IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (RANGEN, INC.) IDWR DOCKET NO. CM-DC-2011-004.

IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Appellant on Appeal,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent-Respondent on Appeal,

v.

RANGEN, INC.,

Petitioner-Respondent on Appeal,

v.

FREMONT MADISON IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, THE CITY OF POCATELLO,

Intervenors-Respondents on Appeal.

Supreme Court Docket No. 42775-2015

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

IDAHO DEPARTMENT OF WATER RESOURCES' BRIEF IN RESPONSE TO IGWA'S OPENING BRIEF

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

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out of an appeal from two final orders issued by the Director ("Director") of the Idaho Department of Water Resources ("Department") in response to the December 13, 2011, *Petition for Delivery Call* ("Petition") filed by Rangen, Inc. ("Rangen") alleging water right nos. 36-02551 and 36-07694 are being materially injured by junior-priority ground water pumping. The two final orders are the January 29, 2014, *Final Order Regarding Rangen, Inc.'s Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order") and the March 4, 2014, *Order on Reconsideration*. The Director, pursuant to the *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"), concluded that Rangen's senior water rights are being materially injured by junior ground water pumping and ordered curtailment of certain ground water rights junior to July 13, 1962, unless mitigation is provided. R. Vol. XXI, p. 4229.

The Idaho Ground Water Appropriators, Inc. ("IGWA"), present five issues on appeal. The first four issues relate to the Director's adoption of a trim line based on the Great Rift, a volcanic rift zone bisecting the Eastern Snake Plain Aquifer ("ESPA") that impedes transmission of water through the aquifer. First, IGWA argues the Director misinterpreted the legal standard for exercising discretion in adopting a trim line. *IGWA's Opening Brief* at 21. Second, IGWA challenges the adequacy of the Director's analysis of the trim line, arguing the Director did not comply with the requirement in Idaho Code § 67-5248 to provide a reasoned statement in support of the trim line decision. *Id*. Third, IGWA argues the Director abused his discretion by failing to account for model error in establishing a trim line. *Id*. Fourth, IGWA argues the Director abused his discretion by not further reducing the area of curtailment. *Id*. The final issue

raised by IGWA relates to the source of Rangen's water supply. In the underlying delivery call proceeding, the Director interpreted the Snake River Basin Adjudication ("SRBA") partial decrees for Rangen's water rights. Based on the plain language of the decrees and previous Idaho Supreme Court decisions, the Director concluded the source of Rangen's water rights is surface water, not ground water. R. Vol. XV, p. 3174. IGWA challenges this determination, arguing the source of Rangen's water rights is ground water. *IGWA's Opening Brief* at 21.

B. STATEMENT OF FACTS

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

C. PROCEDURAL BACKGROUND

Rangen filed a delivery call in 2003, seeking to curtail junior-priority ground water users. In February of 2004, the former Director of the Department, Karl Dreher, ordered curtailment of all ground water rights in Water District 130 with priority dates junior to July 13, 1962 (the priority date of Rangen's water right no. 36-02551). R. Vol. I, p. 130. Shortly thereafter, the Enhanced Snake Plain Aquifer Model ("ESPAM") version 1.0 ("ESPAM 1.0"), which was developed by the Department in working with the Eastern Snake Hydrologic Modeling Committee ("ESHMC"), was released. Based on the curtailment predictions of ESPAM 1.0, Director Dreher withdrew his curtailment order on May 19, 2005, concluding that Rangen's delivery call was futile. R. Vol. I, p. 189.

The ESHMC was in the process of finalizing an update to the model when, on December 13, 2011, Rangen renewed its delivery call by filing its Petition with the Department alleging it is not receiving all of the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694.

R. Vol. I, p. 4-5. The Petition requested the Director administer and distribute water consistent with the upcoming update to the model ("ESPAM 2.0") in accordance with the prior appropriation doctrine and curtail junior-priority ground water pumping as necessary to deliver Rangen's water. *Id.* at 8. Because ESPAM 2.0 was not complete when Rangen renewed its delivery call, the proceeding was stayed pending completion of the updated model.

Several dispositive motions were filed prior to the delivery call hearing. Of relevance here, Rangen filed a *Motion* and *Brief in Support of Motion for Partial Summary Judgment Re: Source*. Rangen sought a ruling that the source for its water rights, the "Martin-Curren Tunnel,"[1] is surface water, not ground water.[2] R. Vol. XIII, p. 2570. The Director granted Rangen's motion on this issue. R. Vol. XV, p. 3177. The Director reviewed the SRBA partial decrees for Rangen's water rights and concluded they "show that Martin-Curren Tunnel is unambiguously surface water." R. Vol. XV, p. 3174. The Director also concluded that prior Idaho Supreme Court decisions decided this issue definitively. *Id.*

The hearing on Rangen's delivery call commenced on May 1, 2013, and concluded on May 16, 2013. The hearing was bifurcated. The first part of the hearing focused on issues of material injury and beneficial use and the second part of the hearing focused on issues related to ESPAM 2.1.[3]

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[1] The terms "Martin-Curren Tunnel" and "Curren Tunnel" are used interchangeably by the parties.

[2] Rangen also sought summary judgment on the issue of whether Rangen was limited to only water emitting from the Martin-Curren Tunnel. R. Vol. XV, p. 3171. That issue was not appealed by IGWA, but has been appealed by Rangen and is addressed in *Idaho Department of Water Resources' Brief in Response to Rangen's Opening Brief* filed in Docket No. 42772-2015.

[3] ESPAM 2.0 was updated shortly before the hearing commenced. R. Vol. XXI, p. 4205. The latest version is referred to as ESPAM 2.1. *Id.*

On January 29, 2014, the Director issued the Curtailment Order. The Director concluded Rangen's water right nos. 36-02551 and 36-07694 are being materially injured by junior ground water diversions. R. Vol. XXI, p. 4228. As to the use of ESPAM 2.1 for determining the impact of junior ground water pumping on Rangen's water rights, the Director determined that:

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

Id. at 4224.

