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,

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)

RANGEN, INC.'S RESPONSE BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. STATEMENT OF CASE

Rangen, Inc. ("Rangen") and the Idaho Ground Water Appropriators, Inc. ("IGWA") have both filed Petitions for Judicial Review challenging various aspects of Director Gary R. Spackman's Final Order Regarding Delivery Call; Curtailing Groundwater Rights Junior to July 13, 1962 ("Final Order") and Order on Reconsideration. The two Petitions have been consolidated. Rangen's Statement of Case set forth in its Opening Brief is hereby incorporated by reference and will not be repeated here.

II. STANDARD OF REVIEW

The standard of review for factual matters under the Idaho Administrative Procedure Act is as follows:

> The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. In an appeal from the decision of district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review. . . . The Court may overturn the Board's decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary."

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted). Courts review legal issues de novo. Polk v. Larrabee, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000).

III. ARGUMENT

The basic thrust of IGWA's arguments on appeal is that it is unfair to curtail a substantial number of ground water irrigated acres to satisfy Rangen's call. IGWA admits that the amount of water discharging from springs such as the Martin-Curren Tunnel is declining and that one of the factors responsible for this decline is "groundwater pumping from the ESPA." See, IGWA's Opening Brief, p. 12. There has never been any dispute in this case regarding those basic facts. Simply put, there is not sufficient water flowing from the Martin-Curren Tunnel to satisfy Rangen's water rights and there would be more water available if junior ground water pumping on the ESPA were curtailed.

Nonetheless, IGWA argues that curtailment affects too many water rights and irrigated acres and that the Director has the authority to consider the disproportionate economic impact of curtailment when deciding Rangen's delivery call. IGWA is careful not to mention dollar amounts, but the repeated reference to IGWA's estimate of the number of acres involved makes it clear that they contend that Rangen's delivery call should be denied because of disproportionate economic impact or inherent unfairness. In this particular appeal, IGWA's argument has three basic components: (1) the source of Rangen's water rights is ground water; (2) the Director did not adequately apply what IGWA refers to as the "doctrine of reasonable use; and (3) the Director did not properly phase-in curtailment. Each of these arguments should be rejected for the reasons stated below. It should be noted at the outset, however, that the underlying predicate for IGWA's arguments on appeal has been specifically rejected by the Idaho Supreme Court. **"A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm."** Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 803, 252 P.3d 71, 84 (2011) (emphasis added).

A. The Director Correctly Determined that the Source of Rangen's Water Rights is Surface Water.

Nearly twenty years ago in Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court adjudicated water rights involving the Martin-Curren Tunnel – the source designated on the Partial Decrees for Rangen's water rights. The Supreme Court specifically described the source of water as spring water in its opinion. See, 125 Idaho at 394, 871 P.3d at 811. Spring water is surface water – not groundwater. See, Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011) IGWA filed an Amicus Brief in support of rehearing after the Supreme Court issued the Musser decision. Apparently not realizing that the Court had described the source as "spring water," IGWA argued that the Idaho Supreme Court wrongly determined that the Martin-Curren Tunnel is ground water when, in fact, the water is surface water. IGWA argued:

> The Court also failed to address the threshold question of whether the Mussers were ground or surface water diverters (which would be relevant if the Court concluded that section 42-226 applies only in contests among ground water users). Nor was this question addressed below (because section 42-226 was not in issue). **The Court apparently assumed, without the benefit of an adequate factual record or legal analysis, that the Mussers' spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho's water code lumps springs and lakes together with surface rights. I.C. § 42-201. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226. This distinction is discussed in Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: "The water flow did not issue naturally from the surface of the earth; thus it was not a spring." In contrast, the Mussers' water source is a natural spring (albeit one which has been improved with an artificial tunnel).**

See, Amicus Curiae Brief of Idaho Ground Water Association (March 30, 1994), p. 9 fn 7 (emphasis added) (attached hereto as Appendix A) (emphasis added).

The source of Rangen's water has not changed over the nearly twenty years that have passed since the Musser call was decided. The Director correctly found that the source of Rangen's

water rights is surface water and that decision should be affirmed. (R., Vol. 21, p. 004163-64 at ¶¶ 25-28).

Section 42-1420(1) of the Idaho Code makes it clear that a decree entered in a general adjudication is conclusive. It states in relevant part: "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system . . . ." I.C. § 42-1420(1); see e.g., In Re Snake River Basin Water System, 115 Idaho 1, 7, 764 P.2d 78, 84 (1988) (explaining that a decree entered in a "general adjudication" is "one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated."). The Idaho Supreme Court has explained that finality in water rights is essential and that making a change to a water right is tantamount to changing a description of real property:

> Finality in water rights is essential. "A water right is tantamount to a real property right, and is legally protected as such." Crow v. Carlson, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. Olson v. Idaho Dept. of Water Resources, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983).

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998).

In this case, the SRBA adjudicated and decreed the source of Rangen's water rights when it entered the Partial Decrees in Rangen's favor. (See, Exhs. 1026 and 1028). The decreed source of the two rights is the "Martin-Curren Tunnel; tributary to Billingsley Creek." (See id.) Rangen's Partial Decrees follow the standard SRBA form. The form is based on the Director's Report filed by the Department. Section 42-1401(B) of the Idaho Code explains the role that the Department played in the SRBA. It states in relevant part:

> (1) the Director's role under this chapter is as an independent expert and technical assistant to assure` that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use parameters for

quantification of beneficial use recommended for rights within climatic regions of the state.

I.C. § 42-1401B(1). To fulfill its role as an independent expert and technical assistant, the Department was required to file a Director's report on the Snake River Basin which included determination of the following elements of the water rights within the basin:

(a) the name and address of the claimant;

(b) **the source of water;**

(c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;

(d) the date of priority;

(e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;

(f) the purpose of use;

(g) the period of the year when water is used for such purposes;

(h) legal description of the place of use; . . . .

