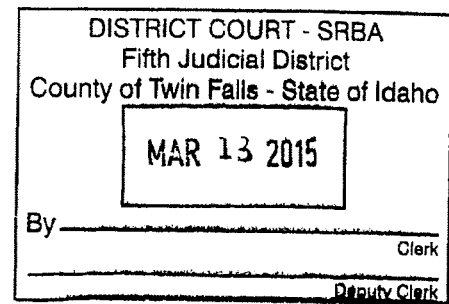


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ATTORNEYS FOR THE CITY OF POCATELLO

**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

Case No. 39576

) Subcase No. 36-07694
) Subcase No. 36-02551
)
) **CITY OF POCATELLO'S RESPONSE TO**
) **RANGEN, INC.'S MOTION TO SET ASIDE**
) **PARTIAL DECREES**

Comes now, the City of Pocatello ("Pocatello" or the "City") by and through its attorneys of record, and hereby submits this Response to *Rangen, Inc.'s Motion to Set Aside Partial Decrees* ("Motion"), dated January 16, 2015.

Introduction

Rangen, Inc.'s ("Rangen") Motion asks this Court to permit Rangen to relitigate issues already decided by its partial decrees so that it can call for additional water in its delivery call before the Idaho Department of Water Resources ("IDWR" or "Department"). Pursuant to Idaho

Rule of Civil Procedure 60(b) Rangen's Motion is untimely, as it has been seventeen years since entry of Rangen's partial decrees, two years since the Director interpreted Rangen's partial decrees contrary to Rangen's reading, fifteen months since the Court informed Rangen it needed to file this Motion, and over five months since the Court entered the final SRBA Unified Decree. Regardless of the effective date used by the Court, Rangen's Motion is untimely and need not be addressed on its merits.

The doctrine of collateral estoppel also requires dismissal of this Motion. Because the Director recommended water rights with source and point of diversion elements that differed from those claimed by Rangen in the SRBA, those issues were "actually decided" in the prior litigation, and cannot be expanded. Rangen's Motion does not satisfy the standards of Rule 60(b)(5): Rangen has failed to demonstrate that compliance with the terms of its partial decrees is inequitable given it has legal access to the talus slope water regardless of the outcome of this Motion, or that there has been any material change in circumstances that would justify reopening its partial decrees. Further, Rangen's Motion fails under Rule 60(b)(6)—Rangen's position is not compelling or unique, given it is often the position of seniors to attempt to expand the elements of their water rights in order to acquire additional water in delivery calls. Further, Rangen does not have a meritorious position—it has not provided evidence that it can prove all the elements of its claimed water rights, in particular the quantity of water available at the time of its claimed priority dates. Pocatello requests that the Court deny Rangen's Motion.

PROCEDURAL HISTORY

A. Adjudication of Water Right Nos. 36-02551 and 36-07694

Rangen obtained several partial decrees for water rights in the SRBA District Court, including 36-02551 and 36-07694. As shown in Exhibit 1 to Affidavit of Mitra M. Pemberton

("Pemberton Affidavit"),¹ Rangen is located in the SE1/4 of the NE1/4 in Section 31 and the SW1/4 of the NW1/4 of Section 32, Township 7 South, Range 14 East, just below the rim of the Snake River plain. In subcase nos. 36-02551 and 36-07694, Rangen claimed the following source: "Curran Tunnel Trib. to: Billingsley Creek." *Notice of Claim to a Water Right* at 1, A36-02551, Civil Case No. 39576, July 27, 1988 (attached as Exhibit 2 to Pemberton Affidavit); *Notice of Claim to a Water Right* at 1, A36-07694, Civil Case No. 39576, July 27, 1988 (attached as Exhibit 3 to Pemberton Affidavit). Rangen's notices claimed a point of diversion of the following forty-acre tract: Township 07S, Range 14E, Section 32, SW1/4 of NW1/4 within Gooding County. *Id.* On November 2, 1992, the Director issued a Director's Report, Part I, Reporting Area 3 (Basin 36), which included recommendations for Rangen's claims nos. 36-02551 and 36-07694 (attached as Exhibit 4 to Pemberton Affidavit) ("Director's Recommendations").