Whether there should be a trim line associated with ESPAM 2.1 and if so, the nature and extent of the trim line, were issues raised in the hearing. The Director adopted a trim line based upon a known geologic feature on the ESPA referred to as the Great Rift. The Director focused on the diminishing benefits to Rangen from curtailment of junior-priority ground water rights on the eastern side of the Great Rift (Findings of Fact 105-111; R. Vol. XXI, pp. 4211-16) and acknowledged uncertainty surrounding ESPAM 2.1 model predictions (especially east of the Great Rift) (Findings of Fact 91, 96; R. Vol. XXI, pp. 4206, 4209). The Director recognized that "[t]he real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right" and concluded "[t]he use of the Great Rift … for a trim line strikes an appropriate balance." R. Vol. XXII, p. 4466. The Director determined that a trim line should be used in conjunction with the application of ESPAM 2.1 because: "the portion of benefits of curtailed ground water use east of the Great Rift that would accrue to the Rangen spring complex is generally less than 1%." Finding of Fact 105, Figure 1. Thus, the Director concluded that the "effect of the Great Rift on

propagation of impacts to Curren Tunnel should be taken into consideration when deciding on a trim line."

ESPAM 2.1 simulations predicted that 9.1 cfs of the decline in the flow from the Martin-Curren Tunnel, the source of Rangen's senior water rights, could be attributed to junior-priority ground water pumping west of the Great Rift and in the area of common groundwater supply. R. Vol. XXI, pp. 4215, 4222. Curtailment of junior ground water irrigation west of the Great Rift would dry up approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Martin-Curren Tunnel. *Id.* at 4215. In contrast, curtailment of junior ground water diversions east of the Great Rift would dry up approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Martin-Curren Tunnel. *Id.* The Director concluded curtailment of ground water diversions 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." *Id.* at 4227. Therefore, the Director ordered that holders of junior-priority ground water rights west of the Great Rift and in the area of common ground water supply be curtailed unless they implemented a mitigation plan that provided "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id*. at 4229.

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

On March 28, 2014, IGWA filed a petition seeking judicial review of the Director's Curtailment Order and subsequent *Order on Reconsideration* (Case No. CV-2014-179). On March 24, 2014, Rangen filed a petition seeking judicial review of the Director's Curtailment

Order and subsequent *Order on Reconsideration* (Case No. CV-2014-1338). On April 22, 2014, the District Court granted motions by Pocatello and the Surface Water Coalition ("SWC")[4] to intervene in both judicial review proceedings. On June 20, 2014, the District Court entered an order consolidating Case No. CV-2014-179 into Case No. CV-2014-1338.

On October 24, 2014, the District Court entered its *Memorandum Decision and Order on Petitions for Judicial Review,* Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179) (Oct. 24, 2014) ("Memorandum Decision") affirming the Director on the determination that the source of Rangen's water rights, the Martin-Curren Tunnel, is surface water, but concluding the Director erred by applying the Great Rift trim line. The District Court did not adopt IGWA's argument that the Director erred because the trim line must be smaller. Instead, the District Court concluded the authorities cited by the Director did not support application of any trim line. *Memorandum Decision* at 37.

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

II. ISSUES PRESENTED ON APPEAL

The issues presented by IGWA are as follows:

1. Idaho law permits the holder of a senior-priority water right to curtail junior rights as long as the senior beneficially uses the additional water without hoarding the resource.

    1.1 Did the Director err as a matter of law by concluding he has "limited discretion" to prevent hoarding of Idaho's water resources?

    1.2 Did the Director violate Idaho Code § 67-5248 by not providing a reasoned statement applying the law against hoarding?

    1.3 Did the Director abuse his discretion by failing to account for Model error in applying the law against hoarding?

    1.4 Did the Director abuse his discretion by allowing Rangen to command 100 times more water than it will beneficially use?

2. The Ground Water Act, Idaho Code § 42-229 governs the administration of Idaho's aquifers. The Curren Tunnel meets the statutory definition of a ground water well under the Act. Did the Director violate the Act by administering the Tunnel as a surface water diversion instead of a groundwater diversion, thereby excusing it from the Act.

Respondents' formulation of the issues presented is as follows:

1. Whether the Director properly interpreted the legal standard for exercising discretion.

2. Whether the Curtailment Order complies with the requirement in Idaho Code § 67-5248 to provide a reasoned statement in support of the decision.

3. Whether the Director considered model error in the Curtailment Order and whether the Director is required to establish a trim line because a model has uncertainty or error.

4. Whether the Director erred by not further reducing the area of curtailment.

5. Whether the Director erred by treating the Martin-Curren Tunnel as a surface water source.

III. STANDARD OF REVIEW

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

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

IV. ARGUMENT

A. THE DIRECTOR DID NOT ERR AS ALLEGED BY IGWA

1. History of ESPAM

The history of ESPA modeling efforts provides important context to the Director's decisions regarding application of a trim line in the underlying delivery call proceeding. ESPAM is a calibrated regional ground water model representing the ESPA. R. Vol. XXI, p. 4203. ESPAM 1.0 was developed by the Department working in collaboration with ESHMC, a technical committee comprised of hydrogeologists, ground water modelers, and other technical professionals working on ESPA water issues. *Id.* ESPAM 1.0 simulated the effects of ground water pumping from the ESPA on the Snake River and tributary springs. *Id.* Shortly after its issuance, ESHMC found certain errors in the model and issued an update that was designated ESPAM 1.1.

