

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RANGEN, INC.,

Petitioner,

vs.

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

Respondents,

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
THE CITY OF POCA TELLO,

Intervenors.

Case No. CV-2014-1338

(Consolidated Gooding County Case No.
CV-2014-179)

**IDAHO DEPARTMENT OF WATER RESOURCES' BRIEF
IN RESPONSE TO IGWA'S OPENING BRIEF**

Judicial Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. NATURE OF THE CASE	1
B. STATEMENT OF FACTS	1
C. COURSE OF THE PROCEEDINGS	1
ISSUES PRESENTED ON APPEAL	6
STANDARD OF REVIEW	7
ARGUMENT	8
A. THE SOURCE FOR RANGEN’S WATER RIGHTS IS SURFACE WATER, NOT GROUND WATER.....	8
B. THE DIRECTOR DID NOT ERR IN HIS DELINEATION AND APPLICATION OF A TRIM LINE USING THE GREAT RIFT	12
1. History of ESPAM.....	12
2. IGWA’s Criticisms of ESPAM 2.1	15
3. Delineating a Trim Line Using the Great Rift	18
4. IGWA’s Objections to the Director’s Delineation of a Trim Line	20
a. The Director correctly interpreted Idaho Law regarding his scope of discretion in implementing a trim line	21
b. The Curtailment Order contains a reasoned statement in support of the application of the Great Rift trim line	22
c. The Director did not err in concluding model uncertainty is unquantifiable	22
d. IGWA’s suggested 10% trim line is not supported by the record	24
C. THE CURTAILMENT ORDER COMPLIES WITH IDAHO CODE § 67-5248	22
D. THE DIRECTOR DID NOT ERR BY PHASING IN MITIGATION	30
CONCLUSION.....	32

TABLE OF CASES AND AUTHORITIES

Cases

<u>A&B Irrigation Dist. v. Idaho Dept. of Water Resources</u> , 153 Idaho 500, 509, 284 P.3d 225, 234 (2012)	9, 12
<u>American Falls Reservoir District No. 2 v. IDWR</u> , 143 Idaho 862, 875, 876-80, 154 P.3d 433, 446, 447-51 (2007)	10, 18, 19, 21, 22
<u>Baker v. Ore-Idaho Foods, Inc.</u> , 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).....	19
<u>Barron v. Idaho Dept. of Water Resources</u> , 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).....	7
<u>Basinger v. Taylor</u> , 36 Idaho 591, 592, 211 P. 1085, 1086 (1922)	26, 27
<u>Clark v. Hansen</u> , 35 Idaho 449, 206 P. 808, 810 (1922)	26, 27
<u>Clear Springs Foods, Inc. v. Spackman</u> , 150 Idaho 790, 794, 804, 807-10, 813, 816, 252 P.3d 71, 75, 85, 88-91, 94, 98 (2011)	9, 12, 18, 19, 21, 26
<u>Dovel v. Dobson</u> , 122 Idaho 59, 61, 831 P.2d 57, 529 (1992)	7
<u>Haw v. Idaho State Bd. Of Med.</u> , 143 Idaho 51, 54, 137 P.3d 438, 441 (2006)	21
<u>Idaho Power Co. v. Idaho Dep't of Water Res.</u> , 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).....	7
<u>In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District</u> , slip op. at 13-17.....	19
<u>Musser v. Higginson</u> , 125 Idaho 392, 394, 871 P.2d 809, 811 (1994).....	8, 12
<u>Poole v. Olaveson</u> , 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)	19
<u>Schodde v. Twin Falls Land Company</u> , 224 U.S. 107 (1912).....	26, 27
<u>State v. Mosqueda</u> , 150 Idaho 830, 835, 252 P.3d 563, 568 (Ct. App. 2010)	32
<u>Tupper v. State Farm Inc.</u> , 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998)	7
<u>VanCamp v. Emery</u> , 13 Idaho 202, 208, 90 P.752, 754 (1907)	26

Statutes

I.C. § 42-226	12
I.C. § 42-1411(2)(a)-(j)	10
I.C. § 42-1420	10
I.C. § 42-1701A(4)	7
I.C. § 67-5248	6, 28, 29
I.C. § 67-5248(1)(a)	30
I.C. § 67-5277	7
I.C. § 67-5279(3)	7
I.C. § 67-5279(4)	7

Rules

IDAPA 37.03.01.060	3, 8, 11
IDAPA 37.03.01.020	19
IDAPA 37.03.11.020.03	6, 18
IDAPA 37.03.11.020.04	6
IDAPA 37.04.11.040	5, 30, 31, 32
IDAPA 37.04.11.040.01.a	30, 31
IDAPA 37.04.11.040.03	6

IDAPA 37.04.11.042	19
IDAPA 37.04.11.042.01(g)-(h)	28
I.R.C.P. 54	8
I.R.C.P. 54(b).....	10

Constitutional Provisions

Idaho Const. Art. XV § 7	19
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STATEMENT OF CASE

A. NATURE OF THE CASE

This case is a judicial review proceeding in which the Idaho Ground Water Appropriators, Inc. (“IGWA”) appeals the final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) in response to the water right delivery call filed by Rangen, Inc. (“Rangen”) on December 13, 2011. The order appealed is the January 29, 2014, *Final Order Regarding Rangen, Inc.’s Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). The Director, pursuant to the Conjunctive Management Rules (“CM Rules”), concluded that Rangen’s senior water rights are being materially injured by junior ground water pumping and ordered curtailment of certain ground water rights junior to July 13, 1962. *Curtailment Order*, p. 41, ¶60 (R. Vol. XXI, p. 4228).

B. STATEMENT OF FACTS

The Department adopts the statement of facts as outlined in *Idaho Department of Water Resources’ Brief in Response to Rangen’s Opening Brief*.

C. COURSE OF PROCEEDINGS

Rangen first filed a delivery call in September of 2003, seeking to curtail junior-priority ground water users. In February of 2004, a previous Director of the Department, Karl Dreher, ordered curtailment of all ground water rights in Water District 130 with priority dates junior to July 13, 1962 (the priority date of Rangen’s water right no. 36-02551). *Order*, p. 26 (R. Vol. I, p. 130). However, the Enhanced Snake Plain Aquifer Model (“ESPAM”) version 1.0 (“ESPAM 1.0”), which was developed by the Department in working with the Eastern Snake Hydrologic Modeling Committee (“ESHMC”), was released shortly thereafter. Based on the curtailment

predictions of ESPAM 1.0, on May 19, 2005, Director Dreher withdrew his curtailment order, concluding instead that the Rangen delivery call was futile. *Second Amended Order*, p. 28, ¶ 25 (R. Vol. I, p. 189).

The ESHMC was in the process of finalizing an update to the model when, on December 13, 2011, Rangen renewed its delivery call by filing its *Petition for Delivery Call* (“Petition”) with the Department alleging it is not receiving all of the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694.¹ *Petition*, p. 3-4 (R. Vol. I, p. 4-5).

The Petition requested the Director administer and distribute water consistent with the upcoming update to the model (which was referred to as “ESPAM 2.0”) in accordance with the prior appropriation doctrine and curtail junior-priority ground water pumping as necessary to deliver Rangen’s water. *Id.* at 7 (*Id.* at 8). Because ESPAM 2.0 was not complete when Rangen renewed its delivery call, the proceeding was stayed pending completion of the updated model.

