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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 AND 36-07694 (RANGEN, INC.)	)	**CM-DC-2011-004** **SURFACE WATER COALITION'S RESPONSE TO IGWA'S PETITION FOR RECONSIDERATION**

COME NOW, 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 (collectively, the "Surface Water Coalition" or "Coalition") by and through their undersigned attorneys of record, and submit this Response to *IGWA's Petition for Reconsideration* filed on February 12, 2014. The Idaho Ground Water Appropriators, Inc. ("IGWA") seek reconsideration of certain issues in the Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("*Final Order*").

The Coalition opposes IGWA's petition and its arguments about a "10% trim line" and application in this case or any other proceeding where the Director utilizes ESPAM 2.1. The Director should deny IGWA's petition accordingly.

RESPONSE

I. The Former Director's Use of a 10% "Trim Line" With a Perceived "Margin of Error" for ESPAM 1.1 is Not Relevant or Applicable to ESPAM 2.1 or its Use in Conjunctive Administration.

IGWA characterizes the Director's decision relative to the Great Rift barrier as a "1% trim line." *IGWA Petition* at 2. IGWA then argues this decision is contrary to former Director Dreher's "10% trim line" associated with the use of ESPMA 1.1 and will result in "re-litigation of issues decided previously in the SWC case."[1] *Id.* at 3. Finally, IGWA analogizes concepts of "excessive waste" and "hoarding" to support its theory that a "10% trim line" has been established by Idaho law and is binding precedent. *Id.* at 3-7. IGWA misinterprets Idaho law, confuses the prior "10% trim line" or "margin of error" associated with ESPAM 1.1, and completely misrepresents what was litigated on this issue in the SWC Delivery Call case. Therefore, the Director should deny IGWA's petition for reconsideration.

a. The 10% Trim Line Used with ESPAM 1.1 Does Not Apply to ESPAM 2.1.

IGWA does not contest the Director's use of ESPAM 2.1 in this case. Although IGWA accepts ESPAM 2.1, it confusingly references the former Director's use of a "10% trim line" associated with his perceived "margin of error" related to ESPAM 1.1 as if it somehow applies in this case. To the contrary, the Director did not use ESPAM 1.1 in response to Rangen's delivery call. Instead, the Director used ESPAM 2.1, which he found, by clear and convincing evidence,

[1] IGWA alleges the "unappealed district court ruling in the Surface Water Coalition case that upheld a 10% trimline is also binding precedent for the Director." *IGWA Petition* at 6. The District Court in the SWC case incorporated by reference its analysis of the former Director's use of a 10% trim line with ESPAM 1.1 in the *Clear Springs* case. *See Order on Petition for Judicial Review* at 26-27, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. 2009-551 (July 24, 2009) (Hon. J. Melanson). Contrary to IGWA's claim, the case did not establish a 10% trim line as a matter of law or for the Director's use with ESPAM 2.1 in conjunctive administration.

to be "the best scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell." *Final Order*, FF ¶ 96. IGWA does not the dispute the Director's technical findings on this issue. Accordingly, any argument regarding ESPAM 1.1 and its application in prior matters is irrelevant to the case at hand, as well as to any other conjunctive administration where ESPAM 2.1 is utilized.

Contrary to IGWA's assertion, using ESPAM 2.1, a "technical improvement to ESPAM 1.1", will not result in the "re-litigation of issues decided previously in the SWC case." *IGWA Petition* at 3. Tellingly, IGWA does not identify what "issues" it claims were decided in the "SWC case" that cannot be re-litigated here. If IGWA implies that the use of a "10% trim line" with ESPAM 1.1 cannot be re-litigated such a claim is irrelevant and inapplicable where the Director used ESPAM 2.1 and concluded it did not have a quantifiable "margin of error" associated with any model uncertainty. *Final Order* at 39, CL ¶ 49.

Moreover, IGWA's current claims about an immutable "10% trim line" contradict its prior arguments and efforts to expand that number. For example, IGWA attempted to offer expert testimony that conceptual uncertainty in ESPAM 2.1 should be quantified at twenty percent (20%). *See* Tr. Day 11, p. 140, lns. 16-19. IGWA further attempted to offer expert testimony that a trim line greater than 10% should be applied. *Id.* p. 224, lns. 6-10. The Hearing Officer struck this testimony. *See Order Granting May 13, 2013 Motion to Strike Certain Testimony of Dr. Charles Brendecke* (May 16, 2013). If the "10% trim line" was set in stone and could not be "re-litigated," then IGWA's prior actions in this case clearly show the association believed otherwise as it sought to increase that percentage at hearing. In the end it doesn't matter. Since the Director used ESPAM 2.1, any perceived margin of error associated with ESPAM 1.1 and its prior application is irrelevant and inapplicable to this case.

b. IGWA Misconstrues Alleged "Excessive Waste" or "Hoarding" by Rangen, Defenses it Failed to Prove by Clear and Convincing Evidence at Hearing.

