Docket No. 42775-2015

IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (RANGEN, INC.) IDWR DOCKET CM-DC-2011-004

IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Appellant

v.

THE 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 the CITY OF POCATELLO,
Intervenors-Respondents.

INTERVENOR-RESPONDENT CITY OF POCATELLO'S RESPONSE BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Twin Falls, Case No. CV-2014-1338
(Consolidated Gooding County Case No. CV-2014-179)

Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUMMARY OF RESPONSE ARGUMENT

City of Pocatello ("Pocatello") and Idaho Ground Water Appropriators, Inc. ("IGWA") both filed appeals in this matter, and both raised one issue in common: the Great Rift trim line used by the Director to exclude certain water users from curtailment.[1] While Pocatello's appeal sought reversal of the district court to reinstate the Great Rift trim line (*see* Pocatello's Opening Brief on page 12 in Docket No. 42386-2015),[2] IGWA's appeal herein does not directly address the district court's trim line ruling, and instead asks for reversal of the Director's decision below which rejected IGWA's evidence and arguments for a more expansive trim line. On appeal, IGWA's Opening Brief properly highlights the concern that conjunctive administration ensure that curtailed ground water satisfy the calling senior water right, rather than other, non-calling (and even junior) water rights that might benefit from the senior commanding the entirety of the stream in order to make its diversions. IGWA's Opening Brief §§ 1.1−1.2. However, IGWA's argument relies on misinterpretations of this Court's prior decisions and applicable principles of administrative law in its attempt to attack the Great Rift trim line, and should be rejected.

[1] IGWA raised other issues as well, which Pocatello does not take a position on.

[2] Pocatello's appeal, Docket No. 42386-2015, currently pending in this Court, is limited to the single question of whether the district court erred in invalidating the Director's Great Rift trim line. Pocatello's Opening Brief in that matter is expressly incorporated by this reference, and this brief is intentionally abbreviated to avoid belaboring applicable arguments already made in that companion matter.

I. THE DIRECTOR'S AUTHORITY TO ADMINISTER A DELIVERY CALL INCLUDES THE ABILITY, WITHIN HIS DISCRETION, TO INSTITUTE A TRIM LINE, AND APPLY PRINCIPLES OF BENEFICIAL USE AND ADMINISTRATIVE LAW.

IGWA relies on *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) and *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) to support the proposition that the Director cannot curtail junior water rights where curtailment results in the calling seniors commanding far more water than needed to satisfy beneficial uses. In *Schodde* and *Van Camp*, the Idaho Supreme Court rejected seniors' demands for curtailment of juniors to supply water to the seniors' unreasonable means of diversion as inconsistent with the doctrine of beneficial use. *See also Basinger v. Taylor*, 36 Idaho 591, 597, 211 P. 1085, 1087 (1922); *see also Clark v. Hansen*, 35 Idaho 449, 455, 206 P. 808, 810 (1922) (finding ditch operations involving a 90% conveyance loss to be against "public policy"). This Court has recently reiterated this legal limitation on the operation of prior appropriative rights and, by extension, on conjunctive administration. *In Re Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.* ("*A&B Irrigation*"), 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) ("If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water."). In reliance on these and other related decisions, IGWA asks the Court to reverse the Director's finding that he has "limited discretion" to implement the principles of reasonable means of diversion. IGWA's Opening Brief at 30.

Pocatello agrees that it is within the Director's discretion to refuse to curtail when the record demonstrates that the senior means of diversion is not reasonable; Pocatello also agrees that Rangen's means of diversion is itself not reasonable, and further—as noted in Pocatello's Opening Brief in Docket No. 42386-2015—that this issue was not decided by the Director.[3] However, as argued in Pocatello's Opening Brief in Docket No. 42386-2015, the Director's selection of the Great Rift as the trim line reflected appropriate exercise of agency discretion.

