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 POCATELLO,

Intervenors.

Case No. CV-2014-1338

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

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

Judicial Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF CASE

A. NATURE OF THE CASE

This case is a judicial review proceeding in which Rangen, Inc. ("Rangen") has appealed three orders issued by the Director ("Director") of the Idaho Department of Water Resources ("Department") responding to Rangen's delivery call pursuant to the Conjunctive Management Rules ("CM Rules"). The orders appealed are: 1) the April 22, 2013, *Order Granting in Part and Denying in Part Rangen, Inc.'s Motion For Partial Summary Judgment Re: Source* ("Order on Summary Judgment"); 2) the January 29, 2014, *Final Order Regarding Rangen, Inc.'s Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"); and 3) the March 4, 2014, *Order on Reconsideration.*

This appeal presents six issues. In the delivery call proceeding, the Director interpreted the Snake River Basin Adjudication ("SRBA") partial decrees for Rangen to identify Rangen's authorized point of diversion and source and to quantify Rangen's authorized entitlement. The Director held that "[t]he point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW" and rejected Rangen's argument that it can divert water outside its decreed point of diversion. *Order on Summary Judgment*, p. 16, ¶ 11 (R. Vol. XV, p. 3176). Based on the plain language of the partial decrees, the Director also held that the decreed source for Rangen's water rights is the Martin-Curren Tunnel, not the entire spring complex that forms the headwaters of Billingsley Creek. *Curtailment Order,* p. 32, ¶ 15 (R. Vol. XXI, p. 4219). The first three issues raised by Rangen challenge these holdings. The next two issues raised by Rangen focus on whether the record supports the Director's adoption of a regression analysis and the Director's conclusion that junior ground water users are

using water efficiently and without waste. The final issue challenges the Director's legal authority to apply a trim line in a delivery call proceeding.

B. STATEMENT OF FACTS

I. History and Layout of the Rangen Facility

Rangen owns and operates a fish research and propagation facility ("Rangen Facility") in the Thousands Springs area near Hagerman, Idaho. Tr. Vol. I, p. 55. Below is a site map of the Rangen Facility reproduced from Exhibit 2286:

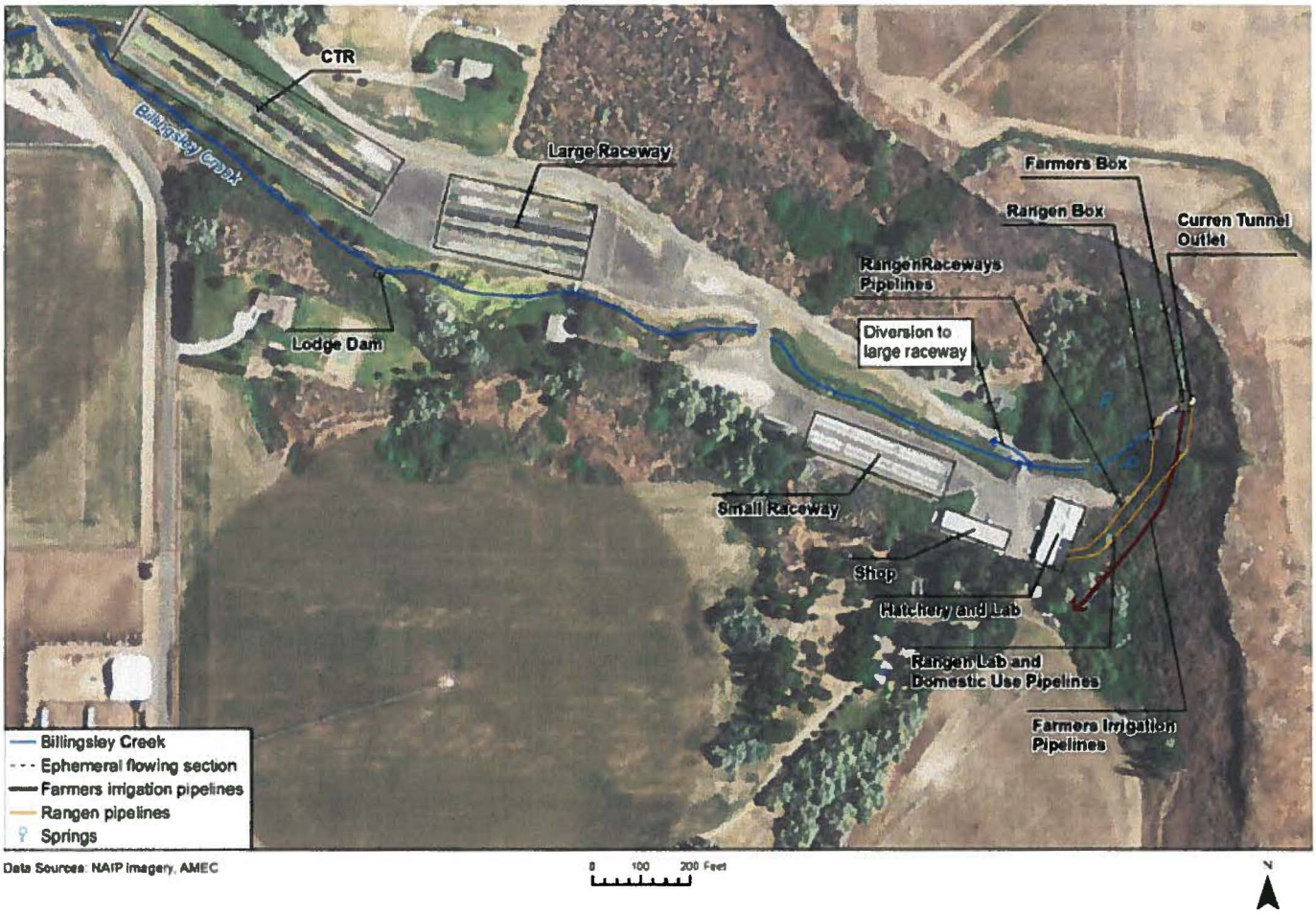

Figure 3.3: Rangen Site Map

The facility starts with a series of concrete channels for fish rearing, now commonly referred to as the "small raceways" and "large raceways," and a hatchery for incubation of fish

eggs. Ex. 1014; Tr. Vol. I, pp. 60, 66. The facility was expanded in 1976 when the raceways now referred to as the "CTR raceways" were constructed. Tr. Vol. I, p. 61. In approximately 1992, the greenhouse was added to the back of the hatch house to expand Rangen's hatching and research capabilities. *Id.* Other buildings were added over time, but their addition is not relevant to this proceeding.

II. Source of Water and Diversions

Immediately east of the Rangen Facility, water emanates from numerous springs on the talus slopes just below the canyon rim. Water also emanates from what is called the "Martin-Curren Tunnel" or "Curren Tunnel." The tunnel is a large, excavated conduit constructed high on the canyon rim and extends approximately 300 feet into the canyon wall. Tr. Vol. IV, p. 911. The first fifty feet of the tunnel is supported by a corrugated metal pipe approximately six feet in diameter. Tr. Vol. IX, p. 2039. The remaining 250 feet of the excavation is an open tunnel unsupported by any structure. *Id.* The main tunnel bifurcates into two tunnels approximately 150-200 feet into the tunnel from its mouth. *Id.*; Ex. 2328. The record does not establish when the Current Tunnel was built, but it predates the construction of the Rangen Facility.

A concrete collection box located near the mouth of the Curren Tunnel collects water for delivery to Rangen and holders of early priority irrigation water rights via pipelines. Ex. 3651. The concrete box is commonly referred to as the "Farmers' Box." Since 2002, the water historically diverted by the senior-priority irrigation water right holders has been replaced with surface water delivered by the Sandy Pipeline. Tr. Vol. VI, p. 1345; Tr. Vol. IX, p. 2081.

Further down the talus slope is a second concrete water collection box with an open top, commonly referred to as the "Rangen Box." Rangen transports the water from the Farmers' box through two plastic pipes down to the Rangen Box. Tr. Vol. VII, p. 1661. Water is then

delivered from the Rangen Box via a twelve-inch diameter steel pipe to the small raceways. *Id.* at 1584-85. The water diverted by Rangen can then be routed from the small raceways down through the large and CTR raceways. *Id.* Rangen Exhibit 1292 is a picture showing the two collection boxes and the distribution piping. Water can also be spilled out the side of the Rangen Box and returned to the talus slope.

In the early 1980's, Rangen built a six-inch white PVC pipeline to divert water from inside the Curren Tunnel and deliver the water to the hatch house and greenhouse buildings. The water is used in the hatch house and/or greenhouse and then can be discharged either back into Billingsley Creek or directly into the small raceways and used in the large and CTR raceways. Tr. Vol. VI, p. 1336.

