

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 42836-2015

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

CITY OF POCATELLO.

Intervenor / Appellant,

v.

RANGEN, INC.

Petitioner / Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent / Respondent,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., 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, and
MINIDOKA IRRIGATION DISTRICT,

Intervenors / Respondents.

IGWA's Response to Pocatello'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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RESPONSE ARGUMENT

Pocatello asks this Court to reverse the district court decision by reinstating the Great Rift trim line.¹ Pocatello contends the Great Rift trim line is justified based on “technical uncertainty regarding the model’s ability to accurately predict reach gains,” and “to promote principles of optimum use.”² While Idaho Ground Water Appropriators, Inc. (“IGWA”) agrees that the Director must consider Model uncertainty as well as optimum use when administering groundwater, IGWA disagrees that the Great Rift trim line is a coherent or reasonable application of either.

1. The Great Rift trim line is not a coherent or reasonable application of the prohibition against hoarding set forth in CM Rule 20.03.

Pocatello contends the Great Rift trim line is based on “the Director’s reliance on Rule 20.03.”³ While the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”) cites CM Rule 20.03, it contains no explanation, as required by Idaho Code § 67-5248, of how much water Rangen can command without putting it to beneficial use, and it permits Rangen to curtail wells located so far away that the Eastern Snake Plain Aquifer Model

¹ Pocatello’s Opening Brief, p. 12; *see also id.* at 27-28.

² *Id.*

³ Pocatello’s Opening Brief, p. 14.

(the “Model”) predicts Rangen will receive less than one percent of the water that could have otherwise been applied to beneficial use by the junior.⁴

Pocatello asserts that “at least 0.63% of the curtailed amounts west of the Great Rift is predicted to reach Rangen’s Martin-Curren Tunnel,”⁵ as if the Director decided under CM Rule 20.03 that seniors can reasonably command 99.37 percent more water than they put to beneficial use. This assertion is based on the following statement in the Curtailment Order: “Delineating a trim line using the Great Rift will limit curtailment to an area where the Rangen spring cell is predicted to receive at least 1% of the benefits of curtailment, and the calling party is predicted to receive at least 0.63% of the benefits of curtailment.”⁶ The problem, however, is the Great Rift trim line does not in fact define the zone of curtailment based on a 0.63 percent threshold.

