Docket No. 42836-2015

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

RANGEN, INC.,
Petitioner-Respondent

v.

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

and

CITY OF POCATELLO,
Intervenor-Appellant

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.

INTERVENOR-APPELLANT CITY OF POCATELLO'S REPLY 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

ATTORNEYS FOR INTERVENOR-APPELLANT

A. Dean Tranmer, ISB # 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
Telephone: (208) 234-6149
Facsimile: (208) 234-6297
dtranmer@pocatello.us
and
Sarah A. Klahn, ISB # 7928
Mitra M. Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
Telephone: (303) 595-9441
Facsimile: (303) 825-5632
sarahk@white-jankowski.com
mitrap@white-jankowski.com

Attorneys for City of Pocatello

ATTORNEYS FOR RESPONDENTS-RESPONDENTS

Garrick L. Baxter, ISB # 6301
Emmi L. Blades, ISB # 8682
Deputy Attorneys General
Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Deputy Attorneys General for the Idaho Department of Water Resources and Gary Spackman in his capacity as Director of the Idaho Department of Water Resources

ATTORNEYS FOR PETITIONER-RESPONDENT

Robyn M. Brody, ISB # 5678
BRODY LAW OFFICE, PLLC
P. O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780
robynbrody@hotmail.com
and
Fritz X. Haemmerle, ISB # 3862
HAEMMERLE LAW OFFICE, PLLC
P. O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com
and
J. Justin May, ISB # 5818
MAY BROWNING & MAY, PLLC
1419 W. Washington
Boise, ID 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com

Attorneys for Rangen, Inc.

ATTORNEYS FOR INTERVENORS-RESPONDENTS
John K. Simpson, ISB # 4242
Travis L. Thompson, ISB # 6168
Paul L. Arrington, ISB # 7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, ID 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 733-2444
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

ATTORNEYS FOR INTERVENOR-RESPONDENT
Randy C. Budge, ISB # 1949
Thomas J. Budge, ISB # 7465
RACINE OLSON NYE BUDGE & BAILEY
P.O. Box 1391
Pocatello, ID 83204
Telephone: (208) 232-6101
Facsimile: (208) 232-6109
rcb@racinelaw.net
tjb@racinelaw.net
bjh@racinelaw.net

Attorneys for Idaho Ground Water Appropriators, Inc.

ATTORNEYS FOR INTERVENORS-RESPONDENTS
W. Kent Fletcher, ISB # 2248
FLETCHER LAW OFFICE
P. O. Box 248
Burley, ID 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548
wkf@pmt.org

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

ATTORNEYS FOR INTERVENOR-RESPONDENT
Jerry R. Rigby, ISB # 2470
RIGBY ANDRUS & RIGBY LAW PLLC
Attorneys at Law
25 North Second East
Rexburg, ID 83440
Telephone: (208) 356-3633
Facsimile: (208) 356-0768
jrigby@rex-law.com

Attorneys for Fremont Madison Irrigation District

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INTRODUCTION

The City of Pocatello ("Pocatello") asks this Court to reverse the district court and find that the Director's delineation of a curtailment trim line at the Great Rift, limiting curtailment to junior ground water users on the west side of the Great Rift ("Great Rift trim line"), was an appropriate exercise of the Director's discretion in light of the evidence in the record and the constitutional principle of "optimum development of water resources in the public interest" ("optimum use"). IDAHO CONST. art. XV, § 7. The Director and Idaho Department of Water Resources ("Department" or "IDWR") agree. IDWR's Response Brief at 11.

In opposition, respondents the Surface Water Coalition ("SWC") and Rangen, Inc. ("Rangen") offer three possible theories in support of the district court's trim line decision: (1) that the trim line is invalid because it rests on disparity in the amount of water that would accrue to Rangen's rights from curtailment on the west side versus the east side of the Great Rift;[1] (2) that the trim line is an abuse of discretion because any curtailment trim line can ONLY be based on uncertainty;[2] and (3) because there is unquantified uncertainty in the ESPAM 2.1 Model, no trim line can be imposed. Respondent Idaho Ground Water Appropriators, Inc. ("IGWA") also opposes Pocatello's request, and argues that the Great Rift trim line imposed by the Director was not protective enough of juniors, and that *Clear Springs Foods, Inc. v. Spackman* ("*Clear Springs*"), 150 Idaho 790, 252 P.3d 71 (2011) mandates a 10% trim line.[3]

[1]Rangen's Response Brief at 8−9; SWC's Response Brief at 12−13.
[2]Rangen's Response Brief at 17; SWC's Response Brief at 42.
[3]IGWA's Response Brief at 9.

In addition to the theories summarized above, Rangen, SWC, and IGWA also offer incorrect statements of Pocatello's past legal positions regarding the trim line, misrepresentations regarding agreements signed by Pocatello which are irrelevant to the dispute at hand, and incorrect interpretations of this Court's prior rulings. Importantly for purposes of resolving this appeal, the non-IDWR respondents offer no response to Pocatello's arguments regarding the constitutional basis for the Director's exercise of discretion in adopting the Great Rift trim line. The Court should reject the arguments of the non-IDWR respondents and reverse the district court's invalidation of the Great Rift trim line as a misinterpretation of the *Clear Springs* decision as well as an improper limit on the scope of the Director's discretion to administer delivery calls.

I. THE DIRECTOR'S DISCRETION TO IMPLEMENT CONJUNCTIVE ADMINISTRATION REQUIRES MORE THAN SIMPLY ORDERING CURTAILMENT OF WATER RIGHTS BASED ON THE DEPLETIONS MODELED IN ESPAM 2.1

Pocatello's appeal is straightforward: it asks the Court to determine whether the Director can exercise his discretion to decline to curtail junior water rights based on clear and convincing evidence, where the evidence shows that such curtailment is not consistent with principles of optimum use. As stated by the Department:

> 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.

IDWR's Response Brief at 15. As explained in Pocatello's Opening Brief, the Director's Great Rift trim line is consistent with Idaho law. The question on appeal is whether the exercise of the Director's discretion to adopt the Great Rift trim line is grounded adequately in the factual record and satisfies the applicable constitutional principles.

As affirmed by this Court in *Clear Springs*, the Director has discretion to exclude juniors from curtailment if the facts before the Department support such a finding.[4] *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97. Such discretion on the part of the Director is consistent with this Court's decisions on conjunctive management. *A & B Irrigation Dist. v. Spackman* ("*A&B*"), 155 Idaho 640, 652, 315 P.3d 828, 841 (2013) (". . . Director has discretionary authority in a water management case that is not available to him in a water rights case . . . ."); *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97; *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 875−80, 154 P.3d 433, 446−51 (2007).[5]

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[4]Subsequently, the Idaho Supreme Court clarified that any such findings must be based on clear and convincing evidence. *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 525, 284 P.3d 225, 250 (2012).

[5] Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.

> . . . .
>
> 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. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out . . . ."

Am. Falls Reservoir Dist. No. 2, 143 Idaho at 875, 154 P.3d at 446.

A. Respondents argue that the Director has no discretion in administration of juniors beyond running the ESPA Model.

SWC argues that quantified uncertainty in the model is the only basis for a trim line, and that the ESPA Model refinements that lead to version 2.1 (the version currently used by the Department in conjunctive administration) forecloses a trim line and requires the Director to curtail all juniors, regardless of other evidence in the record.[6] As a threshold matter, the scope of the Director's discretion to conjunctively manage Idaho's water resources is not modified by the version of the model the Department implements. If the Director's discretion previously included the ability to impose a trim line as announced by this Court in *Clear Springs*, the adoption of ESPAM version 2.1 does not change the qualitative nature of his authority and discretion.

