

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket Nos. 42772-2015 / 42775-2015 / 42863-2015

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER
RIGHT NOS. 36-02551 & 36-07694 (Rangen, Inc.)
IDWR Docket No. CM-DC-2011-004

IDAHO GROUND WATER APPROPRIATORS, INC.

Intervenor / Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent / Respondent,

v.

RANGEN, INC.

Petitioner / Respondent,

v.

FREMONT-MADISON IRRIGATION DISTRICT, A&B IRRIGATION
DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION
DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL
COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA
IRRIGATION DISTRICT, and CITY OF POCATELLO,

Intervenors / Respondents.

IGWA's Opening Brief

Appeal from Twin Falls County case no. CV-2014-1338
(Consolidated Gooding County case no. CV-2014-179)

Honorable Eric J. Wildman, District Judge, Presiding.

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STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal from a water rights curtailment order issued by the Director of the Idaho Department of Water Resources (IDWR) on January 29, 2014.¹ The order shuts off all groundwater rights in the Magic Valley with priority dates junior to July 13, 1962.

2. Procedural History.

Rangen filed its delivery call with IDWR in December of 2011.² IDWR had previously denied a delivery call by Rangen because the Eastern Snake Plain Aquifer Model (the “Model”) showed that groundwater pumping had an insignificant impact on Rangen’s water supply.³ As the Model was being updated from version 1 to version 2, Rangen filed another call. Version 2 of the Model had not yet been completed, so the administrative proceeding was put on hold until that was done.

Upon completion of version 2, IDWR resumed proceedings on Rangen’s call. Several pre-hearing motions were filed and decided, and an evidentiary hearing was held at the IDWR state office in Boise, concluding with the *Final Order Regarding Rangen, Inc.’s*,

¹ Final Order Regarding Rangen, Inc.’s, Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 (Jan. 29, 2014) (Agency R. Vol. 21, p. 4158).

² Petition for Delivery Call (Agency R. Vol. 1, p. 1).

³ Second Amended Order ¶ 25 p. 28 (May 19, 2005) (Agency R. Vol. 1, p. 162).

*Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*⁴ (“Curtailment Order”) issued January 29, 2014.

IGWA and Rangen each petitioned for judicial review of the Curtailment Order.⁵ The cases were consolidated, and the district court disposed of both petitions via its *Memorandum Decision and Order on Petitions for Judicial Review* (“Memorandum Decision”) issued October 24, 2014.

IGWA, Rangen, and the City of Pocatello have each appealed the district court decision to this Court.⁶

3. Statement of Facts.

A thorough review of facts is contained in *IGWA’s Opening Brief* filed with the district court,⁷ and even more detail is found in *IGWA’s Proposed Findings of Fact and Conclusions of Law* filed with IDWR.⁸ For this appeal, the following facts are essential.

3.1 Curren Tunnel.

Rangen’s water rights are from the Martin-Curren Tunnel (commonly referred to simply as the “Curren Tunnel”), a horizontal shaft dug some 300 feet into a basalt cliff (known as the “Hagerman Rim”) above Rangen’s fish hatchery a few miles east of the

⁴ Agency R. Vol. 21, p. 4158.

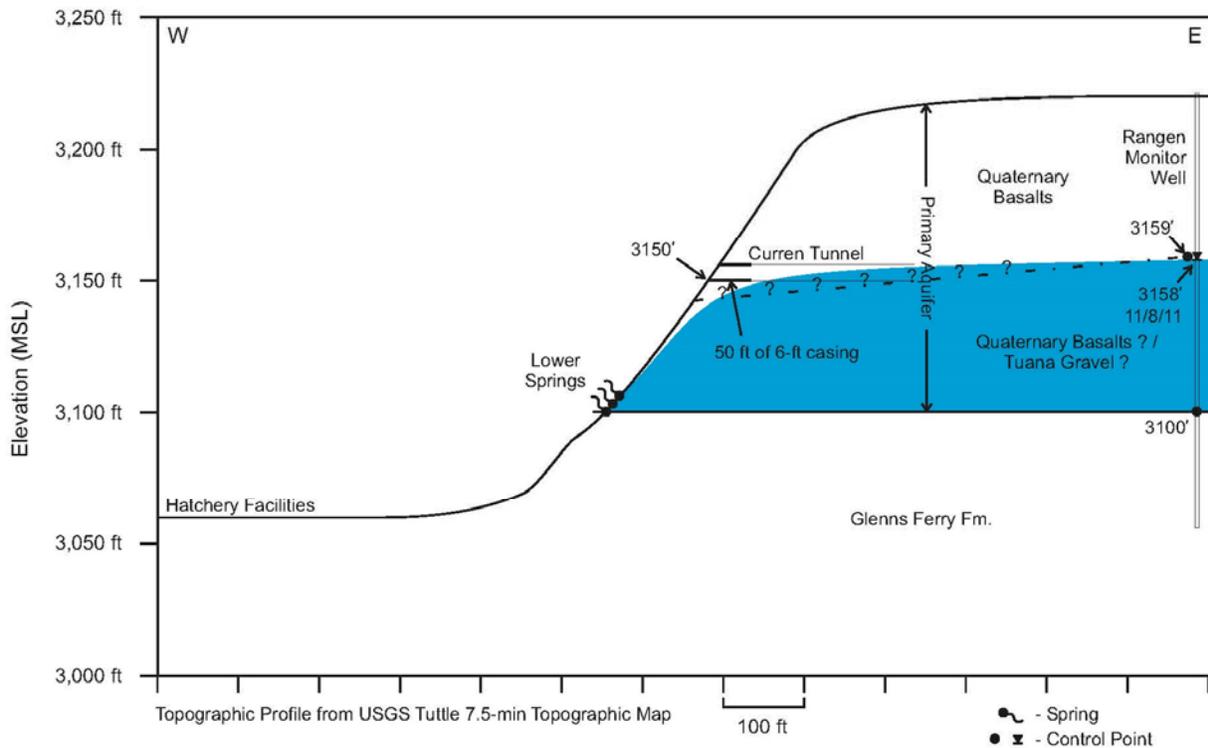
⁵ Agency R. Vol. 22, pp. 4455, 4443.

⁶ Docket Nos. 42772-2015 (Rangen appeal), 42775-2015 (IGWA appeal), 42863-2015 (Pocatello appeal).

⁷ Supp. Clerk’s R., p. 89.

⁸ Agency R. Vol. 19, p. 3880.

city of Hagerman.⁹ It is not a tunnel in the conventional sense of connecting two points, but rather terminates in the Eastern Snake Plain Aquifer (ESPA) where it captures groundwater and conveys it by gravity flow to land surface. Exhibit 2198 depicts this:



The above diagram also depicts springs that naturally discharge from the ESPA about 50 feet in elevation below the Tunnel, at the head of Billingsley Creek. Rangen has historically diverted water from Billingsley Creek in addition to the Tunnel, but the water rights at issue in this proceeding are limited to the Tunnel only.

⁹ Ex. 2199.

The outer 50 feet of the Tunnel is cased in metal pipe, similar to the casing in a vertical well.¹⁰ Groundwater enters the Tunnel beyond the end of the casing, at depths ranging from 40 to 70 vertical feet below land surface.¹¹ About 180 feet in, the Tunnel forks into two separate branches, with the left fork extending an additional 105 feet and the right fork an additional 120 feet.¹² The Tunnel functions like a vertical well by creating a hydraulic gradient that causes groundwater to flow from the aquifer into the Tunnel.¹³ If the gradient is sufficient, a vertical well will flow without need for a pump, as the Tunnel does.¹⁴ The Tunnel is simply a horizontal well.¹⁵

The Tunnel was excavated in the late 1800s to withdraw water from the ESPA at an elevation that would allow it to be transported by gravity to farmland south of Rangen's fish hatchery.¹⁶ To make this possible it had to be constructed high on the Hagerman Rim.¹⁷ Because the Tunnel essentially skims water off the top of the ESPA, the flow of

¹⁰ Ex. 3278; Brendecke Tr. Vol. 9, p. 2039:12-20.

¹¹ Hinckley Report, Ex. 2247 at 20-21.

