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

THE 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-Respondents on Appeal.

SUPREME COURT DOCKET NO. 42836-2015

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

APPELLANT-RESPONDENT ON APPEAL RANGEN, INC.'S RESPONSE BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF CASE

A. INTRODUCTION.

This appeal, together with the companion appeal filed by Idaho Groundwater Appropriators ("IGWA"),[1] is a challenge to full conjunctive management of ground water and surface water rights from the Eastern Snake Plan Aquifer ("ESPA"). The City of Pocatello and other ground water users seek to be excluded from any obligation to either curtail use or mitigate for impacts to the ESPA and connected water sources from out-of-priority ground water pumping. In response to a water delivery call filed by Rangen, Inc. ("Rangen"), the Director of the Department of Water Resources ("Department") found material injury, but implemented a so-called trim line to avoid administration of ground water rights located east of the Great Barrier Rift (the "Great Rift Trim line"). Judge Wildman determined that the Director erred by using a trim line. Pocatello appealed. The propriety of the Great Rift Trim line is the sole issue presented in Pocatello's appeal.[2]

B. STATEMENT OF FACTS.

1. Rangen's diversion and use of water.

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

[1] IGWA has appealed from the same Order. IGWA's appeal is designated as Idaho Supreme Court Case Number 42775-2015.

[2] Various other aspects of Judge Wildman's Order have been appealed by Rangen, Supreme Court Case No. 42772-2015 and IGWA as indicated above.

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

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

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

Id.

2. The Eastern Snake Plain Aquifer.

The eastern Snake Plain encompasses an area of about 11,000 square miles extending from Ashton, Idaho in the northeast to King Hill, Idaho, in the southwest. Most of the Plain's inhabitants

reside along the eastern and southern margins in an agriculturally productive band near the Snake River. The ESPA underlies the eastern Snake Plain. (*See*, Exh. 1273A, p.5) The ESPA is approximately 170 miles long and 60 miles wide. (A.R. Vol. 21, p. 004202). Ground water and surface water rights from the ESPA, including the ground water rights held by the City of Pocatello and others east of the Great Rift, are interconnected. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. IDAPA 37.03.11, Conjunctive Management Rule 50.

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

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

(A.R. Vol. 21, p. 004202-03, ¶ 72).

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

(A.R. Vol. 21, pp. 004199, ¶ 55).

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

> 73. Based on averages for the time period from October of 1980 through September of 2008, the ESPA receives approximately 7.7 million acre feet of recharge on an average annual basis from the following sources: incidental

recharge associated with surface water irrigation on the plain (5.3 million acre feet), infiltration of precipitation on non-irrigated lands (0.7 million acre feet), underflow from tributary drainage basins (1.1 million acres feet), and seepage losses from rivers and streams (0.6 million acre feet). Rangen Ex. 1273A, Figure 8.

74. Based on averages for the time period from October of 1980 through September of 2008, the ESPA discharges approximately 8.0 million acre feet on an average annual basis through the Snake River and tributary springs (5.4 million acre feet), evapotranspiration in wetlands (0.1 acre feet), and ground water withdrawals (2.5 million acre feet). *Id.*

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

Id. ¶73, 74, 75.

3. ESPAM 2.1.

The Idaho Department of Water Resources has developed a ground water model of the ESPA. This ground water model was developed in conjunction with a technical committee comprised in part of experts retained by the parties to this matter known as the Eastern Snake Hydrologic Modeling Committee ("ESHMC"). (A.R. Vol. 21, pp. 004203, ¶ 76). The Director utilized ESPAM 2.1, the most current version of this ground water model, to evaluate Rangen's call.

> ESPAM 2.1 was developed specifically to predict the effect of regional aquifer stresses such as ground water pumping on river reaches and springs, including the model cell containing the Rangen Spring.

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

> The Director finds, based upon clear and convincing evidence, that ESPAM 2.1 is the best technical scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell.

(A.R. Vol. 21, p. 004209, ¶ 96).

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

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

(A.R. Vol. 21, p. 004211, ¶ 104).

4. The trim line.

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

> The Director concludes curtailment of ground water diversion on the east side of the Great Rift is not justified. To curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources.

