Docket No. 42836-2015

In the Supreme Court of the State of Idaho

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, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY,

Intervenors/ Respondents.

FREMONT MADISON IRRIGATION DISTRICT'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,
Honorable Eric J. Wildman, District Judge, Presiding

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1. STATEMENT OF THE CASE

a. Nature of the Case

On January 29th, 2014, the Director of the Idaho Department of Water Resources (IDWR) issued a curtailment order which applied to all ground-water rights that divert from the Eastern Snake Plains Aquifer (ESPA) at any location west of the "Great Rift," with priority dates junior to July 13, 1962. That order was appealed to the SRBA Court which set aside the trim line, and remanded the matter to the Director.

The SRBA Court's decision was appealed by Rangen (SC Docket No. 42772-2015), Pocatello (SC Docket No. 42836-2015) and IGWA (SC Docket No. 42775-2015). Fremont Madison Irrigation District (FMID) is not participating in Rangen's appeal. It is participating in Pocatello's appeal and IGWA's appeal to argue for the use of a trim line in general, and to argue that a trim line is particularly necessary regarding the north east portion of the ESPA served by FMID due to its remoteness from Rangen's point of diversion and the uncertainty in the model created by the distance and time delays. Because the issues for FMID are the same in Pocatello's appeal and IGWA's appeal it is submitting an identical brief in each appeal.

b. Factual Background

The Director's Final Order placed a trim line at the Great Rift. (Agency R. Vol. 21, p. 4224-4228) The Great Rift zone extends north to south across the plain from the Craters of the Moon to just west of American Falls Reservoir, and impedes the transmission of water through the aquifer. (Id. at p. 4202, ¶ 71)[1]. The Director found that the predictive uncertainty for various

[1]Citations to the Agency R. are to the record created in the IDWR and lodged with the District Court on May 28, 2014, which record was included as Exhibit 1 to the Clerk's Record on

pumping locations on the eastern side of the Great Rift is higher than on the western side. (Id. at p. 4206, ¶ 91). Several pumping location evaluations on the eastern side of the Great Rift had negligible impacts on Clear Lakes. (Id.). The Director also found that, according to the model, the benefits that accrue to Rangen from curtailment are much less when the curtailed acres are east of the Great Rift. (Id. at 42111-4214).

The Director made the following finding regarding impacts of ground water use east of the Great Rift:

> While there is some predicted depletion of Curren Tunnel discharge attributable to points of diversion east of the Great Rift, the contribution is small. ESPAM 2.1 establishes, by clear and convincing evidence, that the portion of benefits curtailed ground water use east of the Great Rift that would accrue to the Rangen spring complex is generally less than 1%. The effect of the Great Rift on propagation of impacts to Curren Tunnel should be taken into consideration when deciding on a trim line.

(Id. at p. 4226, ¶ 50).

In past ground water calls in the ESPA, such as Clear Springs Foods and Blue Lakes, a trim line of 10% was used to limit the area of curtailment. (Id. at 4203-4204, ¶78-80 *(Citing Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011).

2. ARGUMENT

a. Standard of Review

The Final Order is subject to review in accordance with the Idaho Administrative Procedure Act. I.C. § 42-1701A(4). The Final Order must be affirmed unless the Court determines the findings, inferences, conclusions, or decisions of the Order are:

Appeal. (R. p. 765).

(a) in violation of constitutional or statutory provisions;
(b) in excess fo 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.

I.C. § 67-5279(3).

Further, the Court must affirm the director, despite any errors, unless it finds that the errors result in prejudice to the substantial rights of the appellant. I.C. § 67-5279(4). Issues of fact must be confined to the record, and the Court should not substitute its judgment for that of the Director as to the weight of the evidence on issues of fact. I.C. §§ 67-5277, 67-5279(1). If the agency's action is not affirmed, it should be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3).

b. The Director correctly exercised his discretion in placing the trim line at the Great Rift to avoid hoarding and avoid waste.

FMID hereby adopts the arguments set out in section 1 of IGWA's opening brief (Docket No. 42775-2015) and section I(A) through I(D) of Pocatello's opening brief (Docket No. 42836-2015).

According to the ESPAM model, curtailing 4,730 acre feet per year (over 1.5 billion gallons) in FMID would result in a benefit of 24 gallons in flow to Rangen in the first year. (Exhibit FMID 4001, Contor Report, p. 6). Over five years it would result in a benefit of .11 acre feet. (Id.) Over 150 years, it would result in a benefit of 1.9 acre feet. (Id.) The Director has the discretion necessary to avoid this type of absurd result.

c. The Director correctly employed a trim line east of the Great Rift on the basis of model uncertainty.

