

**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 NO. CM-DC-2011-004.

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Supreme Court Docket No. 42836-2015

Snake River Basin Adjudication  
Case No. CV-2014-1338  
(Consolidated Gooding County  
Case No. CV-2014-179)

CITY OF POCA TELLO,

Intervenor-Appellant on Appeal,

v.

RANGEN, INC.,

Petitioner-Respondent on Appeal,

v.

IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN, in  
his capacity as Director of the Idaho  
Department of Water Resources,

Respondents-Respondents on Appeal,

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 on Appeal.

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**IDAHO DEPARTMENT OF WATER RESOURCES' BRIEF IN RESPONSE TO  
POCA TELLO'S OPENING BRIEF**

Appeal from the District Court of the Fifth Judicial District for Twin Falls County  
Honorable Eric J. Wildman, Presiding

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## **I. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This case arises out of an appeal from two final orders issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) in response to the December 13, 2011, *Petition for Delivery Call* filed by Rangen, Inc. (“Rangen”), alleging water right nos. 36-02551 and 36-07694 are being materially injured by junior-priority ground water pumping. The two final orders are the January 29, 2014, *Final Order Regarding Rangen, Inc.’s Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”) and the March 4, 2014, *Order on Reconsideration*.

The City of Pocatello (“Pocatello”) presents issues on appeal related to the Director’s application of a trim line based on the Great Rift, a geologic feature that impedes transmission of water through the Eastern Snake Plain Aquifer (“ESPA”). The District Court, acting in its appellate capacity, determined the Director erred by applying the Great Rift trim line and set aside and remanded the issue for further proceedings as necessary. *See Memorandum Decision and Order on Petitions for Judicial Review*, Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179) (Oct. 24, 2014) (“Memorandum Decision”) at 28-40. Pocatello argues the District Court’s “decision invalidating the Great Rift trim line should be reversed.” *Pocatello’s Opening Brief* at 28.

### **B. STATEMENT OF FACTS**

The Director and Department adopt the Statement of Facts as outlined in *Idaho Department of Water Resources’ Brief in Response to Rangen’s Opening Brief* filed in Docket No. 42772-2015.

### C. PROCEDURAL BACKGROUND

On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department alleging water right nos. 36-02551 and 36-07694 are being materially injured by junior-priority ground water pumping in the areas encompassed by Enhanced Snake Plain Aquifer Model (“ESPAM”) version 2.0. R. Vol. I, pp. 4-5. The *Petition for Delivery Call* requested the Director curtail junior ground water rights in the areas encompassed by ESPAM 2.0 in accordance with the prior appropriation doctrine as necessary to deliver water to Rangen’s senior priority water rights. *Id.* at 8.

Starting on May 1, 2013, a two-week hearing was held. The hearing was bifurcated. The first part of the hearing focused on issues of material injury and beneficial use, and the second part of the hearing focused on issues related to ESPAM 2.1.<sup>1</sup> The Director concluded Rangen’s water rights are being materially injured by junior ground water diversions and issued the Curtailment Order. R. Vol. XXI, p. 4228. As to ESPAM 2.1, the Director determined that:

ESPAM 2.1 is a technical improvement to ESPAM 1.1 and is the best available science for simulating the impacts of ground water pumping. There is no other technical instrument as reliable as ESPAM 2.1 that can be used to determine the effects of ground water pumping on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

*Id.* at 4224.

Whether there should be a trim line associated with ESPAM 2.1 and if so, the nature and extent of the trim line, were issues raised in the hearing. As discussed in more detail below, the Director adopted a trim line based upon a known geologic feature on the ESPA referred to as the Great Rift. The Director focused on the diminishing benefits to Rangen from curtailment of junior-priority ground water rights on the eastern side of the Great Rift (Findings of Fact 105-

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<sup>1</sup> ESPAM 2.0 was updated shortly before the hearing commenced. R. Vol. XXI, p. 4205. The latest version is referred to as ESPAM 2.1. *Id.*

111; R. Vol. XXI, pp. 4211-16) and acknowledged uncertainty surrounding ESPAM 2.1 model predictions (especially east of the Great Rift) (Findings of Fact 91, 96; R. Vol. XXI, pp. 4206, 4209). The Director recognized that “[t]he real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right” and concluded “[t]he use of the Great Rift ... for a trim line strikes an appropriate balance.” R. Vol. XXII, p. 4466.

