Docket No. 42775-2015

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.,
Petitioner-Appellant on Appeal

v.

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

and

CITY OF POCATELLO, RANGEN,INC., FREMONT MADISON IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, and CITY OF POCATELLO,
Intervenors-Respondents on Appeal.

SURFACE WATER COALTION'S RESPONSE BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Twin Falls, Case No. CV-2014-1338
(Consolidated Gooding County Case No. CV-2014-179)

Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("*Rangen Order*") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on January 29, 2014.

II. Course of Proceedings / Statement of Facts

The procedural and factual history is set forth in Appellant Rangen Inc.'s ("Rangen") *Opening Brief* (Docket No. 42772-2015). The Surface Water Coalition[1] intervened to address the Director's use of the Enhanced Snake Plain Aquifer Model 2.1 ("ESPAM 2.1"). The Director adopted and applied the new model to Rangen's delivery call:

> 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.

Agency R. Vol. 21, p. 4224.[2]

Unlike the prior model (ESPAM 1.1), the Director expressly found there was no quantifiable margin of error or uncertainty when applying the results of ESPAM 2.1. *See id.*, p.

[1] The "Surface Water Coalition" or "Coalition" is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company. The Court reviewed the Coalition's delivery call and resulting orders in *A&B Irr. Dist. v. Spackman*, 155 Idaho 640 (2013).

[2] Citations to "Agency R." or "Tr." throughout this brief refer to the Agency Record and Hearing Transcripts before IDWR in Docket No. CM-DC-2011-004 as lodged with the District Court. Citations to "R." or "Supp. R." refer to the Clerk's Record and Supplemental Clerk's Record on Appeal before the SRBA District Court (Twin Falls County Dist. Ct., Fifth Jud. Dist., Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)).

4226. Consequently, the modeled results, without qualification, represent the best prediction for conjunctive administration. This fact remains undisputed.

Using the model, the Department predicted that junior pumping would deplete Rangen's water supply by 17.9 cfs (quantity that would show up in the Rangen model cell). *See id.*, p. 4210; Ex. 3203 at p. 6. The Director then reduced the number of rights subject to curtailment to those located within the "area of common ground water supply" under CM Rule 50, finding that 16.9 cfs would result from their curtailment. Agency R. Vol. 21, p. 4211. Finally, the Director again reduced the scope of administration by excluding junior ground water rights located east of the Great Rift, a hydrogeologic feature in the aquifer with lower transmissivity[3]. *See id.*, p. 4215, 4228. After limiting the ground water rights subject to curtailment, the Director then determined that the Martin-Curren Tunnel would receive 63% of the curtailment benefit accruing to the Rangen model cell, resulting in 9.1 cfs. *See id.*, p. 4228. Including junior rights east of the Great Rift would result in 10.6 cfs, an increase of 1.5 cfs. R. 701. If curtailed, ninety percent (90%) of the water modeled to arrive at the Curren tunnel would return to Rangen within the first thirteen years. Ex. 3203 at p. 6.

Importantly, the Director did not find Rangen's call to be futile as against those junior rights east of the Great Rift. Further, the Director did not find curtailment of those rights would fail to produce water that Rangen could put to beneficial use under its senior water right.

[3] "Transmissivity" is a term to define the rate at which water flows horizontally through an aquifer. The higher the transmissivity value the faster water flows, the lower the value, the slower water flows. While water may flow at a slower rate through the Great Rift area it is still hydraulically connected and flows to the spring sources, in this case Rangen's water supply. That fact is undisputed.

Instead, the Director justified the Great Rift "trim line" on the mistaken legal theory that he "must consider the diminishing benefits of curtailment beyond the Great Rift" in light of Article XV, § 7 of the Idaho Constitution and CM Rule 20. Agency R. Vol. 21, p. 4227. Mistakenly, the Director believed these provisions gave him authority to exclude juniors from conjunctive administration.[4]

On appeal, the district court corrected the Director's legal error and set aside the application of the Great Rift trim line. R. 707. The district court carefully analyzed this Court's *Clear Springs Foods* decision and held:

> In sum, a plain reading of the various holdings in *Clear Springs* establish that in the context of a delivery call brought by senior spring users against junior ground water pumpers, neither the CM Rules, the common law, Idaho statutes, nor the Idaho Constitution provide the Director with 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 means of diversion is reasonable and the water is put to beneficial use*.

R. 700 (emphasis in original).

The Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") appealed the district court's ruling.[5] R. 751 & Supp. R. 219. For the convenience of the Court, the Coalition is filing a single response to both opening briefs.

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[4] Where a constitutional provision is clear, the court must follow the law as written. *See McNeal v. Idaho Public Utilities Com'n*, 142 Idaho 685, 691 (2006). The Court thoroughly analyzed both Article XV, § 7 and what CM Rule 20.03 means in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 798-800 & 804-10 (2011).

[5] The district court also denied IGWA's and Pocatello's petitions for rehearing. R. 745.

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure," (d) "is not supported by substantial evidence in the record as a whole," or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc.*, 150 Idaho at 796.

ARGUMENT

I. No Law Mandates the Use of a Trim Line in Conjunctive Administration.

IGWA and Pocatello misinterpret the *Clear Springs* decision and fail to acknowledge how the Director's attempted trim line in the present case is distinguishable based upon the facts and application of ESPAM 2.1, an update of the model with no assigned margin of error. Accordingly, a brief recap of that decision and what was decided is important to set the context of the present appeals.

A. The *Clear Springs* Decision – 10% Trim Line Affirmed Under ESPAM 1.1.

> The Enhanced Snake Plain Aquifer Model ("ESPAM") is a calibrated regional ground water model representing the ESPA. ESPAM version 1.0 ("ESPAM 1.0") was developed by the Department working in collaboration with the Eastern Snake Hydrologic Modeling Committee ("ESHMC"), a technical committee comprised of representatives of water user groups and government agencies. ESPAM 1.0 simulated the effects of ground water pumping from the ESPA on the Snake River and tributary springs.

Agency R. Vol. 21, p. 4203.

Since 2005, the Director has applied ESPAM 1.0, and its successor version 1.1, to simulate the impacts of junior groundwater pumping on senior priority surface water rights. For example, the Director used ESPAM 1.1 to evaluate delivery calls filed by the Surface Water Coalition, as well as Clear Springs Foods and Blue Lakes Trout Company (latter two known as "Spring Users" in the *Clear Springs Foods* opinion). Further, the Director used the prior model to evaluate mitigation plans for each call.

Litigation in the Spring Users case included a dispute over the Director's application of the results of ESPAM 1.1, in particular the use of a ten percent (10%) trim line.[6] As recognized by the Supreme Court, the Director established the 10% trim line by relying on "an uncertainty of up to ten percent due to the margin of error in stream gauges used in developing the model." *Clear Springs*, 150 Idaho at 812 (emphasis added). The Court upheld the use of a 10% trim line even though IGWA and Pocatello argued that the trim line should be higher than 10% due to additional "errors" that they believed required a more limited zone of curtailment:

> "The curtailment orders should be set aside because the Director failed to account for all known limitations of the [Aquifer] Model, resulting in a broader zone of curtailment than should have occurred." They argue that in addition to possible error from the stream gauges, "Model uncertainty also derives from non-uniform geology of the [Aquifer], variations within the Model cells, the assumption that well impacts are isotropic [the same in every direction], the assumption that all data was accurate and reliable, and the unaccounted for impacts of surface water diversions, precipitation recharge, and tributary underflow." They conclude by "ask[ing] the Court to set aside the curtailment

[6] The 10% trim line, or quantified margin of error with ESPAM 1.1, was a geographic area outside which junior priority groundwater users were not subject to administration or a mitigation obligation. This was the case even if a junior water user outside of that trim line was found to contribute to the material injury suffered by the Spring Users' senior water rights.

> orders and remand them to the Director with instructions to exercise his judgment in accounting for all contributing factors of Model uncertainty, and to re-define the area of curtailment accordingly."

Id. at 813.

These errors, they argued, mandated the use of a trim line "between 20 and 30%." *Id*.

Conversely, the senior Spring Users argued that the trim line should be less than 10%:

> The Spring Users contend that the Director abused his discretion for several reasons. First, because the error in the stream gauges is plus or minus 10%, there is no way to know when administering water rights in a particular case whether the error is high or low. Second, the Director has described the groundwater model itself as the best available technology for determining the impact of junior ground water diversions on spring supplies. Third, there is no statute or administrative rule requiring 100% accuracy in measuring devices or in determining material injury, nor is there evidence showing that such level of accuracy could be achieved.

Id. at 816-17.

This Court upheld the Director – affirming the use of a 10% trim line with ESPAM 1.1 due to the "margin of error in the stream gauges":

> The Director concluded that there was up to a 10% margin of error in the groundwater model ***due to the margin of error in the stream gauges***, and he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material injury to the Spring Users' water rights. 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 817 (emphasis added); *see also id*. at 813-14 (trim line based on "margin of error in the stream gauges" and affirmed as use of discretion by Director).

Accordingly, the 10% margin of error, or quantified uncertainty, was affirmed for purposes of the use of ESPAM 1.1 in conjunctive administration. The *Clear Springs* decision did not hold that any type of "trim line," including one rooted in "policy", could be applied by the Director. Critically, the facts of ESPAM 2.1 and its use were not at issue in that case.

B. ESPAM 2.1 Represents the Best Science Available and the "Most Robust" Model for Administering Water Rights in the ESPA.

The Department replaced ESPAM 1.1 with version 2.1 in 2012. The new model, which is technically superior and more reliable than ESPAM 1.1, was used by the Director to evaluate the Rangen delivery call. As the testimony at the hearing confirmed, ESPAM 2.1 is a "robust" model. R. 696. ("Unlike ESPAM 2.1, which is calibrated to predict the benefits of curtailment to the square mile 'cell' within which the calling party's spring is located, ESPAM 1.1 was limited to predicting the benefits to a spring reach containing multiple cells").

Prior to the hearing, the Department issued a *Staff Memorandum*, concluding that ESPAM 2.1 represents the best available science. Ex. 1319. After listening to the testimony at the hearing – including concerns raised by IGWA – the Department's expert witness, Dr. Alan Wylie, testified that the new model represents the "best science" and is well suited for conjunctive water right administration:

> Q. MR. MAY: Do you believe that Exhibit 2300 shows, in your opinion, that the model is well calibrated and does a good job of predicting the impact of curtailment at Rangen Springs?
>
> A. DR. WYLIE: I'm very pleased with the calibration we got. I agree with Mr. Hinckley and Dr. Brendecke that there are shortcomings. I think from participating here – well, from observing that I got some pearls of wisdom that

I can work on to try to improve. It always – criticizing someone else's model is the easiest job you can get paid to do.