The Director did not recommend Rangen's water rights as claimed in its notices: instead, the Director recommended the source of the claims as "Martin-Curren Tunnel", and the Director recommended the following ten-acre tract as Rangen's point of diversion: SE1/4 of the SW1/4 of the NW1/4, Section 32 ("10-acre tract"), as opposed to the larger forty-acre tract claimed by Rangen.² Exhibit 4 to Pemberton Affidavit. "Basin 36 was a highly contested basin, and the Director's recommendations for water right claims in that basin were highly scrutinized by parties to the SRBA." *Memorandum Decision and Order on Petitions for Judicial Review* ("Memorandum Decision on Rangen's Delivery Call") at 18 n.8, Case No. CV-2014-1338, Twin Falls County (Consolidated Gooding County Case No. CV-2014-179), Oct. 24, 2014. However,

¹Exhibit 1 is Figure 2-3 from Spronk Water Engineers, Inc. Expert Supplemental Report (showing points of diversion and place of use for 1962 and 1977 water rights) dated May 5, 2013 and submitted at the hearing on Rangen's Delivery Call.

²Exhibit 1 identifies Rangen's decreed place of use in yellow outline and the decreed point of diversion outlined in red.

no objections were filed to the Director's Recommendations, and Rangen's partial decrees for Water Right Nos. 36-02551 and 36-07694 were entered, respectively, on December 29, 1997 and December 30, 1997, consistent with the unopposed recommendations. *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 36-02551*, In Re SRBA Case No. 39576, Dec. 29, 1997 (Exhibit 4 to *Affidavit in Support of Rangen, Inc.'s Motion to Set Aside Partial Decrees*, Jan. 16, 2015 ("May Affidavit")); *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 36-07694*, In Re SRBA Case No. 39576, Dec. 29, 1997 (collectively, "Partial Decrees") (Exhibit 5 at 3 to May Affidavit). Rangen did not appeal the issuance of either partial decree, and the SRBA Final Unified Decree was entered on August 26, 2014. *Final Unified Decree*, In Re SRBA Case No. 39576, Aug. 26, 2014 (Exhibit 3 to Affidavit of Michael C. Orr, Mar. 6, 2015 ("Orr Affidavit")).

B. The Source and Points of Diversion Relied On By Rangen in Its Operations Are Not Consistent with Its Partial Decrees

Within the 10-acre tract decreed point of diversion, Rangen diverts Martin-Curren Tunnel flows through a 6-inch "white-pipe" that emerges from the Tunnel itself, and from a 12-inch steel pipe that collects water from the Tunnel that flows into the "Rangen box." Memorandum Decision on Rangen's Delivery Call at 3-4. However, springs also arise outside of the 10 acre-tract, below the Martin-Curren Tunnel, in an area referred to as the "talus slope" because of the rocks and stones that form the broken, rubbly surface. *Id.* Rangen has historically diverted the springs from the talus slope through a corrugated metal pipe that delivers water to the large raceways. *Id.* It is undisputed that the diversion is outside Rangen's decreed point of diversion; it is also undisputed that the springs diverted by Rangen arising on the talus slope are outside of Rangen's decreed source, the Martin-Curren Tunnel. The point of Rangen's motion is to include within its Partial Decrees the water it has diverted outside of the Martin-Curren Tunnel and to allow diversion from points beyond the 10-acre tract; this revision could potentially permit

Rangen to file a new round of delivery calls for water that it currently cannot demand because of the limitations in its existing Partial Decrees.

C. Rangen's Delivery Call

Rangen's Delivery Call³ was filed in December of 2011 with IDWR. Prior to trial, Rangen asked the Director to determine, *inter alia*, that Rangen could place a call for not just the amount of water that arises at the Martin-Curren Tunnel—which is Rangen's decreed source—but that Rangen could also place a call for water arising from springs on the talus slope below the Martin-Curren Tunnel that Rangen diverts outside of the 10-acre tract. Memorandum Decision on Rangen's Delivery Call at 6–7.

On April 22, 2013, the Director denied Rangen's requested relief, finding that Rangen was limited to the plain terms of its decrees. *Order Granting In Part and Denying In Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source*, Rangen's Delivery Call, Apr. 22, 2013 (“Order re: Source”) (attached as Exhibit 5 to Pemberton Affidavit). On appeal, this Court affirmed the Director's determination that Rangen may only call for water discharging from the Martin-Curren Tunnel, and “not the entire spring complex forming the headwaters of Billingsley Creek.” Memorandum Decision on Rangen's Delivery Call at 10. The Court found that there was no ambiguity in Rangen's decrees—“[t]he term ‘Martin-Curren Tunnel’ refers to a specific, identifiable and known diversion structure located within the 10 acre authorized point of diversion of Rangen's two senior water rights.” *Id.* at 12.

The Court also found that the decreed point of diversion in Rangen's Partial Decrees was plain and unambiguous, and supported the conclusion that Rangen may only call for water from the Martin-Curren Tunnel. *Id.* at 14.

³A more complete procedural history of Rangen's Delivery Call can be found in this Court's October 24, 2014 Memorandum Decision on Rangen's Delivery Call.