The main diversion for the large raceways is located downstream from the talus slope, where the defined channel for Billingsley Creek begins. *Id.* This Rangen diversion is commonly referred to as the "Large Raceway Diversion" or "Bridge Diversion." The Bridge Diversion collects and diverts spring flows that arise on the talus slope and water spilled from the Rangen Box. *Id.*

III. Rangen Water Rights

Rangen holds five water rights for the Rangen Facility. The five water rights have been decreed through the SRBA. Rangen's decreed water rights are summarized as follows:

ELEMENTS OF RANGEN, INC.'S WATER RIGHTS					
WATER RIGHT NO.:	36-00134B	36-00135A	36-15501	36-02551	36-07694
PRIORITY DATE:	Oct. 9, 1884	Apr. 1, 1908	July 1, 1957	July 13, 1962	Apr. 12, 1977
SOURCE:	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek	Martin-Curren Tunnel Tributary: Billingsley Creek
QUANTITY:	0.09 cfs[3]	0.05 cfs	1.46 cfs	48.54 cfs	26.0 cfs
DIVERSION POINT:	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW	T07S R14E S32 SESWNW
PURPOSE AND PERIOD OF USE:	Domestic (0.07 cfs) 01-01 to 12-31 Irrigation (0.09 cfs) 03-15 to 11-15	Domestic (0.05 cfs) 01-01 to 12-31 Irrigation (0.05 cfs) 03-15 to 11-15	Fish Propagation (1.46 cfs) 01-01 to 12-31	Domestic (0.10 cfs) 01-01 to 12-31 Fish Propagation (48.54 cfs) 01-01 to 12-31	Fish Propagation (26.0 cfs) 01-01 to 12-31
PLACE OF USE:	Domestic T07S R14E S31 SENE S32 SWNW Irrigation T07S R14E S31 SWNE 2 SENE 4 S32 SWNW1 (7 acres total)	Domestic T07S R14E S31 SENE S32 SWNW Irrigation T07S R14E S31 SWNE 2 SENE 4 S32 SWNW 1	Fish Propagation T07S R14 E S31 SENE S32 SWNW	Domestic T07S R14E S31 SENE S32 SWNW Fish Propagation T07S R14E S31 SENE S32 SWNW	Fish Propagation T07S R14E S31 SENE S32 SWNW

Water right nos. 36-00134B and 36-00135A are for irrigation and domestic purposes. They are not for fish propagation. Water right nos. 36-15501, 36-02551, and 36-07694 authorize a total, cumulative diversion of 76.0 cfs for fish propagation. The priority dates associated with the three fish propagation water rights are July 1, 1957, July 13, 1962, and April 12, 1977, respectively.

C. PROCEDURAL BACKGROUND

On December 13, 2011, Rangen filed a *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, and is being materially injured by junior-priority ground water pumping in the areas encompassed by Enhanced Snake Plain Aquifer Model ("ESPAM") version 2.0. *Petition,* pp. 3-4 (R. Vol. I, pp. 4-5). Rangen did not allege injury to water right nos. 36-00134B, 36-00135A, and 36-15501. *Id.* The Petition requested the Director administer and distribute water in the areas encompassed by 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).

On January 4, 2012, the Idaho Ground Water Appropriators, Inc. ("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-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. The source identified on the SRBA partial decrees for water right nos. 36-02551 and 36-07694 is the "Martin-Curren Tunnel," commonly referred to as the Curren Tunnel. Ex. 1026; Ex. 1028. The point of diversion for both water rights is described to the ten acre tract: SESWNW T07S R14E S32. *Id.* In its Motion, Rangen argued that it "is not limited only to water from the mouth of the Martin-Curren Tunnel itself." *Motion for Partial Summary Judgment Re: Source*, p. 2 (R. Vol. XIII, p. 2570). Rangen also argued it had the authority to divert water from the entire complex that supplies the Rangen Facility, even those springs that are located outside its ten acre tract point of diversion. *Id.* at 17 (*Id.* at 2585).

The Director first examined whether Rangen was entitled to divert water from the spring complex outside the ten acre tract point of diversion. On this issue, the Director concluded Rangen could not call for water from those springs located outside the decreed point of diversion:

> The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right) (emphasis added); 37.03.11.010.25 (defining "water right" to mean "[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree . . . .")(emphasis added).

Order on Summary Judgment, p. 6, ¶ 11 (R. Vol. XV, p. 3176). As to the question of whether Rangen was limited to diverting water only from the Curren Tunnel, the Director

denied summary judgment, concluding there are questions of material fact related to how water is diverted by Rangen from the Curren Tunnel. *Id.* at 6-7 (*Id.* at 3176-77).

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.[1]

On January 29, 2014, the Director issued the Curtailment Order. The Director first addressed the issue left unresolved by Rangen's motion for summary judgment. The Director concluded his material injury determination could only focus on water diverted by Rangen from the Curren Tunnel because the source element on Rangen's partial decrees is unambiguously described as "Martin-Curren Tunnel." *Curtailment Order,* pp. 32-33 (R. Vol. XXI, pp. 4219-20).

In determining flows from the Curren Tunnel, the Director relied on historic water flows. Because Rangen used a nonstandard measuring device with an inaccurate rating curve to determine flow rates, Rangen's reported historic flows were lower than actual flows. *Id.* at 11, ¶ 52 (*Id.* at 4198). As a result, the Director used a regression analysis that best reflected the relationship between Curren Tunnel discharge and the corrected historic measurement of total spring complex discharge. *Id.* at 23, ¶ 102 (*Id.* at 4210). The Director concluded that, notwithstanding the measurement error, the declines in flows at Rangen "have been dramatic" and that Rangen is being materially injured by ground water pumping. *Id.* at 33, 36 (*Id.* at 4220, 4223).

As to ESPAM 2.1, the Director determined that:

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[1] ESPAM 2.0 was updated shortly before the hearing commenced. The latest version is referred to as ESPAM 2.1.

> 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 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 that holders of junior-priority ground water rights could 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." *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 the appellant Rangen are as follows:

1. Whether the term "Martin-Curren Tunnel" is ambiguous when viewed in light of Rangen's licenses, historical beneficial use, and prior Department determinations.

2. Whether Rangen can use the Bridge Dam since it is part of a diversion structure that lies mostly within the ten acre tract described in the partial decrees.

3. Whether the doctrine of quasi-estoppel precludes the Director from ruling that Rangen cannot divert any spring water that does not emanate from the mouth of the Martin-Curren Tunnel based on the Department's prior findings and conduct.

4. Whether there is substantial evidence to support the Director's adoption of Sullivan's 63/37 regression analysis.

5. Whether there is substantial evidence to support the Director's determination that junior groundwater users are using water efficiently and without waste.

6. Whether the Director's application of the Great Rift trim line is arbitrary.

The Department's formulation of the first three issues is as follows:

1. Whether the description of the source as "Martin-Curren Tunnel" on the face of the SRBA partial decrees for Rangen's water rights is ambiguous.

2. Whether Rangen is entitled to divert water at the Bridge Diversion even though the diversion is located outside the ten acre tract point of diversion described in its SRBA partial decrees.

3. Whether the doctrine of quasi-estoppel precludes the Director from administering water rights consistent with the plain language of the SRBA partial decrees.

The Department agrees with Rangen's formulation of the last three issues.

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 PARTIAL DECREES UNAMBIGUOUSLY LIMIT RANGEN TO WATER ARISING FROM THE MARTIN-CURREN TUNNEL

In responding to Rangen's delivery call, the Director examined the provisions of the SRBA partial decrees for the Rangen Facility. The Director concluded the plain language of the source element of the decrees only allows Rangen to divert water from the "Martin-Curren Tunnel." *Curtailment Order,* p. 32, ¶ 15 (R. Vol. XXI, pp. 4219). The Director noted that, pursuant to Idaho Code § 42-1420, "[a] decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right" and that "[a]dministration must comport with the unambiguous terms of the SRBA decrees." *Id.* "Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel." *Id.*

The Director's analysis is the correct one. When interpreting a decree, the starting point is the face of the decree. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986)("We turn to the decree's relevant provisions to determine whether the decree is ambiguous."). Only if the language of the decree is ambiguous, does the entity interpreting the decree look outside the four corners of the decree. *See Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010)("The proper analysis is to look first *only* to the four corners of the divorce decree. If the language of the decree clearly and unambiguously holds the property settlement agreement is not merged, the inquiry is at an end."). Here, the identifier "Martin-Curren Tunnel" is not ambiguous. The name refers to a specific and known structure. A decree is ambiguous if it is "reasonably subject to conflicting interpretation." *DeLancey*, 110 Idaho at 65, 714 P.2d at 34. The identifier "Martin-Curren Tunnel" is specific and is not doubtful or subject to a conflicting interpretation.

Rangen suggest the phrase "Martin-Curren Tunnel" means all "the spring water that forms the headwaters of Billingsley Creek." *Rangen Brief* at 9. This argument fails as the plain language of the partial decrees does not in any way invoke an interpretation that the source is a "spring" or "Billingsley Creek." "[A]mbiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous." *State v. Browning*, 123 Idaho 748, 750, 852 P.2d 500, 502 (1993). While *Browning* involved the interpretation of a statute, the logic is reasonably applicable here; ambiguity is not established just because Rangen claims there is another possible interpretation. The Director's interpretation is the plain and logical interpretation and Rangen is attempting to create ambiguity where none exists. A reasonable mind would not conclude that the reference to the "Martin-Curren Tunnel" means all the spring water that forms the headwaters of Billingsley Creek.

Rangen argues there is a latent ambiguity in the decree and seeks to use evidence outside the four corners of the partial decrees. However, as discussed above, the test for interpreting decrees starts with the face of the decree, not with evidence outside the decree. Rangen skips this critical first step. If there is no ambiguity, no further consideration is necessary. *See Borley*, 149 Idaho at 177, 233 P.3d at 108.

If this Court concludes the face of the decrees are ambiguous, the interpretation becomes a question of fact. *DeLancey*, 110 Idaho at 65, 714 P.2d at 34. There is substantial evidence in the record supporting the Director's conclusion that "Martin-Curren Tunnel" describes the tunnel itself, and is not a name in local common usage for the entire Rangen spring complex as suggested by Rangen. In his testimony, the watermaster for Water District 36A, Frank Erwin, distinguished between the Martin-Curren Tunnel and the springs that feed Billingsley Creek. Tr.

Vol. I, pp. 232, 237-238. Erwin has lived in Hagerman all his life and has been watermaster for Water District 36A for 16 years. *Id.* at 230. His distinction between the tunnel and the spring complex is significant because he is in a position to know whether the entire spring complex is commonly referred to as the Martin-Curren Tunnel.

