

IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO WATER RIGHT NOS. 36-
02551 & 36-07694 (RANGEN, INC.) IDWR
DOCKET CM-DC-2011-004

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Intervenor/Appellant,

v.

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

Respondent/Respondent,

v.

RANGEN, INC.,

Petitioner/Respondent,

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, and CITY OF
POCATELLO

Intervenors/Respondents.

SUPREME COURT DOCKET NO.
42775-2015

Snake River Basin Adjudication No.
CV-2014-1338 & CV-2014-179
(consolidated for purposes of Reporter's
Transcript and Clerk's Record only)

PETITIONER/RESPONDENT RANGEN, INC.'S RESPONSE 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 CASE

A. INTRODUCTION.

This appeal, together with the companion appeal filed by the City of Pocatello,¹ is a challenge to full conjunctive management of ground water and surface water rights from the Eastern Snake Plan Aquifer (“ESPA”). In response to a water delivery call filed by Rangen, Inc. (“Rangen”), the Director of the Department of Water Resources (“Department”) found material injury, but implemented a so-called “trim line” to avoid administration of ground water rights located east of the Great Barrier Rift (the “Great Rift trim line”). The Idaho Ground Water Appropriators, Inc. (“IGWA”) urges this Court to adopt a new rule allowing conjunctive management only when “the senior user will beneficially use the water **that would have otherwise been used by the junior.**” *IGWA’s Opening Brief*, p.23. Since conjunctive management inherently involved disparity between acres curtailed and the benefit to any particular spring or river reach, IGWA’s position, at its core, is that the diversion of spring water is *per se* unreasonable and conjunctive management of the ESPA is not required. Judge Wildman rejected IGWA’s argument and determined that the Director erred by implementing the Great Rift trim line to exclude junior-priority ground water pumping east of the Great Rift. IGWA appealed.

B. STATEMENT OF FACTS.

1. Rangen’s diversion and use of water.

Rangen uses spring water to raise trout and conduct research at a Research Hatchery located a few miles south of Hagerman. (*See*, R, Exh. 1001) Rangen built the Research Hatchery in about 1962 and has been raising fish there for 50+ years. (Tr., Vol. II, p. 522, L. 8-10). The facility was

¹ The City of Pocatello has appealed from the same Order. Pocatello’s appeal is designated as Idaho Supreme Court Case Number 42836-2015.

built to develop and test Rangen's fish feeds and showcase Rangen's involvement in the aquaculture industry. (*Id.*) It was a place where Rangen entertained clients from all over the world and brought leading researchers together for conferences and work. (*Id.*; Tr., Vol. I, p.164, L. 4-11). The facility sits on 60+ acres and is situated along a canyon rim. (*See*, Exh. 1004) A 1986 aerial photograph shows the current configuration of the facility and full raceways. (*See*, Exh. 1006). Most of the raceways are empty today because the spring complex from which Rangen diverts its water is drying up along with the other springs from the ESPA. (*See*, Exh. 1206A).

From May 1, 2013 through May 16, 2013 the Director held a hearing examining all aspects of Rangen's diversion and use of water. (R. Vol. 21, pp. 004190, ¶ 11). At the conclusion of the hearing, the Director concluded that "Rangen is beneficially using water by raising fish to satisfy its contract with Idaho Power and to sell fish on the open market." (A.R. Vol. 21, pp. 004222, ¶ 30). "The Director concludes that Rangen's water use is reasonable." *Id.* .The Director considered and rejected proposals by IGWA and Pocatello that Rangen should be required to change its means of diversion. (A.R. Vol. 21, pp. 004223, ¶ 34).

The Director concludes that Rangen's reasons for rejecting the proposals are reasonable. IGWA and Pocatello have failed to show, by clear and convincing evidence, that Rangen's means of diversion is unreasonable. The Director concludes that Rangen employs "reasonable diversion and conveyance efficiency and conservation practices" in diverting water from the Curren Tunnel.

Id.

1. The Eastern Snake Plain Aquifer.

The eastern Snake Plain encompasses an area of about 11,000 square miles extending from Ashton, Idaho in the northeast to King Hill, Idaho, in the southwest. Most of the Plain's inhabitants reside along the eastern and southern margins in an agriculturally productive band near the Snake River. The ESPA underlies the eastern Snake Plain. (*See*, Exh. 1273A, p.5) The ESPA is approximately 170 miles long and 60 miles wide. (A.R. Vol. 21, p. 004202). Ground water and

surface water rights from the ESPA, including the ground water rights held by the City of Pocatello and others east of the Great Rift, are interconnected. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. IDAPA 37.03.11, Conjunctive Management Rule 50.

The Eastern Snake Plain Aquifer is hydraulically connected to the spring source of Rangen's water rights. (A.R. Vol. 21, pp. 004199, ¶ 55 and 004202-03, ¶ 72).

The ground water in the ESPA is hydraulically connected to the Snake River and tributary springs at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and springs tributary to the Snake River is in the Thousand Springs area. The amount of water that discharges from the aquifer to hydraulically connected surface water sources is largely dependent on ground water elevations and hydraulic conductance.

(A.R. Vol. 21, p. 004202-03, ¶ 72).

Because the Rangen spring complex is hydraulically connected to the ESPA, it is clear that ground water pumping has contributed to the decrease in discharge, but other activities have also contributed.

(A.R. Vol. 21, pp. 004199, ¶ 55).