The ESHMC and the Department began working on an update to ESPAM 1.1 in 2005. The update was referred to as ESPAM 2.0. One key aspect of the update was the refining and re-calibration of the model with new data. *Id.* at 4204. In particular, the model was calibrated using monthly water levels and flow targets, including measured spring discharges within fourteen specific model grid cells. *Id.* The springs captured and used by Rangen were measured throughout the model calibration period, and the monthly average spring discharge in the model cell where spring flows are captured by Rangen was a target for model calibration. *Id.*

Another key issue significant to this proceeding is that an error was discovered in ESPAM 1.1. During development of ESPAM 2.0, the Department discovered that some of the spring discharge values used to estimate discharge for Thousand Springs and springs in the Thousand Springs to Malad spring reach for calibration of ESPAM 1.1 were inaccurate. *Id.*

These values were corrected in the calibration targets for ESPAM 2.0. These corrections resulted in a decrease in the spring discharge target at Thousand Springs and a increase in spring discharge targets in the Billingsley Creek area. Ex. 3203, p. 32. The revised model showed that ground water pumping had a larger impact on the Rangen spring cell than previously thought. R. Vol. XXI, p. 4204.

The revision of ESPAM was in progress when Rangen filed its Petition in December of 2011. The parties to this proceeding agreed to wait until ESHMC completed its work on ESPAM 2.0 before going to hearing.

In July of 2012, ESHMC determined the calibration of ESPAM 2.0 was complete and recommended the Department begin using ESPAM 2.0 rather than ESPAM 1.1 for ground water modeling. R. Vol. XXI, p. 4205. In response, an order was issued adopting ESPAM 2.0 for use in the Rangen delivery call. *Id*. However, during preparation of the final project report, minor data calculation mistakes were discovered in the model input data used for calibration. *Id*. The model was re-calibrated in November 2012, resulting in the release of ESPAM 2.1. In January of 2013, the ESHMC endorsed the use of ESPAM 2.1 in place of ESPAM 2.0. *Id*. ESPAM 2.1 was used by the Department and the parties in the Rangen delivery call proceeding to simulate the effects of ground water withdrawals on flows available to the Rangen Facility.

Like ESPAM 1.1., ESPAM 2.1 is a numerical groundwater model developed for the purpose of determining the effects of groundwater pumping on discharge to spring and river reaches, such as the Rangen spring cell. Ex. 3203, p. 2. The model incorporates the spatial distribution of recharge and groundwater pumping, a large number of water level and aquifer discharge observations, regional-scale hydrogeology, and the transient response of aquifer discharge to spatially and temporally distributed recharge and pumping. R. Vol. XXI, p. 4206.

Some key factors distinguish ESPAM 2.1 from ESPAM 1.1. ESPAM 2.1 is a technical improvement to ESPAM 1.1, in part because ESPAM 2.1 was calibrated to monthly observations of spring discharge within individual model cells and is capable of simulating the impacts of depletions from or accretions to the aquifer on spring discharge within those model cells. R. Vol. XXI, p. 4224. ESPAM 1.1 was calibrated to significantly fewer spring discharge data. *Id.* ESPAM 1.1 was only capable of simulating depletions from or accretions to a group of springs that, in total, contribute water to larger segmented reaches of the Snake River. *Id.* In ESPAM 2.1, spring discharge in the model cell where Rangen's water is derived was a target used for calibration of the model. *Id.* The outflow of water in the vicinity of the Rangen Facility was identified as a model calibration target because flows from the Rangen Facility had been measured over a sufficiently long period of time and with enough frequency. *Id.* This is significant because when determining the impact of ground water pumping on the springs under ESPAM 1.1, the model could only calculate the benefits of curtailment that would accrue to the reach of the river in which the senior's point of diversion was located. With the updated model, the Director can now calculate the benefits of curtailment that would accrue to a much smaller area. In this case, ESPAM 2.1 allowed the Director to calculate the benefits of curtailment to the Rangen spring cell itself.

While IGWA criticized ESPAM 2.1 in the underlying delivery call proceeding, the Director found the model is the best tool available to administer water in the ESPA:

> The criticisms raised [by IGWA] fail to persuade the Director that ESPAM 2.1 should not be used in this proceeding. The Director finds, based upon clear and convincing evidence, that ESPAM 2.1 is the best technical scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell. The Director acknowledges that there is uncertainty in the model predictions, but disagrees with IGWA's conclusion that ESPAM 2.1 is biased toward over-predicting impacts to flows at the Rangen model cell.

R. Vol. XXI, p. 4209. The Director concluded:

> Because numerical models are approximations of complex physical systems, aquifer modeling is a dynamic process. ESPAM 2.1 is the result of improvements to previous versions of the model, and it will likely be improved upon through future efforts of the Department and the ESHMC. … While there is the potential to improve the model given additional time and resources, ESPAM 2.1 is currently the best available scientific tool. Imperfections in the model should not preclude the Department from using the model as an administrative tool, and should not be the basis for using other predictive methods that have less scientific basis.

Id. at 4226.

2. Delineating a Trim Line Using the Great Rift

Substantial testimony was presented at the hearing regarding approximations and possible inaccuracies of using a regional model to simulate depletions to Rangen spring complex discharge caused by ground water diversions from the ESPA. Ground water users diverting from the ESPA argued that any application of the model should acknowledge there is an unquantifiable level of uncertainty in the predictions generated by the model by either discounting the prediction or applying a trim line. Rangen argued that, regardless of inaccuracies in the model, it is the best estimate of the impacts of junior ground water pumping on flows in the Rangen cell, therefore no trim line should be applied.

In reference to delineation of a trim line, the Director explained:

> The Idaho Supreme Court stated, "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." *American Falls*, 143 Idaho at 875, 154 P. 3d at 446. The Director perceives this issue of a trim line as one of limited discretion and applies the legal standards established by Idaho courts. *Clear Springs*, 150 Idaho at 813, 252 P.3d at 94.

R. Vol. XXI, p. 4226. The Director stated that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his

appropriation contrary to the public policy of reasonable use of water." *Id.* at 4227. The Director also stated that "[d]emand should be viewed in light of reasonableness and optimum development of water resources in the public interest." *Id*. The Director further stated:

> "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)). The Idaho Constitution enunciates a policy of promoting optimum development of water resources in the public interest. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); Idaho Const. Art. XV, § 7. ... "The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and ground waters, and it requires that they be managed conjunctively." *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90.