In addition to Erwin's testimony, the record is replete with references and exhibits specifically identifying the Martin-Curren Tunnel as a unique structure at a specific location, thereby distinguishing between the spring complex and the Martin-Curren Tunnel itself. Ex. 1290; Ex. 1446A, B and C; Ex. 2408A and B; Ex 2286, Ex. 2328 (diagram of Martin-Curren Tunnel); Ex. 3277; Ex. 3278; Ex. 3648; Ex. 3651. Moreover, all measurements taken by the Department that identify the Martin-Curren Tunnel as the source refer only to water measured in the tunnel itself, not the spring complex. The Director stated that "[a]nytime the tunnel was mentioned in the [delivery call] proceeding, there was no confusion by the witnesses between the Martin-Curren Tunnel and the rest of the spring complex." *Order on Reconsideration*, p. 2 (R. Vol. XXII, p. 4460). When the topic was the Martin-Curren Tunnel, the witnesses would testify about the physical structure itself, not the spring complex as a whole.

While a former Rangen employee, Lynn Babington, testified regarding this issue, his testimony is mixed. Counsel for Rangen asked, "What did you understand was the Curren Tunnel?" Babington's initial response was, "The Curren Tunnel was the – up on the hillside, a tunnel there." Tr. Vol. I, p. 190. He then stated that he considered all springs arising as the source for the hatchery and that he considered the name Martin-Curren Tunnel as referring to all the springs. *Id.* Babington's testimony did not persuade the Director that the Martin-Curren Tunnel is a name of local common usage for all the springs in the Rangen complex. *Order on Reconsideration*, p. 2 (R. Vol. XXII, p. 4460).

Rangen points to a note associated with the water right backfile and the Department's adjudication rules to argue that the decrees' reference to "Martin-Curren Tunnel" describes something more than the tunnel itself. *Rangen Brief* at 12-13. However, the existence of conflicting evidence is not grounds for overturning the Director's decision. If the findings of fact are based on substantial evidence in the record, even if the evidence is conflicting, the Director's findings will not be overturned on appeal. *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

Rangen is not without a remedy in this situation. As this the SRBA District Court has pointed out, "Rangen has not moved to set aside the Partial Decrees for the water rights it fears the Director may interpret unfavorably." *Order Denying Motion to File Late Claim*, p. 8 (a copy of which is attached as Appendix A to Rangen's Brief). If Rangen believes the source of its water rights should be springs and not the Martin-Curren Tunnel, its remedy is to seek to have the SRBA set aside and amend its partial decrees.

B. THE PARTIAL DECREES DO NOT AUTHORIZE RANGEN TO DIVERT WATER AT THE BRIDGE DIVERSION

The Director concluded the point of diversion element decreed by the SRBA District Court unambiguously limits diversions under Rangen's water right nos. 36-2551 and 36-7694 to the following ten-acre tract: T07S R14E S32 SESWNW. *Curtailment Order,* p. 32, ¶ 15 (R. Vol. XXI, p. 4219).

The purple triangle in the following picture depicts the location of the Bridge Diversion in relation to the decreed ten acre tract point of diversion:

Attached to *Order on Summary Judgment* (R. Vol. XV, p. 3180). The yellow dot represents the Curren Tunnel outlet and the red square represents the lower collection box. *Id.* Rangen admits the Bridge Diversion lies outside the ten acre tract described in the partial decrees. *Rangen Brief* at 19. However, Rangen seeks to evade the plain language of the decrees by arguing the Bridge Diversion, Farmers Box, Rangen Box *and* the talus slope all constitute one diversion structure and thus one legal point of diversion. *Id.* at 21. Rangen argues that this single diversion structure "straddles two different quarter/quarter/quarter sections that sit next to each other." *Id.* Rangen suggests it can divert water at the Bridge Diversion because this so-called single diversion structure "lies *mostly* within the 10 acre tract described in the Partial Decrees." *Id.* at

20 (emphasis added). This argument fails as neither the law nor the facts support Rangen's novel theory.

Rangen fails to articulate any legal proposition supporting its argument that the Bridge Diversion, Farmers Box, Rangen Box and talus slope constitute one diversion structure. This is likely because its argument is plainly contrary to law. Idaho water law generally requires an actual physical diversion of water to constitute a valid point of diversion. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). The only recognized exception to this rule is for instream beneficial uses of water. *Id.* Here, Rangen's use is not instream. Rangen is diverting water and transporting it to the Rangen Facility for fish propagation purposes. Rangen's argument that the talus slope itself can be a point of diversion for Rangen's fish propagation water rights is contrary to the well established proposition that a physical diversion is necessary to constitute a valid point of diversion for an out-of-stream use of water. Moreover, the Bridge Diversion collects and diverts water that comes from throughout the talus slope. Ex. 1029, p. 2; Ex. 1446C. Thus, the Bridge Diversion constitutes a unique diversion point for the majority of the water that comes from the talus slope and forms the headwaters of Billingsley Creek, and must be identified on the partial decrees to constitute a valid diversion point.

It appears Rangen is arguing that, because it spills water past the Rangen Box, it can then divert all the water that collects at the Bridge Diversion. While Idaho Code § 42-105 authorizes a water user to use a natural waterway to transport previously diverted water, such diversions are subject to measurement and reporting requirements and the water user is entitled to redivert only the amount of water that was injected into the system. The Bridge Diversion collects and diverts water that comes from throughout the talus slope, not just water that spills past the Rangen Box. To be able to divert the water spilling past the Rangen Box, Rangen is required to have a

mechanism to measure and divert only water that spills past the Rangen Box. In the absence of such a measurement and diversion system, Rangen has no legal right to divert water at the Bridge Diversion.

The record in this case also establishes that the upper concrete boxes are not physically connected to the Bridge Diversion. Water emanates from numerous springs on the talus slopes above the Rangen Facility. *Curtailment Order,* p. 4, ¶ 16 (R. Vol. XXI, p. 4191). Water also emanates from the Curren Tunnel, located on the talus slopes above the Rangen Facility. *Id.* The Farmers' Box, a concrete box located near the mouth of the Curren Tunnel, collects water from the Curren Tunnel for delivery to Rangen and holders of early priority irrigation water rights via pipelines. Ex. 3651. Further down the talus slope is the second concrete box known as the Rangen Box. Rangen transports the water from the Farmers' Box through two plastic pipes down to the Rangen Box. Tr. Vol. VII, p. 1661. Water is then delivered to the Rangen Facility from the Rangen Box via a steel pipe. *Id.* The water diverted by Rangen can then be routed from the small raceways down through the large and CTR raceways. *Id.* Rangen Exhibit 1292 is a picture showing the two concrete boxes and the distribution piping. Water can also be spilled out the side of the Rangen Box and returned to the talus slope. Thus, the Bridge Diversion is a separate and distinct diversion structure and is not physically connected to the Farmers' Box or the Rangen Box.

Rangen argues that it has historically relied upon and diverted water at the Bridge Diversion. Regardless of whether this is true, the Director is bound by the plain language of Rangen's partial decrees. *Curtailment Order,* p. 4, ¶ 16 (R. Vol. XXI, p. 4219). As the Idaho Supreme Court recently stated, "the Director's duty to administer water according to technical expertise is governed by water right decrees." *A&B Irrigation Dist. v. State of Idaho*, Docket

No. 40974-40975 (Aug. 4, 2014). A partial decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Rangen has no right to seek administration for a diversion outside its authorized decreed point of diversion. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right"); 37.03.11.010.25 ("defining "water right" to mean "[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by decree . . . ."). Neither the Director nor this Court can recognize a point of diversion where one is not decreed. Because the SRBA decrees are clear, Rangen is restricted to diverting water from within the decreed point of diversion for water right nos. 36-2551 and 36-7694.

Rangen cites to a previous version of the CM Rules, 37.03.01.060.05.d, which provides that the location of the point of diversion should be described "to the nearest ten (10) acre tract (quarter-quarter-quarter section) if that description is reasonably available." Rangen appears to be arguing that, because the Bridge Diversion is in the ten-acre tract *nearest* to SESWNW, then Rangen can use it as a point of diversion. There is no legal basis for this argument. The reason for describing a point of diversion to the ten-acre tract is to provide more specificity of the location of the point of diversion, not create more ambiguity. If Rangen's interpretation were adopted, suddenly the ten-acre tract description becomes much larger as all neighboring ten-acre tracts become potential locations for points of diversion. This is not an interpretation ever adopted by the Department and Rangen's suggestion to the contrary is incorrect.

Rangen also argues the Director ignored a water source analysis conducted by Brockway. Rangen asserts that, even if its other arguments are rejected, the Court should review Brockway's

analysis and interpret Rangen's partial decrees to allow diversion of 97% of spring water that flows into the hatchery. *Rangen Brief* at 28-30.

Rangen is incorrect in suggesting the Director failed to consider Brockway's analysis. The Director considered Brockway's analysis but rejected it because it rested upon a faulty premise. Brockway argued that Rangen is entitled to 97% of the spring water that flows into the hatchery because the springs that arise on the talus slope in the decreed ten acre tract all constitute valid points of diversion. As discussed above, without a physical diversion, the springs themselves do not constitute valid points of diversion for out-of-stream uses. In the Curtailment Order, the Director stated:

> 15. Dr. Charles Brockway ('Dr. Brockway') testified that Rangen is entitled to divert water at the Bridge Diversion (which is located outside the SESWNW) because Rangen is legally entitled to all the water that emanates from springs in the talus slope in the SESWNW. Brockway, Vol. V, p. 1074-1075. When questioned about how Rangen can legally divert water at a point not listed as a point of diversion in its SRBA decree, Dr. Brockway stated that springs arising in the SESWNW constitute a legal point of diversion. *Id.* p. 1075-1076. In other words, Dr. Brockway argues that a physical diversion structure at the springs is not necessary to declare the spring water appropriated, and that a spring itself, without any sort of diversion structure, constitutes a diversion of water.
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> 16. First, Dr. Brockway's argument ignores the fact that the source listed on the water rights is the Curren Tunnel. Setting aside that impediment for discussion purposes, Dr. Brockway's suggestion that a spring itself constitutes a point of diversion is contrary to Idaho water law. Idaho water law generally requires an actual physical diversion and beneficial use for the existence of a valid water right. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). The only recognized exception to this rule is for instream beneficial uses of water. *Id.* Taken to its logical conclusion, Dr. Brockway's argument means that any water user could claim as his point of diversion the highest headwater of the state and then argue for protection up to the water source. This troublesome outcome underscores the problem of Dr. Brockway's argument and diminishes the credibility of his testimony.
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> 17. Because Rangen's decreed source and point of diversion limit Rangen to only water discharging from the Curren Tunnel and diverted in the 10 acre tract, the evaluation of material injury must consider this limitation. The Director must determine whether Rangen's ability to divert water that discharges from the

> Curren Tunnel and is diverted in the 10-acre tract has diminished sufficiently that Rangen has been materially injured.