¹² Ex. 2328.

¹³ *Id.*

¹⁴ *Id.*

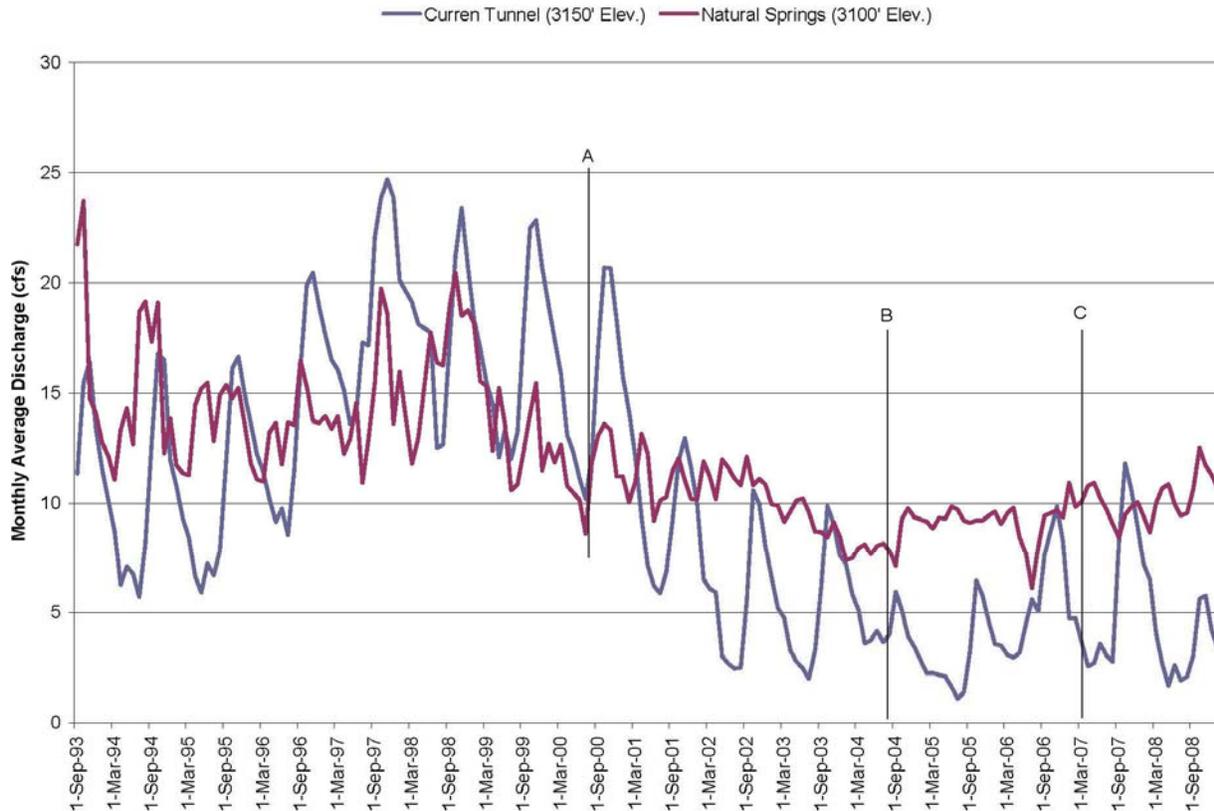
¹⁵ *Id.* at 21; Hinckley Tr. Vol. 9, p. 2224:14-21, p. 2225:6-11.

¹⁶ Brendecke Report, Ex. 2401 at 3-2, 3-3; Hinckley Report. Ex. 2247 at 20.

¹⁷ Hinckley Report. Ex. 2247 at 21, 22.

water is very responsive to small changes in the elevation of the water table.¹⁸ Exhibit

2201 shows the high volatility of flow from the Tunnel compared to the natural springs:¹⁹



Like the Tunnel, the springs discharge water from the ESPA and fluctuate based on aquifer levels, but since they have access to a greater saturated thickness of the ESPA they are much less sensitive to changes in the elevation of the water table.²⁰

¹⁸ Hinckley Report, Ex. 2247 at 34; Hinckley, Tr. Vol. 9, p. 2227:22-25, 2230:13-16.

¹⁹ Ex. 2201; Hinckley Report, Ex. 2247 at 25, Hinckley, Tr. Vol. 9, p. 2230:2-16.

²⁰ Hinckley, Tr. Vol. 9, pp. 2229:9-2230:16; Exs. 2201, 2247.

3.2 Changes in ESPA Overflow.

Flows from the Curren Tunnel do not have a long history of measurement, but regional ESPA discharges do. The United States Geological Survey has measured cumulative ESPA discharges to the Snake River between Milner Dam and King Hill since 1902, shown in exhibit 2266.²¹ Short-term fluctuations correspond with short-term wet and dry periods. More important for this case are the long-term trends.²²

ESPA discharges increased dramatically during the first half of the twentieth century due to flood irrigation on the Snake River Plain. In fact, the Magic Valley gets its name from the massive transformation that took place when large irrigation canals were constructed to transport surface water from the Snake River out onto the Plain, bringing hundreds of thousands of acres under irrigation and “magically” turning what had been considered a nearly uninhabitable area into some of the most productive farmland in the world. Much of this water seeped into the ground, causing the elevation of the water table to rise substantially, which in turn increased the amount of groundwater that overflows from the ESPA via springs and other outlets.²³

²¹ Exhibit 2266.

²² *Id.*

²³ Ex. 2401 at 2-5.

ESAP discharges subsequently declined in response to (a) the transition from flood to sprinkler irrigation, (b) the elimination of winter time canal diversions, (c) lining and piping of irrigation canals and ditches, and (d) groundwater pumping.²⁴

ESPA discharges in the Hagerman area are closely tied to surface water irrigation by the North Side Canal Company (NSCC) which supplies much of the farmland north of the Snake River. Aquifer recharge through the NSCC decreased by roughly 150,000 acre-feet per year beginning in 1961 as a result of the Winter Water Savings Program.²⁵ In addition, sprinkler usage within NSCC grew from nearly zero percent in 1982 to nearly 100 percent by 2008.²⁶

Of special significance to Rangen, approximately 24,000 linear feet of laterals off NSCC's W-canal near Wendell has been lined or placed in pipe since the 1990s, primarily to reduce seepage losses.²⁷ The lining of NSCC canals directly correlate with decreased flow from the Curren Tunnel.²⁸

The advent of groundwater pumping also contributed to the decline in spring flows. Surface water canals could not service much of the arable land in the Magic Valley due to location, elevation, and other factors. But in the mid 1900s, pumping technology, hydro-power generation, and the extension of electric lines into rural areas combined to bring

²⁴ Ex. 2401 at 2-3, 2-5, and 2-6; Brendecke, Tr., Vol. 11, p. 2591:12-19.

²⁵ Ex. 2401 at 1-3.

²⁶ Ex. 2401 at 1-4.

²⁷ *Id.*

²⁸ Ex. 2396.

nearly one million additional acres under irrigation with groundwater. The State of Idaho heavily encouraged this development through legislation, the State Water Plan, and IDWR's determination that the groundwater supply was sufficient to sustain it.

Contrary to some assertions, groundwater pumping is not outpacing recharge of the ESPA.²⁹ The ESPA receives approximately 7.7 million acre feet of recharge annually, whereas groundwater irrigation consumes approximately 2.5 million acre-feet.³⁰ The excess spills out of the ESPA through springs or into the Snake River directly.

While the amount of groundwater stored in the ESPA has declined from peak levels, it remains today above natural, pre-irrigation levels.³¹ Near Rangen, groundwater levels have been stable over the last several years, actually rising in some wells following the record drought that occurred in the early 2000s.³²

3.3 Curtailment Order.

The Curtailment Order shuts off all groundwater rights with priority dates junior to July 13, 1962, that divert from the ESPA at any location west of the "Great Rift."³³ The Great Rift is a wide swath of exposed lava rock that bisects the Snake River Plain between

²⁹ Curtailment Order, p. 16, ¶¶ 75 & 76, (R. Vol. 21, p. 4173); Brendecke, Tr. Vol. 11, p. 2568:16-2569:22 (describing Ex. 2344).