On January 4, 2012, IGWA petitioned to be designated as a respondent or alternatively to intervene in the proceeding. The Director granted IGWA’s petition to intervene on January 13, 2012. On May 21, 2012, the City of Pocatello (“Pocatello”) petitioned to be designated as a respondent or alternatively to intervene in the proceeding. The Director granted Pocatello’s petition to be designated as a respondent on May 29, 2012. On July 24, 2012, 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 “SWC”) petitioned for limited intervention in the proceeding. The Director granted the SWC’s petition for limited intervention on August 14, 2012. On August 21, 2012, Fremont-Madison Irrigation District (“Fremont-

¹ Rangen did not allege injury to all its water rights. It did not allege injury to water right nos. 36-00134B, 36-00135A, and 36-15501.

Madison”) petitioned to be designated as a respondent or alternatively to intervene in the proceeding. The Director granted Fremont-Madison’s petition to be designated as a respondent on September 11, 2012.

Several dispositive motions were filed prior to the hearing in this matter. Of relevance to this petition for judicial review, Rangen filed a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* on March 8, 2013. Rangen sought a ruling that the source for water rights 36-02551, 36-07694, and 36-15501 is surface water, not ground water.² *Motion for Partial Summary Judgment Re: Source*, p. 2 (R. Vol. XIII, p. 2570). The Director granted Rangen’s motion on this issue. *Order Granting in Part and Denying in Part Rangen, Inc.’s Motion for Partial Summary Judgment Re: Source* (“Order on Summary Judgment”), p. 7 (R. Vol. XV, p. 3177). The Director reviewed the SRBA decrees and concluded the decrees were not ambiguous:

Water right nos. 36-2551, 36-7694, and 36-15501 were decreed in the SRBA with the following Source element: Martin-Curren Tunnel, tributary to Billingsley Creek. ... The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* [IDAPA 37.03.01.060] (“For surface water sources, the source of water shall be identified The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as ‘ground water.’”). Consistent with [IDAPA 37.03.01.060], listing a source and tributary for surface water rights, and only “ground water” for ground water rights, was the custom and practice in the SRBA. In 1997, Rangen’s Martin-Curren Tunnel water rights were partially decreed. The partial decrees were entered pursuant to Idaho Rule of Civil Procedure 54(b). No appeal has ever been taken. The plain language of Rangen’s partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water.

² Rangen also sought summary judgment on the issue of whether Rangen was limited to only water emitting from the Martin-Curren Tunnel itself. *Order on Summary Judgment*, p. 1, ¶ 1 (R. Vol. XV, p. 3171). That issue was not appealed by IGWA but has been appealed by Rangen and is addressed in *Idaho Department of Water Resources’ Brief in Response to Rangen’s Opening Brief*.

Order on Summary Judgment, p. 4, ¶ 2 (R. Vol. XV, p. 3174). The Director also concluded previous Idaho Supreme Court decisions decided this issue definitively. *Id.* at ¶ 3 (*Id.*).

The hearing on Rangen's delivery call commenced on May 1, 2013, at the Department's State Office in Boise, Idaho. The hearing concluded on May 16, 2013. The hearing was bifurcated. The first part of the hearing focused on issues of material injury and beneficial use and the second part of the hearing focused on issues related to ESPAM 2.1.³

On January 29, 2014, the Director issued the Curtailment Order. The Director concluded Rangen's water right nos. 36-2551 and 36-7694 are being materially injured by junior ground water diversions. *Curtailment Order*, p. 41, ¶ 60 (R. Vol. XXI, p. 4228). As to ESPAM 2.1, the Director determined that:

ESPAM 2.1 is a technical improvement to ESPAM 1.1 and is the best available science for simulating the impacts of ground water pumping. There is no other technical instrument as reliable as ESPAM 2.1 that can be used to determine the effects of ground water pumping on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

Id. at 37, ¶ 38 (*Id.* at 4224).

Whether there should be a trim line associated with ESPAM 2.1 and if so, what the trim line should look like, was an issue raised at the hearing. The Director concluded:

The Curren Tunnel and the Rangen spring complex are located west of the Great Rift, a low transmissivity feature that impedes the transmission of water through the aquifer. Finding of Fact 108, Figure 4. While there is some simulated depletion of Curren Tunnel discharge attributable to points of diversion east of the Great Rift, the contribution is small. ESPAM 2.1 establishes, by clear and convincing evidence, that the portion of benefits of curtailed ground water use east of the Great Rift that would accrue to the Rangen spring complex is generally less than 1%. Finding of Fact 105, Figure 1. The benefit of curtailment with respect to the number of acres curtailed diminishes significantly if areas east of

³ ESPAM 2.0 was updated shortly before the hearing commenced. *Curtailment Order*, p. 18, ¶ 84 (R. Vol. XXI, p. 4205). The latest version is referred to as ESPAM 2.1. *Id.*

the Great Rift are included in the curtailment. Finding of Fact 107, Figure 3. The argument that no trim line is appropriate was considered and rejected in *Clear Springs*. The effect of the Great Rift on propagation of impacts to Curren Tunnel should be taken into consideration when deciding on a trim line.

Id. at 39, ¶ 50 (*Id.* at 4226).

ESPAM 2.1 simulations predicted that 9.1 cfs of the decline in the flow from the Curren Tunnel can be attributed to junior-priority ground water pumping west of the Great Rift and in the area of common groundwater supply. *Id.* at 35, ¶ 31 (*Id.* at 4222). The Director ordered curtailment of junior priority ground water rights west of the Great Rift and in the area of common ground water supply with a priority junior to July 13, 1962. *Id.* at 42 (*Id.* at 4229). The Director stated that holders of the junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to Rangen.” *Id.* The Curtailment Order explains that mitigation provided by direct flow to Rangen “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.*

Three petitions for reconsideration of the Curtailment Order were filed. On February 11, 2014, IGWA timely filed *IGWA’s Petition for Reconsideration* (“IGWA’s Petition”). On February 12, 2014, Rangen timely filed *Rangen, Inc.’s Motion for Reconsideration and Clarification* (“Rangen’s Motion”). On February 12, 2014, Pocatello timely filed *City of Pocatello’s Motion to Reconsider* (“Pocatello’s Motion”). Various responsive briefs were submitted by the parties. On March 4, 2014, the Director issued an *Order on Reconsideration* denying IGWA’s Petition and Pocatello’s Motion and partially denying and partially granting Rangen’s Motion.