Without any technical or scientific basis to dispute the Director's use of ESPAM 2.1 and his finding that model uncertainty cannot be quantified, IGWA once again resorts to subjective claims that "excessive waste" and "hoarding" must temper conjunctive administration. IGWA misreads Idaho law on these subjects and wrongly attempts to meld them into the concept of model uncertainty and application of a trim line.

No water user has the right to "waste" water. Beneficial use is the measure and limit upon the extent of a water right. *See A&B Irr. Dist. v. Spackman*, 315 P.3d 828, 155 Idaho 640 (2013). Waste or the "failure to put the decreed quantity to beneficial use is a defense to a delivery call." *In the Matter of the Petition for Delivery Call of A&B Irrigation District*, Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. CV-2009-647 at 33 (May 4, 2010) (Hon. E. Wildman) ("*A&B Order*"). Waste by the senior is a defense that must be proven by junior appropriators by clear and convincing evidence. *See* 315 P.3d at 841; *A&B Irr. Dist v. IDWR*; 153 Idaho 500, 524 (2012). IGWA failed to carry this burden at hearing, and the Director found that Rangen beneficially uses available water. *Final Order* at 35, CL ¶ 30.

IGWA confuses the concept of a senior's "waste" with water that a junior appropriator does not have a right to use. If groundwater rights junior to Rangen's July 13, 1962 surface water right are curtailed, water that does not arrive for use at Rangen's facility is not "wasted" or "hoarded" by Rangen. Instead, that water either remains in the aquifer for use by other ground water users or will flow to other springs and river reaches where that water can be put to

beneficial use by other senior surface water rights. In light of the continued moratorium[2] on new appropriations in the ESPA, and the fact that certain senior surface water rights are curtailed every year, water that improves aquifer levels or flows to other springs and river reaches is needed and will be put to beneficial use. In no sense is the curtailed water "wasted" or "hoarded" by Rangen. IGWA simply misses the point on how those issues apply to analyze a senior's water use in administration.

Moreover, as found by the Director, the ESPA suffers from a continued state of deficit of nearly 300,000 acre-feet per year. *See Final Order* at 16, FF ¶ 75. This annual deficit, approximately the capacity of Arrowrock Reservoir, causes declining ground water levels and reduced discharge to hydraulically connected reaches of the Snake River and tributary springs. Accordingly, curtailment that sustains and improves the health of the ESPA is not "waste" in any sense, and certainly not in the context of a senior user wasting water under Idaho law. IGWA's misinterpretation of this issue should be rejected.

Despite its misinterpretation of the "waste" issue, IGWA rightly argues that *Clear Springs Foods, Inc. v. Spackman* does not support the use a model trim line in this case. IGWA notes that the Idaho Supreme Court did not sanction a "1%" trim line in *Clear Springs*. *IGWA Petition* at 6. The Coalition agrees. The issue of model uncertainty and the perceived margin of error used with ESPAM 1.1 in the *Clear Springs* case have absolutely no application to ESPAM 2.1 or the Director's decision not to administer ground water rights located east of the Great Rift. Accordingly, as IGWA suggests, the Director cannot use the *Clear Springs* case as justification

[2] *See Amended Moratorium Order* (Eastern Snake Plain Area) (April 30, 1993); available on-line at IDWR's website: http://www.idwr.idaho.gov/WaterManagement/Orders/Moratorium/orders_moratorium.htm.

for any trim line associated with ESPAM 2.1. *See IGWA Petition* at 6 ("the *Clear Springs Foods* decision does not provide a reliable basis for a 1% trimline").[3]

That being said, IGWA mistakenly interprets *Clear Springs* as justifying its arguments concerning "waste," "hoarding," and "reasonable use." *Id.* at 4-5. IGWA selectively quotes the reference to *Poole v. Olaveson* without explaining the context of the statement. In *Clear Springs* the Supreme Court examined CM Rule 20.03 and corrected the rule's misstatements of Idaho law. First, the Court noted that the concept of "full economic development" only appears in Idaho Code § 42-226 and that the statute has no application in a surface water delivery call case. 150 Idaho at 807-808. Any reliance upon that concept in CM Rule 20.03 is therefore misplaced.

