

Docket No. 42836-2015

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

CITY OF POCATELLO,
Petitioner-Appellant on Appeal,

v.

RANGEN, INC.,
Appellant-Respondent on Appeal,

and

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

IDAHO GROUND WATER APPROPRIATORS, 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; and TWIN FALLS CANAL
COMPANY;
Intervenors.

PETITIONER-APPELLANT ON APPEAL CITY OF POCATELLO'S OPENING 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. INTRODUCTION

Rangen is a small fish hatchery with senior water rights in the Martin-Curren Tunnel. The facts in the record below demonstrate that while the Eastern Snake Plain Aquifer Model can be used to mathematically predict how much water would accrue at Rangen after 20, 30 or 150 years from curtailment of junior ground water pumping far from Rangen, the benefit to Rangen from curtailment of these rights is of little value at best, and uncertain to happen at all. The Director ordered curtailment of approximately 155,000 irrigated acres, which the model predicts will result in accruals at the Martin-Curren Tunnel in the near term. By the same token, the Director imposed the Great Rift trim line to exclude from curtailment over 300,000 irrigated acres. The juniors on the east side of the Great Rift individually contribute insignificantly to Rangen's shortage, and Rangen will wait generations (or possibly forever) to receive the minute benefits associated with curtailment of these lands.

This appeal involves the question of whether the Director must remedy injury to Rangen's senior water rights in the Martin-Curren Tunnel by curtailing the entirety of the Eastern Snake Plains Aquifer, or if remote areas of the ESPA can properly be excluded from curtailment in the exercise of the Director's discretion.

II. ADJUDICATION OF RANGEN'S WATER RIGHTS IN THE SRBA

Rangen obtained several partial decrees for water rights in the Snake River Basin Adjudication ("SRBA") District Court, including 36-02551 and 36-07694.¹ Rangen is located in

¹A complete list of Rangen's water rights can be found in the record at page 000671.

the SE1/4 of the NE1/4 of Section 31 and the SW1/4 of the NW1/4 of Section 32, Township 7 South, Range 14 East, just below the rim of the Snake River plain. R. 000569.² In subcase nos. 36-02551 and 36-07694, Rangen claimed the following source: “Curran Tunnel Trib. to: Billingsley Creek.” R. 000563, 000566. Rangen’s notices claimed a point of diversion of the following forty-acre tract: Township 07S, Range 14E, Section 32, SW1/4 of NW1/4 within Gooding County. R. 000563, 000567. On November 2, 1992, the Director of the Idaho Department of Water Resources (“IDWR”) issued a Director’s Report, Part I, Reporting Area 3 (Basin 36), which included recommendations for Rangen’s claims nos. 36-02551 and 36-07694. R. 000683.

The Director did not recommend Rangen’s water rights as claimed in its notices: instead, the Director recommended the source of the claims as “Martin-Curren Tunnel”, and the Director recommended the following ten-acre tract as Rangen’s point of diversion: SE1/4 of the SW1/4 of the NW1/4 of Section 32 (“10-acre tract”), as opposed to the larger forty-acre tract claimed by Rangen. Exhibit 3650, Fig. 2-3. “Basin 36 was a highly contested basin, and the Director’s recommendations for water right claims in that basin were highly scrutinized by parties to the SRBA.” R. 000685 n.8. However, neither Rangen nor any other party to the adjudication objected to the Director’s Recommendations, and Rangen’s partial decrees for water right nos. 36-02551 and 36-07694 were entered, respectively, on December 29, 1997 and December 30,

²Citations to “R.” throughout this brief refer to the Clerk’s Record on Appeal before the SRBA District Court (Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)). Citations to “Agency R.” or “Tr.” refer to the Agency Record and Hearing Transcripts before IDWR in Docket No. CM-DC-2011-004 as lodged with the district court.

1997, consistent with the unopposed recommendations. Agency R. Vol. 1, pp. 000098, 000099. Rangen did not appeal the issuance of either partial decree.

III. RANGEN DIVERTS WATER OUTSIDE THE LIMITS OF ITS PARTIAL DECREES

Within the 10-acre tract decreed point of diversion, Rangen diverts Martin-Curren Tunnel flows through a 6-inch “white pipe” that emerges from the Tunnel itself, and from a 12-inch steel pipe that collects water from the Tunnel that flows into the “Rangen Box.” R. 000670–71. However, springs also arise outside of the 10-acre tract, below the Martin-Curren Tunnel, in an area referred to as the “talus slope” because of the rocks and stones that form the broken, rubbly surface. *Id.* Although not part of its decreed water rights, Rangen has also historically diverted the springs from the talus slope through a corrugated metal pipe that delivers water to the large raceways (the so-called “Bridge Diversion” or “talus slope diversion”). *Id.* The record establishes that the Bridge Diversion is outside Rangen’s decreed 10-acre tract- point of diversion; it is also undisputed that the springs diverted by Rangen arising on the talus slope are outside of Rangen’s decreed source, the Martin-Curren Tunnel. *Id.*

IV. RANGEN’S DELIVERY CALL

Rangen filed its delivery call in September 2003. Agency R. Vol. 1, p. 000105. Director Dreher initially entered an order on February 25, 2004, curtailing all ground water rights in Water District 130 with priority dates junior to July 13, 1962. Agency R. Vol. 1, p. 000130. However, no curtailment was imposed because various water users, including Rangen, entered into the 2004 Aquifer Recovery and Enhancement Agreement which delayed curtailment for one year. During that time, the Enhanced Snake Plain Aquifer Model (“ESPAM”) version 1.1 was

released which called into serious question the Director's conclusions under his initial order. On May 19, 2005, based on the curtailment predictions of ESPAM 1.1, Director Dreher concluded that the Rangen delivery call was futile and withdrew his curtailment order. Agency R. Vol. 1, p. 000189.