For decades more water has been withdrawn from the ESPA than has been replaced. (A.R. Vol. 21, pp. 004203, ¶ 75). This mining of the aquifer has resulted in declining aquifer levels and spring flows throughout the aquifer and its tributaries:

73. Based on averages for the time period from October of 1980 through September of 2008, the ESPA receives approximately 7.7 million acre feet of recharge on an average annual basis from the following sources: incidental recharge associated with surface water irrigation on the plain (5.3 million acre feet), infiltration of precipitation on non-irrigated lands (0.7 million acre feet), underflow from tributary drainage basins (1.1 million acres feet), and seepage losses from rivers and streams (0.6 million acre feet). Rangen Ex. 1273A, Figure 8.

74. Based on averages for the time period from October of 1980 through September of 2008, the ESPA discharges approximately 8.0 million acre feet on an average annual basis through the Snake River and tributary springs (5.4 million

acre feet), evapotranspiration in wetlands (0.1 acre feet), and ground water withdrawals (2.5 million acre feet). *Id.*

75. For the time period from October of 1980 through September of 2008, average annual discharge from the ESPA exceeded annual average recharge by approximately 270,000 acre feet, resulting in declining aquifer water levels and declining discharge to hydraulically connected reaches of the Snake River and tributary springs. *Id.*

Id. ¶¶73, 74, 75.

2. ESPAM 2.1.

The Idaho Department of Water Resources has developed a ground water model of the ESPA. This ground water model was developed in conjunction with a technical committee comprised in part of experts retained by the parties to this matter known as the Eastern Snake Hydrologic Modeling Committee (“ESHMC”). (A.R. Vol. 21, pp. 004203, ¶ 76). The Director utilized ESPAM 2.1, the most current version of this ground water model, to evaluate Rangen’s call. ESPAM 2.1 was designed to predict the impact of ground water pumping on Rangen’s water rights and is the best available science to evaluate Rangen’s delivery call:

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.

(A.R. Vol. 21, p. 004209, ¶ 95e, citing Exh. 3203, p.2).

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.

(A.R. Vol. 21, p. 004209, ¶ 96).

Utilizing ESPAM 2.1, the Director quantified the impact of out-of-priority ground water pumping from the portion of the ESPA included within the area of common ground water supply.

The area of common ground water supply includes thousands of wells owned and operated by IWGA's junior-priority ground water pumpers and Pocatello:

Department staff eliminated points of diversion inside the model boundary but outside the boundary of common ground water supply as described in Rule 50 of the Department's Conjunctive Management Rules. After the removal of these points of diversion from the simulation, the model predicted a total of 16.9 cfs of reach gains to the Rangen cell attributable to modeled curtailment of junior ground water diversions within the area of common ground water supply at steady state.

(A.R. Vol. 21, p. 004211, ¶ 104).

3. The trim line.

The Director also utilized the model to calculate the predicted gains associated with the simulated curtailment of various different subareas within the area of common ground water supply. (A.R. Vol. 21, p. 004211). The Director also used the model to calculate "depletion percentages" for each model cell. (A.R. Vol. 21, p. 004211, ¶ 105). These depletion percentages are the result of model simulated curtailment for each model cell and show the percentage of water that would accrue to the Rangen cell and the percentage that would accrue to other spring cells or river reaches. Utilizing these depletion percentages, the Director concluded that the low transmissivity of the Great Rift "causes the benefit of curtailment compared to the number of acres curtailed to diminish significantly." (A.R. Vol. 21, p. 004227, ¶ 55). On this basis the Director implemented a trim line excluding 322,000 acres of ground water pumping east of the Great Rift from any obligation to curtail or mitigate. *Id.*

The Director concludes curtailment of ground water diversion on the east side of the Great Rift is not justified. 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.

Id. The Director did not determine that ground water pumping east of the Great Rift has no impact on areas of the ESPA west of the Great Rift. In fact, the Director determined the quantity of that impact on the Rangen cell as well as other springs and river reaches. The Director simply determined that the conjunctive management of areas east of the Great Rift is “not justified.” The district court invalidated the Director’s implementation of the Great Rift trim line.

II. ARGUMENT

A. THERE IS NO LEGAL BASIS FOR IGWA’S “HOARDING” ARGUMENT.

IGWA’s statement of the issues on appeal in this case begins with the sentence “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.**” *IGWA’s Opening Brief*, p. 21 (emphasis added). On its face, this statement is not objectionable. Of course all water users must put the water diverted under their water right to beneficial use and may not waste water. These are core principals of the doctrine of prior appropriation. But, IGWA does not argue that Rangen hoards water that it has diverted for beneficial use in the Research Hatchery. Rather, IGWA actually argues that if junior-priority pumping is actually curtailed in response to Rangen’s delivery call, Rangen will be hoarding the water because not all of the curtailed water will show up at the Research Hatchery for Rangen’s use. According to IGWA, “[t]he holder of a senior-priority water right may exercise priority to shut off a junior right *so long as* the senior will beneficially use the water that would have otherwise been used by the junior.” *IGWA’s Opening Brief*, p. 23 (emphasis in original). IGWA’s position is legally and factually untenable.

First, IGWA’s position does is not the law in Idaho. If it were, conjunctive management would be impossible. Judge Wildman noted in his Memorandum Decision that “unlike surface to surface administration, the very nature of conjunctive management involves a large disparity

between the number of acres curtailed and the accrued benefit to a senior surface right.” (R., p. 000704).] “Nonetheless, Idaho law mandates that ground and surface water be administered conjunctively.” *Id.*

IGWA urges this Court to adopt its novel “hoarding” argument on the basis that:

The public has an interest in maximizing beneficial use of the State’s limited water supplies: “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”

IGWA’s Opening Brief, p. 23. This Court has already ruled that such a policy requires conjunctive management. In *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), the Court stated:

The Groundwater Users’ argument that full economic development means that priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer is not consistent with Idaho law. It would, in essence, preclude conjunctive management of the Aquifer. Conflicts between senior surface water users and junior ground water users would be ignored as long as withdrawals from the Aquifer and recharge were in balance. That argument is contrary to the current State Water Plan, which provides, “It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection.” As we held in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), hydrologically connected surface and ground waters must be managed conjunctively.