Curtailment Order, p. 32 (R. Vol. XXI, p. 4219). Accordingly, this Court should reject Rangen's argument as it is without a legal basis.

Furthermore, as discussed in Section A *supra*, Rangen has a plain remedy at law in this situation. If Rangen desires to use the Bridge Diversion as a valid point of diversion, its remedy is to seek to have the SRBA set aside and amend its partial decrees.

C. THE DOCTRINE OF QUASI-ESTOPPEL DOES NOT APPLY TO THE DIRECTOR'S EXERCISE OF HIS DUTY TO DISTRIBUTE WATER

Rangen argues that the doctrine of quasi-estoppel should be applied to preclude the Director from interpreting the SRBA partial decrees to limit Rangen from diverting from the entire spring complex. *Rangen Brief* at 32. Estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity. *Naranjo v. Idaho Dep't of Correction*, 151 Idaho 916, 919, 265 P.3d 529, 532 (Ct. App. 2011); *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 727, 52 P.3d 863, 872 (2002). Only when the government is not acting in a proprietary function may estoppel be invoked and then it must be invoked with caution and only in exceptional cases. *Naranjo*, 151 Idaho at 919, 265 P.3d at 532. Here, the Director is acting in a governmental capacity pursuant to his statutory obligation under Idaho Code § 42-602 to distribute water in water districts in accordance with the prior appropriation doctrine. The Director is statutorily obligated to distribute water consistent with the SRBA partial decrees issued by the SRBA District Court. Idaho Code §§ 42-607, 42-1420. Estoppel is not appropriate when it would serve to prevent a governmental entity from undertaking its statutorily obligated actions.

Rangen suggests the rule that estoppel may not ordinarily be invoked against governmental entities applies only to equitable estoppel and not quasi-estoppel. *Rangen Brief* at 31-32. This is incorrect. Idaho courts have applied this rule in cases involving quasi-estoppel. Indeed, both *Naranjo* and *Floyd* cited above involved quasi-estoppel.

Even if this Court were to conclude that quasi-estoppel may be invoked against a governmental entity, the elements of quasi-estoppel are not met in this circumstance. The doctrine of quasi-estoppel applies when it would be unconscionable to allow a party to assert a right that is inconsistent with a prior position. *Willig v. State, Dep't of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). First, this test is not met here because the Department is not "asserting a right" in this proceeding, but is interpreting the SRBA partial decrees as required by Idaho law. Second, prior to December 2012, the Department had not been faced with a direct challenge to the source of water for Rangen's water rights. When faced with the request to review partial decrees entered in the SRBA in this delivery call proceeding, the Department determined the decrees unequivocally identify the source as the Martin-Curren Tunnel and list the point of diversion as T07S R14E S32 SESWNW. Rangen suggests it would be unconscionable for the Department to now interpret the SRBA partial decrees this way, given its long history of diverting water at the Bridge Diversion. Rangen points to the Department's visits to the site over the years and suggests the Department had an obligation to inform Rangen that its use of water was improper. Again, a decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. While Rangen points to this past history, it is not unconscionable for the Director to interpret the decrees consistent with their plain reading and consistent with his statutory duty.

D. CLEAR AND CONVINCING EVIDENCE SUPPORTS ADOPTION OF SULLIVAN'S REGRESSION ANALYSIS

ESPAM 2.1 predicts the effect of ground water pumping on the aggregate flows from springs located within the Rangen model cell, including but not limited to the Curren Tunnel. ESPAM 2.1 cannot distinguish the water flowing from the Curren Tunnel from water discharging from other springs within the model cell. Because Rangen's water rights only authorize diversion of water from the Curren Tunnel, the Director had to develop a methodology for determining how much of the total modeled spring complex discharge would accrue to the Curren Tunnel.

1. Methods Used to Calculate Curren Tunnel and Total Spring Complex Discharge.

The Department has measured discharge from the mouth of Curren Tunnel since 1993. Ex. 3650, p. 5. The measured discharge does not include flow in the six-inch PVC pipe. Rangen submitted flow data for the six-inch PVC pipe to the Department beginning in 1996. *Id.* The sum of the measured tunnel discharge and flow in the six-inch PVC pipe represents the flow available from the Curren Tunnel source.

Historically, the total spring complex discharge is the sum of the flow in Rangen's CTR raceways, Rangen's lodge pond dam, and irrigation diversions from the Farmers' Box. Rangen has measured the flows through the Rangen Facility since 1966. Tr. Vol. III, p. 617; Ex. 1075. Since 1995, Rangen has been required by the Department to measure the flows through the Rangen Facility and report the measurements annually to the watermaster. Ex. 3203, p. 13. Rangen measures the water that flows through the Rangen Facility at two different locations, the CTR raceways and the lodge pond dam. Tr. Vol. I, p. 269; Ex. 1074. Rangen's measurements at the CTR raceways and the lodge pond dam, summed together, quantify all inflow that is tributary to Billingsley Creek upstream from those measurement locations, except for diversions to the

senior irrigation rights from the Farmers' Box. Tr. Vol. I, p. 142. Irrigation return flows sporadically discharge into Billingsley Creek above the lodge dam measurement point. Rangen is not able to beneficially use these irrigation return flows, but the irrigation return flows are included in Rangen's measurements. *Id.*, pp. 142-43. Rangen measures the flows weekly. *Id.*, p. 270. The weekly measurements from the CTR raceways and the lodge pond dam are summed for reporting purposes. Tr. Vol. I. p. 281; Ex. 1094.

To determine the flow of water in the CTR raceways, Rangen employees measure the depth of water (head) flowing over wooden check board dams in each raceway using a ruler placed on top of the board. Tr. Vol. I, pp. 270-73. This method of measuring head with a ruler on top of the board is commonly referred to as "sticking the weir." Tr. Vol. XI, p. 1387. Rangen employees clean the upper board in each multi-board dam prior to measuring the head to prevent error from moss accumulation. Tr. Vol. I, p. 249. Rangen also inspects the upper dam board to ensure that the board is centered and flush. Tr. Vol. I, pp. 273-74. Rangen uses the same procedure to measure head at the lodge pond dam.

Wooden check board dams are considered nonstandard measurement devices and are not listed as an acceptable measuring device in the Department's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices*. Tr. Vol. III, p. 557; Ex. 3203, p. 59; Tr. Vol. V, pp. 1134-35. Roughness, rounding, and sagging in wooden check boards can cause measurement error. Tr. Vol. VI, pp. 1408-09.

Although wooden check board dams are considered nonstandard measuring devices, the Department historically accepted measurements using these structures because the Department's standards allow an accuracy of +/- 10% for open channel measuring devices when compared to measurements using standard portable measuring devices. The Department's experience is that

flows rates derived by treating wooden check board dams as weirs generally provide an accuracy of +/- 10%. Tr. Vol. III, p. 567; Ex. 3203, p. 13; Tr. Vol. V, pp. 1139, 1140, 1168.

The Francis equation for a standard suppressed rectangular weir with full bottom contraction is $Q=CLH^{3/2}$ where the weir coefficient "C" is 3.33, and:

Q=flow rate in cubic feet per second
L=length of the weir crest in feet
H=head of water over the weir crest in feet

Each weir type has a unique weir coefficient and relates the measurement of the head on the weir to the flow rate over the weir. Tr. Vol. IV, p. 935. The wooden check board dam employed by Rangen is considered a suppressed weir with a nonstandard weir blade. *Id.*

After measuring the head over the wooden check board dams, Rangen employees consult a rating table and identify the flow value corresponding to the measured head for each raceway. By referring to a rating table, a water user can determine flow rates based solely upon the head of water over the weir without calculating the flow with a weir equation. The values in a rating table should be derived either from a weir equation or from direct measurements of discharge and head at numerous flow rates.

Historically, Rangen has used at least two different rating tables. It is not clear how Rangen's rating tables were derived. The accuracy of Rangen's original and revised rating tables was an issue discussed extensively at the hearing. The parties, including Rangen, agreed there are problems with the original and revised rating tables. *Curtailment Order,* p. 9, ¶ 42 (R. Vol. XXI, p. 4196).

