IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 42775-2015

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (Rangen, Inc.)
IDWR Docket No. CM-DC-2011-004

RANGEN, INC.
Petitioner / Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,
Respondent / Respondent,

v.

IDAHO GROUND WATER APPROPRIATORS, INC.
Intervenor / Appellant,

v.

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

IGWA's Combined Reply Brief

Appeal from Twin Falls County case no. CV-2014-1338
(Consolidated Gooding County case no. CV-2014-179)

Honorable Eric J. Wildman, District Judge, Presiding.

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INTRODUCTION

Idaho Department of Water Resources (IDWR), Rangen, Inc., the Surface Water Coalition, City of Pocatello, and Fremont-Madison Irrigation District have all filed briefs in response to *IGWA's Opening Brief*. Their responses make a number of similar arguments. Therefore, in the interest of efficiency, IGWA hereby replies to all of the response briefs in combined fashion.

REPLY

1. Arguments related to CM Rule 20.03.

1.1 IGWA's argument about Rangen unreasonably commanding large volumes of water is part and parcel with Pocatello's argument that Rangen's diversion is unreasonable.

IGWA has asked this Court to reverse the district court decision because the IDWR Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order") permits Rangen to unreasonably command vast amounts of water without applying it to beneficial use—often referred to as "hoarding" or "unreasonable use" of the resource—contrary to CM Rule 20.03.[1] Pocatello states that "IGWA does not specifically argue that Rangen's means of diversion is unreasonable," but says "that is implied from its arguments"[2] and "agrees that Rangen's means of diversion is itself not reasonable, and further—as noted

[1] IGWA's Opening Br., p. 22-38.

[2] Pocatello's Resp. Br., p. 3 n.3.

in Pocatello's Opening Brief in Docket No. 42386-2015—that this issue was not decided by the Director."[3] These statements warrant clarification of the relationship between IGWA's argument that the Director failed to determine how much water Rangen can reasonably command without applying it to beneficial use, and Pocatello's argument that the Director failed to determine whether Rangen's diversion is reasonable.

Though different verbiage is emphasized, the issue is the same. What makes Rangen's diversion unreasonable is the commanding of vast amounts of water without applying it to beneficial use.[4] While the Director found that Rangen reasonably uses the water it diverts into its raceways, he did not decide how much water Rangen can reasonably command without diverting it at all. IGWA and Pocatello are in agreement that the Director failed to decide this important issue.

It bears mentioning that IGWA does not contend that groundwater should be allocated based simply by determining a reasonable amount of water for each user. As this Court explained in *Baker v. Ore-Ida Foods*, Idaho does not subscribe to the concept that "a landowner could withdraw percolating waters under his land to the extent that such withdrawals were reasonably consistent with the similar rights of other neighboring landowners."[5] To be sure, priority is a primary driver of water allocation, but beneficial

[3] Pocatello's Resp. Br., p. 3.

[4] Pocatello's Resp. Br., p. 3 ("Pocatello also agrees that Rangen's means of diversion is itself not reasonable, and further . . . that this issue was not decided by the Director.")

[5] *Baker v. Ore-Ida Foods*, 95 Idaho 575, 579-80 (1973).

use plays an equally important role, as this Court recently held in *A&B Irrigation District v. Spackman*: "The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use."[6]

As explained in IGWA's Opening Brief, Idaho law allows seniors to exercise priority to take water from juniors *so long as* the senior applies the water to beneficial use, and, while the senior is not required to apply all the additional water to beneficial use, the Director must exercise discretion, under a standard of reasonableness, to ensure the senior does not command large amounts of water without using it.

1.2 Clarification is needed as to the scope of the CM Rule 20.03 analysis.

Since CM Rule 20.03 explicitly states: "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 as described in this rule," it seems obvious the Director must determine how much water Rangen can reasonably command without applying it to beneficial use, yet IDWR and Rangen contend he doesn't. Rangen argues "there is no legal basis for IGWA's 'hoarding' argument."[7] IDWR similarly argues that the *Van Camp* and *Schodde* cases cited "do not

[6] 155 Idaho 640, 650 (2013); *see also Am. Falls Reservoir Dist. #2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 880 (2007) (*AFRD2*) ("Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.").

[7] Rangen's Resp. Br., p. 6.

support IGWA's trim line argument" and are "inapplicable to this case because the Director found Rangen's means of diversion to be reasonable."[8] Both Rangen and IDWR seem to contend that the analysis under CM Rule 20.03 is limited to whether the senior's physical diversion structure is leaky. Precedent from this Court and the plain language of CM Rule 20.03, however, clearly go further, requiring the Director to consider not only whether the senior efficiently uses the water it diverts, but also how much water the senior commands without diverting it at all.

For example, the senior's water wheels in *Schodde* worked perfectly fine to divert water from the Snake River, yet the diversion was deemed unreasonable because it enabled the senior to command vast amounts of water without diverting it at all.[9] Similarly, the storage bylaw that was declared void in *Glavin* had nothing to do with faulty diversion structures; it was just that water users were commanding large amounts of water without applying it to beneficial use, which this Court deemed illegal and against public policy.[10]

The distinction between whether the senior is efficiently using the water it diverts versus commanding vast amounts of water without diverting it at all is important

[8] IDWR's Resp. Br., p. 25.

[9] *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 122-23 (1912).

[10] *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 589-90 (1927).

because it is this second aspect of beneficial use that IGWA and Pocatello contend the Director failed to decide.

Rangen contends that even if the Director is required to consider how much water the senior commands without using in the context of surface water management, the same consideration does not apply to conjunctive management, citing the district court's statement that "the very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefit to a senior surface right."[11] However, this statement must be read in light of this Court's *American Falls Reservoir District #2 v. IDWR* ("*AFRD2*") decision which held CM Rule 20.03 to be facially constitutional.[12] The district court's acknowledgement that conjunctive management usually involves greater disparities than surface-to-surface water administration must be read as an acknowledgement of fact, not a legal conclusion that there are no limits on how much water seniors can command without applying it to beneficial use.

