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DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02551 & 36-07694
(RANGEN, INC.)

Docket No. CM-DC-2011-004

**IGWA's Reply Brief in Support of
its Petition for Reconsideration**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby replies to the *Surface Water Coalition's Response to IGWA's Petition for Reconsideration* filed February 25, 2014, and *Rangen, Inc.'s Memorandum in Opposition to IGWA's Petition for Reconsideration* filed February 26, 2014. IGWA does not wish to belabor the issues in its Petition for Reconsideration, but a few arguments made by the Surface Water Coalition (SWC) and Rangen concerning the trimline and waste of water necessitate a reply.

1. 10% Trimline.

The SWC and Rangen argue the 10 percent margin of error assigned to ESPAM 1.1 "is not relevant or applicable to ESPAM 2.1 or its use in conjunctive administration."¹ They say that since the USGS stream gauges that Director Dreher cited were not used in the calibration of ESPAM 2.1 to the Rangen model cell, there is no basis to assign any degree of uncertainty to ESPAM 2.1.² They read the Final Order to stand for the proposition that ESPAM 2.1 has no quantifiable margin of error associated with model uncertainty.³ Further, they allege that since IGWA readily agrees that ESPAM 2.1 is the best science available, "any argument regarding ESPAM 1.1 and its application in prior matters is irrelevant to the case at

¹ SWC Response p. 2; Rangen Response p. 2 (joining in the SWC response).

² SWC Response p. 2.

³ *Id.* at 3.

hand, as well as to any other conjunctive administration where ESPAM 2.1 is utilized.”⁴ This line of reasoning underscores the problem of the Director declining to assign any degree of uncertainty to ESPAM 2.1 predictions for Rangen.

In the Clear Springs and Blue Lakes delivery call cases, Director Dreher assigned 10 percent uncertainty to ESPAM 1.1. He relied heavily on the 10 percent margin of error in USGS stream gauges used in ESPAM 1.1, but acknowledged that the USGS gauges were but one source of uncertainty, and that all sources of uncertainty must be considered. Importantly, the judiciary did not uphold the 10 percent trimline as a mathematical calculation, but as a reasonable exercise of discretion, supported by substantial evidence, to account for overall uncertainty in the predictions generated by ESPAM. The Court explained:

The district court held that “the Court concludes that the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model.” The court stated, “The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality. . . . Given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error.” The court concluded, “Accordingly, the Director did not abuse discretion by applying the 10% margin of error ‘trim line.’” The issue is whether the district court erred in upholding the Director on the ground that he did not abuse his discretion in not curtailing ground water appropriators who are within the model’s margin of error.

...

The Director perceived the issue as discretionary, he acted within the outer limits of his discretion and consistent with legal standards applicable to the available choices, and he reached his decision through an exercise of reason. The district court did not err in upholding the Director’s decision in this regard.⁵

There is no substance to the notion that ESPAM 2.1 is devoid of uncertainty simply because USGS gauges are not used in ESPAM 2.1’s predictions for Rangen. In fact, the evidence in the record strongly suggests the water measurements used to calibrate ESPAM 2.1 to the Rangen model cell have greater uncertainty than the USGS gauges used in ESPAM 1.1. Whereas USGS gauges are an approved measurement device, Rangen’s measurements, which were used to calibrate ESPAM 2.1 to EPA discharge from the Rangen model cell, are based on a non-standard measuring practice that is also deemed to have an error factor of 10 percent.⁶ Moreover, Greg Sullivan discovered that Rangen’s measurement practices pro-

⁴ *Id.*

⁵ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 817 (2011).

⁶ IDWR Staff Memo, Ex. 3203, p. 13.

duce an even higher degree of error of 15.9 percent.⁷ Thus, without taking into account other sources of uncertainty in ESPAM 2.1, the trimline, using Director Dreher's reasoning, which the Idaho Supreme Court accepts, should limit curtailment to groundwater rights for which ESPAM 2.1 predicts at least 10 percent, and arguably 15.9 percent, of the curtailed water will accrue to Rangen.