IGWA does not specifically argue that Rangen's means of diversion is unreasonable and that the Director should have so found, although that is implied from its arguments. IGWA does suggest that the Director's remedy for Rangen's unreasonable means of diversion is to limit curtailment to junior wells that will result in at least 10% of curtailed amounts accruing at the Martin-Curren Tunnel, rather than the Director's Great Rift trim line which resulted in 0.63% (on average) of curtailed amounts accruing at the Martin-Curren Tunnel. IGWA's Opening Brief at 33.[4] The trouble with IGWA's argument is that it does not articulate a factual basis to support its proposed 10% standard.[5] IGWA's Opening Brief at 36.

[3] The Director found that Rangen's use of water was reasonable and efficient. Agency R. Vol. 21, pp. 004221−22. In other words, once the water gets from the Martin-Curren Tunnel to the Rangen raceways, the Director did not find the *use* of the water to be unreasonable or wasteful; however, the Director's Final Order does not pass on whether means of diversion to get water to the raceways is *per se* unreasonable.

[4] Pocatello's arguments in support of the Great Rift trim line are the substance of its Opening Brief in Docket No. 42386-2015 and will not be repeated here.

[5] IGWA appears to suggest that a 10% trim line is required as a matter of law because the *Schodde* Court rejected as unreasonable Schodde's means of diversion, which allowed the senior to command 10 times more water than could be applied to beneficial use.

As a starting point, IGWA argues that a 10% trim line is proper based on its reading of *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), but as recited in the Director's Final Order in the captioned matter, the *Clear Springs* trim line resulted in the seniors receiving not 10% or more of the benefits of curtailment, but instead at least 0.69−2% of the benefits of curtailment. Agency R. Vol. 21, p. 004203−04. Similarly, the Great Rift trim line results in gains at Rangen of at least 0.63% of curtailed amounts. *Id.* at 004226, COL ¶ 51. Thus, the Director properly exercised his discretion to impose the Great Rift trim line, because Rangen's treatment is similar to that received by the senior spring users in *Clear Springs*.

Furthermore, IGWA misperceives this Court's prior decisions involving model error in the context of conjunctive management. The issue of model error and the trim line was not directly at issue in *A&B Irrigation*. *Cf.* IGWA's Opening Brief at 33. And, while the *Clear Springs* Court affirmed the 10% trim line in that case as within the Director's discretion, the Court did not, as IGWA argues, state that it was unwilling to sanction a "lesser threshold" than 10%. IGWA's Opening Brief at 39. Instead, the Court's decision in *Clear Springs* stands for the proposition that a trim line based on model uncertainty is proper under Idaho law and within the Director's discretion but does not mandate a 10% trim line in every delivery call. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 817, 252 P.3d 71, 98 (2011) ("The Director perceived the issue as discretionary, he acted within the outer limits of his discretion and consistently with the 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 . . . .").

Contrary to IGWA's arguments, this Court's treatment of the trim line in *Clear Springs* supports the Director's imposition of the Great Rift trim line in this matter, as argued in Pocatello's Opening Brief in Docket No. 42386-2015 (Argument on pages 12–28). The Director had clear and convincing evidence to support the adoption of the Great Rift trim line (Pocatello's Opening Brief at ¶¶ I.A.–B.) and, contrary to the district court's rationale, the clear and convincing standard in and of itself does not foreclose the Director's exercise of discretion to adopt appropriate trim lines. *Id.* ¶ I.C.3.

The Court should reverse the district court's decision and uphold the Director's Great Rift trim line.

Respectfully submitted this 8th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8thd day of June, 2015, I caused to be served a true and correct copy of the foregoing **Intervenor-Respondent City of Pocatello's Response Brief** in **Idaho Supreme Court Docket No. 42775-2015** (SRBA Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)) upon the following by the method indicated:

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief, Intervenor-Respondent City of Pocatello's Response Brief in Docket No. 42775-2015, submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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