ISSUES PRESENTED ON APPEAL

The issues presented by appellant IGWA are as follows:

1. Did the Department violate the Idaho Ground Water Act by treating the Martin-Curren Tunnel as a surface water source?
2. Does the Curtailment Order inadequately apply the law of reasonable use by allowing Rangen to command more than 100 times more water than it can put to beneficial use?
 - a. Did the Director misinterpret the law by ruling he has “limited discretion” to apply the law of reasonable beneficial use?
 - b. Does the Curtailment Order violate Idaho Code § 67-5248 by not making findings of fact or conclusions of law concerning reasonable use of the ESPA as set forth in CM Rules 20.3 and 40.03?
 - c. Did the Department abuse its discretion by not assigning any degree of uncertainty to ESPAM 2.1 predictions for Rangen?
 - d. Did the Director abuse his discretion by curtailing beneficial water use where less than one percent of the curtailed water will ever reach Rangen?
 - e. Is the Director’s application of a different trim line that increases the number of curtailed water rights more than two hundred fold, without a rational, reasonable, and factually grounded explanation for the change, arbitrary, capricious, or an abuse of discretion?
 - f. Does the Curtailment Order violate Idaho Code § 67-5248 by not making any conclusions of law concerning IGWA’s argument that Rangen should be required to implement a recirculation system before seeking to curtail juniors? If not, is the Director’s failure to require Rangen to improve its conveyance facilities an abuse of discretion?
3. CM Rule 20.4 authorizes the Department to phase in curtailment over five years to lessen the impacts of curtailment. Did the Director misinterpret the rule by phasing in mitigation as opposed to curtailment, and requiring junior water users to deliver more mitigation water to Rangen than it would receive from curtailment?

The Department rephrases the issues presented as follows:

1. Whether the Director erred by treating the Curren Tunnel as a surface water source.
2. Whether the Director erred in his delineation and application of a trim line using the Great Rift.
3. Whether the Curtailment Order satisfies the criteria of Idaho Code § 67-5248.
4. Whether the Director erred by phasing in mitigation.

STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act (“IDAPA”), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall affirm the agency decision unless it finds the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

ARGUMENT

A. THE SOURCE FOR RANGEN'S WATER RIGHTS IS SURFACE WATER, NOT GROUND WATER.

On March 8, 2013, prior to the hearing in this matter, Rangen filed a motion for partial summary judgment seeking a ruling that it is entitled to judgment as a matter of law that the source for water right nos. 36-02551, 36-07694, and 36-15501 is surface water, not ground water.

On the issue of source, the Director reviewed the SRBA decrees and concluded the decrees were unambiguous:

Water right nos. 36-2551, 36-7694, and 36-15501 were decreed in the SRBA with the following Source element: Martin-Curren Tunnel, tributary to Billingsley Creek. . . . The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* AJ Rule 60 [IDAPA 37.03.01.060] (“For surface water sources, the source of water shall be identified The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as ‘ground water.’”). Consistent with AJ Rule 60, listing a source and tributary for surface water rights, and only “ground water” for ground water rights, was the custom and practice in the SRBA. In 1997, Rangen’s Martin-Curren Tunnel water rights were partially decreed. The partial decrees were entered pursuant to Idaho Rule of Civil Procedure 54(b). No appeal has ever been taken. The plain language of Rangen’s partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water.

Order on Summary Judgment, p. 4, ¶ 2 (R. Vol. XV, p. 3174).

The Director also concluded that previous Idaho Supreme Court decisions already decided that the source of the Martin-Curren Tunnel is surface water. *Id.* Specifically, *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), involved a delivery call by water users other than Rangen with water rights from the Martin-Curren Tunnel. The Court in *Musser* specifically described the source as “springs.” *Musser* at 394, 871 P.2d at 811. Spring water users are considered surface water users, not ground water users.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011)

(“The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs.”). The Court in *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, had cause to discuss the *Musser* Court’s characterization of the source and recognized that the Martin-Curren Tunnel is considered surface water. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 509, 284 P.3d 225, 234(2012)(Concluding that the Court in *Musser* could not have opined on the application of the Ground Water Act because the call was “between senior spring users and junior ground water users.”).

Based on these conclusions, the Director granted summary judgment to Rangen on the issue of source. *Order on Summary Judgment*, p. 7 (R. Vol. XV, p. 3177).

IGWA argues the Director erred in his interpretation. First, IGWA argues the SRBA partial decrees for Rangen’s water rights “contain no remark, condition, or other statement that the Curren Tunnel is surface water.” *Opening Brief* at 40. This argument misses the mark as the SRBA District Court does not decree water rights with a remark or condition that says “surface water.” Rather, when a water right is ground water, the SRBA District Court does clearly identify the source as such. For surface water rights, the practice in the SRBA is to list the source and the tributary. If the source of the water right is ground water, the practice is to list the source as “ground water” and the tributary as “ground water.” The SRBA partial decrees for Rangen’s water rights provide: “Source: Martin-Curren Tunnel...Tributary: Billingsley Creek.” Ex. 1026, 1028. Because the source for Rangen’s water rights is decreed as “Martin-Curren Tunnel” and not “ground water” the source is surface water and not ground water.

Citing *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (hereafter referred to as “AFRD#2”), IGWA argues that “the name of the senior’s source is not conclusive of how water rights will be administered in response to a delivery call.” *Opening Brief* at 40. The language from *AFRD#2* relied upon by IGWA is taken out of context. The Court in *AFRD#2* was discussing the Director’s application of the material injury factors listed in the Conjunctive Administration Rules in response to an argument that the Director’s application of the rules was a “re-adjudication” of the water right. The Court explained how certain issues presented in delivery calls, such as the issue of reasonableness, did not constitute a re-adjudication of the water rights. Importantly for this case, the Court distinguished the consideration of reasonableness from elements of the decrees:

[T]he SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42–1411(2)(a)–(j). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication.

AFRD#2, 143 Idaho at 877, 154 P.3d at 448.

Here, IGWA is challenging an element of Rangen’s water rights as decreed by the SRBA District Court. A decree is conclusive as to each element of a water right and neither the Director nor this Court in its appellate capacity has the authority to change the elements of a decreed water right. Idaho Code § 42-1420. The partial decrees for Rangen’s water rights involved in this matter were issued in 1997 and were entered pursuant to I.R.C.P. 54(b). Ex. 1026, 1028. No appeal has ever been taken and no requests to set aside have been filed. IGWA’s argument that the rights should be considered ground water constitutes an impermissible collateral attack on Rangen’s partial decrees and should be rejected.

IGWA also cites the Ground Water Act and argues “the applicability of the Ground Water Act is not dependent upon the name of the water source on the senior’s water right license or decree.” *Opening Brief* at 41. This statement is legally incorrect. The name of the source element on the SRBA partial decree is the legal determination of that element of the water right. This legal determination is binding upon IGWA, the Director, and all parties to the SRBA.

In his Order on Summary Judgment, the Director referenced Adjudication Rule 60 (hereafter referred to as “AJ Rule 60”):

The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* AJ Rule 60 (“For surface water sources, the source of water shall be identified The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as ‘ground water.’”). Consistent with AJ Rule 60, listing a source and tributary for surface water rights, and only “ground water” for ground water rights, was the custom and practice in the SRBA.

Order on Summary Judgment, p. 4, ¶ 2 (R. Vol. XV, p. 3174). IGWA argues the Ground Water Act defines what constitutes ground water and “to the extent [AJ Rule 60] conflicts with the Ground Water Act, the Act controls. . . . [AJ Rule 60] cannot be construed in a manner that forces the Director to fallaciously administer a ground water diversion as if it is a surface water structure... .” *Opening Brief* at 41. Contrary to IGWA’s suggestion, AJ Rule 60 does not serve as the legal authority declaring Rangen’s water source as surface water. The SRBA partial decrees are the authority that declare the source to be surface water. AJ Rule 60 simply highlights the naming convention used in the SRBA to distinguish surface and ground water and shows that, if the Court had intended the source to be ground water, the decrees would have said ground water.

