

Comes now Fremont-Madison Irrigation District (“FMID”), by and through its counsel, Jerry R. Rigby, of Rigby, Andrus & Rigby Law, PLLC, and hereby submits its Response Brief.

INTRODUCTION AND SCOPE OF FMID’S POSITION

FMID’s involvement in the Rangen Call has been largely limited to asserting that the hydrologic effect or impact on Rangen’s water rights from pumping occurring in the FMID area cannot be determined with any degree of certainty, notwithstanding ESPAM 2.1 produces de minimis modeled impacts. As such, the Director correctly found that Rangen’s water rights are not effected by wells located east of the Great Rift. However, FMID also agrees with IGWA’s assertion that the Director erred by not applying the previously administered ten percent (10%) trimline to calls in the ESPA.

STATEMENT OF THE CASE

1. Nature of the Case

On January 29th, 2014, the Idaho Department of Water Resources (“IDWR”) issued a curtailment order, which shut off all ground-water rights that divert from the ESPA at any location west of the “Great Rift,” with priority dates junior to July 13, 1962. Final Order at 42 (R. Vol. 21, p. 4199). IDWR’s order is before this Court for judicial review.

2. Statement of Facts from Final Order Supporting FMID’s Position

The Final Order noted that the Great Rift zone extends north to south across the plain from the Craters of the Moon to just west of American Falls Reservoir, and impedes the transmission of water through the aquifer. Final Order at 15, ¶71 (R. Vol.21, p. 4172). The Great Rift zone is a zone of lower hydraulic conductivity which impedes the transmission of

water through the aquifer. *Id.*

The Director found that the predictive uncertainty for various pumping locations on the eastern side of the Great Rift is higher than on the western side. Several pumping location evaluations on the eastern side of the Great Rift had negligible impacts on Clear Lakes. *Id.* at 19, ¶90 (R. Vol.21, p. 4206).

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

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

Id. at 39, ¶50 (R. Vol.21, p. 4226).

In past ground water calls in the ESPA, such as *Clear Springs Foods* and *Blue Lakes*, a trim line of 10% was used to limit the area of curtailment. *Id.* at 16, 17, ¶79 (R. Vol.21, p. 4203-4); *Id.* at 17, ¶80 (R. Vol.21, p. 4203).

3. Standard of Review

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

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;

- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3).

Further, the Court must affirm the director, despite any errors, unless it finds that the errors result in prejudice to the substantial rights of the appellant. Idaho Code § 67-5279(4). Issues of fact must be confined to the record, and the Court should not substitute its judgment for that of the Director as to the weight of the evidence on issues of fact. Idaho Code §§ 67-5277 and 67-5279(1). If the agency's action is not affirmed, it should be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-4279(3).

ISSUE PRESENTED

1. Was IDWR correct in applying the so called "Great Rift trimline"?
2. Did the IDWR abuse its discretion in failing to apply a trimline of not less than 10%?

ARGUMENT

1. The Director correctly set a trim line east of the Great Rift.

The Director's decision not to curtail wells east of the Great Rift is supported by substantial and competent evidence. Bryce Contor, a participant in the creation and calibration of the ESPAM models and the author of the water budget used in the models testified regarding the lack of precision and the limitations of the model, especially when the distance is great and there are intervening natural barriers, such as the Great Rift. *See* Contor, Tr. Vol. 12, p. 2860:3-23.

Furthermore, Mr. Brendeke's testified regarding rules built into the model and how they

affect its ability to deal with distant wells. Most importantly, when asked, Mr. Brendeke agreed that the model has been programmed to show a pre-assumed impact of ANY well to Rangen's water rights regardless of where the well is located. *See Brendeke*, Tr. Vol. 11, pp. 2756:3 to 2758:19; *see also* Contor, Tr. Vol. 12, pp. 2856:4-25; 2857:1-24. In fact, the model would actually show an impact to Rangen's water rights of a well located in Island Park even though everyone would agree that such a well could not possibly impact Rangen's water right. *See Brendeke*, Tr. Vol. 11, p. 2757:6-16. The model has certain "rules" built into it, one of those being that regardless of any measured hydrological impacts a well actually has upon a spring, the model MUST find impact. *See Brendeke*, Tr. Vol. 11, pp. 2756:3 to 2758:19; *see also* Contor, Tr. Vol. 12, p. 2859:12-24. This rule casts substantial doubt on any modeled impacts from a well located a great distance away and through many natural barriers.