Over six years later, on December 13, 2011 Rangen filed its Petition for Delivery Call ("Petition"), renewing its prior call and alleging injury to water right nos. 36-02551 and 36-07694 from junior-priority ground water pumping in the area of common ground water supply modeled in ESPAM 2.0.³ Agency R. Vol. 1, pp. 000004–5. Rangen's Petition demanded curtailment as necessary to deliver Rangen's water. *Id.* at 000008.

Soon after the delivery call was filed, IDWR found significant problems with ESPAM 2.0, and the delivery call was put on hold while the Eastern Snake Hydrologic Modeling Committee and IDWR resolved the structural problems with the model. During 2012, ESPAM 2.1 was announced, and the captioned matter proceeded. The City of Pocatello ("Pocatello"), Idaho Ground Water Appropriators, Inc. ("IGWA"), Fremont Madison Irrigation District, upper valley ground water pumpers ("UVP"), and the Surface Water Coalition ("SWC") participated in the delivery call. A 12-day trial was held in May of 2013. The Director's Final Order in Rangen's 2011 Delivery Call is summarized below.

³Rangen did not call for its other decreed water rights, nos. 36-00134B, 36-00135A, and 36-15501, in the 2011 Delivery Call. Agency R. Vol. 1, p. 000004.

A. Rangen's Decreed Source and Point of Diversion

Prior to trial, Rangen asked the Director to determine, *inter alia*, that Rangen could place a call for not just the amount of water that arises at the Martin-Curren Tunnel—which is Rangen’s decreed source—but that Rangen could also place a call for water arising from springs on the talus slope below the Martin-Curren Tunnel that Rangen diverts outside of the 10-acre tract. R. 000673–74.

On April 22, 2013, the Director denied Rangen’s requested relief, finding that Rangen was limited to the plain terms of its decrees. Agency R. Vol. 15, p. 003171.

B. Measurement

Prior to trial, the parties and IDWR raised questions regarding the accuracy of Rangen’s historical measurements of its water supply. Exhibits 3203, 3274, 3325, 3345, 3650, 3654. The Director found that Rangen employed a nonstandard measuring device and an uncalibrated rating table, which resulted in “under-reporting of flows at the CTR raceways and Rangen’s lodge pond dam.” Agency R. Vol. 21, p. 004197. Pocatello’s witness, Mr. Greg Sullivan, presented evidence that Rangen had under-measured its water historically by 15.9% on average. Mr. Sullivan developed his analysis by comparing USGS measurements made in the same vicinity as Rangen’s measurements. *Id.* at 004198. The Director adopted Mr. Sullivan’s analysis, but also found that despite the measurement errors by Rangen, “it is clear that spring flows in the area of the Curren Tunnel have declined significantly.” *Id.*

The measurement errors identified by the Director created consequences for accurate estimation of the proportion of Rangen Spring Cell predicted gains from curtailment that would

arise at the Martin-Curren Tunnel, Rangen's decreed source. *Id.* at 004210, FOF ¶¶ 100–01. Previously, IDWR and the other experts in the case had simply compared Rangen's flow data measured at the bottom of the Rangen hatchery with the IDWR flow data collected at the mouth of the Martin-Curren Tunnel. The regression analysis comparing those two sets of data, without correcting for the undermeasurement problem, determined that 74.7% of gains at the Rangen Spring Cell were predicted to arise at the Martin-Curren Tunnel. *Id.* at 004210, FOF ¶ 101. However, given that Rangen's flow data was found to be biased low by 15.9% on average, the Director asked Mr. Sullivan if the relationship between the Rangen Spring Cell gains and Martin-Curren Tunnel gains did not also have to be corrected, using the corrected measurement data. Sullivan Testimony, Tr. Vol. VII, p. 1663, L. 19–p. 1668, L. 23. Subsequently, Mr. Sullivan performed the analysis inquired of by the Director and disclosed a revised analysis. Exhibit 3654. The final regression showed that the Martin-Curren Tunnel could expect to see 63% of ESPAM predicted gains to the Rangen Spring Cell from curtailment of junior pumping. *Id.* at Fig. 2.⁴

C. Trim Line

In previous delivery calls, the Director has applied a “trim line”—“a geographical demarcation defining an area of the SPA that would be subject to curtailment and excluding from curtailment the area of the SPA located outside of the trim line.” R. 000695. From the beginning of this matter the parties disputed which water users should be subject to curtailment

⁴See also Sullivan Testimony, Tr. Vol. XII, pp. 2797–98.

pursuant to Rangen’s Delivery Call, and whether a trim line should be imposed at all.⁵ As developed in more detail within, the effect of the Great Rift trim line imposed in the Director’s Final Order was to exclude from curtailment and mitigation obligations junior ground water pumping remote from Rangen.