In his Order on Summary Judgment, the Director also discussed three Idaho Supreme Court cases that support the conclusion the source of Rangen's water rights is surface water:

The conclusion that the source of Rangen's water rights is surface water is supported by three Idaho Supreme Court decisions. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Court reviewed the Director's defense of inaction in a delivery call filed by holders of a Martin-Curren Tunnel water right against junior-priority ground water users. The Court stated the source of Mussers' water right as follows: "The springs which supply the Mussers' water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer)." *Musser* at 394, 871 P.2d at 811 (emphasis added). The fact that Musser was an appropriator of a surface water right was reconfirmed by the Court in *A&B*. 153 Idaho at 234, 284 P.3d at _____. In *Clear Springs*, the Court examined separate conjunctive management delivery calls initiated by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. ("Spring Users"). The Spring Users, like Rangen, "have water rights in certain springs emanating from the canyon wall along a section of the Snake River below Milner Dam in south central Idaho." *Clear Springs* at 794, 252 P.3d at 75. In *Clear Springs*, IGWA argued that the Spring Users should be administered as ground water users, consistent with Idaho Code § 42-226: "the Spring Users' priority rights should be protected only in the maintenance of a reasonable aquifer level." *Clear Springs* at 804, 252 P.3d at 85. The Court rejected this argument: "By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs." *Id.* (emphasis added). These cases clearly demonstrate that Martin-Curren Tunnel is a surface water source.

Order on Summary Judgment, p. 4, ¶ 3 (R. Vol. XV, p. 3174).

IGWA does not address the Director's analysis related to Idaho Supreme Court precedent. Contrary to IGWA's assertion, the Director did not err by concluding the source of Martin-Curren Tunnel is surface water, not ground water.

B. THE DIRECTOR DID NOT ERR IN HIS DELINEATION AND APPLICATION OF A TRIM LINE USING THE GREAT RIFT

1. History of ESPAM

The history of the Eastern Snake Plain Aquifer (“ESPA”) modeling effort helps provide important context to the Director’s decisions in the Rangen delivery call. ESPAM is a calibrated regional ground water model representing the ESPA. ESPAM 1.0 was developed by the Department working in collaboration with ESHMC, a technical committee comprised of hydrogeologists, ground water modelers and other technical professionals working on ESPA water issues. ESPAM 1.0 simulated the effects of ground water pumping from the ESPA on the Snake River and tributary springs. Shortly after its issuance, ESHMC found certain errors in the model and issued an update that was designated ESPAM version 1.1 (“ESPAM 1.1”).

The ESHMC and the Department started working on an update to ESPAM 1.1 in 2005. The update was referred to as ESPAM 2.0. One key aspect of the update was the refining and re-calibration of the model with new data. In particular, the model was calibrated using monthly water levels and flow targets, including measured spring discharges within fourteen specific model grid cells. The springs captured and used by Rangen were measured throughout the model calibration period, and the monthly average spring discharge in the model cell where spring flows are captured by Rangen was a target for model calibration.

Another key issue significant to this proceeding is that an error was discovered in ESPAM 1.1. During development of ESPAM 2.0, the Department discovered that spring discharge values used to estimate discharge for Thousand Springs and springs in the Thousand Springs to Malad spring reach for calibration of ESPAM 1.1 were inaccurate. These values were corrected in the calibration targets for ESPAM 2.0. These corrections resulted in a significant decrease in the spring discharge target at Thousand Springs and a significant increase in spring discharge targets in the Billingsley Creek area. Ex. 3203, p. 32. The revised model showed that ground water pumping had a much larger impact on the Rangen spring than previously thought.

The revision of ESPAM was in progress when Rangen filed its Petition in December of 2011. The parties to this proceeding agreed to wait until the ESHMC completed its work on ESPAM 2.0 before going to hearing.

In July of 2012, ESHMC determined the calibration of ESPAM 2.0 was complete and recommended the Department begin using ESPAM 2.0 rather than ESPAM 1.1 for ground water modeling. *Curtailment Order*, p. 18, ¶ 84 (R. Vol. XXI, p. 4205). In response, an order was issued adopting ESPAM 2.0 for use in the Rangen delivery call. *Id.* However, during preparation of the final project report, data calculation mistakes were discovered in the model input data used for calibration. *Id.* The model was re-calibrated in November 2012, resulting in the release of ESPAM 2.1. In January of 2013, the ESHMC endorsed the use of ESPAM 2.1 in place of ESPAM 2.0. *Id.* ESPAM 2.1 was subsequently used by the Department and the parties in this proceeding to simulate the effects of ground water withdrawals on flows available to the Rangen Facility.

Like ESPAM 1.1., ESPAM 2.1 is a numerical groundwater model that was developed for the purpose of determining the effects of groundwater pumping on discharge to spring and river reaches, such as the Rangen spring cell. Ex. 3203, p. 2. The model incorporates the spatial distribution of recharge and groundwater pumping, a large number of water level and aquifer discharge observations, regional-scale hydrogeology, and the transient response of aquifer discharge to spatially and temporally distributed recharge and pumping.

Some key factors distinguish ESPAM 2.1 from ESPAM 1.1. ESPAM 2.1 is a technical improvement to ESPAM 1.1 in part because ESPAM 2.1 was calibrated to monthly observations of spring discharge within individual model cells and is capable of simulating the impacts of depletions from or accretions to the aquifer on spring discharge within those model cells.

ESPAM 1.1 was calibrated to significantly fewer spring discharge data. ESPAM 1.1 was only capable of simulating depletions from or accretions to a group of springs that, in total, contribute water to larger segmented reaches of the Snake River. In ESPAM 2.1, spring discharge in the model cell where Rangen's water is derived was a target used for calibration of the model. The outflow of water in the vicinity of the Rangen Facility was identified as a model calibration target because flows from the Rangen Facility had been measured over a sufficiently long period of time and with enough frequency. This is significant because when determining the impact of ground water pumping on the springs under ESPAM 1.1, the model could only calculate the benefits of curtailment that would accrue to the reach of the river in which the senior's point of diversion was located. With the updated model, the Director can now calculate the benefits of curtailment that would accrue to a much smaller area. In this case, ESPAM 2.1 allows the Director to calculate the benefits of curtailment to the Rangen spring cell itself.

2. IGWA's Criticisms of ESPAM 2.1

IGWA's expert reports criticize the model. Many of the criticisms in those reports are described in IGWA's Opening Brief. *Opening Brief* at 15-23. IGWA states the criticisms "are not meant to suggest ESPAM 2.1 is entirely unreliable" but "to highlight uncertainty in the accuracy of ESPAM 2.1 predictions for the Rangen model cell, which IGWA contends the [Curtailment Order] does not adequately account for." *Id.* at 17.