³⁰ Ex. 2344.

³¹ Brendecke, Tr. Vol. 11, pp. 2568:16-2570:23.

³² Ex. 1250; Carlquist, Tr. 1683:18-25.

³³ Curtailment Order at 42 (Agency R. Vol. 21, p. 4199).

the cities of Burley and American Falls.³⁴ The Great Rift “trim line”³⁵ creates a zone of curtailment that encompasses the Magic Valley, shutting off water to 157,000 acres of irrigated farmland and numerous cities, dairies, food processors, and other businesses.³⁶

The objective of the curtailment is to elevate the water table in the ESPA and thereby cause more groundwater to discharge from the Curren Tunnel. However, Rangen will receive only a tiny fraction of the water that would have otherwise been put to use by juniors. Collectively, the curtailed junior water rights authorize the use of 3,139 cubic feet per second (cfs).³⁷ Their curtailment is predicted to increase flows from the Curren Tunnel by 9.1 cfs.³⁸ The disparity is equally stark when comparing acre-feet, as the curtailment eliminates beneficial use of more than 549,500 acre-feet annually to provide only 6,588 acre-feet to Rangen.³⁹

³⁴ See Curtailment Order at 15, ¶ 71 (Agency R. Vol.21, p. 4172).

³⁵ The “trim line” demarcates the geographic zone of curtailment. Junior groundwater rights within the trim line are exposed to curtailment; junior rights outside the line are not.

³⁶ Curtailment Order at 40, ¶ 55 (Agency R. Vol. 21, p. 4197).

³⁷ Calculated by tallying the diversion rate authorized under the curtailed water rights listed in Appendix C to the Curtailment Order (Agency R. Vol. 21, pp. 4207-59)

³⁸ Curtailment Order at 42, ¶ 3 (Agency R. Vol. 21, p. 4199).

³⁹ Assuming an authorized diversion volume of 3.5 acre-feet per acre for irrigation, curtailment of 157,000 acres eliminates beneficial use of 549,500 acre-feet annually. (This figure does not account for commercial, industrial, and municipal rights, which are also curtailed.) The predicted 9.1 cfs benefit to Rangen equates to 6,588 acre-feet annually.

The zone of curtailment is so expansive it shuts off wells 70 to 80 miles east of Rangen where as little as 0.63 percent of the water that could have been put to use by the junior is expected to accrue to Rangen.⁴⁰

Yet even these predictions are doubtful. As explained below, they are based on computer model simulations that are subject to significant uncertainty.

3.4 Model Errors and Bias.

The Model is constrained by several conceptual and structure limitations that produce errors in the vicinity of Rangen, including:

- a) The Model simulates groundwater levels west of the Hagerman Rim that are above the actual land surface.⁴¹
- b) The Model simulates groundwater levels east of the Hagerman Rim that are systematically lower than measured groundwater levels.⁴²
- c) The Model simulates groundwater flow in the Model cells immediately west and south of Rangen that is the opposite of the observed flow direction.⁴³
- d) The Model simulates Snake River reach gains in the Rangen area that reflect very little of the observed, large seasonal fluctuations in those gains.⁴⁴
- e) The Model systematically simulates the seasonal low flow as occurring three months earlier than it actually occurs.⁴⁵
- f) The ESPA terminates at the Hagerman Rim, yet the Model represents it continuing westward another 1.7 miles.⁴⁶

⁴⁰ Curtailment Order at 39, ¶ 51 (Agency R. Vol. 21, p. 4196).

⁴¹ Exs. 2213.

⁴² Ex. 2247 at 68; Exs. 2301 and 2302.

⁴³ Ex. 2247 at 38 (Bates No. 76); Hinckley, Tr. Vol. 10, p. 2456:11-25.

⁴⁴ Hinckley, Tr. Vol. 10, p. 2485:5-23, Ex. 2247 at Bates No. 84.

⁴⁵ Ex. 2219; Hinckley Tr. Vol. 10, p. 2482:8-11.

- g) The Model simulates a clear, linear relationship between groundwater levels west of Rangen and the discharge from the Rangen Model cell, whereas actual measurements show no relationship at all between Rangen discharge and the disconnected water-bearing zones to the west.⁴⁷

These errors add uncertainty to the Model's predictions of the effect of groundwater pumping on flow from the Curren Tunnel.⁴⁸ Moreover, while some sources of uncertainty are likely to produce random errors in the predicted impacts, others create a bias toward over-predicting the impact of groundwater pumping on Rangen.⁴⁹ This is evident in the systematic error between simulated and observed water flows.⁵⁰ The Model predicts discharge from the Rangen Model cell that is consistently smaller than was physically measured through the 1980s, and consistently larger than was physically measured since 2000, as shown in exhibit 2300. This systematic error ranges from an average under-prediction of 6.1 cfs in the first eight years of the calibration period to an average over-prediction of 4.7 cfs in the last 10 years of the calibration period.⁵¹ This indicates version 2 of the Model predicts a larger impact of groundwater pumping on flows from the Curren Tunnel than actually exists.⁵²

⁴⁶ Ex. 2213.

⁴⁷ Ex. 2247 pp. 30-34.

⁴⁸ Ex. 2247 at 42.

⁴⁹ Hinckley, Tr. Vol. 10, pp. 2447:8-14, 2477:2-22, 2481:22-2483:3, 2486:11-2487:8.

⁵⁰ Ex. 2300.

⁵¹ Ex. 2424.

⁵² Ex. 2401 at 10; Brendecke, Tr. Vol. 11, pp. 2587:21-2588:1; 2646:3-7.

A likely explanation of this error is the lining of NSCC laterals in the late 1980s and again in the late 1990s which reduced seepage of surface water from canals and ditches off of the “W Lateral” immediately east of Rangen.⁵³ The Model assumes constant seepage rates over the modeling period, such that a change in the local water budget could in fact contribute to the systematic over-prediction of flows at Rangen.⁵⁴

It also partially accounts for the Model generating higher transmissivity (the rate at which groundwater flows through the aquifer) closer to the Hagerman Rim when in reality the transmissivity should decrease.⁵⁵ This causes the Model to exaggerate the effects of groundwater pumping on ESPA discharge from the Rangen Model cell.⁵⁶

A comparison of measured water flows at Rangen with measured groundwater levels in nearby wells also shows actual flows to be less sensitive to changes in groundwater levels than the Model predicts.⁵⁷ Exhibit 2197 shows that for every one foot increase in the elevation of the water table, the Model predicts an additional 4.85 cfs will discharge from the Rangen Model cell. By contrast, a comparison of measured water flows from the Rangen Model cell with measured groundwater levels in a nearby well shows that for

⁵³ Brendecke, Tr. Vol. 10, pp. 2584:5-2585:17, 2595:15-2597:20; Ex. 1416 at 54:6-12; Ex. 2396.

⁵⁴ Wylie, Tr. Vol. 12, p. 2913:3-25; Ex. 1416 at 53:21-54:18.

⁵⁵ Brendecke, Tr. Vol. 11, p. 2576:11-2577:16-24.

⁵⁶ *Id.* at 2647:17, 2648:15; Ex. 2401 at 31.

⁵⁷ Ex. 2401 at 4-3; Ex. 2296.

every one foot rise in the water table only 3 cfs will discharge from the Rangen Model cell—38 percent less than what the Model predicts.⁵⁸

This bias is even more pronounced when comparing measured discharge from the Curren Tunnel to measured groundwater levels in nearby wells. The Model can only predict the impact of pumping on the total groundwater discharge within a Model cell, yet there are multiple spring outlets within the Rangen Model cell in addition to the Tunnel, each of which responds differently to changes in ESPA water levels. To accommodate this limitation, the Curtailment Order attributes 63 percent of the predicted impact to the Rangen Model cell to the Curren Tunnel, and the remainder to the springs.⁵⁹ Thus, of the 4.85 cfs impact to the Rangen Model cell that the Model predicts will result from a one foot change in the elevation of the water table, the Curtailment Order assumes 63 percent, or 3.06 cfs, will accrue to the Tunnel. However, a comparison of measured water flows from the Curren Tunnel with measured groundwater levels in the nearby Rangen Monitoring Well shows every one foot change in water level increasing Tunnel discharge by only 1.37 cfs—55 percent less than what the Model predicts.⁶⁰

⁵⁸ Ex. 2247 at Bates 70; Ex. 2248 at Bates 10; Hinckley, Tr. Vol. 11 p. 2545:5-2547:16.