Clear Springs at 809, 252 P.3d at 90. The Court continued “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.* (emphasis added). IGWA’s “hoarding” argument is simply a repackaging of the “reasonable use” argument that IGWA raised in the district court, which was a repackaging of the “waste” argument raised before the Director. Both the Director and the district court rejected this argument. This Court should reject it as well.

The second problem with IGWA's hoarding argument is that it is not supported factually. Rangen attempted to put on evidence of how other water users would benefit from Rangen's delivery call and how curtailed water would be put to beneficial use. IGWA actually objected to this evidence and the objection was sustained. For example, Rangen called Frank Erwin, the water master of District 36A, to testify at the hearing. When Rangen began questioning Mr. Erwin about other users downstream of Rangen being short of water and the benefit of a water call to them, IGWA objected to the questions on the basis of relevance. (*See* Tr., Vol. 1, p. 232, l. 16 – 234, l. 8). The Director asked Rangen to respond to the objection and Rangen pointed out:

Well, one of the issues is that the call doesn't, you know, accrue to – that not enough of the water that would come – that would be curtailed as a result of this would accrue to Rangen, and that other people don't benefit. And I think this goes directly to that issue, that other people benefit if there's curtailment as well.

(Tr., Vol. 1, p. 233, l. 20 – p. 234, l. 8). The Director sustained the objection and Rangen was not allowed to put on evidence through Mr. Erwin that others would benefit from the call. (*See Id.*)

IGWA also objected to Dr. Charles Brockway, Rangen's expert hydrologist, testifying about the waste issue, but that objection was overruled because the City of Pocatello introduced the issue through Greg Sullivan, its expert hydrologist:

Q: Now, I want to talk with you a moment, Dr. Brockway, about the issue of waste.

You understand that the curtailment of groundwater pumping will benefit others in addition to Rangen; correct?

A: It will, yes.

Ms. McHugh: Object. I was going to say objection. Relevance.

The Hearing Officer: We'll, there's been quite a bit of discussion, I think, coming in regarding the benefits. In fact, I think that may have come in through Mr. Sullivan, although I don't recall. But I –

Mr. Haemmerle: It did, Director. There was a chart kind of indicating where water would flow to in addition to the water at the Rangen cell.

The Hearing Officer: So I assume this is in the nature of rebuttal testimony again.

Ms. McHugh: And I was just understanding that Mr. Sullivan said benefits to other areas within the model – I mean other reaches, not others, as in, I guess, the term “others” was used in the questioning.

The Hearing Officer: Perhaps you could clarify, Mr. Haemmerle. But I assume that’s where we were headed.

So objection overruled right now.

Q: Dr. Brockway, the water that’s – that gets curtailed because of the Rangen call would go to other places and potentially other users.

Do you understand that?

A: Yes.

Q: Is it your opinion that the water that does not go to Rangen, is it your opinion that water is wasted?

A: Well, not according to what I believe waste is in the context of a water right. It – if water is utilized, diverted and utilized for a beneficial use, then to me that water is not wasted.

Now, some of the allegations have been that because when you curtail the Eastern Snake Plain Aquifer that a large majority of the curtailed water or the decrease of – extraction will not go to the calling party, and therefore everything that doesn’t go to the calling party is – is categorized as waste.

Well, there are hundreds of springs in the reach of say – of the Snake River from Kimberly down to King Hill. And all of these springs have suffered from decreases in spring flow. Many of them are developed for aquaculture and irrigation and for other purposes. And they have water rights.

So to the extent even though those users did not make a water call, they receive water from say a Rangen call or another call, and that enhances and decreases the depletion of their water supply, and they beneficially use it.

So, in my opinion, that water is not wasted. It's different from a term that we normally think of as, for instance, waste of irrigation water. You diverted it from the canal, but you never put it on the field, you might want to term that "waste."

But in the context of a water call and the water not being utilized by the calling party is not necessarily wasted.

Now, if it gets into the river without having gone through a spring that has a water right on it, either for irrigation or fish or whatever, when it get in the river, it's still beneficially used by people like Idaho Power who have bona fide water rights for hydropower in the river, or it's certainly beneficial for in-stream flows or meeting minimum flows. So in my opinion, that water isn't wasted either.

So – and you could say if you decrease the depletion from the aquifer, the water levels rise in the aquifer, which they have to do in order for spring flows to increase, but that rise in the water table is beneficial also to groundwater pumpers. It decreases their energy use.

So I have a problem with saying that anything that – any water that does not go to the calling party is wasted.

(Tr., Vol. 10, p. 2360, l. 16 – p. 2363, l. 22).

The Director made the same point in his *Order on Reconsideration*:

IGWA's identification of "waste" as an issue arising out of the Rangen curtailment order is incorrect. The fact that a large portion of the water curtailed will not reach Rangen does not mean it is being wasted. Water not reaching Rangen becomes available to other senior water users in the Thousand Springs area. The water also benefits other senior water users with pending delivery calls upstream from the Thousand Springs area (such as the Surface Water Coalition call) because the benefits of curtailment of ground water rights propagate upstream as well as downstream. The real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

(A.R., Vol. 22, p. 004466).