SWC also argues that the district court's decision was proper because no matter how "small" the impact of juniors east of the Great Rift, that impact must be mitigated.[7] However, SWC does not explain how the imposition of the trim line in *Clear Springs*, which SWC admits excluded juniors from curtailment "even if a junior water user outside of that trim line was found to contribute to the material injury suffered by the Spring Users' senior water rights" could be within the Director's discretion (as affirmed by this Court), and the imposition of the Great Rift trim line—which similarly excludes juniors depleting seniors by insignificant amounts of water—is not.[8] In *Clear Springs*, the trim line was based on an assumed 10% error in the stream

[6]SWC's Response Brief at 11−12.
[7]SWC's Response Brief at 35−36.
[8]SWC's Response Brief at 5 n.6.

gauge to which the model reaches were calibrated, and resulted in curtailing all junior users that would result in at least 0.69% and 2% of curtailed amounts arising respectively at the two senior spring users points of diversion. Agency R. Vol. 21, pp. 004203−04.[9] Here, the Director's Great Rift trim line requires curtailment of junior users that would result in at least 0.63% of curtailed amounts at the Martin-Curren Tunnel. *Id.* at 004226, COL ¶ 51.

The question before the Court in this appeal is whether the Director has any discretion to exclude juniors from curtailment on any basis, or whether he must run the model and curtail every water user found to contribute to the senior's injury, no matter how small the depletion, or how long the benefit will take to reach Rangen—in the case of Pocatello, it will take 30 years to get Rangen the amount of water in a garden hose.[10] *Cf.* SWC's Response Brief at 12−13 ("The prior appropriation doctrine does not change merely because diversions from one junior water right may have less of an impact than the diversions from another junior water right.").

Rangen's and SWC's arguments, if taken to their logical conclusion, pay lip-service to the constitutional principle of optimum use which the Director is obligated to consider in administering delivery calls based on the evidence before him. *See infra* Part II.C. If the doctrine of optimum use means anything, there has to be more to the Director's administration of

[9]Citations to "Agency R." or "Tr." throughout this brief refer to the Agency Record and Hearing Transcripts before IDWR in Docket NO. CM-DC-2011-004 as lodged with the district court. Citations to "R." refer to the Clerk's Record on Appeal before the SRBA District Court (Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)).

[10]Curtailment of Pocatello's junior pumping was predicted to result in 5 to 8 gallons per minute ("gpm") at Rangen over 30 years. This rate of flow is comparable to a garden hose. Sullivan Testimony, Tr. Vol. VII, p. 1484, L. 7−11. *See also id.* at L. 14−15 (describing 6 gpm as "negligible").

delivery calls than simply shut-and-fasten administration based on the results of ground water modeling, with no interpretation of the facts and data, or exercise of the Director's expertise. As explained below, the evidence in the record demonstrates the Great Rift trim line is proper, and respondents' arguments that the trim line fails because it lacks a quantifiable margin of error ignore the undisputed evidence in this case to the contrary.

B. The Director's decision to impose the Great Rift trim line is supported by clear and convincing evidence.

The Director found that the benefits of curtailment to Rangen diminished significantly at the Great Rift. Agency R. Vol. 21, pp. 004213−14. The Great Rift is a geological formation that creates a physical barrier to the transmissivity of water through the aquifer to Rangen. *Id.* at 004226. In other words, the Great Rift naturally reduces the connectivity of the aquifer, reducing the rate at which ground water pumping east of the aquifer affect water rights west of the aquifer. The Director found that curtailment of water rights east of the Great Rift—an additional 322,000 irrigated acres—would provide Rangen with 1.5 cubic feet per second ("cfs") of water, which was a "small" amount of water, and did not justify curtailment. *Id.* at 004226, 004213.

Also informing the Director's decision to impose the Great Rift trim line is undisputed evidence in the record regarding the remote-in-time benefits to Rangen from curtailment of junior ground water users east of the Great Rift. For example, Pocatello presented an analysis of its water rights to demonstrate that it was not causing a material amount of impact on Rangen's water rights, and was too remote in time to make curtailment a viable option. Agency R. Vol. 19, Exhibit 3274 at 27. Pocatello has several junior wells within the ESPA area of common

ground water. *Id.* at 25. These include "City Wells," which provide water for culinary (indoor domestic use) for residents of Pocatello. These also include wells in and around the Pocatello Regional Airport, which "supply culinary water to the airport and . . . that are used for land application of biosolids from the City's wastewater treatment plant" as required by the City's NPDES Permit. *Id.* "Pocatello has ground water priorities junior to the 1962 Rangen water right totaling 20.3 cfs in the ESPA and 38.6 cfs in the LPRVA, and curtailment of the junior Pocatello ground water rights would substantially impact the City's water supply." *Id.* at 26. Curtailment would result in the City losing 8,078 acre feet of water, or 46% of Pocatello's current water supply. *Id.* at 26−27. Yet at Rangen, ESPAM modeling results demonstrated that after 10 years of curtailment of Pocatello's junior wells, Rangen would see at most 0.014 cfs arising at the Curren Spring, of which 0.63% would accrue to Rangen's water rights at the Martin-Curren Tunnel. *Id.* at 29. After curtailing Pocatello's junior ground water rights for 30 years, the Curran Spring flow would increase by 0.018 cfs, at most. These amounts were analogized at trial to the flow of a garden hose (Sullivan Testimony, Tr. Vol. VII, p. 1484, L. 7−11) and described as "not a huge amount of water" by a senior Rangen employee. Kinyon Testimony, Tr. Vol. II, p. 494, L. 23−p. 495, L. 6.

Based on such evidence regarding the effect of curtailing juniors east of the Great Rift, the Director found that the doctrine of optimum use required that the Director impose the Great Rift trim line.

> The Director, in an exercise of discretion, must consider the diminishing benefits of curtailment beyond the Great Rift. The Great Rift is an area of low

> transmissivity that justifies its use as a trim line. Low transmissivity impedes the transmission of water through the aquifer at the Great Rift. . . .
>
> . . . .
>
> The 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. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

Agency R. Vol. 22, pp. 004465−66. The Director found 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." Agency R. Vol. 21, p. 004227.

The Director's decision therefore, was not based solely on "policy"—as erroneously suggested by Rangen[11]—but was based on undisputed evidence in the record that remote water users were not depleting Rangen's water rights by material amounts, and that the Great Rift was the line at which the remoteness of water users became insignificant enough as to preclude curtailment. The Director properly utilized his experience, technical competence, and specialized knowledge in the evaluation of the evidence. Idaho Code § 67-5251(5). Indeed, it is the Director's responsibility in a delivery call to make factual and legal findings to determine the extent of the connection and the impact junior water users have on seniors, and apply the law of the State of Idaho. *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97.[12]

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[11]Rangen's Response Brief at 17 ("The Director justified his decision solely on policy grounds.").

[12]*See also A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997) ("Conjunctive management **combines legal and hydrologic aspects** of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management in this system requires knowledge by the IDWR of the relative

C. The district court's decision to overturn the Director's finding that 1.5 cfs was a "small" amount of water for Rangen violated the standard of review.

On appeal, the district court rejected the finding of the Director that curtailment of junior ground water users east of the Great Rift was not appropriate and, substituting the Court's judgment for the Director's, found instead that the amount of water that Rangen would receive through curtailment was "neither insignificant nor *de minimis*." R. 000706−07. The district court exceeded its authority in making this finding, as it cannot properly "substitute its judgment for that of the [Director] as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1). The district court's jurisdiction in an administrative appeal is limited to record review of the Director's findings of fact,[13] rather than *de novo* review[14]—the Court cannot re-try or re-determine the Director's weighing of the evidence to reach factual findings. "The district court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Clear Springs*, 150 Idaho at 797, 252 P.3d at 78.

Further, the Director has authority to determine the "materiality" of a junior's depletions—i.e., an evaluation within a proper exercise of discretion, of which juniors to curtail.

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priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.") (emphasis added).

[13]"A finding of fact is a determination of a fact by the court [or agency], which fact is averred by one party and denied by the other and this determination must be founded on the evidence in the case." *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 77, 156 P.3d 573, 578 (2007) (internal quotation marks and citation omitted).