Rangen and the Surface Water Coalition also contend this Court eliminated consideration of how much water the senior commands without using, asserting: "This Court rejected IGWA's *Schodde* argument in the *Clear Springs* case and IGWA has

[11] Rangen's Resp. Br., p. 6-7 (quoting Clerk's R., p. 704).

[12] *AFRD2*, 143 Idaho at 878.

continued reliance on the *Schodde* case here is misplaced."[13] A comprehensive reading of the *Clear Springs* decision proves otherwise. While this Court held that the reasonable pumping level requirement of Idaho Code § 42-226 does not apply to surface water rights,[14] it also held:

> There is no difference between securing the maximum use and benefit, and least wasteful use, of Idaho's water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between full economic development and the optimum development of water resources in the public interest. They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the state's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.[15]

Read as a whole, the *Clear Springs* decision explains that both surface and ground water rights are subject to the principle of optimum beneficial use of the resource, but that the reasonable pumping level mechanism of Idaho Code § 42-226 does not govern surface rights. The Director still must prevent seniors from commanding vast amounts of water without applying it to beneficial use, but by other means. IGWA contends the most logical mechanism in this case is implementing a trim line to preclude Rangen from

[13] Rangen's Resp. Br., p. 13; Surface Water Coalition's Resp. Br., pp. 12-13.

[14] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 804 (2011).

[15] *Id.* at 808.

curtailing other water uses unless Rangen will receive a significant portion of the water that would have otherwise been applied to beneficial use by the junior.[16]

Moreover, the rule against hoarding set forth in CM Rule 20.03 is supported by more than just the *Schodde* case. It is also grounded in this Court's decisions in *Van Camp v. Emery*,[17] *Basinger v. Taylor*,[18] *Clark v. Hansen*,[19] *Glavin v. Salmon River Canal Co.*,[20] and *American Falls Reservoir Dist. #2 v. IDWR*.[21] The Surface Water Coalition attempts to distinguish these cases by arguing "neither [of them] addresses water right administration at all."[22] Yet each case dealt directly with parties competing for water. In each case, holders of junior rights were challenging the senior's right to deprive juniors of diverting water. The facts may have been unique, but the principle was the same.

Despite all this, the district court decision seems to support the argument advanced by Rangen and the Surface Water Coalition that CM Rule 20.03 does not permit the

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[16] *See* IGWA's Opening Br., p. 33-34, 39-41.

[17] *Van Camp v. Emery*, 13 Idaho 202, 208 (1907) (refusing to allow "subirrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application").

[18] *Basinger v. Taylor*, 36 Idaho 591, 597 (1922) (holding a conveyance loss of fifty percent to be "unreasonable, excessive and against public policy").

[19] *Clark v. Hansen*, 35 Idaho 449, 455 (1922) (finding it to be "against public policy" for a water user to divert ten times more water than he applies to beneficial use).

[20] *Glavin*, 44 Idaho at 586 (declaring "void and contrary to public policy" an irrigation company bylaw that allowed unlimited carryover of storage water).

[21] *AFRD2*, 143 Idaho at 880 ("Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.").

[22] Surface Water Coalition Resp. Br., p. 18.

Director to impose trim lines of any sort. The district court eliminated the Great Rift trim line based on its interpretation of *Clear Springs*, which it said held:

> 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.[23]

In light of this holding, it is now unclear whether the Director has any authority to impose a trim line based on the rule that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water."[24] Given the confusion and conflict among water users over this issue, it is critical that this Court clarify the Director's authority in this regard.

Further, it must be noted that the district court's conclusion that implementing a trim line will "reduce the decreed quantity of a water right to which a senior appropriator is entitled" is incorrect. While a trim line certainly restricts the extent to which Rangen may stop juniors from beneficially using water, it will not prevent Rangen from diverting its full decreed rate of diversion if climatic conditions cause Curren Tunnel flows to increase or if Rangen takes action to improve its water supply by deepening or lowering

[23] Mem. Decision & Order on Petitions for Jud. Rev. p. 37 (Clerk's R., p. 704).

[24] CM Rule 20.03 (IDAPA 37.03.11.020.03).

the Curren Tunnel. A trim line only prevents Rangen from exercising priority in a manner that commands large amounts of water without applying it to beneficial use.

As this Court recognized in *AFRD2*, "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication,"[25] and "reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication."[26] Thus, the district court erred in holding that implementing a trim line under CM Rule 20.03 reduces the amount water the senior is entitled to divert.

1.3 The Director's analysis of the reasonableness of Rangen's diversion under CM Rule 20.03 was incomplete.

If the Court agrees that the Director has a duty to prevent appropriators from commanding large amounts of water without applying it to beneficial use, then the Director's analysis of the reasonableness of Rangen's diversion under CM Rule 20.03 was incomplete.

IDWR acknowledges the Director's obligation to apply CM Rule 20.03, but contends "the Director found Rangen's means of diversion to be reasonable."[27] The Surface Water Coalition similarly argues the cases undergirding CM Rule 20.03 (*Van*

[25] *AFRD2*, 143 Idaho at 876-77.

[26] *Id*. at 877 (citing *Schodde*, 224 U.S. 107).

[27] IDWR's Resp. Br., p. 25.

Camp, *Schodde*, *Basinger*, and *Clark*) "are not applicable to the present facts, where the Director has determined that Rangen's means of diversion are reasonable."[28]

The problem, however, is that the Director's analysis of the reasonableness of Rangen's diversion was limited to how Rangen uses the water that flows through its raceways.[29] While the Curtailment Order finds that Rangen is reasonably using the water it diverts into its raceways, it does not decide how much water Rangen can reasonably command without diverting it at all.