ESPAM 2.1 simulations predicted that 9.1 cfs of the decline in the flow from the Martin-Curren Tunnel<sup>2</sup>, the source of Rangen’s senior water rights, could be attributed to junior-priority ground water pumping west of the Great Rift and in the area of common groundwater supply. R. Vol. XXI, pp. 4215, 4222. Curtailment of junior ground water irrigation west of the Great Rift would dry up approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Martin-Curren Tunnel. *Id.* at 4215. In contrast, curtailment of junior ground water diversions east of the Great Rift would dry up approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Martin-Curren Tunnel. *Id.* Curtailment of the additional 322,000 acres east of the Great Rift is only predicted to produce an additional 1.5 cfs to the Martin-Curren Tunnel. *See* Findings of Fact 104, 109; R. Vol. XXI, pp. 4211, 4215.<sup>3</sup> The Director concluded curtailment of ground water diversions east of the Great

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<sup>2</sup> The terms “Martin-Curren Tunnel” and “Curren Tunnel” are used interchangeably by the parties.

<sup>3</sup> ESPAM 2.1 predicted a total of 16.9 cfs of reach gains to the Rangen model cell from curtailment of junior ground water diversions within the area of common ground water supply. Only 63% of those gains, or 10.6 cfs, are predicted to accrue to the Martin-Curren Tunnel. Subtracting from 10.6 cfs the 9.1 cfs of predicted increase in discharge to the Martin-Curren Tunnel resulting from curtailment of junior ground water diversions west of the Great Rift demonstrates that curtailment of the additional 322,000 acres east of the Great Rift is predicted to produce only an additional 1.5 cfs to the Martin-Curren Tunnel.



Rift “would be counter to the optimum development of Idaho’s water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources.” *Id.* at 4227. Therefore, the Director ordered that holders of junior-priority ground water rights west of the Great Rift and in the area of common ground water supply be curtailed unless they implemented a mitigation plan that provided “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.” *Id.* at 4229.

Three petitions for reconsideration of the Curtailment Order were filed. On March 4, 2014, the Director issued his *Order on Reconsideration*.

On March 24, 2014, Rangen filed a petition seeking judicial review of the Director’s Curtailment Order and subsequent *Order on Reconsideration* (Case No. CV-2014-1338). On March 28, 2014, the Idaho Ground Water Appropriators, Inc. (“IGWA”), filed a petition seeking judicial review of the Director’s Curtailment Order and subsequent *Order on Reconsideration* (Case No. CV-2014-179). On April 22, 2014, the District Court granted motions by Pocatello and the Surface Water Coalition (“SWC”)<sup>4</sup> to intervene in both judicial review proceedings. On June 20, 2014, the District Court entered an order consolidating Case No. CV-2014-179 into Case No. CV-2014-1338.

On October 24, 2014, the District Court issued its Memorandum Decision affirming the Director on all decisions in the Curtailment Order, except for the Director’s application of the Great Rift trim line. On December 5, 2014, the District Court issued the *Order Denying Petitions for Rehearing* denying petitions for rehearing filed by both IGWA and Pocatello. On

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<sup>4</sup> The SWC is comprised of Twin Falls Canal Company, North Side Canal Company, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, and Minidoka Irrigation District.

January 16, 2015, Pocatello filed the instant petition seeking judicial review of the District Court's Memorandum Decision and *Order Denying Petitions for Rehearing*.

## **II. ISSUES ON APPEAL**

The issue presented by Pocatello is:

1. Whether the District Court erred in invalidating the Great Rift trim line.

While Pocatello identifies only one issue on appeal, its briefing raises two independent issues. Accordingly, the Director and Department's formulation of the issues presented on appeal is as follows:

1. Whether the policy of optimum development of the State's water resources in the public interest supports the Director's application of the Great Rift trim line.
2. Whether the Director determined Rangen's means of diversion is reasonable.

### **III. STANDARD OF REVIEW**

In an appeal from a decision of the district court acting in its appellate capacity under the Idaho Administrative Procedure Act (“IDAPA”), the Supreme Court reviews the agency record independently of the district court's decision. *Chisholm v. Twin Falls County*, 139 Idaho 131, 132, 75 P.3d 185, 187 (2003). The Court does not substitute its judgment as to the weight of the evidence presented, but instead defers to the agency's findings of fact unless they are clearly erroneous. *Id.* at 132, 75 P.3d at 187. When conflicting evidence is presented, the agency's findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether the Court might have reached a different conclusion. *Barron v. Id. Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The agency's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the agency reached. *See, e.g., Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974). This Court exercises free review over questions of law. *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006).