[14]"This Court has stated that on an appeal from an administrative agency 'a trial de novo is not a possible course of action.'" *Clow v. Bd. of County Comm'rs of Payette County*, 105 Idaho 714, 716, 672 P.2d 1044, 1046 (1983) (quoting *Hill v. Bd. of County Comm'rs of Ada County*, 101 Idaho 850, 852, 623 P.2d 462, 464 (1981)).

The standard of "material" injury does not contemplate that every depletion to the aquifer, no matter how small, will be found to cause a senior injury. If injury is "material" it must be "substantial[,] noticeable" (Webster's II New College Dictionary 675 (1999)) or "significant" (Black's Law Dictionary 991 (7th ed. 1999)). Seniors are protected from "material injury"—as contrasted with a bright line "no" injury standard, and the Director has the expertise to determine whether injury is "material" or not. IDAPA (IDWR's *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules")) 37.03.11.010.14 (material injury defined as "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law"); Idaho Code § 67-5251(5) ("The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.").

D. SWC, IGWA, and Rangen have all misinterpreted *Clear Springs*.

In *Clear Springs*, this Court affirmed the Director's use of a trim line to exclude water users in a delineated geographical area from curtailment. In support of their arguments, SWC and IGWA have both misinterpreted this much-cited holding in *Clear Springs*:

> 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 Springs 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.

Clear Springs, 150 Idaho at 817, 252 P.3d at 98 (emphasis added). IGWA rests on this holding for the proposition that any trim line has to be 10% or it is an abuse of the Director's discretion (IGWA's Opening Brief at 19, Docket No. 42775-2015 (May 4, 2015));[15] SWC relies on this holding for the proposition that the Director's discretion to adopt a trim line expired upon replacement of the ESPAM 1.1 because there is no quantified margin of error in ESPAM 2.1. SWC's Response Brief at 7−9. Neither is correct. This portion of the *Clear Springs* decision says that the Director has authority to impose a trim line through a proper exercise of discretion, if excluding such juniors from curtailment is supported by the evidence. *Clear Springs*, 150 Idaho at 817, 252 P.3d at 98. The Director does, in fact, have discretion to determine which water rights among those contributing to a senior's shortage should be curtailed, if there is clear and convincing evidence that the facts of a particular delivery call require such administration. *Id.*; *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 525, 284 P.3d at 250.

Rangen argues that Pocatello's appeal attempts to "create[] broad discretion for the Director to decide whether to follow the doctrine of prior appropriation in conjunctive management," and argues that *Clear Springs* stands for the proposition that the only exception to an order of curtailment in response to a delivery call requires the Director to find that a senior is wasting water. Rangen's Response Brief at 12. Rangen would constrict the scope of the Director's discretion to excluding juniors from curtailment only upon a finding of waste by the

[15]As explained in Pocatello's Opening Brief in this appeal and in Pocatello's Response Brief, filed on June 9, 2015 in Docket No. 42775-2015, *Clear Springs* does not stand for the proposition that Idaho law requires a 10% trim line in every delivery call. Pocatello incorporates its response brief in Docket No. 42775-2015 herein by reference.

senior and regardless of the facts in a particular case. This Court's decision in *Clear Springs* reaches no such conclusion, and places no such limits on the Director's discretion. *See also A&B*, 155 Idaho at 652, 315 P.3d at 840 (". . . Director has discretionary authority in a water management case that is not available to him in a water rights case . . . .").

The exercise of an agency's discretion is judged by:

> [D]etermin[ing] whether 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.

Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho 496, 502, 337 P.3d 655, 661 (2014) (internal quotation marks and citation omitted).

In evaluating whether an agency acts within its discretion, a reviewing court is asked to determine if

> the judgment [was] a permissible one? If the decision was within the range of permissible decisions, it still remains to be determined whether the decision was "arbitrary, capricious, or an abuse of discretion." This standard is often phrased in the negative: an agency decision would be arbitrary, capricious or an abuse of discretion if it were not based on those factors that the legislature thought relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error in judgment. The focus of this inquiry is on the methods by which the agency arrived at its decision: for example, did the agency not only consider all the right questions, did it consider some wrong ones? Does the relationship between the facts found and the conclusion reached reveal gaps in the logic of the reasoning process? . . . .

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 365 (1994).

In conjunctive administration, the Director has discretion to consider whether curtailment of juniors will produce such small amounts of water over such a long period of time that curtailment cannot be justified under the doctrine of optimum use. SWC's contention that juniors can only be excluded from curtailment if there is quantified uncertainty in the model would result in shut-and-fasten administration, and remove from the Director the authority to, when supported by facts in the record, impose a curtailment trim line. IGWA's position is similarly flawed—*Clear Springs* did not state that a trim line is only proper if it excludes water users with less than a 10% impact. Here, rather than apply this standard to the Director's decision, the district court ruled that the Great Rift trim line violated *Clear Springs* and *A&B*, entirely ignoring the question of the Director's discretion. As explained below, the Great Rift trim line is consistent with this Court's prior case law, and should have been affirmed.

II. THE DIRECTOR'S DECISION IS CONSISTENT WITH AND SUPPPORTED BY *CLEAR SPRINGS*

A. Pocatello was not a party to the *Clear Springs* case and does not endorse IGWA's trim line position.

SWC's response brief avoids dealing with any of the arguments Pocatello made in its opening brief by creating a strawman—suggesting erroneously that Pocatello's position in this appeal is identical with IGWA's. As Pocatello and IGWA's briefs in each entities' respective appeals demonstrate, on the issue of the trim line Pocatello and IGWA are not aligned. SWC's brief goes on to make the further erroneous suggestion that Pocatello was: 1) a party to the *Clear Springs* case (it was not); and 2) that it took positions in support of an even larger trim line than the 10% trim line affirmed by the Court as within the Director's discretion (it did not).

Pocatello did not take legal positions in either the *Clear Springs* case or in the Rangen Delivery Call[16] that the Director's trim line should be enlarged due to unspecified or qualitative errors in any model. Indeed, Pocatello did not participate at any level in the Clear Springs Delivery Call, as the Director's trim line in that matter (announced in an initial order and before hearing) excluded Pocatello from potential curtailment. Pocatello asked leave of this Court to participate as Amicus in *Clear Springs* on appeal on the issue of clear and convincing evidence, and that request was denied.[17]

It is true, however, that IGWA has argued for a more expansive trim line beyond those imposed by the Director in *Clear Springs* and in the Rangen Delivery Call. IGWA's Opening Brief at 39, Docket No. 42775-2015; Agency R. Vol. 19, p. 003848. As explained above, the *Clear Springs* decision does not stand for the proposition that the Director must impose a 10% trim line in every delivery call. Contrary to the arguments of SWC in its response brief, Pocatello has never endorsed such arguments—Pocatello has only appealed the district court's rejection of the Great Rift trim line, which should have been affirmed.

B. The *Clear Springs* trim line decision excluded juniors on the basis of uncertainty.

As argued in Pocatello's Opening Brief and herein, the Great Rift trim line is supported by the Director's exercise of discretion to ensure conjunctive management is consistent with

[16]Pocatello did not appeal the Director's trim line decision to the district court, and did not present briefing on the issue at the district court until rehearing, where Pocatello asked the court to reconsider its decision to strike down the Great Rift trim line.

[17]Pocatello's Petition to Appear as Amicus Curiae, dated August 12, 2010 and filed in Docket No. 37308-2010 is attached as Addendum A to this Brief. The Court's September 1, 2010 Order denying the Petition is attached as Addendum B.

optimum use, as was the trim line in *Clear Springs*. The district court did not address the question of whether the Great Rift trim line was created as part of a proper exercise of the Director's discretion, but instead, rejected it, *inter alia*, because uncertainty cannot be the basis for a trim line, and "any uncertainty or margin of error must operate in favor of Rangen, the senior right holder." R. 000707.

The district court's concern with the Director's reliance on "uncertainty" is the exact argument rejected by this Court in *Clear Springs*. There, seniors argued that a trim line based on model uncertainty is improper, as uncertainty can cut either way, and "there is no way to know when administering water rights in a particular case whether the error is high or low." *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97. The Court rejected this argument, and found that the Director properly "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." *Id.* at 817, 252 P.3d at 98. Therefore, uncertainty can be a basis for a trim line to exclude juniors from a finding of material injury.