Id.

The Director recognized the Martin-Curren Tunnel and Rangen spring complex are located west of the Great Rift. *Id.* While there is some predicted depletion of Martin-Curren Tunnel discharge attributable to points of diversion east of the Great Rift, the contribution is small. Generally less than 1% of the benefits of curtailment of water users east of the Great Rift will accrue to the Rangen spring cell. *Id.* Even less will be expected to accrue to the Martin-Curren Tunnel. *Id.* The low transmissivity that impedes transmission of water through the aquifer at the Great Rift causes the benefit of curtailment with respect to the number of acres curtailed to diminish significantly east of the Great Rift. *Id.* at 4213, Fig. 3. Curtailment of junior ground water irrigation west of the Great Rift would dry up approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Martin-Curren Tunnel. *Id.* at 4227. Curtailment of junior ground water irrigation east of the Great Rift would dry up approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Martin-Curren Tunnel. *Id.* Curtailment of the additional 322,000 acres east of the Great Rift is only predicted

to produce an additional 1.5 cfs to the Martin-Curren Tunnel. *See* Findings of Fact 104, 109; R. Vol. XXI, pp. 4211, 4215.[5] The Director concluded curtailment of ground water diversions on the east side of the Great Rift is not justified because, "[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227.

The Director also concluded model uncertainty justified use of a trim line. *Id.* In delineating a trim line using the Great Rift, the Director considered uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. *Id.* at 4226. The Director concluded that, while there is generally higher predictive uncertainty on the eastern side of the Great Rift than the western side, impacts from several pumping locations evaluated on the eastern side had negligible impacts on the spring cell evaluated in the Department's predictive uncertainty analysis. *Id.* at 4227.

On judicial review, the District Court focused on this Court's decision in *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) ("*Clear Springs*") and determined the authorities cited by the Director do not support the use of a trim line:

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

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

Memorandum Decision at 37 (citation omitted). The District Court also rejected the Director's reliance on model uncertainty as justification for a trim line. *Id.* at 40.

3. IGWA's Challenges to the Director's Delineation of a Trim Line

IGWA raises four challenges to the Director's application of a trim line. Each is addressed below.

a. The Director correctly interpreted Idaho law regarding his scope of discretion in implementing a trim line.

In discussing his authority to implement a trim line, the Director concluded:

> The Idaho Supreme Court stated, "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." *American Falls*, 143 Idaho at 875, 154 P. 3d at 446. The Director perceives this issue of a trim line as one of limited discretion and applies the legal standards established by Idaho courts. *Clear Springs,* 150 Idaho at 813, 252 P.3d at 94.

R. Vol. XXI, p. 4226. IGWA suggests that inclusion of the term "limited" before the word "discretion," equates to the Director "self-limiting his ability to prevent hoarding of water" inconsistent with Idaho law and this Court's statements in *Clear Springs* and *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007) ("*AFRD#2*"). *IGWA's Opening Brief* at 30-32.

IGWA misconstrues the Director's statement regarding the exercise of discretion. Contrary to IGWA's assertions, the statement that the Director "perceives this issue of a trim line as one of limited discretion" is consistent with the standard for discretion as outlined by this Court in *Clear Springs* and *AFRD#2*. In *Clear Springs*, the spring water users argued the Director abused his discretion in implementing a trim line. *Clear Springs*, 150 Idaho at 816, 252 P.3d at 98. The Court stated:

> 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.

Id. at 813, 252 P.3d at 94 (emphasis added). This decision expressly recognized the Director's discretion has "limits" and the Director must act within those limits.

The Director's inclusion of the term "limited" in his characterization of the discretionary standard recognizes the limits set forth in *Clear Springs* and this Court's decision in *AFRD#2*:

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion … .

AFRD#2, 143 Idaho at 880, 154 P.3d at 451. Inclusion of the word "limited" only signals the Director's recognition that his discretion is not "unfettered." The Director correctly recognized this limit of discretion in the Curtailment Order.

b. <u>The Curtailment Order contains a reasoned statement in support of the application of the Great Rift trim line.</u>

IGWA argues the Curtailment Order violates Idaho Code § 67-5248 by failing to contain a reasoned statement "explaining the point at which curtailment of a well will result in unreasonable hoarding of the resource" and not applying "any threshold as to how much water Rangen can command without using." *IGWA's Opening Brief* at 34. Contrary to IGWA's argument, the Director directly determined the point at which the exercise of priority in this matter becomes unreasonable by delineating and implementing a trim line using the Great Rift. The reasoning, facts, and inferences underlying the Director's decision to use the Great Rift as a trim line are explained in detail in Section A.2 above and in the Curtailment Order in Findings of Fact 105-110 and Conclusions of Law 37-57. The Curtailment Order complies with Idaho Code § 67-5248.

c. The Director considered model error in the Curtailment Order.

IGWA offered several criticisms of ESPAM 2.1 in the underlying delivery call proceeding. Many of those criticisms are described in *IGWA's Opening Brief* at 15. IGWA states it agrees that ESPAM 2.1 is the best available science and should have been used in the delivery call proceeding, but asserts the Director erred by ignoring localized model error and bias in the model's predictions related to Rangen. *Id.* at 36.

The Director did not ignore localized model error and bias in ESPAM 2.1's predictions. Rather, the Director rejected IGWA's criticism that ESPAM 2.1's ability to accurately predict groundwater flow conditions is compromised because it is a regional model that does not consider detailed localized information. Specifically, the Director found that ESPAM 2.1 does consider localized data:

> Although ESPAM 2.1 is a regional model that accounts for variation in geologic features within the constraints of a one-square-mile grid cell, ESPAM 2.1 was calibrated to observed monthly spring discharge in the Rangen model cell. These discharge data reflect local and regional geologic controls on hydrologic responses to ground water pumping and other aquifer stresses. IDWR Staff Memorandum, Ex. 3203, pp. 4, 28.