If compared to the Francis equation, the weir coefficient implicit in Rangen's original rating table varied with the depth of water over the weir crest. Ex. 3345, p. 18. Prior to December 1998, Rangen's rating table implied a weir coefficient that averaged between 3.27 and

3.40. *Id.* Sometime between December 1998 and July 2003, Rangen revised its rating table. Ex. 3345, p. 18. Between December 1998 and July 2003, there are no measured head data available with which to determine the implicit average weir coefficient. *Id.* Starting in July 2003 through the present, the available measurement data suggest that the revised table had an equivalent weir coefficient in the range of 3.05 to 3.09. *Id.*

When the head over a wooden dam board exceeds approximately two times the width of the board crest, the nape, or the sheet of water flowing over the top of the dam board, begins to "spring" from the front edge of the dam board, and simulates the physical "springing" of water across a sharp crested weir blade. Tr. Vol. IV, pp. 955-58. The width of Rangen's dam boards is 1 and 5/8 inches. Two times 1 and 5/8 inches is 3 and ¼ inches. The vast majority of Rangen's head measurements exceeded 3 and ¼ inches, more than two times the dam board width. *Id.*. at 959. Rangen's wooden dam boards act like a standard suppressed sharp-crested weir. *Id.* Without actually calibrating the measurement of flows over the nonstandard dam boards, the best approximation of a correct flow computation for measurements of head at Rangen's wooden check board dams, is derived using the Francis formula with the standard suppressed sharp-crested weir coefficient of 3.33. Tr. Vol. IV, pp. 959, 962.

In 2003, the Department evaluated Rangen's measurements in connection with Rangen's previous delivery call. Department employees measured flows at the large and CTR raceways and the lodge pond dam by "sticking the weir." Department employees measured a combined total discharge of 18.69 cfs for the CTR raceways and the lodge pond dam. Ex. 1129, p. 3. The day prior to the Department's measurement, Rangen employees measured a combined total discharge of 17.52 cfs for the CTR raceways and the lodge pond dam, a difference of 1.17 cfs, or a difference of approximately -6%. *Id.* at 12.

The Director concluded Rangen's use of a nonstandard measuring device with an inaccurate rating curve resulted in under-reporting of flows at the CTR raceways and Rangen's lodge pond dam. *Curtailment Order,* p. 11, ¶ 52 (R. Vol. XXI, p. 4198). In addition to Rangen's admitted error in its rating table, the discrepancy in actual measured values was direct evidence that other available flow rate measurement values, including those derived by USGS, should be considered.

The USGS periodically measures Billingsley Creek flows at a site just downstream of the Rangen Facility. Tr. Vol. VI, pp. 1414-15. The USGS derives flow values by measuring velocities across the creek's flow profile and by multiplying each measured velocity by a cross sectional area to compute the flow rate in each individual cross sectional area using a current meter. The flow rates for each area are summed, resulting in a total flow rate. The method described above is considered a standard method of water measurement, is listed as an acceptable measuring method in the Department's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices,* and is employed to calibrate the accuracy of weirs and other measuring devices. USGS flow measurements are widely accepted as accurate and objective measurements.

When a USGS hydrographer measures flow rates, the hydrographer assigns a quality rating to the measurement. Tr. Vol. VI, p. 1423. This is a quasi-quantitative rating of the quality of the measurement. Various factors are considered in rating the measurement. The USGS quantifies the standard error[2] associated with each rating. The highest rating assigned to measurements in Billingsley Creek below the Rangen Facility is "good," abbreviated by the letter "G." When a measurement is rated "G," the estimated standard error is plus or minus 5%.

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[2] A standard error of 5% means there is a 68% probability that the true measurement is within plus or minus 5% of the true value. Tr. Vol. VI, p. 1423.

A lesser rating of "fair" is abbreviated by the letter "F." When a measurement is rated "F," the estimated standard error of the measurement is plus or minus 8%. *Id.* at 1424. The lowest rating is "poor," abbreviated by the letter "P." When a measurement is rated "P," the estimated standard error of the measurement is greater than 8%. *Id.* The abbreviation "U" means the measurement was unrated and means that, for some reason, the hydrographer did not assign a rating. *Id.* Most of the USGS measurements in Billingsley Creek below the Rangen Facility are rated as "good" or "fair" measurements. The rating of measurement conditions may be "fair" because, as discussed in the Department's staff memorandum, flow and/or cross-sectional conditions are less than ideal. Ex. 3203, p. 65.

Rangen presented evidence there is a small drain that discharges into Billingsley Creek between where Rangen measures flows from the Rangen Facility and where the USGS measures flow in Billingsley Creek. This drain sometimes carries irrigation return flows to the creek. Tr. Vol. VI, p. 1419. However, the record does not support a finding that these return flows affected the USGS measurements because the USGS generally measures the flow in Billingsley Creek during the non-irrigation season. *Id.*

Pocatello compared the USGS measurements taken downstream from Rangen with Rangen's reported flows closest to the date of the USGS measurement. Pocatello's expert, Greg Sullivan, testified that comparison of Rangen's reported flows with flows measured by the USGS below the Rangen Facility show a systematic under-measurement of Rangen's flows, especially since 1980. Sullivan estimated the measurement error to be 15.9% based on the comparison of forty-five measurements by the USGS between 1980 and 2012. Tr. Vol. VI, pp. 1428-29; Ex., p. 3349. In addition, Sullivan derived a weir coefficient for the Rangen Facility by solving the standard weir equation for the weir coefficient using fourteen of the USGS flow measurements

and Rangen head measurements made nearest in time. Sullivan derived an average weir coefficient of 3.62. Tr. Vol. VI., pp. 1438-39.

2. Adoption of Sullivan's Regression Analysis was Appropriate Because Rejected Analyses Utilized Rangen's Under-Reported Flow Data.

In Pocatello Exhibit 3650, Figure 1, Sullivan plotted data for measured Curren Tunnel flow rates on the "y" axis and data for measured total spring flows on the "x" axis, and performed a linear regression of the data. The resulting regression line represented the historic relationship between Curren Tunnel flow and total flow in the spring complex. The slope of the regression line in Exhibit 3650, Figure 1, is the coefficient 0.7488 associated with the "x" variable and represents the change in flow at Curren Tunnel corresponding to a 1 cfs change in total spring complex flow. The increase in flow at Curren Tunnel resulting from curtailment can be computed by multiplying the predicted increase in total spring flow from ESPAM 2.1 by 0.7488. This analysis used flow data reported by Rangen, and predicted that approximately 75% of curtailment benefits accruing to the model cell would accrue to the Curren Tunnel. However, because this analysis used Rangen's under-reported flow data, the Director found, based upon clear and convincing evidence, that the slope of the regression line was too high. *Curtailment Order,* p. 23, ¶ 100 (R. Vol. XXI, p. 4210).

Sullivan plotted another regression line using adjusted data derived from USGS measurements. Ex. 3654, Fig. 1. Data values that were under-reported were "corrected for the historical 15.9% under-measurement of flows by Rangen by multiplying the reported flows by a factor of 1.189 (computed as 1/[1-0.159])." *Id.*, Fn. 2. The slope of Sullivan's alternative regression line is 0.6337, which is the coefficient associated with the "x" variable. This analysis predicted that approximately 63% of curtailment benefits accruing to the model cell would accrue to the Curren Tunnel. The other 37% of the benefits from curtailment would accrue to the

talus slope springs below the Curren Tunnel and would not be available to water rights 36-02551 and 36-07694. Because there is uncertainty about the accuracy of the USGS measurements used by Sullivan to adjust the under-reported data, the Director acknowledged the slope of this regression line may have been too low or too high. *Curtailment Order,* p. 23, ¶ 101 (R. Vol. XXI, p. 4210).

There are two reasons why the Director applied the 63% proportion to determine the increase in Curren Tunnel flow from the total simulated increase in flow to the Rangen model cell. First, all parties agree the data used to calculate the 75% proportion were under-reported. The alternative regression line plotted by Sullivan is a credible method to correct the under-reported data. Because of Rangen's measurement error, the Director adopted Sullivan's corrected calculation of the proportion of the benefit to total spring flows in the Rangen model cell that would accrue to the Curren Tunnel. The Director concluded, based upon clear and convincing evidence, that a percentage of 63% should be used to compute the quantity of water the ground water users may be required to provide as mitigation to avoid curtailment. *Curtailment Order,* p. 33, ¶ 122 (R. Vol. XXI, p. 4220). Second, applying a 75% proportion to determine the increase in the Curren Tunnel flow may have resulted in Rangen benefiting from its own under-reporting of flows if mitigation by direct flow to Rangen is provided in lieu of curtailment.

Rangen asserts Sullivan's reliance on USGS flow data is inconsistent with Department staff opinion. While Department staff member Tim Luke testified there was some concern with the quality of the stream channel where the USGS takes its measurements, this does not prevent the Director from adopting an approach which relies upon the USGS data for support. As discussed above, the method used by the USGS to measure flows on Billingsley Creek is

considered a standard method of water measurement, is listed as an acceptable measuring method in the Department's *Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices,* and is employed to calibrate the accuracy of weirs and other measuring devices. Furthermore, USGS flow measurements are widely accepted as accurate and objective measurements. Contrary to Rangen's assertion, the Director's decision to utilize Sullivan's regression analysis is supported by clear and convincing evidence.

E. SUBSTANTIAL EVIDENCE SUPPORTS THE DIRECTOR'S DETERMINATION THAT JUNIOR GROUNDWATER USERS ARE USING WATER EFFICIENTLY AND WITHOUT WASTE

CM Rule 40.03 requires that the Director consider whether respondent junior-priority water right holders are using water efficiently and without waste when evaluating a petition for delivery call. IDAPA 37.03.11.040.03. Testimony was presented at the hearing in this matter regarding respondent junior-priority water right holders' use of water. The Director concluded the junior-priority water right holders are using water efficiently and without waste. *Curtailment Order,* p. 41, ¶ 59 (R. Vol. XXI, p. 4228). The evidence in the record supports this conclusion.