Q. Do you believe that it is, however, well calibrated and it's the best science that we have?

A. It's the best science we have, yes.

Q. And did anything that you heard while you were sitting through the hearing today change that opinion?

A. No.

Tr. at 2949-50 (emphasis added).

IDWR's final agency report for ESPAM 2.1 confirmed Dr. Wylie's testimony.[7] Rangen's experts, Dr. Charles Brockway and David Colvin, agreed and testified that ESPAM 2.1 was a "robust" groundwater model representing a "significant improvement" over the prior version. Tr. at 2296-97 (Brockway testimony); Tr. 2403-06 (Colvin testimony); *see also*, Tr. at 2327, ll.14-16 (Brockway Testimony) (describing ESPAM 2.1 as "robust"). Even Pocatello's witness, Gregory Sullivan, testified that he had no "specific criticisms of ESPAM 2.1," Tr. at 1465, ll.21-23, and that ESPAM 2.1 represents "the best available science," *id*. at 2739, ll.9-14.

Despite these experts' opinions, IGWA attempted to challenge the model's ability to predict impacts at the particular spring from which Rangen receives water, including providing

[7] The final agency report for ESPAM 2.1 concluded: "Although every model represents a simplification of complex processes, with the ESPAM being no exception, ***ESPAM 2.1 is the best available tool for understanding the interaction between groundwater and surface water on the Eastern Snake Plain***. The science underlying the production and calibration of ESPAM 2.1 ***reflects the best knowledge of the aquifer system available at this time***. ESPAM 2.1 was calibrated to 43,165 observed aquifer levels, 2,248 river gain and loss estimates, and 2,845 transient spring discharge measurements collected from 14 different springs. Calibration parameters indicate an excellent representation of the complex hydrologic system of the eastern Snake Plain." Exhibit 1273A at 89 (emphasis added).

alternative models prepared by its expert witness Charles Brendecke [of AMEC engineering]. However, these efforts only illuminated the robust nature of ESPAM 2.1:

> A. DR. WYLIE: It made me pretty confident that what we've done at Rangen is fairly robust.
>
> Q. MR. MAY: And why did it give you that confidence?
>
> A. The AMEC 1 had almost exactly the same sum of squared residuals for Rangen and a very, very similar value for the whole model curtailment. And AMEC 2, the residuals were higher for Rangen, but they changed the weights. So I don't know how much of that was a result of changing the weights. But they also – that also had very similar curtailment values for Rangen.

Tr. at 2925-26.

In the end, although IGWA attempted to discredit the results of ESPAM 2.1, its actions only confirmed that ESPAM 2.1 is the best science available. *Id*. Moreover, IGWA cannot meet the standard of review necessary to overturn the Director's decision to adopt ESPAM 2.1. *See* I.C. § 67-5279(3). Without a defined margin of error, the ESPAM 2.1 results represent the best scientific information available for conjunctive administration of Rangen's senior rights.

C. The District Court Rejects the Great Rift Trim Line.

Acknowledging a new and improved model was being used for administration, the Director concluded: "[b]ecause of the complexity of the model, the margin of error associated with model predictions cannot be quantified." Agency R. Vol. 21, p. 4228 (emphasis added). Without a quantified margin of error, the Director realized that the modeled results produced the best estimates for administration. With this realization, the Director had no technical basis to exclude certain junior ground water rights from administration.

However, rather than continue using the 10% trim line implemented under ESPAM 1.1, which this Court upheld based upon a margin of error and which was not justified using ESPAM 2.1, the Director created a trim line associated with the Great Rift, a subsurface geological feature of the ESPA. Agency R. Vol. 21, pp. 4224-28. The district court recognized the different trim line determinations based on the use of ESPAM 1.1 in the prior cases versus the new trim line theory the Director imposed in the *Rangen Order* using ESPAM 2.1:

> In addressing the use of a trim line, the Director concluded that ***the 10% trim line imposed in Clear Springs would not be appropriate because the 10% trim line was based on predictions of impacts to a multi-cell reach (ESPAM 1.1)***. And, that applying a 10% trim line based on model predictions of impacts to a single model cell (ESPAM 2.1) would result in a significantly different standard than was applied in the Clear Springs delivery call. To illustrate, at oral argument, counsel for the Department explained that if a 10% trim line were applied in this case approximately only 175 acres would be subject to curtailment. The Director acknowledged the holding in Clear Springs providing that because a model is only a prediction or simulation of reality it must have some margin of error and that it would be inappropriate to apply the model independent of the assigned margin of error. ***However, the Director also concluded that because of the complexity of the ESPAM 2.1 model, the margin of error associated with the model predictions could not be quantified***.

R. 702 (emphasis added).

As to the development of the Great Rift trim line, the district court explained:

> The Director found by clear and convincing evidence that ESPAM 2.1 constitutes the best science currently available for simulating the effect of ground water pumping from the ESPA on the spring flows located in the Rangen cell. Although some of the parties offered criticisms of the model, no party advocated the use of an alternative model. However, in applying ESPAM 2.1, the Director imposed a "trim line" or a geographical demarcation defining an area of the ESPA that would be subject to curtailment and excluding from curtailment the area of the ESP A located outside of the trim line. The trim line imposed by the Director corresponds with a geological

> feature referred to as the "Great Rift." The Great Rift is a volcanic rift zone comprised of less permeable basalts having lower hydraulic conductivity which impedes the transmission of water through the aquifer. The Great Rift runs north to south across the Eastern Snake River Plain extending from Craters of Moon to just west of American Falls Reservoir. The Director determined that due to the low transmissivity of the Great Rift zone the benefit of curtailment to senior rights with respect to the number of acres curtailed diminishes significantly if areas east of the Great Rift are included in the curtailment. As a result and for reasons explained more fully below, the Director determined that junior rights located east of the Great Rift would be excluded from curtailment.

R. 695-96.

Importantly, the undisputed and overwhelming testimony and evidence at hearing was that there is no scientific or technical justification for the use of any trim line with ESPAM 2.1. Rather, any use of a trim line would be a "policy", not a technical decision.[8] As such, whereas the 10% trim line applied with ESPAM 1.1 was based on a technical determination of quantified model uncertainty, *see Clear Springs Foods*, 150 Idaho at 812-13, no such justification exists relative to the use of ESPAM 2.1.[9]

[8] Pocatello's witness admitted that "there does not appear to be a basis to adopt a trim line based on specific technical uncertainty analysis." Tr. at 1641, ll.12-16 (Sullivan testimony) (Pocatello's engineer testifying that there is no technical basis for a trim line as it is "largely a policy decision"). IGWA's experts agreed. *Id*. at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g*., at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision").

[9] For this reason, IGWA's attempt to justify the use of a 10% trim line by arguing that the Coalition call and Spring Users' calls both implemented a 10% trim line are misleading and misplaced. *IGWA Br*. at 35-38. Indeed, the Director applied ESPAM 1.1 in those prior calls. As discussed herein, this Court upheld the use of a 10% trim line being applied to the results of ESPAM 1.1. *Clear Springs Foods*, 150 Idaho at 812-13. Nothing in this Court's order held that the 10% trim line was a perpetual requirement that must be applied – especially when all experts agree that there is no technical basis for the application of a trim line to the results of ESPAM 2.1. Tr. at 1641, ll.12-16, at 2697, ll.3-4, *e.g*., at 2551, ln. 17.

Consequently, the district court rejected the Great Rift trim line on both legal and technical grounds. First, there is no legal basis to reduce the amount of water available through administration based on an apparent disparity relative to the impacted junior water rights:

> As previously discussed, the Idaho Supreme Court instructed in *Clear Springs* that neither the CM Rules, the common law, Idaho statutes, 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.

R. 704.

The law in Idaho is clear: junior water rights cannot take water that would otherwise be put to beneficial use by a senior water right. IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602 & -607. Indeed, the SRBA Court has determined that all water rights in the basin must be administered as connected sources, unless the water right decree includes a separate streams general provision. *See Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management), Memorandum Decision and Order of Partial Decree* (Subcase No. 91-00005) (Feb. 27, 2002). The CM Rules follow this principle as well. *See* CM Rule 42.01.c ("This may include the seasonal as well as the multi-year and cumulative impacts of ***all ground water withdrawals from the area having a common ground water supply***.") (emphasis added).

The district court rightly adhered to this foundation for administration. Further, there is no dispute that junior groundwater users carry the burden to prove, by clear and convincing evidence, no injury to seniors as a result of their out-of-priority diversions – whether the defense is legal or factual. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500 (2012). The prior appropriation

doctrine does not change merely because diversions from one junior water right may have less of an impact than the diversions from another junior water right. *See* CM Rule 42.01.c. So long as diversions under a junior ground water right are found to be contributing to the material injury, those diversions are subject to administration. CM Rule 40. Moreover, the rules allow all juniors the opportunity to mitigate if they seek to continue their out-of-priority diversions. CM Rule 42.01.c, 43. Notably, all juniors, both east and west of the Great Rift have recently implemented actions to mitigate Rangen's injury and deliver the water required by the Director's order. *See* Addendum A (stipulation signed by "Upper Valley Pumpers" and "Pocatello", juniors located east of the Great Rift, without Exhibit C)[10]; Addendum B (IDWR memo identifying predicted impact and mitigation obligation at Rangen model cell and Curren Tunnel from all junior pumping within the ESPA common ground water supply, including area east of the Great Rift).

In this case the district court rightly noted that junior groundwater pumping east of the Great Rift contributes to Rangen's injury and depletes the water supply by 1.5 cfs, or what equates to fifty percent (50%) of the Martin-Curren tunnel flows in 2005. R. 706. Second, the district court confirmed there is no *technical justification* for the application of a trim line to the results of ESPAM 2.1:

> The Director's remaining support for the use of the trim line concerns the margin of error or level of uncertainty based on the application of the model. ***Unlike the situation in Clear Springs which assigned a margin of error of 10% based upon the limitations of ESPAM 1.1, the Director concluded in this case that: "Because of the complexity of the model, the margin of error***

[10] Although the parties reserved all arguments in this appeal and others, it does not change the fact that all juniors east of the Great Rift can and in fact are mitigating Rangen's injury as determined by the Director.*See* Addendum A.

> ***associated with model predictions [ESPAM 2. I] cannot be quantified***." R., p. 4227. But did conclude that "there is uncertainty in the predicted increase in spring flow resulting from curtailment and the actual response may be higher or lower than predicted." *Id.* ***All experts involved in this case were in general agreement that the use of a trim line would be based more on a policy decision than on a quantifiable level of uncertainty***.

