

## **IDAHO DEPARTMENT OF WATER RESOURCES**

### **Negotiated Rulemaking - Petition to Amend Rule 50**

Notes from the Public Meeting held on June 2, 2014,  
at the AmericInn Lodge and Suites, Rexburg, Idaho.

\* Due to a technical error there is no audio recording for this meeting. These meeting notes will be posted to the Department's website in lieu of the audio recording.

The meeting was led by Richard Rigby of IDWR. These meeting notes as well as the agenda and roster of attendance for this meeting are posted on the Department's website at the following link:

<http://www.idwr.idaho.gov/WaterInformation/GroundWaterManagement/Petition/Meetings.htm>.

#### Introduction:

- History of Conjunctive Administration on the ESPA
  - The rate of discharge at the Thousand Springs area during the high peak in 1955 was approximately 42,000 cfs. This amount has declined since the peak in 1955 and is now approximately 4,900 cfs. Some of the causes of the decline include:
    - Pumping
    - Changes in irrigation practices.
  - In 1993 the Idaho Supreme Court issued its decision on the Musser delivery call which ordered the Director of the Department to regulate and administer water rights regardless of the complexity.
  - The Conjunctive Management Rules were adopted by the Department in 1994.
  - There are two types of water calls:
    - Surface Water Calls
    - Spring Water Calls.
  - This area is affected by surface water delivery calls. Surface water delivery calls made by the Surface Water Coalition (SWC) are unpredictable because the shortfall depends on the snowpack that year. The Director has to consider many variables including the shortfall each year to calculate the curtailment.
  - This area is not affected by spring water delivery calls. Spring water user delivery calls are more predictable because the supply is static and therefore it is easier to determine the curtailment.
  - Significant water delivery calls were made by the Spring Water Users in 2004 and the Surface Water Coalition in 2005.
  - The year 2010 represents the worst scenario of a surface water shortfall in the amount of 84,000 AF.
  - Work on the Eastern Snake Plain Aquifer Model 1.0 began in 1999. ESPAM Version 1.1 (ESPAM 1.1) was adopted in 2004. IDWR is continually working to improve the model. The model is not perfect, but it is the best tool and science available.

- Development of the ESPAM Model 2.1
  - ESPAM Version 2.0 was completed in 2009. Errors were discovered in this version, which lead to the development of version 2.1 (ESPAM 2.1). ESPAM 2.1 was completed in 2012.
  - ESPAM 2.1 calibrates to the spring cell (1% trimline) instead of a reach (10% trimline).
  - Presently, the only active spring call is the Rangen delivery call (CM-DC-2011-004). The water users in this area are outside of the Rangen 1% trim line.
  
- Clear Springs Foods, Inc.'s Petition for Modification of Area of Common Ground Water
  - In 2010, Clear Springs filed its petition to amend rule 50 of the conjunctive management rules (37.03.11) requesting that the area of common ground water boundary be based upon the most recent data/information, specifically the Enhanced Snake Plain Aquifer Model Final Report dated July 2006, Idaho Water Resources Research Institute Technical Report 06-002.
  - The Department initiated the negotiated rulemaking process, held public meetings and received comments.
  - The Director temporarily suspended the rulemaking process in 2011 pending the completion of ESPAM version 2.0 (now 2.1) and the decision in the Rangen Delivery Call (CM-2011-004).
  - With the completion of ESPAM 2.1 and the issuance of the order in the Rangen Delivery Call on January 29, 2014, the Director reinitiated action on Clear Springs' petition on April 11, 2014.
  
- Department's Rulemaking Process and Schedule
  - The deadline to submit comments on the negotiated rulemaking is June 24, 2014. Twenty-one (21) days from the date of the last public meeting (June 3, 2014). During the prior negotiated rulemaking action on this petition the Department received 180 comments. Those comments received are still a part of the administrative record. Supplemental comments are not necessary unless you have new information you wish to be considered.
  - The Department must submit the proposed rule to the Department of Financial Management by August 29, 2014, in order for it to be considered by the legislature at the next legislative session in 2015.
  - Mr. Rigby discussed the information available on the Department's website relating to this matter and how to navigate the webpage.

Discussion/Q&A:

- The three main options for the Department to consider concerning the change in the boundary.
  - 1) Include all the areas from mountain range to mountain range.
  - 2) Use the ESPAM 2.1 boundary.
  - 3) Don't change it.

- The Director is limited to two options when responding to a delivery call:
  - 1) Curtailment; or
  - 2) Mitigation.
  
- There are two ways water users can prepare for delivery calls:
  - 1) Find a way to produce recharge that would replace what they are using.
    - a. Recharge is very viable and valuable option in this area as it establishes credits which will count toward mitigation. If you recharge enough in the good years it may help to get by in the bad.
    - b. Recharge credits decay.
    - c. Recharge legislation is imperative as currently the Director cannot count recharge credits unless a mitigation plan is in place.
    - d. Best long term solution is recharge, but everyone needs to be on the same page.
  - 2) Put money aside to save for a possible curtailment for purchasing water from the rental pool.
  
- Question: Why has this area been included in the boundary? We believed that we were in a perched aquifer?
  - Response: Perched aquifers contribute to the main aquifer.
  
- Question: How long does it take for the water on the bench to get to Milner?
  - Response: This information was not available at the meeting, but the Department stated it would be posted to its website.
  
- Question: At what point does a call become futile? What is a futile call?
  - Response: A futile call is the a delivery call make by the holder of a senior-priority surface or ground water right that, for physical and hydrological reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in the waste of the water resource. The determination of a futile call is dependent on specific elements of the water right making associated with the delivery call, such as season of use, time period, and location.
  
- Question: What is the mechanism the Department is going to use to enforce or enact the use of reach and a futile call?
  - Response: The mechanism will most likely be case law as most of the Department's orders are appealed to the District and Supreme Courts.
  
- Question: Please explain why the use of the trimline was established and why the change was made in the Rangen curtailment order from the prior use of 10% to 1%. Please explain why the 2005 Rangen Call was determined futile with the use of the 10% trimline?
  - Response: The use of the trimline was enacted by the Department as a way to utilize the data provided in the model to more accurately administer a curtailment. ESPAM 1.1 was relied upon in the 2005 Rangen Delivery Call. ESPAM 2.1 was relied upon in the 2011 Rangen Delivery Call. Errors were found in the data used in ESPAM 1.1,

which lead to the development of ESPAM 2.1 which incorporated updated data. The flawed data and errors found in ESPAM 1.1 contributed to the determination of the futile call in the 2005 Rangen Call. With the inclusion of the updated and corrected data in ESPAM 2.1 it was determined that 10% to the reach (data from ESPAM 1.1) was equivalent to 1% to the spring cell (data from ESPAM 2.1). It was further determined that since the percentages were equivalent, the more current data from ESPAM 2.1 should be used to calculate the Rangen curtailments issued in the January 29, 2014 order.

- Question: Why are all the tributary basins not included?
  - Response: The modeling committee determined the areas to be included based upon the availability of monitoring data.
  
- Question: What is the level of refinement in the ESPAM 2.1 in relation to the Rexburg bench? Is the level the same in the other areas that are set to be included in the boundary?
  - Response: This information was not available at the meeting, but the Department stated it would be posted to its website.
  
- Question: What is the standard deviation of the model?
  - Response: Less than 10% error. We are continually working to improve the model.
  
- Comment: All tributary basins should be included in the boundary.
  
- Comment: No changes to the boundary should be made until the recharge legislation has been adopted.
  
- Comment: Due to the gravel soil type in this area, water users here automatically inject recharge and should be credited as such every year.