There has been no change in the law since *Clear Springs* to justify the district court's deviation from this Court's controlling precedent—indeed, the only thing that has changed since *Clear Springs* is the clarification of the clear and convincing evidence rule. *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 525, 284 P.3d at 250. However, the clarification of the evidentiary standard that the Director must use in order to support findings does not change the *scope* of the Director's discretion, but instead only changes the nature of the evidence that the Director must have based on facts in the record before making his decision.

Pocatello agrees that ESPAM 2.1 is the best available tool for purposes of conjunctive management and does not challenge the model itself—indeed, the Model is the basis for Pocatello's evidence equating the flow of a garden hose with accruals at the Martin-Curren Tunnel from curtailment of Pocatello's junior ground water rights after 30 years, discussed *supra* note 10. And ESPAM version 2.1 is more sophisticated than prior versions, including being calibrated to square mile cells rather than Snake River reaches (eliminating issues with the 10% error in stream gauge analysis data discussed in *Clear Springs*) (Agency R. Vol. 21, p. 004204)). However, the record in this matter demonstrates that modeled predictions of gains at the Martin-Curren Tunnel with ESPAM 2.1 still involve predictive uncertainty. At the hearing in this matter, Department staff presented evidence of predictive uncertainty related to the model's results, and that the level of uncertainty varied based on geographic area. Agency R. Vol. 13, Exhibit 1277. Based on that evidence, the Director found that "[t]here is lower predictive uncertainty on the western side of the Great Rift. There is generally higher predictive uncertainty on the eastern side of the Great Rift . . . ." Agency R. Vol. 22, p. 004466 (internal citation omitted). The Director determined there was not sufficient evidence to quantify that uncertainty, but that since all parties acknowledged it existed, it was another piece of evidence in support of a trim line. Agency R. Vol. 21, p. 004227.

The Director's recognition of the existence of uncertainty, in addition to his other factual findings in support of the Great Rift trim line, does not somehow turn his decision (based on undisputed technical evidence of the small amount of water that will reach Rangen from curtailment of water users east of the Great Rift) into one that is somehow lacking a "technical"

basis. *See* SWC's Response Brief at 40, 42 (claiming Pocatello argues "that the Director has the discretion to impose a trim line – regardless of the law or science", and that "there is no technical justification for a trim line under ESPAM 2.1"). Such evidence, based on model runs of ESPAM 2.1, cannot be characterized as anything but technical. *See supra* Part I.B.

Further, SWC's Response Brief at pages 40 to 42 mischaracterizes this Court's holding in *A&B*, which approved of the Director's baseline methodology as a proper exercise of his discretion—despite the fact that he was making predictions of annual supply and demand in the Snake River basin, which have significant, but unquantified uncertainty by their very nature—just like the unquantified predictive uncertainty associated with ESPAM 2.1 curtailment runs. *A&B*, 155 Idaho at 650, 315 P.3d at 838. In *A&B*, the Court noted that "[in] an interconnected system of ground and surface water as complicated as the Snake River Basin, with as many variables, moving parts, and imponderables that present themselves during any particular irrigation season . . . . [t]he use of a baseline methodology in [the] context [of a water allocation plan] is . . . not inconsistent with Idaho law." *Id*. at 651, 315 P.3d at 839. Thus, the concept of uncertainty in water administration is well known to this Court, and the Director's recognition of this fact does not deprive his decision of a technical basis.

SWC's characterization of *A&B* suggests that any water right administration with elements of uncertainty may only be used as the "starting point" for administration, and not for determinations of material injury, and that seniors are entitled to squeeze every drop of water out of junior ground water users, no matter how remote in time and uncertain are the benefits. SWC's Response Brief at 40−42. This is not consistent with *A&B*, where the Court upheld "the

baseline methodology, both as a starting point for consideration of the Coalition's call for administration and in determining the issue of material injury", despite the fact that the Director's approach had uncertainty, "variables, [and] moving parts". *A&B*, 155 Idaho at 651, 315 P.3d at 839 (emphasis added). This Court has already rejected SWC's attempts to invalidate the Director's reliance on predictions that are uncertain. *Id*. at 649, 315 P.3d at 837 (Court rejecting the SWC's argument that "any methodology founded upon the prediction of the minimum amount of water actually necessary to satisfy a senior water right holder's irrigation and storage needs is contrary to the doctrine of prior appropriation") (emphasis added).

As explained *supra*, the Director's Great Rift trim line had more than one basis—the Director found that curtailing juniors east of the Great Rift would not produce significant amounts of water to Rangen, and noted that this conclusion was further supported by the fact that there was uncertainty in how accurate his predictions were to begin with. Agency R. Vol. 21, pp. 004226−27. The district court's decision that uncertainty can never be the basis of a trim line is contrary to this Court's ruling in *Clear Springs*, and should be reversed.

C. *Clear Springs* did not invalidate the doctrine of optimum use.

Rangen and SWC argue that after *Clear Springs*, the Director cannot rely on the doctrine of optimum use, Article XV, Section 7 of the Idaho Constitution, or CM Rule 20.03 for the basis of excluding water users not materially injuring seniors from curtailment.[18] An examination of the *Clear Springs* Court's treatment of these principles and authority shows otherwise.

[18]SWC's Response Brief at 30, 39; Rangen's Response Brief at 10−11.

In *Clear Springs*, this Court rejected IGWA's argument that certain principles of Idaho water law required the Director to avoid conjunctive administration *entirely*, but the Court did not invalidate the underlying authorities—Article XV, Section 7 of the Idaho Constitution and CM Rule 20.03—for all purposes. In *Clear Springs*, IGWA argued that the aquifer should be administered only if depleted beyond reasonable aquifer levels, and because the Director's "curtailment orders would be more than offset by the severe economic damage to others caused by the curtailment of the Groundwater Users' water rights." *Clear Springs*, 150 Idaho at 801, 252 P.3d at 82.

IGWA also argued that "full economic development requires that [IGWA] be permitted to withdraw as much water from the Aquifer as they need (as long as total annual withdrawals do not exceed annual recharge), even if doing so deprives senior surface water users of water. . . . as long as the Aquifer is not being over-drafted, priority of water rights as between surface and ground water users is not to be considered." *Id.* at 804, 252 P.3d at 85. "In support of their argument, they cite Conjunctive Management Rule 20.03 . . . ." *Id.* at 805, 252 P.3d at 86. The Court rejected this argument, finding that "[CM Rule 20.03] does not state that priority of right as between a senior surface water user and junior ground water users is to be disregarded as long as the Aquifer is not being overdrawn by ground water users." *Id.* The Court went on to point out that CM Rule 20.03 cites to Article XV, Sections 5 and 7 of the Idaho Constitution, in the text of the rule. *Id.* The Court found that Article XV, Section 5, which must be read together with Section 4, do not apply to the case at hand, and rejected them. *Id.* at 805−06, 252 P.3d at 86−87.

However, the Court did not find that Article XV, Section 7 did not apply in conjunctive administration—instead, the Court found that the doctrine of optimum use did not support IGWA's argument that there was authority under Idaho law to ignore the prior appropriation doctrine and avoid curtailment until the aquifer was over drafted. The Court noted that IGWA's interpretation would "preclude conjunctive management of the Aquifer. . . . as long as withdrawals from the Aquifer and recharge were in balance." *Id.* at 808, 252 P.3d at 89.

The Court discussed the import of Article XV, Section 7:

> The Idaho Water Resource Board and the Idaho legislature have the power to formulate and implement a state water plan for "optimum development of water resources in the public interest." Idaho Const. Art. XV, § 7. There 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. Likewise, there is no material difference between "full economic development" and the "optimum development of water resources in the public interest." They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest. As we stated in *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), "[I]t is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution." When discussing the Ground Water Act and particularly Idaho Code § 42–226, we stated, "The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources." *Id.* at 512, 650 P.2d at 654. 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.