R. 705 (emphasis added).

It is a "long standing rule" in Idaho that the holders of the junior priority groundwater rights "bear the burden of proving by clear and convincing evidence that the call would be futile or is otherwise unfounded." R. 706. In this case, IGWA and Pocatello failed to meet this burden, particularly as it relates to those juniors pumping east of the Great Rift (i.e. outside of the Director's zone of curtailment). Notably, the district court held:

> In this case, the model predicts that curtailment of junior rights east of the Great Rift are causing material injury and curtailment of such rights would produce a quantity of water to the Martin-Curren Tunnel in the amount of 1.5 cfs. Indeed, while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren Tunnel, the meaningfulness of the quantity becomes readily apparent. The Director found that the average annual flow available from the Martin-Curren tunnel in 1997 was 19.1 cfs. R., p. 4215. The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. *Id.* And that the average annual flow has not exceeded 7 cfs since 2002. *Id.* From that perspective, the additional 1.5 cfs is neither insignificant nor *de minimis*.
>
> ***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***. Therefore, the Director's application of the trim line in this matter is set aside and remanded for further proceedings as necessary.

R. 706-707 (emphasis added).

This conclusion is very similar to that of the *Clear Springs* Court, which concluded that, although there are imperfections in the model, such imperfections do not warrant the use of an increased trim line:

> The hearing officer found that "***[t]he limitations of the model are identifiable and important but they do not preclude reliance upon it. It has an acceptable level of reliability based on peer reviewed science***." The Director adopted those findings, and found that the model "represents the best available science for determining the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically-connected reaches of the Snake River and its tributaries." He also found, "There currently is no other technical basis as reliable as the simulations from the [Aquifer] ground water model that can be used to determine the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically connected reaches of the Snake River and its tributaries." Those findings are not challenged on appeal. In fact, the Groundwater Users state, "The Model is the best science available for administering hydraulically connected surface and groundwater rights on the [Aquifer], but the Model is not perfect." They have failed to show that the Director abused his discretion in relying upon the model. He perceived the issue of utilizing the model 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 reliance upon the model.

Clear Springs, *supra* at 813-14.

In the end, since neither the law nor the facts support the use of a trim line, the district court properly reversed the Director and set aside the Great Rift trim line. The Court should deny IGWA's appeal accordingly.

D. There is No Law That Mandates the Use of a Trim Line in Administration.

The hallmark of lawful administration is that junior water rights cannot take water that would otherwise be put to beneficial use by a senior water right. IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602 & -607. Further, the Conjunctive Management Rules prohibit junior pumping which causes material injury to a senior water right.[11] *See* CM Rules 20 & 40. The rules require administration of all junior priority ground water rights located within the ESPA, an area of common ground water supply. CM Rule 50; *see also*, CM Rule 42.01.c ("as well as the multi-year and cumulative impacts of all ground water withdrawals from an area of common ground water supply.") (emphasis added). Finally, the Director and watermaster must administer junior ground water rights causing injury to a senior water right within an organized water district. CM Rule 40.

The concept of a "trim line" was developed through a defined margin of error for ESPAM 1.1, a prior version of the model. Yet, ESPAM 2.1 is *a different model* – a much more "robust" model, with more accurate results calibrated to specific springs. Unlike version 1.1, here the Director expressly found that any model uncertainty with ESPAM 2.1 could not be quantified. Agency R. Vol. 21, p. 4226. Indeed, there is no technical or scientific basis to qualify the modeled results and apply a trim line to ESPAM 2.1. *See* Tr. at 1641, 1l.12-16 (Sullivan testimony) (Pocatello's engineer testifying that there is no technical basis for a trim line as it is "largely a policy decision"); *Id.* at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g.*, at 2551, ln. 17 (Hinckley testimony) (frequently

[11] Unless the junior user provides mitigation through an approved mitigation plan. *See* CM Rule 43.

referring to the trim line as a "policy decision"). Consequently, the Director cannot use "agency discretion" to justify his decision on this issue.

IGWA would have this Court believe that the law on the use of any "trim line" is settled. In doing so, it relies on a number cases dealing with new water right appropriations. *IGWA Br.* at 24-26 & 38-39. Importantly, this Court previously rejected these arguments – holding that the cases cited by IGWA deal with new appropriations, not conjunctive water right administration. *Clear Springs, supra* at 809-10. IGWA wrongly ignores established precedent and argues that these cases somehow mandate that the Director must implement a trim line in any case regardless of the scientific facts at hand. *IGWA Br.* at 24-26 & 38-39. IGWA's arguments are without merit and cannot be sustained in light of existing precedent and the rule of *stare decisis*. *See State v. Grant*, 154 Idaho 281, 287 (2013).

In *Van Camp v. Emery*, 13 Idaho 202 (1907), the Court held that the holder of a water right should not be authorized to dam a stream "so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much." 13 Idaho at 754. As such, although the "senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion." *Clear Springs* at 809.

Similarly, *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) did not address water right administration and did not establish the right to impose a trim line when conjunctively administering junior ground water rights. As with *Van Camp*, it addressed the reasonableness of a means of diversion in the river. In *Schodde*, the senior water user constructed a water wheel diversion that required the entire flow of the river in order to fulfill

one person's water right.[12] Again, the "issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not his priority of rights." *Clear Springs*, at 809. Similarly, neither *Basinger v. Taylor*, 36 Idaho 591 (1922), nor *Clark v. Hansen*, 35 Idaho 449 (1922), address the use of a trim line or other limitation in administering water rights – indeed, neither addresses water right administration at all.[13]

In sum, these cases are not applicable to the present facts, where the Director has determined that Rangen's means of diversion are reasonable. Agency R. Vol. 21, p. 4222-23. The district court succinctly summarized the state of the law and properly rejected IGWA's arguments:

> Further, reliance … on *Schodde* and *Van Camp* for the proposition that an appropriator is not entitled to command the entirety of large volumes of water to support his or her appropriation is equally misplaced. For reasons previously discussed, in *Clear Springs*, the Idaho Supreme Court instructed that those cases 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. As discussed elsewhere in this opinion the Director found Rangen's means of diversion to be reasonable. Hence, the holdings in *Schodde* and *Van Camp* do not apply to the facts of this case.

R. 704.

[12] To that extent, the Court recited, as a hypothetical example, a situation wherein 90% of the current of a river was needed in order to divert the other 10%. The example dealt with the water user's means of diversion. The case dealt solely with reasonableness of diversions and does not apply to altering the results of the model for the purposes of conjunctive administration, particularly where junior users east of the Great Rift are found to deplete Rangen's water supply by 50% in certain years. R. 706-07.

[13] *Clark* dealt with the issuance of a water right after diversion works were not completed within the statutory timeframe. Other water users claimed that since the irrigation works were not completed within the statutory timeframe, any water right authorizing the diversion of water through those irrigation works was not valid. Although the Court found that a 90% loss through a particular ditch was "against public policy" and considered "waste," the Court did not conclude that a junior priority water right should be able to avoid administration because of the 90% loss. The issue before the Court was the reasonableness of diversion, not curtailment for administration. *See also Basinger v. Taylor*, 36 Idaho 591 (1922) (dealing with means of diversion and not administration of water rights and finding that 50% conveyance loss was unreasonable).

IGWA and Pocatello cannot escape the district court's clear and precise reasoning. Since Rangen's means of diversion are reasonable, and since the model shows junior ground water diversions east of the Great Rift will cause material injury to Rangen's senior water rights, there is no legal or technical basis for implementing a trim line. Moreover, technology in administration will certainly advance. Models will improve. With these advancements and improvements, the ability of the Director to anticipate and more precisely identify impacts from groundwater diversions will improve as well. The Director may determine – as he did in the application of ESPAM 2.1 here – that model uncertainty cannot be quantified. As such, without a defined margin of error, the modeled results of ESPAM 2.1 represent the best science available.

In sum, the uncertainty or margin of error defined with a prior model and its application has no relevance, and certainly does not create any rule of law regarding a trim line. None of the cases relied upon by IGWA changes this undeniable fact. Therefore, the district court's decision should be affirmed.

II. IGWA's Policy Arguments are Without Merit.

IGWA's frustration with the district court's decision to set aside the Great Rift trim line– and with the Director's decision imposing the Great Rift trim line – boils down to one complaint: It is too harsh. IGWA asserts that the court and Director may not stray from the 10% trim line associated with ESPAM 1.1. IGWA chastises the Director for recognizing that he has limited discretion in administering water rights, and concludes that, regardless of the science or other information, the trim line must always remain 10%. *IGWA Br*. at 30-35. IGWA accuses the

district court and Department of being inconsistent and unreliable in their decision-making processes. *Id*. at 38-40.

In the end, IGWA would have this Court ignore the best science available and force the Director to apply a 10% trim line forever. Such arguments, however, ignore the latest science and merely shift the burden of a depleted resource onto the senior water user, contrary to Idaho water law. *See, e.g.,* I.C. § 43-106 ("First in time is first in right").

As to IGWA's "fairness" allegations, Judge John Melanson plainly described how priority administration is fair but harsh:

> The doctrine of prior appropriation … is a just, although sometimes harsh, method of administering water rights here in the desert, where the demand for water often exceeds water available for supply. The doctrine is just because it acknowledges the reality that in times of scarcity, if everyone were allowed to share in the resources, no one would have enough for their needs, and so first in time – first in right is the rule. The doctrine is harsh, because when it is applied, junior appropriators may face economic hardship or even ruin.

Order Dismissing Application for Temporary Restraining Order at 1-2, (Jerome County Dist. Ct., Fifth Jud. Dist., Case No. CV-2007-526) (Jun. 12, 2007).

Throughout Idaho's history, water users have diverted and developed Idaho's water resources with the express knowledge and understanding that, in times of shortage, those who diverted the water first had a prior right to the continued use of that water. Each subsequent water user, including the groundwater users in this case, diverted water subject to the "long-standing rule in Idaho" that "each junior appropriator is entitled to divert water only when the rights of previous appropriators have been satisfied." *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26 (Ct. App. 1988) (emphasis added).

This "underlying basic principle of water rights in the State of Idaho," *Application of Boyer*, 73 Idaho 152, 161 (1952), existed prior to statehood and is engrained in Idaho's constitution, statutes and regulations:

> Even though we refer to it as the constitutional method of appropriating water, the Idaho Constitution did not create the doctrine of prior appropriation. "The rights of appropriators were regulated in the first instance by local customs, and out of these initial sources grew our present laws and rules with respect to irrigation." *Sarret v. Hunter*, 32 Idaho 536, 542, 185 P. 1072, 1074 (1919). "The framers and adopters of our Constitution were familiar with the prevailing customs and rules governing the manner in which water might be appropriated ... and they gave it form and sanction by writing it in the fundamental law of the state." *Id.* at 543, 185 P. at 1075. ***"The rule in this state, both before and since the adoption of our constitution, is ... that he who is first in time is first in right."*** *Brossard v. Morgan*, 7 Idaho 215, 219–20, 61 P. 1031, 1033 (1900).