⁵⁹ Curtailment Order at 33, 39, 41 (Agency R. Vol. 21, pp. 4190, 4196, 4198).

⁶⁰ Ex. 2247 at 28; Ex. 2205; Brendecke, Tr. Vol. 11, pp. 2605:19-2606:2.

The Curtailment Order acknowledges uncertainty in the Model’s predictions for Rangen, but does not assign an error factor or otherwise account for the errors cited above. The only source of uncertainty considered relates to the Great Rift.⁶¹

4. Standard of Review.

Judicial review of the Curtailment Order is governed by the Idaho Administrative Procedure Act (IDAPA).⁶² “In an appeal from a district court, where the court was acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court’s decision.”⁶³ In other words, this Court does “not give deference to the district court’s decision.”⁶⁴

Under IDAPA, this Court must affirm the Curtailment Order unless its findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.⁶⁵

Issues of fact must be confined to the record created before the agency,⁶⁶ and the court must not substitute its judgment for that of the agency as to the weight of the evidence on issues of fact.⁶⁷ In contrast, courts exercise free review of questions of law.⁶⁸

⁶¹ Curtailment Order at 37-40, CL 42-57 (Agency R. Vol. 21, pp. 4194-98).

⁶² Idaho Code §§ 42-1701A(4), 67-5270 et seq.

⁶³ *Spencer v. Kootenai County*, 145 Idaho 448, 452 (2008).

⁶⁴ *Idaho Power Co. v. Idaho State Tax Comm’n*, 141 Idaho 316, 317 (2005).

⁶⁵ Idaho Code § 67-5279(3).

Discretionary decisions should be affirmed if the agency “perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason.”⁶⁹ A decision is arbitrary “if it was done in disregard of the facts and circumstances presented or without adequate determining principles.”⁷⁰ It is capricious if “done without a rational basis.”⁷¹ An abuse of discretion occurs if the action is “arbitrary, capricious, or unreasonable.”⁷² Thus, discretionary decisions must be rational, reasonable, and based on facts in the record and adequate determining principles.

If the Curtailment Order is not affirmed, it must be set aside in whole or in part, and remanded for further proceedings as necessary.⁷³ It should not be set aside unless substantial rights have been prejudiced.⁷⁴

⁶⁶ Idaho Code § 67-5277.

⁶⁷ Idaho Code § 67-5279(1).

⁶⁸ *Vickers v. Lowe*, 150 Idaho 439, 442 (2011).

⁶⁹ *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 54 (2006).

⁷⁰ *In re Delivery Call of A&B Irrigation Dist.*, 153 Idaho 500, 511 (2011) (citing *Am. Lung Ass’n of Idaho/Nevada v. State, Dept. of Agric.*, 142 Idaho 544, 547 (2006)).

⁷¹ *Id.*

⁷² *Lane Ranch P’ship v. City of Sun Valley*, 145 Idaho 87, 91 (2007).

⁷³ Idaho Code § 67-5279(3).

⁷⁴ Idaho Code § 67-5279(4).

ISSUES ON APPEAL

1. Idaho law permits the holder of a senior-priority water right to curtail junior rights as long as the senior beneficially uses the additional water without hoarding the resource.
 - 1.1 Did the Director err as a matter of law by concluding he has “limited discretion” to prevent hoarding of Idaho’s water resources?
 - 1.2 Did the Director violate Idaho Code § 67-5248 by not providing a reasoned statement applying the law against hoarding?
 - 1.3 Did the Director abuse his discretion by failing to account for Model error in applying the law against hoarding?
 - 1.4 Did the Director abuse his discretion by allowing Rangen to command 100 times more water than it will beneficially use?

2. The Ground Water Act governs the administration of Idaho’s aquifers.⁷⁵ The Curren Tunnel meets the statutory definition of a groundwater well under the Act. Did the Director violate the Act by administering the Tunnel as a surface water diversion instead of a groundwater diversion, thereby excusing it from the Act?

⁷⁵ Idaho Code § 42-229.

SUMMARY OF THE ARGUMENT

This appeal exists because, after more than a decade of litigation, there remains no answer or reliable guidance to the question of how much water a senior water user can command without using it. The Director has allowed Rangen to command—to take from other water users—100 times more water than it will use. The district court has allowed Rangen to command even more. IGWA contends this is an abuse of discretion because it permits Rangen to “hoard” excessive amounts of water in violation of the principle of beneficial use established by Idaho law.

IGWA also contends Rangen should be required to comply with the Ground Water Act because the Curren Tunnel qualifies as a groundwater well under the Act. The Director mistakenly relied on an agency rule to trump the requirements of the Act.

ARGUMENT

1. Allowing Rangen to command 100 times more water than it will beneficially use results in excessive hoarding of the ESPA.

Priority is a fundamental tenet of Idaho water law,⁷⁶ but it “is not an absolute rule without exception.”⁷⁷ Alongside priority is beneficial use: “The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use.”⁷⁸ These principles work in

⁷⁶ Idaho Const. Art. 15, § 3; Idaho Code § 42-106.

⁷⁷ *AFRD2*, 143 Idaho at 880.

⁷⁸ *A&B Irrigation v. Spackman*, 155 Idaho 640, 650 (2013).

tandem. The holder of a senior-priority water right may exercise priority to shut off a junior right *so long as* the senior will beneficially use the water that would have otherwise been used by the junior.

The principle of beneficial use derives from the fact that Idaho's waterways are a State resource,⁷⁹ and the public has an interest in maximizing beneficial use of the State's limited water supplies: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."⁸⁰

Usually, administration by priority maximizes beneficial use of water resources by enabling water users to analyze water delivery records, determine the amount of water available under a given priority date, and develop projects suited to available supplies. For example, once the earliest and most reliable river flows were fully developed, farmers utilized more ephemeral flows under later-priority rights to raise crops such as wheat and barley that have shorter irrigation seasons. And after summertime flows were fully developed, they built reservoirs to capture winter flows for use later in the summer.

⁷⁹ Idaho Code § 42-101 ("All the waters of the state . . . are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose . . .").

⁸⁰ *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977); *see also Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho 525, 535 (1909) ("It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."); *Simonson v. Moon*, 72 Idaho 39, 47 (1951) ("It is the policy of the law to encourage the most efficient, and least wasteful, use of the waters of the state."); *Poole v. Olaveson*, 82 Idaho 496, 502 (1960) (same as *Simonson*); *Parker v. Wallentine*, 103 Idaho 506, 513 (1982) ("[I]t is clearly state policy that water be put to its maximum use and benefit.").

Sometimes, however, priority may be exercised in a manner that has the opposite effect, such as when the holder of a senior right shuts off juniors yet does not beneficially use the water that would have been used by the juniors. The senior could be diverting more water than is needed or commanding water from juniors without diverting it at all.

Idaho law combats this risk by prohibiting hoarding of water and requiring that water be used efficiently and without waste. This Court aptly summarized these requirements in its recent *A&B Irrigation District v. Spackman* decision:

The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law. *E.g.*, I.C. § 42-220 (“neither [a] licensee nor anyone claiming a right under [a] decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed.”); *AFRD #2*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (“Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.”); *Wash. State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (“It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration.”); *Conant v. Jones*, 3 Idaho (3 Hasb.) 606, 612-13, 32 P. 250, 251 (1893) (prior appropriator may ultimately claim entirety of his original appropriation, but he is only entitled to the amount of water he actually puts to beneficial use during the time it takes him to prepare his land for cultivation).⁸¹

Idaho law does not require absolute efficiency of water use. Rather, the standard is one of reasonableness. For example, in *Basinger v. Taylor* this Court held that losing fifty

⁸¹ *A&B Irrigation*, 155 Idaho at 650.

percent of the water in an irrigation ditch was “unreasonable, excessive and against public policy,” explaining that a water user “is entitled allowance for only a reasonable loss in conducting water from the point of diversion to the place of use.”⁸²

The Court used similar reasoning in *Van Camp v. Emery* to prevent a senior from damming a stream to sub-irrigate adjacent meadows.⁸³ By damming the stream the senior commanded far more water than was needed to grow his crops, depriving juniors of the opportunity to also use the stream to irrigate. The Court held:

Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree, but beyond that he cannot go under any other pretext or claims for the natural condition of the stream.