Dr. Brockway's testimony makes it clear that not only will Rangen benefit from a delivery call, but so will other downstream surface water users, Idaho Power and even other groundwater pumpers who are able to pump water more efficiently when aquifer levels rise. Director Spackman adopted this reasoning in his *Order on Reconsideration*. There is simply no factual or legal basis for IGWA's assertion that Rangen's delivery call will result in waste or hoarding. As such, the district court's decision should be affirmed.

B. IGWA HAS MISINTERPRETED THE DIRECTOR'S STATEMENT CONCERNING "LIMITED DISCRETION."

IGWA argues that the Director "mistakenly concluded he has 'limited discretion' to prevent seniors from hoarding excessive amounts of water." *IGWA's Opening Brief*, p. 29. IGWA's argument here is unclear. To the extent that IGWA is arguing that the Director failed to recognize some kind of broad discretion to consider the reasonableness of the scope of curtailment, such broad discretion does not exist. To the extent that IGWA is implying that the Director did not properly perceive his discretion to consider whether Rangen's diversion and use of water is reasonable, IGWA is incorrect. This is a potentially important issue because in analyzing the Director's decision the Court must determine whether the Director correctly perceived an issue as one of discretion and acted within the boundaries of his discretion. *See, Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

To support its position, IGWA cites paragraph 52 on page 39 of the Director's *Final Order*. *See* FN 104 of *IGWA's Opening Brief*. IGWA did not set forth the text of paragraph 52 in its *Opening Brief*. Paragraph 52 is contained in Section V of the Conclusions of Law. Section V is

titled: “ESPAM2.1 Results and Area of Common Ground Water Supply.” The text of paragraph 52 states in its entirety:

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 813, 252 P.3d at 94.

(A.R., Vol. 21, p. 004226, ¶ 52) (emphasis added).

Contrary to IGWA’s assertion, paragraph 52 has nothing to do with Rangen’s beneficial use of water. It has to do with the imposition of a trim line in an area of common ground water supply. While all agency discretion is limited in the sense that it can be reviewed by courts within certain parameters, Director Spackman is acknowledging in paragraph 52 that there are serious limitations on his ability to exclude junior-priority groundwater pumping from a delivery call where the source of water is known to be hydrologically connected like in the ESPA where there is a common ground water supply. There is simply no basis in this paragraph or anywhere else in the *Final Order* to support IGWA’s argument that the Director improperly limited his discretion when analyzing whether Rangen makes reasonable and beneficial use of water. There is no basis for reversing the district court or Director’s decisions because of some misperception of the Director’s discretion.

C. IGWA HAS MISCONSTRUED THE REASONABLE DIVERSION REQUIREMENT.

IGWA argues that Rangen’s diversion and use of spring water is unreasonable because it will result in “hoarding” or “wasting” water. IGWA made the same argument in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (Idaho 2011), but couched it in terms of “monopolizing” the aquifer. In support of its position IGWA cited *Schodde v. Twin Falls Land &*

Water Company, 224 U.S. 107 (1912), the same case it relies upon here. This Court rejected IGWA's *Schodde* argument in the Clear Springs case, and IGWA's continued reliance on the *Schodde* case here is misplaced.

In *Schodde*, the senior water right holder constructed water wheels to divert water from the Snake River to irrigate his farm. Twin Falls Land & Water Company later built a dam below *Schodde*'s water wheels, which caused the current necessary to power the wheels to stop flowing. *Schodde* sued Twin Falls Land & Water Company for damages due to the interference with the operation of his water wheels. The U.S. Supreme Court rejected *Schodde*'s claim, holding that *Schodde* could not appropriate the entire flow of the Snake River in order to power his water wheels. The Court, however, affirmed that *Schodde* had the right to use the amount of water actually appropriated by him and put to beneficial use.

In Clear Springs, Clear Springs Foods and Blue Lake Trout Farms, like Rangen, raised fish utilizing water rights from "certain springs emanating from the canyon wall along a section of the Snake River Those springs are fed by the aquifer." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho at 794, 252 P.3d at 75 (2011). The Director in Clear Springs, like in this case, ordered curtailment. IGWA argued on appeal that the curtailment orders violated *Schodde*. After reviewing *Schodde*, this Court stated:

The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights. Thus, In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007), we cited *Schodde* for the proposition that "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication [of a water right]."

Clear Springs Foods, Inc. v. Spackman, 150 Idaho at 809, 252 P.3d at 90. The Court went on to hold that: "Under the law, the Groundwater Users' arguments regarding reasonable aquifer levels

and full economic development **must challenge the Spring Users' means of diversion.**" *Id.* (emphasis added).

It is apparent from the *Clear Springs* decision that this Court rejected IGWA's argument that the diversion of spring water is *per se* unreasonable. This Court did, however, leave the door open for juniors to avoid a call by proving by clear and convincing evidence that a particular diversion structure is unreasonable. In this case, the Director's *Final Order* tracks the applicable factors of CM Rule 42, the rule used to evaluate whether a water right holder is suffering material injury and using water efficiently and without waste. (*See*, A.R., Vol. 21, p. 004218-4223). The *Final Order* sets forth a detailed discussion of: (i) the amount of water from the source (CM Rule 42.01.a -- IDAPA 37.03.11.042.01.a); (ii) the existence of measuring devices (CM Rule 42.01.f -- IDAPA 37.03.11.042.01.f); (iii) the amount of water diverted compared to the water right (CM Rule 42.01.e -- IDAPA 37.03.11.042.01.e); (iv) existing facilities, water supplies and needs (CM Rule 42.01.g -- IDAPA 37.03.11.042.01.g); (v) whether ground water rights affect the quantity and timing of when water is available (CM Rule 42.01.c -- IDAPA 37.03.11.042.01.c); and (vi) alternate means of diversion (CM Rule 42.01.g -- IDAPA 37.03.11.042.01.g). (*See id.*) Ultimately, the Director concluded that Rangen's methods of diversion are reasonable in terms of efficiency and conservation practices. (A.R., Vol. 21, p. 004223 at ¶ 34). The Director also concluded that Rangen considered alternative means of diversion such as a pump-back system, vertical well, and horizontal well and that it was reasonable for Rangen to reject those alternatives. (*See id.*; *see also*, A.R., Vol. 21, p. 004223 at ¶ 34).