While the Director concluded that “ESPM 2.1 is the best technical scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell” (Agency R. Vol. 21, p. 004209, FOF ¶ 96), the Director also acknowledged the uncertainty surrounding ESPM 2.1 predictions (particularly in the eastern side of the model domain) (*id.* at 004206, FOF ¶ 91) and noted the diminishing benefits to Rangen from curtailment on the eastern side of the model domain. *Id.* at 004211–16, FOF ¶¶ 104–11. Taken together, the Director concluded that the modeled results regarding benefits to Rangen were uncertain with regard to junior ground water pumping on the eastern side of the Great Rift and that even if the modeled predictions were correct, the gains to Rangen diminished dramatically east of the Great Rift. Thus the Director selected the Great Rift as the geologic feature that would define the trim line in this matter.

The Director arrived at these conclusions based on testimony and evidence in the record that the gains to Rangen’s Martin-Curren Tunnel water supply from curtailment of Pocatello’s or UVP’s junior wells were “negligible” and “not a huge amount of water” for purposes of hatchery operations. Exhibit 3203 at 50; Kinyon Testimony, Tr. Vol. II, p. 494, L. 23–p. 495, L. 6.

⁵See, e.g., SWC’s Petition for Limited Intervention (requesting the ability to participate for the sole purpose of litigating the applicability of a trim line). Agency R. Vol. 2, p. 000298.

On behalf of UVP, Dr. Bryce Contor testified that curtailing UVP junior wells would result in 1.9 acre-feet over 150 years.⁶

Time Period	Cumulative Benefit to Reach	Benefit Relative to Curtailed Volume
First Year	24 gallons	$1.5 \times 10^{-6}\%$
First Five Years	0.11 acre feet	0.002%
150 Years	1.90 acre feet	0.04%

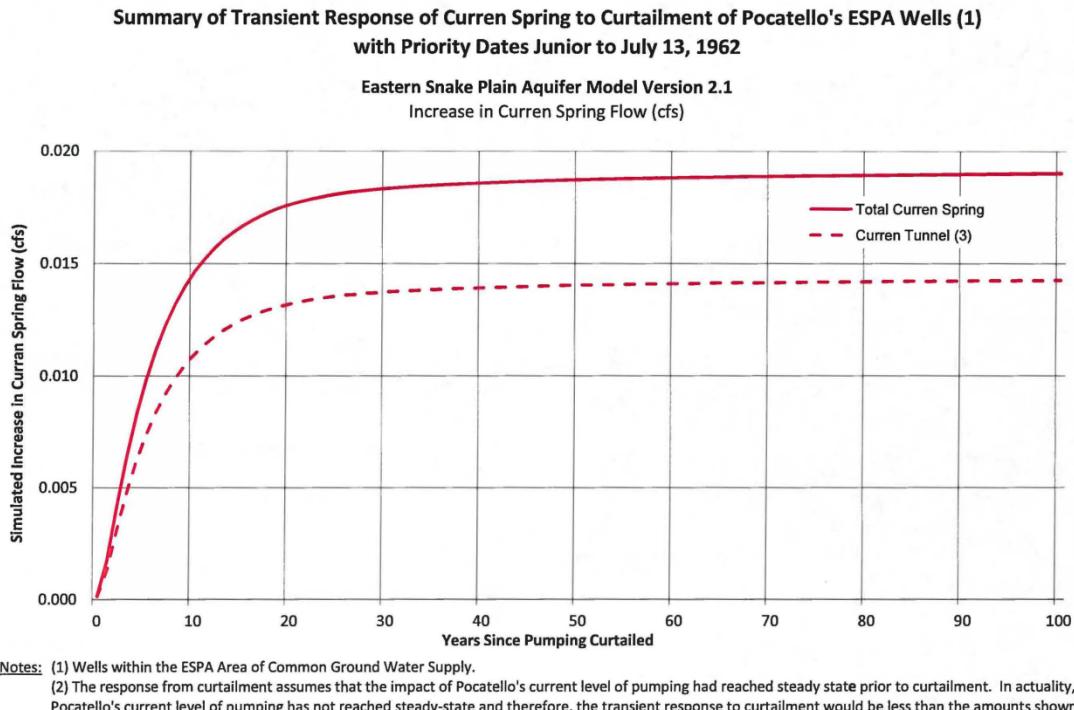
Exhibit 4001 at 6, Fig. 2.

Curtailment of Pocatello's junior pumping was predicted to result in 5 to 8 gallons per minute ("gpm") at Rangen over 30 years.⁷

⁶See also Contor Testimony, Tr. Vol. XII, pp. 2854–55.

⁷This rate of flow, 5 to 8 gpm, is comparable to a garden hose. Sullivan Testimony, Tr. Vol. VII, p. 1484, L. 7–11. See also *id.* at p. 1484, L. 14–15(describing 6 gpm as "negligible").

Figure 8-2a



Spronk Water Engineers, Inc.