Fremont-Madison Irrigation District contends the Great Rift trim line properly applied CM Rule 20.03.[30] Indeed, the Curtailment Order does cite CM Rule 20.03 to support the Great Rift trim line, stating that "[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources."[31] At first blush, these statements may appear to be an adequate application of CM Rule 20.03. However, they intertwine two distinct issues, ultimately leaving unanswered the question of how much water Rangen can reasonably command without using.

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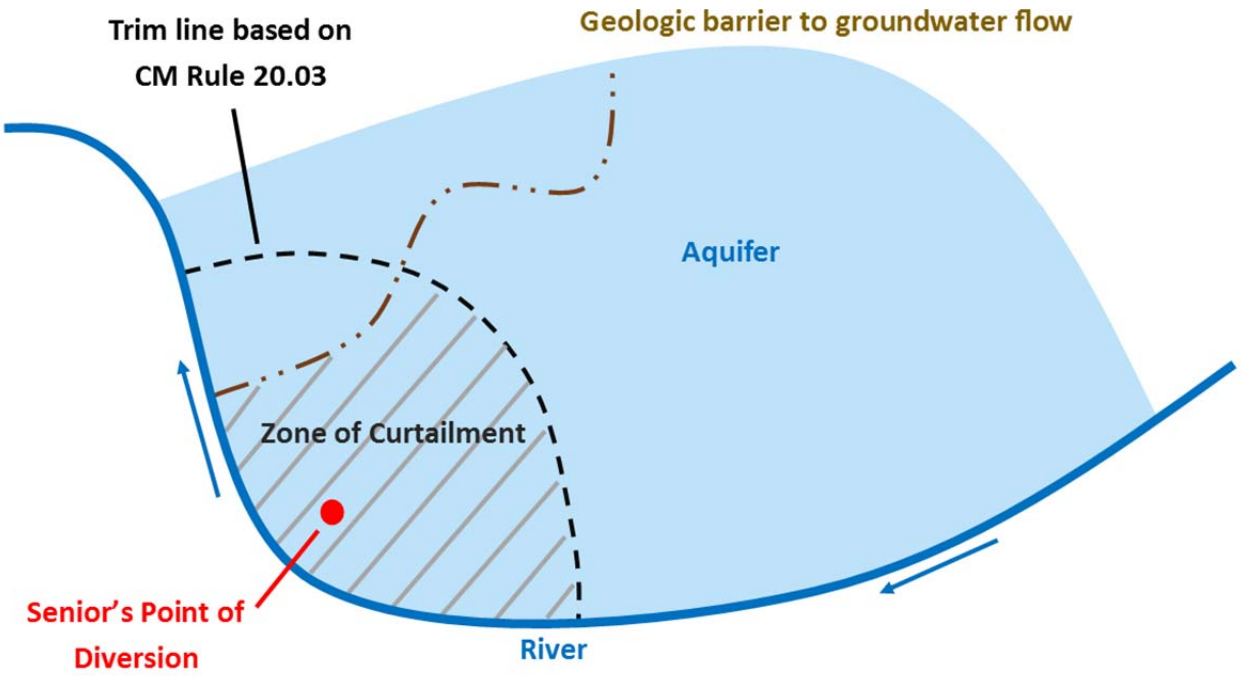
[28] Surface Water Coalition's Resp. Br., p, 18.

[29] Curtailment Order p. 35, ¶ 30 (Agency R. Vol. 21, p. 4192) ("Rangen is beneficially using water by raising fish to satisfy its contract with Idaho Power and to sell fish on the open market. IGWA and Pocatello have failed to show, by clear and convincing evidence, that Rangen's water use is unreasonable.").

[30] Fremont-Madison's Resp. Br., p. 3.

[31] Curtailment Order p. 40, ¶ 55 (Agency R. Vol. 21, p. 4197).

The Director's duty to consider geologic barriers to groundwater flow is not one and the same as his duty to protect against hoarding of the resource under CM Rule 20.03. In any given conjunctive management case, the zone of curtailment may be constrained by geologic barriers, or by the Director's determination of how much water the senior can reasonably command without using, or by a combination of both. A geologic barrier may warrant a smaller zone of curtailment than the Director's application of CM Rule 20.03, or vice versa. To illustrate, the following diagram depicts a zone of curtailment that is constrained by both a geologic barrier and the Director's determination of how much water the senior can reasonably command without using under CM Rule 20.03:



In this case, IGWA does not challenge the Great Rift trim line *per se*.[32] IGWA agrees that the Director can and should consider geologic barriers to groundwater flow when distributing water, and that implementing a trim line at the Great Rift is an appropriate way to account for that particular geologic feature. The problem is not that the Director accounted for the Great Rift, but that he did not separately determine how much water Rangen can reasonably command without using. He mistakenly combined the analyses, and in the process failed to directly apply CM Rule 20.03. We know how he has accounted for the Great Rift,[33] but we don't know how much water Rangen can reasonably command without using under CM Rule 20.03.[34]

Theoretically, the Director could have decided that the appropriate threshold under CM Rule 20.03 would have resulted in a trim line further east of the Great Rift; for instance, he could have decided that curtailment is reasonable as long as Rangen receives one tenth of one percent of the water that would have otherwise been applied to beneficial use by juniors. However, the Curtailment Order does not say this. And without a direct answer to the question, this Court cannot judge whether the Director abused his discretion. Hence, the Curtailment Order violates Idaho Code § 67-5248 by failing to

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[32] *Cf.* Pocatello's Resp. Br., p. 1 ("IGWA's appeal herein does not directly address the district court's trim line ruling.").

[33] IDWR's Resp. Br., p. 4 ("The Director adopted a trim line based upon a known geologic feature on the ESPA referred to as the Great Rift."); *see also* Surface Water Coalition's Resp. Br., p. 10 ("the Director created a trim line associated with the Great Rift, a subsurface geological feature of the ESPA").