There is simply no legal basis for Rangen's argument that it can use the Bridge Diversion to collect and divert water even though that diversion structure is not located within its decreed point of diversion. Such an argument ignores the purpose of identifying with particularity the point of diversion element of a decreed water right. 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.

Id. at 15 (emphasis added).

D. Permits for the Talus Slope

After the Director's ruling in Rangen's Delivery Call limited Rangen's ability to call for water at the Martin-Curren Tunnel, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed an application for a permit to appropriate the talus slope water in order to provide mitigation to Rangen on April 3, 2013. *See* Exhibit 12 to May Affidavit. After receiving a preliminary order issuing a permit to IGWA, the Director denied IGWA's application. *Final Order Denying Application*, In the Matter of Application for Permit No. 36-16976 In the Name of North Snake Ground Water District, et al., Feb. 6, 2015 (Exhibit 6 to Pemberton Affidavit). Rangen also filed an application for a permit for the same water, and a preliminary order issuing a permit to Rangen was issued by the Hearing Officer on January 2, 2015. *Preliminary Order Issuing Permit*, In the Matter of Application for Permit No. 36-17002 in the Name of Rangen, Inc., Jan. 2, 2015 (Exhibit 7 to Pemberton Affidavit). Rangen filed exceptions to the preliminary order, which are currently pending before the Department.

E. Rangen's Late Claim in the SRBA

On April 19, 2013 Rangen filed a Motion to File Late Claim in "an attempt to protect its alleged historic water use by supplementing the use identified in its *Partial Decrees*" pursuant to Idaho Rule of Civil Procedure 60(b)(1), (2), (3), (5) and (6). *Order Denying Motion to File Late Claim; Order Denying Motion to File Amended Notice of Claim* at 4, and 6 n.6, In Re SRBA

Case No. 39576, Subcase No. 36-16977, Oct. 2, 2013 (Exhibit 1 to Orr Affidavit). The Court denied Rangen's Motion. *Id.* "[T]he fact that the record shows that Rangen had both ample notice of the requirements to file its claims in the SRBA and ample opportunity to file a late claim in the SRBA, this Court finds that Rangen has failed to establish a meritorious position. . . ." *Id.* at 8. "[T]his Court finds Rangen's water right claims associated with its fish propagation facilities were already adjudicated in full in the SRBA." *Id.* at 9. Rangen did not appeal the Court's decision.

ARGUMENT

I. RANGEN'S MOTION IS UNTIMELY AND NEED NOT BE CONSIDERED ON ITS MERITS

All motions pursuant to Rule 60(b)(5) or (6) must be filed within a "reasonable time." I.R.C.P. 60(b). "Whether a motion under Rule 60(b) is timely is an issue of fact" *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009). Rangen filed its Motion approximately seventeen years after its Partial Decrees were entered in 1997, and one year after it received a Notice of Violation and Cease and Desist Order from the Department and the Director's Order re: Source. Exhibit 16 to May Affidavit; Exhibit 5 to Pemberton Affidavit. Rangen's Motion is untimely as under these circumstances because waiting seventeen years, or even one year, to file the Motion is an unreasonable length of time.

"[W]hen the movant alleges that a judgment has become inequitable under Rule 60(b)(5), the court should examine the movant's delay after the moment it became reasonably apparent that the order is inequitable due to a change in law or circumstances." *Id.* (emphasis added). (finding effective date could not be later than date of service of judgment, as "[t]here is no reason why Hansen could not have reasonably ascertained the nature and extent of the default judgment against him when he received notice.").

Rangen's Motion was not filed within a reasonable time, regardless of what date the Court considers the issue to be "reasonably apparent" to Rangen, the Court need not reach the merits of Rangen's Motion. Rangen does not dispute that seventeen years since the entry of Rangen's Partial Decrees is an unreasonable amount of time—instead, Rangen argues that its Motion is timely because the Department did not enforce Rangen's Partial Decrees until January 2013, and its delay in filing since then should be excused due to continuing litigation over the Department's decision. *Memorandum in Support of Rangen, Inc.'s Motion to Set Aside Partial Decrees* ("Memorandum in Support") at 20, Jan. 16, 2015. However, Rangen—a sophisticated water user—was aware of the limitations on its water rights when its Partial Decrees were issued in 1997. In fact, Rangen received the Director's Recommendations in 1992, which reflected a different source and smaller point of diversion than what was claimed by Rangen. Rangen does not claim it lacked knowledge that the decreed legal description was incorrect, or indeed offer any excuse for why it failed to oppose the recommendation, why it failed to timely appeal the Partial Decrees, or why it failed to correct the alleged error in the last seventeen years with this Court.