Updated 5/5/2013

Exhibit 3650, Fig. 8-2a.⁸

In addition, the Director accepted into evidence an analysis which showed that the model predicted curtailment of all ESPA wells junior to 1962 (in other words, not simply wells west of

⁸This graph shows gains at Rangen from curtailment at Pocatello in hundredths of cfs; converted to gallons per minute these rates reflect 5 to 8 gpm of predicted benefit at Rangen. However, 5 to 8 gpm was based on the original analysis which predicted 74.7% of total Rangen Spring Cell accruals would arise at the Martin-Curren Tunnel. However, as described in Part IV.B., *supra*, based on Mr. Sullivan's error analysis of Rangen's measured flow data and the Director's questions at trial, Mr. Sullivan refined his regression analysis to correct for the erroneously measured flow data. Compare, Figure 1 and Figure 2 in Exhibit 3654. See also Sullivan Testimony, Tr. Vol. XII, pp. 2797–98 (explaining the change in the regression analysis). Simple math suggests that applying 63% rather than 74.7% to accruals from curtailment at the Rangen Spring Cell would further reduce the benefit to Rangen from curtailing Pocatello's wells from the originally estimated 5 to 8 gpm to rates on the order of 4 to 7 gpm.

the Great Rift) would result in 1,705 cubic feet per second (“cfs”) of gains to all river and spring reaches,⁹ with only 10.1 cfs of the 1,705 cfs accruing at the Martin-Curren Tunnel, and the remainder showing up as gains for other non-calling (and in many cases, junior) water rights. Exhibit 3650, Fig. 2-1 and Table 2-1, as refined by revised regression analysis, Exhibit 3654 and Sullivan Testimony, Tr. Vol. XII, pp. 2795–99; Agency R. Vol. 21, pp. 004210–16, FOF ¶¶ 101–11.¹⁰

Based on this and other evidence, which the Director found to be clear and convincing, the Director imposed a trim line in Rangen’s delivery call limiting curtailment to junior ground water rights west of the Great Rift (“Great Rift trim line”). Agency R. Vol. 21, pp. 004224–28. 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. *Id.* at 004202. The change in transmissivity across the Great Rift results in sharp reduction in spring gains at Rangen from curtailment of junior pumping east of the Great Rift. *Id.* at 004213–14, FOF ¶¶ 107–08; *see also* Exhibit 3203, Fig. 2 (showing that at least 1% of curtailed pumping west of the Great Rift accrues at the Rangen Spring Cell, less than 0.2 to 0.3% of curtailed pumping east of the Great Rift accrues at the Rangen Spring Cell).

The Director determined a trim line was proper in this case based on clear and convincing evidence that (1) there was significant uncertainty surrounding the ESPAM 2.1 predicted results from curtailing junior wells, particularly east of the Great Rift; (2) there was a significant

⁹This is equal to the amount of consumptive use pumping of all the wells in the area of common ground water, annualized.

¹⁰See explanation *supra* note 8.

“disparity” between the amount of irrigated acres to be curtailed east of the Great Rift, and the amount of gains that would accrue at Rangen (*id.* at 004212–15, FOF ¶¶ 106–10); and thus, (3) he was authorized to exercise discretion (based on this clear and convincing evidence) to curtail only those wells and irrigated acres west of the Great Rift to promote principles of maximum use and optimum utilization. *Id.* at 004206, FOF ¶ 91, 004227, COL ¶¶ 53, 54, 55.

V. DISTRICT COURT APPEAL

On appeal, the district court affirmed the Director’s determination that Rangen may only call for water discharging from the Martin-Curren Tunnel, and “not the entire spring complex forming the headwaters of Billingsley Creek.” R. 000677. The Court found that there was no ambiguity in Rangen’s decrees—“[t]he term ‘Martin-Curren Tunnel’ refers to a specific, identifiable and known diversion structure located within the 10 acre authorized point of diversion of Rangen’s two senior water rights.” *Id.* at 000679. The Court also found that the decreed point of diversion in Rangen’s Partial Decrees was plain and unambiguous, and supported the conclusion that Rangen may only call for water from the Martin-Curren Tunnel. *Id.* at 000681.

The district court also affirmed the use of a regression analysis developed by Pocatello’s expert, Greg Sullivan, to predict that 63% of the gains predicted to arise at the Rangen Spring Cell in the model would arise at the Martin-Curren Tunnel, which is Rangen’s decreed water supply; that the finding that junior water users are using water efficiently is supported by substantial evidence; that Rangen’s use of water is reasonable; and that any proposed mitigation plan may be phased in over a five-year period. *Id.* at 000689–93, 000707. The district court

reversed the Director's finding regarding the trim line. "It is important to note that the Director did not find, nor rely upon the doctrine of futile call in justifying the implementation of the trim line. *Id.* at 000703. [T]he Director did not make the finding that curtailing water rights east of the Great Rift would result in a futile call." *Id.* at 000704. The Court clarified on rehearing that "its ruling was not addressing the futile call doctrine which may take into account the disparity [between the number of acres curtailed and the accrued benefit to a senior surface right] in conjunction with other factors such as timing." R. 000747.¹¹ The district court remanded to the Director for further proceedings as necessary to comply with the court's decision. The parties have briefed before the Director the appropriate scope of remand, including the issue of futile call as an alternative basis for support of the trim line.