[34] *See* IGWA's Opening Br., p. 34 (explaining that the Great Rift trim line does not apply a uniform threshold as to how much water Rangen can command without using).

include a reasoned statement explaining how much water Rangen and reasonably command without applying it to beneficial use.

If, however, this Court concludes the Director can properly combine his accounting of geologic barriers with his determination of how much water an appropriator may command under CM Rule 20.03, the Court must still determine whether it is an abuse of discretion for the Director to permit Rangen to curtail beneficial use when it is expected to receive as little as 0.63 percent of the water that would have otherwise been applied to beneficial use by the junior.[35]

The Surface Water Coalition contends that IGWA's grievance with the Director's application of CM Rule 20.03 "boils down to one complaint: It is too harsh."[36] This is true. Curtailment of any type is harsh, yet IGWA readily accepts curtailment as part of water administration in Idaho. A proper application of CM Rule 20.03 will still have harsh results. Indeed, curtailment of 1,000 or 5,000 or 10,000 acres is exceedingly harsh. IGWA is not asking this Court to do away with the exercise of priority, but to give equal deference to the constitutional requirement that "[p]riority of appropriation shall give the better right as between those *using* the water,"[37] by preventing a single water user from commanding vast amounts of water without applying it to beneficial use.

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[35] *See* IGWA's Opening Br., pp. 38-41.

[36] Surface Water Coalition's Resp. Br., p. 19.

[37] Idaho Const., Art. 15 § 3 (emphasis added).

1.4 The district court did not squarely address the issue of how much water Rangen can reasonably command without applying it to beneficial use.

IGWA made its argument concerning CM Rule 20.03 to the district court, but the court did not squarely address it. On page 37 of its decision the court acknowledged IGWA's argument that the Curtailment Order violates CM Rule 20.03 by allowing Rangen to command hundreds of thousands of acre-feet of water without diverting or using it, but instead of addressing the issue the court points back to page 26 of its decision where upheld the Director's finding that Rangen was efficiently using the water it diverts.[38] Thus, the district court decision suffers from the same omission as the Curtailment Order: it decides that Rangen is reasonably using the water it diverts into its raceways, but does not decide how much water Rangen can reasonably command without diverting at all.

1.5 IDWR's defense of the Director's perception of "limited discretion" to impose a trim line defies common sense.

IGWA contends the Director's forthright admission that he "perceives this issue of a trim line as one of limited discretion" reflects a mistaken assumption that he has little autonomy to implement a trim line to prevent water users from commanding large amounts of water without applying it to beneficial use.[39] IDWR defends the "limited

[38] Mem. Decision & Order on Pets. for Jud. Rev., p. 37 (Clerk's R., p. 704).

[39] IGWA's Opening Br., pp. 30-32.

discretion" statement by arguing it "only signals the Director's recognition that his discretion is not 'unfettered.'"[40]

Of course the Director does not have unfettered discretion. All his decisions are subject to judicial review under the "abuse of discretion" standard.[41] A common-sense reading of the "limited discretion" statement clearly indicates more than a recognition that the trim line issue is a discretionary matter. Had that been the Director's intent the Curtailment Order would have simply said the trim line issue is a discretionary matter. The addition of the word "limited" signals the Director perceived lesser autonomy than in other discretionary matters.[42]

Significantly, the trim line issue is not the only discretionary matter decided in this case, just the only one for which the Director perceived limited discretion. He did not say he perceived limited discretion to determine whether Rangen is efficiently using the water it diverts into its raceways, whether junior groundwater users are efficiently using water, whether Rangen should be required to recirculate water, or any other matter. He only perceived limited autonomy to implement a trim line. This, IGWA believes, contributed materially to the lack of a direct decision of how much water Rangen can reasonably command without applying it to beneficial use.

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[40] IDWR Resp. Br., p. 16.

[41] Idaho Code § 67-5269.

[42] By the same token, had the Director stated he perceived "broad" discretion to implement a trim line, it would indicate wider latitude than other discretionary decisions.

An agency errs as a matter of law when it refuses to exercise its discretionary duties—or, in this case, when it applies an incorrect standard to its discretionary duties. Such an error "could be intentional, *i.e.*, 'arbitrary,' or unintentional, *i.e.*, 'by a mistaken view of the law.'"[43] Either way, it is a reversible error.[44]

Here, the Director had a mistaken view of the law. He has an affirmative duty to apply both bedrock principles of water distribution—that "the first appropriator in time is the first in right and that water must be placed to a beneficial use."[45] Applying both principles simultaneously means a senior may exercise priority to curtail juniors only if the senior puts the curtailed water to beneficial use without excessive hoarding of the resource.[46] By perceiving limited discretion to implement a trim line, the Director effectively subordinated the principle of beneficial use to the principle of priority. This subordination in itself is an abuse of discretion and violation of law.

1.6 This Court may establish a baseline threshold as to how much water a senior may reasonably command without using, but it should not exercise the Director's discretion for him.

While Pocatello agrees with IGWA that the Director did not decide how much water Rangen can reasonably command without using, it nonetheless asks the Court to

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[43] *Seeton v. Adams*, 50 A.3d 268, 274 (Pa. Commw. Ct. 2012) (citing *Tanenbaum v. D'Ascenzo*, 356 Pa. 260, 263, 51 A.2d 757, 758 (1947)).

[44] *Kolp v. Bd. of Trs.*, 102 Idaho 320, 323 n.1 (1981) (quoting 55 C.J.S. Mandamus § 133); *see also Morris v. Harper*, 94 Cal. App. 4th 52, 62-63, 114 Cal. Rptr. 2d 62, 69 (2001) ("A refusal to exercise discretion is itself an abuse of discretion.").

[45] *A&B Irr. Dist.*, 155 Idaho at 650.

[46] *See* IGWA Opening Br., pp. 42-49.

find that "the Director's selection of the Great Rift as the trim line reflected appropriate exercise of agency discretion."[47] In other words, Pocatello asks this Court to exercise the Director's discretion for him.

