangen Brief* at 13. Rangen's argument fails to recognize, however, that the Court was referring to injunctive orders, not water right decrees. *See Meyers*, 48 Idaho at 283, 221 P.3d at 81 (discussing "an injunction against a bridge company" and the "continuing decree of injunction" in an

²⁴ Rangen relies on Rule 60(b)(5)'s provision authorizing a court to set aside a judgment if "it is no longer equitable that the judgment should have prospective application." I.R.C.P. 60(b)(5); *Rangen Brief* at 10-11.

anti-monopoly consent decree). The type of judgment the Court had in mind in *Meyers* “is ‘executory’ or involves ‘the supervision of changing conduct or conditions.’” *Id.* (citation omitted). A partial decree for a water right is neither. A partial decree determines “the nature and extent of the water right.” Idaho Code § 42-1412(6).

Rangen alternatively argues that a partial decree is “prospective” because “it determines a right that will be exercised in the future.” *Rangen Brief* at 13. This argument incorrectly equates the finality of SRBA decrees with an “executory” order or a decree of “supervision.” *Meyers*, 48 Idaho at 283, 221 P.3d at 81. The fact that an SRBA decree is final and conclusive as to the nature and extent of a water right does not transform the decree into a type of executory order or injunction. Finality, rather, precludes future reliance on the same claims and/or objections resolved during the adjudication if a dispute or question arises regarding the exercise of the water right. That is entirely different from an injunction, or an order that “is ‘executory’ or involves ‘the supervision of changing conduct or conditions.’” *Id.* (citation omitted).

Rangen’s argument that water rights “can be forfeited . . . and can be altered through private contracts . . . and administrative proceedings,” *Rangen Brief* at 13, also lacks merit. The fact that Idaho law allows water rights decreed in the SRBA to be modified in the future through forfeiture, private contracts, or administrative proceedings does not mean a partial decree is anything more or less than a determination of “the nature and extent of the water right” at the time of the adjudication. Idaho Code § 42-1412(6).

B. Granting The Motion Would Be Inequitable To Other Water Users.

Rangen's argument that "it would no longer be equitable" to enforce the Partial Decrees, *Rangen Brief* at 13, repeats the same assertions Rangen made in support of its motion for late claim and in seeking judicial review of the Director's delivery call order. Rangen asserts "it has actually and historically used all of the spring water," *Rangen Brief* at 14, that the Partial Decrees "were not supposed to change the actual and historical beneficial use," *id.*, that "[n]o one ever told Rangen" the Partial Decrees did not reflect its claimed historic use, *id.* at 15, and "Rangen learned for the first time" in April 2013 that the Partial Decrees might not protect Rangen's claimed historic use. *Id.* Rangen argues the Partial Decrees have been interpreted "in a manner which deprives Rangen of its actual and historical beneficial use of water" and therefore "it would be inequitable to allow the Partial Decrees to remain in place unaltered." *Id.* at 16.

Even if it is assumed that Rangen's assertions correctly describe its actual historic use of water, Rangen's arguments omit or mischaracterize its central role—or rather Rangen's inexplicable inaction—in failing to prevent this allegedly "inequitable" situation. As previously discussed, this Court determined in the *Order Denying Late Claim* and in the *Delivery Call Order* that: the Director's recommendations clearly and unambiguously limited the "source" and "point of diversion" elements of Rangen's water rights to the Martin-Curren Tunnel and the Ten-Acre Tract; Rangen failed to object to these recommendations despite having claimed larger areas for the "source" and "point of diversion"; the water rights were decreed consistent with the Director's recommendations rather than Rangen's claims, and Rangen failed to appeal; the question of the "interpretation" of the "source" and "point of diversion" did not become an issue until

Rangen filed its 2011 delivery call; Rangen should not have been surprised when the facially plain language of the Partial Decrees was interpreted to mean exactly what it says; and while Rangen filed a motion for late claim in the SRBA as a precautionary measure against just such an “interpretation,” what Rangen actually needed to file was a motion to set aside the Partial Decrees. Finally, it is undisputed that this Court put Rangen on notice of the need to file a set-aside motion ten months before the signing of the *Final Unified Decree*, and yet Rangen failed to file such a motion until almost five months after the signing.