(i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and

(j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

I.C. § 42-1411 (emphasis added).

The Department has promulgated an extensive set of rules governing its role in the adjudication process. See IDAPA 37.03.01 (Adjudication Rules). The Department's Adjudication Rules actually specify how water sources were to be listed in the claim forms used in the SRBA.

The claim forms were the basis for the partial decrees that were entered in the SRBA. Rule 37.03.01.060.02.c states:

> Source of Water Supply. The source of water supply shall be stated at item three (3) of the form.
>
> i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. If no official name has been given, the name in local common usage should be listed. If there is no official name, the source should be described as "unnamed stream" or "spring." 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."**

IDAPA 37.03.01.060.02.c (emphasis added).

Rangen's Partial Decrees follow the IDWR format required for surface water. They describe the source of Rangen's water as the "Martin-Curren Tunnel" – the name of the springs in local usage since there is no official USGS name. See, Rangen's Opening Brief, pp. 8-19 for a discussion of the term Martin-Curren Tunnel and its reference to the entirety of the springs complex that forms the headwaters of Billingsley Creek. Rangen's Partial Decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of a tributary is unique to surface water sources. Rangen's Partial Decrees do **not** specify the source as "Ground Water" as required if the source is, in fact, ground water. To replace the designation of "Martin-Curren Tunnel; tributary to Billingsley Creek" with the designation of "Ground Water" would be tantamount to a change to the Partial Decrees entered in the SRBA. This is improper.

While it is not necessary or proper to go beyond the Partial Decrees to determine that Rangen's water rights are surface water rights – not Ground Water – the evidence outside the Partial Decrees supports Rangen's position. The License for Water Right No. 36-07694 contains a note that the "springs" identified as the source of that water are locally known as the "Curran Tunnel." (See Exh. 1029, pp. 28-29). The SRBA Verification Report prepared by the Department

for that right also states that the source is known locally as the "Martin-Curren Tunnel." (See, R., Vol. 13, p. 002597). The Department classifies the Martin-Curren Tunnel as "springs" as evidenced by the results of the Water Right and Adjudication Search done on Water Right No. 36-15501 on March 7, 2013. (See, R., Vol. 13, p. 002608). Water Right No. 36-15501 is the companion right to Rangen's 1962 water right for 48.56 cfs of water. Both rights show "Martin-Curren Tunnel; tributary to Billingsley Creek" as the source of those rights.

Once again, the Partial Decrees entered in the SRBA conclusively established that the source of Rangen's water rights at issue is the "Martin-Curren Tunnel; tributary to Billingsley Creek." If the source of Rangen's Water Rights were ground water as IGWA contends then Rangen's Partial Decrees would show the source as "Ground Water." The Director did not substitute "Martin-Curren Tunnel; tributary to Billingsley Creek" with "Ground Water" and neither should the Court. The Court should affirm the Director's decision on this issue.

B. The Broad "Doctrine of Reasonable Use" as it is Described by IGWA Does Not Exist.

Neither the phrase "doctrine of reasonable use" nor "law of reasonable use" is found in any reported decision in Idaho. While it is true that various aspects of the diversion and beneficial use of water are subject to a review of their reasonableness, there is no broad authority to refuse to administer water rights based upon the perceived unreasonableness of the scope of curtailment. The Director found that Rangen's means of diversion are reasonable and that Rangen is beneficially using its water with reasonable efficiency and without waste. Those findings are supported by substantial evidence in the record. IGWA has not challenged those findings in this appeal.

1. IGWA Has Misinterpreted the Director's Statement Concerning "Limited Discretion."

The first problem with IGWA's reasonable use argument is its assertion that Director Spackman incorrectly perceived that he had "limited discretion" to apply the law of reasonable use. IGWA argues: "The errors related to the law of reasonable use appear to stem from the Director's mistaken perception that he has 'limited discretion' to evaluate whether a means of appropriation is reasonable." IGWA's Opening Brief, p. 51 (emphasis added). IGWA's argument here is unclear. To the extent that IGWA is arguing that the Director failed to recognize some kind of broad discretion to consider the reasonableness of the scope of curtailment, such broad discretion does not exist. To the extent that IGWA is implying that the Director did not properly perceive his discretion to consider whether Rangen's diversion and use of water is reasonable, IGWA is incorrect. This is a potentially important issue because in analyzing the Director's decision the Court must determine whether the Director correctly perceived an issue as one of discretion and acted within the boundaries of his discretion. See, Sun Valley Shopping Ctr. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

To support its position, IGWA cites paragraph 52 on page 39 of the Director's Final Order. See FN 230 of IGWA's Opening Brief. IGWA did not set forth the text of paragraph 52 in its Opening Brief. Paragraph 52 is contained in Section V of the Conclusions of Law. Section V is titled: "ESPAM2.1 Results and Area of Common Ground Water Supply." The text of paragraph 52 states in its entirety:

> 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 813, 252 P.3d at 94.

(R., Vol. 21, p. 004196) (emphasis added).

Contrary to IGWA's assertion, paragraph 52 has nothing to do with the reasonable use of water. It has to do with the imposition of a trim line in an area of common ground water supply. While all agency discretion is limited in the sense that it can be reviewed by courts within certain parameters, Director Spackman is acknowledging in paragraph 52 that there are serious limitations on his ability to exclude junior-priority groundwater pumping from a delivery call where the source of water is known to be hydrologically connected like in the ESPA where there is a common ground water supply. There is simply no basis in this paragraph or anywhere else in the Final Order to support IGWA's argument that the Director improperly limited his discretion when analyzing the reasonable use of water.