R. Vol. XXI, p. 4207. The Director continued:

> It is appropriate for the Department to use a regional model as a tool for conjunctive administration of water rights, because the effect of junior ground water pumping within the Eastern Snake Plain, an approximately 11,000 square mile area, on spring discharge and river reaches is a regional-scale question that cannot be addressed with a small-scale, local model. IDWR Staff Memorandum, Ex. 3203, p. 4. ESPAM 2.1 was developed specifically to predict the effect of regional aquifer stresses such as ground water pumping on river reaches and springs, including the model cell containing the Rangen spring. *Id.*, p. 2. ESPAM 2.1 incorporates much more information about the aquifer than can be considered in other predictive methods available to the Department, and incorporates data that specifically reflect how spring discharge in the Rangen cell has responded to regional aquifer stresses in the past. *Id.*, p. 4.

Id. at 4209. The Director also considered IGWA's criticism that ESPAM 2.1 is biased toward over-predicting the impact of groundwater pumping on the Rangen Model cell. The Director rejected this notion:

> Mr. Hinckley's and Dr. Brendecke's arguments that the model is biased to over-predict impacts are based largely on comparison of model results with well and spring discharge data collected only after the year 2000. Ignoring data collected before 2000 compromises their interpretation. It is important to consider both older and more recent data to obtain the best representation of the physical system. IDWR staff memorandum, p. 37. The difference between recent low flow values and older historic values is the spring's response to changes in the aquifer water budget and is critical to the prediction of the impacts of ground water pumping. *Id.*, p. 57. Contrary to IGWA's arguments, evaluation of ESPAM 2.1's calibration results, which under-predict the difference between flows in the 1980s and the 2000s, suggests that the model would be more likely to under-predict the impacts of ground water pumping on spring flows in the Rangen cell. *Id.* IGWA's arguments are further contradicted by the results obtained from Dr. Brendecke's alternative model (AMEC Model 2), which he states "*appears to resolve the overprediction problem noted for ESPAM 2.1 in recent years*." IGWA Ex. 2401, p. 45. AMEC Model 2 predicts a response of 18.0 cfs in response to curtailment within the model domain, which is slightly higher than the ESPAM 2.1-predicted response of 17.9 cfs. IDWR Staff Memorandum, Ex. 3203, p. 57.

R. Vol. XXI, p. 4208-09. Accordingly, IGWA's argument that the Director ignored localized model error and bias in ESPAM 2.1's predictions related to Rangen must be rejected.

IGWA suggests the Director should have assigned a margin of error to ESPAM 2.1 model predictions consistent with prior cases in order to account for model error. *IGWA's Opening Brief* at 35-36. With respect to assigning a margin of error to ESPAM 2.1, the Director concluded:

> Because of the complexity of the model, the margin of error associated with model predictions cannot be quantified. The lack of a quantifiable margin of error associated with the model does not mean that the model should be abandoned, but simply that its use should be tempered with the fact that it is a "simulation or prediction of reality."

R. Vol. XXI, p. 4226. The Director's conclusion that "the margin of error associate with model predictions cannot be quantified" is consistent with the Department's staff report[6] and the testimony of IGWA's own expert, Dr. Charles Brendecke, who testified "any application of ESPAM 2.1 must acknowledge and accept that *there is an inherent and unquantifiable level of uncertainty* in the predictions generated by the model." Tr. Vol. XI, p. 2743-44 (emphasis added).

The conclusion that a specific margin of error cannot be assigned to the model does not mean the Director ignored model error when delineating a trim line. Rather, in delineating a trim line using the Great Rift, the Director considered that there is uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. R. Vol. XXI, p. 4226. The Director also considered that, while there is generally higher predictive uncertainty on the eastern side of the Great Rift, impacts from several pumping locations evaluated on the eastern side of the Great Rift had negligible impacts on the spring cell evaluated in the Department's predictive uncertainty analysis. *Id.* at 4227. Contrary to IGWA's assertions, the Director considered model error and bias when delineating the Great Rift trim line.

d. <u>The Director appropriately exercised discretion in applying the Great Rift trim line</u>.

In the Curtailment Order, the Director concluded that "[t]he real issue [in this case] is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right." R. Vol. XXII, p. 4466. While IGWA agrees the Director has the authority to establish a trim line, its disagreement is

[6] "Predictive uncertainty, as shown in Wylie (2012a), varies with the locations of stresses and responses and cannot be assigned a single numeric value." Ex. 3230, p. 21.

with how the Director exercised his discretion in applying a trim line. *Id.* at 29-30, 38, 50. IGWA argues the Director erred in adopting a trim line based on the Great Rift and should have adopted a trim line that resulted in a smaller area of curtailment. *Id.*

As discussed above, the Director adopted a trim line based upon a known geologic feature on the ESPA referred to as the Great Rift. R. Vol. XXI, p. 4229. The Great Rift is a volcanic rift zone bisecting the ESPA. Finding of Fact 71; R. Vol. XXI, p. 4202. It is comprised of less permeable basalts having lower hydraulic conductivity that impede transmission of water through the aquifer. *Id*. The Director explained the factual basis for adopting the Great Rift trim line, focusing on how the low transmissivity of the Great Rift diminishes the benefits of curtailment east of the Great Rift. The Director found "by clear and convincing evidence, that the portion of benefits of curtailed ground water use east of the Great Rift that would accrue to the Rangen spring complex is generally less than 1%." R. Vol. XXI, p. 4226 (citations omitted). The Director highlighted the limited benefits that accrue from curtailment on the east side of the Great Rift by comparing the number of curtailed acres versus the predicted increase in water that curtailment would bring to Rangen. Findings of Fact 107 & 108; R. Vol. XXI, p. 4213-14.