Joyce Livestock Co. v. United States, 144 Idaho 1, 7-8 (2007) (emphasis added); *see also Nielson v. Parker*, 19 Idaho 727 (1911) ("The doctrine prevailed prior to statehood, and in the earliest territorial history, that the 'first in time is the first in right,' in the diversion and use of the public waters"); *Dunniway v. Lawson*, 6 Idaho 28 (1898) ("plaintiffs were entitled, by virtue of a prior location, to the waters of Alder creek").

Priority of use is the pre-eminent rule of Idaho water law. Over 100 years ago, the Supreme Court, in *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589 (1904), confirmed that securing the most beneficial use and development of Idaho's water resources does not override the prior appropriation doctrine:

> It is certainly unnecessary for us to suggest that it was the evident intent of the framers of the Constitution to so husband the water of the state as to secure the most beneficial use thereof; that is, that it should always be so used as to benefit the greatest number of inhabitants of the state. They were careful to

> provide who should be entitled to the preference right to the use of the waters flowing in our natural streams. Nearly every session of our Legislature has attempted to improve upon its predecessor by so legislating as to improve the former use of water, and an inspection of the various acts plainly shows that the guiding star has always been to so legislate as to protect all users of water in the most useful, beneficial way, ***keeping in view the rule existing all over the arid region, "First in time first in right***."

9 Idaho at 594 (emphasis added).

Indeed, as early as 1891, the Court recognized that the right to the use of water "has been decided so often in favor of the prior appropriator that it has been generally considered, both by professionals and profanes, as a settled question." *Hillman v. Hardwick*, 3 Idaho 255 (1891); *Nielson, supra* (if a water user "should actually divert the water and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired").

Of course senior right holders must put the water to beneficial use as well. *See A&B Irr. Dist.*, 155 Idaho at 650. The Director and district court both found that Rangen would beneficially use the water that was being taken by junior ground water rights. As such, conjunctive administration was required.

A. The Director's Discretion.

IGWA argues that the Director erred in concluding that he has "limited authority to evaluate whether Rangen's means of appropriation is reasonable." *IGWA Br.* at 30. This argument is confusing because the Director did find that Rangen's means of diversion were reasonable. Agency R. Vol. 21, p. 4223. As such, the argument should be rejected.

That notwithstanding, although the Director has discretion to make decisions in conjunctive administration, *A&B Irr. Dist.*, 155 Idaho at 652 ("Director has discretionary authority in a water management case that is not available to him in a water rights case"), that discretion is not unfettered. Indeed, the Director is bound by the well-established burdens of proof and legal framework provided in Idaho law. *See, e.g.* I.C. § 67-5279 (Court may overturn agency actions that violate constitutional or statutory provision, exceed the agency authority, etc.); *see also supra* (discussing cases regarding Idaho's prior appropriation doctrine).

As such, since the Director found: (1) Rangen's means of diversion were reasonable; (2) that Rangen would beneficially use water made available through administration; and (3) that Rangen's senior water rights were being materially injured by depletions caused by junior groundwater diversions, the Director was then obligated to administer all hydraulically connected junior priority groundwater rights that did not prove any viable defenses to the call. Agency R. Vol. 21, pp. 4223-24. IGWA provides no argument to refute these facts and basic legal principles.[14] Further, IGWA cannot show that the Director's findings on these points were in error or not supported by substantial evidence. *See* I.C. § 67-5279(3). As such IGWA's argument fails the applicable the standard of review and should be denied.

B. The Quantity of Water Curtailed as Compared to the Quantity that Would Reach Rangen's Spring Source.

IGWA's next argument is that the Director failed to adequately explain why it was acceptable for more water users to be subject to administration than in prior spring user delivery

[14] IGWA and Pocatello had the opportunity to show that administration would have been futile, but they failed to meet that burden at hearing before the Director. Agency R. Vol. 21, pp. 4223-24.

calls. *IGWA Br*. at 32. IGWA complains that the Director failed to explain why the Great Rift trim line was applied rather than the 10% trim line used to define ESPAM 1.1's margin of error. *Id*. at 41 ("The Great Rift trim line is so far removed from the 10 percent trim line that junior users are left with no predictability as to how trim lines may be implemented in the future, in this case or others").

In short, IGWA complains that more juniors should have been exempted from administration and not have to accept responsibility for their injury to Rangen's senior water right.[15] The arguments are not supported by the law or facts.

Moreover, IGWA's arguments ignore the critical distinction in this case, the fact that ESPAM 2.1 does not have a quantified margin of error. Agency R. Vol 21, p. 4226 ("Because of the complexity of the model, the margin of error associated with model predictions cannot be quantified."). Indeed, whereas the 10% trim line was implemented under ESPAM 1.1 to account for "the margin of error in stream gauges," *Clear Spring*, 150 Idaho at 813, the groundwater users' own experts agreed that there was no technical basis for any trim line applied to the results of ESPAM 2.1, Tr. at 1641, 1l.12-16 (Sullivan testimony) (Pocatello's engineer testifying that there is no technical basis for a trim line as it is "largely a policy decision"). IGWA's experts agreed. *Id*. at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g.*, at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision").

[15] Again, all juniors subject to administration, both east and west of the Great Rift have since provided Rangen the ordered mitigation water. Addendum A. This action shows the CM Rules work. If juniors want to divert in the face of injury to a senior water right they must mitigate. *See* CM Rules 40.01.b; 43.

Ground water users cannot expect that all delivery calls will be subject to the same trim line associated with outdated technical tools such as ESPAM 1.1. The Director concluded that no margin of error could be quantified with ESPAM 2.1. Agency R. Vol 21, p. 4226. Indeed, as technologies advance – such as the update to the model with version 2.1– so too will the Director's ability to determine the impacts of groundwater diversions on senior water rights.[16] IGWA's argument that because a 10% trim line based upon a river reach model was used previously, then a 10% trim line with respect to the model cell containing the Curren tunnel should be applied in this scenario, is like comparing apples to oranges. Agency R. Vol. 22, p. 4466.

Furthermore, since delivery calls are all fact dependent – there is no single rule or test that would subject all delivery calls to the same trim line, particularly when they are based upon a margin of error associated with a prior model. There is no dispute that ESPAM 2.1 is a superior model that produces more robust results. It is undisputed – indeed, IGWA agrees – that ESPAM 2.1 is a marked improvement over ESPAM 1.1. *Supra* Part I. IGWA simply disagrees with the Director's decision and the results of the new model. However, this disagreement does not mean that the Director has failed to provide a "rational, reasonable and factually grounded explanation" for not applying a 10% trim line. IGWA's demands for more information or

[16] IGWA's arguments are essentially an effort to avoid administration. Use of a 10% trim line, would be especially egregious in this case, where, even though the senior water right is materially injured, no water would be provided to Rangen, Agency R. Vol 19, p. 3901, while junior water right holders would continue to divert their entire water right(s). There is simply no legal basis for applying a 10% trim line to the results of ESPAM 2.1.

justification are not necessary and are not supported by law.[17] The Court should deny IGWA's appeal accordingly.

C. Accounting for Model Errors.

IGWA next argues that the Director's Great Rift trim line does not properly account for the errors in the model. *IGWA Br*. at 35-38. IGWA alleges the Director ignored those errors and that the district court's decision mandates that "no matter how significant Model errors may be, they must be applied to the disadvantage of junior water users." *Id*. at 36-37. IGWA misstates the facts.

First, the Director did consider the arguments of the parties addressing the concerns about the model. *See, for example,* Agency R. Vol. 21, pp. 4225-26. The Director concluded that "[i]mperfections 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. The Director concludes that ESPAM 2.1 predicted responses to curtailment are the best available predictions." *Id*., p. 4226. Furthermore, "Because of the complexity of the model, the margin of error associated with model predictions cannot be quantified." *Id*. IGWA cannot meet the applicable standard of review to show the Director erred on this point. *See* I.C. § 67-5279(3); *A&B Irr. Dist.*, 153 Idaho at 506.

In the end, notwithstanding these complexities and imperfections, all parties agreed that there was no technical or scientific basis for a trim line, as found by the district court:

[17] Indeed, the use of any trim line under ESPAM 2.1 is not support by the law.

> The Director's remaining support for the use of the trim line concerns the margin of error or level of uncertainty based on the application of the model. ***Unlike the situation in Clear Springs which assigned a margin of error of 10% based upon the limitations of ESPAM 1.1, the Director concluded in this case that: "Because of the complexity of the model, the margin of error associated with model predictions [ESPAM 2. I] cannot be quantified***." But did conclude that "there is uncertainty in the predicted increase in spring flow resulting from curtailment and the actual response may be higher or lower than predicted." ***All experts involved in this case were in general agreement that the use of a trim line would be based more on a policy decision than on a quantifiable level of uncertainty***.

R. 705 (emphasis added).

Absent any technical justification, there is no legal basis for any limitation on administration based upon "model error." This was made apparent by the Court's ruling in *Clear Springs*. There, IGWA and Pocatello challenged the Director's 10% trim line, arguing that "all known uncertainties in the model" must be accounted for – requiring a trim line of 20-30%. 150 Idaho at 812-13. This Court recognized that there may be additional technical concerns with the model, but rejected IGWA's and Pocatello's arguments that these additional issues necessitated a larger trim line.

> The hearing officer found that "***[t]he limitations of the model are identifiable and important but they do not preclude reliance upon it. It has an acceptable level of reliability based on peer reviewed science***." The Director adopted those findings, and found that the model "represents the best available science for determining the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically-connected reaches of the Snake River and its tributaries." He also found, "There currently is no other technical basis as reliable as the simulations from the [Aquifer] ground water model that can be used to determine the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically connected reaches of the Snake River and its tributaries." Those findings are not challenged on appeal. In fact, the Groundwater Users state, "The Model is the best science available for administering hydraulically connected surface and groundwater rights on the

> [Aquifer], but the Model is not perfect." They have failed to show that the Director abused his discretion in relying upon the model. He perceived the issue of utilizing the model 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 reliance upon the model.

Id. at 813-14.

In this case, IGWA admits that "the Model is the best science available and should be used in this proceeding." *IGWA Br*. at 36. IGWA's and Pocatello's experts agree that there is no technical basis for a trim line. Tr. at 1641, ll.12-16 (Sullivan testimony) (Pocatello's engineer testifying that there is no technical basis for a trim line as it is "largely a policy decision"). IGWA's experts agreed. *Id*. at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id*., *e.g*., at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision"). As such, there is no reason for this Court to stray from its prior holdings. The Court should reject IGWA's argument that a higher trim line is necessary due to "model errors."

D. The Law of "Waste" and "Hoarding."

Finally, IGWA seeks a limitation on curtailment because more water must be curtailed than will actually appear at the springs from which Rangen diverts its senior water rights. *IGWA Br*. at 38-41. Relying on *Basinger*, *Van Camp* and *Schodde*, IGWA argues that "an 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." *IGWA Br*. at 22-30. Curtailment, IGWA concludes, will therefore lead to "waste" and

"hoarding" of the water resources. *IGWA Br*. at 22-30. It demands a decision from the Court drawing a bright administrative trim line. *IGWA Br*. at 33 ("IGWA asserted that Rangen should not be permitted to shut off a well if Rangen will not beneficially use at least 10 percent of the water that would have otherwise been used by the junior"). IGWA misapplies the law on these points.

