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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 AND 36-07694 (RANGEN, INC.)	)	**CM-DC-2011-004** **SURFACE WATER COALITION'S POST-HEARING RESPONSE BRIEF**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, the "Surface Water Coalition" or "Coalition") by and through their undersigned attorneys of record, and submit this Post-Hearing Response Brief.

INTRODUCTION

Eastern Snake Plain Aquifer Model 2.1 ("ESPAM 2.1") is the best available science and provides the most scientifically accurate method of predicting the hydrology of the Eastern Snake Plain Aquifer ("ESPA"). *See, e.g., IGWA Findings of Fact* at ¶ 60 ("ESPAM 2.1 … is the best science available for predicting the regional effects of hydrologic changes in the ESPA").

There is no evidence, testimony or argument submitted by any party to refute this undisputed fact. Likewise, there is no assertion of any scientific or technical justification for any limitation (i.e. "trim line") on ESPAM 2.1 results. *Pocatello Br.* at 15 ("there does not appear to be a basis to adopt a trim line based on specific technical uncertainty analysis"); Tr. at 1641, ll.12-16 (Sullivan testimony) (there is no technical basis for a trim line as it is "largely a policy decision"); *Id.* at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g.*, at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision").

The only argument in favor of a "trim line" is a policy-based argument provided by IGWA – who claims that "a 10 percent trim line should be implemented." *IGWA Br.* at 29. IGWA asserts that, unless a 10% trim line is implemented, "Pandora's box" will be opened and administration would "unreasonably impede beneficial use of the ESPA." These arguments, however, are simply veiled attempts to force senior water right holders to bear the burden of a depleted water supply without any valid defense. Idaho law does not support such arguments.

When junior priority ground water rights materially injure a senior surface water right, there is no policy that allows the Director to pick and choose which of those ground water rights will be subject to conjunctive administration. None of the parties' technical experts attempted to define or create such a policy. Indeed, given the unanimous testimony that there is no scientific basis for a trim line, *supra*, no experts could have defined such a policy. Furthermore, nothing in Idaho's Constitution, statutes, or regulations authorize the Director to exclude junior ground water rights from administration when they are found to be contributing to the material injury suffered by a senior water right. Any trim line policy, therefore, would be a policy without

scientific or legal justification. As such, and as discussed below, the Director should reject any proposed "trim line" for purposes of using ESPAM 2.1.

ARGUMENT

I. There is no Justification for a Trim Line

ESPAM 2.1 is a more accurate model than its predecessor ESPAM 1.1. *See SWC Opening Br.* at 2-7. It is the result of a long, extensive and collaborative process which included many of the parties involved in these proceedings. *Id.* In the end, a model that more accurately predicts the impacts of ground water diversions has been approved for use. *See Order RE: Eastern Snake Plain Aquifer Model and the Rangen, Inc. Delivery Call* (July 27, 2012). Although no ground water model is perfect and free from conceptual uncertainty, ESPAM 2.1 is an improvement over the prior model and represents the best available science for evaluating the impacts caused by junior groundwater pumping. *Supra.*

Notwithstanding this admitted improvement, IGWA claims that the limitations of the prior model should be carried over and applied to the results of the new model.[1] IGWA cites to several cases and the rationale of a former director in applying the trim line to ESPAM 1.1 results. None of these arguments justifies allowing the Director to exclude from administration those juniors that are causing injury to a senior water right.

A. Case Law Relied on by IGWA Fails to Justify Application of a Trim Line.

IGWA cites to *Van Camp v. Emery*, 13 Idaho 202 (1907), *Schodde v Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), *Clark v. Hansen*, 35 Idaho 449 (1922), and *AFRD#2 v. IDWR*, 143 Idaho 862 (2007), to support its argument. It claims that these cases created a judicial recognition that it is "patently unreasonable to curtail beneficial water use under junior rights if

[1] IGWA casually asserts that the Coalition is seeking to litigate the trim line issue for the 3rd time. *IGWA Br.* at 5. This assertion overlooks that fact that ESPAM 2.1 is not the same model. It is a new and improved model. Any alleged limitations of the prior model do not automatically carry over and apply to this new model.

only 10 percent of the curtailed water would reach the calling senior." *IGWA Br.* at 30-31. IGWA's strained reading of these cases is inapplicable and should be rejected.