The Director considered the criticisms raised by IGWA and either disagreed with them or found them not to rise to such a level as to prevent application of the model. For example, both at the hearing and in its Opening Brief, IGWA discussed Dr. Brendecke's three alternative conceptual models. *Id.* at 16. As to the first two models, the Director found that they produced results "very similar to the impacts predicted by ESPAM 2.1..." *Curtailment Order*, p. 21, ¶

95.b (R. Vol. XXI, p. 4208). As to the third model, IGWA states it “produced results that differed by 20 percent from ESPAM 2.1.” *Opening Brief* at 16. This model was rejected by the Director since “the calibration method used in [the model] did not follow proper procedures” and because “[t]he quality of the calibration of the composite model was compromised.” *Curtailment Order*, p. 21, ¶ 95.b (R. Vol. XXI, p. 4208).

IGWA also suggests ESPAM 2.1’s “ability to accurately predict localized groundwater flow conditions” is compromised because ESPAM 2.1 is a regional model that does not consider detailed localized information. *Opening Brief* at 17. The Director rejected this criticism as the model does consider localized data:

Although ESPAM 2.1 is a regional model that accounts for variation in geologic features within the constraints of a one-square-mile grid cell, ESPAM 2.1 was calibrated to observed monthly spring discharge in the Rangen model cell. These discharge data reflect local and regional geologic controls on hydrologic responses to ground water pumping and other aquifer stresses. IDWR Staff Memorandum, Ex. 3203, pp. 4, 28.

Curtailment Order, p. 20, ¶ 95.b (R. Vol. XXI, p. 4207). The Director continued:

It is appropriate for the Department to use a regional model as a tool for conjunctive administration of water rights, because the effect of junior ground water pumping within the Eastern Snake Plain, an approximately 11,000 square mile area, on spring discharge and river reaches is a regional-scale question that cannot be addressed with a small-scale, local model. IDWR Staff Memorandum, Ex. 3203, p. 4. 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. *Id.*, p. 2. ESPAM 2.1 incorporates much more information about the aquifer than can be considered in other predictive methods available to the Department, and incorporates data that specifically reflect how spring discharge in the Rangen cell has responded to regional aquifer stresses in the past. *Id.*, p. 4. This is the reason that numerical models are recognized by the USGS as the most robust approach for predicting the effects of groundwater pumping on surface-water discharge. *Id.*, p. 2.

Id. at 22, ¶ 95.e (*Id.* at 4209).

A third complaint IGWA raises is that the model has “a bias toward over-predicting the impact of groundwater pumping on the Rangen Model cell.” *Opening Brief* at 20. The Director rejected this notion:

Department staff disagree with the conclusion that calibration results indicate ESPAM 2.1 is biased to over-predict impacts to spring flows in the Rangen model cell. IDWR Staff Memorandum, Ex. 3203, pp. 39, 57. Mr. Hinckley’s and Dr. Brendecke’s arguments that the model is biased to over-predict impacts are based largely on comparison of model results with well and spring discharge data collected only after the year 2000. Ignoring data collected before 2000 compromises their interpretation. It is important to consider both older and more recent data to obtain the best representation of the physical system. IDWR staff memorandum, p. 37. The difference between recent low flow values and older historic values is the spring’s response to changes in the aquifer water budget and is critical to the prediction of the impacts of ground water pumping. *Id.*, p. 57. Contrary to IGWA’s arguments, evaluation of ESPAM2.1’s calibration results, which under-predict the difference between flows in the 1980s and the 2000s, suggests that the model would be more likely to under-predict the impacts of ground water pumping on spring flows in the Rangen cell. *Id.* IGWA’s arguments are further contradicted by the results obtained from Dr. Brendecke’s alternative model (AMEC Model 2), which he states “*appears to resolve the overprediction problem noted for ESPAM 2.1 in recent years.*” IGWA Ex. 2401, p. 45. AMEC Model 2 predicts a response of 18.0 cfs in response to curtailment within the model domain, which is slightly higher than the ESPAM 2.1-predicted response of 17.9 cfs. IDWR Staff Memorandum, Ex. 3203, p. 57.

Curtailment Order, p. 21-22, ¶ 95.d (R. Vol. XXI, p. 4208-09).

Ultimately, in response to IGWA’s criticisms, the Director found the model is the best tool available to administer water in the ESPA:

The criticisms raised [by IGWA] fail to persuade the Director that ESPAM 2.1 should not be used in this proceeding. 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. The Director acknowledges that there is uncertainty in the model predictions, but disagrees with IGWA’s conclusion that ESPAM 2.1 is biased toward over-predicting impacts to flows at the Rangen model cell.

Id. at 22, ¶ 96 (*Id.* at 4209). The Director concluded:

Because numerical models are approximations of complex physical systems, aquifer modeling is a dynamic process. ESPAM 2.1 is the result of improvements to previous

versions of the model, and it will likely be improved upon through future efforts of the Department and the ESHMC. Some of the criticisms of the model have merit, and may be addressed in future versions of the model as data availability and improvements in computing technology allow. While there is the potential to improve the model given additional time and resources, ESPAM 2.1 is currently the best available scientific tool. Imperfections in the model should not preclude the Department from using the model as an administrative tool, and should not be the basis for using other predictive methods that have less scientific basis. The Director concludes that ESPAM 2.1 predicted responses to curtailment are the best available predictions.

Id. at 39, ¶ 48 (*Id.* at 4226).

3. Delineating a Trim Line Using the Great Rift

Substantial testimony was presented at the hearing regarding approximations and possible inaccuracies of using a regional model to simulate depletions to Rangen spring complex discharge caused by ground water diversions from the ESPA. Ground water users diverting from the ESPA argued that any application of the model should acknowledge there is an unquantifiable level of uncertainty in the predictions generated by the model by either discounting the prediction or applying a trim line. Rangen argued that, regardless of inaccuracies in the model, it is the best estimate of the impacts of junior ground water pumping on flows in the Rangen cell, therefore no trim line should be applied.

In reference to delineation of a trim line, the Director explained:

The Idaho Supreme Court stated, “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.” *American Falls*, 143 Idaho at 875, 154 P. 3d at 446. The Director perceives this issue of a trim line as one of limited discretion and applies the legal standards established by Idaho courts. *Clear Springs*, 150 Idaho at 813, 252 P.3d at 94.

Curtailment Order, p. 39, ¶ 52 (R. Vol. XXI, p. 4226). The Director noted that, in accordance with CM Rule 20.03, entitled “Reasonable Use of Surface and Ground Water,” 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. *Id.* at 40, ¶ 53 (R. Vol. XXI, p. 4227). The Director also noted demand should be viewed in light of reasonableness and optimum development of water resources in the public interest citing to CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *Clear Springs*, 150 Idaho at 807-10; 252 P.3d at 88-91; and *In Matter of Distribution of Water to Various Water Rights Held By or For The Benefit of A & B Irrigation Dist.*, *supra*, slip op. at 13-17. *Id.* The Director further noted:

“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 ¶ 54 (*Id.*).