As Pocatello's brief is focused on the district court's erroneous invalidation of the trim line, the district court's reasoning on the trim line is further addressed in significant detail in the Argument section of this brief.

ISSUES PRESENTED ON APPEAL

Whether the district court erred in invalidating the Great Rift trim line.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT INVALIDATED THE TRIM LINE

The Director adopted a trim line at the Great Rift to exclude from curtailment junior ground water pumping east of the Great Rift. As found by the Director and recited by the district court, the disparity in benefit between curtailment west of the Great Rift and east of the Great

¹¹The Court denied IGWA's and Pocatello's Petitions for Rehearing.

Rift was, respectively, 17,000 irrigated acres per one cubic foot per second of predicted benefit at the Martin-Curren Tunnel as compared with 204,000 acres per one cubic foot per second of predicted benefit at the Martin-Curren Tunnel. Agency R. Vol. 21, p. 004215. Put another way, at least 0.63% of the curtailed amounts west of the Great Rift is predicted to reach Rangen's Martin-Curren Tunnel; east of the Great Rift, only 0.63% of 0.2 to 0.3% of curtailed junior pumping is predicted to accrue at Rangen's Martin-Curren Tunnel. Exhibit 3203, Fig. 2. This, together with technical uncertainty regarding the model's ability to accurately predict reach gains under these circumstances lead the Director to conclude that the Great Rift trim line was required to promote, *inter alia*, the principle of optimum use and development of the state's water resources in the public interest.

The district court invalidated the trim line, finding:

[The Director does not have discretion] to reduce the decreed quantity of a water right to which the 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. 000700 (emphasis in the original).

To allow model uncertainty to operate in favor of junior ground pumpers [sic] would shift the burden of proof to the senior to prove that junior ground pumpers [sic] 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.

Id. at 000707.

The district court erred in invalidating the Director's adoption of the trim line. First, the Director's adoption of the trim line was based on factual determinations arising from evidence

that the Director found to be clear and convincing, and was designed to promote principles of optimum use, consistent with Idaho law. The Director's reliance on legal principles in addition to optimum use as a basis for the trim line is not a basis to invalidate the decision. "Where a decision is correct but wrongly premised, this court will affirm the result on the proper basis." *Gray v. Brasch & Miller Const. Co.*, 102 Idaho 14, 17, 624 P.2d 396, 399 (1981). Second, the Director's exercise of discretion to adopt the Great Rift trim line is consistent with this Court's decision in *Clear Springs Foods, Inc. v. Spackman* ("Clear Springs"), 150 Idaho 790, 252 P.3d 71 (2011), as well as other conjunctive management decisions of this Court. Finally, the district court erred in concluding that the Director's reliance on Rule 20.03 in support of the trim line was without factual basis contrary to the district court's decision, the Director's Final Order concludes only that Rangen's water use was reasonable, not that its means of diversion was reasonable. Rather than invalidate the trim line, the district court should have remanded to the Director to clarify his findings on this issue.

The upshot of the district court's decision is to improperly narrow the Director's discretion to impose a trim line in conjunctive management to promote principles of optimum use only upon the showing by juniors of futile call or unreasonable means of diversion.

A. The Director's Great Rift trim line decision

The Director found that the doctrine of optimum development required the imposition of a trim line because predicted benefits to Rangen were uncertain, the disparity between the number of acres curtailed east of the Great Rift and the amount of water received by Rangen was

large, and also because the amount of water itself that Rangen would receive from curtailment of water rights east of the Great Rift—1.5 cfs of water—was so small:

While there is some predicted depletion of Curren Tunnel discharge attributable to points of diversion east of the Great Rift, the contribution is small. . . .

. . .

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. CM Rule 20. Demand should be viewed in light of reasonableness and optimum development of water resources in the public interest.

Agency R. Vol. 21, pp. 004226–27. The Director went on to recite the doctrine of maximum use and optimum development:

“The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)). The Idaho Constitution enunciates a policy of promoting optimum development of water resources in the public interest. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); Idaho Const. Art. XV, § 7. “There is no difference between securing the maximum use and benefit, and least wasteful use, of this State’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.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and ground waters, and it requires that they be managed conjunctively.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90.

Id. at 004227. Because

[l]ow transmissivity impedes the transmission of water through the aquifer at the Great Rift. . . . [t]he Director concludes curtailment of ground water diversions on the east side of the Great Rift is not justified. To curtail junior ground water users

east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources.

Id.

B. The district court failed to acknowledge that the Director had an adequate (and clear and convincing) factual basis to exercise discretion to impose the trim line at the Great Rift.

1. The district court focused primarily on the disparity between curtailed acres east of the Great Rift and benefits to Rangen, and failed to evaluate whether the Director's exercise of discretion was consistent with Idaho law.

In rejecting the Great Rift trim line, the district court focused on two categories of factual findings made by the Director to support his trim line decision: that the trim line is justified based on uncertainty in the model, and that curtailment beyond the Great Rift would curtail 204,000 irrigated acres per cfs received by Rangen, resulting in an extreme disparity between curtailed irrigated acre and benefit to Rangen. *Id.* However, the court ignored the fundamental question: was the Director's decision sound in light of the clear and convincing factual bases for the exercise of discretion?