In this arid country where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home-building, it will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application.⁸⁴

Citing *Van Camp*, the United States Supreme Court prevented a senior from exercising priority over juniors in *Schodde v. Twin Falls Land & Water Company*.⁸⁵ There, the senior sought to recover damages caused by a large dam constructed by a junior canal

⁸² *Basinger v. Taylor*, 36 Idaho 591, 597 (1922); see also *Clark v. Hansen*, 35 Idaho 449, 455 (1922) (finding conveyance loss of ninety percent to be “against public policy”).

⁸³ *Van Camp v. Emery*, 13 Idaho 202 (1907).

⁸⁴ *Id.* at 208.

⁸⁵ *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912).

company to divert water into the Twin Falls Canal.⁸⁶ The senior had previously and at great expense constructed a series of water wheels to divert water from the Snake River for use on his adjacent farm.⁸⁷ The junior's dam "destroyed the current in the river by means of which [the senior's] water wheels were driven," making it impossible for the senior to divert water from the River.⁸⁸ The senior suffered damages totaling \$56,650 (more than \$1.3 million in today's dollars) as a result.⁸⁹

This created a conundrum. On one hand, the Court "recognized fully the right of the plaintiff to the volume of water actually appropriated for a beneficial purpose."⁹⁰ On the other, protecting the senior's means of appropriation would severely inhibit beneficial use of the Snake River. The Court noted the Twin Falls Canal was constructed "for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300,000 acres of arable and arid lands," for many landowners "there is no other supply available for irrigation, stock, domestic, or manufacturing purposes except the water from said canal," and "without the dam the Twin Falls scheme with all its present great promise fails."⁹¹

The answer to the problem lay in the doctrine of beneficial use. The Court held:

⁸⁶ *Id.*

⁸⁷ *Id.* at 114-16.

⁸⁸ *Id.* at 116.

⁸⁹ *Id.*

⁹⁰ *Id.* at 117.

⁹¹ *Id.* at 116, 118.

As by Art. 15, Sec. 3, Constitution of Idaho, all unappropriated waters are subject to appropriation, it follows that all water that plaintiff has legally appropriated belongs to him, but all other is subject to appropriation. It is unquestioned that what he has actually diverted and used upon his land, he has appropriated, but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation; it is not reasonable.⁹²

The Court explained that “to uphold as an appropriation the use of the current of the river to the extent required to work the [senior’s] wheels would amount to saying that a limited taking of water from the river by appropriation for a limited beneficial use, justified the appropriation of all the water in the river as incident to the limited benefit resulting from the use of the water actually appropriated.”⁹³ The Court rejected this notion, concluding “there was no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses.”⁹⁴

The prohibition against hoarding water is memorialized in the *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”). CM Rule 20.03 states:

⁹² *Id.* at 118.

⁹³ *Id.* at 117.

⁹⁴ *Id.*

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.⁹⁵

CM Rule 40.03 reinforces this by requiring the Director to determine whether the senior “is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42.”⁹⁶ CM Rule 42 then lists a number of factors the Director may consider when “determining material injury *and* reasonableness of water diversions,”⁹⁷ the first of which is: “The amount of water available in the source from which the water right is diverted.”⁹⁸ This factor is a clear reference to the rule that a senior cannot command far more water from the source than the senior applies to beneficial use.

This Court upheld the constitutionality of the CM Rules in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* (“AFRD2”), ruling the Director has a duty when responding to a delivery call to consider “reasonableness of the senior water right diversion . . . and reasonableness of use.”⁹⁹ In *Clear Springs Foods v. Spackman*, the

⁹⁵ CM Rule 20.03 (IDAPA 37.03.11.020.03).

⁹⁶ CM Rule 40.03 (IDAPA 37.03.11.040.03).

⁹⁷ CM Rule 42 (IDAPA 37.03.11.042) (emphasis added).

⁹⁸ CM Rule 42.01.a (IDAPA 37.03.11.042.01.a).

⁹⁹ *American Falls Reservoir Dist. #2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 869-70 (2007) (“AFRD2”).

Court confirmed that “[a]n 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”¹⁰⁰ And in *A&B Irrigation District v. Spackman* the Court again held that Idaho law does not allow water users “to waste water or unnecessarily hoard it without putting it to some beneficial use,”¹⁰¹ and that a senior “is only entitled to the amount of water he actually puts to beneficial use.”¹⁰²

The Idaho Legislature has not set a bright line rule as to how much water a senior can command without using, leaving the decision to the Director’s discretion: “Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director.”¹⁰³

IGWA contends the Director erred in performing this duty. First, he mistakenly concluded he has “limited discretion” to prevent seniors from hoarding excessive amounts of water. Second, he failed to provide a reasoned statement, as required by Idaho Code § 67-5248, applying the rule that a senior cannot hoard water. Third, he did not meaningfully account for Model uncertainty, which bears on how much water Rangen is

¹⁰⁰ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809 (quoting CM Rule 20.03).

¹⁰¹ *A&B Irrigation District*, 150 Idaho at 650 (quoting *AFRD2*, 143 Idaho at 880).

¹⁰² *Id.* (quoting *Conant v. Jones*, 3 Idaho 606, 612-13 (1893)).

¹⁰³ *AFRD2*, 143 Idaho at 880 ; *see also A&B Irrigation*, 155 Idaho at 650.

permitted to command without using. Fourth, he abused discretion by allowing Rangen to command 100 times more water than it will use.

IGWA contends the district court erred by not setting aside the Curtailment Order based on these errors.

1.1 The Director made a legal error by concluding he has “limited discretion” to prevent Rangen from hoarding excessive amounts of water.

The Director candidly acknowledged that he perceives he has “limited discretion” to evaluate whether Rangen’s means of appropriation is reasonable.¹⁰⁴ This statement is made in the context of the rule that “[a]n 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.”¹⁰⁵

By self-limiting his ability to prevent hoarding of water, the Director gave the two “bedrock principles” of the prior appropriation doctrine unequal deference. Beneficial use was made subservient to priority. This was a legal error.

Priority and beneficial use are both constitutional requirements; neither is superior to the other.¹⁰⁶ This was made clear in the *AFRD2* case where a group of senior water users argued the CM Rules are unconstitutional for allowing the Director to evaluate beneficial use and limit or refuse curtailment based on a standard of reasonableness, which

¹⁰⁴ Curtailment Order p. 39, ¶ 52 (Agency R. Vol. 21, p. 4196).

¹⁰⁵ *Id.* at 40, ¶ 53 (quoting CM Rule 20.03) (Agency R. Vol. 21, p. 4197).

¹⁰⁶ Idaho Const. Art. 15, § 3.

they claimed undermined their water right decrees.¹⁰⁷ This Court disagreed, ruling that the determinations required under CM Rule 42 are appropriate and “of necessity, require some determination of ‘reasonableness.’”¹⁰⁸ These determinations do not undermine water right decrees because “water rights adjudications neither address, nor answer, the questions presented in delivery calls.”¹⁰⁹ Since “reasonableness is not an element of a water right,” the Court explained, “evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication.”¹¹⁰ The decision does not say the Director has “limited discretion” in this regard.

The Court further clarified the Director’s role in its recent *A&B Irrigation District* decision, quoting from *AFRD2* to explain “the Director has discretionary authority in a water management case that is not available to him in a water rights case.”¹¹¹ The Court acknowledged the “tension between the first in time and beneficial use aspects of the prior appropriation doctrine,” and reaffirmed that “[s]omewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of direction by the

¹⁰⁷ *AFRD2*, 143 Idaho at 875.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 877.

¹¹¹ *A&B Irrigation*, 155 Idaho at 652.

Director.”¹¹² Again, nothing in this decision suggests the Director’s duty to evaluate beneficial use of the resource is subject to “limited discretion.”