None of these cases establishes a legal basis to assign a 10% "trim line" to the results obtained from ESPAM 2.1. Rather, each addresses the means of diversion of particular water users under the specific facts of those cases. In *Van Camp*, the Court held that the holder of a water right should not be authorized to dam a stream "so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much." 13 Idaho at 754. This holding – dealing with the water user's means of diversion – cannot be read to extend to the administration of water rights and certainly cannot be read as creating a right to alter a ground water model's results when junior priority water rights are found to be contributing to material injury suffered by a senior surface water user.

Likewise, *Schodde* did not address water right administration and did not establish the right to alter modeled results by 10% when conjunctively administering water rights. Rather, it addressed the reasonableness of a diversion that required the entire flow of the river in order to fulfill one person's water right. To that extent, the Court recited, as a hypothetical example, a situation wherein 90% of the current of a river was needed in order to divert the other 10%. The example dealt with the water user's means of diversion and the appropriation of new water rights. The case dealt solely with reasonableness of diversions and does not apply to altering the results of the model for the purposes of conjunctive administration.

The Supreme Court's decision in *Clark* had nothing to do with priority administration. *Clark* dealt with the issuance of a water right after diversion works were not completed within the statutory timeframe. Other water users claimed that since irrigation works were not completed within the statutory timeframe, any water right authorizing the diversion of water

through those irrigation works was not valid. Although the Court found that a 90% loss through a particular ditch was "against public policy" and considered "waste," the Court did not conclude that a junior priority water right should be able to avoid administration because of the 90% loss. *See Basinger v. Taylor*, 36 Idaho 591 (1922) (dealing with means of diversion and not administration of water rights and finding that 50% conveyance loss was unreasonable). The issue before the Court in all of these cases was the reasonableness of a diversion, not curtailment for administration.

Finally, *AFRD#2* does not address the use of a trim line in administration. Indeed, that issue did not even arise until subsequent decisions. Reliance on this decision is wholly misplaced.

None of these cases discuss the use of a trim line in conjunctive administration. Since IGWA provided no technical support for a 10% trim line, it now seeks to expand the holdings of *Van Camp, Schodde, Clark, Basinger* and *AFRD#2* as justification for its argument. Although IGWA argues that these cases "found it patently unreasonable to curtail beneficial water use under junior rights if only 10 percent of the curtailed water would reach the calling senior," *IGWA Br.* at 30-31, this statement is wholly unfounded and finds no support in the plain language of any of the cases upon which IGWA relies.

Furthermore, the fact that the Court in *Clear Springs Foods, Inc. v. IDWR*, 150 Idaho 790 (2011), affirmed the use of a trim line relating to the model results of ESPAM 1.1 has no bearing on whether or not such a trim line should be implemented to the model results of ESPAM 2.1. As stated above, all parties agree that ESPAM 2.1 is a superior product to ESPAM 1.1. *Supra.* There is no legal justification for the application of a trim line to the results obtained from ESPAM 2.1.

B. The Former Director's Rationale for Applying a Trim Line to ESPAM 1.1 Does Not Apply to ESPAM 2.1.

According to IGWA, former Director Karl Dreher implemented a trim line for two primary reasons: (1) "ESPAM cannot perfectly predict the effects of curtailing junior rights, and it is not appropriate to curtail junior rights without reasonable certainty that the senior will actually benefit from it;" and (2) the "state policy of maximum beneficial use of its water resources precludes curtailment of a junior right if an insignificant portion of the junior's water would actually be put to beneficial use by the senior making the delivery call." *IGWA Br.* at 31-32.