Further, even if the plain terms of Rangen's Partial Decrees only became apparent to Rangen in January 2013, as Rangen claims, Rangen fails to offer a justification for the two year delay to file the Motion. *Id.* Rangen also offers no justification for its disregard of this Court's Order Denying Motion to File Late Claim, issued October 2, 2013, which gave Rangen express notice that the proper procedure was to file a motion to set aside the partial decree. *Order Denying Motion to File Late Claim; Order Denying Motion to File Amended Notice of Claim* at 9, Subcase No. 36-16977 (Exhibit 1 to Orr Affidavit). Rangen waited fifteen months to comply with the Court's direction, rendering the Motion untimely.

Finally, Rangen's Motion was filed nearly five months after entry of the SRBA Final Unified Decree. Exhibit 3 to Orr Affidavit. Rangen was aware of the alleged problems with its Partial Decrees well before that date, as explained above, yet made no effort to resolve these issues before the Court entered the Final Unified Decree.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES RANGEN'S MOTION.

Rangen is collaterally estopped from re-litigating the issues related to Rangen's proper point of diversion and source. Under Idaho law, a decree entered in a general adjudication "shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420(1). Rule 60 operates as an extremely limited, rather than blanket, exception to the doctrine of collateral estoppel, and if the elements of collateral estoppel are met, Rule 60 motions must be denied:

[T]his Court has stated that an independent action to set aside a judgment is a most unusual remedy, available only rarely. Thus, a motion to set aside a judgment will only be granted in the most unusual of circumstances. This form of relief should not be a remedy for inadvertence or oversight by a party to the original action.

Waller v. State Dep't of Health & Welfare, 146 Idaho 234, 240, 192 P.3d 1058, 1064 (2008) (citations and quotation marks omitted). Five elements are required for collateral estoppel to bar relitigation of an issue decided in an earlier proceeding (i.e., issue preclusion):

(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Ticor Title Co. v. Stanion, 144 Idaho 119, 124, 157 P.3d 613, 618. Each of these elements is applied in turn below to Rangen's Motion.

A. Rangen had a full and fair opportunity to litigate the elements of its water rights.

The first collateral estoppel element is met, as Rangen does not argue that it had a full and fair opportunity to litigate the elements of water rights in subcase nos. 36-07694 and 36-02551.

B. The source and point of diversion issues which Rangen seeks to change in its Motion to Set Aside Partial Decrees are identical to issues decided in the first instance.

The second element is also met: the “source” and “point of diversion” elements of water right nos. 36-07694 and 36-02551 were determined by the Partial Decrees; it is these exact elements that Rangen is asking the Court to re-write.

C. The issues of point of diversion and source were “actually decided” by the entry of the Partial Decrees.

Determining whether these elements were “actually decided” in the prior litigation “may be dependent on whether deciding the issue was ‘necessary to [the prior] judgment.’” *Anderson v. City of Pocatello*, 112 Idaho 176, 183, 731 P.2d 171, 178 (1986). The resolution of the differences between Rangen’s claimed water rights and the water rights as recommended by the Director was absolutely necessary to the prior judgment. As a matter of law, the specific determination of the elements of a water right is a necessary part of adjudication. I.C. § 42-1411(2).

Here, the issues of point of diversion and source were “actually decided” by the Partial Decrees, which recognize water rights with different source and points of diversion elements than Rangen’s original notices of claim. *See discussion supra, Procedural History Part A.* The difference between the claims and recommendations created a factual dispute, which the SRBA allowed Rangen an opportunity to resolve by presenting its case to refute the Director’s Recommendations. Rangen failed to dispute the Director’s Recommendations, and the Court

resolved the dispute through entry of the Partial Decrees. *See Bach v. Bagley*, 148 Idaho 784, 795, 229 P.3d 1146, 1157 (2010) (finding issue actually litigated because “the cause of action was disposed of and there was an opportunity to provide sufficient facts to prove” a defense to the Court’s finding: “Bach has already asserted this claim and it was fully decided so he is not entitled to seek relief on the same claim in this case.” (emphasis added)).

Further, the fact that the Court entered the Partial Decrees based on the findings of the Director is significant. In the SRBA, the Director’s report “constitute[s] prima facie evidence of the nature and extent of the water rights acquired under state law,” and operates to create a rebuttable evidentiary presumption. I.C. § 42-1411; *In re SRBA Case No. 39576*, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995). Under Idaho law, where a determination is made by a court based on a presumption, the Idaho Supreme Court has found that said issue was “actually decided” in the prior litigation. In *Waller*, Waller filed a Rule 60(b) motion to set aside a default judgment finding of paternity, “asserting that the issue of paternity was not actually decided in the previous case because the State merely made a presumption that he was the father of the child.” *Waller*, 146 Idaho at 238, 192 P.3d at 1062. The district court rejected this argument and the Idaho Supreme Court affirmed, finding the father “‘admitted each and every allegation set forth in the complaint, including the allegation that he was parent of the child, because he failed to file an answer, appear at the hearing, or otherwise raise any defenses to rebut the presumption of his paternity.’” *Id.* (emphasis added and citation omitted).