The agency's action may be set aside if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron*, 135 Idaho at 417, 18 P.3d at 222. In addition, the Court will affirm an agency action unless a substantial right of the appellant has been prejudiced. *Id.* If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

#### IV. ARGUMENT

##### A. **THE POLICY OF OPTIMUM DEVELOPMENT OF THE STATE'S WATER RESOURCES IN THE PUBLIC INTEREST SUPPORTS APPLICATION OF THE GREAT RIFT TRIM LINE**

As discussed above, whether there should be a trim line associated with ESPAM 2.1 and if so, the nature and extent of the trim line, were issues raised in Rangen's delivery call hearing. Rangen and the SWC argued the Director should not apply any trim line. R. Vol. XIX, pp. 3912-13, 4000. Junior ground water users argued for the same 10% trim line used in the Clear Springs delivery call. *Id.* at 3872-76, 3916-17. The Director concluded a trim line was appropriate, but rejected application of the 10% trim line used in the Clear Springs delivery call because of a key difference in the way ESPAM 1.1 (which was used in the Clear Springs delivery call) and ESPAM 2.1 (which was used in the Rangen delivery call) are calibrated.<sup>5</sup> R. Vol. XXI, p. 4224; R. Vol. XXII, p. 4466. The Director ultimately adopted a trim line based upon the Great Rift. R. Vol. XXI, p. 4229. The Great Rift is a volcanic rift zone bisecting the ESPA. Finding of Fact 71; R. Vol. XXI, p. 4202. It is comprised of basalts having lower hydraulic conductivity that impede transmission of water through the aquifer. *Id.* The following figure shows the location of the Great Rift:

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<sup>5</sup> ESPAM 2.1 was calibrated to monthly observations of spring discharge within individual model cells and can simulate the impacts of depletions from or accretions to the aquifer on spring discharge within those model cells. ESPAM 1.1 was calibrated to significantly fewer spring discharge data and was only capable of simulating depletions from or accretions to a group of springs that, in total, contribute to larger segmented reaches of the Snake River. This issue is discussed further in *Idaho Department of Water Resources' Brief in Response to IGWA's Opening Brief* filed in Docket No. 42775-2015.

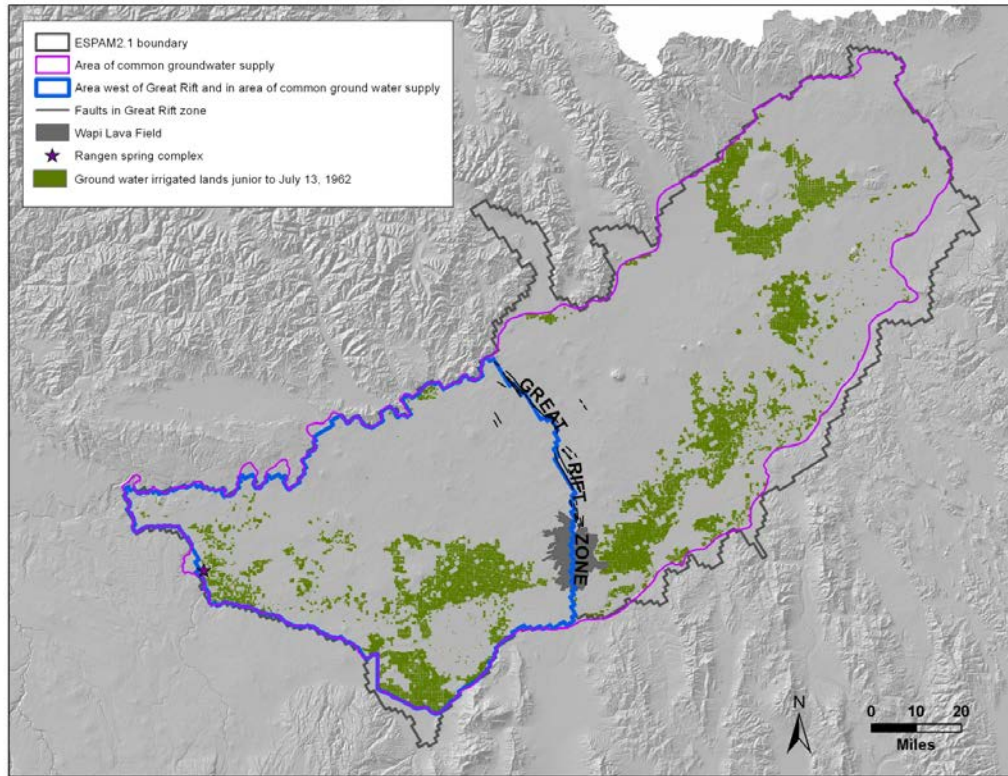


Figure 4 from Finding of Fact 108; R. Vol. XXI, p. 4214.