The exercise of an agency's discretion is judged by:

[D]etermin[ing] whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason.

Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho 496, 337 P.3d 655, 661 (2014) (quotation marks and citation omitted). In this case the Director had evidence which he found to be "clear and convincing" to support a trim line to promote principles of optimum use. As

described in Part IV.C. *supra*, the parties put on evidence at trial regarding the diminishing benefits to Rangen from curtailment in areas of the aquifer remote from Rangen. By curtailing the UVP, ESPAM predicted gains at the Martin-Curren Tunnel of 1.9 acre-feet over 150 years.¹² Curtailment of Pocatello's junior pumping was predicted to result in 5 to 8 gpm at Rangen over 30 years.¹³

In addition, the Director accepted into evidence an analysis which showed that the model predicted 1,705 cfs in gains to all river reaches and spring reaches from curtailment of all ESPA wells junior to 1962 at steady state (this is equal to the total amount of the curtailed consumptive use of pumping), and only 10.1 cfs of that amount was predicted to accrue at the Martin-Curren Tunnel.¹⁴ Furthermore, the Director concluded that Rangen would receive at most 0.63% of the gains associated with wells curtailed on the west side of the Great Rift trim line. Agency R. Vol. 21, p. 004226, COL ¶ 51.

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. However, in addition, the benefits to Rangen from curtailment west of the Great Rift trim line is nearly identical to the benefits to the senior Spring Users in *Clear Springs*. As recited in the Director's Order and explained in more detail below, this Court upheld the Director's trim line in *Clear Springs*, where the Director curtailed only water rights in model cells where at least 10% of the curtailed

¹²See also Contor Testimony, Tr. Vol. XII, pp. 2854–55.

¹³This rate of flow, 5 to 8 gpm, is comparable to a garden hose. Sullivan Testimony, Tr. Vol. VII, p. 1484, L. 7–11. See also *id.* at p. 1484, L. 14–15 (describing 6 gpm as “negligible”).

¹⁴Exhibit 3650, Table 2-1, Fig. 2-1.

water would arrive at the relevant reach of the river, and where the calling parties were predicted to receive 0.69% and 2% of the curtailed benefits respectively. *Id.* at 004203–04. Put another way, the effect on the senior Spring Users of declining to curtail juniors on the far side of the trim line that was affirmed by the *Clear Springs* Court is the same as the effect on Rangen (and in fact Rangen is predicted to receive slightly more water than the Spring Users).

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*. If the goal of conjunctive management is to ensure that juniors are curtailed consistently with constitutional principles to provide water to seniors for beneficial uses, and if the seniors in *Clear Springs* were recipients of amounts consistent with curtailment on these principles as this Court’s decision suggests, then the district court’s ruling on the Great Rift trim line must be reversed.

The district court’s decision stands the only factual basis left for the Director to impose a trim line is one based on either unreasonable means of diversion or the futile call doctrine. R. 000747 (this “ruling was not addressing the futile call doctrine which may take into account the disparity [between the number of acres curtailed and the accrued benefit to a senior surface right] in conjunction with other factors such as timing.”). This effectively removes the discretion of the Director to consider facts when determining which water rights to curtail. The Court should reverse and remand consistent with its trim line decision in *Clear Springs*.

C. This Court’s prior decisions support the Director’s trim line decision

In invalidating the Great Rift trim line, the district court took issue with the Director’s reliance on this Court’s decisions in *Clear Springs*, *A & B Irrigation Dist. v. Idaho Dep’t of*

Water Res. (“A&B”), 153 Idaho 500, 284 P.3d 225 (2012), and *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.* (“AFRD#2”), 143 Idaho 862, 154 P.3d 433 (2007). R. 000702–07. However, and contrary to the district court’s decision, this Court’s prior decisions involving conjunctive management support the Director’s imposition of the Great Rift trim line.

1. The scope of IDWR’s discretion to conjunctively manage surface and ground water rights is at issue in this appeal.

The *AFRD#2* decision was among the first published decisions of this Court to acknowledge the role of the Director’s discretion in conjunctive management.

Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.

Id. at 875, 154 P.3d at 447.

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. . . . [T]he CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task.

Id. at 880, 154 P.3d at 451.

The Director’s discretion to implement the conjunctive management (“CM”) rules and applicable constitutional principles is the means by which Idaho’s ground and surface waters are administered—and as the *AFRD#2* Court articulated, conjunctive administration does not require “shut-and-fasten” administration of the sort applied to surface water systems:

Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. . . . While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception.

Id. (emphasis added). Thus, although left undefined by the *AFRD#2* Court because it was considering a facial constitutional challenge to the Idaho Department of Water Resources' *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CM Rules"), the Court concluded that conjunctive management to satisfy seniors' claims of injury required exercise of the Director's discretion, which implicitly requires an analysis beyond simply running ESPAM to determine which wells to curtail.