It is undisputed that Rangen made no attempt to rebut the presumption of accuracy of the Director’s report. This Court has already noted the import of Rangen’s failure to object:

When Rangen filed its claims for water right numbers 36-2551 and 36-7694 in the SRBA, the Department fully examined those claims. I.C. § 42-1410. As a result of its examination, the Department determined to file recommendations in the SRBA that diverged from the claims in several respects.

The Director recommended the source of the claims as “Martin-Curren Tunnel,” and also recommended the point of diversion for both claims as a ten-acre tract, as opposed to the larger forty-acre tract claimed by Rangen. The manners in which the recommendations diverged from the claims were of consequence. For instance, the Bridge Diversion is located within the larger forty-acre tract Rangen claimed as its point of diversion, but is not located within the ten-acre tract point of diversion recommended by the Department. The Director’s recommendations constituted *prima facie* evidence of the nature and extent of Rangen’s water rights. I.C. § 42-1411(5). If Rangen disagreed with the Department’s recommendations, it was incumbent upon it to timely file objections to the recommendations in the SRBA, and then present the SRBA Court with evidence to rebut the recommendations. *Id.* Rangen did not do so, and no other party to the SRBA came forth with objections to the recommendations. Therefore, the SRBA Court entered *Partial Decrees* for water right claims 36-2551 and 36-7694 consistent with the uncontested recommendations. . . . Under Idaho law, those *Partial Decrees* are conclusive as to the nature and extent of Rangen’s water rights.

Memorandum Decision on Rangen’s Delivery Call at 17 (citation omitted). Accordingly, Rangen’s *Partial Decrees* actually decided the elements of source and point of diversion, and Rangen is foreclosed from raising these again under Rule 60.

D. Rangen received a final judgment on the merits.

One of the central justifications for Rule 60 is the principle that default judgments are not favored, and the general rule in doubtful cases is to grant relief in order to reach a judgment on the merits. *Reeves v. Wisenor*, 102 Idaho 271, 272, 629 P.2d 667, 668 (1981). However, even uncontested claims in the SRBA are in fact “decided on the merits.” *Order Conditionally Granting Motion to Set Aside Partial Decrees for Water Rights 37-07454 and 37-07602* at 9, In Re SRBA Case No. 39576, Dec. 3, 2003. “[A]n uncontested water right that proceeds to partial decree is subject to more scrutiny than in a typical non-SRBA case where a default judgment is ultimately entered.” *Id.* “In the SRBA, ‘deciding a case on the merits’ must be placed in the proper context.” *Id.* Here, Rangen received a final determination on the merits of the elements of source and point of diversion. See Memorandum Decision on Rangen’s Delivery Call at 17 (“If Rangen believed the facially plain language of its *Partial Decrees* does not reflect its actual

historic use, those issues needed to be raised in the SRBA.”). Rangen did not appeal the Partial Decrees or the Final Unified Decree.

E. Rangen was a party to the litigation of its claims in the SRBA.

Finally, Rangen was a party to the litigation of its claims in the SRBA, meeting the fifth element of issue preclusion. Rangen’s motion must be denied.

III. RANGEN’S MOTION DOES NOT MEET THE REQUIREMENTS OF RULE 60(b)(5)

To prevail under Rule 60(b)(5), Rangen must show that it should be relieved from a final order because “it is no longer equitable that the judgment should have prospective application.” I.R.C.P. 60(b)(5). Rangen bears the burden of proving “(1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written.” *Rudd v. Rudd*, 105 Idaho 112, 118, 666 P.2d 639, 645 (1983). The rule requires some material change in circumstances that makes continued enforcement inequitable. *Memorandum Decision and Order on Challenge; Order of Further Proceedings in Related Subcase 41-8B*, 10 SRBA 3 at 3.4, In Re SRBA Case No. 39576, Subcase Nos. 41-0008C, 41-0008D, and 41-0008F, Feb. 2, 2006. *See also Rudd*, 105 Idaho at 118, 666 P.2d at 645. The rule is not a substitute for an appeal nor does it allow re-litigation of issues previously resolved by the judgment. *Gordon v. Gordon*, 118 Idaho 804, 806–07, 800 P.2d 1018, 1020–21 (1990). “The prospective application of a judgment is no longer equitable if it is no longer just and fair to all concerned.” *VFP VC v. Dakota Co.*, 142 Idaho 675, 679, 132 P.3d 432, 436 (2006).