As Mr. Contor's testimony and reports further described how the "built in rules" to the model work, all active cells are configured to convey water and hydraulic signals, including transmissivity values that are greater than zero. This means that unavoidably, any point within the active model domain will be shown to have some mathematical effect on any other point within the model domain. Ex. 4003 p. 5. Mr. Contor testified that this decision was made by the modelers and the ESHMC (modeling committee) at the beginning of model construction. Therefore, the fact that there is a mathematical relationship shown between FMID and the Rangen Cell is a result of this modeling decision, not because it has been measured.

A priority right does NOT grant a senior rightholder the right to curtail another's use of its valid junior water rights if the added benefits to the priority right are so minimal, *de minimis*,

or uncertain, that it amounts to waste and otherwise stops the full economic development of the water resource (I.C. §42–226). On point is the language quoted by IGWA in its Post Hearing brief, from the Idaho Supreme Court case of *Van Camp v. Emery*, 13 Idaho 202 (1907), where the court recognized that even though the senior might derive some benefit from curtailing the juniors from use of the source, it cannot do so to the total detriment of the juniors. This principle has been upheld in the United States Supreme Court case of *Schodde vs. Twin Falls Land and Water Company*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (as also addressed in IGWA's Post Hearing brief). Furthermore, in the case of *Van Camp*, the senior priority was actually receiving some proven benefit to its pasture through sub irrigation, yet was denied the right to curtail the juniors. In the present case, it is not clear that there would be ANY benefit to Rangen from the curtailment of wells east of the Great Rift.

Mr. Contor further addressed the great distance between FMID and Rangen. There are a large number of physical, geological and hydrogeological features that lie between Rangen and FMID. *See* Contor, Tr. Vol. 12, p. 2860:2-15. The representation of each of these in the model is subject to uncertainty, and the uncertainty is compounded by the number of features and the large distance. *Id.* All told, it is doubtful that the model could accurately predict any impact from the FMID wells to the Rangen springs. Dr. Brendecke confirmed that the distance involved, the natural barriers, and other factors, would cause any impact calculations from FMID's well pumping to be "lost in the noise". *Brendeke*, Tr. Vol. 11, p. 2760:8.

Furthermore, both the timing and magnitude of effects from FMID's wells are reduced by zones of low aquifer transmissivity. Both the Mud Lake Barrier and the Great Rift are zones of

low transmissivity. *See* Contor, Tr. Vol. 12, p. 2860:3-7; and 2876:9-12. This has been deduced by observation of water levels in wells across the plain, and by the experts understanding of the geology of both regions. Mr. Contor's uncontradicted testimony fully supports the ruling by the Director that the Great Rift is a proper "trimline" to any pumping on the opposite side of Rangen's water rights.

Mr. Contor testified that the modeling used for the Rangen Call was performed in ESPAM2.0, and that work by IDWR suggests that for the Rangen Call, ESPAM2.1 results should be very similar to ESPAM2.0 results. *See* Contor, Tr. Vol. 12, p. 2871:3-12. However, because the modeling was performed in superposition mode, one of the implications of using it is that results are additive and scalable. *See* Contor, Tr. Vol. 12, p. 2858:8-23. This means that the 0.04% value as was testified to by Mr. Contor and described in on page 6 to Exhibit 4001, is applicable regardless of the magnitude of curtailment or its temporal duration. *See* Contor, Tr. Vol. 12, p. 2853:15 to 2855:23. If one adds the uncertainty described previously to the 0.04% number, while the model construction made it impossible for the representation to be zero, the fact that the number is extremely small indicates that the data supports the understanding that if there is an effect it is so de minimis that an impact can't be determined with any degree of certainty.