This Court has upheld the Director's exercise of discretion in administering delivery calls in nearly every instance since its *AFRD#2* decision. *Clear Springs*, 150 Idaho 790, 252 P.3d 71 (2011); *A&B*, 153 Idaho 500, 284 P.3d 225 (2012); *In Re Distribution of Water to Various Water Rights Held By or For the Benefit of A & B Irrigation Dist.* ("SWC Delivery Call"), 155 Idaho 640, 315 P.3d 828 (2013). This case should be no different.

In the case at hand, the Director properly exercised his discretion to adopt the trim line in the captioned matter—as explained above, the effect of the Great Rift trim line on Rangen is quantitatively the same as the trim line imposed by the Director and upheld by this Court in the *Clear Springs* decision. The district court's decision, however, improperly narrows the scope of the Director's discretion to the point that conjunctive management, in the view of the district court, is now simply shut-and-fasten administration of the sort this Court rejected 8 years ago.

2. The district court incorrectly interpreted *Clear Springs* to foreclose the Great Rift trim line.

- a. Consistent with *Clear Springs*, the Director's adoption of the trim line was designed to promote principles of optimum use.

The Director's findings in Rangen relied in part¹⁵ on the constitutional principle affirmed by *Clear Springs*: that “[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” Agency R. Vol. 21, p. 004227 (citation omitted). The district court improperly rejected the Director's reliance on these constitutional principles: “any reliance on of [sic] Article XV § 7 as a justification for modifying a senior appropriator's existing water right to promote maximum use or optimum development of the state's water resources is misplaced.” R. 000699; *see also id.* at 000704. However, the portions of the *Clear Springs* decision relied on by the district court to reject the Director's use of optimum development principles are not related to the challenge to the trim line brought in *Clear Springs*.

In the Clear Springs delivery call, the Director limited curtailment of juniors by reference to a 10% trim line. *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97. The Director chose 10% because stream gage data used as inputs to the ESPAM had an assumed 10% margin of error, and the Director reasoned that model precision could only be as good as the inputs. *Id.* The Director concluded that if the stream gage data were off by 10%, then the predicted effect of curtailing juniors outside of the 10% trim line was similarly incorrect and curtailment was not

¹⁵As mentioned *supra*, the fact that the Director's decision had multiple bases, some of which are not argued here, is not a basis to reject the exercise of his discretion. *Gray*, 102 Idaho at 17, 624 P.2d at 399.

warranted. *Id.* The Hearing Officer affirmed this decision and went on to find that the public interest doctrine outlined in CM Rule 20.03 affected the Director's use of the trim line, and that Spring Users were not entitled to dry up hundreds of thousands of acres when that action may contribute little to their shortage. On appeal, the district court affirmed the application of the trim line as an exercise of discretion on the part of the Director, and merely noted, but did not rely on, the Director's rationale of "full economic development" and the public interest doctrine. Instead the district court found that given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error.

The *Clear Springs* Court affirmed the trim line as consistent with the Director's discretion in conjunctive management, despite arguments by the Spring Users that the trim line reduced their decreed water rights and that "water sources must be administered based upon priority." *Id.* In rejecting the Spring Users' arguments the Court found:

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, 252 P.3d at 98 (emphasis added).

In rejecting the Great Rift trim line in the captioned matter, the district court did not attempt to reconcile its decision with the above-referenced portion of the *Clear Springs* decision. Instead the district court relied upon the *Clear Springs* Court's analysis rejecting IGWA's direct

challenge to IDWR’s application of the prior appropriation doctrine to conjunctive management. *Id.* at 800–10, 252 P.3d at 81–91. In *Clear Springs*, IGWA argued that Idaho Code section 42-226 and certain constitutional principles recited in CM Rule 20.03 supported junior ground water pumping until the diversions exceeded the rate of recharge. *Id.* at §§ B.1, B.2. In rejecting IGWA’s arguments, the Court concluded that the Ground Water Act does not apply to conjunctive management of surface and ground water rights, and thus the concept of “full economic development” does not act as a servitude or restraint on the operation of the prior rights of surface users. *Id.*

The Idaho Supreme Court then turned to analysis of the constitutional provisions referred to in CM Rule 20.03, and concluded, *inter alia*, that Section 7 of the Idaho Constitution does not grant[] 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 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.”

....

The Groundwater Users’ argument that full economic development means that priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer is not consistent with Idaho law.

Id. at 807–08, 252 P.3d at 88–89 (emphasis added). However, the Court in rejecting “full economic development” as a reason to avoid conjunctive management entirely, the Court reaffirmed that the doctrine of optimum development and maximum use is alive and well in Idaho:

In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept [as that embodied in I.C. § 42-101] by stating, “[t]he policy of

the law of this State is to secure the maximum use and benefit, and the least wasteful use, of its water resources.”

. . . There is no difference between securing the maximum use and benefit, and least wasteful use, of this State’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. As we stated in *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), “[I]t is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.” When discussing the Ground Water Act and particularly Idaho Code § 42-226, we stated, “The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources.” *Id.* at 512, 650 P.2d at 654. The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Id. at 808, 252 P.3d at 89 (emphasis added).