The Director also recognized the Curren Tunnel and Rangen spring complex are located west of the Great Rift, a low-transmissivity feature that impedes the transmission of water through the ESPA. *Id.* at ¶ 55 (*Id.*). While there is some predicted depletion of Curren Tunnel discharge attributable to points of diversion east of the Great Rift, the contribution is small. Generally less than 1% of the benefits of curtailment of water users east of the Great Rift will accrue to the Rangen spring cell. *Id.* Even less will be expected to accrue to the Curren Tunnel. *Id.* The low transmissivity that impedes the transmission of water through the aquifer at the

Great Rift causes the benefit of curtailment with respect to the number of acres curtailed to diminish significantly if areas east of the Great Rift are included in the curtailment. *Id.* at 26, Fig. 3 (*Id.* at 4213, Fig. 3). Curtailment of junior ground water irrigation west of the Great Rift would dry up approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Curren Tunnel. *Id.* at 40, ¶ 55 (*Id.* at 4227). Curtailment of junior ground water irrigation east of the Great Rift would dry up approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Curren Tunnel. *Id.* The Director concluded curtailment of ground water diversions on the east side of the Great Rift is not justified because, “[t]o curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho’s water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources.” *Id.*

The Director also concluded model uncertainty justified use of a trim line. *Id.* In delineating a trim line using the Great Rift, the Director considered uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. *Id.* at 39, ¶ 49 (*Id.* at 4226). The Director concluded that, while there is generally higher predictive uncertainty on the eastern side of the Great Rift than the western side, impacts from several pumping locations evaluated on the eastern side had negligible impacts on the spring cell evaluated in the Department’s predictive uncertainty analysis. *Id.* at 40, ¶ 55 (*Id.* at 4227).

4. IGWA’s Objections to the Director’s Delineation of a Trim Line.

IGWA raises a number of objections related the Director's use of the Great Rift as a basis for a trim line and suggests its use results in the impermissible waste of water. *Opening Brief* at 51-62. Each objection is addressed below.

- a. The Director correctly interpreted Idaho law regarding his scope of discretion in implementing a trim line.

IGWA first asserts the Director misinterpreted Idaho law by concluding he has "'limited discretion' to apply the law of reasonable use." *Opening Brief* at 51. IGWA misconstrues the Director's statement in the Curtailment Order regarding the exercise of discretion. In discussing his authority to implement a trim line, the Director concluded:

The Idaho Supreme Court stated, "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." *American Falls*, 143 Idaho at 875, 154 P. 3d at 446. The Director perceives this issue of a trim line as one of limited discretion and applies the legal standards established by Idaho courts. *Clear Springs*, 150 Idaho at 813, 252 P.3d at 94.

Curtailment Order, p. 39, ¶ 52 (R. Vol. XXI, p. 4226). IGWA suggests inclusion of the term "limited" before the word "discretion" results in an error of law. The statement that the Director "perceives this issue of a trim line as one of limited discretion" is consistent with the standard for discretion as outlined by the Idaho Supreme Court in *Clear Springs* and *AFRD#2*. In *Clear Springs*, the spring water users argued the Director abused his discretion in implementing a trim line. *Clear Springs*, 150 Idaho at 816, 252 P.3d at 98. The Court stated:

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.

Clear Springs, 150 Idaho at 813, 252 P.3d at 94 (emphasis added) (quoting *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006)). This decision expressly recognized the Director's discretion has "limits" and the Director must act within those limits.

The Director's inclusion of the term "limited" in his characterization of the discretionary standard is consistent with the express recognition of limits in the Idaho Supreme Court's decision in *AFRD#2*:

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. This is certainly not unfettered discretion

Am. Falls Reservoir Dist. No. 2, 143 Idaho at 880, 154 P.3d at 451. Inclusion of the word "limited" simply signals the Director's discretion is not "unfettered." These cases show that IGWA, not the Director, has the "mistaken perception" regarding the scope of the Director's discretion. The fact that the Director must act within the outer limits of his discretion in order to not abuse that discretion exemplifies that the Director's discretion is limited. The Director correctly recognized this limit of discretion in the Curtailment Order.

- b. The Curtailment Order contains a reasoned statement in support of the application of the Great Rift trim line.

IGWA also argues the Director erred by not deciding "the point at which the exercise of priority becomes unreasonable." *Opening Brief* at 56. Contrary to IGWA's argument, the Director directly determined the point at which the exercise of priority in this matter becomes unreasonable. Specifically, delineating a trim line using the Great Rift limits curtailment to an area where the Rangen spring cell is predicted to receive at least 1% of the benefits of curtailment, and the calling party is predicted to receive at least 0.63% of the benefits of curtailment. *Curtailment Order*, p. 39, ¶ 51 (R. Vol. XXI, p. 4226). The reasoning, facts, and inferences underlying the Director's decision to use the Great Rift as a trim line are explained in detail in Section B.3 above and in the Curtailment Order in Findings of Fact 105-110 and Conclusions of Law 37-57.

- c. The Director did not err in concluding model uncertainty is unquantifiable.

IGWA further argues the Director erred by “not assigning a margin of uncertainty to its predictions” in this delivery call proceeding. *Opening Brief* at 57. IGWA asks the Court to “remand this matter with an instruction to assign a margin of error or uncertainty to ESPA 2.1 prediction for Rangen, and explain how it is taken into account in the Director’s remand decision.” *Id.*

With respect to model uncertainty, the Director concluded:

Because of the complexity of the model, the margin of error associated with model predictions 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.”

Curtailment Order, p. 39, ¶ 49 (R. Vol. XXI, p. 4226).

The Director’s conclusion that “the margin of error associate with model predictions cannot be quantified” is consistent with the Department’s staff report⁴ and even the testimony of IGWA’s own expert, Dr. Charles Brendecke, who testified “any application of ESPAM 2.1 must acknowledge and accept that *there is an inherent and unquantifiable level of uncertainty* in the predictions generated by the model.” Tr. Vol. XI, p. 2743-44 (emphasis added). Given these statements, the Director’s conclusion that a specific margin of error associated with the model cannot be quantified is supported by substantial evidence in the record.

Contrary to IGWA’s suggestion, the Director did explain how uncertainty is taken into account in the decision. The conclusion that a specific margin of error cannot be assigned to the model does not mean the Director did not adequately consider model uncertainty when delineating a trim line. Rather, as the Director noted in the Curtailment Order, “[u]ncertainty in

⁴ “Predictive uncertainty, as shown in Wylie (2012a), varies with the locations of stresses and responses and cannot be assigned a single numeric value.” Ex. 3230, p. 21.

the model justifies use of a trim line.” *Curtailment Order*, p. 40, ¶ 55 (R. Vol. XXI, p. 4227). In delineating a trim line using the Great Rift, the Director considered 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. *Id.* at 39, ¶ 49 (*Id.* at 4226). The Director also considered that, while there is generally higher predictive uncertainty on the eastern side of the Great Rift, impacts from several pumping locations evaluated on the eastern side of the Great Rift had negligible impacts on the spring cell evaluated in the Department’s predictive uncertainty analysis. *Id.* at 40, ¶ 55 (*Id.* at 4227). These considerations supported the Director’s delineation of a trim line using the Great Rift. The Director adequately considered model uncertainty when delineating a trim line.

d. IGWA’s suggested 10% trim line is not supported by the record.