First, there is no law that requires the senior water right to receive and beneficially use all water curtailed in conjunctive administration. The CM Rules recognize that water resulting from curtailment may take time to arrive and that not all of the water curtailed will flow to the senior water right. *See e.g.* CM Rule 42.01.c ("Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the areas having a common ground water supply."). IGWA admitted as much when it argued, at hearing, that as much as 90% of the curtailed water could be used by water users other than the senior water right holder. *IGWA Br*. at 33 (IGWA "asserts that Rangen" must "beneficially use at least 10 percent of the water that would have otherwise been used by the junior").[18]

[18] Ironically, IGWA has failed to provide any legal or factual basis to support its effort to draw a bright line test for administration at 10%. Why not 5% or 20%? As discussed above, there is no law demanding any trim line in administration. *Supra* Part I. Merely because a quantified model margin of error trim line was confirmed for prior version (i.e. ESPAM 1.1), that does not mean that a trim line is appropriate under a more robust and updated version that does not have a quantified margin of error. In truth, the analysis is fact dependent. In this case, the Director reviewed the facts and concluded that Rangen's senior priority water rights were being materially injured by junior ground water diversions. Agency R. Vol. 21, p. 4223 ("The Director concludes that pumping by junior ground water users has materially injured Rangen."). As such, all juniors found to contribute to the injury must be administered under the law. *See* CM Rules 40, 42.01.c, and 50. IGWA's failure to meet its burden to prove that the call is futile does not equate to an obligation on the part of the Director to impose a trim line in administration.

Furthermore, neither CM Rule 20.03 nor cases addressing the reasonableness of diversions – such as *Basinger*, *Van Camp* and *Schodde* – speak to the issue of how much water is appropriately curtailed in administration. *See supra* Part I.D. Indeed, relying on this Court's decision in *Clear Springs*, the district court properly rejected IWGA's arguments on this point:

> The Supreme Court held that the provision [of Rule 20.03 quoted above] is consistent with prior holdings in *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) and *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912), which stand for the proposition that senior water right holder is entitled to the decreed quantity of his water right but is not protected in his unreasonable means of diversion. *Id*. at 809. The Court noted that "the senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion." *Id*. Similarly in *Schodde*, the Court stated that "[t]he issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not his priority of rights." *Id*. The Supreme Court concluded that the purpose of the provision is to provide that to the extent the means of diversion is determined to be unreasonable, a senior appropriator must change his means of diversion. *Id*. The purpose of the provision is not to modify the decreed quantity of the senior appropriator's right. *Id*. As previously addressed in this opinion, the Director found Rangen's means of diversion to be reasonable.

R. 700.[19]

There is nothing in IGWA's brief that would warrant an alternate holding – particularly where the Director has already determined that Rangen's means of diversion are reasonable, Agency R. Vol. 21, p. 4223. IGWA refers to several other provisions in the Conjunctive Management Rules to support its "hoarding" theory. However, those rules speak to the

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[19] IGWA argues that the *Clear Springs* Court "confirmed" the language of CM Rule 20.03. *IGWA Br*. at 29. This argument, however, is misleading. Indeed, this Court also held that quoted provisions of Rule 20.03 address the methods of appropriation and reasonableness of diversion – which are not at issue in these proceedings. 150 Idaho at 809.

reasonableness of the senior appropriator's diversions and use – again, an issue that both the Director and district court confirmed. *See* CM Rule 40.03 (the Director may consider whether an appropriator is "diverting and using water efficiently and without waste"); 42.01 (factors the Director may consider whether water user is "using water efficiently and without waste").[20]

It is true that no water user has the right to "waste" or "hoard" water. Beneficial use is the measure and limit upon the extent of a water right. *A&B Irr. Dist. v. Spackman*, 155 Idaho 640 (2013). Waste by a senior is a defense to a delivery call that must be proven by junior appropriators by clear and convincing evidence. *See* 155 Idaho at 652; *see also, A&B Irr. Dist*; 153 Idaho at 524.

In this case, IGWA failed to carry its burden. Indeed, IGWA does not even contend that Rangen will waste or hoard the water that will arrive at the spring sources. For this reason, IGWA failed to carry its burden and both the district court and Director found that Rangen's means of diversion are reasonable and that it beneficially uses available water. Agency R. Vol. 21, pp. 4222-23; R. 693-95.

IGWA confuses the concept of a senior's "waste" and "hoarding" of water with water resulting from curtailment of a junior appropriator that may not be delivered to the senior user. IGWA's reasoning is flawed. For example, if groundwater rights junior to July 13, 1962 are curtailed, water that does not arrive for use at Rangen's facility is not "wasted" or "hoarded" by

[20] Citing to CM Rule 42.01.a, allowing the Director to consider the "amount of water available in the source from which the water right is diverted," IGWA alleges that "this factor is a clear reference to the rule that a senior cannot command far more water from the source than the senior applies to beneficial use." *IGWA Br.* at 28. To the contrary, this rule allowed the Director to consider whether the source – in this case, the Martin-Curren Tunnel – has sufficient "water available" to fulfill the demands of the senior water right. In this case, the Director found that it did not and ordered curtailment to satisfy Rangen's senior water right. Agency R. Vol. 21, p. 4219-20.

Rangen. The water is not even available for Rangen to "waste" or "hoard." IGWA offered no evidence that the water would be "wasted" or "hoarded" by anyone. Instead, that water either remains in the aquifer for use by other ground water users or will flow to other springs and river reaches where that water can be put to beneficial use by other senior surface water rights. Further, coupled with the continued moratorium[21] on new appropriations in the ESPA, and the fact that certain senior surface water rights are curtailed every year, water that improves aquifer levels or flows to other springs and river reaches is needed and will be put to beneficial use.[22] In no sense is this curtailed water "wasted" or "hoarded" by Rangen, as recognized by the Director when he appropriately held:

> 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.

Agency R. Vol. 22, p. 4466.

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

[22] Moreover, as found by the Director, the ESPA suffers from a continued state of deficit of nearly 300,000 acre-feet per year. Agency R. Vol. 21, p. 4203. This annual deficit causes declining ground water levels and reduced discharge to hydraulically connected reaches of the Snake River and tributary springs. Accordingly, curtailment that sustains and improves the health of the ESPA is not "waste" in any sense, and certainly not in the context of a senior user wasting water under Idaho law. IGWA's misinterpretation of this issue should be rejected.

IGWA simply misses the point on how those issues apply to analyze a senior's water use in administration.[23] IGWA's misstatement of the law leads it to conclude that the "Director abandoned the rule against hoarding and skyrocketed the zone of curtailment from 735 to 157,000 acres, creating a nine-bell fire alarm for the cities, dairies, businesses and farmers who were given less than three months to provide mitigation or have their wells shut off." *IGWA Br.* at 40. This argument is nothing more than hyperbole. Indeed, as discussed above, IGWA had no legal basis to expect that the trim line implemented under an outdated and inferior model would somehow apply to the results of ESPAM 2.1 – indeed, as it relates to ESPAM 2.1, there was never any trim line to "abandon." *IGWA Br.* at 40.[24] Further, IGWA ignores the fact that during the delay between the finding of injury and implementation of curtailment (or approval of mitigation), the senior water right holder is suffering injury every day.

Finally, it is worth noting that all junior users in this case eventually answered the "nine-bell fire alarm" and mitigated as required by the Director's order. *See* Addendum A. Consequently the Court should deny IGWA's appeal on this point.

[23] Furthermore, IGWA fails to mention the opportunity that groundwater users have to submit mitigation plans pursuant to CM Rule 43 if they do not want to face curtailment based on ESPAM 2.1 results.

[24] For this reason, IGWA's attempt to evade Rangen's criticism of IGWA for failing to plan for curtailment is unpersuasive. Indeed, the application of a trim line was fully litigated at the administration hearing. Agency R. Vol. 21, pp. 4224-28. All parties presented evidence to either support or refute the use of a trim line. All parties agreed there was no technical basis for a trim line. *See* Tr. at 1641, 1l.12-16 (Sullivan testimony) (Pocatello's engineer testifying that there is no technical basis for a trim line as it is "largely a policy decision"). IGWA's experts agreed. *Id.* at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g.*, at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision"). As such, IGWA's failure to properly plan is not the Director's fault. *IGWA Br.* at 40 (complaining that "there is an utter dearth of consistency or guidance from IDWR as to how much water seniors are permitted to curtail without using").

III. Pocatello's Efforts to Reinstate the Great Rift Trim Line Should be Denied.

Pocatello challenges the district court's reversal of the Great Rift trim line, arguing that the facts and law support its application. However, as discussed above, there is no law mandating the use of a trim line in this situation. Further, Pocatello misconstrues the basis for the Great Rift trim line, arguing that the evidence supported the Director's "benefits comparison" justification. To the contrary, it was undisputed that juniors east of the Great Rift contribute to Rangen's material injury. Further, the best available science showed that those juniors deplete Rangen's water supply by 1.5 cfs over time, which in a year like 2005 would constitute 50% of the senior's water supply. R. 706 ("while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren tunnel, the meaningfulness of the quantity becomes readily apparent."). Accordingly, the district court properly rejected Pocatello's arguments and this Court should affirm.

A general theme in Pocatello's brief is that since this Court, in *Clear Springs*, affirmed the use of a trim line, one must be applied in this case as well. Pocatello asserts that the Director has essential unlimited discretion to impose a trim line – regardless of the law or science. Relying on testimony regarding "the diminishing benefits to Rangen from curtailment in areas of the aquifer remote from Rangen," Pocatello concludes that these "factual findings, as well as the Director's determination that this evidence was clear and convincing, is enough to sustain the Director's decision." *Poc. Br.* at 17. Pocatello's argument is in error.[25]

[25] Pocatello grossly exaggerates the claim that Rangen would have to "wait generations (or possibly forever) to receive the minute benefits associated with curtailment" of juniors east of the Great Rift. *Poc. Br.* at 1. The facts dispel Pocatello's claim. IDWR's staff memo plainly shows that 90% of the water curtailed would arrive at the

While the Director has limited discretion in administering water rights, *AFRD#2*, 143 Idaho at 880, that discretion is not absolute. The Director's actions are prescribed by law. *See* I.C. § 42-1805 (listing duties of the Director); CM Rule 20.02 ("These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law."). Any action by the Director that violates the law will be overturned and set aside. *See* I.C. § 67-5279(3); *Galli v. Idaho County*, 146 Idaho 155, 159 (2008).