The Director's decision not to curtail wells east of the Great Rift is supported by

substantial and competent evidence. The Director acknowledged uncertainty in the ESPAM models. (Agency R., Vol 21, p. 4209, ¶ 96). The Director found that the uncertainty was greater east of the Great Rift. (Id. at 4224-4228, ¶¶ 42-57). Both findings are supported by the record.

The position of FMID in this matter serves as a compelling example of the need for the Director to exercise his discretion regarding the use of the model. FMID is located in the extreme north east corner of the ESPA. (Contor, Tr. Vol. 12, p. 2850; See Ex. 3275). As such, the effect of pumping by FMID on Rangen's rights are much less, and much less certain, then even other areas east of the Great Rift. The need for a trim line for FMID, and others similarly situated, is shown the uncertainty inherent in the ESPAM model, and the realities of the distance and time that separates FMID from Rangen's point of diversion.

i. The Nature of the ESPAM Model Requires the Use of a Trim Line.

As found by the Director, ESPAM 2.1 is the best available science. (Agency R., Vol. 21, p. 4205-4209). FMID supports the use of ESPAM 2.1 and similar tools in this proceeding and in conjunctive management in general. However, ESPAM 2.1 is merely a model. As such, as it addresses more of the complexities of reality, the reliability of the model breaks down. Further, due to the way ESPAM 2.1 was designed, in some situations, its results are not only uncertain, but clearly wrong.

Two experts testified at length regarding model uncertainty. Bryce Contor, a hydrologist who has been active in the creation and calibration of the ESPAM models and the author of the water budget used in the models, testified regarding the lack of precision and the limitations of the model, especially when the distance is great and there are intervening natural barriers, such as the Great Rift. (See Contor, Tr. Vol. 12, pp. 2852-2917). Charles Brendecke, Ph.D, P.E, also

testified extensively regarding the uncertainty of the ESPAM model. (See Brendeke, Tr. Vol. 11, pp. 2557-2742).

The ESPAM model is designed so that each well within the ESPA, regardless of location, must show an impact to any cell within the model. (Brendeke, Tr. Vol. 11, pp. 2756:3 to 2758:19; Contor, Tr. Vol. 12, pp. 2856:4-25; 2857:1-24). Therefore, even if it is clear that such an effect is impossible in reality, the model will show an impact. Both Contor and Brendeke agreed that because ESPAM 2.1 has been programmed to show a pre-assumed impact, the existence of any well will show an impact Rangen's water rights. This is true regardless of where the well is located. As an example, ESPAM 2.1 would actually show an impact to Rangen's water rights from a well located in Island Park – even though such an impact is impossible in reality. (Brendeke, Tr. Vol. 11, p. 2757:6-16).

This is not an error in the model. Rather, the model has certain "rules" built into it, one of those being that regardless of any measured hydrological impacts a well actually has upon a spring, the model MUST find impact. (Brendeke, Tr. Vol. 11, pp. 2756:3 to 2758:19; Contor, Tr. Vol. 12, p. 2859:12-24). Mr. Contor testified as follows:

> [T]he presence of a response is a foregone conclusion. Because no cells are allowed to have a transmissivity of zero, it is unavoidable that the model will indicate a response between any well within the active model boundary, and Rangen. This is not an outcome of the model, it is one of the inputs to it.

(Ex. 4003, p. 5, ¶ 16 (emphasis in original)). Mr. Contor testified that this decision was made by the modelers and the ESHMC (modeling committee) at the beginning of model construction.

> [W]hen Dr. Wylie and Dr. Cosgrove and Dr. Johnson and I sat down at the table and drew the map, we decided in drawing the map that every point within the map would be shown by the model to have some effect on any other point in the map, including the cell that contains Rangen Spring.

(Contor, Tr. V. 12, p. 2856:6-11). Therefore, for areas that show only very small effects on Rangen in the model, those are just as likely to be the results of the model rules as they are to be any type of an approximation of reality.

The proposition that the Director is bound by the results of ESPAM 2.1, or any similar model, without the discretion to determine when it is appropriate to apply the model, ignores the realities of the limitations of models in general, and ESPAM 2.1 in particular.

ii. The Physical Realities of the ESPA and the Great Distance Separating FMID and Rangen's Point of Diversion Require the Use of a Trim Line.