Therefore, IGWA asks this Court to rule that that the Director erred as a matter of law by perceiving he has limited discretion in applying the principle of beneficial use.

1.2 The Curtailment Order violates Idaho Code § 67-5248 by failing to address how much water Rangen can reasonably command without using.

Idaho Code § 67-5248 requires agency orders to include a “reasoned statement in support of the decision,” and a “concise and explicit statement of the underlying facts of record supporting the findings.” The statement should include “inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision,” as such information is “essential to meaningful judicial review.”¹¹³

As the dominant issue in this case is how much water Rangen can command without using, IGWA put on a great deal of evidence bearing on it, including:

- (a) The amount of water stored in the ESPA and corresponding spring flows in the Milner to King Hill reach of the Snake River are above natural levels;¹¹⁴
- (b) Groundwater levels in the vicinity of Rangen have been stable, and in some areas have risen, since 2010;¹¹⁵
- (c) The aquifer is not being “mined” by junior-priority groundwater pumping (i.e. withdrawals are not outpacing recharge);¹¹⁶

¹¹² *A&B Irrigation*, 155 Idaho at 651 (quoting *AFRD2*, 143 Idaho at 880).

¹¹³ *Woodfield v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 127 Idaho 738, 746 (Ct. App. 1995).

¹¹⁴ Brendecke, Tr. Vol. 11, p. 2570:7-23; Ex. 2266.

¹¹⁵ Ex. 1250; Carlquist, Tr. Vol. 7, p. 1683:18-25.

- (d) The Curren Tunnel is akin to a shallow well in that it skims water off the top of the ESPA, making it very susceptible to small changes in the elevation of the water table;¹¹⁷
- (e) The only way to protect Rangen's means of diversion via the Curren Tunnel is to maintain a large supply of groundwater that cannot be appropriated in order to keep overflow from the ESPA at peak levels;¹¹⁸
- (f) The Model over-estimates the effect of pumping on ESPA discharges from the Tunnel.¹¹⁹

Paraphrasing *Schodde*, IGWA argued:

To uphold Rangen's appropriation of the entire storage of the ESPA would amount to saying that a limited taking of water from the ESPA by appropriation for a limited beneficial use, justifies the appropriation of all of the water in the ESPA incident to the limited benefit resulting from the water actually appropriated. It is unquestioned that what Rangen has actually diverted and used in its facility, it has appropriated, but can it be said that Rangen has made an appropriation of all of the water in the ESPA needed to maintain peak overflow from the Tunnel? There is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation; it is not reasonable.¹²⁰

IGWA asserted that Rangen should not be permitted to shut off a well if Rangen will not beneficially use at least 10 percent of the water that would have otherwise been used by the junior.¹²¹ One way or another, IGWA expected a ruling as to how much water Rangen can reasonably command without using.

¹¹⁶ Bredecke, Tr. Vol. 11, pp. 2568:16-2569:22.

¹¹⁷ See Statement of Facts, section 3.1, *supra*.

¹¹⁸ IGWA's Post-Hearing Br. at 28 (Agency R. Vol. 19, p. 3841).

¹¹⁹ See Statement of Facts section 3.4, *supra*.

¹²⁰ Cf. *Schodde*, 224 U.S. at 117; cf. IGWA's Post-Hearing Br. at 28 (Agency R. Vol. 19, pp. 3871).

¹²¹ IGWA's Post-Hearing Br. at 29-32 (Agency R. Vol. 19, pp. 3842-45).

The Curtailment Order CM Rule 20.03, but does not apply any threshold as to how much water Rangen can command without using. It implements a trim line at the Great Rift, but this was based on a geologic feature that impedes groundwater flow, not on a determination of how much water Rangen can command without using.

It is tempting to assume the Director must have deemed it reasonable to shut off wells for which Rangen will receive at least 0.63 percent of the water that would otherwise been applied to beneficial use by juniors, but the Curtailment Order doesn't support this assumption. A comparison of Figure 1 with Figure 4 in the Curtailment Order shows the Great Rift trim line curtails some wells where the Rangen Model cell is predicted to receive less than one percent of the water that would otherwise have been used by the junior, while not curtailing other wells even though the Model predicts the Rangen Model cell will receive more than one percent.¹²²

There is simply no reasoned statement in the Curtailment Order explaining the point at which curtailment of a well will result in unreasonable hoarding of the resource. The Director's perception that has "limited discretion" to prevent hoarding seems to have caused him to avoid applying the law head-on.

Idaho Code § 67-5248 is intended to prevent parties and reviewing judges from having to make assumptions and inferences about agency decisions. Therefore, IGWA

¹²² Curtailment Order at 24, 27 (Agency R. Vol. 21, pp. 4181, 4184).

asks the Court to rule the Curtailment Order violates Idaho Code § 67-5248 by failing to include a reasoned statement applying the rule against hoarding.

1.3 The Director erred by not accounting for Model error with respect to Rangen specifically in applying the principle of beneficial use.

The Model is programmed so that any change in hydraulic conditions in any single Model cell will predict an impact in every other Model cell, even if there is no measurable impact. For example, it predicts that pumping a well at the very western edge of the Model near King Hill will affect groundwater conditions 200 miles east at the opposite edge of the Model near Ashton, whether or not there is an impact in reality.¹²³ Consequently, in every prior case where the Director has relied upon the Model to make curtailment decisions, he has assigned a margin of error to the Model predictions and excluded from curtailment junior water diversions for which the predicted benefit to the senior is smaller than the margin of error. This Court has upheld this practice.¹²⁴

Model error bears on the Director's discretionary determination of how much water Rangen can curtail without using because it affects the likelihood that Rangen will actually receive water that would otherwise have been put to use by juniors. Accordingly, IGWA presented substantial evidence of errors in the Model that cause it to over-predict

¹²³ See generally Exhibits 4001 and 4002.

¹²⁴ *Clear Springs Foods*, 150 Idaho at 812-17.

the effect of groundwater pumping on water flows in the Curren Tunnel,¹²⁵ and asked the Director to assign an error factor to the Model predictions for Rangen.¹²⁶

The Curtailment Order acknowledges error in the Model's predictions for Rangen, but does nothing about it. It cites Model uncertainty to support the Great Rift trim line, yet the low transmissivity of the Great Rift does not address the localized Model error and bias related to Rangen specifically.

The Curtailment Order suggests localized uncertainty need not be considered because the Model is the "best science available" and IGWA "did not offer reasonable alternatives to using ESPAM 2.1."¹²⁷ But this was never IGWA's intention. IGWA agrees that the Model is the best science available and should be used in this proceeding. However, the fact that the Model is the best we've got does not mean the Director should ignore errors and bias in its predictions. It is precisely because Model uncertainty for Rangen is not mathematically quantifiable that the Director must *exercise discretion* to account for it. IGWA argued that the most logical way to do this is by using a trim line to limit curtailment to groundwater diversions for which the Model predicts a significant impact on Rangen. Instead, the Director ignored the Model error and bias that pertains to Rangen specifically.

¹²⁵ See Statement of Facts § 3.4, *supra*.

¹²⁶ IGWA's Post-Hearing Br. at 31-33 (Agency R. Vol. 19, pp. 3844-46).

¹²⁷ *Id.* at 20, FF 94 (Agency R. Vol. 21, p. 4177).

IGWA petitioned the district court to set aside the Curtailment Order for failing to account for error in the Model predictions for Rangen,¹²⁸ but it refused for a different reason. The district court did not find the Director had accounted for Model error specific to Rangen; rather, it ruled the Director cannot consider Model error at all.¹²⁹ It held that no matter how significant Model errors may be, they must be applied to the disadvantage of junior water users.¹³⁰

The district court ruling mistakenly assumes that the Director's consideration of Model error undermines the senior's water right decree, but this is not so. The SRBA court does not consider Model error in decreeing water rights. The issue of Model error goes to the Director's application of the law against hoarding; it does not challenge the decreed elements of the senior's right. In other words, IGWA does not ask that Model error be applied to back up the priority date of juniors that are exposed to curtailment, or to reduce the amount of water the senior is entitled to divert. It simply asks the Director to consider Model error in determining the likelihood that Rangen will actually use the water that would otherwise have been used by juniors. This is precisely the type of issue that demands the exercise of discretion by the Director.