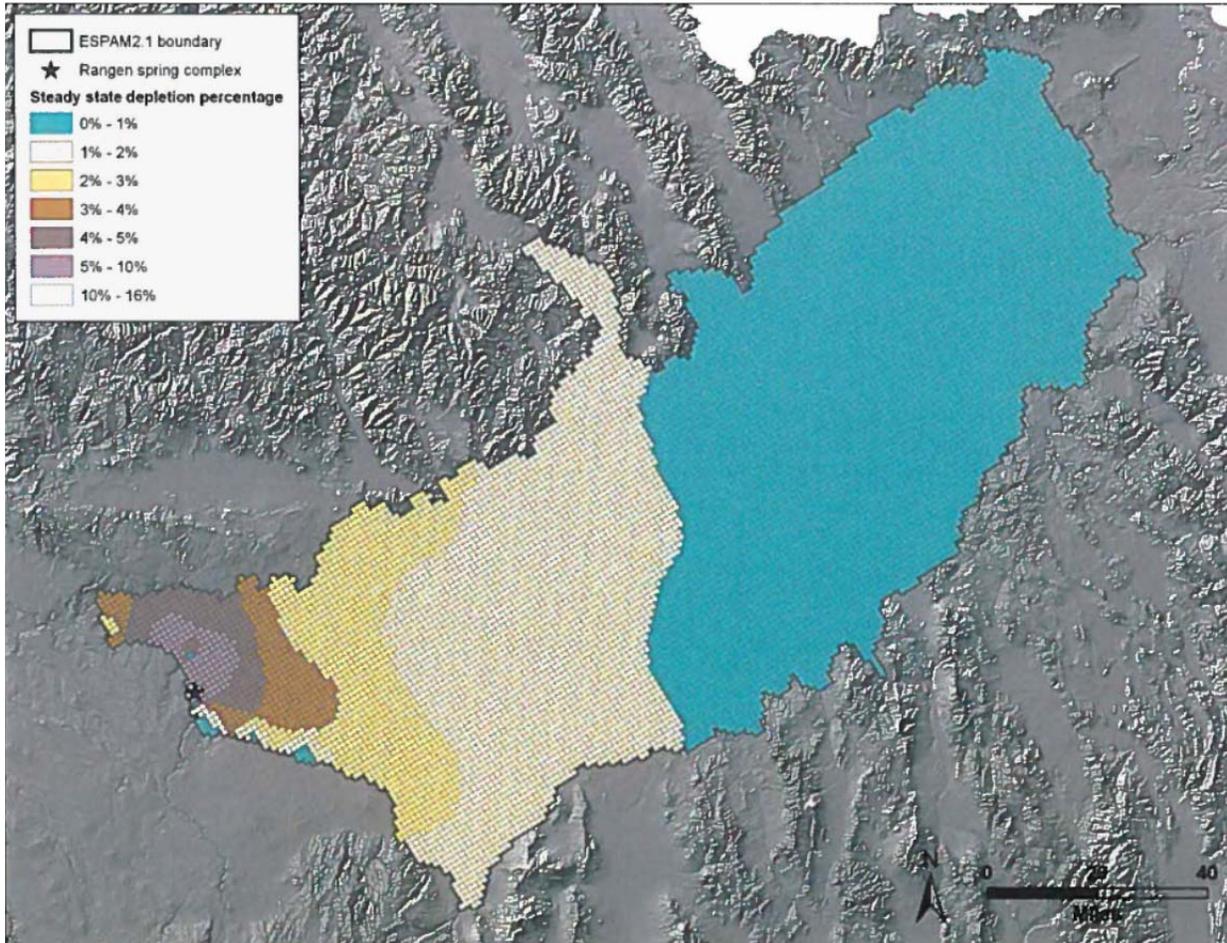
Figure 1 in the Curtailment Order depicts the amount of water that the Model predicts will eventually accrue to the Rangen Model cell as a result of curtailment:⁷

⁴ See IGWA’s Opening Brief, Idaho Supreme Court docket no. 2015-42775, pp. 32-35, 38-41.

⁵ Pocatello’s Opening Brief, p. 13.