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

5. Statement of Facts not at issue in this appeal.

Pocatello included sections in the Statement of Facts section of its brief related to issues that are not related to this appeal. For instance, Sections III and IV.A. relate to the proper interpretation of Rangen's water rights. Section IV.B. relates to the propriety of the regression analysis used by the Director to calculate the percentage of flows in the Rangen cell to be allocated to the Curren Tunnel. Rangen has not addressed these sections of Pocatello's Statement of Facts in this brief. They are not relevant to any issue raised by Pocatello in this appeal. However, these issues have been raised and briefed by Rangen in the related appeal from Judge Wildman's decision that has been filed by Rangen.

II. ARGUMENT

The sole issue in this appeal is the propriety of the Director's implementation of a Great Rift trim line. The Director based his implementation of the Great Rift Trim line upon two bases: 1) disparity between the number of acres curtailed and the benefit to the Curren Tunnel, and 2) a

policy determination based loosely upon the conclusion that "there is uncertainty in the predicted increase in spring flow resulting from curtailment and the actual response may be higher or lower than predicted." (A.R. Vol. 21, p. 004226, ¶ 49).

Judge Wildman rejected each of these justifications for a trim line. After examining this Court's decision in *Clear Springs Foods v. Spackman,* 150 Idaho 790, 252 P.3d 71 (2011), Judge Wildman concluded:

> In sum, a plain reading of the various holdings in *Clear Springs* establish that in the context of a delivery call brought by senior springs users against junior ground water pumpers, 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 means of diversion is reasonable and the water is put to beneficial use.*

(R., p. 00700) (emphasis in original). With regard to uncertainty, the district court concluded:

> By its very nature uncertainty does not support a finding of clear and convincing evidence. To allow model uncertainty to operate in favor of junior ground pumpers would shift the burden of proof to the senior to prove that junior ground pumpers east of the Great Rift were causing injury. Therefore, the Director's application of the trim line in this matter is set aside and remanded for further proceedings as necessary.

(R., P. 00707).

Pocatello argues that the District Court erred for three reasons. "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." *Pocatello Opening Brief,* pp. 13 & 14. "Second, the Director's exercise of discretion to adopt the Great Rift trim line is consistent with [*Clear Springs*]." *Id.,*

p.14. "Finally, . . . the Director's Final Order concludes only that Rangen's water use was reasonable, not that its means of diversion was reasonable." *Id.*

Each of these three arguments is addressed below. None of these arguments are well taken. Judge Wildman's decision invalidating the Director's implementation of a Great Rift trim line should be affirmed.

A. THE DIRECTOR ERRED BY IMPLEMENTING A TRIM LINE TO ADDRESS DISPARITY OR PROMOTE OPTIMUM DEVELOPMENT.

1. Pocatello did not meet its burden to show a valid defense by clear and convincing evidence.

Pocatello argues that:

> [T]he [district] 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?
>
> . . .
>
> 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**.

Pocatello's Opening Brief, p. 16 (emphasis added). The evidence that Pocatello refers to is the model results and expert testimony establishing the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior water right.

The obvious problem with Pocatello's argument is that this disparity is not a valid defense to a water call. Such a disparity when comparing a single senior surface water user to all junior ground water users is inherent in the concept of conjunctive management.

> While the disparity between curtailed acreage and realized water accruing to the Martin-Curren Tunnel is large, it should be noted that unlike surface to surface administration, the very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefit to a senior surface right. As an example in this case, the highest depletion percentage predicted to accrue to the Rangen spring complex is 16%. **Nonetheless, Idaho law mandates that ground and surface water be administered conjunctively**.

(R., p. 000704) (citation omitted, emphasis added). Because the existence of a disparity is not a valid defense to a call, it is not relevant whether the existence of a disparity is proven by clear and convincing evidence. When there is a shortage, junior groundwater users have the burden of proving by clear and convincing evidence that their out-of-priority use does not injure the seniors. *See, A& B Irr. Dist. v. IDWR,* 153 Idaho 500, 284 P.3d 225 (2012).