Since the Idaho Legislature has not established a bright line rule as to how much water a senior can command without using, the decision is left to the Director's discretion. This Court may establish sideboards to guide that discretion, but the decision ultimately rests with the Director.[48] Idaho Code § 67-5279 permits the Court to set aside and remand the Curtailment Order, but not to exercise agency discretion on its own.

Should the Court consider enunciating a baseline threshold as to how much water an appropriator may reasonably command without using, the *Clear Springs* decision should not be viewed as the benchmark, as IDWR and Pocatello suggest.[49] While one of the seniors in that case received only 0.69 percent of the curtailed water (the other senior received two percent), the Court declined to sanction either as reasonable. After considering IGWA's argument that it was unreasonable to curtail juniors when the senior will receive as little as 0.69 percent of the water, the Court held: "the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development

[47] Pocatello's Resp. Br., p. 3.

[48] *See* IGWA's Opening Br., pp. 30-32.

[49] IDWR's Resp. Br., pp. 20-22; Pocatello's Resp. Br., p. 4.

must challenge the Spring Users' means of diversion," which the Court held had not been raised on appeal.[50]

1.7 The record contains the facts necessary for the Director to decide how much water Rangen can reasonably command without applying it to beneficial use.

Pocatello argues that IGWA "does not articulate a factual basis to support its proposed 10% standard" (i.e. to support IGWA's argument that seniors should not be permitted to command water if they will not use at least 10 percent of the water that would have otherwise been applied to beneficial use by the junior).[51] Yet, the IDWR Staff Memo shows both the location of different trim line thresholds as well as the amount of water Rangen would receive under each thresholds.[52] Figure 2 from the Staff Memo shows various trim line locations:

[50] *Clear Springs Foods*, 150 Idaho at 809.

[51] Pocatello's Resp. Br., p. 3.

[52] Ex. 3203, p. 9 Fig. 2 and p. 50 Table 4.

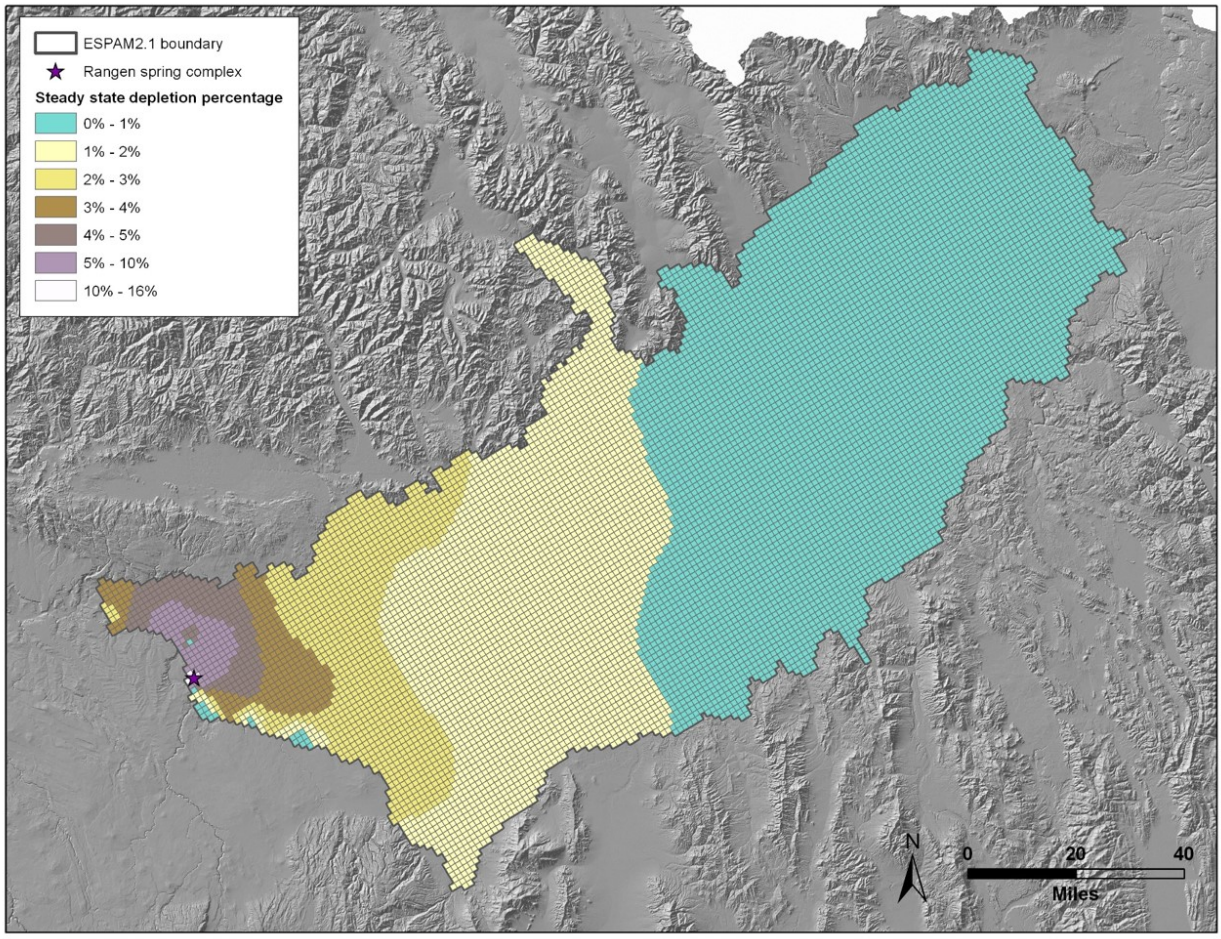

Table 4 from the Staff Memo then shows how much water is projected to accrue to the Rangen Model cell from curtailment within each trim line (of which Rangen will receive approximately 63 percent via the Curren Tunnel) versus the number of irrigated acres that will be curtailed:

Area of curtailment[7]	Curtailed groundwater irrigation (ac)	ESPAM2.1 predicted response at Rangen spring cell (cfs)	Acres curtailed per cfs of benefit at Rangen spring cell (ac/cfs)
Model Boundary	565,026	17.89	31,591
Area Common Ground Water Supply (CGW)	479,203	16.94	28,296
CGW 0.2% trim line	257,673	16.15	15,956
CGW 1% trim line	160,389	14.55	11,022
CGW 1.5% trim line	154,270	14.32	10,774
CGW 1.7% trim line	108,543	11.84	9,167
CGW 2% trim line	67,093	9.31	7,210
CGW 3.5% trim line	26,694	5.71	4,678
CGW 5% trim line	12,346	3.35	3,689
CGW 10% trim line	24	0.01	1,868

Table 4. IDWR analysis of response to curtailment within various areas. (ESPAM2.1)

This is precisely the data needed to apply CM Rule 20.03. If Pocatello believes something more is required, it does not say what it is.

1.8 The Director's application of drastically different trim line thresholds is arbitrary, capricious, and an abuse of discretion.

IDWR contends "the change in result in this proceeding is not due to changes in the approach used to define the trim line as implied by IGWA, but rather data error."[53] While there was certainly error in the data used in version 1 of the Model (as there is with version 2), this clearly is not the reason why the curtailment exploded from 735 acres to 157,000 acres. The increase was due entirely to the Director's decision to abandon the

[53] IDWR's Resp. Br., p. 26.

use of the Model to implement a trim line based on how much of the water that would have otherwise been applied to beneficial use by juniors will instead accrue to the senior.

The Director could have implemented the same trim line he applied the first time Rangen made a delivery call, and the same 735 acres would have been exposed to curtailment. He also could have applied a 10 percent trim line based on the more accurate predictive capabilities of version 2 of the Model, which would have exposed *fewer* than 735 acres to curtailment. Instead, the Director went an entirely different direction, abandoning trim lines based on the modeled effect of groundwater pumping and instead using only geologic features to demarcate the zone of curtailment.

And therein lies the problem. 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 fact, the IDWR has assured juniors they better not assume any consistency. When IGWA asserted that the Great Rift trim line exposes every groundwater right in the Magic Valley to curtailment, the IDWR dismissed this argument as speculative, arguing there is no reason to expect the Director will apply the Great Rift trim line to other calls.

After a decade of conjunctive management, there is no reliable standard or rationale from the IDWR concerning how much water seniors can reasonably command without applying it to beneficial use. Groundwater users are presently operating under a 10-percent trim line in the Surface Water Coalition case, a trim line based on a geologic

feature in the Rangen case that is in the neighborhood of one-half of one percent, and a representation by IDWR that IGWA cannot assume any consistent application of trim lines in the future.

If it was previously unreasonable for Rangen to curtail juniors beyond a 10 percent trim line, and if it is still unreasonable for the Surface Water Coalition to curtail juniors beyond a 10 percent trim line, then the IDWR must provide a rational, reasonable, and factually grounded explanation as to why Rangen is now being permitted to curtail juniors even though less than one percent of the curtailed water is expected to ever reach the Curren Tunnel. The Curtailment Order does not provide an adequate explanation, and, as a result, is arbitrary, capricious, and/or an abuse of discretion.

1.9 The Director properly declined to consider hearsay about purported injury to water users other than Rangen.

Rangen contends IGWA's argument about CM Rule 20.03 "is not supportive factually" since the Director declined to allow Frank Erwin to testify about material injury to water users other than Rangen, while allowing evidence about where water that does not accrue to the Rangen Model cell is predicted to accrue to.[54] As explained below, the Director's decision was appropriate.

The CM Rules instruct the Director to determine material injury to the water user making the delivery call. It would certainly be improper for the Director to order

[54] Rangen's Resp. Br., p. 8.

curtailment based on hearsay about purported injury to other water users who have not made a call. Thus, it was appropriate for the Director to not permit Mr. Erwin to speculate about injury to water users other than Rangen.

On the other hand, the Director has an obligation under CM Rule 20.03 to consider how much water Rangen commands without applying to beneficial use. While IGWA does not believe the Director should speculate as to what becomes of the water Rangen commands without using, Rangen asserted, and the Surface Water Coalition makes the same argument here—without any supporting evidence—that the portion of the curtailed water that does not accrue to Rangen would be applied to beneficial use by other senior water users.[55] To refute this, IGWA showed that the water that does not accrue to the Rangen Model cell will accrue to other springs or reaches of the Snake River for which there are no water rights, no delivery calls, or approved mitigation plans in place.[56] This is shown in table 5 of Exhibit 2402, a copy of which is attached hereto as Appendix A.

IGWA certainly acknowledges that the additional water that accrues to Rangen would be available to downstream water users on Billingsley Creek, but since there were no delivery calls from other Billingsley Creek water users, it would have been inappropriate for the Director to order curtailment under the assumption that other Billingsley Creek water users are suffering material injury. The evidence in the record

[55] Surface Water Coalition's Resp. Br., p. 32.

[56] Ex. 2402, p. 38 table 5; Brendecke, Transcript 2567: 18-25, 2568; 1-9.

shows that all or nearly all of the water Rangen commands without using will not be applied to beneficial use by other users.

2. Arguments related to bias in the Model's predictions for Rangen.

2.1 IGWA does not challenge the Great Rift trim line as a product of Model uncertainty.

Fremont-Madison Irrigation District argues that "[t]he Director correctly employed a trim line east of the Great Rift on the basis of model uncertainty."[57] As explained above, IGWA does not challenge the Director's imposition of a trim line at the Great Rift. IGWA challenges his failure to account for localized errors in the Model that systematically over-predict the effect of groundwater pumping on Rangen's water supply.[58] As explained below, the Great Rift trim line does not account for this.