Lynn Carlquist, President of North Snake Ground Water District, testified as to his water use practices and the practices of others in his district. Tr. Vol. VII, pp. 1671-73. He described how he sprinkler irrigates and how almost 100 percent of the members of his ground water district also sprinkler irrigate. *Id.* Carlquist also testified about the conversions that the district has undertaken to reduce reliance on ground water pumping and increase recharge. *Id.* at 1692-93. He testified as to the steps the district takes to monitor diversions to ensure its member are not using more water than they have a right to. *Id.* at 1727. Similarly, Tim Deeg, President of IGWA, testified about how he sprinkler irrigates and costs of his pumping and about the various projects IGWA has undertaken to reduce reliance on ground water pumping, increase recharge,

and remove end guns. Tr. Vol. VIII, pp. 1739-40, 1748, 1751. He suggested that ground water pumpers will pump only the minimum amount of water to get by because of the costs associated with pumping ground water. *Id.* at. 1753-54. Deeg also testified about how the ground water districts monitor ground water diversions to ensure the ground water pumpers are using water consistent with their decrees. *Id.* at 1765. Pocatello presented evidence of its water user through Justin Armstrong, Pocatello's Water Superintendent. Tr. Vol. V, pp. 1104-07. Contrary to Rangen's suggestion, the evidence in the record supports the Director's conclusion that junior ground water pumpers efficiently use water without waste.

F. THE DIRECTOR'S APPLICATION OF THE GREAT RIFT TRIM LINE IS NOT ARBITRARY

Rangen argues the Director's application of the Great Rift trim line "is arbitrary in that it has no scientific basis and is contrary to Idaho law which requires the water resources of this state to be managed conjunctively." *Rangen Brief* at 47. Contrary to Rangen's suggestion, the Director's application of the trim line is consistent with the case law surrounding the application of a trim line in delivery call proceedings and is grounded in numerous scientifically supported findings.

1. The Director's Use of a Trim Line is Consistent with Established Case Law.

The applicability of a trim-line was previously litigated in the Clear Springs delivery call. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011). In *Clear Springs,* the Department used ESPAM 1.1 to determine effects of ground water pumping, just as ESPAM 2.1 is being applied in this proceeding. *Id.* at 814, 252 P.3d at 95. With ESPAM 1.1, former Director Dreher implemented a trim line based upon model uncertainty and public interest criteria. *Id.* at 816, 252 P.3d at 97. On appeal, the SWC made the same argument that

Rangen is making now, that "hydraulically connected water sources must be administered based upon priority." *Id.* The district court in the Clear Springs delivery call affirmed the application of a trim line on appeal. Because the model is just a "simulation or prediction of reality," the district court held that "it would be inappropriate to apply the [model] results independent of the assigned margin of error." *Id.* The district court concluded "the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model...the Director did not abuse discretion by apply the 10% margin of error 'trim line.'" *Id.* The Idaho Supreme Court affirmed the Director's application of the trim line, finding the Director properly exercised discretion in making the trim line determination: "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 reached his decision through an exercise of reason. The district court did not err in upholding the Director's decision in this regard." *Id.* at 817, 252 P.3d at 98.

The Idaho Supreme Court has 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." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The Director perceived the issue of a trim line as one of limited discretion in this matter. *Curtailment Order,* p. 39, ¶ 52 (R. Vol. XXI, p. 4226).

As noted above, in delineating a trim line, the Director considered that 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. *Id.* at ¶ 50 (*Id.*). This low transmissivity 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.*

Delineating a trim line using the Great Rift limited 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. *Id.* at ¶ 51 (*Id.*). This is similar to the trim lines applied to ESPAM 1.1 in the Clear Springs delivery call and the Blue Lakes delivery call, where the calling parties were predicted to receive 0.69% and 2% of the curtailed benefits, respectively. *Id.*

Rangen argues the Director has no discretion to consider diminishing benefits of curtailment beyond the Great Rift in determining the trim line in this case because the Court in *Clear Springs*, 150 Idaho at 803, 252 P.3d at 98, stated "[a] delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm." *Rangen Brief* at 48. The Director has not denied Rangen's delivery call in this matter based upon economic factors, but rather has applied a trim line taking into consideration diminishing benefits of curtailment beyond the Great Rift in order to determine the appropriate area within which curtailment will occur.

Rangen also argues the Director's use of the trim line is contrary to Idaho Code § 42-233a. *Id.* But Idaho Code § 42-233a is part of the Ground Water Act and the Idaho Supreme Court has declared that the act is not applicable in a surface to ground water delivery call. *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89. Even if it did apply in this instance, the statute gives the Director discretion to establish the area of curtailment. Idaho Code § 42-233a provides:

> The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water area, shall order those water right holders on a time priority basis, *within the area determined by the director*, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water.

(emphasis added). Rangen also argues the Director's use of the trim line is contrary to Article XV, § 3 of the Idaho Constitution. While Article XV, § 3 of the Idaho Constitution states "[p]riority of appropriation shall give the better right as between those using the 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. CM Rule 20. Demand should be viewed in light of reasonableness and optimum development of water resources in the public interest. CM Rules 20 and 42; *Am. 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; *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.

As stated in *Clear Springs*, "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 808, 252 P.3d at 89. "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." *Id.* at 809, 252 P.3d at 90.

The Director concluded curtailment of ground water diversions on the east side of the Great Rift was not justified, noting that such curtailment 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. *Curtailment Order*, p. 40 (R. Vol. XXI, p. 4227). This conclusion was consistent with previous conclusions regarding trim lines applied in the Clear Springs and Blue Lakes delivery calls. The Director did not err by considering diminishing benefits of curtailment beyond the Great Rift when determining the trim line in this matter.

Rangen also suggests the Director erred by considering model uncertainty when delineating a trim line. *Rangen Brief* at 49. Substantial testimony was presented about the approximations and possible inaccuracies of using a regional model to simulate the depletions to Rangen spring complex discharge caused by ground water diversions from the ESPA. The Department and the parties' experts performed evaluations of model uncertainty. Ex. 3203, p. 10. While those evaluations are only partial evaluations and do not fully explore or quantify all aspects of model uncertainty, they do not contradict the Department's conclusion that ESPAM 2.1 is capable of providing a reasonable prediction of the response to groundwater pumping at the Rangen spring cell or is the best available scientific tool to estimate the quantity of the response. *Id.* Rangen acknowledges ESPAM 2.1 is the best available science to evaluate Rangen's delivery call. *Rangen Brief* at 47.

As the Director stated in the Curtailment Order:

> 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 conclusion that a specific margin of error cannot be assigned to the model does not mean the Director should not consider model uncertainty when delineating a trim. Rather, as the Director noted in the Curtailment Order, consistent with *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97, "[u]ncertainty in 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 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 (*Id.* at 4226). The Director did not err by taking model uncertainty into consideration when delineating a trim line in this matter.

2. The Great Rift Trim Line is Scientifically Grounded and Supported by the Record.

Rangen argues the Director's delineation of a trim line using the Great Rift is arbitrary in that it has no scientific basis or support in the record. *Rangen Brief* at 47-49. An action is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Am. Lung Ass'n of Idaho/Nevada v. State, Dept. of Agric.,* 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006) (citing *Enterprise, Inc. v. Nampa City,* 96 Idaho 734, 536 P.2d 729 (1975)). Contrary to Rangen's assertion, the Director's application of the trim line using the Great Rift is grounded in numerous scientifically supported findings in the record.

Using ESPAM 2.1, Department staff simulated curtailment of ground water rights for irrigation within the model boundaries bearing priority dates later than July 13, 1962, the priority date of Rangen's water right no. 36-02551. *Curtailment Order,* p. 23, ¶ 103 (R. Vol. XXI, p. 4210). The simulated increase in discharge to the Rangen model cell at steady state is 17.9 cfs.

Ex. 3203, p. 6. Department staff eliminated points of diversion inside the model boundary but outside the boundary of common ground water supply as described in Rule 50 of the CM Rules. *Curtailment Order,* p. 24, ¶ 104 (R. Vol. XXI, p. 4211). After removal of these points of diversion from the simulation, the model predicted a total of 16.9 cfs of reach gains to the Rangen cell attributable to modeled curtailment of junior ground water diversions within the area of common ground water supply at steady state. *Id.*

In model simulations of curtailment for each model cell, Department staff determined the percentage of water that would accrue to the Rangen cell and the percentage that would accrue to other spring cells or river reaches. *Id.* at ¶ 105 (*Id.*). A map of the ESPA showing the depletion percentage for each model cell with respect to spring discharge in the Rangen cell is provided in Figure 1. Ex. 3203, p. 9.