Clear Springs, 150 Idaho at 808, 252 P.3d at 89 (emphasis added).

Here, the Director's decision to impose a trim line based on optimum use was very different than the issue presented in *Clear Springs*—where IGWA argued that principles of optimum use excused curtailment completely in the absence of mining of the aquifer. In

Rangen, the Director excluded from curtailment only those water users who would contribute a "small" amount of water to Rangen's injury—a very different proposition from that rejected in *Clear Springs*, where IGWA asked the Court to find that curtailment could never be ordered for any water users until the rate of recharge was exceeded. Here, the Director's Final Order would have curtailed 157,000 acres in response to Rangen's Delivery Call, and excluded only those water users east of the Great Rift. Agency R. Vol. 21, p. 004215.

Further, the Director's Final Order discussed multiple bases for the Great Rift trim line in Rangen, most significantly the doctrine of optimum use. This Court should reverse the district court's decision based on the record, the doctrine of optimum use, and *Clear Springs*.

D. SWC's reliance on the 2014 Rangen Delivery Call stipulation is similarly unavailing.

In support of its arguments for limiting the Director to shut and fasten administration, as opposed to administration that implements constitutional principles of optimum use, SWC makes the assertion that it is "simple" to mitigate for Rangen's shortage and relies, in part, on the stipulation entered in Rangen's 2014 Delivery Call. SWC's Response Brief at 13. There are at least two problems with this statement.

First, contrary to SWC's claims, all juniors, "both east and west of the Great Rift" have not "recently implemented actions to mitigate Rangen's injury and deliver the water required by the Director's order." *Id.* The stipulation attached to SWC's response was an agreement by all parties to the 2014 Rangen Delivery Call, which involves different, more senior, water rights than the case at hand, and is not before this Court. That 2014 Delivery Call stipulation reflects

agreement among certain junior water users[19] and Rangen regarding how IGWA's currently approved mitigation supplies should be accounted for in the context of Rangen's 2014 Delivery Call dispute. The stipulation makes clear that it does not affect pending appeals involving Rangen's 2011 Delivery Call (i.e., the above-captioned matter), and that it does not decide "the issue of futile call, trimline, or related issues of which junior ground water users are obligated to replace depletions associated with a finding of injury by the Director." *Id.* Addendum A, ¶ 11.b, at 3.

Second, unlike mitigating for senior surface rights (like SWC's) which can be accomplished by storage transfers and the rental pool, Rangen's means of diversion require it to receive water through the Martin-Curren Tunnel, which is the same as a senior canal company diverting its annual irrigation supplies through a soda straw. SWC's Response Brief at 35 ("the city ignores how easily [it's small] quantity [of injury] can be mitigated"). IGWA has already spent millions of dollars to build a pipeline that has the capacity to mitigate for injury caused by those water users west of the Great Rift. Other entities[20] subject to the Department's curtailment orders have spent substantial sums to deliver water to Rangen through recharge, with mixed results. Because juniors east of the Great Rift have no physical means to deliver mitigation water to the Tunnel, elimination of the Great Rift trim line will mean curtailment, not mitigation.

[19]The stipulation only discusses IGWA's delivery of mitigation water. *Id.* Addendum A at 3.
[20]*See* the Coalition of Cities' Second Mitigation Plan, *available at* http://www.idwr.idaho.gov/News/MitigationPlan/Rangen/CoalitionofCities2nd.htm.

III. RANGEN'S MEANS OF DIVERSION

Pocatello withdraws the arguments made and issues raised in Part I.D of the Argument section of its Opening Brief.

CONCLUSION

Pocatello respectfully requests, for the foregoing reasons, that this Court reverse the district court's decision regarding the Great Rift trim line.

Respectfully submitted this 29th day of June, 2015.

CITY OF POCATELLO ATTORNEY'S OFFICE

By _____
A. Dean Tranmer

WHITE & JANKOWSKI, LLP

By _____
Sarah A. Klahn

By _____
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2015, I caused to be served a true and correct copy of the foregoing **Intervenor-Appellant City of Pocatello's Reply Brief** in **Idaho Supreme Court Docket No. 42836-2015** (SRBA Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)) upon the following by the method indicated:

Sarah Klahn, White & Jankowski, LLP

Idaho Supreme Court 451 W State St Boise ID 83702 sctbriefs@idcourts.net	____ U.S. Mail, Postage Prepaid ____ Hand Delivery __X__ Federal Express (Phone 208-736-2210) ____ Facsimile 208-736-2121 __X__ Email
SRBA District Court 253 3rd Ave North P.O. Box 2707 Twin Falls ID 83303-2707	__X__ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-342-7278 ____ Email
J. Justin May May Browning 1419 W Washington Boise ID 83702 jmay@maybrowning.com	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-342-7278 __X__ Email
Robyn Brody Brody Law Office P.O. Box 554 Rupert ID 83350 robynbrody@hotmail.com	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-434-2780 __X__ Email
Fritz Haemmerle Haemmerle & Haemmerle P.O. Box 1800 Hailey ID 83333 fxh@haemlaw.com	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-578-0564 __X__ Email
Randall C. Budge Thomas J. Budge Racine Olson Nye Budge & Bailey 201 E Center St P.O. Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-232-6109 __X__ Email

Garrick L. Baxter Emmi L. Blades Deputy Attorneys General – IDWR P.O. Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov kimi.white@idwr.idaho.gov	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-287-6700 __X__ Email
Gary Spackman Director Idaho Department of Water Resources 322 E Front St P.O. Box 83720 Boise ID 83720-0098 deborah.gibson@idwr.idaho.gov	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-287-6700 __X__ Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello ID 83201 dtranmer@pocatello.us	__X__ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-234-6297 __X__ Email
Jerry Rigby Rigby Andrus & Rigby Law Attorneys at Law 25 North Second East Rexburg ID 83440 jrigby@rex-law.com	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-356-0768 __X__ Email
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com jf@idahowaters.com	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express ____ Facsimile 208-735-2444 __X__ Email
W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile 208-878-2548 __X__ Email

ADDENDUM A

Docket No. 37308-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148 (Clear Springs Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210M AND 36-07427 (Blue Lakes Delivery Call)

CLEAR SPRINGS FOODS, INC.,
Petitioner/Respondent/Cross-Appellant,

v.

BLUE LAKES TROUT FARM, INC.,
Cross Petitioner/Respondent/Cross-Appellant,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,
Cross Petitioners/Appellants/Cross-Respondents,

v.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents/Respondents on Appeal/Cross-Respondents,

v.

IDAHO DAIRYMEN'S ASSOCIATION, INC., and RANGEN, INC.,
Intervenors/Respondents/Cross-Respondents.

POCATELLO'S PETITION TO APPEAR AS AMICUS CURIAE

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Gooding.

Honorable John M. Melanson, District Judge, Presiding.

ATTORNEYS FOR APPELLANTS/CROSS-RESPONDENTS

Randall C. Budge (ISB #1949)
Candice M. McHugh (ISB # 5908)
Thomas J. Budge (ISB #7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 East Center St.; Post Office Box 1391
Pocatello, Idaho 83201
(209) 232-6101 – Telephone
(208) 232-6109 – Facsimile

Attorneys for Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, Magic Valley Ground Water District (collectively, the "Groundwater Users")

ATTORNEYS FOR RESPONDENTS/CROSS-APPELLANTS

Daniel V. Steenson
Charles L. Honsinger
S. Bryce Ferris
RINGERT LAW, CHARTERED
455 South Third St.; Post Office Box 2773
Twin Falls, Idaho 83701-2773
(208) 342-4591 – Telephone
(208) 342-4657 – Facsimile

Attorneys for Blue Lakes Trout Farm, Inc.

John K. Simpson
Travis L. Thompson
BARKER ROSHOLT & SIMPSON, LLP
1113 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 – Telephone
(208) 735-2444 – Facsimile

Attorneys for Clear Springs Foods, Inc.