As to the first reason, former Director Dreher concluded that because the stream gauges used in the development of ESPAM 1.1 had a margin of error of plus or minus 10%, it was appropriate to implement a trim line of 10%. *Id.*; *see also Pocatello Findings of Fact* ¶ 29 ("The calibration targets having the maximum uncertainty are the reach gains or losses determined from stream gages, which although rated 'good' by the USGS, have uncertainties of up to 10 percent"). Based on this, he concluded that "we didn't know whether curtailment would result in a meaningful amount of water reaching the calling senior right." *IGWA Br.* at 31.

Importantly, no party presented any testimony or evidence to support the extension of this alleged uncertainty to the results of ESPAM 2.1. There was no discussion in any expert report or testimony that the alleged stream gauge uncertainties create unreliable results by ESPAM 2.1. Rather, the evidence and testimony unanimously concludes that there is no scientific or technical basis for the application of a trim line to the results of ESPAM 2.1. *See SWC Opening Br.* at 2-7 (discussing vast extensive process in preparing ESPAM 2.1 and the undisputed fact that it is a better model than ESPAM 1.1); *IGWA Br.* at 32 ("ESPAM 2.1 is an improvement over 1.1"); Tr. at 1641, ll.12-16 (Sullivan testimony) (there is no technical basis for a trim line as it is "largely a

policy decision"); *Id.* at 2697, ll.3-4 (Brendecke testimony) ("the trim line is a policy matter and not a technical one"); *Id., e.g.*, at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a "policy decision").

Furthermore, since ESPAM 2.1 is calibrated directly to springs there is no basis to claim the reach gauges should qualify the results in any way. Furthermore, all experts agreed that ESPAM 2.1 is a good regional model. *See IGWA Findings of Fact* at ¶ 60 ("ESPAM 2.1 … is the best science available for predicting the regional effects of hydrologic changes in the ESPA"). As Pocatello admits, "there does not appear to be a basis to adopt a trim line based on specific technical uncertainty analysis." *Pocatello Br.* at 15.

The second justification cited by IGWA is that maximum use of the water resources demands implementation of a trim line. Without any supporting evidence, IGWA asserts that curtailment of water rights falling within a 10% trim line are "unlikely [to provide] any benefit" to the senior water user and that the impact on the holder of the junior water right would be "potentially devastating." *IGWA Br.* at 32. IGWA simply failed to prove, by clear and convincing evidence that junior rights within the 10% trim line would not injure Rangen's senior surface water rights.

Not only is there no evidence to support this argument, it also defies logic and is contrary to Idaho law. If diversions under a junior water right are found to be contributing to material injury, it is counterintuitive to then argue that curtailing that water right would have no benefit on the senior. This argument is merely a ruse to push the burden of a depleted resource on the senior water user contrary to Idaho water law. *See, e.g.,* I.C. § 43-106 ("First in time is first in right"). Priority administration may be a harsh doctrine but it is a fair doctrine.

> The doctrine of prior appropriation … is a just, although sometimes harsh, method of administering water rights here in the desert, where the demand for

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

Order Dismissing Application for Temporary Restraining Order, Jerome County Case No. 2007-526 (Jun. 12, 2007).

Throughout Idaho's history, water users have diverted and developed Idaho's water resources with the express knowledge and understanding that, in times of shortage, those who diverted the water first had a prior right to the continued use of that water. Each subsequent water user diverted water subject to the "long-standing rule in Idaho" that "each junior appropriator is entitled to divert water ***only when the rights of previous appropriators have been satisfied***." *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26 (Ct. App. 1988) (emphasis added). This "underlying basic principle of water rights in the State of Idaho," *Application of Boyer*, 73 Idaho 152, 161 (1952), existed prior to statehood and is engrained in Idaho's Constitution, statutes and regulations:

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

Joyce Livestock Co. v. United States, 144 Idaho 1, 7-8 (2007) (emphasis added); *see also Nielson v. Parker*, 19 Idaho 727 (1911) ("The doctrine prevailed prior to statehood, and in the earliest territorial history, that the "first in time is the first in right," in the diversion and use of the public

waters"); *Dunniway v. Lawson*, 6 Idaho 28 (1898) ("plaintiffs were entitled, by virtue of a prior location, to the waters of Alder creek").