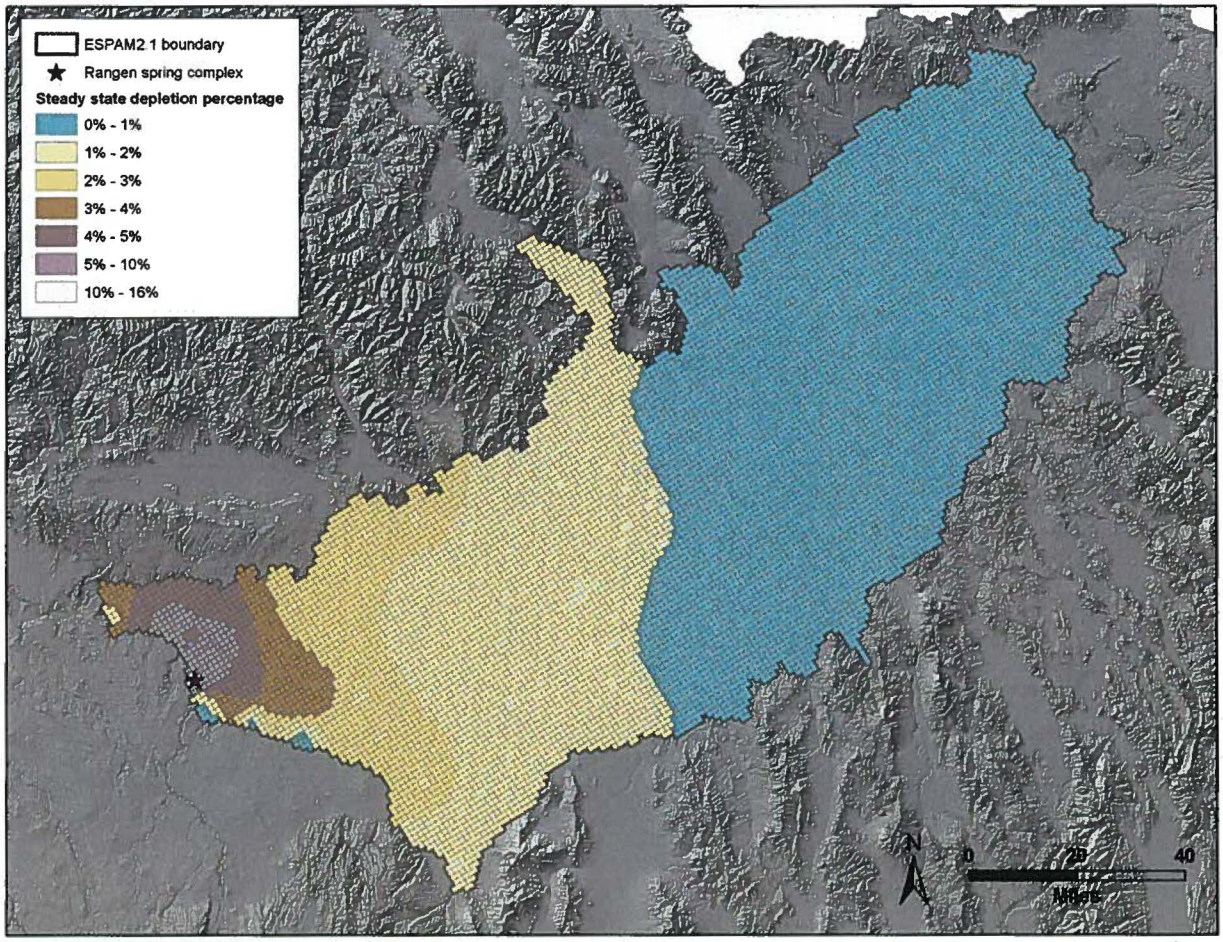

Figure 1. Depletion percentages indicating the portion of curtailed ground water use predicted to accrue to the Rangen model cell.

Department staff used ESPAM 2.1 to predict the benefit to discharge in the Rangen model cell resulting from curtailment within areas bounded by various depletion percentages. See Figure 2 below, taken from Exhibit 3203, p. 51. For each depletion percentage, the predicted increase in discharge in the Rangen model cell was plotted against the number of curtailed acres.

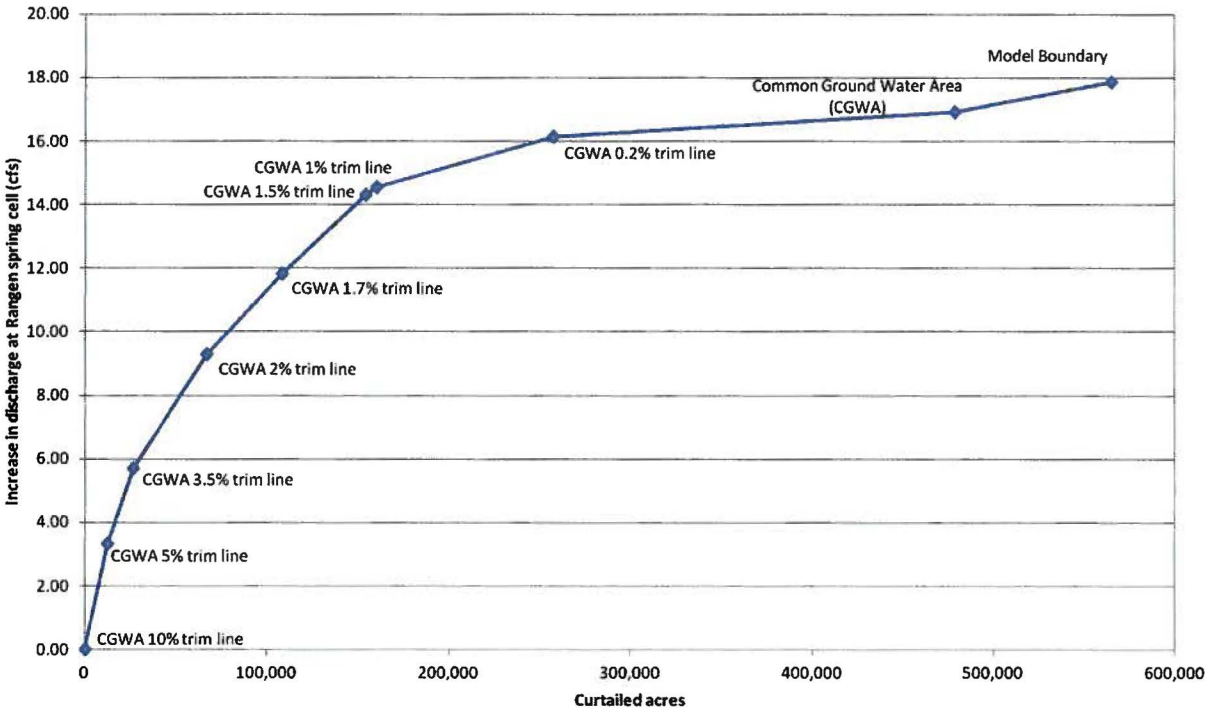

Figure 2. Acres of ground water irrigation curtailed and simulated increase in spring discharge in the model cell.

This chart illustrates the benefit of curtailment with respect to the number of acres curtailed diminishes significantly where the depletion percentage approaches 1.0 to 1.5% and the benefit approaches approximately 14.3 to 14.6 cfs. *Curtailment Order,* p. 25, ¶ 106 (R. Vol. XXI, p. 4212). Because Rangen is only entitled to the portion of the benefit that is predicted to accrue to Curren Tunnel, a revised chart was prepared (Figure 3). This chart also illustrates that the benefit of curtailment with respect to the number of acres curtailed diminishes significantly where the depletion percentage for the Rangen model cell approaches 1.0 to 1.5% and the corresponding benefit to Curren Tunnel approaches approximately 9.0 to 9.2 cfs. *Curtailment Order,* p. 26, ¶ 107 (R. Vol. XXI, p. 4213).

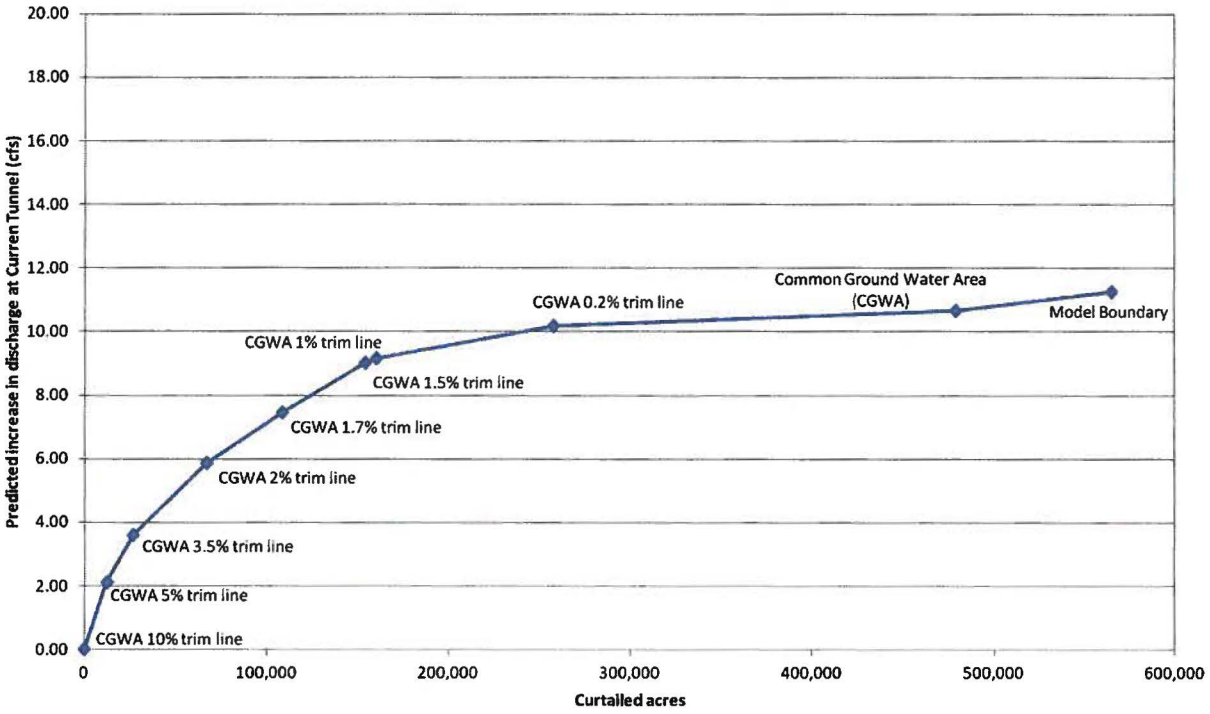

Figure 3. Acres of ground water irrigation curtailed and predicted increase in spring discharge from Curren Tunnel.

The diminishing benefits correspond with the location of the Great Rift (Figure 4), where low transmissivity impedes the transmission of water through the aquifer. Ex. 3203, p. 8.