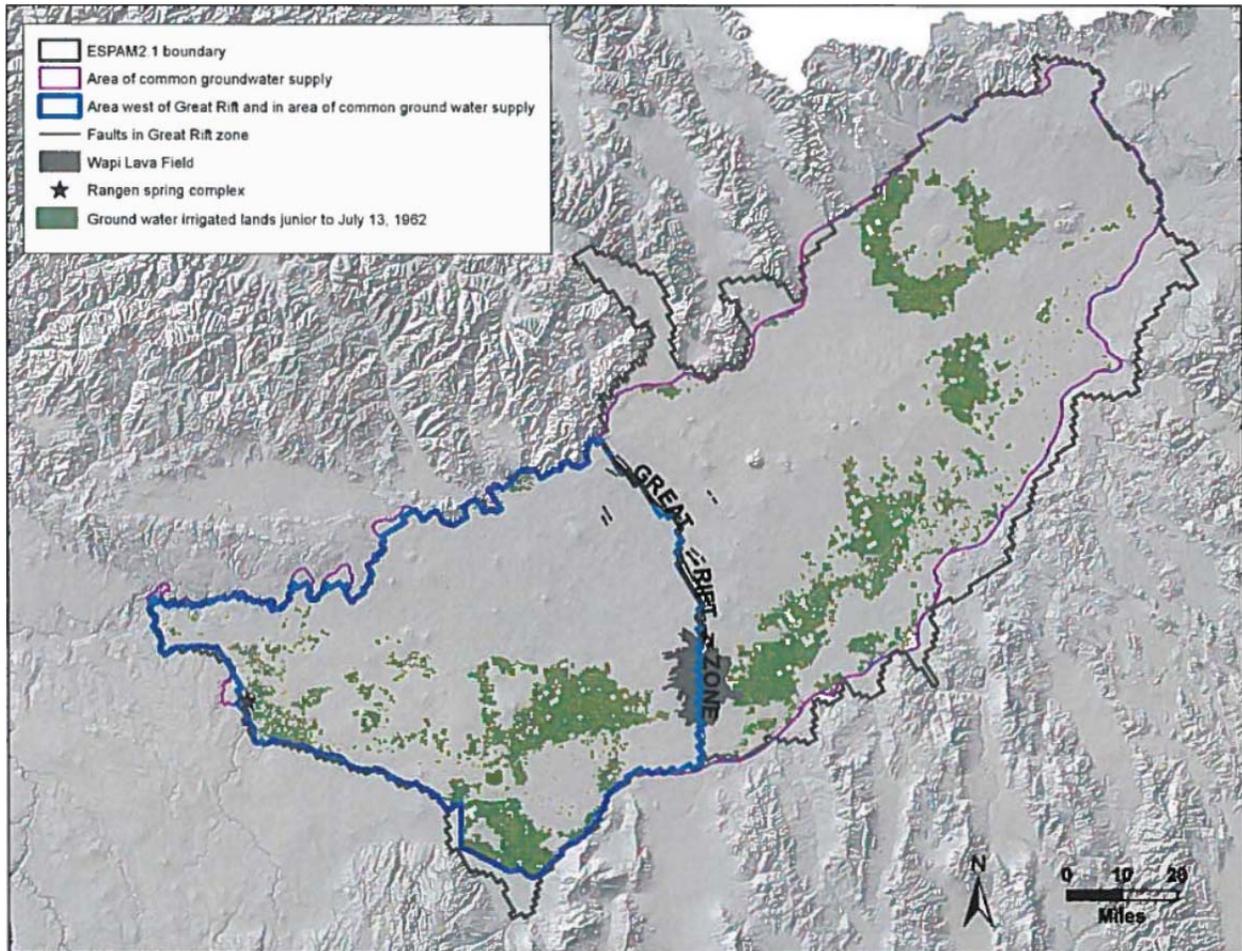
⁶ Curtailment Order, p. 39 (Agency R. Vol. 21, p. 4226).

⁷ *Id.* at 24 (Agency R. Vol. 21, p. 4211).



Because only 63 percent of the water that is predicted to accrue to the Rangen Model cell is expected to discharge from the Curren Tunnel, the one percent threshold (the boundary between the areas depicted in cream and blue) marks the trim line that would ensure Rangen receives at least 0.63 percent of the water that would otherwise have been put to beneficial use by curtailed water users.

However, the Great Rift trim line does not match the one percent threshold, as evident by comparing the one percent threshold shown in Figure 1 above with the Great Rift trim line shown in Figure 4 below:⁸



The northern portion of the Great Rift trim line is located many miles west of the one percent threshold, whereas the southern portion of the Great Rift trim line appears to be

⁸ *Id.* at 27 (Agency R. Vol. 21, p. 4214).

located east of the one percent threshold. Thus, the Great Rift trim line does not apply a uniform threshold in terms of how much water Rangen command without using.

Pocatello cites the principle that “[w]here a decision is correct but wrongly premised, this court will affirm the result on the proper basis,”⁹ and argues that “evidence at trial regarding the diminishing benefits to Rangen from curtailment in areas of the aquifer remote from Rangen . . . is enough to sustain the Director’s decision,”¹⁰ suggesting that even though the Director did not apply CM Rule 20.03 this Court should nonetheless uphold the Great Rift trim line as a proper application of the rule. This argument is unavailing because the Great Rift trim line is not a coherent application of the rule. While this Court could properly enunciate a baseline threshold for application of CM Rule 20.03, such as by reaffirming the 10 percent threshold stated in *Van Camp v. Emery* and *Schodde v. Twin Falls Land & Water Company*,¹¹ it would not be proper to cast the Great Rift trim line as a proper application of CM Rule 20.03 since it does not apply any uniform threshold as to how much water the senior can reasonable command without using.