2. IGWA Has Misconstrued the Reasonable Diversion Requirement.

The second problem with IGWA's argument is its misinterpretation of the reasonable diversion requirement. IGWA argues that Rangen's diversion and use of spring water is unreasonable because it will result in "hoarding" or "wasting" water. Although IGWA's argument has been slightly repackaged, IGWA made the same argument in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (Idaho 2011), but couched it in terms of "monopolizing" the aquifer. See, Groundwater Users' Opening Brief, p. 40-44 (attached hereto as Appendix B). In support of its position IGWA cited Schodde v. Twin Falls Land & Water Company, 224 U.S. 107 (1912)), the same case it relies upon here. IGWA's continued reliance on the Schodde case is misplaced.

In Schodde, the senior water right holder constructed water wheels to divert water from the Snake River to irrigate his farm. Twin Falls Land & Water Company later built a dam below Schodde's water wheels, which caused the current necessary to power the wheels to stop flowing.

Schodde sued Twin Falls Land & Water Company for damages due to the interference with the operation of his water wheels. The U.S. Supreme Court rejected Schodde's claim, holding that Schodde could not appropriate the entire flow of the Snake River in order to power his water wheels. The Court, however, affirmed that Schodde had the right to use the amount of water actually appropriated by him and put to beneficial use.

In Clear Springs, Clear Springs Foods and Blue Lake Trout Farms, like Rangen, raised fish utilizing water rights from "certain springs emanating from the canyon wall along a section of the Snake River . . . . Those springs are fed by the aquifer." 150 Idaho at 794, 252 P.3d at 75. The Director in Clear Springs, like in this case, ordered curtailment. IGWA argued on appeal that the curtailment orders violated Schodde. After reviewing Schodde, the Idaho Supreme Court stated:

> The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights. Thus, In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007), we cited *Schodde* for the proposition that "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication [of a water right]."

150 Idaho at 809, 252 P.3d at 90. The Court went on to hold that: "Under the law, the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development **must challenge the Spring Users' means of diversion**." Id. (emphasis added).

It is apparent from the Clear Springs decision that the Idaho Supreme Court rejected IGWA's argument that the diversion of spring water is *per se* unreasonable. The Supreme Court did, however, leave the door open for juniors to avoid a call by proving by clear and convincing evidence that a particular diversion structure is unreasonable. In this case, the Director's Final Order tracks the applicable factors of CM Rule 42, the rule used to evaluate whether a water right holder is suffering material injury and using water efficiently and without waste. (See, R., Vol. 21, p. 004188-93). The Final Order sets forth a detailed discussion of: (i) the amount of water

from the source (CM Rule 42.01.a -- IDAPA 37.03.11.042.01.a); (ii) the existence of measuring devices (CM Rule 42.01.f – IDAPA 37.03.11.042.01.f); (iii) the amount of water diverted compared to the water right (CM Rule 42.01.e – IDAPA 37.03.11.042.01.e); (iv) existing facilities, water supplies and needs (CM Rule 42.01.g – IDAPA 37.03.11.042.01.g); (v) whether ground water rights affect the quantity and timing of when water is available (CM Rule 42.01.c – IDAPA 37.03.11.042.01.c); and (vi) alternate means of diversion (CM Rule 42.01.g – IDAPA 37.03.11.042.01.g). (See id.) Ultimately, the Director concluded that Rangen's methods of diversion are reasonable in terms of efficiency and conservation practices. (R., Vol. 21, p. 004193 at ¶ 34). The Director also concluded that Rangen considered alternative means of diversion such as a pump-back system, vertical well, and horizontal well and that it was reasonable for Rangen to reject those alternatives. (See id.; see also, R., Vol. 21, p. 004171 at ¶ 64).

IGWA does not attack the Director's findings except with respect to the pump-back system. See, IGWA's Opening Brief, p. 62-63 and argument below. There is no way to find that the Director's analysis of the CM Rule 42 factors was somehow an abuse of discretion, and IGWA does not even try. Instead of attacking the findings, IGWA wants the Court to redefine what constitutes a reasonable diversion. IGWA contends it is not the structure used to collect and transport water that makes a diversion unreasonable or inefficient or wasteful, but instead ". . . what makes an appropriation or diversion unreasonable is its effect on beneficial use of the resource as a whole." See, IGWA's Opening Brief, p. 46 (emphasis added). This is not the law in Idaho, and, if it were, ground water pumping in the ESPA should be found to be an unreasonable diversion because of its known adverse effect on surface water flows. The Director made the proper analysis of whether Rangen's diversion structure is reasonable under CM Rule 42 and found

that it is reasonable in terms of efficiency and conservation. There is no basis for reversing that determination. As such, the Court should affirm the Director's ruling.

3. There is No Foundation for IGWA's Waste Argument.

Another problem with IGWA's position is its assertion that waste will occur if curtailment is ordered. There is no legal or factual basis for this assertion. IGWA does not argue that Rangen wastes water that it has diverted for beneficial use in the Research Hatchery. The Director found that Rangen beneficially uses the water that it diverts without waste. IGWA has not challenged this finding. Instead, IGWA urges this Court to adopt a novel concept of "waste" in which all water that does not reach the Martin-Curren Tunnel is "wasted." The Director correctly perceived that there is no basis for this novel concept of "waste."

IGWA actually objected to Rangen putting on evidence of how other surface water users are short of water and how they would benefit from Rangen's delivery call. For example, Rangen called Frank Erwin, the water master of District 36A, to testify at the hearing. When Rangen began questioning Mr. Erwin about other users downstream of Rangen being short of water and the benefit of a water call to them, IGWA objected to the questions on the basis of relevance. (See Tr., Vol. 1, p. 232, l. 16 – 234, l. 8). The Director asked Rangen to respond to the objection and Rangen pointed out:

> Well, one of the issues is that the call doesn't, you know, accrue to – that not enough of the water that would come – that would be curtailed as a result of this would accrue to Rangen, and that other people don't benefit. And I think this goes directly to that issue, that other people benefit if there's curtailment as well.

(Tr., Vol. 1, p. 233, l. 20 – p. 234, l. 8). The Director sustained the objection and Rangen was not allowed to put on evidence through Mr. Erwin that others would benefit from the call. (See id.)