As Judge Wildman acknowledged, the junior users did not provide clear and convincing evidence to establish a valid defense and the Director did not rely upon any such valid defense to support the Great Rift trim line.

> As previously discussed, the portion of the benefits of ground water curtailment east of the Great Rift is predicted to be generally less than 1%. The Court notes however that the Director did not make the finding that curtailing water rights east of the Great Rift would result in a futile call. To the contrary, the Director recognized that the curtailment of the additional 322,000 acres east of the Great Rift is predicted to produce an additional 1.5 cfs to the Martin-Curren Tunnel.

(R., p. 000704). Rather than establishing a valid defense, the evidence upon which Pocatello relies actually supports the Director's determination that out-of-priority ground water pumping materially injures Rangen.

> In this case, the model predicts that curtailment of junior rights east of the Great Rift are causing material injury and curtailment of such rights would produce a quantity of water to the Martin-Curren Tunnel in the amount of 1.5 cfs. Indeed, while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren

> Tunnel, the meaningfulness of the quantity becomes readily apparent. The Director found that the average annual flow available from the Martin-Curren tunnel in 1997 was 19.1 cfs. The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. And that the average annual flow has not exceeded 7 cfs since 2002. From that perspective, the additional 1.5 cfs is neither insignificant nor *de minimis*.

(R., p. 000706-07) (italics in original).

2. The Director does not have the discretion to determine "which water rights to curtail" under the guise of promoting "principles of optimum use."

Pocatello argues that the district court's decision "effectively removes the discretion of the Director to consider facts when **determining which water rights to curtail**." *Pocatello Opening Brief, p. 18* (emphasis added).

> The district court's decision stands the [sic] 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.

Pocatello Opening Brief, p. 18. In other words, the essence of Pocatello's argument is that the Director has the discretion after making a finding of material injury to decide which out-of-priority pumping to curtail even in the absence of proof sufficient to show a valid defense. According to Pocatello, the source of this broad discretion to ignore priority is the promotion of "principles of optimum use." *Pocatello Opening Brief, p, 14.*

Pocatello's reliance upon "principles of optimum use" as the source of discretion for the Director to avoid conjunctive management of the aquifer on the basis of disparity is misplaced. In *Clear Springs*, the Court stated:

> The Groundwater Users' argument that full economic development means that priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer is not consistent with Idaho law. It would, in essence, preclude conjunctive management of the Aquifer. Conflicts

> between senior surface water users and junior ground water users would be ignored as long as withdrawals from the Aquifer and recharge were in balance. That argument is contrary to the current State Water Plan, which provides, "It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection." As we held in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), hydrologically connected surface and ground waters must be managed conjunctively.

Clear Springs at 809, 252 P.3d at 90. The Court continued "The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, **and it requires that they be managed conjunctively**." *Id.* (emphasis added).

The district court correctly held that

> As previously discussed, the Idaho Supreme Court instructed in *Clear Springs* that neither the CM Rules, the common law, Idaho statutes, nor the Idaho Constitution provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled based on the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior right, provided the water is put to beneficial use. Therefore, the Director's reliance on CM Rule 20.03 and Article XV § 7, as partial support for the use of a trim line is in error.

(R., p. 000704).

B. THIS COURT'S PRIOR DECISIONS DO NOT SUPPORT THE DIRECTOR'S IMPLEMENTATION OF A GREAT RIFT TRIM LINE.

Pocatello relies upon two of this Court's prior decisions to support its position: 1) *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* ("AFRD#2"), 143 Idaho 862, 154 P.3d 433 (2007), and 2) *Clear Springs*. Pocatello argues that *Clear Springs* and *AFRD#2* grant the Director broad discretion to ignore priority when conjunctive management results in disparity. Pocatello's reliance upon these two decisions is misplaced.

1. AFRD#2 does not grant the Director broad discretion to decide not to administer water rights by priority.

AFRD#2 involved a challenge to the constitutionality of the Conjunctive Management Rules. In analyzing the issues raised in that case, this Court considered several areas where the Director has some discretion when responding to a senior water right holder making a call. Pocatello relies upon several quotes taken out of context to imply that this Court has created broad discretion for the Director to decide whether to follow the doctrine of prior appropriation in conjunctive management.