2.2 The Great Rift trim line does not account for localized errors in the Model that systematically skew its predictions in Rangen's favor.

IDWR does not explain what the Director did to account for bias on the Model's predictions for Rangen specifically, but rather argues that "the Director rejected IGWA's criticisms that ESPAM 2.1's ability to accurately predict groundwater flow conditions is compromised because it is a regional model that does not consider detailed localized information."[59] This argument misses the point. IGWA does not contend the Model cannot be used to predict the effects of curtailment on Rangen; rather, IGWA contends

[57] Fremont-Madison's Resp. Br., p. 3.

[58] IGWA's Opening Br., pp. 35-38.

[59] IDWR's Resp. Br., p. 17.

the Director must account for the bias in those predictions. IDWR's explanation—that the Model can be used to predict the effects of curtailment on Rangen—does not answer the question of how the Director accounted for bias in its predictions for to Rangen.

IDWR also argues that the modified model prepared by Dr. Brendecke somehow absolves the Director from responsibility to deal with Model bias. This argument has been made before, and is, frankly, misleading. Dr. Brendecke made adjustments to only a few model parameters within a few model cells close to Rangen. With these adjustments, a curtailment run within the 10 percent trim line produced substantially different model predictions, demonstrating that erroneous assumptions within the Model can have drastic effects on its predictions. These modifications do not and cannot be used in any comparison with a model-wide curtailment run because the modified model was not recalibrated across the entire model domain due to time and resource constraints. Thus, the fact the modified model produces similar results in a model-wide curtailment scenario does nothing to undermine the substantial disparity under curtailment within a 10-percent trim line; thus, it does not resolve the problem of systematic bias in the Model's predications for Rangen.

2.3 The fact that ESPAM 2.1 is the best science available does not mean the Director can ignore known errors in its predictions.

IDWR and the Surface Water Coalition also defend the Director's failure to account for Model errors that bias its predictions for Rangen by emphasizing that "ESPAM 2.1 is

the best technical scientific tool currently available to predict the effective groundwater pumping on flows from springs located in the Rangen cell."[60] IGWA does not dispute that the Model is the best science available, nor does IGWA contend the Model cannot be used in this case. IGWA's argument is that even with the most up-to-date model, the Director must consider the reliability of its predictions and account for known errors in those productions, particularly when such errors systematically skew the predictions.[61]

2.4 Model error may bear on the Director's application of CM Rule 20.03.

The Surface Water Coalition argues that no matter how inaccurate or biased the Model's predictions may be, the Director can do nothing about it in light of the clear and convincing standard of proof that favors senior water users.[62] The Coalition cites the district court decision, which does seem to reach this conclusion.[63]

The district court held that "*any* uncertainty or margin of error must operate in favor of Rangen, the senior right holder."[64] This ruling mistakenly turned the heightened burden of proof into an insurmountable hurdle that precludes the Director from ever accounting for Model error, no matter how substantial and no matter how clear and convincing the evidence.

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[60] IDWR's Resp. Br., p. 11 (quoting Agency R., Vol. 21, p. 4209); Surface Water Coalition Resp. Br., pp. 7-9.

[61] *See* IGWA's Opening Br., pp. 35-36.

[62] Surface Water Coalitions' Resp. Br., pp. 14-15.

[63] *Id*. (quoting Clerk's R., pp. 706-07).

[64] *Id*. (emphasis added).

IGWA agrees with Fremont-Madison Irrigation District that this Court's *A&B Irrigation District* decision did not eliminate consideration of Model errors.[65] That decision stands for the proposition that Model errors must be established by clear and convincing evidence if the Director is to deviate from the Model's predictions, not that Model errors must forever be ignored.

In this case, the evidence is undisputed that version 2 of the Model systematically over-predicts water flows from the Rangen Model cell. IDWR's own modelling expert Dr. Wylie agreed.[66] Consequently, the Director must account for known bias in the Model's predictions, or explain why such bias need not be accounted for, neither of which happened here.

2.5 Even if the Model were perfect, the Director must apply CM Rule 20.03.

The Surface Water Coalition argues that a trim line cannot legally be implemented in this case since the Director has not assigned a margin of error to ESPAM 2.1.[67] On one hand, this argument supports IGWA's position that the Director erred by failing to account for undisputed evidence of Model error. On the other hand, even if the Model were perfect, the Director still determine how much water Rangen can reasonably command without applying it to beneficial use under CM Rule 20.03. Therefore, even if this Court permits the Director to disregard the bias in the Model's predictions for

[65] Fremont-Madison's Resp. Br., pp. 7-8.

[66] Agency R., Vol. 21, p. 4270.

[67] Surface Water Coalition's Resp. Br., p. 4.

Rangen, that does not resolve the Director's failure to properly or reasonably apply CM Rule 20.03.

3. Arguments related to the applicability of the Ground Water Act.

3.1 Whether the Curren Tunnel is subject to the Ground Water Act has never previously been adjudicated.

IGWA has appealed the Director's decision that the Curren Tunnel is not subject to the Ground Water Act since it qualifies as a groundwater well under the plain language of the Act.[68] IDWR and Rangen contend that even so, this Court ruled in *Musser v. Higginson* that the Curren Tunnel is exempt from the Act.[69] However, the issue in *Musser* was whether the trial court properly issued a writ of mandate ordering the Director of the IDWR "to comply with I.C. § 42-602 and distribute water in accordance with the doctrine of prior appropriation."[70] The Director had not held a hearing or taken any action on the Musser delivery call because he believed the CM Rules needed to be completed first.[71]

Furthermore, the *Musser* decision indicates the Director may have believed the Musser call involved ground water rights, since he opposed the writ of mandate on the

[68] IGWA's Opening Br., p. 42-49.

[69] Rangen's Response Br., p. 23; IDWR's Resp. Br., p. 8.