Moreover, the Director cannot claim "discretion" in issuing a new "policy" decision that violates Idaho law. *Id.* Yet, that is exactly what the Director attempted to do by creating a "trim line" based upon the "diminishing benefits of curtailment" standard. The district court properly saw through the Director's attempt to exclude juniors causing material injury to Rangen's senior right and reversed that decision. This Court should affirm.

Importantly, the district court recognized that the juniors east of the Great Rift contributed to deplete the Curren tunnel flows by 1.5 cfs, or what would be 50% of the flows experienced in 2005. R. 706. The district court rightly found this quantity was significant, particularly in light of reduced spring flows and aquifer levels across the entire ESPA. R. 706-707. Moreover, juniors east of the Great Rift can and have contributed to the mitigation currently being delivered to Rangen. Addendum A. While Pocatello makes much of the "small" amount of water that its diversions impact Rangen, *Poc. Br.* at 8, the city ignores how easily that quantity can be mitigated. The CM Rules contemplate this very scenario. *See* CM Rules

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Curren tunnel within the first 13 years. *See* Ex. 3203 at 6 (IDWR staff finding that "it would take approximately 13 years to reach 90% of the steady state response."). The CM Rules also expressly recognize that benefits from conjunctive administration can take time. *See* CM Rule 43.03.c ("even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed.")

42.01.c, 43.03.c ("even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed"); *see e.g.* CM Rule 20.4 ("Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior priority use if diversion and use of water by the holder of the junior-priority right causes material injury, even though not immediately measureable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.") (emphasis added).

Idaho law mandates that junior priority ground water rights be curtailed to the extent that they are contributing to the material injury suffered by a senior water right. *Infra*, Part I; *see also* CM Rule 40. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD#2*, 143 Idaho at 878.

In *Clear Springs*, this Court affirmed the use of a 10% trim line that was *based on the defined margin of error in the stream gauges* used in ESPAM 1.1. *Clear Springs, supra*. Importantly, when faced with additional arguments that, according to IGWA and Pocatello, should have increased the trim line from 10% to "between 20 and 30%," this Court affirmed the Director's rejection of those arguments. 150 Idaho at 813.

Unlike the situation in *Clear Springs*, the Court is now presented with a new groundwater model (ESPAM 2.1), for which there is no technical justification for the use of a trim line. Tr. at 1641, 1l.12-16 (Sullivan testimony) (Pocatello's engineer testifying that there is no technical

basis for a trim line as it is "largely a policy decision"). IGWA's experts agreed. *Id.* at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g.,* at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision"). Unlike the facts with ESPAM 1.1, here the Director has determined that the uncertainty with ESPAM 2.1 is not quantifiable. The district court explained this critical difference:

> The Director's remaining support for the use of the trim line concerns the margin of error or level of uncertainty based on the application of the model. ***Unlike the situation in Clear Springs which assigned a margin of error of 10% based upon the limitations of ESPAM 1.1, the Director concluded in this case that: "Because of the complexity of the model, the margin of error associated with model predictions [ESPAM 2. I] cannot be quantified***." But did conclude that "there is uncertainty in the predicted increase in spring flow resulting from curtailment and the actual response may be higher or lower than predicted." ***All experts involved in this case were in general agreement that the use of a trim line would be based more on a policy decision than on a quantifiable level of uncertainty***.

R. 705 (emphasis added).

In this case the junior water users failed to meet their burden to prove any "constitutionally permissible" defenses to deny Rangen's delivery call. *See AFRD#2*, 143 Idaho at 878. Indeed, the model shows the impacts of administering those rights east of the Great Rift are "neither insignificant nor *de minimis*."

> In this case, the model predicts that curtailment of junior rights east of the Great Rift are causing material injury and curtailment of such rights would produce a quantity of water to the Martin-Curren Tunnel in the amount of 1.5 cfs. Indeed, while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren Tunnel, the meaningfulness of the quantity becomes readily apparent. The Director found that the average annual flow available from the Martin-Curren tunnel in 1997 was 19.1 cfs. ***The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. And that the average***

> ***annual flow has not exceeded 7 cfs since 2002. From that perspective, the additional 1.5 cfs is neither insignificant nor de minimis.***
>
> 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. Therefore, the Director's application of the trim line in this matter is set aside and remanded for further proceedings as necessary.

R. 706-707 (emphasis added). Importantly, Pocatello does not challenge these findings.[26]

Overlooking the distinctions between the models, Pocatello asserts that "principles of optimum development and maximum use" demand the implementation of a trim line. *Poc. Br.* at 21-24. Pointing to isolated language from the *Clear Springs* decision discussing Article XV, § 7 of the Idaho Constitution, Pocatello argues that optimal development cannot be reached unless a trim line is imposed. *Id*. In other words Pocatello believes the Director can exclude connected juniors on "policy" grounds.[27] In particular, Pocatello points to this Court's holding that "the policy of securing the maximum use and benefit, and least wasteful use, of the State's water

[26] Confusingly, even with these findings by the district court, Pocatello repeatedly complains that the district court "did not attempt to reconcile its decision" with the *Clear Springs* decision. *Poc. Br*. at 22; *see also id*. at 14 (abused discretion in failing to follow *Clear Springs*); *id*. at 18 ("The district court provided no explanation for its rejection of the Great Rift trim line in light of the similar factual bases for the trim line affirmed in *Clear Springs*"). A reading of the district court's decision refutes this argument. *See* R. 705 (explaining distinction between ESPAM 1.1 and ESPAM 2.1). Pocatello ignores the critical distinguishing fact in this case: ESPAM 2.1 is not the same as the older version. Without a defined margin of error, the best prediction for administration is ESPAM 2.1's unqualified result. As such, Pocatello's arguments on this point are without merit and should be denied.

[27] Pocatello's argument is contrary to the plain language of the CM Rules. *See* CM Rules 40.01, 42.01.c ("impacts of all ground water withdrawals from an area having a common ground water supply"); *see also*, CM Rule 50.

resources applies to both surface and underground water." 150 Idaho at 809. A review of the *Clear Springs* decision reveals the error in Pocatello's arguments.

Indeed, after stating that both surface and ground water is subject to "securing the maximum use and benefit," the *Clear Springs* Court explained this principle by discussing the prior decisions in *Van Camp, supra* and *Schodde, supra*. *Id*. at 809-10. As previously discussed in this brief, *supra* Part I.D, these cases speak to the appropriation of the State's water – not the administration of established water rights. *Id*. at 809 ("The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, ***not in his priority of water rights***") (emphasis added). Indeed, the Court recognized that, although Article XV, § 7 of the Idaho Constitution authorized the "Idaho Water Resource Board and the Idaho legislature … to formulate and implement a state water plan for 'optimum development of water resources in the public interest,'" such authority does not allow for the derailing of the prior appropriation doctrine:

> There is nothing in the wording of Article XV, § 7, that indicates that it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, § 3, which states, "Priority of appropriation shall give the better right as between those using the water [of any natural stream] …" The current State Water Plan does not purport to do so. It provides, "The goal of conjunctive management is to protect the holders of prior water rights while allowing for the optimum development and use of the state's water resources."

150 Idaho at 807.

Moreover, the Supreme Court had previously clarified that optimum development of the resource does not preclude administration of junior water rights that would otherwise injure a senior right:

> The principles set forth in *Bower* and *Noh* balance the competing interests of the parties involved and the public and serve to effectuate the policy of maximum development of the water resources of this state. Under these principles, we hold that Wallentine has a right to divert any surplus subterranean waters provided and ***so long as his diversion of such waters does not deprive Parker of his use of the water***. Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss.

Parker v. Wallentine, 103 Idaho 506, 514 (1982).

In other words, optimum development allowed Wallentine to divert "any surplus" groundwater. It did not, however, allow Wallentine to avoid administration whenever his diversions injured the senior water right. *Id*. Here, there is no dispute that groundwater diversions east of the Great Rift contribute to the material injury suffered by Rangen. R. 706-707. As such, those connected junior rights must be administered by priority.

Finally, pointing to this Court's recent decision in *A&B Irr. v. Spackman*, 155 Idaho 640 (2013), Pocatello argues, again, that the Director has the discretion to impose a trim line – regardless of the law or science. *Poc. Br*. at 25-27. First of all, the facts of ESPAM 2.1 and its application were not at issue in *A&B Irr. Dist.* Regardless, relying upon the discussion of the Director's baseline methodology for predicting material injury, Pocatello concludes that:

> Therefore, despite the uncertainty that the Director's plan will be accurate in a given season, the Director has the authority and expertise to make management decisions within a proper exercise of discretion, while recognizing the relevant facts and developing a well-informed decision based on clear and convincing evidence.

Id. at 27. Pocatello's attempt to equate the baseline methodology to the use of a trim line is misplaced and cannot stand.

The issue in *A&B Irr. Dist.* was whether or not the Director could use a baseline methodology to establish early season water supply predictions and mitigation requirements for administration, described as follows:

> In determining material injury to senior rights the Director considered a "baseline" quantity independent of the decreed or licensed quantity. The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable-carryover. The Director then determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities.

155 Idaho at 648.

In affirming the use of a baseline methodology, the Court recognized that there are several technical decisions that must be made in managing Idaho's water resources, thus warranting the use of a baseline only as a "starting point":

> The authority of the Director to prepare and implement a water allocation plan as part of his management responsibility has not been challenged by any party in this proceeding, perhaps in recognition of the fact that an interconnected system of ground and surface water as complicated as the Snake River Basin, with as many variables, moving parts, and imponderables that present themselves during any particular irrigation season, simply cannot be managed without a great deal of prior analysis and planning toward determining the proper apportionment of water to and among the various water right holders according to their priority. The use of a baseline methodology ***in this context*** is, therefore, not inconsistent with Idaho law.

Id. at 651 (emphasis added).

The Court concluded by upholding the baseline methodology as follows:

> The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, ***which methodology must comport in all respects with the requirements of Idaho's prior appropriation doctrine***, ***be made available in advance of the applicable irrigation season, and be promptly updated to take into account changing conditions***.

Id. at 653 (emphasis added).

In sum, this Court upheld the use of a baseline methodology based on the technical determinations of the Director and provided that the baseline methodology cannot violate the prior appropriation doctrine and that it must be updated to take into account changing conditions. In this sense, the use of a baseline was similar to the use of a trim line under ESPAM 1.1. As discussed above, the ESPAM 1.1 trim line was based on the Director's technical determination that the uncertainty in the stream gauges required the use of a 10% trim line. *Clear Springs, supra*.

Unlike the facts with ESPAM 1.1, since there is no technical justification for a trim line under ESPAM 2.1, the Director cannot impose one in this case. To do so would violate the prior appropriation doctrine and allow unmitigated injury to Rangen's senior water right. As discussed above, the prior appropriation doctrine requires administration of all rights contributing to the material injury, subject only to a showing by the juniors that "the call would be futile or otherwise unfounded." *A&B Irr.* 155 Idaho at 653; *see also* CM Rules 40, 42.01.c, 50. In this case, the juniors failed to meet their burden – and have not challenged the Director's determination that 1.5 cfs would accrue to the Curren tunnel as a result of administration east of the Great Rift. R. 705-706.