The Director in adopting the Great Rift trim line focused on how the low transmissivity of the Great Rift diminishes the benefits of curtailment east of the Great Rift:

The Curren Tunnel and the Rangen spring complex are located west of the Great Rift, a low transmissivity feature that impedes the transmission of water through the aquifer. 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 of curtailed ground water use east of the Great Rift that would accrue to the Rangen spring complex is generally less than 1%. The benefit of curtailment with respect to the number of acres curtailed diminishes significantly if areas east of the Great Rift are included in the curtailment. ... The effect of the Great Rift on propagation of impacts to Curren Tunnel should be taken into consideration when deciding on a trim line.

R. Vol. XXI, p. 4226 (citations omitted). The Director highlighted the limited benefits that accrue from curtailment on the east side of the Great Rift by comparing the number of curtailed acres versus the predicted increase in water that curtailment would bring to Rangen.

Findings of Fact 107 & 108; R. Vol. XXI, p. 4213-14. Evidence presented showed a striking increase in the number of acres that had to be curtailed on the east side of the Great Rift to provide each additional increment of benefit. *Id.* The Director concluded:

Curtailement of junior ground water irrigation west of the Great Rift would curtail irrigation of approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Curren Tunnel. Curtailement of junior ground water irrigation east of the Great Rift would curtail irrigation of approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Curren Tunnel.

*Id.* at 4215. The Director also discussed how uncertainty plays a role in the trim line determination:

The Director concludes that there is uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. This variance should be taken into consideration when considering a trim line.

*Id.* at 4226. The Director determined there is generally higher uncertainty on the eastern side of the Great Rift. Finding of Fact 91; R. Vol. XXI, p. 4206 and Conclusion of Law 55; R. Vol. XXI, p. 4227.

The effect of the Director's Great Rift trim line was to exclude certain junior-priority ground water users from administration under Rangen's delivery call. As legal authority for imposition of the trim line, the Director cited to CM Rule<sup>6</sup> 20.03's statement 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." R. Vol. XXI, p. 4227. The Director referenced the Idaho Constitution's enunciated "policy of promoting optimum development of water resources in the public interest" and this

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<sup>6</sup> The term "CM Rule" refers to the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources*. IDAPA 37.03.11.

Court's statements regarding optimum development and maximum use and benefit in *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), ultimately concluding that, "[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227.

On judicial review, the District Court focused on this Court's decision in *Clear Springs* and determined the authorities cited by the Director do not support the use of a trim line:

[T]he Idaho Supreme Court instructed in *Clear Springs* that neither the CM Rules, the common law, Idaho statutes, nor the Idaho Constitution provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled based on the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior right, provided the water is put to beneficial use.

*Memorandum Decision* at 37 (citation omitted).

In this appeal, Pocatello asserts the District Court erred in rejecting the Director's application of the Great Rift trim line. *Pocatello's Opening Brief* at 13. Pocatello argues the Director's reliance on the constitutional policy of optimum development of Idaho's water resources is consistent with this Court's decision in *Clear Springs* and justifies the Director's imposition of the Great Rift trim line. *Id.* at 14. The Director and Department agree. The Great Rift trim line is necessary to ensure the optimum development of Idaho's water resources in the public interest, and the maximum use and benefit, and least wasteful use, of the State's water resources.

As this Court held in *Clear Springs*, "[t]here is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest." *Clear Springs*, 150 Idaho at 808, 252



P.3d at 89. They are simply different formulations of a basic principle of prior appropriation under Idaho law: the public has a vital and continuing interest in the development of the State's water resources. These principles are recognized in the Idaho Constitution. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Describing the “constitutionally enunciated” policy of optimum development of water resources.).<sup>7</sup>

All waters within the State “when flowing in their natural channels and all ground waters are property of the State. Idaho Code §§ 42–101 & 42–226.” *Clear Springs*, 150 Idaho at 815, 252 P.3d at 96. A water right is a usufructuary right that “does not constitute ownership of the water.” *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). Title is vested in the State for the use and benefit of all citizens. *Walbridge v. Robinson*, 22 Idaho 236, 242, 125 P. 812, 814 (1912). The State's ownership of water resources is in its sovereign capacity “for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.” *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). So while a water right is a property right, the owner does not own the water itself but owns the right to use the water for a specific beneficial purpose consistent with constitutional and statutory constraints. The policy of optimum development of the State's water resources in the public interest is one of the constraints impressed upon any water right. *See Joyce Livestock*, 144 Idaho at 7, 156 P.3d at 508 (“The proprietary rights to use water, which are the subject of the [Snake River Basin Adjudication], are held subject to the public trust.” (quoting *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 156–57, 911 P.2d 748, 749–50 (1995))).