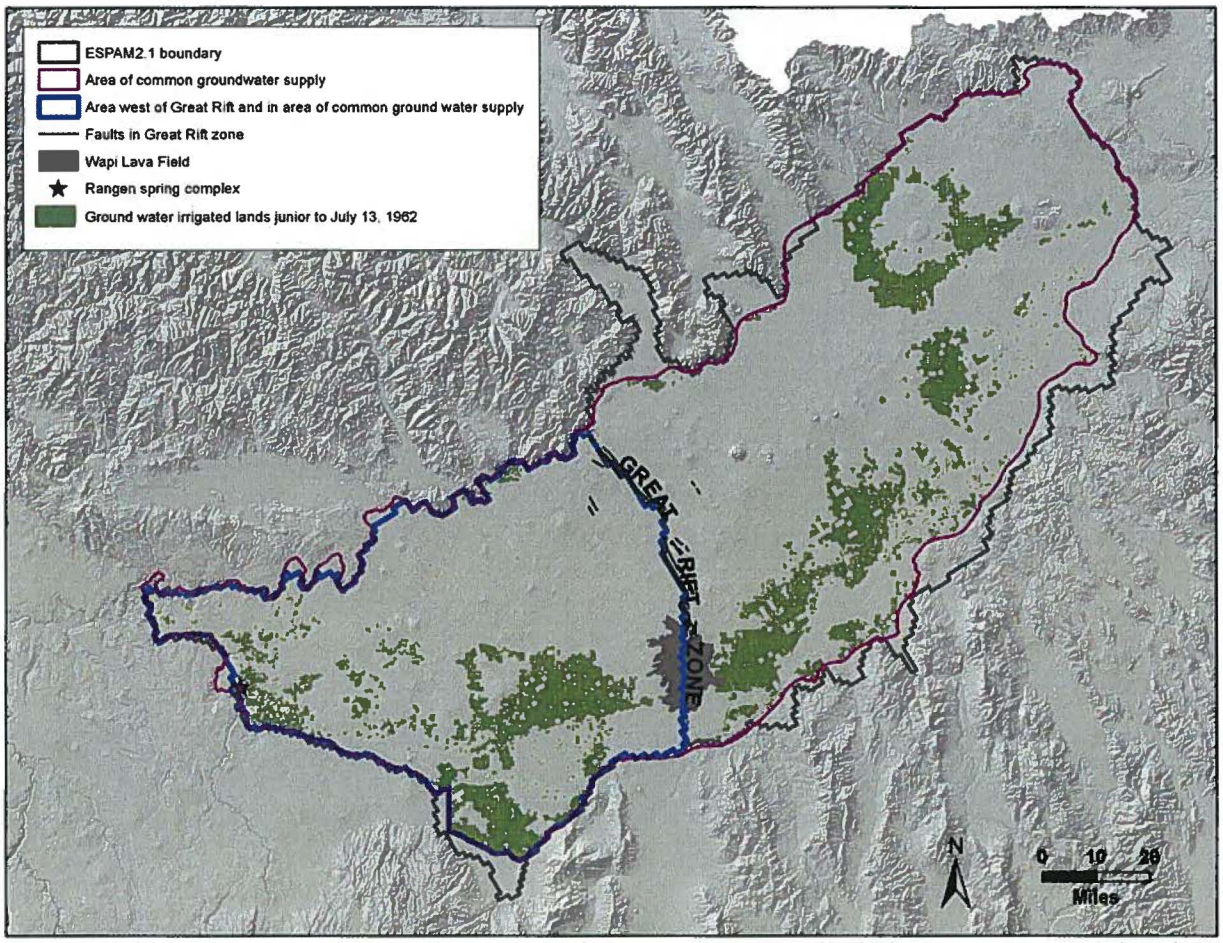

Figure 4. Delineation of area west of the Great Rift.

If ground water points of diversion located east of the Great Rift are eliminated from the simulation (Figure 5), ESPAM 2.1 predicts the curtailment of the remaining junior wells in the area of common ground water supply would accrue 14.4 cfs of benefit to the Rangen model cell at steady state. The predicted increase in discharge to Curren Tunnel is 9.1 cfs (63% of 14.4 cfs). *Curtailment Order,* p. 28, ¶ 109 (R. Vol. XXI, p. 4215).

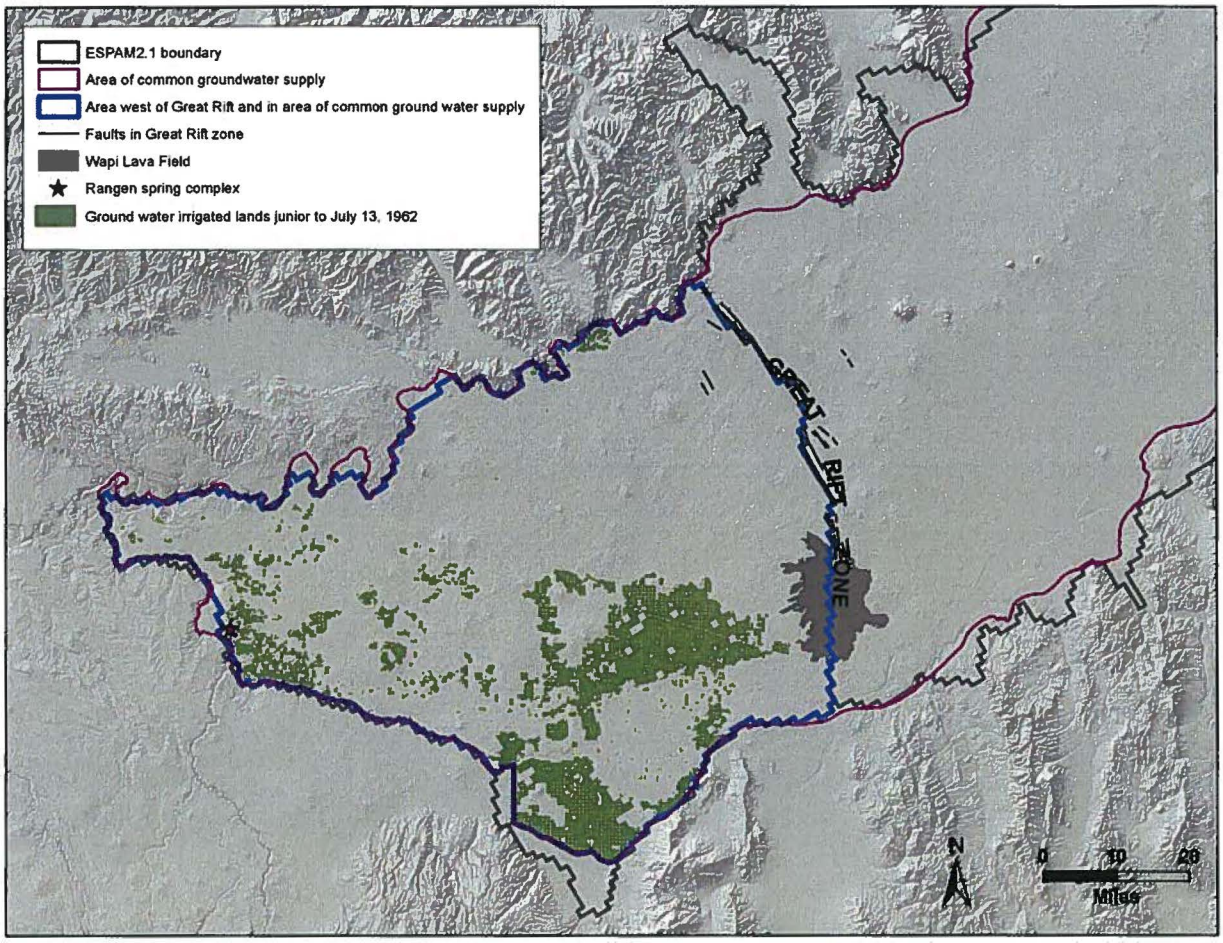

Figure 5. Junior ground water irrigated lands within area of common ground water and west of the Great Rift.

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 ¶ 110 (*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.*

In light of the technical analyses conducted by Department staff using ESPAM 2.1 described above, the Director concluded curtailment of ground water diversions on the east side of the Great Rift is not justified. *Id.* at 40, ¶ 55 (*Id.* at 4227). The Director's decision to

delineate a trim line using the Great Rift is supported by numerous scientific findings in the record and was not made in disregard of the facts and circumstances presented or without adequate determining principles.

G. RANGEN IS NOT ENTITLED TO ATTORNEY FEES AND COSTS

Rangen asserts it "is entitled to attorney fees and costs should it prevail in this action pursuant to Idaho Code § 12-117(1) and Rule 54 of the Idaho Rules of Civil Procedure." *Opening Brief* at 7. Idaho Code § 12-117(1) provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

This provision applies to petitions for judicial review or any appeal from any administrative proceeding. Idaho Code § 12-117(5)(c).

Rangen is not entitled to attorney fees and costs in this matter. The Director's factual findings challenged by Rangen are supported by substantial and competent evidence and his determinations of legal issues are not clearly erroneous.

CONCLUSION

The name Martin-Curren Tunnel is not ambiguous and does not create a latent ambiguity in the partial decrees for water right nos. 36-2551 and 36-7694. The point of diversion element decreed by the SRBA district court unambiguously limits diversions under Rangen's water right nos. 36-2551 and 36-7694 to the following ten-acre tract: T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW, including the Bridge Diversion.

The Director is statutorily obligated to distribute water consistent with the SRBA partial decrees issued by the SRBA District Court. Idaho Code §§ 42-607, 42-1420. Estoppel is not appropriate when it would serve to prevent a governmental entity from undertaking its statutorily obligated actions. Even if this Court were to conclude that quasi-estoppel may be invoked against a governmental entity, the elements of quasi-estoppel are not met in this circumstance.

The Director's adoption of Sullivan's regression analysis and determination that junior groundwater users are using water efficiently and without waste are supported by substantial evidence. Application of the Great Rift trim line was not arbitrary and the Director did not err by considering model uncertainty and diminishing benefits of curtailment when delineating the trim line.

Rangen is not entitled to attorney fees and costs in this matter because the Director's factual findings challenged by Rangen are supported by substantial and competent evidence and his determinations of legal issues are not clearly erroneous.

DATED this 8th day of August, 2014.

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