To begin with, Pocatello relies upon the following sentence from *AFRD#2*:

> 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.

AFRD#2, at 875, 154 P.3d at 447. When viewed in context, however, it is clear that the discretion to be exercised by the Director is related to evaluating the factors necessary for making a determination of material injury and whether water is being used efficiently without waste. What this Court actually stated was:

> Rule 42 lists factors the Director may consider in determining material injury and whether the holders of water rights are using water efficiently and without waste, which are decisions properly vested in the Director. Those factors, of necessity, require some determination of "reasonableness" – which caused the district court to conclude the rules were facially defective. 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.

Similarly, on page 19 of its opening brief Pocatello selectively quotes portions of the following discussion of the Director's discretion to determine how much carryover storage is reasonable:

> Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional. The CM Rules are not facially unconstitutional in permitting some discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.
>
> Again, this is an area where the Rules are not facially invalid, but there is room for challenge on an "as applied" basis if the rules are not applied in a manner consistent with the Constitution. Clearly American Falls has decreed storage rights. 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. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. 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. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. 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. . . . For the purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task. This Court upholds the reasonable carryover provisions in the CM Rules.

Id. at 880, 154 P.3d at 451. When viewed in this context, this discussion does not support Pocatello's argument that the Director has broad discretion to determine which water rights among those causing material injury to curtail or to administer water rights on a basis other than priority.

2. *Clear Springs*

In *Clear Springs*, this Court affirmed a trim line that a previous Director used when applying a previous version of the model when determining material injury. This 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 User's 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. Pocatello contends that "the district court did not attempt to reconcile its decision with the above-referenced portion of the *Clear Springs* decision." *Pocatello Opening Brief*, p.22.

The district court properly distinguished this case from *Clear Springs*. First, in *Clear Springs*, this Court specifically rejected the bases upon which the Director relied to implement the Great Rift trim line in this case. Second, the Great Rift trim line was not justified based upon model uncertainty or a margin of error like the trim line applied with the previous version of the model in *Clear Springs*. Finally, even if the Director had based the trim line upon uncertainty, "[t]o allow model uncertainty to operate in favor of junior ground pumpers would shift the burden of proof to the senior to prove that junior ground pumpers east of the Great Rift were causing injury." (R., p. 000707).

i. *Clear Springs* rejected the justifications for the Great Rift Trim line relied upon by the Director.

> As previously discussed, the Idaho Supreme Court instructed in *Clear Springs* that neither the CM Rules, the common law, Idaho statutes, nor the Idaho Constitution

> provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled based on the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior right, provided the water is put to beneficial use. Therefore, the Director's reliance on CM Rule 20.03 and Article XV § 7, as partial support for the use of a trim line is in error.

(R., p. 000704).

ii. The Great Rift Trim line was not based upon model uncertainty.

The district court also properly rejected the Great Rift Trim line because the Director's decision to implement the Great Rift Trim line was a policy decision rather than a technical decision based upon calculated uncertainty in ESPAM 2.1. During the development of ESPAM2.1 the ESHMC considered the role the Committee should play in terms of addressing a trim line. Mr. Tuthill, then the Director of IDWR, asked the ESHMC to discuss the following: "Should the ESHMC address the technical aspects (not policy issues) of a trim line as a function of uncertainty?" (Exh. 1369, p. 1). Some of the Committee Members (Dr. Brockway was one of them), put together a "White Paper" addressing the issue. (*Id.*) Dr. Brendecke, IGWA's expert hydrologist, provided his own written comments. (*See Id.*) In his comments, Dr. Brendecke wrote: "Apparently Koreny et. al, at least partially agree with me, for they repeatedly state in their white paper that 'The trim line has nothing to do with model uncertainty.'" (*Id.*)

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

> Q: Do you believe the trim line has anything to do with uncertainty whatsoever?
>
> A: It had nothing to do with the uncertainty in the model.