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<sup>7</sup> While in *Baker* this Court recognized that “the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest,” *Baker*, 95 Idaho at 584, 513 P.2d at 636 (underlining added), this Court has never held that the constitutional policy is limited to ground water.

The prior appropriation doctrine as established by Idaho law is not simply a system of establishing and enforcing private interests in the State's water resources. To the contrary, it has always been true that "[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole*, 82 Idaho at 502, 356 P.2d at 65 (underlining added); *see Clear Springs*, 150 Idaho at 808, 252 P.3d at 89 ("That policy has long been recognized in this state . . .") (quoting *Parker v. Wallentine* 103 Idaho 506, 513, 650 P.2d 648, 655 (1982)). While the establishment and enforcement of private interests is vital to achieving optimum development of the State's water resources in the public interest, it is not sufficient to ensure optimum development or to protect the public interest. This was recognized in Idaho and the other prior appropriation states more than a century ago, as stated in a well-known water law treatise:

It became increasingly evident [in the last decades of the 19<sup>th</sup> century and the early part of the 20<sup>th</sup> century] that if the potential of the West's water resources was to be realized in the developing economy, something had to be done about public control of these resources and their utilization. Necessarily, efficient public control went beyond legislative declarations as construed by the courts in individual controversies and as enforced in their decrees. It invoked continuing action by the executive arm of the State government, through the agency of administrative organizations equipped to find facts and to act upon them. It called for such action by applying clearly worded directives in exercising the police power of the State for the protection and utilization of public property.

Wells A. Hutchins, *I WATER RIGHTS IN THE WESTERN UNITED STATES* 298 (1971).

As a result, Idaho (and other states) enacted statutes authorizing an executive officer to perform water distribution and administration. Thus, the Director is charged not only with administering private water rights, but also with ensuring the maximum beneficial use, and least wasteful use, of Idaho's water resources. As this Court has recognized: "The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title

42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.” *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

The prior appropriation doctrine requires that surface and ground water be managed conjunctively. *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89. (“The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.”). At the same time, under Idaho law, the Director must take the public interest into account when distributing water. As this Court recognized in *Clear Springs*, Idaho Code § 42-101 provides that because water is “essential to the industrial prosperity of the state . . . its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.”) *Id.* (quoting Idaho Code §42-101) (underlining added). Consideration of the public interest is particularly important in a conjunctive management delivery call. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (“AFRD#2”) (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.”) (underlining added).

In some circumstances, conjunctive management delivery calls can require idling hundreds of thousands of acres of productive agricultural land to deliver small increments of water to a senior water right holder. In such scenarios, the senior water right holder’s private interest in receiving additional water may directly conflict with the public’s interest in the optimum development of the State’s water resources. Certain “bedrock” principles of Idaho’s prior appropriation doctrine are launched into “tension.” *See In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.* (“A&B”), 155 Idaho 640,

650, 315 P.3d 828, 838 (2013). Here, the bedrock principles that are in tension are a water right holder's private proprietary interest in seeking curtailment of junior uses of water and the public's interest in the optimum development of the State's water resources. The Director has the statutory duty, authority, and discretion to resolve this tension. *See id.* at 651, 315 P.3d at 839 (quoting *AFRD#2*).

In this case, the Director resolved the tension through recognition of the Great Rift trim line. The Director concluded that “[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho’s water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources.” R. Vol. XXI, p. 4227. In short, the Director concluded there is a point where Rangen’s delivery call would require curtailment of vastly more acreage to produce a very small increment of additional water, and that at this point, Rangen’s right to seek additional curtailment must give way to the public’s interest in optimum development of the State’s water resources. The Director also concluded that this point is the Great Rift. There is substantial evidence in the record to support this decision. *See, e.g.*, R. Vol. XXI, p. 4215 (finding that west of the Great Rift approximately 17,000 acres must be curtailed per cfs of predicted benefit, while east of the Great Rift approximately 204,000 acres must be curtailed per cfs of predicted benefit).