ATTORNEYS FOR RESPONDENTS/CROSS-RESPONDENTS

Phillip J. Rassier
Chris M. Bromley
IDAHO DEPT. OF WATER RESOURCES
Post Office Box 83720
Boise, Idaho 83720-0098
(208) 287-4800 - Telephone
(208) 287-6700 – Facsimile

Attorneys for the Idaho Department of Water Resources

Justin May
MAY SUDWEEKS & BROWNING, LLP
1419 West Washington
Boise, Idaho 83702

Attorneys for Rangen, Inc.

Michael C. Creamer
Jeffrey C. Fereday
GIVENS PURSLEY, LLP
601 W. Bannock St.: Post Office Box 2720
Boise, Idaho 83701-2720
(208) 388-1200 – Telephone
(208) 388-1300 – Facsimile

Attorneys for Idaho Dairymen's Association, Inc.

ATTORNEYS FOR AMICUS CURIAE

A. Dean Tranmer ISB # 2793
City of Pocatello
Post Office Box 4169
Pocatello, ID 83201
(208) 234-6149 - Telephone
(208) 234-6297 – Facsimile

Sarah A. Klahn, ISB #7928
WHITE & JANKOWSKI, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441 - Telephone
(303) 825-5632 – Facsimile

Attorneys for City of Pocatello

COMES NOW the City of Pocatello ("Pocatello" or "City") and petitions this Court pursuant to Idaho Appellate Rule 8 to grant Pocatello's Petition to Appear as Amicus Curiae.

INTRODUCTION

The City of Pocatello is a municipal corporation of the State of Idaho which diverts its municipal water supply from wells in the Eastern Snake Plan Aquifer (ESPA) within Water District 120. Pocatello also owns and operates associated surface water rights, including rights to water stored in Palisade Reservoir. Pocatello is not a member of Appellant Idaho Ground Water Appropriators ("Ground Water Users").

Although it is a junior ground water right holder, Pocatello was not a party to the above-captioned matter before the Department because the Department limited curtailment of water rights to Water District 130. *See* R. Vol. 1, p. 59, ¶ 67 and R. Vol. 3, p. 501, ¶ 66. However, Pocatello is a party to two other ongoing delivery call matters: the Surface Water Coalition ("SWC") delivery call, which is currently on appeal before the Honorable Judge John Melanson and the A&B delivery call which is currently on appeal before the Honorable Judge Eric Wildman. A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc., Case No. 2008-0000551 (5th Judicial Dist., Gooding Cty) ("SWC Delivery Call"); A&B Irrigation District v. Idaho Department of Water Resources, Case No. CV-2009-647 (5th Judicial Dist., Minidoka Cty) ("A&B Delivery Call").

As described more fully within, the Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (collectively "Spring Users") raise substantive legal issues through their Joint Response Brief and their Opening Brief on Cross-Appeal that are identical to the issues on appeal in the SWC and A&B Delivery Calls. Furthermore, if the Spring Users prevail on their

argument that IDWR curtailment should extend to Water District 120, Pocatello's ground water supply may become the subject of curtailment orders. Thus, Pocatello requests that it be allowed to participate in this matter as an amicus in the interests of judicial economy and to avoid prejudice.

ARGUMENT

I. This Appeal Raises Identical Issues to Those At Issue in Other Related Matters

This appeal involves a delivery call initiated in 2005, in which the Spring Users alleged material injury from a failure to receive their decreed amounts of water and requested curtailment of junior ground water rights on the Eastern Snake Plain Aquifer (ESPA). *See* R. Vol. 1, p. 11 and R. Vol. 1, pp. 2 & 4. The Director found, *inter alia*, that the Spring Users were experiencing shortage but that only a portion of that shortage was due to junior groundwater pumping. As such, the Director ordered curtailment of junior ground water rights in Water District 130. The so-called "trim line" was the factual basis for the Director's extending curtailment only to Water District 130. R. Vol. 1, p. 59, ¶ 67 and R. Vol. 3, p. 501, ¶ 66.

On appeal, the Spring Users argue:

- That the "trim line" used by the Director to curtail only those junior water rights shown by the ESPA Model to impact the seniors' water rights is arbitrary and capricious and unconstitutionally results in shifting the burden of proof to the senior to show injury. Spring Users' Joint Opening Brief p. 12-17; Spring Users Joint Response Brief p. 57-59.
- That the evidentiary standard to be applied to junior ground water users in a delivery call is "clear and convincing" evidence: "Idaho law requires junior

appropriators to prove any valid defenses [to a delivery call] by 'clear and convincing evidence'" and that the Director's administration of the Spring Users' delivery call "impermissibly shift[ed] the burden to the Spring Users to rebut a defense that was never presented by the ground water users." Spring Users' Joint Opening Brief p. 9.

- Finally, that material injury is established when a senior asserts it *can* use more water–not that the senior *requires* more water in order to satisfy beneficial uses, and that in a delivery call proceeding injury is determined by whether a senior appropriator is receiving its entire decreed amount of water, regardless of whether it is possible for the senior to receive less than the decreed amount and not suffer injury. *See, e.g.*, Springs Users Joint Response Brief p. 25-26 ("The injury addressed in conjunctive administration is to the water right. The law does not require a showing that . . . a farmer could raise more, larger, or healthier crops with additional water.").

These arguments are mirror images of the issues already decided and likely to be on appeal in the SWC Delivery Call case before Judge Melanson and the A&B Delivery Call case before Judge Wildman[1].

For example, the "trim line" issue is identical in both cases, as Judge Melanson incorporated wholesale his ruling in the Spring Users' *Order on Petition for Judicial Review* into the ruling on the SWC Delivery call appeal:

[1] Note that Judge Wildman recently took jurisdiction of certain issues that are still pending on rehearing in the SWC Delivery Call case. *See* Order Denying Motion to Renumber; Order Consolidating Proceedings Involving Petitions for Judicial Review of "Methodology Order" and "As-Applied Order", Idaho Ground Water Appropriators, Inc. v. Twin Falls Canal Co., Case No. 2010-382 (July 29, 2010) (5th Judicial Dist., Gooding Cty), attached as Exhibit 1.

> The Court addressed this issue at length in the *Order on Petitions for Judicial Review* recently issued in Gooding County Case No. 2008-000444, which involves many of the same parties to this action. The Court's analysis and holding in that decision are incorporated herein by reference.

Order on Petition for Judicial Review ¶ V.C, at 26-27, A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc., Case No. 2008-0000551 (July 24, 2009) (pending before the district court on rehearing).

In addition to the "trim line" matter, the Court's resolution of the remaining issues raised by the Spring Users in their arguments in this matter will also directly affect the outcome of the A&B and SWC pending matters and impact the administration of Pocatello's water rights. In the SWC Delivery Call, the district court affirmed the Director's injury methodology, which began by evaluating the amount of water an appropriator requires to avoid injury, based on in-season irrigation requirements, and rejected the senior water user's argument that injury is *per se* established if a senior received less than its decreed or licensed quantity. Order on Petition for Judicial Review ¶ V.B.1., at 25-26, A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc., Case No. 2008-0000551 (July 24, 2009) (pending before the district court on rehearing and agency remand).

The Springs Users assertion that the threshold showing of material injury can be established by the senior's mere allegation of shortage is also a live issue in the A&B Delivery Call. There, Judge Wildman ruled that junior users have the burden of showing by "clear and convincing" evidence that senior users have wasted, forfeited, abandoned or otherwise failed to beneficially use the entire decreed right to avoid curtailment. *Memorandum Decision and Order on Petition for Judicial Review* ¶ 6, at 35 (May 4, 2010) (5th Judicial Dist., Minidoka Cty) (pending before the Court on rehearing). The Court also held that the Department's failure to

find by clear and convincing evidence that A&B was capable of satisfying its beneficial uses without injury to its water right upon delivery of an amount less than the decreed amount was reversible error. *Id.* at 49. The district court held that instead of evaluating whether A&B was receiving an adequate water supply to satisfy its uses, the Department should instead evaluate whether A&B was receiving its entire decreed amount of water.