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

Bern Hinckley, IGWA's expert geologist, testified:

> Q: And I want to be clear, you were asked some questions about uncertainty and it being tied to the number.
>
> The uncertainty of the model itself has absolutely nothing to do with the number that you would put on a trim line; is that correct? Or on a zone of exclusion, excuse me.
>
> A: No, I think that's one of the many that that one would consider in making that policy decision. So I would consider it to be a factor, but it doesn't give you a definitive answer.

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

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

> Q: Do you think the trim line has anything to do with model uncertainty?
>
> A: I think it's largely a policy decision.
>
> Q: And we could wade through your deposition, Greg, but I think over and over when I asked you that question, you said, it's a policy decision?
>
> A: I would agree, it's largely a policy decision.
>
> Q: When you use words like "largely," it only begs me to ask another question, so . . .
>
> A: Well, I can't – let me say this another way. I don't have any specific elements of uncertainty that I want to link to the trim line, but I'm not saying that there could be none that ever existed.

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

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

The Director also perceived the implementation of the Great Rift Trim line as a policy decision. Unlike the trim line at issue in *Clear Springs,* the Director did not determine a trim line based upon calculated uncertainty or margin of error. The Director justified his decision solely on policy grounds:

> Because of the complexity of the model, the margin of error associated with model prediction cannot be quantified. The lack of a quantifiable margin of error associated with the model does not mean that the model should be abandoned, but simply that its use should be tempered with the fact that it is a "simulation or prediction of reality." The Director concludes that there is uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. This variance should be taken into consideration when considering a trim line.

(A.R. Vol. 21, pp. 004226, ¶ 49).

> Uncertainty in the model justifies use of a trim line. The Director concludes curtailment of ground water diversion on the east side of the Great Rift is not justified. To curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources. This conclusion is consistent with previous conclusions regarding trim lines applied in Clear Springs delivery call and the Blue Lakes delivery call.

(A.R. Vol. 21, pp. 004227, ¶ 55). The district court correctly found that the Director's policy justification was improper and invalidated the Great Rift Trim line. The district court's decision should be affirmed.

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

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

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

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

C. POCATELLO HAS MISSTATED THE DIRECTOR'S RULING REGARDING THE REASONABLENESS OF RANGEN'S DIVERSION

Pocatello argues that the Director did not find that Rangen's means of diversion was reasonable:

> 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 . . . 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. 00221-22. The district court misstated the Director's finding on this matter.

Pocatello's Opening Brief, p. 28.

This argument misstates the Director's conclusions. While it is true that the Director found Rangen's use of water was reasonable and efficient, the Director also examined Rangen's diversion of water. The Director considered and rejected proposals by IGWA and Pocatello that Rangen should be required to change its means of diversion. (A.R. Vol. 21, pp. 004223, ¶ 34).

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

Id.

The district court rejected IGWA's, Pocatello's, and Fremont-Madison's reliance upon *Schodde v. Twin Falls Land and Water Co.,* 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed.686 (1912) and *Van Camp v. Emery,* 13 Idaho 202, 89 P. 752 (1907) and CM Rule 20.03 based upon the finding by the Director that Rangen's means of diversion is reasonable:

> Further, reliance by IGWA, City of Pocatello and Fremont-Madison on *Schodde* and *Van Camp* for the proposition that an appropriator is not entitled to command the entirety of large volumes of water to support his or her appropriation is equally misplaced. For reasons previously discussed, in *Clear Springs*, the Idaho Supreme Court instructed that those cases only stand for the proposition that a senior appropriator is not protected in his means of diversion to the extent it is determined to be unreasonable. As discussed elsewhere in this opinion the director found Rangen's means of diversion to be reasonable. Hence the holdings in *Schodde* and *Van Camp* do not apply to the facts of this case.

(R., p. 000704).

III. CONCLUSION

Judge Wildman's decision to invalidate the Great Rift Trim line was correct. The Great Rift Trim line is inconsistent with conjunctive management and has no scientific justification. As such, Rangen respectfully requests that Judge Wildman's decision invalidating the Director's implementation of a Great Rift trim line be affirmed.

DATED this 8th day of June, 2015.

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CERTIFICATE OF SERVICE

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

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