But this is not all. Undisputed evidence was also presented that ESPAM 2.1 does not reflect important local hydrogeologic features near Rangen, that there is systematic error in ESPAM 2.1 predictions for Rangen, and that ESPAM 2.1 over-predicts the effect of a change in groundwater levels on ESPA discharge in the Rangen model cell.⁸ The evidence of Model uncertainty presented in this case is, without question, more thorough, detailed, and substantial than the evidence of Model uncertainty in the Clear Springs case. The fact that the surface water measurement data used in ESPAM 2.1 have equal or greater uncertainty than the surface water measurements used in ESPAM 1.1, plus Rangen obstructing IDWR efforts to obtain more accurate measurement data, plus concrete evidence of additional localized error in ESPAM 2.1 predictions for Rangen, makes it all the more difficult to understand how no degree of uncertainty was assigned to ESPAM 2.1 and a trimline was adopted that infers essentially no uncertainty by increasing the zone of curtailment from 735 acres to 157,000 acres.

The point is, there is a great deal of evidence in the record to indicate that the level of uncertainty in ESPAM 2.1 predictions for Rangen is equal to or greater than the uncertainty of ESPAM 1.1. Should the Director, upon reconsideration, reduce the zone of curtailment to bring it in line with Director Dreher's prior order in this case, it would be completely justifiable and defensible, factually and legally, not only to prevent excessive waste, but also based on Model uncertainty.

2. Waste, Hoarding, and Reasonable Use of Water.

There continues to be an aggressive effort by the SWC to redefine what constitutes waste and hoarding of water under Idaho law. They claim that waste and hoarding of water are about nothing more than whether the senior applies more water to its crops than are needed to grow them (or, in the case of fish farmers, runs more water through its raceways than is needed to grow them). Their position is that "since the Director found Rangen's means of diversion to be reasonable, these cases [involving waste] have no application to the use of ESPAM 2.1."⁹ To support this assertion they cite to conclusion of law 34 in the Final Order where

⁷ See Final Order p. 11, FF 50.

⁸ See IGWA's Proposed Findings of Fact pp. 15-19. The Final Order perfunctorily dismisses ESPAM 2.1's systematic over-prediction for Rangen by pointing out that prior to the year 2000 ESPAM 2.1 systematically under-predicts flows at Rangen. (Final Order p. 21 ¶d.) But this only reinforces the existence of systematic error in the predictions for Rangen. Regardless of the cause of this error, there is no dispute that it exists.

⁹ SWC Response p. 8.

the Director refused to require Rangen to improve its diversion and conveyance system before looking to curtail junior rights.¹⁰ This conclusion, however, does not exhaust the waste analysis.

The reason Idaho law detests waste is because it counteracts the ultimate objective of Idaho law to secure the maximum use and benefit of its limited water resources. Waste occurs when a senior takes water, depriving others of the opportunity to use it, yet does not apply it to beneficial use. A senior certainly may cause waste by applying excess water to crops, but this is not the only way. Waste may also result from the senior taking control of a large amount of water that the senior cannot divert and apply to his crops at all. This aspect of waste may more aptly fall under the category of hoarding, but there is no need to split hairs. Concepts of waste, hoarding, reasonable means of diversion, and reasonable use of water all have the same objective: guarding against the exercise of priority in a manner that unreasonably counteracts “policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources.”¹¹

In *Van Camp* the Court did not say the senior was over-watering his crops.¹² Rather, the senior caused excessive waste by taking control of the whole stream even though the senior applied only a portion of it to his crops. The waste prevented junior water users from making use of a large amount of water that the senior was not himself applying to beneficial use. Likewise, nothing in the *Schodde* case suggests the senior was applying more water to his crops than were needed to raise them.¹³ The problem, again, was that the senior’s appropriation could not be sustained without leaving a huge amount of water in the Snake River that the senior himself would not apply to beneficial use. The senior’s water wheels functioned just fine, but his appropriation was nevertheless deemed unreasonable because it prevented junior water users from making use of a large amount of water in the Snake River. The focus on overall beneficial use of the resource in *Van Camp* and *Schodde* is reflected in Conjunctive Management Rule 20.03:

03. Reasonable Use of Surface and Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. . . . An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.¹⁴

¹⁰ *Id.*

¹¹ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)).

¹² *Van Camp v. Emery*, 13 Idaho 202 (1907).

¹³ *Schodde v. Twin Falls Land Company*, 224 U.S. 107 (1912).

¹⁴ IDAPA 37.03.11.20.03 (emphasis added).