IGWA does not attack the Director's findings that Rangen's diversion and use of water is reasonable, efficient and without waste. There is no way to find that the Director's analysis of the CM Rule 42 factors was somehow an abuse of discretion, and IGWA does not even try. Instead of attacking the findings, IGWA wants the Court to redefine what constitutes a reasonable diversion. The Director made the proper analysis of whether Rangen's diversion structure is reasonable under CM Rule 42 and found that it is reasonable in terms of efficiency and conservation. (A.R., Vol. 21, p. 004223 at ¶ 34). The district court affirmed this determination. As such, IGWA's appeal should be rejected.

D. THE DIRECTOR DID NOT ERR BY USING ESPAM2.1 WITHOUT ASSIGNING A MARGIN OF ERROR TO IMPLEMENT A TRIM LINE.

IGWA contends that the Director should have addressed model uncertainty by assigning a margin of error to ESPAM2.1 predictions so that he could implement a trim line to exclude junior groundwater diversions for which the predicted benefit of curtailment to the senior is smaller than the margin of error. *See, IGWA's Opening Brief*, p. 36. IGWA contends that this is the practice that this Court upheld in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) and it is the practice the director should have used in this case. IGWA's position is untenable because: (i) the imposition of a trim line has nothing to do with model uncertainty; and (ii) the uncertainty analysis done by IDWR does not provide a scientific basis for establishing a margin of error. Despite their own experts' opinions, IGWA refuses to recognize that the best estimate of the impact of junior-priority ground water pumping on the spring flows at Rangen's Research Hatchery is the result calculated by ESPAM2.1 – a model which has undergone rigorous validation, calibration and uncertainty analyses. As Judge Wildman determined, the only error the Director committed with respect to his use of ESPAM2.1 was excluding junior-priority groundwater pumping east of the Great Rift from the curtailment.

1. ESPAM2.1 is the Best Available Science to Evaluate Rangen's Delivery Call.

The Director found in the *Final Order* that ESPAM2.1 is the best available scientific tool to evaluate Rangen's delivery call. (A.R., Vol. 21, p. 004224 at ¶ 38). This conclusion is supported by the IDWR staff report which states: "ESPAM2.1 is the best developed scientific tool for predicting the effects of junior groundwater pumping on the Buhl to Lower Salmon Falls Spring reach and at the Rangen spring complex." (Exh. 3203, p. 12). It is also supported by every expert who testified in this case. All of the experts -- regardless of who hired them -- agreed that ESPAM2.1 is the best available science. *See* testimony of Dr. Brockway, Rangen's expert hydrologist, (Tr., Vol. 10, p. 2340, l. 25 – p. 2341, l. 8); Bern Hinckley, IGWA's expert geologist, (Tr., Vol. 10, p. 2487, l. 21 – 24); Dr. Brendecke, IGWA's expert hydrologist, (Tr., Vol. 12, p. 2793, l. 11–14); Dr. Wylie, IDWR's modeler, (Tr., Vol. 12, p. 2950, l. 3–9); Greg Sullivan, Pocatello's expert hydrologist, (Tr., Vol. 7, p. 1642, l. 2–15), and Bryce Contor, Fremont-Madison's expert, (Tr., Vol. 12, p. 2893, l. 20 – 22).

2. ESPAM2.1 is Fundamentally Different than Prior Versions of the Model and Can be Used to Determine the Impact of Junior-Priority Groundwater Pumping on Rangen's Water Rights.

Over the years, IDWR has developed several numerical ground water models of the ESPA. The purpose of these models is to evaluate and understand the interaction between groundwater and surface-water in the Eastern Snake Plain Aquifer. (Exh. 1273A, pg. 1). The current version of the model is ESPAM2.1. ESPAM2.1 incorporates the best knowledge of the aquifer system available at this time.

Unlike previous versions of the model, “ESPAM2.1 can be used to compute regional impact on selected individual springs because it was calibrated to spring-specific discharge measurements.” (See, Final Report for ESPAM2.1 which is Exh. 1273A, pp. 86-87). One of the changes made in ESPAM2.1 was the development and utilization of calibration targets for spring flows. (Tr., Vol. 10, p. 2297, l. 23 – p. 2298, l. 2; Exh. 1273A, p. 73). The spring calibration targets are categorized into three groups based upon the nature of the available data. (Exh. 1273A, p. 75). Group A springs include springs that are measured by the USGS or IDWR. (Id.) Group B springs are measured and reported by water users. (Id.) Group C springs are not routinely measured or reported. (Id.) The Rangen spring complex was included as a Group B spring. (Tr., Vol.10, p. 2299, line 10; Exh. 1273A, p. 76).