¹²⁸ See IGWA's Opening Brief at 56-57 (Supp. Clerk's R., p. 137-38).

¹²⁹ Mem. Decisions & Order on Pets. for Judicial Review at 36-40 (Clerk's R., pp. 703-07).

¹³⁰ *Id.* at 40 (Clerk's R., p. 707).

Therefore, IGWA asks this Court to rule that the Director abused his discretion by failing to account for undisputed evidence of Model error and bias with respect to Rangen specifically when applying the principle of beneficial use.

1.4 The Director abused his discretion by curtailing beneficial use when Rangen will receive less than one percent of the water that the junior would have otherwise applied to beneficial use.

The facts in *Van Camp* and in *Schodde* are analogous to this case. In those cases, the seniors desired to command their respective streams to support their use of a fraction of it. Here, Rangen seeks to command the ESPA to support its use of a fraction of it.

In both *Van Camp* and *Schodde*, this Court found it patently unreasonable and against public policy to allow the senior to command 10 times more water than it applies to beneficial use.¹³¹ The *Schodde* decision says it best:

Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he had made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land his 100 inches, can he then object to those above him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation. In effect this is substantially the principle that plaintiff is asking to have established.¹³²

¹³¹ *Van Camp*, 13 Idaho at 208.

¹³² *Schodde*, 224 U.S. at 119; *see also Van Camp*, 13 Idaho at 208 (“[I]t will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application.”)

This Court accepted the Director's use of a 10 percent threshold for the Surface Water Coalition in the *A&B Irrigation District* case.¹³³ By contrast, it was unwilling to sanction a lesser threshold in the *Clear Springs Foods* case. There, the Director applied a 10 percent trim line, but because version 1 of the Model was calibrated only to reaches of the Snake River, it was incapable of applying the threshold to specific springs. The best the Model could do was apply the 10 percent threshold to the reaches of the Snake River to which the target springs were tributary. This resulted in the senior receiving only a portion of the water that was predicted to accrue to the reach, and as little as one to three percent of the amount curtailed. When was faced with whether this resulted in excessive hoarding of the resource, this Court declined to address the issue, ruling it had not been properly raised on appeal.¹³⁴ Had the Court believed it to be reasonable it could have simply affirmed the Director's decision. It was unwilling to go that far.

This case squarely presents the issue of how much water a senior can command without using. While this Court has been unwilling to sanction anything less than 10 percent, the Curtailment Order allows Rangen to shut off wells even if Rangen will receive only 0.63 percent of the curtailed water, the district court decision goes even further. By removing the Great Rift trim line, the district court effectively extended the zone of cur-

¹³³ *A&B Irr. Dist.*, 155 Idaho 640.

¹³⁴ *Clear Springs Foods*, 150 Idaho at 810.

tailment all the way to Ashton, shutting off wells where Rangen may receive only hundredths of one percent of the water that would have been used by juniors.

What's more, there is an utter dearth of consistency or guidance from IDWR as to how much water seniors are permitted to curtail without using.

Former IDWR Director Karl Dreher applied a 10 percent threshold to Rangen's first delivery call in 2003, which exposed 735 acres to curtailment.¹³⁵ With the upgrade of the Model enabling IDWR to determine the impacts of groundwater pumping on specific springs, IGWA anticipated a more accurate determination of which groundwater wells meet the 10 percent threshold.

Instead, the Director abandoned the rule against hoarding and skyrocketed the zone of curtailment from 735 acres to 157,000 acres, creating a nine-bell fire alarm for the cities, dairies, businesses, and farmers who were given less than three months to provide mitigation or have their wells shut off.

Rangen likes to argue that IGWA should have planned for curtailment and had mitigation in place. The fact is, IGWA did. It had already taken actions to mitigate for curtailment of far more than 735 acres. But there was no reason to think a computer model upgrade would cause IDWR to completely change course, abandon the 10 percent trim line applied previously, and increase curtailment by more than two hundred fold.

¹³⁵ IGWA's Opening Br. at App. A, Second Amended Order ¶ 22, p. 6 (Supp. Clerk's R., p. 152).

Meanwhile, IDWR continues to apply a 10 percent trim line to the Surface Water Coalition delivery call.

And therein lies the problem. The Great Rift trim line is so far removed from the 10 percent trim line that junior users are left with no predictability as to how trim lines may be implemented in the future, in this case or others.

As explained in the Standard of Review, *supra*, discretionary decisions must be rational, reasonable, and based on facts and adequate determining principles. These requirements are intended to produce consistency and reliability in agency decision-making. Unfortunately, IDWR's trim line decisions have been anything but that.

If it was previously unreasonable for Rangen to curtail juniors beyond a 10 percent trim line, and if it is still unreasonable for the Surface Water Coalition to curtail juniors beyond a 10 percent trim line, then the Director must provide a rational, reasonable, and factually grounded explanation as to why Rangen is now being permitted to curtail juniors if less than one percent of the curtailed water is expected to ever reach the Current Tunnel. The Curtailment Order does not meet this standard, and, as a result, is arbitrary, capricious, and/or an abuse of discretion.

Therefore, IGWA respectfully asks this Court to conclude it is an abuse of discretion for the Director to allow a senior to shut off a junior if the senior will be able to beneficially use 0.63 percent or less of the water that would have otherwise been applied to beneficial use by the junior.

2. The Curren Tunnel meets the statutory definition of a groundwater well and must be administered as such.

Another significant issue is whether the Curren Tunnel should be administered as a surface water source or a groundwater source. The distinction is important because this Court ruled in *Clear Springs Foods* that senior surface water rights are excused from the requirements of the Ground Water Act, even when they make a delivery call seeking to procure groundwater.¹³⁶ Under *Clear Springs Foods*, only if the Tunnel is administered as a groundwater diversion must Rangen's delivery call comply with the Act.

Before discussing the Director's decision on this issue, an explanation of the implications of the Act is in order.

The principle of "first in time is first in right" applies to both surface water and groundwater, but in a different manner. Allocating surface water by priority is relatively straightforward. Since surface water flows through defined channels where it can be observed and measured, IDWR can shuttle water from one water user to another by opening and closing headgates and shepherding it through rivers, canals, and ditches. When a junior surface water right is curtailed, usually nearly all of the water that could have been used by the junior is delivered to the senior in a matter of hours or, at most, a few days.

Groundwater is different. It does not flow in defined channels and cannot be shepherded from one water user to another. If a well is shut off, water that could have been

¹³⁶ *Clear Springs Foods*, 150 Idaho at 804.

used by the junior does not simply flow downstream to the senior. Rather, the effect of curtailment radiates outward in all directions through the aquifer, with only a fraction of the curtailed water reaching the senior, often taking years to arrive.

The priority doctrine was originally applied to groundwater no differently than surface water. This Court ruled in 1933 in *Noh v. Stoner* that holders of junior groundwater rights cannot withdraw groundwater if it will cause *any* injury to a senior water user.¹³⁷ However, this ruling had the effect of minimizing beneficial use of the resource. It enabled the holders of senior rights to demand that the groundwater table be maintained at peak level, allowing a single, shallow well to block all subsequent groundwater use.

When *Noh* was decided, there was little groundwater use in Idaho. This changed over the ensuing two decades as pump technology, cheap hydropower, and a rapidly expanding electric grid combined to enable extensive development of the ESPA and other aquifers in Idaho. The State desperately wanted to seize the opportunity, yet the *Noh* decision naturally had a chilling effect on groundwater development.

Recognizing that groundwater exists in a different hydrologic environment, and that the doctrine of priority must be adapted to that environment if there was to be significant development of Idaho's aquifers, the Legislature passed the Ground Water Act, which provides for management of aquifers based on groundwater levels. It declares:

¹³⁷ *Noh v. Stoner*, 53 Idaho 651 (1933); see also *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 581 (1973) (explaining that under *Noh*, “the only way that a junior can draw on the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior’s pumping”).