These pending district court matters, therefore, address the same issues of law as are present in the pending appeal before the Court. Pocatello does not wish to participate in the other issues in this matter, or to raise any factual disputes: it asks the Court's leave to be permitted as amicus to participate in the Court's determination of these common legal issues alone.

II. Pocatello's Risk of Curtailment

In the case at hand, the Director limited curtailment to Water District 130 because, *inter alia*, the Department's model indicated curtailment of juniors in Water District 120 would have insignificant effect on the amount water available at the Spring Users' diversion points. *See* R. Vol. 1, p. 59, ¶ 67 and R. Vol. 3, p. 501, ¶ 66. The Director's relied upon a 10% "trim line" in reaching this conclusion, which reflects the uncertainty in model simulations. The 10% trim line was affirmed by the Hearing Officer [R. Vol 16, pp. 3703-04, ¶ 4], the Director in the Final Order [R. Vol. 16, p. 3950], and Judge Melanson's Order on Petition for Judicial Review [Clerk's R. at 44]. Pocatello has an interest in affirming the Director's curtailment order which limited curtailment to Water District 130, as this determination will have a direct and immediate effect on the administration of the City's water rights in future administration under this call.

CONCLUSION

Issues raised by the Spring Users in their cross-appeal are common legal issues in the SWC Delivery Call and the A&B Delivery Call. Pocatello anticipates appealing those decisions, but is unable to file such an appeal until the respective district courts issue final orders pursuant to Idaho Rule of Civil Procedure 54 on rehearing. Pocatello therefore requests to participate as amicus solely on the two legal issues before this Court raised in the Spring Users' Joint Opening Brief. Pocatello's participation as Amicus Curiae will not delay the appeal or prejudice other parties. Pocatello therefore requests to submit an Amicus Brief on the issues described above, in support of the Ground Water Users, and to participate at oral argument. True and correct copies of this Petition have been served upon all counsel of record in the above-captioned case.

Respectfully submitted this 12th day of August, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By _____
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

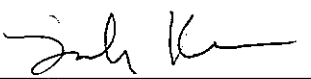
By _____
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2010, the above and foregoing document was served in the following manner:

Idaho Supreme Court Clerk of the Courts 451 West State Street Boise ID 83702	[ ] U.S. Mail, Postage Prepaid [ ] Hand Delivery [X] Overnight Mail = Federal Express [ ] telephone 208-334-2210 [ ] Email
Daniel V. Steenson Charles L. Honsinger S. Bryce Farris Ringert Law, Chartered P O Box 2773 Boise ID 83701-2773 dvs@ringertclark.com clh@ringertclark.com sbf@ringertclark.com	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson, LLP P O Box 2139 Boise ID 83701-2139 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P O Box 83702 Boise ID 83702-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email

Randall C. Budge Candice M. McHugh Thomas J. Budge Racine Olson Nye Budge & Bailey P O Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
Michael C. Creamer Jeffrey C. Fereday Givens Pursley P O Box 2720 Boise ID 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
Michael S. Gilmore Attorney General's Office P O Box 83720 Boise ID 83702-0011 mike.gilmore@ag.idaho.gov	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
J. Justin May May Sudweeks & Browning, LLP P O Box 6091 Boise ID 83707 jmay@may-law.com	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
Robert E. Williams Fredericksen Williams Meservy P O Box 168 Jerome, ID 83338-0168 rewilliams@cableone.net	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email
Josephine P. Beeman Beeman & Associates 409 W Jefferson Boise ID 83702 jo.beeman@beemanlaw.com	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email



Sarah A. Klahn

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho
JUL 29 2010
By Clerk
Deputy Clerk

AUG 02 2010

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

[1]IDAHO GROUND WATER APPROPRIATORS, INC., Petitioners, vs. CITY OF POCATELLO, Petitioner, vs. 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, Petitioners, vs. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and THE DEPARTMENT OF WATER RESOURCES, Respondents.	Case No.: CV-2010-382 (consolidated Gooding County Cases CV-2010-382, CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, and Twin Falls County Case CV-2010-3403) ORDER DENYING MOTION TO RENUMBER ORDER CONSOLIDATING PROCEEDINGS INVOLVING PETITIONS FOR JUDICIAL REVIEW OF "METHODOLOGY ORDER" AND "AS-APPLIED ORDER"

[1] This caption is modified from the caption under which the various *Petitions* were filed in order to accurately reflect the arrangement of the parties. *See* I.R.C.P. 84(a).

EXHIBIT 1

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY AND TWIN FALLS CANAL COMPANY	)

I.

FACTS AND PROCEDURAL BACKGROUND

1. On June 23, 2010, the Director of the Idaho Department of Water Resources issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*") in IDWR Docket No. CM-DC-2010-001. The following *Petitions for Judicial Review* were filed in Gooding County seeking review of the *Methodology Order* on or about July 21, 2010: (1) Idaho Ground Water Appropriators, Inc.'s *Petition for Judicial Review* in Gooding County Case CV-2010-383; (2) The Surface Water Coalition's *Petition for Judicial Review* in Gooding County Case No. CV 2010-384; and (3) The City of Pocatello's *Petition for Judicial Review* in Gooding County Case CV-2010-388.[2]

2. On June 24, 2010, the Director issued his *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3&4); Order on Reconsideration* ("*As-Applied Order*") in IDWR Docket No. CM-DC-2010-001. The following *Petitions for Judicial Review* were filed in Gooding or Twin Falls County seeking review of the *As-Applied Order* on or about July 21, 2010: (1) Idaho Ground Water Appropriators, Inc.'s *Petition*

[2] Although all *Petitions* sought review of the same *Methodology Order*, each was assigned a separate case number by the Gooding County Clerk.

for Judicial Review in Gooding County Case CV-2010-382; (2) The Surface Water Coalition's *Petition for Judicial Review* in Twin Falls County Case CV-2010-3403; and (3) The City of Pocatello's *Petition for Judicial Review* in Gooding County Case CV-2010-387.[3]

3. On July 21, 2010, Idaho Ground Water Appropriators, Inc. and the City of Pocatello jointly filed a *Motion for Consolidation*, requesting that their respective *Petitions for Judicial Review* of the *Methodology Order* and the *As-Applied Order* be consolidated into a single proceeding. Specifically, the *Motion* requested that their *Petitions for Judicial Review* of the *Methodology Order* and the *As-Applied Order* be consolidated into pre-existing Gooding County Case CV-2008-551.[4] Oral argument was not requested on the *Motion*.

4. The Clerk of the Gooding County District Court subsequently filed *Notices of Reassignment* in the above-mentioned cases assigning them to this Court for disposition and further proceedings.

5. On July 23, 2010, Idaho Ground Water Appropriators, Inc. and the City of Pocatello filed a joint *Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-551*, wherein they moved this Court to renumber and file the cases involving petitions for judicial review of the *Methodology Order* in Gooding County Case No. CV-2008-551. Oral argument was not requested on the *Motion*.

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[3] The Gooding County Clerk also assigned separate case numbers for all *Petitions* seeking review of the *As-Applied Order*.

[4] The Honorable John M. Melanson issued an *Order on Petition for Judicial Review* in Gooding County Case CV-2008-551 on July 24, 2009. The *Order* remanded in part to the Director for the purpose of adopting a methodology for predicting material injury to reasonable in-season demand and reasonable carryover. *Petitions for Rehearing* were filed and granted. In the interim, Judge Melanson was appointed to the Idaho Court of Appeals but retained the case on a pro tem basis for the purpose of ruling on the *Petitions for Rehearing*. Judge Melanson stayed the issuance of a decision on the *Petitions for Rehearing* pending the issuance of the Director's order on the action taken on remand and the expiration of the time periods for filing a motion for reconsideration and petition for judicial review of the new order. Thereafter, the Director issued the *Methodology Order* and the *As-Applied Order*.