IGWA also objected to Dr. Charles Brockway, Rangen's expert hydrologist, testifying about the waste issue, but that objection was overruled because the City of Pocatello introduced the issue through Greg Sullivan, its expert hydrologist:

> Q: Now, I want to talk with you a moment, Dr. Brockway, about the issue of waste.
>
> You understand that the curtailment of groundwater pumping will benefit others in addition to Rangen; correct?
>
> A: It will, yes.
>
> Ms. McHugh: Object. I was going to say objection. Relevance.
>
> The Hearing Officer: We'll, there's been quite a bit of discussion, I think, coming in regarding the benefits. In fact, I think that may have come in through Mr. Sullivan, although I don't recall. But I –
>
> Mr. Haemmerle: It did, Director. There was a chart kind of indicating where water would flow to in addition to the water at the Rangen cell.
>
> The Hearing Officer: So I assume this is in the nature of rebuttal testimony again.
>
> Ms. McHugh: And I was just understanding that Mr. Sullivan said benefits to other areas within the model – I mean other reaches, not others, as in, I guess, the term "others" was used in the questioning.
>
> The Hearing Officer: Perhaps you could clarify, Mr. Haemmerle. But I assume that's where we were headed.
>
> So objection overruled right now.
>
> Q: Dr. Brockway, the water that's – that gets curtailed because of the Rangen call would go to other places and potentially other users.
>
> Do you understand that?
>
> A: Yes.
>
> Q: Is it your opinion that the water that does not go to Rangen, is it your opinion that water is wasted?

A: Well, not according to what I believe waste is in the context of a water right. It – if water is utilized, diverted and utilized for a beneficial use, then to me that water is not wasted.

Now, some of the allegations have been that because when you curtail the Eastern Snake Plain Aquifer that a large majority of the curtailed water or the decrease of – extraction will not go to the calling party, and therefore everything that doesn't go to the calling party is – is categorized as waste.

Well, there are hundreds of springs in the reach of say – of the Snake River from Kimberly down to King Hill. And all of these springs have suffered from decreases in spring flow. Many of them are developed for aquaculture and irrigation and for other purposes. And they have water rights.

So to the extent even though those users did not make a water call, they receive water from say a Rangen call or another call, and that enhances and decreases the depletion of their water supply, and they beneficially use it.

So, in my opinion, that water is not wasted. It's different from a term that we normally think of as, for instance, waste of irrigation water. You diverted it from the canal, but you never put it on the field, you might want to term that "waste."

But in the context of a water call and the water not being utilized by the calling party is not necessarily wasted.

Now, if it gets into the river without having gone through a spring that has a water right on it, either for irrigation or fish or whatever, when it get in the river, it's still beneficially used by people like Idaho Power who have bona fide water rights for hydropower in the river, or it's certainly beneficial for in-stream flows or meeting minimum flows. So in my opinion, that water isn't wasted either.

So – and you could say if you decrease the depletion from the aquifer, the water levels rise in the aquifer, which they have to do in order for spring flows to increase, but that rise in the water table is beneficial also to groundwater pumpers. It decreases their energy use.

So I have a problem with saying that anything that – any water that does not go to the calling party is wasted.

(Tr., Vol. 10, p. 2360, l. 16 – p. 2363, l. 22).

The Director made the same point in his Order on Reconsideration:

IGWA's identification of "waste" as an issue arising out of the Rangen 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 call upon an aquifer to satisfy a senior water right. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

(R., Vol. 22, p. 004432).

Dr. Brockway's testimony makes it clear that not only will Rangen benefit from a delivery call, but so will other downstream surface water users, Idaho Power and even other groundwater pumpers who are able to pump water more efficiently when aquifer levels rise. Director Spackman adopted this reasoning in his Order on Reconsideration. There is simply no factual or legal basis for IGWA's assertion that Rangen's delivery call will result in waste. Therefore, the Director's decision should be affirmed.

4. The Director's Decision to Reject a Pump-Back System as an Alternate Means of Diversion is Reasonable.

IGWA also complains in its reasonable use argument that the Director did not adequately address its contention that Rangen should be required to install a pump-back system before being permitted to seek curtailment. IGWA's Opening Brief, pp. 62-63. IGWA argues that the findings of fact are deficient under I.C. § 67-5248, and, alternatively, even if they aren't deficient, the Director's decision should be reversed because it constitutes an abuse of discretion. There is no merit to IGWA's position.

Section 67-5248 sets forth what a written order must contain under the Idaho Administrative Procedure Act. It states:

(1) An order must be in writing and shall include:

(a) A reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.
(b) A statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.
(2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.
(3) All parties to the contested case shall be served with a copy of the order. The order shall be accompanied by proof of service stating the service date, each party who was served and the method(s) of service.

I.C. § 67-5248.

The Director addressed the pump-back system at length in the Final Order. He found:

> IGWA and Pocatello also argue that Rangen's use of the water is unreasonable because Rangen is not recycling the water it has already beneficially used to raise more fish. Rogers, Vol. VIII, pp. 1843, 1866. 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 - $46,000. *Id.* Because of the significant costs to build the project, and other concerns about the issues of water quality and water temperature, Rangen ultimately rejected the idea of a pump-back system. Courtney, Vol. I, p. 113. The cost of building redundant systems along with annual operating costs makes a pump-back system cost prohibitive.

(R., Vol. 21, p. 004171 at ¶ 64).

The Director's findings on the pump-back system are comprehensive, are based on the evidence in the record, and contain extensive record citations. In fact, the findings are every bit as detailed as the Director's findings on the vertical and horizontal well alternatives which IGWA

does not challenge. (See, R., Vol. 21, p. 004193 at ¶ 34). The Director's findings satisfy all of the requirements of I.C. § 67-5248 and IGWA's argument to the contrary should be rejected.