[70] *Musser v. Higginson*, 125 Idaho 392, 393 (1994).

[71] *Id.* at 394.

basis it was "an inappropriate method by which to litigate the relationship between *senior and junior ground water rights*."[72]

Regardless, since there was no litigation or decision by the Director concerning the applicability of the Ground Water Act, this Court's reference to the source as "springs" is not *res judicata* as to that issue.[73]

Rangen also contends the SRBA Court ordered the Director to administer the Curren Tunnel as a surface water source since it was not named "Ground Water" instead of "Martin-Curren Tunnel." This argument assumes that (i) AJ Rule 60 was intended to do more than provide a naming construct, and (ii) the SRBA Court deliberately decided to judicially exclude the Curren Tunnel from the Act by approving the name "Martin-Curren Tunnel." Both assumptions are incorrect.

First, AJ Rule 60 is a naming construct and nothing more. Most ground water sources do not have commonly known names, so they are listed simply as "Ground Water." However, given the unique nature, history, and well-known name of the Curren Tunnel, it was not inappropriate to name it as such on the partial decrees. Doing so only more

[72] *Id.* (emphasis added).

[73] There are five factors for determining whether *res judicata* bars re-litigation of an issue, one of which is that "the issue decided in the prior litigation was identical to the issue presented in the present action." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). Because the issue of whether the Marin-Curren Tunnel is subject to the Ground Water Act as a ground water source was not decided in the *Musser* case, the issue is not barred in the present case.

clearly identified the source of Rangen's water rights. To read more power into AJ Rule 60 would be improper and unreasonable.[74]

Second, and more importantly, the Legislature did not give the SRBA Court power to exempt water rights from the Ground Water Act that, under the plain language of the Act, are under its purview.

3.2 The Director's surface water determination is based on an agency rule.

IGWA has argued the Director erred by allowing Adjudication Rule 60 (AJ Rule 60) to trump the Ground Water Act.[75] In response, IDWR claims AJ Rule 60 "does not serve as legal authority declaring Rangen's water source as surface water," but that it "simply highlights the naming convention used in the SRBA to distinguish surface and ground water."[76] Yet, without AJ Rule 60, all the Director has to go by is the language in Rangen's partial decrees, which do not explicitly state the Martin-Curren Tunnel is a "surface water" source or contain a condition saying they be administered as surface water. Since the plain language of the decrees does not judicially require administration as surface water, the Ground Water Act demands their administration as groundwater, as explained in IGWA's Opening Brief.[77]

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[74] "An agency interpretation is not reasonable if it contradicts either the language of a statute of legislative intent." *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 247, 612 N.W.2d 659, 676.

[75] IGWA's Opening Br., p. 48-49.

[76] IDWR's Response Br., p. 29.

[77] IGWA's Opening Br., pp. 47-49.

The reality is that while AJ Rule 60 was intended simply to provide a naming convention, not to control water right administration in response to a delivery call. The Director's and district court's decisions bootstrap the rule into imposing a requirement it does not on its face claim to impose, and in so doing they violate the Ground Water Act.

CONCLUSION

Based on the foregoing, IGWA respectfully urges this Court to grant the relief requested in IGWA's Opening Brief.

RESPECTFULLY SUBMITTED this 29th day of June, 2015.

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CERTIFICATE OF SERVICE

I CERTIFY that on this 29th day of June, 2015, the above document was served on the following persons in the manner indicated:

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Table 5.1 - Gains to River Reaches and Springs as Simulated by ESPAM 2.1, Priority Date 7/13/1962

River Reach	Gain (CFS)	Administrative Status
Ashton to Rexburg	157.79	No call
Heise to Shelley	206.50	No call
Shelley to Near Blackfoot	229.60	No call
Near Blackfoot to Minidoka	695.22	Mitigation plan

Springs	Spring Class	Gain (CFS) ESPAM 2.1	Administrative Status
BANCROFT	C	0.69	No call
10 unnamed class C springs	C	3.01	No call
MALAD	B	43.95	No call (IPC*)
WHITE (37, 14)	C	0.15	No call
BIRCH	C	0.07	No call
1 unnamed class C spring	C	0.97	No call
BIGSP	C	7.09	No call
2 unnamed class C springs	C	0.90	No call
THREESP	B	13.03	Mitigation plan
TUCKER	C	1.13	No call
RANGEN	B	17.89	Active call
NTLFSHH	B	11.37	No call
THOUSAND	B	50.06	No call (IPC)
2 unnamed class C springs	C	0.03	No call
SAND	B	18.33	No call
1 unnamed class C spring	B	0.11	No call
BOX	A	68.74	Mitigation plan
BANBURY	C	3.30	No call
BRIGGS	A	1.14	No call
CLEARLK	B	41.84	Mitigation plan
2 unnamed class C springs	C	0.00	No call
NIAGARA	B	31.98	Mitigation plan
CRYSTAL	B	45.75	Mitigation plan
2 unnamed class C springs	C	0.07	No call
ELLISON	C	0.12	No call
2 unnamed class C springs	C	0.02	No call
WARM CRK SP (61, 23)	C	0.17	No call
1 unnamed class C spring	C	0.04	No call
BLUELK	B	20.02	Mitigation plan
2 unnamed class C springs	C	1.02	No call
DEVILC	A	7.39	No call
DEVILW	A	5.67	No call (IPC)
3 unnamed class C springs	C	0.13	No call
2 unnamed class C springs	C	0.58	No call
DEVILC	A	7.86	No call
DEVILC	A	7.39	No call
DEVILW	A	5.67	No call (IPC)
3 unnamed class C springs	C	0.14	No call

Totals	Gain (CFS)	% of total
Undivertable baseflow (GHBs)	19.66	1.15%
Mitigation plans	916.58	53.76%
No call	750.82	44.04%
Rangen	17.89	1.05%
Total Change All Connected Reaches	**1704.95**	100.00%

*IPC - Idaho Power Company