ESPAM2.1 was developed in an open, collaborative environment, with guidance from the Eastern Snake Hydrologic Modeling Committee (ESHMC). (Exh. 3203, p. 3). The ESHMC was formed out of the Idaho Technical Committee on Hydrology (the ITCH Committee) in approximately 2000 to serve as an advisory group for updating and improving the ESPA model. (Tr., Vol. 10, p. 2294, l. 12 – p. 2295, l. 15).

Experts retained by the parties to this call participated heavily in both the ITCH Committee and the ESHMC. Dr. Brockway and Greg Sullivan were each members of the ITCH Committee. (Tr., Vol. 10, p. 2294, l. 10-16; p. 1570 l. 6-10). Dr. Brockway and Mr. Sullivan became members of the ESHMC when it was formed in 2000. (Tr., Vol. 10, p. 2300, l. 7 – p. 2301, l. 3). Dr. Brendecke, Bryce Contor, and Dave Colvin and Jim Brannon, two other Rangen experts, were also members of the ESHMC. (Tr., Vol. 10, p. 2400, l. 16-20; Exh. 1273A, p. 4).

The ESHMC provided a forum for discussing model design, providing interested parties the opportunity for technical review and input throughout the model development process. Decisions regarding the conceptual model, model grid size, drain elevations, locations of transmissivity pilot points, spring discharge and aquifer head targets, the location of general head boundaries, calibration bounds, and other model features were presented to the ESHMC with opportunity for committee members to provide comments and suggest alternative approaches.

(Exh. 3203, p. 3).

3. A Trim Line Does Not Address Model Uncertainty.

Ignoring its own experts' opinions, IGWA steadfastly clings to its argument that a trim line can somehow be related to model uncertainty. During the development of ESPAM2.1 the ESHMC considered the role the Committee should play in terms of addressing a trim line. Mr. Tuthill, then the Director of IDWR, asked the ESHMC to discuss the following: "Should the ESHMC address the technical aspects (not policy issues) of a trim line as a function of uncertainty?" (Exh. 1369, p. 1). Some of the Committee Members (Dr. Brockway was one of them), put together a "White Paper" addressing the issue. (*Id.*) Dr. Brendecke, IGWA's expert hydrologist, provided his own written comments. (*See Id.*) In his comments, Dr. Brendecke wrote: "Apparently Koreny et. al, at least partially agree with me, for they repeatedly state in their white paper that 'The trim line has nothing to do with model uncertainty.'" (*Id.*)

Indeed, the experts testified at the hearing repeatedly stated that the imposition of a trim line a legal policy decision and is not related to model uncertainty. Dr. Brockway testified:

Q: Do you believe the trim line has anything to do with uncertainty whatsoever?

A: It had nothing to do with the uncertainty in the model.

(Tr., Vol. 10, p. 2329, l. 6-9).

Bern Hinckley, IGWA's expert geologist, testified:

Q: And I want to be clear, you were asked some questions about uncertainty and it being tied to the number.

The uncertainty of the model itself has absolutely nothing to do with the number that you would put on a trim line; is that correct? Or on a zone of exclusion, excuse me.

A: No, I think that's one of the many that that one would consider in making that policy decision. So I would consider it to be a factor, but it doesn't give you a definitive answer.

(Tr., Vol. 11, p. 2551, l. 9-19).

Dr. Brendecke testified that the imposition of a trim line is a policy decision – not a technical one -- and that a trim line cannot be derived from model uncertainty. (Tr., Vol. 11, p. 2696, line 12 – p. 2697, line 9). Greg Sullivan also testified that a trim line is a policy decision and that he cannot link model uncertainty to it:

Q: Do you think the trim line has anything to do with model uncertainty?

A: I think it's largely a policy decision.

Q: And we could wade through your deposition, Greg, but I think over and over when I asked you that question, you said, it's a policy decision?

A: I would agree, it's largely a policy decision.

Q: When you use words like "largely," it only begs me to ask another question, so . . .

A: Well, I can't – let me say this another way. I don't have any specific elements of uncertainty that I want to link to the trim line, but I'm not saying that there could be none that ever existed.

Q: Fair enough. In this particular case, there is nothing about your concerns about uncertainty that you would tag on to a so-called “trim line”; correct?

A: Right.

(Tr., Vol. 7, p. 1641, line 10 – p. 1642, line 1).

4. Quantification of Model Uncertainty is Not Necessary.

IDWR performed an uncertainty analysis on ESPAM2.1. The purpose of this analysis was to gain an understanding of the quality of the model results rather than to attempt to quantify or place a specific number on uncertainty. Coming up with such a number, although technically possible, would be prohibitively expensive and time consuming and would add little to our understanding of the quality of the model results.

The Department’s report on its uncertainty analysis is Exhibit 1277. There are four types of model uncertainty – conceptual uncertainty (arises because of uncertainty concerning the true hydro-geologic conditions of an aquifer), parameter uncertainty (arises because not all water budget parameters can be precisely quantified), internal calibration uncertainty (arises because there are many combinations of parameters that can lead to a well-calibrated model), and external calibration uncertainty (arises because calibration is done to an historical set of data that has its own uncertainties). (*See*, Exh. 1369 for a discussion by Dr. Brendecke of uncertainty).

There are two basic ways of expressing the uncertainty in model results. One way is to determine the probability distribution of the error associated with a model prediction, choose a confidence limit and state the predicted result with a range determined from the error distribution and confidence limit. (*Id.*) This appears to be what IGWA is arguing should have been done. Dr.