IGWA's alternative argument that the Director's findings are arbitrary or capricious should likewise be rejected. Under Idaho law, a decision is "capricious" if it was done without a rational basis. In Re Delivery Call of A&B Irr. Dist., 153 Idaho 500, 511, 284 P.3d 225, 236 (2012) (citations omitted). A decision is "arbitrary" ". . . if it was done in disregard of the facts and circumstances presented or without adequate determining principles." Id. There is no requirement that Rangen must change its means of diversion before it can make a delivery call. IGWA does not cite any authority for this proposition. In fact, IGWA overlooks the fact that the Clear Springs court acknowledged that even if a change of diversion method is required, it is something that must be paid for by the junior appropriator – not the senior. See Note 5 in Clear Springs v. Spackman, 150 Idaho 790, 810, 252 P.3d 71, 91 (2011). The Clear Springs Court noted:

> In Parker v. Wallentine, 103 Idaho 506, 514, 650 P.2d 648, 656 (1982), we held, "the expense of changing the method or means of diversion, however must be paid by the subsequent appropriator . . . so that the [the senior appropriator] will not suffer any monetary loss.

150 Idaho at 810, n. 5, 252 P.3d at 91, n. 5. If a change of diversion has to be paid for by the junior then making the change cannot be a requirement before the call is made – the change is an obligation imposed on the junior as a result of the delivery call.

The bottom line is that the Director carefully considered the pump-back system and determined that it was reasonable to reject it --- not only because of cost – but also because of factors such as water quality and temperature. That decision was well-reasoned and informed and was based on his assessment of the evidence as a whole. There is no basis for the Court to overturn that decision by finding that it was arbitrary or capricious or otherwise constitutes an abuse of discretion. The Director's decision on the pump-back system issue should be affirmed.

C. The Director Did Not Err By Using ESPAM2.1 Without Assigning a Margin of Error to Implement a Trim Line.

IGWA contends that the Director should have addressed model uncertainty by assigning a margin of error to ESPAM2.1 predictions so that he could implement a trim line to exclude junior groundwater diversions for which the predicted benefit of curtailment to the senior is smaller than the margin of error. See, IGWA's Opening Brief, p. 56. IGWA contends that this is the practice that the Idaho Supreme Court upheld in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011) and it is the practice the director should have used in this case. IGWA's position is untenable because: (i) the imposition of a trim line has nothing to do with model uncertainty; and (ii) the uncertainty analysis done by IDWR does not provide a scientific basis for establishing a margin of error. Despite their own experts' opinions, IGWA refuses to recognize that the best estimate of the impact of junior-priority ground water pumping on the spring flows at Rangen's Research Hatchery is the result calculated by ESPAM2.1 – a model which has undergone rigorous validation, calibration and uncertainty analyses. The only error the Director committed with respect to his use of ESPAM2.1 was excluding junior-priority groundwater pumping East of the Great Rift from the curtailment order as discussed at length in Rangen's Opening Brief, pp. 47-50.

1. ESPAM2.1 is the Best Available Science to Evaluate Rangen's Delivery Call.

The Director found in the Final Order that ESPAM2.1 is the best available scientific tool to evaluate Rangen's delivery call. (R., Vol. 21, p. 004195 at ¶ 38). This conclusion is supported by the IDWR staff report which states: "ESPAM2.1 is the best developed scientific tool for predicting the effects of junior groundwater pumping on the Buhl to Lower Salmon Falls Spring reach and at the Rangen spring complex." (Exh. 3203, p. 12). It is also supported by every expert who testified in this case. All of the experts -- regardless of who hired them -- agreed that ESPAM2.1 is the best available science. See testimony of Dr. Brockway, Rangen's expert hydrologist, (Tr., Vol. 10, p. 2340, l. 25 – p. 2341, l. 8); Bern Hinckley, IGWA's expert geologist,

(Tr., Vol. 10, p. 2487, l. 21 – 24); Dr. Brendecke, IGWA's expert hydrologist, (Tr., Vol. 12, p. 2793, l. 11–14); Dr. Wylie, IDWR's modeler, (Tr., Vol. 12, p. 2950, l. 3–9); Greg Sullivan, Pocatello's expert hydrologist, (Tr., Vol, 7, p. 1642, l. 2–15), and Bryce Contor, Fremont-Madison's expert, (Tr., Vol. 12, p. 2893, l. 20 – 22).

2. ESPAM2.1 is Fundamentally Different than Prior Versions of the Model and Can be Used to Determine the Impact of Junior-Priority Groundwater Pumping on Rangen's Water Rights.

Over the years, IDWR has developed several numerical ground water models of the ESPA. The purpose of these models is to evaluate and understand the interaction between groundwater and surface-water in the Eastern Snake Plain Aquifer. (Exh. 1273A, pg. 1). The current version of the model is ESPAM2.1. ESPAM2.1 incorporates the best knowledge of the aquifer system available at this time.

Unlike previous versions of the model, "ESPAM2.1 can be used to compute regional impact on selected individual springs because it was calibrated to spring-specific discharge measurements." (See, Final Report for ESPAM2.1 which is Exh. 1273A, pp. 86-87). One of the changes made in ESPAM2.1 was the development and utilization of calibration targets for spring flows. (Tr., Vol. 10, p. 2297, l. 23 – p. 2298, l. 2; Exh. 1273A, p. 73). The spring calibration targets are categorized into three groups based upon the nature of the available data. (Exh. 1273A, p. 75). Group A springs include springs that are measured by the USGS or IDWR. (Id.) Group B springs are measured and reported by water users. (Id.) Group C springs are not routinely measured or reported. (Id.) The Rangen spring complex was included as a Group B spring. (Tr., Vol.10, p. 2299, line 10; Exh. 1273A, p. 76).