Given the circumstances of this case, it is equitable for Rangen to be held to the plain terms of its Partial Decrees, given its utter lack of action to correct any alleged errors even after being put on notice by this Court and the Director of IDWR multiple times in the last two years. Rangen is a sophisticated water user, and has been an active litigant and participated in the

SRBA, and did not object to the Director's revisions to its claims in his Recommendations. Rangen's claimed failure to realize that its operations were not consistent with the plain terms of its Partial Decrees is difficult to sympathize with, and is certainly not a "material change" in circumstances that satisfies the standard under Rule 60(b)(5); nor is the Director's enforcement of the Partial Decrees as entered by the Court at Rangen's request. *See Gordon*, 118 Idaho at 805-07, 800 P.2d at 1019-21 (A mistake of fact on which the original judgment is based is not sufficient to demonstrate changed circumstances.).

Further, prospective application of the Partial Decrees is equitable, as Rangen will be able to use the talus slope water, no matter what the outcome of this Motion. As described *infra*, after learning the Director would enforce the decrees as entered, Rangen filed for a permit for the point of diversion and talus slope water. IGWA's competing permit has been denied, and Rangen's has been conditionally granted. Whether through operation of its own permit—or, if reversed on appeal, IGWA's—the talus slope water will be legally available to Rangen (it is already physically available, and as described above, Rangen continues to divert this water under a consent decree with IDWR—see Exhibit 17 to May Affidavit). A new partial decree would therefore only affect Rangen's ability to place a delivery call for that water under a senior right. This is not equity—this is seeking to expand Rangen's decreed rights, and Rangen's efforts should be rejected.

IV. RANGEN'S MOTION DOES NOT MEET THE REQUIREMENTS OF RULE 60(b)(6)

To set aside a partial decree under Rule 60(b)(6), Idaho law requires a movant to show "any other reason justifying relief from the operation of the judgment." I.R.C.P. 60(b)(6). To prevail under this standard, Rangen must (1) establish unique and compelling circumstances that justify setting aside the Partial Decrees, and (2) allege detailed facts which if established would

constitute a meritorious position. *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996); *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993). A judgment may be set aside under Rule 60(b)(6) when extraordinary circumstances exist. *Miller*, 129 Idaho at 349; 924 P.2d at 611; *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). The Rule is “used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.” *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (citation and quotation marks omitted). *See also Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) (“[T]he broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests.”) (citations omitted)).

Rangen’s Motion fails to meet this standard and must be denied.

A. The circumstances of Rangen’s Partial Decrees are not unique and compelling.

Rangen’s decision to divert water outside the terms of the Partial Decrees for seventeen years does not create unique and compelling circumstances. It is not unusual for a water right owner to object to the Department’s interpretation of their decree—indeed, examination of a senior’s decree is the first step in a delivery call. Contesting this interpretation is not uncommon, and has occurred in two separate recent delivery calls before the Department.

In A&B Irrigation District’s delivery call, A&B contested the Director’s interpretation of its partial decree, which the Director found to be “decreed as a system of separate wells with multiple points of diversion,” which required A&B’s system as a whole be considered in determining injury. *Memorandum Decision and Order on Petition for Judicial Review* at 39, Case No. 2009-647, Minidoka County, May 4, 2010 (citation omitted). In the Surface Water

Coalition's delivery call, senior surface users objected to the Director's interpretation of their decrees when he concluded that "[a]lthough the storage rights are decreed separately from the natural flow rights, the purpose of use of the storage rights is that the stored water will be released and used to supplement the natural flow rights for irrigating the same lands." *Order on Petition for Judicial Review* at 23, Case No. 2008-551, Gooding County, July 24, 2009. Just like Rangen, both A&B Irrigation District and Surface Water Coalition were arguing for a different interpretation of their partial decrees in order to increase the amount of water they could call for pursuant to the Conjunctive Management Rules. If the Court allows Rangen to open its decrees, it is inevitable that more users will attempt to set aside their partial decrees in order to avoid decree interpretations by the Director that they disagree with.

As previously recognized by this Court, Rangen's request "is an attempt to now raise issues that should have been raised and litigated in the SRBA." Memorandum Decision on Rangen's Delivery Call at 17. "To allow parties to contest a partial decree outside of the SRBA based on the argument that the partial decree is not consistent with historical beneficial use undermines any certainty or finality in the partial decree as well as one of the primary purposes of the SRBA." *Id.* at 19. Rangen had the opportunity and obligation to protect its interests in its water rights by objecting to the Director's Recommendations or appealing its Partial Decrees—accordingly, its Motion should be denied.⁴ I.C. § 42-1411(5). See Memorandum Decision on Rangen's Delivery Call at 17.