6. On July 28, 2010, the Surface Water Coalition filed its *Joint Response to IGWA and Pocatello's Motion for Stay and Consolidation and Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-551*, wherein the Coalition agreed with Idaho Ground Water Appropriators, Inc. and the City of Pocatello that the various *Petitions for Judicial Review* filed by the parties seeking judicial review of the *Methodology Order* and the *As-Applied Order* should be consolidated into one proceeding. The Coalition did not agree however with Idaho Ground Water Appropriators, Inc.'s and the City of Pocatello's assertion that the *Petitions* should be consolidated into pre-existing Gooding County Case CV-2008-551. Rather the Coalition contends that the *Petitions* should be consolidated into a single proceeding before the SRBA District Court pursuant to the Idaho Supreme Court's *Administrative Order* dated December 9, 2009 which declares that all petitions for judicial review made pursuant to Idaho Code § 42-1701A of any decision from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court.

II.

ANALYSIS

A. Motion to Renumber Appeals.

This Court finds Gooding County Case CV-2008-551 and the *Petitions* filed in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 to be separate and distinct actions under Idaho Rule of Civil Procedure 84. The *Petitions for Judicial Review* filed in Gooding County Case CV-2008-551 sought judicial review of a final agency action (i.e., the Director's September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call*) separate and distinct from the final agency action from which judicial review is sought in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 (i.e., the Director's *Methodology Order*). As a result, the Clerk of the District Court did not error in assigning new case numbers to the *Petitions* in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 upon filing.

Moreover, Idaho Supreme Count Administrative Order dated December 9, 2009, which became effective the 1st day of July, 2010, declares that all petitions for judicial review made pursuant to Idaho Code § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court. Likewise, on July 1, 2010, this Court issued an *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*, providing that upon filing of a petition for judicial review from any decision of the Department of Water Resources, the clerk of the district court where the action is filed shall forthwith issue, file, and concurrently serve upon the parties a *Notice of Reassignment*, assigning the matter to the presiding judge of the Snake River Basin Adjudication District Court for disposition and further proceeding. Pursuant to the plain language of the Idaho Supreme Court's December 9, 2009 *Administrative Order* and this Court's subsequent July 1, 2010 *Administrative Order*, the Clerk of the District Court correctly entered a *Notice of Reassignment* assigning the *Petitions* in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 to this Court. As a result, Idaho Ground Water Appropriators, Inc.'s and the City of Pocatello's joint request to renumber the *Petitions* seeking judicial review of the *Methodology Order* into Gooding County Case CV-2008-551 is denied

B. Motion to Consolidate.

A court's decision whether to grant or deny a request for consolidation is a discretionary one. *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 508, 365 P.2d 958, 961 (1961). The Idaho Supreme Court has directed that "whenever the court is of the opinion that it may expedite its business and further the interests of the litigants, at the same time minimizing the expense upon the public and the litigants alike, the order of consolidation should be made." *Id.*

In this case, the parties are in agreement that the *Petitions for Judicial Review* filed by the parties seeking judicial review of the *Methodology Order* and the *As-Applied Order* should be consolidated into one proceeding. This Court finds that these *Petitions* involve similar issues, and that consolidation of these *Petitions* will expedite resolution of

this matter. However, pursuant to the Idaho Supreme Court's December 9, 2009 *Administrative Order* and this Court's subsequent July 1, 2010 *Administrative Order*, and for the reasons set forth above concerning the *Motion to Renumber Appeals*, the *Petitions* will be consolidated in a single proceeding before the SRBA District Court rather than in Gooding County Case CV-2008-551.

III.

ORDER

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. Idaho Ground Water Appropriators, Inc.'s and the City of Pocatello's *Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-551* is **denied.**

2. The *Petitions for Judicial Review* filed by the Idaho Ground Water Appropriators, Inc., the Surface Water Coalition and the City of Pocatello respectively, seeking judicial review of the Director's *Methodology Order* and *As-Applied Order*, shall be consolidated into Gooding County Case No. CV-2010-382.

Dated July 29, 2010

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER DENYING MOTION TO RENUMBER and CONSOLIDATING PROCEEDINGS INVOLVING PETITIONS FOR JUDICIAL REVIEW OF "METHODOLOGY ORDER" AND "AS-APPLIED ORDER"** were mailed on July 29, 2010, by first-class mail to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Idaho Ground Water Appropriators, Inc.
Represented by:
Randall C. Budge
201 E Center
PO Box 1391
Pocatello, ID 83204-1391

Idaho Ground Water Appropriators, Inc.
Represented by:
Candice M. McHugh
101 S Capitol Blvd, Ste. 208
Boise, ID 83702

A& B Irrigation District
Burley Irrigation District
Milner Irrigation District
North Side Canal Company
Twin Falls Canal Company
Represented by:
Travis L. Thompson
Paul L. Arrington
113 Main Ave W. Ste 303
PO Box 485
Twin Falls, ID 83303-0485

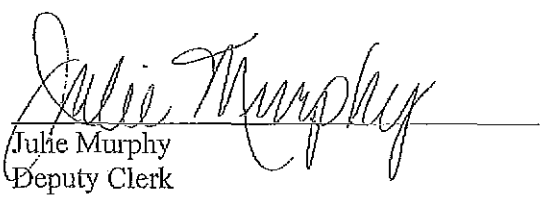
American Falls Reservoir District #2
C. Thomas Arkoosh
301 Main St.
PO Box 32
Gooding, ID 83330

Minidoka Irrigation District
Represented by:
W. Kent Fletcher
1200 Overland Ave.
PO Box 248
Burley, ID 83318

Gary Spackman
Interim Director, IDWR
Represented by:
State of Idaho
Deputy Attorney Generals
Garrick L. Baxter
Chris M. Bromley
PO Box 83720
Boise, ID 83720

City of Pocatello
Represented by:
A. Dean Tranmer
PO Box 4169
Pocatello, ID 83201

City of Pocatello
Represented by:
Sarah A. Klahn
511 16th St Ste 500
Denver, CO 80202



Julie Murphy
Deputy Clerk

ADDENDUM B

SEP – 7 2010

In the Supreme Court of the State of Idaho

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-04013B AND 36-07148 (CLEAR SPRINGS DELIVERY CALL).

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210 AND 36-07427. (BLUE LAKES DELIVERY CALL).

CLEAR SPRINGS FOODS, INC.,

Petitioner-Respondent-Cross Appellant,

v.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner-Respondent-Cross Appellant,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, MAGIC VALLEY GROUND WATER DISTRICT,

Cross Petitioners-Appellants- Cross Respondents,

v.

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

Respondents-Respondents on Appeal-Cross Respondents.

ORDER DENYING PETITION TO APPEAR AS AMICUS CURIAE

Supreme Court Docket No. 37308-2010
Gooding County Docket No. 2008-444

Ref. No. 10-394

v.

IDAHO DAIRYMEN'S ASSOCIATION, INC., and RANGEN, INC.,

Intervenors-Respondents-Cross Respondents.

POCATELLO'S PETITION TO APPEAR AS AMICUS CURIAE was filed by counsel for the City of Pocatello on August 13, 2010. Thereafter, CROSS-APPELLANTS/RESPONDENTS' JOINT MOTION TO DENY CITY OF POCATELLO'S PETITION TO APPEAR AS AMICUS CURIAE was filed on August 27, 2010. The Court is fully advised; therefore, after due consideration,

IT HEREBY IS ORDERED that the POCATELLO'S PETITION TO APPEAR AS AMICUS CURIAE be, and hereby is, DENIED.

DATED this 1st day of September 2010.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record
Counsel for City of Pocatello

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief, Intervenor-Appellant City of Pocatello's Reply Brief in Docket No. 42836-2015, 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:

sctbriefs@idcourts.net
jmay@maybrowning.com
robynbrody@hotmail.com
fxh@haemlaw.com
rcb@racinelaw.net
tjb@racinelaw.net
bjh@racinelaw.net
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov
kimi.white@idwr.idaho.gov
deborah.gibson@idwr.idaho.gov
dtranmer@pocatello.us
jrigby@rex-law.com
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com
jf@idahowaters.com
wkf@pmt.org

Dated and certified this 29th day of June, 2015.

Sarah A. Klahn