ESPAM2.1 was developed in an open, collaborative environment, with guidance from the Eastern Snake Hydrologic Modeling Committee (ESHMC). (Exh. 3203, p. 3). The ESHMC was

formed out of the Idaho Technical Committee on Hydrology (the ITCH Committee) in approximately 2000 to serve as an advisory group for updating and improving the ESPA model. (Tr., Vol. 10, p. 2294, l. 12 – p. 2295, l. 15).

Experts retained by the parties to this call participated heavily in both the ITCH Committee and the ESHMC. Dr. Brockway and Greg Sullivan were each members of the ITCH Committee. (Tr., Vol. 10, p. 2294, l. 10-16; p. 1570 l. 6-10). Dr. Brockway and Mr. Sullivan became members of the ESHMC when it was formed in 2000. (Tr., Vol. 10, p. 2300, l. 7 – p. 2301, l. 3). Dr. Brendecke, Bryce Contor, and Dave Colvin and Jim Brannon, two other Rangen experts, were also members of the ESHMC. (Tr., Vol. 10, p. 2400, l. 16-20; Exh. 1273A, p. 4).

> The ESHMC provided a forum for discussing model design, providing interested parties the opportunity for technical review and input throughout the model development process. Decisions regarding the conceptual model, model grid size, drain elevations, locations of transmissivity pilot points, spring discharge and aquifer head targets, the location of general head boundaries, calibration bounds, and other model features were presented to the ESHMC with opportunity for committee members to provide comments and suggest alternative approaches.

(Exh. 3203, p. 3).

3. A Trim Line Does Not Address Model Uncertainty.

Ignoring its own experts opinions, IGWA steadfastly clings to its argument that a trim line can somehow be related to model uncertainty. During the development of ESPAM2.1 the ESHMC considered the role the Committee should play in terms of addressing a trim line. Mr. Tuthill, then the Director of IDWR, asked the ESHMC to discuss the following: "Should the ESHMC address the technical aspects (not policy issues) of a trimline as a function of uncertainty?" (Exh. 1369, p. 1). Some of the Committee Members (Dr. Brockway was one of them), put together a "White Paper" addressing the issue. (Id.) Dr. Brendecke, IGWA's expert hydrologist, provided his own written comments. (See id.) In his comments, Dr. Brendecke wrote: "Apparently Koreny et. al,

at least partially agree with me, for they repeatedly state in their white paper that 'The trim line has nothing to do with model uncertainty.'" (Id.)

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

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

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

Bern Hinckley, IGWA's expert geologist, testified:

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

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

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

> Q: Do you think the trim line has anything to do with model uncertainty?
>
> A: I think it's largely a policy decision.
>
> Q: And we could wade through your deposition, Greg, but I think over and over when I asked you that question, you said, it's a policy decision?
>
> A: I would agree, it's largely a policy decision.

Q: When you use words like "largely," it only begs me to ask another question, so . . .

A: Well, I can't – let me say this another way. I don't have any specific elements of uncertainty that I want to link to the trim line, but I'm not saying that there could be none that ever existed.

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

A: Right.

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

Given the testimony of Bern Hinckley and Dr. Brendecke it is unfathomable how IGWA can now assert in it's Opening Brief that: "The trim line is a product of both Model uncertainty and the doctrine of reasonable use of water . . . ." See IGWA's Opening Brief, p. 59. This is simply false and directly contrary to the testimony of IGWA's own experts.

4. Quantification of Model Uncertainty is Not Necessary.

IDWR performed an uncertainty analysis on ESPAM2.1. The purpose of this analysis was to gain an understanding of the quality of the model results rather than to attempt to quantify or place a specific number on uncertainty. Coming up with such a number, although technically possible, would be prohibitively expensive and time consuming and would add little to our understanding of the quality of the model results.

The Department's report on its uncertainty analysis is Exhibit 1277. There are four types of model uncertainty – conceptual uncertainty (arises because of uncertainty concerning the true hydro-geologic conditions of an aquifer), parameter uncertainty (arises because not all water budget parameters can be precisely quantified), internal calibration uncertainty (arises because there are many combinations of parameters that can lead to a well-calibrated model), and external

calibration uncertainty (arises because calibration is done to an historical set of data that has its own uncertainties). (See, Exh. 1369 for a discussion by Dr. Brendecke of uncertainty).

There are two basic ways of expressing the uncertainty in model results. One way is to determine the probability distribution of the error associated with a model prediction, choose a confidence limit and state the predicted result with a range determined from the error distribution and confidence limit. (Id.) This appears to be what IGWA is arguing should have been done. Dr. Brockway explained that the "Monte Carlo" method used to do this type of analysis is simply not feasible in terms of resources or time. (Tr., Vol. 10, p. 2330, l. 22 – p. 2331, l. 23). He testified that it probably would have taken Dr. Wylie, the Department's modeler, the rest of his career with the Department to do a Monte Carlo analysis. (Tr., Vol.10, p. 2331, l. 9-13). Dr. Brendecke, IGWA's expert admitted a Monte Carlo analysis was not a reasonably way of quantifying uncertainty because of the complexities involved in the ESPAM2.1 model. (Tr., Vol. 11, p. 2699, l. 7-11. No one within the Department or the ESHMC attempted to quantify uncertainty using a probability distribution. (Tr., Vol. 10, p. 2331, l. 2-8). Bern Hinckley confirmed that no one put a numerical value to the uncertainty of the model. (Tr., Vol. 11, p. 2552, l. 8-16). Instead, the ESHMC chose to conduct what is called a "maximization/minimization" uncertainty analysis. (See Exh. 1277, a report titled "Enhanced Snake Plain Aquifer Model, Version 2.1, Uncertainty Analysis"). While the maximization/minimization uncertainty analysis that was done is not as comprehensive Monte Carlo method, it provides confidence in the predictions of ESPAM2.1. (Tr. p. 2321, l. 13 – 21; p. 2325, l. 4 – 9; see also, Exh. 1284, p. 17-18).