IGWA suggests the Director should have applied a 10% trim line with respect to the model cell containing the Martin-Curren Tunnel because this is what was used in previous delivery calls. *Opening Brief* at 55. The Director rejected this argument because of a key difference in the way ESPAM 1.1 and ESPAM 2.1 are calibrated. *Order on Reconsideration*, p. 6 (R. Vol. XXII, p. 4464). ESPAM 1.1 was used to delineate trim lines for the previous Thousand Springs delivery calls. ESPAM 1.1 was only calibrated to calculate the benefits of curtailment to groups of springs tributary to a reach of the Snake River (commonly referred to as a “spring reach”). Former Director Karl Dreher applied a 10% trim line and limited the curtailment of ground water rights to areas in which at least 10% of the benefits of curtailment would accrue to a spring reach in which the senior’s point of diversion was located. Because a spring reach contains numerous springs that are not available to the calling party, significantly less than 10% of the curtailed use benefitted the calling party. The portion of the benefit

received by the calling party was estimated based on spring flow data for all springs in the reach. For example, as discussed in the Curtailment Order, in the Clear Springs Foods delivery call, the calling party was predicted to receive only 6.9% of the benefit to the spring reach. In the Blue Lakes delivery call, the calling party was predicted to receive only 20% of the benefit to the spring reach. In these delivery calls, a 10% trim line limited the area subject to curtailment to areas where at least 0.69% (6.9% of 10%) and 2% (20% of 10%), respectively, of the curtailed use was predicted to benefit the calling party. *Curtailment Order*, p. 38, ¶¶ 43, 45 (R. Vol. XXI, p. 4225).

ESPAM 2.1, the updated model used in the Rangen delivery call, was improved by calibration to more detailed spring flow data. Because of this improvement, the Department can predict the benefit to individual spring cells instead of the larger spring reaches. Because the model is now calibrated to specific springs cells instead of only spring reaches, a 10% trim line for a spring reach is not comparable to a 10% trim line for specific springs. To compare the two models, the more appropriate standard is to consider the benefits to the calling party. The trim line delineated by the Great Rift generally limits the area subject to curtailment to areas where at least 0.63% of the curtailed use benefits the calling party. Comparing the benefit to the calling party at the trim line in previous Thousand Springs area delivery calls (0.69% and 2%) and the benefit to Rangen at the eastern boundary of the Great Rift trim line (0.63%) establishes that the standard applied previously in the Clear Springs Foods and Blue Lakes delivery calls is similar to the standard used in this proceeding.

Moreover, if the Department were to return to the approach used in previous Thousand Springs delivery calls, it would apply a 10% trim line with respect to the Buhl to Thousand Springs reach, which is the calibrated spring reach in ESPA model version 2 containing the

Martin-Curren Tunnel and numerous other springs. A 10% trim line for the Buhl to Thousand Springs reach would be similar to the trim line delineated using the Great Rift. *Order on Reconsideration*, p. 7 (R. Vol. XXII, p. 4465). IGWA's argument that, because a 10% trim line with respect to the spring reach was used previously, a 10% trim line with respect to the model cell containing Curren Tunnel should be applied in this scenario, is like comparing apples to oranges. To correctly compare, the benefits to the calling party should be examined.

IGWA also suggests the Director is compelled to use a 10% trim line based upon prior court precedent. *Opening Brief* at 57. In support of this argument, IGWA cites to *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907); *Schodde v. Twin Falls Land Company*, 224 U.S. 107 (1912); *Clark v. Hansen*, 35 Idaho 449, 206 P. 808, 810 (1922); and *Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085, 1086 (1922).

In *Van Camp*, the senior appropriator dammed a creek so that the water would back up, raising the water table to subirrigate his lands. *Van Camp*, 13 Idaho at 208, 89 P. at 754. The *Van Camp* Court held that although Van Camp could divert water from the stream to fill his water right, he could not dam or impede the flow of the remaining water in order to cause a subirrigation of his meadows. *Id.* As discussed in *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90, the issue in *Van Camp* was whether a senior appropriator was protected in his means of diversion. In *Clear Springs*, IGWA argued that *Van Camp* could be read broadly to require the Director to reduce the amount of water a senior is entitled to under his water right. The *Clear Spring* Court rejected this argument, recognizing the limited holding of *Van Camp*: "The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion." *Id.* In *Clear Springs*, IGWA also cited *Schodde* as a defense in a delivery call proceeding. As with *Van Camp*, the Court recognized that the holding of

Schodde was limited to the reasonableness of the appropriator's means of diversion: "The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights." *Id.*

In *Clark*, the Court denied a senior's right to call for additional water finding a ninety percent conveyance loss to be "against public policy." *Clark*, 35 Idaho, 449, 206 Pac. at 810. In *Basinger*, the Court determined a conveyance loss of fifty percent was "unreasonable, excessive and against public policy" and explained "[a] water user is entitled to allowance for only a reasonable loss in conducting his water from the point of diversion to the place of use." *Basinger*, 36 Idaho 591, 211 P. at 1086. These cases are equally distinguishable as they do not relate to the application of trim line in a delivery call case but address conveyance loss through ditch systems.

IGWA's identification of "waste" as an issue arising out of the Curtailment Order is incorrect. The fact that a large portion of the water curtailed will not reach Rangen does not mean it is being wasted. Water not reaching Rangen becomes available to other senior water users in the Thousand Springs area. The water also benefits other senior water users with pending delivery calls upstream from the Thousand Springs area (such as the Surface Water Coalition call) because the benefits of curtailment of ground water rights propagate upstream as well as downstream. The real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to exercise priority against an aquifer. The use of the Great Rift as justification for a trim line strikes an appropriate balance between protection of priority of right and not allowing the senior to command the entirety of the resource.

IGWA also contrasts the futile call determination in the first Rangen delivery call in 2005 with the results of the most recent Rangen delivery call. *Opening Brief* at 59-62. IGWA suggests the “change in curtailment is the result of the Director adopting different trim lines.” *Id.* at 59. While Director Dreher determined in the first Rangen delivery call in 2005 that the call was futile, the change in result in this proceeding is not due to changes in the approach used to define the trim line as implied by IGWA, but rather data error. As discussed above, during development of ESPAM 2.0, the Department discovered spring discharge values that were used to estimate discharge for Thousand Springs and springs in the Thousand Springs to Malad spring reach for calibration of ESPAM 1.1 were inaccurate. These values were corrected in the calibration targets for ESPAM 2.0. These corrections resulted in a significant increase in the spring discharge targets in the Billingsley Creek area. Ex. 3203, p.32. The revised model showed that ground water pumping had a much larger impact on the Rangen spring cell than previously thought. Thus, IGWA is wrong in suggesting the trim line is the basis for the change in result.

C. THE CURTAILMENT ORDER COMPLIES WITH IDAHO CODE § 67-5248.

The Director may consider multiple factors in determining whether holders of water rights are suffering material injury and using water efficiently and without waste, including whether the rights could be met with the user’s existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices or by using alternate reasonable means or alternate points of diversion. IDAPA 37.03.11.042.01(g-h).