Conjunctive management by reference to the Great Rift trim line presents a factual situation analogous to that of the trim line in *Clear Springs*, not an effort by the Director to manage conjunctively via the principles of “full economic development” which were rejected by the *Clear Springs* Court. If the trim line at issue in *Clear Springs* had offended Article XV, Section 7 of the Idaho Constitution, the *Clear Springs* Court had ample opportunity and context to say so. The fact that the Court did not preclude the trim line in *Clear Springs* on this basis (and indeed affirmed its application by the Director) demonstrates that *Clear Springs* supports the Director’s Great Rift trim line rather than invalidating it.

3. The clear and convincing evidence standard is not a restraint on the Director's imposition of the trim line in this matter.

The district court held that “[i]t is Idaho’s long standing rule that proof of ‘no injury by a junior appropriator in a water delivery call must be by clear and convincing evidence’” and went on:

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 [sic] would shift the burden of proof to the senior to prove that junior ground pumpers [sic] east of the Great Rift were causing injury.

R. 000706–07 (citations omitted) (emphasis added). The concept that the “clear and convincing” standard of proof—which this Court affirmed was not a change in the law at the time it clarified the issue—somehow changes the Director’s ability to impose a trim line based on uncertainty is incorrect. *A&B*, 153 Idaho at 518, 284 P.3d at 243 (“this Court has previously stated the appropriate evidentiary standard to be used under the CM Rules”). Cf. R. 000705 (district court claiming this Court’s *Clear Springs* decision did not address applicable burdens of proof).

Further, in its recent decision, *SWC Delivery Call*, this Court rejected a similar argument regarding the consequences of the “clear and convincing evidence” standard in delivery calls. 155 Idaho 640, 315 P.3d 828 (2013). There, the SWC argued that the Director’s baseline methodology for predicting injury to its water rights (a delivery call in which a trim line was also applied) “created a de facto defense for junior water right holders and forces senior water right

holders to re-prove their decreed or licensed rights.” *Id.* at 649, 315 P.3d at 837. The baseline supply concept intends to predict water supply for the year, despite the fact that any prediction of supply and demand at the beginning of an irrigation season is necessarily uncertain. *Id.* The SWC argued that because this prediction is not necessarily the amount of water they may need in a given year as it is less than these decreed amounts, it was not properly protective of seniors, violating evidentiary standard, and therefore the Director was required to provide the SWC’s full decreed amount of water, rather than make a prediction. *Id.*

This Court found that the Director’s baseline methodology was proper despite these complaints under the “established evidentiary standards, presumptions, and burdens of proof.” *Id.* at 650, 315 P.3d at 838. The Court pointed out that a delivery call is “a water management case wherein the management authority and discretion of the Director are at issue.” *Id.* The Court rejected the SWC’s argument, even though the baseline methodology approach predicted demand and supply for the coming irrigation season with a level of uncertainty. The Court found that the Director’s management decision to employ a baseline methodology at the beginning of the season was proper, despite the fact that the Director

expressly rejected the concept of placing the burden of proof upon junior water right holders “the Director had the authority and the responsibility to develop the facts upon which a well-informed decision could be made and to make a decision from the best information developed.”

Id. at 651–52, 315 P.3d at 839–40 (citation omitted). The Director had discretion and authority under the CM Rules, to develop “a water allocation plan for an up-coming irrigation season” because

the Idaho Legislature has authorized the Director “to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.” I.C. § 42-603. The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994. . . . **[A]n 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.

Id. at 650–51, 315 P.3d at 838–39 (emphasis added). 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.

D. Director’s reliance on CM Rule 20.03 was proper as he did not find that Rangen’s means of diversion was reasonable.

The Director also relied on CM Rule 20.03 in imposing the trim line, which includes consideration of optimum development and maximum use. Agency R. Vol. 21, p. 004227, COL ¶ 53. Specifically, the Director stated as a conclusion of law in support of the trim line that “[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water.” *Id.* In evaluating the Director’s reliance on CM Rule 20.03, the district court invoked the *Clear Springs* interpretation of this portion of CM Rule 20.03 to equate to the holdings of *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470 (1912) and *Van Camp v. Emery*, 13 Idaho 202, 89 P.752 (1907), and rejected the Director’s reliance on Rule 20 because

the Director had held previously that Rangen's means of diversion was reasonable. However, the Director did not find that Rangen's means of diversion was reasonable—rather, the Director found Rangen's use of water was reasonable and efficient. Agency R. Vol. 21, pp. 004221–22. The district court misstated the Director's findings on this matter. R. 000693. Rather than invalidate the trim line, the district court should have remanded for clarification.

CONCLUSION

The district court's decision invalidating the Great Rift trim line should be reversed.

Respectfully submitted this 4th day of May, 2015.

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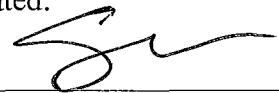
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2015, I caused to be served a true and correct copy of the foregoing **Appellant City of Pocatello's Opening Brief in Idaho Supreme Court Docket No. 42836-2015** (SRBA Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)) upon the following by the method indicated:



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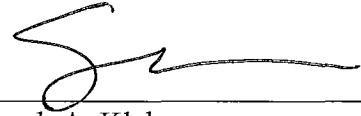
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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief, Appellant City of Pocatello's Opening Brief in Docket No. 42836-2015, 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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