The modeling process that went into producing ESPAM2.1 resulted in a very "robust model"; i.e. a high quality model with good calibration results and accurate predictions. (Tr., Vol. 6, p. 1403, l. 7 – p. 1404, l. 5). The best available predictions of junior pumping impacts on the

Rangen spring complex are those made by ESPAM2.1. (Exh. 1284, p. 17-18, 26). Regardless of any numeric value of uncertainty, the ESPAM2.1 prediction is currently the best available and most unbiased prediction. (Exh. 3203, p.21). There is no rational basis for assigning any "margin of error" as IGWA contends because the ESHMC chose to do a maximization/minimization uncertainty analysis rather than using a Monte Carlo approach because of time and resource constraints. There simply is no basis for reversing the Director's decision to use ESPAM2.1 without assigning a margin of error.

5. Improvements to the Model Produced Different Results.

IGWA contends that "[t]he most startling aspect of the Final Order is how far the Great Rift trim line departs from [the] prior trim line applied to the Rangen call. Previously the IDWR applied a 10 percent trim line, which exposed 735 acres to curtailment. Junior groundwater users cannot fathom, nor does the Final Order adequately explain, how an upgrade of ESPAM caused the IDWR to rationalize skyrocketing the curtailment to 157,000 acres." IGWA's Opening Brief, p. 59. There are two problems with IGWA's position.

First, it is difficult to understand IGWA's surprise that the Director did not use the ten percent trim line used with ESPAM1.1 when using ESPAM2.1 in this case. The Director made it clear from the very first status conference on January 29, 2012 that ESPAM2.1 functions much differently than the prior model and that the use of any trim line is much more difficult. In fact, he told the parties that there may be no trim line involved. The Director explained:

> **I will tell you, in discussing version 2.1**, given the way in which the – and I may slip in my discussion in representations of the model – in its simulations and calibrations to spring nodes – well, model nodes and springs, rather than reaches of the river, **the use of any kind of trim line is much more difficult.**
>
> **And trim lines may not be a component at all in using version 2.0. I don't have any idea. But version 2.0 certainly changes the accuracy and the way it simulates the impacts of various activities on the plain to a particular cell or node. It changes of much of that previous analysis.** So I'm giving you more in answering your question. I want to kind of give you a comparison, talking about version 1.1 and 2.0.

(Tr., 20120109 Pre-Hearing Conf., p. 24, l. 2-16) (emphasis added).

Second, in making this argument it is apparent that IGWA refuses to understand that the imposition of the Great Rift trim line did not cause the number of curtailed acres to "skyrocket." What caused the change in the number of acres subject to curtailment is the difference in the way that ESPAM1.1 and ESPAM2.1 function. The Director addressed IGWA's argument in the Order on Reconsideration issued on March 4, 2014. (R., Vol. 22, p. 4431). The Director explained that:

> 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. Model predictions of benefits to springs in the Billingsley Creek area changed significantly in the latest version of the model because important improvements to spring discharge calibration targets were made. For example, errors discovered in spring flow measurements used in the first version of the model were corrected in the new version of the model and additional, more detailed, spring flow data were available for calibration of the new version of the model. To imply as IGWA does that the application of the trim line is the basis for the change in the result is simply incorrect.

(R., Vol. 22, p. 004431).

IGWA also argues that the Director's ruling set off a "nine-bell" fire alarm for the cities, dairies, businesses and farmers who were given less than three months to prepare for curtailment. If it is true that IGWA and its members were surprised by the Director's decision, this is shocking.

IGWA has known since before 1997 when the Musser case was decided that the Martin-Curren Tunnel was short of water. IGWA has known since at least 2003, when Rangen first made a delivery call, that Rangen was short of water. IGWA's expert witnesses have participated in the development and refinement of the ground water model used by the Director to determine the amount of acres to be curtailed since that development began. Rangen made the delivery call at issue in December 2011 -- almost three years ago. The parties had monthly status conferences until ESPAM2.1 was ready to be used and engaged in extensive discovery involving the production

of tens of thousands of documents, and, at last count, nearly 60 depositions. IGWA's attorneys received the Department's Staff Report in February 2013, deposed the Department's staff, and participated in 16 days of testimony during the hearing on this matter in May 2013. The Director issued his opinion on January 29, 2014 – more than 8 months after the hearing took place.

Rangen actually anticipated IGWA and its members' claim of surprise and during a status conference on May 24, 2012 raised the issue of providing notice of the delivery call to junior-priority ground water pumpers:

> Ms. Brody: Yeah, especially because – and I appreciate the director's comments this morning that you were looking at an April 1 drop-dead date, but it's one of those things, depending upon when orders get issued you hate to bump up against arguments like, well, we're not prepared for this, we haven't taken this into consideration. And so I guess from our perspective it's good to let everybody know this is out there.

(Tr., 20120522 Pre-Hearing Conf., p. 44, l. 2-9). The Director advised counsel for IGWA that it had the responsibility of notifying its members ahead of a formal hearing of the possibility of curtailment. (Id., l. 10-22). IGWA unequivocally rejected the Director's suggestion and indicated that they are not going to send out notices to individual groundwater users. (Id. at p. 43, l. 23 – p. 44, l. 4). IGWA has known about the risks involved in Rangen's delivery call from the outset, and it's continued cries of unfair surprise are not well taken.

D. IGWA's Plan to Phase-In Curtailment in Twenty Percent Increments Would Deprive Rangen of the Water to Which it is Entitled.

IGWA contends that the Director's five-year phase-in of mitigation is improper and that he should have ordered the incremental curtailment of twenty percent of junior irrigated acres each year until full curtailment is reached. IGWA argues that the Director has implemented a "new interpretation" of the phase-in rule and that it is improper.

To begin with, it is worth noting that IDWR has never actually implemented curtailment in any of the surface water delivery calls that have been made since the Conjunctive Management rules were adopted. There is no precedent for determining how actual curtailment should be done and the Snake River Farms opinion cited by IGWA does not spell out the procedure either.