IGWA argues the Director erred in adopting the Great Rift trim line and asserts the Director should have instead applied a 10% trim line with respect to the model cell containing the Martin-Curren Tunnel because this is what was used in previous delivery calls.[7] *IGWA's Opening Brief* at 38-41. The Director rejected this argument on reconsideration because of a key difference in the way ESPAM 1.1 and ESPAM 2.1 are calibrated. R. Vol. XXII, p. 4464. ESPAM 1.1 was only calibrated to calculate the benefits of curtailment to groups of springs

[7] While IGWA asserts the Department "continues to apply a 10 percent trim line to the [SWC] delivery call," IGWA cites nothing to support its assertion. *IGWA's Opening Brief* at 41. Indeed, there is nothing to support it. There has been no determination regarding what, if any, trim line to apply in the SWC delivery call case since release of ESPAM 2.1.

tributary to a reach of the Snake River (commonly referred to as a "spring reach"). Former Director Karl Dreher applied a 10% trim line and limited the curtailment of ground water rights to areas in which at least 10% of the benefits of curtailment would accrue to a spring reach in which the senior's point of diversion was located. A spring reach contains numerous springs that are not available to the calling party. Because of this, significantly less than 10% of the curtailed use benefitted the calling party. The portion of the benefit received by the calling party can be estimated based on spring flow data for all springs in the reach. As discussed in the Curtailment Order, in the Clear Springs delivery call, Clear Springs was predicted to receive only 6.9% of the benefit to the spring reach. R. Vol. XXI, p. 4225. In the Blue Lakes delivery call, Blue Lakes was predicted to receive only 20% of the benefit to the spring reach. *Id.* In these delivery calls, a 10% trim line limited curtailment to areas where at least 0.69% (6.9% of 10%) and 2% (20% of 10%), respectively, of the curtailed use was predicted to benefit the calling party. *Id*.

ESPAM 2.1, the updated model used in the Rangen delivery call, was improved by calibration to more detailed spring flow data. R. Vol. XXII, p. 4464. The Department can now predict the benefit to individual spring cells instead of the larger spring reaches. *Id.* at 4464-65. Because the model is now calibrated to specific springs cells instead of only spring reaches, a 10% trim line for a spring reach is not comparable to a 10% trim line for specific springs.

IGWA's argument that, because a 10% trim line with respect to the spring reach was used previously a 10% trim line with respect to the model cell containing the Martin-Curren Tunnel should be applied in the Rangen delivery call, is like comparing apples to oranges. To correctly compare, the benefits to the calling party should be examined. The trim line delineated by the Great Rift generally limits the area subject to curtailment to areas where at least 0.63% of the curtailed use benefits the calling party. R. Vol. XXI, p. 4226. Comparing the benefit Clear

Springs (0.69%) and the benefit to Blue Lakes (2%) and the benefit to Rangen at the eastern boundary of the Great Rift trim line (0.63%) establishes that the standard applied previously in the Clear Springs and Blue Lakes delivery calls is similar to the standard used in the Rangen delivery call. Moreover, if the Department were to return to the approach used in previous Thousand Springs delivery calls, it would apply a 10% trim line with respect to the Buhl to Thousand Springs reach, which is the calibrated spring reach in ESPAM 2.0 containing the Martin-Curren Tunnel and numerous other springs. R. Vol. XXII, p. 4465. A 10% trim line for the Buhl to Thousand Springs reach would be similar to the trim line delineated using the Great Rift. *Id*.

The 10% trim line proposed by IGWA is not reasonable when applied to the facts of this case. The prior appropriation doctrine requires that surface and ground water be managed conjunctively. *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89. ("The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively."). Adoption of a 10% trim line in this case is inconsistent with the principles of conjunctive management and is inconsistent with the need to balance competing principles of the prior appropriation doctrine.

As discussed at pages 15 through 16 in the *Idaho Department of Water Resources' Brief in Response to Pocatello's Opening Brief*, this case centers on the tension between a water right holder's private proprietary interest in seeking curtailment of junior uses of water and the public's interest in the optimum development of the State's water resources. In this case, the Director resolved the tension through recognition of the Great Rift trim line. The Director concluded that "[t]o curtail junior ground water users east of the Great Rift would be counter to

the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227. In short, the Director concluded there is a point where Rangen's delivery call would require curtailment of vastly more acreage to produce a very small increment of additional water, and that at this point, Rangen's right to seek additional curtailment must give way to the public's interest in optimum development of the State's water resources. The Director also concluded that this point is the Great Rift. There is substantial evidence in the record to support this decision. *See, e.g.*, R. Vol. XXI, p. 4215 (finding that west of the Great Rift approximately 17,000 acres must be curtailed per cfs of predicted benefit, while east of the Great Rift approximately 204,000 acres must be curtailed per cfs of predicted benefit).

In its sovereign capacity and for the public interest, the State must regulate the reach of private water rights in the ESPA, one of the State's most important public resources. "[T]he public waters of this state shall be subjected to the highest and greatest duty." *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89 (citation omitted). Optimum development requires the State to determine the point where Rangen's right to seek additional curtailment must give way to the public's interest in optimum development of the State's water resources. The Director considered the evidence in the record and stated: "To curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227. The Director concluded "[t]he use of the Great Rift …for a trim line strikes an appropriate balance." R. Vol. XXII, p. 4466.

The Director perceived this issue of a trim line as one of discretion and applied the legal standards established by Idaho law. Adoption of the 10% trim line advocated by

IGWA does not strike an appropriate balance. It would result in the curtailment of only 24 acres of ground water irrigation, thereby increasing the flows to the Rangen model cell an estimated 0.01 cfs. Ex. 3203, Attachment A of Staff Memo, p.4. Because the Martin-Curren Tunnel only receives a portion of the estimated flow in the Rangen model cell, the increase to the Martin-Curren Tunnel would be even less. R. Vol. XXI, p. 4226. Adoption of a 10% trim line is inconsistent with the requirement to manage surface and ground water sources conjunctively and is inconsistent with the need to balance competing principles of the prior appropriation doctrine.