In its sovereign capacity and for the public interest, the State must regulate the reach of private water rights in the ESPA, one of the State’s most important public resources. “[T]he public waters of this state shall be subjected to the highest and greatest duty.” *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89 (citation omitted). As the Director recognized “[t]he real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right.” R. Vol. XXII, p. 4466.

Optimum development requires the State to determine the point where Rangen's right to seek additional curtailment must give way to the public's interest in optimum development of the State's water resources. The Director considered the evidence in the record and stated: "To curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227. The Director concluded "[t]he use of the Great Rift ... for a trim line strikes an appropriate balance." R. Vol. XXII, p. 4466.

This situation is distinguishable from the situation in *Clear Springs* where this Court rejected IGWA's arguments that the Ground Water Act effectively nullified a senior water right holder's priority "as long as withdrawals from the Aquifer and recharge were in balance." *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89. The policy of optimum development, in contrast, recognizes there is a point where benefits of curtailment to the senior are so small, and the number of acres curtailed so large, that the outer bounds of the prior appropriation doctrines' application have been reached.

This Court has repeatedly rejected arguments that the prior appropriation doctrine must be applied with blinders. *See A&B*, 155 Idaho at 650, 315 P.3d at 838 (Rejecting the SWC's argument that the Director's baseline methodology is contrary to the prior appropriation doctrine.); *see also AFRD#2*, 143 Idaho at 876, 154 P.3d at 447 (Rejecting the SWC's argument that the prior appropriation doctrine requires the Director to deliver the full quantity of decreed senior water rights.). While the prior appropriation doctrine gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. How each water right on a source physically

interacts with or affects other rights on that same source is an administrative question properly for the Director. *Id.* at 876-77, 154 P.3d at 447-48. Applying the prior appropriation doctrine blindly to curtail junior ground water users where the benefits of curtailment to the senior are very small when compared to the number of acres curtailed is contrary to the “state policy that water be put to its maximum use and benefit.” *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89 (quoting *Parker*, 103 Idaho at 513, 650 P.2d at 655). It would be contrary to the State’s obligation to act in its sovereign capacity and for the public interest. *Poole*, 82 Idaho at 502, 356 P.2d at 65. In short, the Great Rift trim line is necessary to ensure the optimum development of Idaho’s water resources in the public interest, and the maximum use and benefit, and least wasteful use, of the State’s water resources. The Director’s application of the Great Rift trim line must be affirmed.

**B. THE DIRECTOR CONCLUDED THAT RANGEN’S MEANS OF DIVERSION IS REASONABLE**

Pocatello asserts that “contrary to the district court’s decision, the Director’s [Curtailment Order] concludes only that Rangen’s water use was reasonable, not that its means of diversion was reasonable.” *Pocatello’s Opening Brief* at 14. This assertion is contrary to the plain reading of the Curtailment Order. The Director extensively discusses Rangen’s means of diversion of water in the Curtailment Order. R. Vol. XXI, p. 4191. The Director concluded:

IGWA and Pocatello have failed to show, by clear and convincing evidence, that Rangen’s means of diversion is unreasonable. The Director concludes that Rangen employs “reasonable diversion and conveyance efficiency and conservation practices” in diverting water from the Curren Tunnel.

...

Because the method of diversion is reasonable, the effort and expense by Rangen to divert water from the source is also reasonable.

R. Vol. XXI, p. 4223. Thus, Pocatello's assertion that the Director did not conclude that Rangen's means of diversion is reasonable is contrary to the record and must be rejected. No remand is necessary regarding this issue.

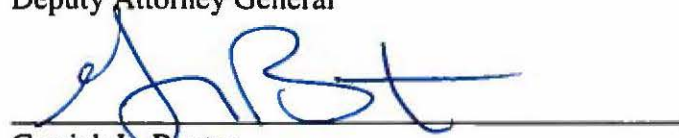
## V. CONCLUSION

The optimum development of Idaho's water resources in the public interest, and the maximum use and benefit, and least wasteful use, of the State's water resources support the Director's application of a trim line. Here, curtailment of junior ground water users east of the Great Rift would produce very small benefits to Rangen when compared to the number of acres curtailed. Thus, the Director concluded "[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227. There is substantial evidence in the record to support this decision. The Director's application of the Great Rift trim line must be affirmed. In addition, Pocatello's assertion that the Director did not conclude in the Curtailment Order that Rangen's means of diversion is reasonable is contrary to the record and must be rejected.

DATED this 8<sup>th</sup> day of June 2015.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by United States mail, first class, with the correct postage affixed thereto on this 8<sup>th</sup> day of June 2015.

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