⁴In recognition of a party's responsibility and obligation to protect its interests, a court's disagreement with the parties' interpretation is "not the kind of intervening event contemplated by Rule 60(b)(6)." *Cashner*, 98 F.3d at 579–80. Similarly, a party's decision to not appeal a judgment does not warrant extraordinary relief under Rule 60(b)(6). *Ackermann v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 211–12 (1950).

B. Rangen fails to identify a meritorious claim to additional water rights.

A party seeking to set aside a partial decree under Rule 60(b)(6) must allege facts, which if established, would constitute a meritorious defense. *McFarland v. Curtis*, 123 Idaho 931, 934, 854 P.2d 274, 277 (1993). The movant has the burden of supplying facts of the proposed defense. *Smith Electric, Inc. v. Crandlemire*, 100 Idaho 172, 173, 595 P.2d 321, 322 (1979). The facts must be detailed, requiring more than “the mere general notice requirement that would ordinarily be sufficient if pled” before the partial decree was entered. *Memorandum Decision and Order on Challenge*, 10 SRBA 3 at 3.4, Subcase Nos. 41-0008C, 41-0008D, and 41-0008F.

To meet this standard, Rangen bears the burden of show that if the Court were to grant its motion, it could prevail on the merits of its claim—i.e., that Rangen is entitled to the water it now claims should have been included in the Partial Decrees, with the same priority date and amount as its original decrees. However, Rangen’s argument that it has a meritorious defense—less than two paragraphs of its brief—cite to not a single piece of evidence to support its contentions. *Memorandum in Support* at 12.

Further, Rangen’s Motion is carefully drafted to claim that Rangen has always diverted “all of the spring water that forms the headwaters of Billingsley Creek” which is different than claiming Rangen has diverted the full amount of its decreed rates of diversion. *Memorandum in Support* at 2 (emphasis added). For example, Rangen cannot prove its claim that it diverted 26 cfs pursuant to water right no. 36-07694 on April 12, 1977—as found by the Director in the Second Amended Order water right no. 36-07594 was decreed based on a flow estimate rather than actual measurement made nearly five years prior to the application’s filing date. *Second Amended Order* ¶ 62, at 14, In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551, and 36-07694, May 19, 2002 (Exhibit 11 to May Affidavit). See discussion below in Part V. Therefore, Rangen has no evidence of beneficial use of the full decreed rate of

flow for water right no. 36-07694, as historical flows do not support the conclusion that this amount of water was ever available at the tunnel at the time of Rangen's appropriation.

V. PAST SRBA DECISIONS TO SET ASIDE PARTIAL DECREES DO NOT SUPPORT RANGEN'S POSITION

Rangen has attached three prior decisions of the SRBA Court to set aside partial decrees, and argues that these decisions support its Motion. *See* Exhibits 20, 21 and 22 to May Affidavit. Most notably, these decisions were announced before the Final Unified Decree was entered in the SRBA on August 26, 2014. As explained above, Rangen has failed to point to a justification for why it has waited until after entry of the final decree to file this motion, making it untimely. *See* Part I.

Rangen argues the Court should consider its Motion because it has set aside partial decrees in the Weston-Spillett decision because they did not accurately reflect historical water use. Memorandum in Support at 13. There are significant differences between the case at hand and Weston-Spillett—where pro se water users contacted the Court about inaccuracies in their decrees, explaining that they did not understand the SRBA process, for example the fact that their claims had to be based on irrigated acres in 1987, and because of the history of informal transfers on various water users lands. Exhibit 20 at 2 to May Affidavit. Rangen did not appear pro se before the SRBA, and does not claim that it did not understand the SRBA claims process; accordingly, Weston-Spillett is inapposite.

The facts of the Sand Creek decision also differ from Rangen—there, Idaho Fish and Game filed a motion to correct errors that they had discovered in their partial decrees, which contained elements that in some cases were inconsistent with Idaho law, physically impossible to comply with the originally decreed points of diversion, and would make administration of the rights extremely difficult. Exhibit 21 to May Affidavit. IDWR also submitted affidavits that

staff had only discovered the errors in the partial decrees within less than 12 months. *Id.* at 10. There, the Department established that “the delay was not willfull, the errors were only recently discovered, and no other water users will be prejudiced.” *Id.*

Finally, In contrast to the claimant in *Lloyd*, Rangen (1) has not submitted an affidavit alleging that any of its authorized representatives believed its Partial Decrees were entered with elements identical to its license; nor (2) was Rangen representing itself pro se in the partial decree proceedings, and therefore did not understand the Director’s Recommendations or the Court’s final ruling. Exhibit 22, *Motion to Set Aside Partial Decree and Memorandum in Support Thereof* at 6, In Re SRBA Case No. 39576, Subcase No. 43-192, Feb. 26, 2010 to May Affidavit. Further, the announcement of the Facility Volume decision by this Court constituted a significant compelling fact justifying the Court’s decision. *Id.* at 7, 10.