IGWA's claim that some notion of "maximum beneficial use" can override the prior appropriation doctrine conflates issues of development and administration. Over 100 years ago, the Supreme Court, in *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589 (1904), confirmed that securing "the most beneficial use" and development of Idaho's water resources does not override the prior appropriation doctrine:

> It is certainly unnecessary for us to suggest that it was the evident intent of the framers of the Constitution to so husband the water of the state as to secure the most beneficial use thereof; that is, that it should always be so used as to benefit the greatest number of inhabitants of the state. They were careful to provide who should be entitled to the preference right to the use of the waters flowing in our natural streams. Nearly every session of our Legislature has attempted to improve upon its predecessor by so legislating as to improve the former use of water, and an inspection of the various acts plainly shows that the guiding star has always been to so legislate as to protect all users of water in the most useful, beneficial way, ***keeping in view the rule existing all over the arid region, "First in time first in right."***

(Emphasis added).

IGWA's confusion appears to be based on its contention that in administration, the Director must consider the "maximum beneficial use" of the water resource and limit administration accordingly. However, while "maximum beneficial use" may apply to the development of Idaho's water resources, it does not limit administration – particularly when a junior water right is found to be contributing to material injury. *See Hard, supra* (considerations of maximum use must "keep in view" the prior appropriation doctrine); *see also Order Dismissing Application for Temporary Restraining Order, supra* (the prior appropriation doctrine "is harsh, because when it is applied, junior appropriators may face economic hardship or even ruin"). Indeed, as early as 1891, the Court recognized that the right to the use of water "has been decided so often in favor of the prior appropriator that it has been generally

considered, both by professionals and profanes, as a settled question." *Hillman v. Hardwick*, 3 Idaho 255 (1891); *Nielson, supra* (if a water users "should actually divert the water and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired").

The priority equation does not change merely because diversions from one junior water right may have less of an impact than the diversions from another junior water right. So long as diversions under a junior ground water right are found to be contributing to the material injury, those diversions must be subject to administration.

In this case, application of a 10% trim line would be especially egregious where, even though the senior water right is materially injured, no water would be provided to Rangen, *IGWA Findings of Fact* ¶ 99, while junior water right holders would continue to divert their entire water right(s). There is simply no legal basis for applying a trim line to the results of ESPAM 2.1.

II. IGWA's Attempt to Submit Argument Relating to the Value of a Trim Line Should be Stricken Again.

During the hearing, IGWA improperly attempted to submit testimony relating to the trim line, asserting that it should be 20% or higher. The hearing officer appropriately struck that testimony from the record. *Order Granting May 13, 2013 Motion to Strike Certain Testimony of Dr. Charles Brendecke* (May 16, 2013). IGWA's proposed *Findings of Fact* appear to attempt to resurrect this stricken testimony. *IGWA Findings of Fact* at ¶ 77 ("These ESPAM 2.1 variations produced results that differed by 20 percent from the curtailment predictions simulated by ESPAM 2.1). To the extent that IGWA is attempting to reassert the stricken testimony, the same basis previously applied by the hearing officer justifies striking this statement from the proposed findings of fact.

CONCLUSION

The uncontroverted evidence establishes that ESPAM 2.1 is the best and most reliable science available for anticipating the impacts of diversions on the ESPA. It is a marked improvement over prior models and represents the accumulated efforts of several interests. There is no justification – whether based on the evidence or in science, law or policy – for adjusting the results of ESPAM 2.1 through application of any trim line to the detriment of a senior water right holder. Doing so unlawfully forces the senior water user to assume the burden of a depleted water resource. Idaho' Constitution, statutes and regulations clearly do not support such a result.

Dated this 19th day of July, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2013, the above and foregoing document was served on the following via email:

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