IGWA also argues that *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) and *Schodde v. Twin Falls Land Company*, 224 U.S. 107 (1912) support the argument that the Director erred in applying the Great Rift trim line. *IGWA's Opening Brief* at 38. These cases are inapplicable here. In *Van Camp*, the senior appropriator dammed a creek so that the water would back up, raising the water table to subirrigate his lands. *Van Camp*, 13 Idaho at 208, 89 P. at 754. The *Van Camp* Court held that although Van Camp could divert water from the stream to fill his water right, he could not dam or impede the flow of the remaining water in order to cause a subirrigation of his meadows. *Id*. As discussed in *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90, the issue in *Van Camp* was whether a senior appropriator was protected in his means of diversion.

In *Clear Springs*, IGWA argued that *Van Camp* could be read broadly to require the Director to reduce the amount of water a senior is entitled to under his water right. The *Clear Springs* Court rejected this argument, recognizing the limited holding of *Van Camp*: "The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion." *Id*.

IGWA also cited *Schodde* as a defense in a *Clear Springs*. As with *Van Camp*, the Court recognized that the holding of *Schodde* was limited to the reasonableness of the appropriator's 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." *Id*. As the District Court confirmed, *Schodde* and *Van Camp* "only stand for the proposition that a senior appropriator is not protected in his means of diversion to the extent it is determined to be unreasonable." *Memorandum Decision* at 37. Thus, these cases do not support IGWA's trim line argument. Moreover, the holdings are inapplicable to this case because the Director found Rangen's means of diversion to be reasonable. R. Vol. XXI, p. 4223.

IGWA also cites *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 315 P.3d 828 (2013) ("A&B") as support for rejecting the Great Rift trim line. However, the sections of A&B cited by IGWA are taken out of context. The question in A&B was whether the Director can adopt a baseline methodology that estimates the amount of water needed by a senior to accomplish beneficial use or whether the Director must administer to the full decreed water right. *A&B*, 155 Idaho at 648-49, 315 P.3d at 836-37. The Court stated:

> On appeal, the [SWC] asserts that the district court erred in affirming the Director's baseline methodology. The [SWC] argues 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 as established by Idaho constitutional, statutory, and case law. A decreed or licensed water right, contends the [SWC], creates a presumption that the full extent of the right has already been defined by its beneficial use.

Id.

The Court concluded the Director can adopt a baseline methodology that looks to how much water is needed to accomplish the beneficial use. *Id.* at 650, 315 P.3d at 838. ("[N]either

[a] licensee nor anyone claiming a right under [a] decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed." (quoting *AFRD#2*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007)). Here, the question is not how much water is needed by Rangen to accomplish beneficial use. The Director found that Rangen is beneficially using water without waste and that Rangen could beneficially use the full decreed amount of water. R. Vol. XXI, p. 4221-23. The question in this proceeding relates to a different doctrine of law, optimum development of the State's water resources. As such, A&B is not on point.

IGWA also contrasts the futile call determination in the first Rangen delivery call in 2005 with the results of the most recent Rangen delivery call. *IGWA's Opening Brief* at 40. IGWA suggests the change in curtailment is the result of the Director adopting different trim lines. *Id.* While Director Dreher determined in the first Rangen delivery call that the call was futile, the change in result in this proceeding is not due to changes in the approach used to define the trim line as implied by IGWA, but rather data error. As discussed above, during development of ESPAM 2.0, the Department discovered spring discharge values that were used to estimate discharge for Thousand Springs and springs in the Thousand Springs to Malad spring reach for calibration of ESPAM 1.1 were inaccurate. These values were corrected in the calibration targets for ESPAM 2.0. These corrections resulted in an increase in the spring discharge targets in the Billingsley Creek area. Ex. 3203, p.32. The revised model showed that ground water pumping had a larger impact on the Rangen spring cell than previously thought. Thus, IGWA is wrong in suggesting the trim line is the basis for the change in result.

B. THE SOURCE FOR RANGEN'S WATER RIGHTS IS SURFACE WATER, NOT GROUND WATER

Prior to the hearing on Rangen's delivery call, Rangen filed a motion for partial summary judgment seeking a ruling that it is entitled to judgment as a matter of law that the source for its senior water rights is surface water, not ground water. On the issue of source, the Director reviewed the SRBA decrees and concluded they are unambiguous:

> Water right nos. 36-2551, 36-7694, and 36-15501 were decreed in the SRBA with the following Source element: Martin-Curren Tunnel, tributary to Billingsley Creek. … The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* [Adjudication] Rule 60 [IDAPA 37.03.01.060] ("For surface water sources, the source of water shall be identified . . . . The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as 'ground water.'"). Consistent with [Adjudication] Rule 60, listing a source and tributary for surface water rights, and only "ground water" for ground water rights, was the custom and practice in the SRBA. In 1997, Rangen's Martin-Curren Tunnel water rights were partially decreed. The partial decrees were entered pursuant to Idaho Rule of Civil Procedure 54(b). No appeal has ever been taken. The plain language of Rangen's partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water.

R. Vol. XV, p. 3174. The Director also concluded that previous Idaho Supreme Court decisions already decided the source of the Martin-Curren Tunnel is surface water. *Id.* Based on these conclusions, the Director granted summary judgment to Rangen on the issue of source. R. Vol. XV, p. 3177.

IGWA argues the Director erred in his interpretation. IGWA, relying on *AFRD#2*, argues that, "[w]hile Adjudication Rule 60 generally facilitated uniformity in naming water sources, the name of the senior's source is not conclusive of how water rights will be administered in response to a delivery call." *IGWA's Opening Brief* at 48. The language from *AFRD#2* relied upon by IGWA is taken out of context. The Court in *AFRD#2* was discussing the Director's

application of the material injury factors listed in the Department's CM Rules in response to an argument that the Director's application of the rules was a "re-adjudication" of the water right. The Court explained how certain issues presented in delivery calls, such as the issue of reasonableness, did not constitute a re-adjudication of the water rights. Importantly for this case, the Court distinguished the consideration of reasonableness from elements of the decrees:

> [T]he SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42–1411(2)(a)–(j). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication.