Brockway explained that the “Monte Carlo” method used to do this type of analysis is simply not feasible in terms of resources or time. (Tr., Vol. 10, p. 2330, l. 22 – p. 2331, l. 23). He testified that it probably would have taken Dr. Wylie, the Department’s modeler, the rest of his career with the Department to do a Monte Carlo analysis. (Tr., Vol.10, p. 2331, l. 9-13). Dr. Brendecke, IGWA’s expert admitted a Monte Carlo analysis was not a reasonably way of quantifying uncertainty because of the complexities involved in the ESPAM2.1 model. (Tr., Vol. 11, p. 2699, l. 7-11. No one within the Department or the ESHMC attempted to quantify uncertainty using a probability distribution. (Tr., Vol. 10, p. 2331, l. 2-8). Bern Hinckley confirmed that no one put a numerical value to the uncertainty of the model. (Tr., Vol. 11, p. 2552, l. 8-16). Instead, the ESHMC chose to conduct what is called a “maximization/minimization” uncertainty analysis. (See Exh. 1277, a report titled “Enhanced Snake Plain Aquifer Model, Version 2.1, Uncertainty Analysis”). While the maximization/minimization uncertainty analysis that was done is not as comprehensive Monte Carlo method, it provides confidence in the predictions of ESPAM2.1. (Tr. p. 2321, l. 13 – 21; p. 2325, l. 4 – 9; *see also*, Exh. 1284, p. 17-18).

The modeling process that went into producing ESPAM2.1 resulted in a very “robust model”; i.e. a high quality model with good calibration results and accurate predictions. (Tr., Vol. 6, p. 1403, l. 7 – p. 1404, l. 5). The best available predictions of junior pumping impacts on the Rangen spring complex are those made by ESPAM2.1. (Exh. 1284, p. 17-18, 26). Regardless of any numeric value of uncertainty, the ESPAM2.1 prediction is currently the best available and most unbiased prediction. (Exh. 3203, p.21). There is no rational basis for assigning any “margin of error” as IGWA contends because the ESHMC chose to do a maximization/minimization uncertainty analysis rather than using a Monte Carlo approach because of time and resource constraints. There simply is no basis for reversing the Director’s decision to use ESPAM2.1 without assigning a margin of error.

i. The application of model uncertainty to implement a trim line constitutes an improper allocation of the burden of proof.

The district court found that uncertainty cannot be the basis for trim line for one final and critically important reason. The *Clear Springs* Court specifically declined to address the spring users' argument that the application of uncertainty as a justification for a trim line is contrary to established burdens of proof. This Court determined that the issue had not been properly raised below and declined to address it. The burden of proof issue was properly raised in the present case and Judge Wildman determined that the trim line improperly shifted the burden of proof to the senior user:

While there is a higher level of predicted uncertainty or margin of error in the model results east of the Great Rift, based on the constitutionally established burdens of proof, any uncertainty or margin of error must operate in favor of Rangen, the senior right holder. By its very nature uncertainty does not support a finding of clear and convincing evidence. To allow model uncertainty to operate in favor of junior ground pumpers would shift the burden of proof to the senior to prove that junior ground pumpers east of the Great Rift were causing injury.

(R., p. 000707). Judge Wildman's decision to set aside the trim line on this basis was correct and should be affirmed.

E. THE CURTAILMENT ORDER DOES NOT VIOLATE I.C. § 67-5248.

IGWA argues that the Curtailment Order violates Idaho Code § 67-5248 by failing to address IGWA's hoarding/reasonable use/waste argument. As discussed above, IGWA's argument really boils down to an argument that Rangen's means of diversion, and by implication all diversion of spring water, is *per se* unreasonable. As the district court found, "[t]he Director considered and rejected IGWA's arguments that Rangen's use of water and diversion methods are unreasonable, and its argument that Rangen should be required to install a recirculation system before it may seek curtailment." (R., p. 000694). "The Director's analysis is reasoned, is based

on evidence, and contains appropriate citations to the record.” *Id.* The Director also specifically addressed and rejected IGWA’s hoarding/reasonable use/waste argument on reconsideration:

IGWA's identification of "waste" as an issue arising out of the Rangen curtailment order is incorrect. The fact that a large portion of the water curtailed will not reach Rangen does not mean it is being wasted. Water not reaching Rangen becomes available to other senior water users in the Thousand Springs area. The water also benefits other senior water users with pending delivery calls upstream from the Thousand Springs area (such as the Surface Water Coalition call) because the benefits of curtailment of ground water rights propagate upstream as well as downstream. The real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

(A.R., Vol. 22, p. 004466).

This Court should affirm the district court’s conclusion that “IGWA’s argument that the Director’s decision is not supported by a reasoned statement is unavailing.” (R., p. 000694).

F. THE DIRECTOR DID NOT VIOLATE THE GROUND WATER ACT BY ADMINISTERING THE CURREN TUNNEL AS A SURFACE WATER DIVERSION INSTEAD OF A GROUNDWATER DIVERSION.

IGWA contends that the Martin-Curren Tunnel is ground water and that Rangen’s delivery call is subject to the requirements of the Ground Water Act. *IGWA’s Opening Brief*, pp. 42-49. Nearly twenty years ago in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), this Court adjudicated water rights involving the Martin-Curren Tunnel – the source designated on the Partial Decrees for Rangen’s water rights. This Court specifically described the Martin-Curren Tunnel as spring water in its opinion. *See*, 125 Idaho at 394, 871 P.3d at 811. Spring water is surface water – not ground water. *See, Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011).