Accordingly, Rangen’s Motion is distinguishable from this Court’s previous decisions and should be denied.

VI. IF THE COURT GRANTS RANGEN’S MOTION, ALL ELEMENTS OF ITS DECREES SHALL BE SUBJECT TO REVISION BY THIS COURT

If the Court grants Rangen’s Motion, it will be necessary for the Department and Court to reexamine all of the elements of Rangen’s claimed water rights, including whether additional terms are necessary for its administration.

Rangen’s Motion requests that “Rangen be given the opportunity to file late objections to the source and point of diversion elements in the Director’s Reports pertaining to the water rights at issue.” Memorandum in Support at 21. Rangen cannot limit the Court’s scrutiny to these elements alone—further, IDWR should be afforded the opportunity to issue an amended Director’s report and recommendations. In the Director’s Second Amended Order in Rangen’s 2003 delivery call, the Director found, for instance, that

[b]ased on available records, there was not water available for appropriation at the time or subsequent to the date of appropriation for water right no. 36-07694. Therefore, the Department erred in licensing water right no. 36-07694, and should not have recommended this right for decree in the SRBA. Nonetheless, since the SRBA District Court decreed water right no. 36-07694, Rangen may be entitled to divert water under this right when such water is physically available. However, because water was not available to appropriate on the date of appropriation for right no. 36-07694, Rangen may not be entitled to have a delivery call recognized against junior priority water rights.

Exhibit 11 to May Affidavit at 14–15 (emphasis added). The Department should be permitted the opportunity to consider whether it recommends Rangen’s Partial Decrees contain terms reflecting the above facts. Further, as recognized by this Court,

[I]t bears mentioning that at the time Rangen’s license was issued for water right 36-02551, the state water plan in effect at the time recognized that full development of the ESPA may result in a reduction in the spring flows relied on by the aquaculture industry. With respect to aquaculture, policy 32 of the 1976 state water plan provided in relevant part:

“Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected; however, aquaculture interests may need to construct different water diversion facilities than presently exist.”

To give effect to this policy, the license issued for water right no. 36-07694 was conditioned as follows: “Use of water under this right is subject to policies set forth in the State of Idaho Water Plan, including Policy No. 32F.” Exhibit 1029. However, that condition was not recommended by the Department nor included [in] the partial decree. Had the condition been included in the partial decree, no modification of that right would have been implicated in order to give effect to the state water plan in furtherance of promoting the “optimum development of water resources in the public interest.”

Memorandum Decision on Rangen’s Delivery Call at 32 n.12 (internal citation omitted).

If the Court grants Rangen’s Motion, Pocatello is prepared to litigate Rangen’s Partial Decrees to ensure that any water right decreed include elements that reflect accurate use of the water and any necessary conditions to reflect the above-referenced facts and license conditions.

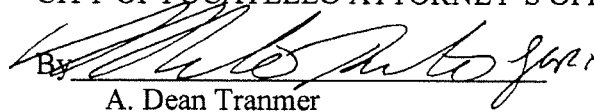
The City reserves the right to identify additional issues with Rangen's claims, and if the Court grants Rangen's Motion, Pocatello requests amended Director's Reports and Recommendations.

CONCLUSION

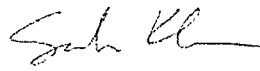
For the foregoing reasons, Pocatello respectfully requests that the Court deny Rangen's Motion; if the Court grants Rangen's Motion, Pocatello requests that the Court order the Director of IDWR to issue an amended Director's Report and Recommendations.

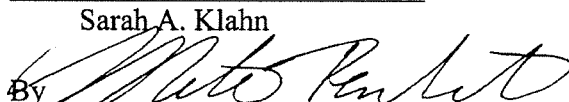
Dated this 12th day of March, 2015.

CITY OF POCATELLO ATTORNEY'S OFFICE

By 
A. Dean Tranmer

WHITE & JANKOWSKI

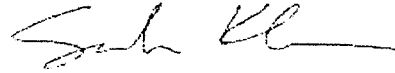
By 
Sarah A. Klahn

By 
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2015, I caused to be served a true and correct copy of the foregoing **CITY OF POCA TELLO'S RESPONSE TO RANGEN, INC.'S MOTION TO SET ASIDE PARTIAL DECREES Case No. 39576, Subcase No. 36-07694 and Subcase No. 36-02551** upon the following by the method indicated:



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