Finally, despite Pocatello's desires, in reality these juniors are participating in the mitigation provided to Rangen as provided by the CM Rules. Addendum A. The district court's decision should be affirmed.

CONCLUSION

It is undisputed that junior pumping east of the Great Rift contributes to Rangen's material injury. In turn, Idaho law requires administration of those rights. Without a technical basis to exclude juniors within that area of the area of common ground water supply (CM Rule 50), the Director had no authority to develop a new "policy" based upon diminishing benefits of curtailment. The district court properly corrected the Director's legal error and reversed and set aside the Great Rift trim line, which is a recognition of the long standing principle in Idaho that if the use of water by a junior right holder injures a senior, the junior user must curtail or mitigate. This Court should affirm.

Dated this 8th day of June, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of June, 2015, I served true and correct copies of the foregoing upon the following by the method indicated:

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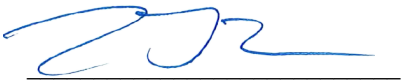

Travis L. Thompson

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief, *Surface Water Coalition's Joint Response Brief* in Docket No 42775-2015 and 42863-2015, submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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Dated and certified this 8th day of June, 2015.

Travis L. Thompson

Addendum
A

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION OF WATER TO WATER RIGHT NO. 36-15501 HELD BY RANGEN, INC.	Docket No. CM-DC-2014-004 **Stipulation Between Rangen, IGWA, UVP, Pocatello, and Coalition of Cities**

WHEREAS, Rangen, Inc. ("Rangen") has placed delivery calls for its water right nos. 36-2551, 36-7694, and 36-15501;

WHEREAS, Idaho Ground Water Appropriators, Inc. ("IGWA"), City of Pocatello ("Pocatello"), Upper Valley Pumpers ("UVP"), and Coalition of Cities ("Cities") have formally resisted these delivery calls;

WHEREAS, IGWA and Cities have obtained approved mitigation plans;

WHEREAS, other junior water users have sought or are in the process of seeking approved mitigation plans;

WHEREAS, there are pending appeals related to legal and factual issues in the above referenced matters:

WHEREAS, despite the ongoing appeals, the Parties desire to create certainty regarding the application of mitigation supplies in the context of physical flows at the Curren Tunnel;

Rangen, Pocatello, IGWA, UVP, and Cities (together "Parties") stipulate as follows:

1. The Parties agree that beginning April 1, 2015, this Stipulation is intended to control the allocation and accounting of IDWR approved mitigation supplies in the following matters:

   a. Rangen 1957 Delivery Call (IDWR Docket No. CM-DC-2014-004)

   b. Rangen 1962 Delivery Call (IDWR Docket No. CM-DC-2011-004)

   c. IGWA's First Mitigation Plan (IDWR Docket No. CM-MP-2014-001)

   d. IGWA's Fourth Mitigation Plan (IDWR Docket No. CM-MP-2014-006)

2. Exhibit A sets forth the Mitigation Formula that the Parties agree will be used to allocate and account for mitigation provided to water right nos. 36-15501, 36-2551, and

36-7694 in the matters identified above. Should additional or alternative mitigation be approved to mitigate material injury to water right nos. 36-15501, 36-2551, or 36-7694, the "Mitigation Provided" section of the Mitigation Formula will be revised to account for such additional or alternative mitigation.[1] If the parties cannot agree to how the Mitigation Formula should be revised to account for any additional or alternative mitigation, the issue will be submitted to IDWR for decision.

3. Exhibit B is an Excel spreadsheet ("Mitigation Spreadsheet") that the Parties agree should be used to implement the Mitigation Formula attached as Exhibit A. To the extent the Mitigation Spreadsheet fails to reflect the concepts embodied in the Mitigation Formula or is otherwise inconsistent with the Mitigation Formula, the Mitigation Formula controls. If the Mitigation Formula is revised to account for additional or alternative mitigation, the Mitigation Spreadsheet will be revised accordingly.

4. So long as the Rangen fish hatchery is actively being used to raise fish, Rangen water right no. 36-15501 will be deemed to suffer material injury during times when the "1957 Obligation" as calculated in paragraph 2.c.iii of the Mitigation Formula and column S of Mitigation Spreadsheet is greater than zero. Column S of the Mitigation Spreadsheet shows the daily mitigation obligation to water right no. 36-15501.

5. Exhibit C is an illustration of the operation of the Mitigation Formula on a daily basis, assuming reported Martin-Curren Tunnel flows for the year 2014 and a 5.3 cfs mitigation obligation to water right nos. 36-2551 and 36-7694. It is attached for illustrative purposes only.

6. The Mitigation Formula calculates mitigation obligations and mitigation provided on a daily basis. The rate at which mitigation water will be delivered from Magic Springs will be adjusted less frequently. To reconcile daily mitigation obligations with actual Magic Springs deliveries, the Mitigation Formula provides for a running tabulation of mitigation surpluses and deficits. Magic Springs deliveries will be adjusted periodically to offset such surpluses and deficits over the course of each year. Exhibit D is an illustration, based on the data reflected in Exhibit C, of how this may occur. It is attached for illustrative purposes only.

[1] Exhibit A does not address mitigation approved under the Cities' Second Mitigation Plan, IDWR Docket No. CM-MP-2014-007.

Delivery of Mitigation and Measurement Issues:

7. Beginning April 1, 2015, IGWA will deliver 5 cfs from Magic Springs.

8. From April 1 through March 30 of the following year the quantity of water delivered from Magic Springs may be adjusted up to 6 times. The quantity and timing of such adjustments shall be determined by Rangen. Rangen shall provide two weeks advance written notice to IGWA and the Water Masters of Water Districts 36A and 130 of the adjustments. Adjustments that will result in either a surplus or deficit of mitigation may be made, provided that adjustments shall be made in a manner that aims in good faith to minimize cumulative mitigation surpluses and deficits under part 8 of the Mitigation Formula on March 30 of each year. The Parties acknowledge that the current practical operational limits of the Magic Springs pipeline are a maximum of 10 cfs and a minimum of 2 cfs. Should IGWA object to an adjustment, it will notify Rangen and IDWR of its objection at least one week prior to the adjustment date, and IDWR will determine an appropriate adjustment.

9. No later than August 1, 2015, Rangen will install at its own expense a measuring device on the "White Pipe" capable of measuring to a reasonable degree of certainty how much water discharges from the White Pipe. Such device must be pre-approved by IDWR and constructed and maintained in accordance with industry and IDWR standards.

10. No later than April 1, 2016, a measuring device will be installed to measure flows to Rangen from the Curren Tunnel that has been pre-approved by IDWR, that the Parties agree will measure flows to a reasonable degree of certainty, and which will be maintained in accordance with industry and IDWR standards.

11. Notwithstanding the forgoing, the parties reserve all arguments raised in pending appeals and ongoing related actions before the IDWR, including *inter alia*:

a. The Parties specifically reserve all challenges, arguments, and appeals related to the approval of the Fourth Mitigation Plan and its associated transfers and leases.

b. The Parties also agree that nothing in this Stipulation shall be interpreted to decide the issue of futile call, trimline, or related issues of which junior ground water users are obligated to replace depletions associated with a finding of injury by the Director under the Mitigation Formula agreed to under this Stipulation.

MAY BROWNING & MAY, CHTD

By:_____ _____
Justin May Date
Attorneys for Rangen

RACINE OLSON NYE BUDGE & BAILEY, CHARTERED

By:_____ 4.8.15
Randall C. Budge Date
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By:_____ 4-8-15
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RIGBY, ANDRUS & RIGBY

By:_____ _____
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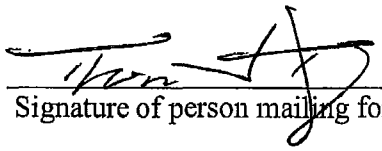
MCHUGH BROMLEY, PLLC

By:_____ _____
Candice McHugh Date
Attorneys for Coalition of Cities

CERTIFICATE OF SERVICE

I certify that on this 8th day of April, 2015, "Stipulation Between Rangen, IGWA, UVP, Pocatello and Cities" was served on the following persons in the manner indicated.



Signature of person mailing form

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Exhibit A

Outline of Mitigation Formula
Rangen Delivery Calls

MITIGATION OBLIGATION

1. Mitigation Obligation for 1962 Rangen Water Right:
   a. 1962 Obligation = 5.30 cfs (2015 value; adjusted yearly)

2. Mitigation Obligation for 1957 Rangen Water Right:
   a. Decreed Amount = 1.46 cfs

   b. Allocate daily measured MCT flow (cfs) in following order:
      i. Senior Rights = first 0.18 cfs (0.16 cfs non-irrig. season)
      ii. Aquifer Enhancement next 1.10 cfs (2015 value; adjusted yearly)
      iii. Morris Credit = next 6.05 cfs (c.cc) (up to 6.05; Apr 15-Oct 15)
      iv. 1957 Natural Flow = next 1.46 cfs (x.xx) (up to 1.46 cfs)

   c. Compute mitigation obligation:
      i. Decreed Amount = 1.46 cfs
      ii. minus 1957 Natural Flow = x.xx cfs (from 2.b.iv)
      iii. 1957 Obligation = y.yy cfs (varies daily)

3. Total Mitigation Obligation:
   a. 1962 Obligation = 5.30 cfs (from 1.a)
   b. plus 1957 Obligation = y.yy cfs (from 2.c.iii)
   c. Total Daily Obligation = z.zz cfs

MITIGATION PROVIDED

4. Aquifer Enhancement Credit = 1.10 cfs (2015 value; adjusted yearly)

5. Morris Credit (April 15-Oct 15) = c.cc cfs (from 2.b.iii)

6. Measured Magic Springs Delivery = d.dd cfs (daily)

7. Daily Mitigation Supply*
   a. Aquifer Enhancement Credit 1.10 cfs (from 4)
   b. Plus Morris Credit = c.cc cfs (from 5)
   c. plus Daily Magic Springs Delivery = d.dd cfs (from 6)
   d. Total Daily Mitigation Supply = e.ee cfs