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.¹³⁸

Under the Act, a senior cannot curtail juniors simply because the water table drops. Rather, the Act authorizes curtailment only if the junior diversion would (1) “affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right,” or (2) “result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.”¹³⁹

The Act’s prohibition of over-drafting an aquifer is obvious, since that would exhaust the groundwater supply and minimize beneficial use of the resource. As to a junior diversion affecting a senior in a manner “contrary to the declared policy of [the Act],” this Court explained in *Baker v. Ore Idaho Foods* that seniors may curtail juniors “to the extent that pumping by the juniors may force seniors to go below the ‘reasonable pumping levels’ set by the IDWA.”¹⁴⁰

¹³⁸ Idaho Code § 42-226.

¹³⁹ Idaho Code § 42-237a(g).

¹⁴⁰ *Baker*, 95 Idaho at 585.

The Act does not define what constitutes a reasonable pumping level, but instead leaves it to the discretion of the Director. IDWR has since defined “reasonable pumping level” as:

A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of **protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels** caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law.¹⁴¹

The practical effect of administering groundwater based on pumping levels is that “senior appropriators are not entitled to relief if the junior appropriators, by pumping from their wells, force seniors to lower their pumps from historic levels to reasonable pumping levels.”¹⁴² Under the Act, a senior “is not absolutely protected in either his historic water level or his historic means of diversion.”¹⁴³ Rather,

Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development. . . . Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.¹⁴⁴

¹⁴¹ IDAPA 37.03.11.010.18 (emphasis added).

¹⁴² *Baker*, 95 Idaho at 585.

¹⁴³ *Baker*, 95 Idaho at 584.

¹⁴⁴ *Id.*

Thus, a significant issue in this case is whether the Curren Tunnel qualifies as a groundwater diversion under the Act. If so, the Director has a duty to evaluate whether the Curren Tunnel is at a reasonable level, and, if not, require Rangen to deepen its diversion structure, as many of IGWA's members have been required to do.

The Ground Water Act defines "groundwater" as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."¹⁴⁵ It defines "well" as "an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained."¹⁴⁶

IGWA presented uncontested evidence that the Curren Tunnel qualifies as a groundwater well under the Act. It is an artificial excavation in the ground, 40 to 70 vertical feet below land surface, constructed to obtain groundwater from the ESPA.¹⁴⁷ While the Tunnel is not oriented vertically, it nonetheless meets the statutory definition of a groundwater well.

However, the Director declined to administer it as such, contending the "plain language of Rangen's partial decrees from the SRBA show that Curren Tunnel is unambigu-

¹⁴⁵ Idaho Code § 42-230(a).

¹⁴⁶ Idaho Code § 42-230(b).

¹⁴⁷ Brendecke Report at 1-1 (Ex. 2401).

ously surface water.”¹⁴⁸ In other words, even though the Tunnel factually qualifies as a groundwater well under the Act, the Director concluded that the SRBA court has judicially excluded the Tunnel from the Act.

He reached this conclusion based on an agency rule, IDWR Adjudication Rule 60,¹⁴⁹ which provides that water right adjudication claim forms should identify surface water sources by their official or common name, and groundwater sources as “ground water.”¹⁵⁰ Because “Curren Tunnel” is a common name, the Director concluded that Rangen’s partial decrees amount to a judicial declaration that Rangen’s water rights are not subject to the Act.¹⁵¹ This ruling is in error for three reasons.

First, the Director over-reads the effect of the name of a water source. The purpose of the name is simply to identify the source from which the water user is authorized to divert. Since SRBA decrees describe the point of diversion to only the nearest 40- or 10-acre tract of land, and since many 40- and 10-acre tracts have multiple water sources within them, the name of the source serves to identify which source water can be diverted from. It prevents people from switching from one source to another, without filing a transfer application with the IDWR.

¹⁴⁸ Order Granting in Part and Denying in Part Rangen’s Motion for Partial Summary Judgment Re: Source, p. 4 ¶ 2 (Apr. 22, 2013) (Agency R. Vol. 15, p. 3144).

¹⁴⁹ IDAPA 37.03.01.060.02.c.

¹⁵⁰ *Id.*

¹⁵¹ Order Granting in Part and Denying in Part Rangen’s Motion for Partial Summary Judgment Re: Source, p. 4 ¶ 2 (Apr. 22, 2013) (Agency R. Vol. 15, p. 3144).

While Adjudication Rule 60 generally facilitated uniformity in naming water sources, the name of the senior's source is not conclusive of how water rights will be administered in response to a delivery call. As noted in *AFRD2*, "water rights adjudications neither address, nor answer, the questions presented in delivery calls."¹⁵²

Second, the applicability of the Act is not dependent upon the name of the water source on the senior's water right license or decree. The Act governs "all rights to the use of ground water, whenever or however acquired."¹⁵³ And it defines "groundwater" based on hydrologic fact ("all water under the surface of the ground whatever may be the geological structure in which it is standing or moving"), not by the source listed on a water right license or decree.

Thus, since the Curren Tunnel meets the statutory definition of a groundwater well under the Act, it is subject to the Act, irrespective of the fact most groundwater diversions do not have unique names.

Third, the Director's reliance on an agency rule to interpret Rangen's decrees in a manner that violates the Act is a mistake of law. To the extent Adjudication Rule 60 conflicts with the Act, the Act controls. While administrative rules may be given the force and effect of law, they do not rise to the level of statutory law.¹⁵⁴ "[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing

¹⁵² *AFRD2*, 143 Idaho 862, 876 (2007).

¹⁵³ Idaho Code § 42-229.

¹⁵⁴ *Mead v. Arnell*, 117 Idaho 660 (1990).

statutory law.”¹⁵⁵ Thus, Adjudication Rule 60 cannot be construed in a manner that forces the Director to fallaciously administer a groundwater diversion as if it is a surface water diversion structure, contrary to the plain language of the Act.

Because the Director mistakenly treated the Curren Tunnel as a surface water diversion, he did not evaluate whether junior diversions had caused the water table to drop below a reasonable level at Rangen, or whether Rangen is required to lower its diversion point to access the abundant groundwater supply at a lower elevation. This omission is significant because groundwater levels in the Hagerman area are stable,¹⁵⁶ and Rangen could readily access more water simply by deepening or lowering the Curren Tunnel.¹⁵⁷ Rangen’s own engineers concluded that substantially more water could be obtained by lowering the elevation of Curren Tunnel.¹⁵⁸

Therefore, IGWA asks this Court to remand this matter with an instruction to apply the reasonable pumping level requirement of the Act to the Curren Tunnel.

3. The errors discussed above prejudice the substantial rights of IGWA and its members.

Any improper curtailment of IGWA’s members’ water rights prejudices their substantial rights. The errors discussed above prejudice these rights.

¹⁵⁵ *Holly Care Ctr. v. Dep’t of Employment*, 110 Idaho 76, 78 (1986).

¹⁵⁶ Curtailment Order, p. 16, ¶ 74 (Agency R. Vol. 21, p. 4173); Carlquist, Tr. Vol. 7, p. 1683:18-25; Ex.1250.

¹⁵⁷ Hinkley Tr. Vol. 9, pp. 2237:18-2243:3.

¹⁵⁸ Ex. 2040.

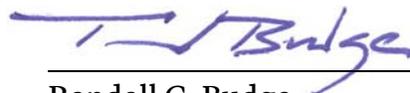
CONCLUSION

Based on the foregoing, IGWA respectfully urges this Court to:

- (1) Find the Director erred as a matter of law by perceiving he has limited discretion in applying the principle of beneficial use.
- (2) Find the Curtailment Order violates Idaho Code § 67-5248 by failing to include a reasoned statement applying the rule against hoarding.
- (3) Find the Director abused his discretion by failing to account for Model error and bias with respect to Rangen specifically.
- (4) Find it is an abuse of discretion for the Director to curtail beneficial water use if the senior will use as little as 0.63 percent of the water that would have otherwise been applied to beneficial use by the junior.
- (5) Find the Curren Tunnel meets the definition of a groundwater well under the Ground Water Act and must be administered as such.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

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CERTIFICATE OF SERVICE

I CERTIFY that on this 4th day of May, 2015, the above document was served on the following persons in the manner indicated:


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