Next, the Court rejected the Groundwater Users' theory that "full economic development means priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer." 150 Idaho at 808. The Court found the argument to be contrary to the State Water Plan, its prior decision in *Musser v. Higginson*, and other case law. *See id.* The Court concluded and held 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." *Id.* The Court was clear that water rights in Idaho must be administered conjunctively. The Court did not sanction administration by a balancing of "economics" or vague and unproven claims of "waste" or "hoarding."

IGWA further relies upon *Van Camp v. Emery* and *Schodde v. Twin Falls Land & Water Company* to assert that Idaho law requires a "10% trim line" in conjunctive administration. *IGWA Petition* at 4. Contrary to IGWA's assertions, these cases did not establish a bright line

[3] The Director erroneously concludes that "the applicability of a trim-line was previously litigated in the Clear Springs delivery call" and that "the argument that no trim line is appropriate was considered and rejected in *Clear Springs*." *Final Order* at 37, CL ¶ 42, at 39, CL ¶ 50. Although the District Court upheld the Director's use of a "10% trim line" or "margin of error" with the use of ESPAM 1.1, the Court did not establish a rule of law sanctioning the Director's use of a "trim line" in any context with any model. Indeed, here the Director found no quantifiable margin of error or "trim line" to apply with ESPAM 2.1.

rule where administration that only produces 10% of the curtailed water results in prohibited "excessive waste" or "hoarding of water." Further, neither of these cases establishes a legal basis to arbitrarily assign a 10% "trim line" to the results obtained from ESPAM 2.1. Rather, as the Idaho Supreme Court specifically noted in *Clear Springs*, each case addressed the means of diversion of particular water users under their specific facts. *See* 150 Idaho at 809 ("The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion. . . . The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights") (emphasis added).

IGWA continues to misinterpret these decisions and the Director rightly rejected this argument in the *Final Order*. First, in *Van Camp*, the Court held that the holder of a water right should not be authorized to dam a stream "so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much." 13 Idaho at 754. This holding – dealing with the water user's means of diversion – cannot be read to extend to a balancing of water rights in administration and certainly cannot be read as creating a right to alter a ground water model's results when junior priority water rights are found to be contributing to material injury suffered by a senior surface water user. As referenced above, the Court in *Clear Springs* specifically examined *Van Camp* and confirmed that the water user in that case "had to change his unreasonable means of diversion." 150 Idaho at 809.

Next, *Schodde* did not address water right administration and did not establish the right to alter modeled results by 10% when conjunctively administering water rights. Rather, it addressed the reasonableness of a diversion that required the entire flow of the river in order to fulfill one person's water right. To that extent, the Court recited, as a hypothetical example, a situation wherein 90% of the current of a river was needed in order to divert the other 10%. The

example dealt with the water user's means of diversion and the appropriation of new water rights. Again, the Court in *Clear Springs* noted that the issue in *Schodde* only concerned "his means of diversion." 150 Idaho at 809. Therefore, the case does not apply to limiting or qualifying ESPAM 2.1 for the purposes of conjunctive administration. IGWA is simply wrong to claim these cases reach "waste, hoarding, and reasonable use" in the context of a "10% trim line" for the use of ESPAM 2.1 in conjunctive administration. Further, since the Director found Rangen's means of diversion to be reasonable, these cases have no application to the use of ESPAM 2.1. *Final Order* at 36, CL ¶ 34.

In sum, none of the cases cited by IGWA support its contention that the Director should apply a "10% trim line" in the administration of ground water rights and use of ESPAM 2.1. Moreover, IGWA can point to no technical or scientific basis to show where the Director erred on this point. Consequently, the Director should deny IGWA's petition for reconsideration.

CONCLUSION

The Director correctly found that ESPAM 2.1 is the best available science for estimating the impacts of diversions on the ESPA. The Director also correctly found that there is no quantifiable "margin of error" or "trim line" based upon model uncertainty. The Director further concluded that Rangen beneficially uses water through a reasonable means of diversion. IGWA failed to prove its alleged defenses at hearing and has not shown any error on reconsideration. IGWA's misinterpretation of Idaho case law on the subject of waste or a reasonable means of diversion is no basis to reconsider the Director's adoption and application of ESPAM 2.1.

As such, IGWA's petition for reconsideration regarding a "10% trim line" based upon "waste," "hoarding," or "unreasonable use" is not supported by the facts in the record or Idaho law. The Director should deny IGWA's petition accordingly.

Dated this 25th day of February, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 2014, the above and foregoing document was served on the following via email:

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