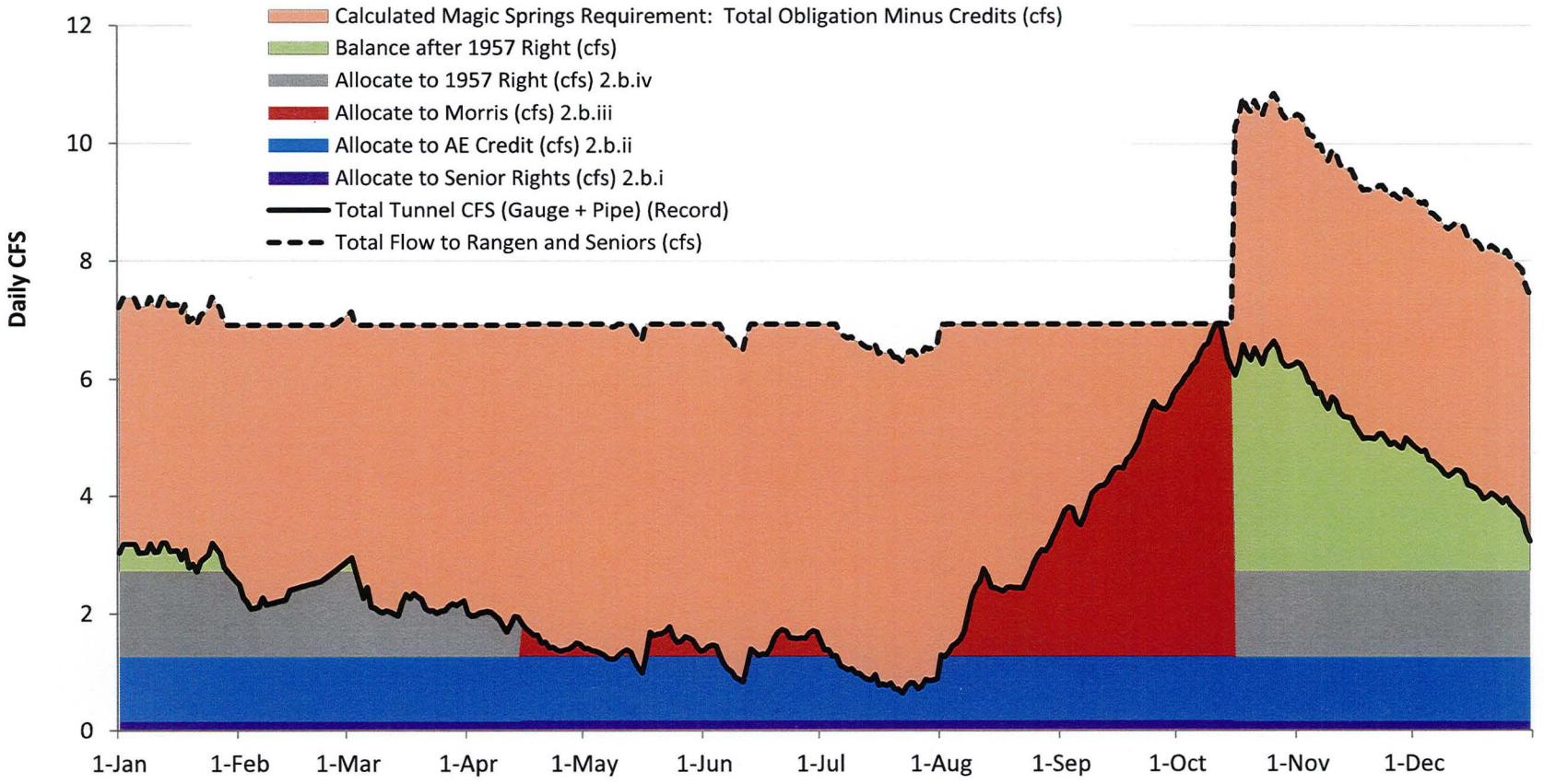
8. Daily Mitigation Balance
   a. Total Mitigation Supply = e.ee cfs (from 7.d)
   b. minus Total Mitigation Obligation = z.zz cfs (from 3.c)
   c. Daily Mitigation Balance = Surplus(+)/Deficit (-)
   d. Running Total Mitigation Balance = Accumulation of Surpluses (+) and Deficits (-)

*Mitigation accounting will need to be adjusted if additional or alternative mitigation is provided.

March 26, 2015

Exhibit C

Illustrative Allocation of Curren Tunnel Flow and Mitigation Supplies Using 2014 Flow Data and 2015 Mitigation Obligations and Supplies



Notes:

(1) Aquifer enhancement activities for 2015 (1.1 cfs).

(2) Total Curren Tunnel flows from 2014.

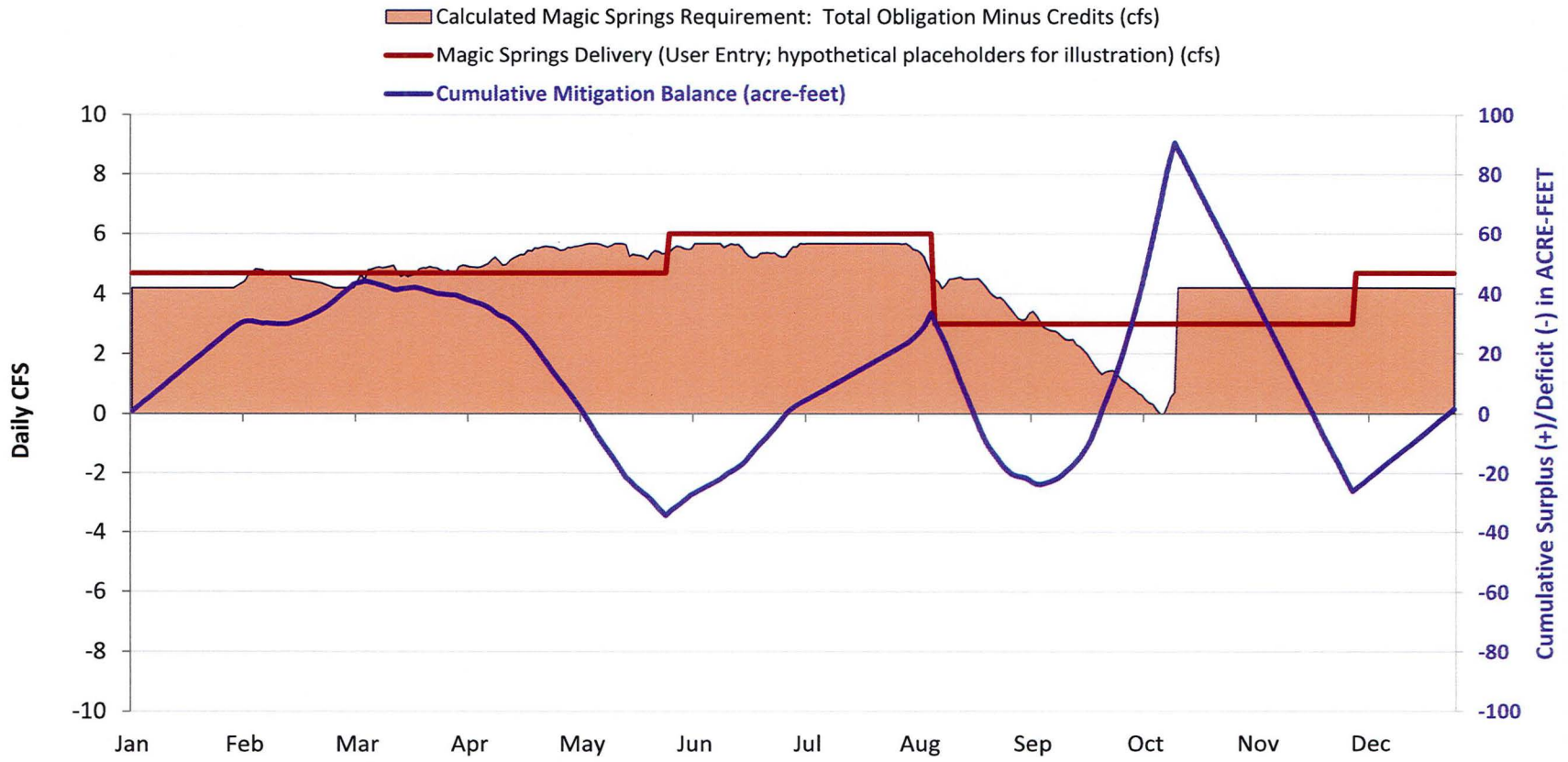
(3) Total mitigation obligation to 1962 water right for 2015 (5.3 cfs).

Spronk Water Engineers, Inc.

3/26/2015

Exhibit D

Illustrative Example of Magic Springs Pipeline Deliveries to Meet Mitigation Obligation After Aquifer Enhancement and Morris Credit Using 2014 Flow Data and 2015 Mitigation Obligations and Supplies



Notes:

(1) Mtigation obligation for 1957 right and 1962 right minus aquifer enhancement in 2015 minus Morris Exchange Credit.

(2) Simulated Magic Spring Pipeline Flow for illustrative purposes.

Spronk Water Engineers, Inc.

3/26/2015

Addendum
B

MEMO

State of Idaho
Department of Water Resources
322 E Front Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 287-4800 Fax: (208) 287-6700

Date: February 25, 2015

To: Gary Spackman, Director

From: Jennifer Sukow, Hydrology Section

Subject: Simulated curtailment junior to July 13, 1962 within Eastern Snake Plain Aquifer area of common groundwater supply

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This memorandum presents results extracted from a prior simulation performed using the Enhanced Snake Plain Aquifer Model Version 2.1 (ESPAM2.1). An analysis of the impact of curtailment of groundwater irrigation junior to July 13, 1962 within the Eastern Snake Plain Aquifer (ESPA) area of common groundwater supply was presented previously in Sukow (2013)[1]. ESPAM2.1 files for the simulation are available to the public at http://www.idwr.idaho.gov/News/WaterCalls/1000Spring%20Users%20Calls/Archive/Rangen_2013.htm in the file "IDWRModelRuns.zip" dated February 27, 2013.

Table 1 summarizes the predicted increase in spring discharge at the Rangen model cell and Curren Tunnel resulting from curtailment of groundwater irrigation junior to July 13, 1962 within the ESPA area of common groundwater supply. The predicted increase in spring discharge at the Rangen model cell was simulated using ESPAM2.1. The increase in discharge at Curren Tunnel is predicted to be 63% of the increase in spring discharge at the Rangen model cell, based on the linear regression model adopted in previous proceedings.

[1] Sukow, J., 2013, *Staff memorandum in response to expert reports submitted for Rangen Delivery Call (In the Matter of Distribution for Water to Water Right Nos. 36-02551 and 36-07694)*, Idaho Department of Water Resources memorandum dated February 27, 2013.

Time period	Average predicted impact at Rangen model cell (cfs)	Average predicted impact at Curren Tunnel (cfs)
Year 1 (4/2014 – 3/2015)	5.4	3.4
Year 2 (4/2015 – 3/2016)	8.4	5.3
Year 3 (4/2016 – 3/2017)	10.1	6.3
Year 4 (4/2017 – 3/2018)	11.3	7.1
Steady state	16.9	10.7

Table 1. Predicted impact of curtailment on spring discharge.