The Idaho Supreme Court cited both *Van Camp* and *Schodde* in its relatively recent *Clear Springs* decision where it unequivocally reaffirmed that “it is clearly state policy that water be put to its maximum use and benefit,”¹⁵ that “by ‘priority of appropriation’ we are not referring to being protected in an unreasonable means of diversion,”¹⁶ and that “the Groundwater Users’ argument regarding reasonable aquifer levels and full economic development must challenge the Spring Users’ means of diversion.”¹⁷ While the Court declined to address the reasonableness of the senior’s appropriation in that case, it is clear from the decision that the exercise of priority may be deemed unreasonable or wasteful not only if the senior uses leaky diversion facilities or applies excess water to crops, but also if the exercise of priority will result in the senior taking control of a large amount of water that the senior cannot apply to beneficial use.

Thus, just because the Director found that Rangen was not running excess water through its raceways, and just because he declined to require Rangen to improve its diversion facilities, does not mean curtailing 157,000 acres to provide 9.1 cfs to Rangen does not produce excessive waste or hoarding of the resource. IGWA’s Petition for Reconsideration does not ask the Director to reconsider whether Rangen puts too much water through its raceways; it asks the Director to consider the reasonableness of allowing Rangen to take control of 392,500 acre-feet¹⁸ of water annually when it will receive only 6,588 acre-feet that may or may not actually be applied to beneficial use. (Rangen has been remarkably willing to comply with the Cease & Desist Order.) In other words, is it reasonable to allow Rangen to hoard or waste (however you want to look at it) 385,912 acre-feet of water annually that it will never apply to beneficial use? To compare cfs, is it reasonable to allow Rangen to command more than 542 cfs to when it will beneficially use only 9.1 cfs?¹⁹

This leads to the major fallacy of the SWC argument. Recognizing that Rangen will receive only a tiny fraction of the curtailed water, they argue that “water that does not arrive for use at Rangen’s facility is not ‘wasted’ or ‘hoarded’ by Rangen. Instead, that water either remains in the aquifer for use by other ground water users or will flow to other springs and river reaches where that water can be put to beneficial use by other senior surface water rights.”²⁰ To accept this argument is to conclude that there is no such thing as waste or hoarding of water, that delivery calls may be made by proxy to curtail juniors for the benefit of other juniors, and that the futile call doctrine is meaningless.

¹⁵ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 n.24 (2011).

¹⁶ *Id.* n.24.

¹⁷ *Id.* at 809.

¹⁸ Assuming an average annual diversion of 2.5 acre-feet per acre (157,000 acres x 2.5 acre-feet per acre = 392,500 acre-feet).

¹⁹ 392,000 acre-feet / 723.94 acre-feet = 542.2 cfs.

²⁰ SWC Response pp. 4-5.

There is no evidence in the record that the 385,912 acre-feet of water that Rangen will curtail but not put to beneficial use will instead be beneficially used by others. Rather, the record demonstrates that this water will accrue to “other connected river reaches, spring and base flows, including those on which there are no water rights or diversions, those on which there are no delivery calls, those on which approved mitigation plans are already in place, and those on which diversions occur under water rights junior to the curtailed rights.”²¹

Moreover, the claim that water that does not accrue to Rangen “can be put to beneficial use by other senior surface water rights” flies in the face of the priority system the SWC so often preaches. If the holders of “other senior surface water rights” are short of water, they can make their own delivery call. What the SWC is really advocating is allowing Rangen to curtail juniors for the benefit of junior surface water users who are not in a position to make their own call. More specifically, they want Rangen to be able to curtail juniors for the benefit of Idaho Power who is not itself in a position to make a call. Or perhaps the SWC is looking out for water users in Oregon and Washington who are the only other water users who may make beneficial use of the 385,912 acre-feet that Rangen will curtail without using.

Further, under the SWC theory there is no such thing as a futile call, because even if the calling senior water user won’t receive the curtailed water, someone will. Combined with their advocacy for no trimline at all, they ultimately contend that the Rangen curtailment order should extend to every junior-priority surface and ground water right in the Snake River Basin above Milner Dam. Since there are losing reaches of the Snake River, every junior right has some impact on flows at Rangen, including storage water rights.

In sum, Idaho law allows seniors to curtail juniors, provided it is not a futile call and does not result in excessive waste or hoarding of the resource. The law does not allow seniors to curtail juniors for the benefit of third parties. Nor is the Rangen call a substitute for the mechanisms implemented by the Legislature to manage and sustain aquifers under the Ground Water Act. The SWC notion that there is no such thing as waste or hoarding of water, and no such thing as a futile call, must be rejected.

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February 27, 2014
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²¹ Brendecke Expert Report p. 1-3, ¶ 24.

CERTIFICATE OF MAILING

I certify that on this 27th day of February, 2014, the foregoing document was served on the following persons in the manner indicated.



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