At hearing, IGWA argued Rangen’s use of water is unreasonable because Rangen is not recycling the water it has already beneficially used to raise more fish. Tr. Vol. VIII, pp. 1843,

1866. The Director considered whether Rangen should be required to construct a recirculation system prior to seeking curtailment of junior water right holders. The Director found:

Recycling water would require a pump-back system or reconfiguring the present system for water delivery. *Id.* Prior to filing its delivery call, Rangen considered constructing a pump-back system but ultimately rejected the idea. Courtney, Vol. I, p. 113; Courtney, Vol. II, pp. 400-404; Rangen Ex. 1203. Raceways require continuous replenishment with fresh water. Courtney, Vol. II, p. 401. Interruption of this flow would result in the loss of fish and likely a significant monetary loss. *Id.* A pump-back system would require redundant power sources and pumps to ensure that a loss of power or a pump failure would not deprive fish of water, thereby killing the fish. Courtney, Vol. I, p. 112; Courtney, Vol. II, p. 401. The cost of building the pump-back system, without the redundant power sources and pumps, was estimated to be \$116,000. Courtney, Vol. II, p. 403. The annual costs of operating the system run between \$22,000 and \$46,000. *Id.* Because of the significant costs to build the project, and other concerns about the issues of water quality and water temperature associated with a pump-back system, Rangen ultimately rejected the idea of a pump-back system. Courtney, Vol. I, p. 113.

Curtailment Order, p. 14, ¶ 64 (R. Vol. XXI, p. 4201). At the end of this finding, the Director stated “[t]he cost of building redundant systems along with annual operating costs makes a pump-back system cost prohibitive.” *Id.*

IGWA argues the Curtailment Order only contains the above findings of fact and does not contain any conclusion of law related to the to the recirculation issue. IGWA argues this violates the threshold required by Idaho Code § 67-5248 of a reasoned statement supporting the Director’s decision. *Opening Brief* at 63.

IGWA’s argument is both factually and legally incorrect. The Director set forth multiple conclusions of law related to the reasonableness of Rangen’s diversions: “The Director concludes Rangen’s water use is reasonable.” *Curtailment Order*, p.35, ¶ 30 (R. Vol. Xxi, p. 4222); “The Director concludes that Rangen employs ‘reasonable diversion and conveyance efficiency and consideration practices’ in diverting water from the Curren Tunnel.” *Id.* at 36, ¶ 34 (*Id.* at 4223); “Rangen is diverting and using water efficiently, without waste and in a manner consistent with the goal of reasonable use.” *Id.* at 41, ¶ 59 (*Id.* at 4228). These conclusions of

law are applicable to the issue of recirculation as the Director could not have concluded Rangen's water use is reasonable if he believed Rangen was required to recirculate water.

Furthermore, Idaho Code § 67-5248(1)(a) provides that an order must contain "[a] reasoned statement in support of the decision." The statements quoted above constitute reasoned statements in support of the decision as required by the statute. Contrary to IGWA's assertion, the Director appropriately exercised his discretion in considering whether Rangen should be required to install a recirculation system and correctly addressed that consideration in the Curtailment Order.

D. THE DIRECTOR DID NOT ERR BY PHASING IN MITIGATION

Using ESPAM 2.1, the Director determined the steady state modeled benefit of curtailment to the Curren Tunnel is 9.1 cfs. *Curtailment Order*, p. 41, ¶ 57 (R. Vol. XXI, p. 4228). The Curtailment Order recognizes holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id.* at 42 (*Id.* at 4229). The Curtailment Order explains that mitigation provided by direct flow to Rangen "may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year."⁵ *Id.*

IGWA argues the Director erred by "phasing in mitigation" as opposed to "phasing in curtailment" based on a mistaken interpretation of CM Rule 40.01.a. . . ." *Opening Brief* at 65. IGWA asserts the plain language of that rule only allows the Director to phase in curtailment.

⁵ While it was not required that the Director establish the standard for mitigation in the Curtailment Order, the Director included this information so the parties would understand his expectations.

Contrary to IGWA's assertion, the Director's decision to phase in mitigation is consistent with the plain language of CM Rule 40.01.a. That rule provides that, upon a finding by the Director that material injury is occurring, the Director must:

Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment."

IDAPA 37.03.11.040.01(a). The plain language of the rule requires the Director to regulate *diversion and use of water* in accordance with priorities of rights and grants the Director discretion to phase in that *regulation* over a five year period. The phasing in of mitigation is a form of regulation of diversion and use of water. In this case, the Director determined that adopting the approach advocated by IGWA would be "inequitable" and that, at a minimum, IGWA "should be required to provide the quantity of water that otherwise would have been supplied to Rangen through curtailment" through the first four years of a five year phase in period. *Order on Reconsideration*, p. 10 (R. Vol. XXII, p. 4468). The Director concluded that, "because the Director can only phase in curtailment over five years per Conjunctive Management Rule 20.04, the full benefit of 9.1 cfs must be supplied in the fifth year." *Id.* at 9 (*Id.* at 4467).

IGWA points to the way former Director Dreher phased in regulation and suggests Director Spackman is required to follow the same approach. *Opening Brief* at 65. While former Director Dreher utilized a different approach to phase in regulation, CM Rule 40 does not limit or prevent Director Spackman from taking a different approach. CM Rule 40 provides that mitigation "may, by order of the Director, be phased-in over not more than a five-year (5) period...." The use of the word "may" evidences that discretion rests with the Director on how

regulation may be phased in within the five-year period. *State v. Mosqueda*, 150 Idaho 830, 835, 252 P.3d 563, 568 (Ct. App. 2010) (“The word “may” is permissive and it denotes the right to exercise discretion”). Director Spackman’s approach to phasing in regulation in this case is consistent with the plain language of CM Rule 40.

IGWA also argues the Director erred by requiring IGWA to provide 9.1 cfs by the fifth year of phased-in mitigation because ESPAM 2.1 predicts only 7.1 cfs will accrue to the Current Tunnel after five years of full curtailment. *Opening Brief* at 65. As CM Rule 40 states, the Director’s discretion to phase in regulation of diversion and use of water to lessen economic impact of immediate and full curtailment is limited to a period of five years. Consistent with the plain language of that rule, IGWA must provide the full benefit of 9.1 cfs to Rangen in the fifth year. IGWA’s argument that the Director cannot require the full 9.1 cfs at the end of the phase in period is contrary to CM Rule 40.


CONCLUSION

The Director did not err by determining the source for Rangen’s water rights is surface water, not ground water. The Director did not err in his delineation and application of a trim line using the Great Rift. The Director appropriately exercised his discretion in considering whether Rangen should be required to install a recirculation system and correctly addressed that consideration in the Curtailment Order. The Director’s interpretation that CM Rule 40 allows phasing in of mitigation over a five period is consistent with the plain language of the rule. The Director’s findings, conclusions, and decisions set forth in the Curtailment Order should be affirmed because there are in accordance with constitutional or statutory provisions; within the statutory authority of the agency; made upon lawful procedure; supported by substantial evidence on the record as a whole; and not arbitrary, capricious, or an abuse of discretion.

DATED this ____ day of August, 2014.

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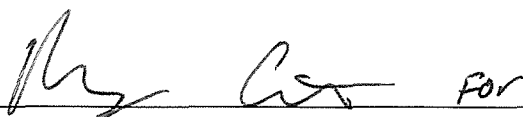
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