Both Dr. Brendecke and Mr. Contor testified that the model is a regional model and not a single model cell model. *See* Contor, Tr. Vol. 12, p. 2902:9-11; *see also* Brendeke, Tr. Vol. 11, pp. 2757:21 to 2758:8. Therefore, it is not designed to be precise in determining impacts to a single cell such as the Rangen diversions. Because of this fact, it only adds to the uncertainty of

determining ANY impact from FMID wells located a great distance from the Rangen rights.

Much was argued by Rangen's experts as to how important the uncertainty of +/- 17% water budget was to the model. *See* Contor, Tr. Vol. 12, pp. 2881:9-25; 2882:1-2; 2883:2-17; *see also* Brendeke, Tr. Vol. 11, pp. 2759:1-17. However, the fact of the matter is that there was and continues to be an uncertainty in the water budget of +/- 17%, which has gone into the model(s) and it clearly has an impact on the uncertainty of the model to some significant degree. *Id.*

2. The Director should have continued to implement a 10% trim line.

Even though the Director has correctly and appropriately used the Great Rift barrier to exclude from Rangen's call any pumping impacts taking place Northeast of the Great Rift, and even though FMID has not appealed the Director's failure to implement a 10% trim line, based on Idaho case law, FMID agrees with IGWA's assertion that the Director should continue to apply a trimline of no less than 10% in its Final Order. Such application is the only fair and appropriate way to correct the imprecise modeled impacts to FMID and other similarly situated water users throughout the basin. The use of the Great Rift as a line of demarcation for the zone of curtailment, and the use of a 10% trimline are not mutually exclusive. It is FMID's position that it is entirely appropriate to add the natural and distinct barrier caused by the Great Rift as an added layer to the 10% trimline. The Director should have applied both.

With the support of previous Idaho and Supreme court cases, as cited in the IGWA Post Hearing brief, previous Directors have correctly implemented and adhered to a trimline which has correctly protected FMID and similarly situated wells from curtailment when the model

shows 10% or less of the impacts would ever reach a call area. As cited by IGWA, Director Dreher used the following language to describe when he would not curtail a junior: “if we **didn’t know** whether curtailment would result in a **meaningful** amount of water reaching the calling senior right.” *In The Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-07210, and 36-07427, et al., Hearing. Tr. pp. 1166-68 (December 6, 2007) (emphasis added)*. He also used such appropriate rationale as “only when you know it will result” instead of “it might result” when deciding whether to curtail. *Id.*

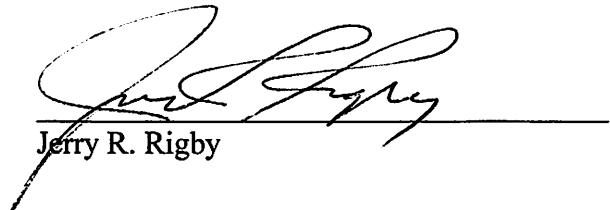
3. FMID adopts IGWA’s argument in sections 1, 2.1, 2.2, 2.3, 2.4, 2.6, and 3 of its Opening Brief

FMID has read and hereby concurs with IGWA’s argument in Sections 1, 2.1, 2.2, 2.3, 2.4, 2.6, and 3 of its Opening Brief, and therefore fully incorporates those arguments into this Response Brief.

CONCLUSION

The Court should affirm the Director’s use of the Great Rift as a line of demarcation to identify wells having an effect on Rangen and his decision not to curtail water users to the east of the Great Rift. However, the Court should rule that the Director erred by failing to also adopt a 10% trimline and remand the issue to Director with instructions that he do so.

DATED this 7th day of August, 2014.



Jerry R. Rigby

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I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 7th day of August, 2014.

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