IGWA filed an Amicus Brief in support of rehearing after this Court issued the *Musser* decision. Apparently not realizing that the Court had described the source as “spring water,” IGWA argued that this Court wrongly determined that the Martin-Curren Tunnel is ground water when, in fact, the water is surface water. IGWA argued:

The Court also failed to address the threshold question of whether the Mussers were ground or surface water diverters (which would be relevant if the Court concluded that section 42-226 applies only in contests among ground water users). Nor was this question addressed below (because section 42-226 was not in issue). **The Court apparently assumed, without the benefit of an adequate factual record or legal analysis, that the Mussers’ spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho’s water code lumps springs and lakes together with surface rights. I.C. § 42-201. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226. This distinction is discussed in *Branson v. Miracle*, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: “The water flow did not issue naturally from the surface of the earth; thus it was not a spring.” In contrast, the Mussers’ water source is a natural spring (albeit one which has been improved with an artificial tunnel).**

See, Amicus Curiae Brief of Idaho Ground Water Association (March 30, 1994), p. 9 fn 7 (emphasis added) (attached as Appendix 1 to *Rangen’s Reply Brief in Support of Motion for Partial Summary Judgment Re: Source, R.*, p. 0002896) (emphasis added). IGWA is now advocating the exact opposite position. The Director rejected IGWA’s position. The District court rejected IGWA’s position. This Court should reject IGWA’s position too because it is contrary to the plain language of *Rangen’s Partial Decrees*.

Section 42-1420(1) of the Idaho Code makes it clear that a decree entered in a general adjudication is conclusive. It states in relevant part: “The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system”

I.C. § 42-1420(1); *see e.g., In Re Snake River Basin Water System*, 115 Idaho 1, 7, 764 P.2d 78, 84 (1988) (explaining that a decree entered in a “general adjudication” is “one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.”). This Court has explained that finality in water rights is essential and that making a change to a water right is tantamount to changing a description of real property:

Finality in water rights is essential. "A water right is tantamount to a real property right, and is legally protected as such." *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983).

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998).

In this case, the SRBA adjudicated and decreed the source of Rangen’s water rights when it entered the Partial Decrees in Rangen’s favor. (*See*, Exhs. 1026 and 1028). The decreed source of the two rights is the “Martin-Curren Tunnel; tributary to Billingsley Creek.” (*See id.*) Rangen’s Partial Decrees follow the standard SRBA form. The form is based on the Director’s Report filed by the Department. Section 42-1401(B) of the Idaho Code explains the role that the Department played in the SRBA. It states in relevant part:

(1) the Director’s role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

I.C. § 42-1401B(1). To fulfill its role as an independent expert and technical assistant, the Department was required to file a Director's report on the Snake River Basin which included determination of the following elements of the water rights within the basin:

- (a) the name and address of the claimant;
- (b) **the source of water;**
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) legal description of the place of use;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

I.C. § 42-1411 (emphasis added).

The Department has promulgated an extensive set of rules governing its role in the adjudication process. *See* IDAPA 37.03.01 (Adjudication Rules). The Department's Adjudication Rules actually specify how water sources were to be listed in the claim forms used in the SRBA.

The claim forms were the basis for the partial decrees that were entered in the SRBA. Rule 37.03.01.060.02.c states:

Source of Water Supply. The source of water supply shall be stated at item three (3) of the form.

i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. If no official name has been given, the name in local common usage should be listed. If there is no official name, the source should be described as “unnamed stream” or “spring.” 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.”**

IDAPA 37.03.01.060.02.c (emphasis added).

Rangen’s Partial Decrees follow the IDWR format required for surface water. They describe the source of Rangen’s water as the “Martin-Curren Tunnel” – the name of the springs in local usage since there is no official USGS name. Rangen’s Partial Decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of a tributary is unique to surface water sources. Rangen’s Partial Decrees do **not** specify the source as “Ground Water” as required if the source is, in fact, ground water. To replace the designation of “Martin-Curren Tunnel; tributary to Billingsley Creek” with the designation of “Ground Water” would be tantamount to a change to the Partial Decrees entered in the SRBA. The District Court correctly held that this would be improper and that IGWA’s arguments had to be made in the SRBA when Rangen’s Partial Decrees were being entered – not in this case.

In its *Opening Brief*, IGWA contends that the Department and the District Court “over-read” Rangen’s Partial Decrees and that the purpose of naming the source is simply to identify it

so that people cannot switch from one source to another. *IGWA's Opening Brief*, p. 47. IGWA's position is untenable. Section 42-1420(1) of the Idaho Code is unequivocal – "The decree entered in a general adjudication shall be conclusive as to the *nature and extent* of all water rights in the adjudicated water system" I.C. § 42-1420(1) (emphasis added). The form of Rangen's Partial Decrees is critical – it shows that the Martin-Curren Tunnel is a surface water source and is not ground water. If IGWA wanted to challenge that determination – the challenge had to be made in the SRBA when the partial decrees were being entered – not now. The fact is, IGWA took the position twenty years ago that the source of Rangen's water was surface water. Now it wants to change its position. This Court should affirm the District Court's determination and rule as a matter of law that the source of Rangen's water rights is surface water.

III. CONCLUSION

Rangen respectfully requests that this Court affirm the district court's decision setting aside the Great Rift trim line and reject IGWA's invitation to undermine the Director's obligation to administer surface and ground water rights on the ESPA conjunctively and by priority. Rangen also requests that this Court affirm the District Court's determination and rule as a matter of law that the source of Rangen's water rights is surface water.

DATED this 8th day of June, 2015.

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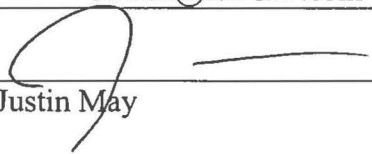
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 8th day of June, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by ~~U.S. Mail~~ and email:

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