The simple fact is that the current situation is almost entirely of Rangen’s own making. Rangen had the same notice and opportunity all water users had to file SRBA objections consistent with Rangen’s actual historic uses and/or prior licenses, and yet failed to do so. Moreover, despite having ample advance notice and a lengthy window of opportunity to file motions to set aside and modify its Partial Decrees before the signing of the *Final Unified Decree*, Rangen once again failed to do so. Rangen’s repeated failures to shoulder its responsibility to protect its claimed rights belie its current arguments that it has been unfairly deprived of those rights. As this Court has stated: “If Rangen believed that the ten-acre tract identified in its *Partial Decrees* inadequately described its historic points of diversion, or that its *Partial Decrees* inadequately described its water source, it was Rangen’s responsibility to raise those issue at the proper time, and in the proper venue—the SRBA.” *Delivery Call Order* at 15 (emphases added); *id.* at 17 (“[Rangen] had an opportunity and a responsibility to voice such concerns in the appropriate forum—the SRBA.”)

Rangen's argument that "it would be inequitable to allow the Partial Decrees to remain in place unaltered," *Rangen Brief* at 16, completely mischaracterizes the issue. Rangen's *Motion* seeks to shift the responsibility for Rangen's lack of diligence onto other water users—water users who presumably exercised reasonable diligence in the SRBA. *See Delivery Call order* at 18 ("Those parties were able to look at the Director's recommendation and see that the source element of those rights was being recommended as 'Martin-Curren Tunnel' and that the point of diversion was being recommended as a specific ten-acre tract located in Gooding County, Idaho."). Granting the *Motion* would prejudice many of these water users, as previously discussed.

Rangen's equity argument is exactly wrong: equity demands leaving the Partial Decrees in place unaltered. Granting the *Motion* would be inequitable to all water users who diligently followed SRBA procedures and complied with SRBA deadlines, and would be patently unfair to those water users forced to carry the burden of Rangen's inexcusable failures to protect its rights "at the proper time." *Delivery Call Order* at 15.

V. THE MOTION DOES NOT PRESENT UNIQUE AND COMPELLING CIRCUMSTANCES.

Rangen's request for relief pursuant to Rule 60(b)(6) "may be granted only on a showing of 'unique and compelling circumstances.'" *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). The "unique and compelling circumstances" Rangen asserts for purposes of Rule 60(b)(6) are the same arguments it made in requesting relief under Rule 60(b)(5), and fail for the same reasons they fall short under Rule 60(b)(5).

Rangen argues that while it has always used "all of the spring water . . . and . . . the Bridge Diversion," the Partial Decrees no longer reflect this historic use "because of the Director's recent interpretation." *Rangen Brief* at 18. Rangen argues "[i]t was only

during Rangen's renewed delivery call that the Department interpreted Rangen's decrees in a manner which is not consistent with the actual and historical beneficial use," *id.*, and that denying the *Motion* "would deprive Rangen of the water it has used for fifty years." *Id.* at 19.

This Court has already rejected Rangen's argument that administration under its Partial Decrees is a close question of "interpretation" rather than one of plain language. "[T]he simple fact in this case is that the language of Rangen's *Partial Decrees* is plain and unambiguous." *Delivery Call Order* at 16-17. In other words, the plain language of Rangen's Partial Decrees has always limited it "to divert[ing] water from the Martin-Curren Tunnel within . . . the ten-acre tract." *Id.* at 17. Further, "[t]he fact that Rangen is bound by the terms of its *Partial Decrees* in the present delivery call proceeding before the Department should not be a surprise to Rangen," *Order Denying Late Claim* at 7, and "questions regarding the interpretation of [the] source and point of diversion elements . . . were addressed for the first time by the Director in relation to the instant delivery call." *Delivery Call Order* at 21.