Since the Curtailment Order does not explicitly explain, as required by Idaho Code § 67-5248, how much water Rangen can reasonably command without using, and since the Great Rift trim line does not impose a uniform threshold as to how much water Rangen can command without using, this Court should reject Pocatello’s argument that

⁹ *Id.* at 14 (quoting *Gray v. Brasch & Miller Const. Co.*, 102 Idaho 14, 17 (1981)).

¹⁰ Pocatello’s Opening Brief, p. 17.

¹¹ *Van Camp v. Emery*, 13 Idaho 202 (1907); *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912).

the Great Rift trim line is a proper application of CM Rule 20.03. Instead, this Court should set aside the Curtailment Order for failing to apply CM Rule 20.03, as argued in IGWA's appeal.¹²

2. The Great Rift trim line does not account for Model uncertainty with respect to Rangen specifically.

Pocatello also defends the Great Rift trim line as an application of Model uncertainty,¹³ citing this Court's decision in *Clear Springs Foods, Inc. v. Spackman* which upheld the Director's authority to impose a trim line based on Model uncertainty:

The Director concluded that there was up to a 10% margin of error in the groundwater model due to the margin of error in the stream gauges, and *he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material injury to the Spring Users' water rights*. 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 in this regard.¹⁴

However, unlike the trim line applied in *Clear Springs*, the Great Rift trim line is not based on an assigned margin of error in the Model. While the Director acknowledged errors in the Model's predictions, he refused to account for those errors, claiming that "the margin of error associated with model predictions cannot be quantified."¹⁵

¹² See IGWA's Opening Brief, Idaho Supreme Court docket no. 2015-42775, pp. 22-41.

¹³ *Id.* at 22-24.

¹⁴ Pocatello's Opening Br. p. 22 (quoting *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 817 (2011) (emphasis added)).

¹⁵ Curtailment Order, p. 39 (Agency R. Vol. 21, p. 4226).

While the Great Rift trim line could be upheld as a proper exercise of the Director authority to account for the Great Rift as a geologic barriers to groundwater flow, it cannot be upheld as a proper response to the error in the Model's predictions for Rangen specifically. As explained in IGWA's appeal, there are systematic errors in the Model's predictions for Rangen specifically that cause it to over-predict the effects of groundwater pumping on flows from the Martin-Curren Tunnel.¹⁶ These errors are caused by the Great Rift, but by more localized hydrogeologic features and aquifer characteristics that the Model does not properly features.

Therefore, IGWA respectfully asks the Court to reject Pocatello's request to uphold the Great Rift trim line as a proper application of Model uncertainty with respect to Rangen specifically.

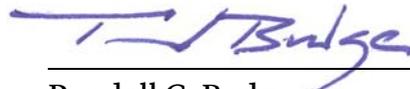
CONCLUSION

Based on the foregoing, IGWA respectfully urges this Court to deny Pocatello's request to reinstate the Great Rift trim line, and instead remand the case to the Director with instructions to directly apply the rule against hoarding set forth in CM Rule 20.03, and account for Model uncertainty with respect to Rangen specifically, as argued in IGWA's appeal from the Curtailment Order.

¹⁶ See IGWA's Opening Brief, Idaho Supreme Court docket no. 2015-42775, pp. 15-19, 35-38.

RESPECTFULLY SUBMITTED this 5th day of June, 2015.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

A handwritten signature in blue ink, appearing to read "R. C. Budge", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I CERTIFY that on this 5th day of June, 2015, the above document was served on the following persons in the manner indicated:


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