FMID and the Rangen point of diversion are separated by approximately 150 miles and a large number of physical, geological and hydrogeological features that make it unlikely that pumping in the area serviced by FMID would affect or impact Rangen's rights. (Contor, Tr. Vol. 12, p. 2860:2-15). For example, two zones of low transmissivity, the Mud Lake Barrier and the Great Rift, are located between FMID and Rangen's point of diversion. (Contor, Tr. Vol. 12, p. 2860:3-7; and 2876:9-12). Mr. Contor testified as follows:

> [E]ven setting aside uncertainty, there's 150 miles of physical distance between the two locations. There are two hydrological barriers that are inferred from geological information and from the model calibration: One we call the Mud Lake Barrier, one we call the Great Rift.
>
> There are significant gaining reaches of the river, including a significant gaining reach of the river in the vicinity of the American Falls Resevior, and from there north to Blackfoot, that all would be expected, in the case of the barriers, to deflect or in the case of the gaining reaches of the river to absorb any influence of the pumping or curtailment . . . in Fremont-Madison.

(Contor, Tr. Vol 12, p. 2860:2-15. The representation of each of these in the model is subject to uncertainty, and the uncertainty is compounded by the number of features and the large distance. (Contor, Tr. Vol. 12, p. 2860:3-7; and 2876:9-12). Dr. Brendecke testified that the distance

involved, the natural barriers, and other factors, would cause any impact calculations from FMID's well pumping to be "lost in the noise" of the model. (Brendeke, Tr. Vol. 11, p. 2760:8).

In addition, both Dr. Brendecke and Mr. Contor testified that the model is a regional model and not a single model cell model. (Contor, Tr. Vol. 12, p. 2902:9-11; Brendeke, Tr. Vol. 11, pp. 2757:21 to 2758:8). Therefore, it is not designed to be precise in determining impacts to a single cell such as the Rangen diversions.

The Director's decision to implement a trim line due to uncertainty in the model, and the decision to place that trim line at the Great Rift, were discretionary decisions of the director, supported by the evidence, and should be upheld by this Court. If this Court determines that the use of the Great Rift trim line must be reversed, it should provide the Director instructions regarding the implementation of a trim line. The use of the ESPAM 2.1, or any model, without the ability to account for imperfections in the model, would lead to absurd results.

d. The District Court erred in concluding that this Court's approval of the use of a trim line in *Clear Springs* had been overruled.

The SRBA Court set aside the Director's decision to place a trim line at the Great Rift. (R. 703-707). It did so based on the conclusion that this Court's approval of the use of a trim line to address model uncertainty in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011), was no longer good law based in light of this Court's decisions in *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012), and *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 315 P.3d 828 (2013). However, the SRBA Court erred. Neither case limits, or even addresses, the discretion of the Director to determine how to address model uncertainty in

water right administration.

The SRBA Court conflates the idea of model uncertainty, with the principle that "proof of 'no injury' by a junior appropriator in a water delivery call must be by clear and convincing evidence." (R. 706). The SRBA Court then concludes that "any uncertainty or margin of error must operate in favor of Rangen, the senior water right holder." (R. 707). In the cases cited by the SRBA Court, the issue before the Director was the standard of proof required when a junior water right holder raised a defense of "no injury" to a call. Essentially saying that the senior water right holder was not injured because it did not need the total amount of water decreed. In both cases the SRBA Court and this Court agreed that the burden was on the junior water right holder to prove the lack of injury by clear and convincing evidence. *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012); *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 655, 315 P.3d 828, 843 (2013). However, that is not at issue in this matter. The issue is the discretion of the Director to apply a model that is, by its nature, imperfect, and that, in certain situations, produces results that are obviously inaccurate. The decision of the SRBA Court would prevent the Director from employing his discretion to address model uncertainty and error and punish junior water users for model results, even when they are clearly inaccurate.

3. CONCLUSION

The Court should affirm the Director's use of his discretion to avoid waste and hoarding. The Court should affirm the use of the Great Rift as a trim line. If the Court determines the Great Rift trim line should not be upheld, it should instruct to the Director regarding the standard applicable to the application of a trim line.

RESPECTFULLY SUBMITTED this 8th day of June, 2015.

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DATED this 8th day of June, 2015.

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