In short, this Court has rejected Rangen's argument that the Director's interpretation of Rangen's Partial Decrees will "deprive Rangen of the water it has used for fifty years." *Rangen Brief* at 19. Quite to the contrary, the responsibility for any inconsistency between the Partial Decrees and the actual historic use lies squarely at Rangen's feet. *See Delivery Call Order* at 15 ("it was Rangen's responsibility to raise those issues at the proper time, and in the proper venue"). Moreover, and as previously discussed, there are undoubtedly other water right holders who also would like to re-open their partial decrees based on assertions their decrees do not accurately reflect "actual

historic use” or “prior licenses.” Rangen’s situation is neither “compelling” nor “unique,” and therefore does not justify relief under Rule 60(b)(6). *Miller*, 129 Idaho at 349, 924 P.2d at 611.

REQUEST FOR ATTORNEY FEES

The State requests that this Court award to the State reasonable attorney fees pursuant to Idaho Code § 42-121 and Rule 54(e) of the Idaho Rules of Civil Procedure. The *Motion* is a direct challenge to the finality of the SRBA and was filed frivolously, unreasonably, and without an adequate foundation in fact or law. As discussed previously in this brief, and as explicitly recognized by this Court in the *Order Denying Late Claim and Delivery Call Order*, Rangen’s current complaints are a direct result of Rangen’s failure to assert and protect its claims in the SRBA.

Rangen had the same responsibilities as every other water right claimant—the responsibilities of due diligence, of following SRBA procedures, and of taking appropriate action in the SRBA when necessary to protect its claims. Despite abundant and repeated notice—including explicit notice provided by this Court in the *Order Denying Late Claim*—and multiple opportunities, Rangen inexcusably failed to protect its claimed historic uses in the SRBA. The *Motion* is a transparent attempt to disclaim Rangen’s responsibility for failing to act and shift that responsibility onto other water right holders.

The *Motion* ignores the *Final Unified Decree* and would re-open the SRBA to similar motions by other water users simply because Rangen failed to act with due diligence. The State deemed it essential to respond to Rangen’s *Motion* because it is a direct challenge to the finality of the SRBA and to the authority and effect of the *Final*

Unified Decree. The State requests an award of reasonable attorney fees as a result of being forced to defend the *Final Unified Decree* and the finality of the SRBA against Rangen's frivolous, unreasonable, and unsupported *Motion*.

CONCLUSION

The State requests that this Court deny the *Motion* and award the State reasonable attorney fees for the reasons set forth herein.

Respectfully submitted this 6th day of March 2015.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 6th day of March, 2015, I caused the foregoing to be filed with the Court and copies served on the following by the methods indicated:

1. Original to:

CLERK OF THE DISTRICT COURT SNAKE RIVER BASIN ADJUDICATION 253 THIRD AVENUE NORTH PO BOX 2707 TWIN FALLS, ID 83303-2707	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: (208) 736-2121
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2. Copies to the following:

RANDALL C BUDGE THOMAS J BUDGE JOSEPH G BALLSTEADT RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: rcb@racinelaw.net tjb@racinelaw.net jgb@racinelaw.net
ROBYN M BRODY BRODY LAW OFFICE PO BOX 554 RUPERT ID 83350	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: robynbrody@hotmail.com
FRITZ X HAEMMERLE HAEMMERLE LAW PO BOX 1800 HAILEY ID 83333	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: fxh@haemlaw.com
J JUSTIN MAY MAY BROWNING 1419 W WASHINGTON BOISE ID 83702	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: jmay@maybrowning.com
US DEPT OF JUSTICE ENVIRONMENT & NAT'L RESOURCES 550 W FORT ST MSC 033 BOISE ID 83724	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☐ E-Mail:

DIRECTOR OF IDWR STATEHOUSE MAIL PO BOX 83720 BOISE ID 83720-0098	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: deborah.gibson@idwr.idaho.gov ☒ Statehouse Mail
SARAH KLAHN MITRA PEMBERTON WHITE JANKOWSKI\N 511 SIXTEENTH ST STE 500 DENVER CO 80202	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: sarahk@white-jankowski.com mitrap@white-jankowski.com
DEAN TRANMER CITY OF POCATELLO PO BOX 4169 POCATELLO ID 83201	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile ☒ E-Mail: dtranmer@pocatello.us