AFRD#2, 143 Idaho at 877, 154 P.3d at 448. Here, IGWA is challenging an element of Rangen's water rights as decreed by the SRBA District Court. A decree is conclusive as to each element of a water right. Idaho Code § 42-1420. The partial decrees for Rangen's water rights involved in this matter were issued in 1997 and were entered pursuant to I.R.C.P. 54(b). Exs. 1026, 1028. No appeal has ever been taken and no requests to set aside have been filed. As the District Court stated:

> Simply put, if the source of Rangen's senior rights was ground water, the SRBA Court would have decreed the source as 'ground water,' the same as every other ground water right in the SRBA. The SRBA Court did not; it entered [partial decrees] for Rangen's senior rights that identified a surface water source tributary to another surface water source. . . . The [Director's] recommendations for the claims did not identify the source of the rights as ground water. If IGWA disagreed with the Department's recommendations, it was incumbent upon it to timely file objections to the recommendations in the SRBA, and then present the SRBA Court with evidence to rebut the recommendations. I.C. § 42-1411(5). Timely raising the issue in the SRBA would have afforded all parties to that adjudication appropriate notice of the issue and the opportunity to respond. Raising the issue at this time, in a proceeding outside the SRBA, constitutes an impermissible collateral attack on the [partial decrees].

Memorandum Decision at 25-26. Because IGWA's argument that the source of Rangen's water rights should be considered ground water constitutes an impermissible collateral attack on the partial decrees for Rangen's water rights, the argument must be rejected.

IGWA also cites the Ground Water Act and argues "the applicability of the Ground Water Act is not dependent upon the name of the water source on the senior's water right license or decree." IGWA's *Opening Brief* at 41. This statement is legally incorrect. The name of the source element on the SRBA partial decree is the legal determination of that element of the water right. This legal determination is binding upon IGWA, the Director, and all parties to the SRBA. In the underlying delivery call proceeding, the Director referenced Adjudication Rule 60 (hereafter referred to as "AJ Rule 60"):

> The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* AJ Rule 60 ("For surface water sources, the source of water shall be identified . . . . The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as 'ground water.'"). Consistent with AJ Rule 60, listing a source and tributary for surface water rights, and only "ground water" for ground water rights, was the custom and practice in the SRBA.

R. Vol. XV, p. 3174. IGWA argues the Ground Water Act defines what constitutes ground water and "to the extent [AJ Rule 60] conflicts with the Ground Water Act, the Act controls. … [AJ Rule 60] cannot be construed in a manner that forces the Director to fallaciously administer a ground water diversion as if it is a surface water structure… ." *IGWA's Opening Brief at* 48-49. Contrary to IGWA's suggestion, AJ Rule 60 does not serve as the legal authority declaring Rangen's water source as surface water. The SRBA partial decrees are the authority declaring the source to be surface water. AJ Rule 60 simply highlights the naming convention used in the SRBA to distinguish surface and ground water.

The Director also cited *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012) and *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) as determining that the source of Rangen's water rights is surface water:

> The conclusion that the source of Rangen's water rights is surface water is supported by three Idaho Supreme Court decisions. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Court reviewed the Director's defense of inaction in a delivery call filed by holders of a Martin-Curren Tunnel water right against junior-priority ground water users. The Court stated the source of Mussers' water right as follows: 'The springs which supply the Mussers' water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer).' *Musser* at 394, 871 P.2d at 811 (emphasis added). The fact that Musser was an appropriator of a surface water right was reconfirmed by the Court in *A&B*. 153 Idaho at 234, 284 P.3d at ___. In *Clear Springs*, the Court examined separate conjunctive management delivery calls initiated by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. ("Spring Users"). The Spring Users, like Rangen, 'have water rights in certain springs emanating from the canyon wall along a section of the Snake River below Milner Dam in south central Idaho.' *Clear Springs* at 794, 252 P.3d at 75. In *Clear Springs*, IGWA argued that the Spring Users should be administered as ground water users, consistent with Idaho Code § 42-226: 'the Spring Users' priority rights should be protected only in the maintenance of a reasonable aquifer level.' *Clear Springs* at 804, 252 P.3d at 85. The Court rejected this argument: 'By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs.' *Id*. (emphasis added).

R. Vol. XV, p. 3174. IGWA does not address the Director's analysis related to Idaho Supreme Court precedent. The Director's determination that the source of Rangen's water rights is surface water, not ground water, must be affirmed because it is consistent with the plain language of the SRBA partial decrees, Idaho Supreme Court precedent, and supported by substantial evidence in the record.

V. CONCLUSION

The Director did not err as alleged by IGWA in applying a trim line using the Great Rift. The optimum development of Idaho's water resources in the public interest, and the maximum use and benefit, and least wasteful use, of the State's water resources support the Director's application of a trim line. Here, curtailment of junior ground water users east of the Great Rift would produce very small benefits to Rangen when compared to the number of acres curtailed. Thus, the Director concluded "[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources." R. Vol. XXI, p. 4227. There is substantial evidence in the record to support this decision. The Director's application of the Great Rift trim line must be affirmed. In addition, the Director's determination that the source of Rangen's water rights is surface water, not ground water, must be affirmed because it is consistent with the plain reading of Rangen's SRBA partial decrees, Idaho Supreme Court precedent, and supported by substantial evidence in the record.

DATED this 8th day of June 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by United States mail, first class, with the correct postage affixed thereto on this 24th day of June 2015.

Document Served: **Idaho Department of Water Resources' Brief in Response to IGWA's Opening Brief**

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