In this case, the Director gave IGWA two mitigation options to avoid curtailment. The first option is to file a mitigation plan which provides a simulated steady state benefit of 9.1 cfs to the Martin-Curren Tunnel. (R., Vol. 21, p. 004199). The second option is to provide direct flow to the Martin-Curren Tunnel over a five- year period as follows:

	Director's Requirement	**IGWA's 20% Incremental Phase-In**
Year One	3.4 cfs	.70
Year Two	5.2 cfs	1.9
Year Three	6.0 cfs	3.2
Year Four	6.6 cfs	4.3
Year Five	9.1 cfs	

(See id.)

IGWA argues that the problem with the Director's mitigation requirement is that in Year Five the junior-users are required to deliver more water than would accrue if full curtailment were implemented. IGWA does not have any problem arguing, however, that curtailment should be phased-in using twenty percent increments even though it means that Rangen would receive substantially less water each year than would accrue through full curtailment. The Director pointed out in his Order on Reconsideration how much Rangen would receive if curtailment were implemented as IGWA advocates. (R., Vol. 22, p. 004433). Those numbers are set forth in the chart above. As between Rangen and the junior-priority groundwater users who are causing

material injury, it makes sense for the junior-users to have to come up with more water in Year Five than forcing Rangen to continue to accept less water than would otherwise accrue through full curtailment for years. The reality is that junior-priority groundwater pumping has been injuring the use of Rangen's water rights for years. It has been eleven years since Rangen made its first delivery call and Rangen has yet to see one drop of water added to its direct flow or curtailment. If the junior users were to fail to deliver the direct flow at any time during the phase-in, Rangen would sustain even more damage.

Besides the fundamental unfairness of IGWA's position, phasing-in curtailment in twenty percent increments would violate the prior appropriation doctrine. For example, in Year One, eighty percent of the junior-priority ground water rights would be allowed to continue to divert out-of-priority. The fact that there are economic impacts from curtailment should not be a consideration for the Director or the Court. As pointed out previously, the Idaho Supreme Court ruled in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011) that a delivery call cannot be denied on the ground that it would result in substantial economic harm. Clear Springs, 150 Idaho at 803, 252 P.3d at 84. Using economic harm to evaluate a call violates Article XV, § 3 of the Idaho Constitution which provides that "Priority of appropriation shall give the better right as between those using the water . . . ." Id. If economic harm cannot be the basis for evaluating a delivery call, it certainly should not be the basis for delaying a mitigation obligation. There is no room in Idaho law or equity for the phase-in IGWA advocates. IGWA's argument should be rejected.

IV. CONCLUSION

The Director did not err on any of the issues identified in IGWA's Opening Brief. IGWA's appeal should be dismissed in its entirety and Rangen should be awarded costs and fees in accordance with the authorities set forth above.

DATED this 8th day of August, 2014.

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for Robyn M. Brody

HAEMMERLE & HAEMMERLE, PLLC

By _____
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By _____
for J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 8th day of August, 2014 she caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

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for Robyn M. Brody

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System

J. ALVIN MUSSER; TIM MUSSER; AND HOWARD "BUTCH" MORRIS,
Petitioners-Respondents,

v.

R. KEITH HIGGINSON, in his official capacity as Director of the Idaho Department of Water Resources and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents-Appellants.

Supreme Court No. 20807

AMICUS CURIAE BRIEF OF IDAHO GROUND WATER ASSOCIATION, INC.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, County of Twin Falls. Honorable Daniel C. Hurlbutt, Jr., Presiding.

John C. Hepworth, John T. Lezamiz and Patrick D. Brown of Hepworth, Nungester & Lezamiz, Chtd., Twin Falls, Idaho, attorneys for J. Alvin Musser, Tim Musser and Howard "Butch" Morris, Petitioners-Respondents.

Hon. Larry EchoHawk, Attorney General, and Clive J. Strong, Phillip J. Rassier and Peter R. Anderson, Deputy Attorneys General, for R. Keith Higginson and the Idaho Department of Water Resources, Respondents-Appellants.

Jeffrey C. Fereday, Christopher H. Meyer and Michael C. Creamer of Givens Pursley & Huntley, Boise, Idaho, and Louis F. Racine, Jr. and Randall C. Budge of Racine, Olson, Nye, Cooper & Budge, Chtd., Pocatello, Idaho, attorneys for Idaho Ground Water Association, Inc., Amicus Curiae.

I. The "full economic development" criterion in section 42-226 governs the administration of the Mussers' water right.

A. Section 42-226 was intended to apply to all water rights affected by ground water.

IGWA contends that, as a matter of statutory interpretation, the "full economic development" criterion spelled out in section 42-226 applies to all water rights affected by ground water pumping.[7] Indeed, it would be unworkable for the statute to apply to a sharply limited set of ground water rights. The entire thrust of the Ground Water Act is to integrate the management of all ground water rights (except for those excepted under the domestic well exemption, I.C. § 42-227) in order to maximize the yield and public benefit from the public's resource and achieve the goal of "full economic development."

Requiring a reasonable means of diversion for some irrigation, industrial

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[7] The Court did not address the question of whether section 42-226 and the rest of the Ground Water Act is applicable to the allocation and administration of water rights between ground and surface water users, or whether it is limited to contests among ground water users. IGWA contends that the Act was intended to remove any distinction between ground and surface users to ensure that all are treated alike under the Prior Appropriation Doctrine. That is, the Act simply codified the great body of common law which had reached that conclusion that ground and surface waters must be regulated conjunctively when they are hydrologically joined.

The Court also failed to address the threshold question of whether the Mussers were ground or surface water diverters (which would be relevant if the Court concluded that section 42-226 applies only in contests among ground water users). Nor was this question addressed below (because section 42-226 was not in issue). The Court apparently assumed, without the benefit of a an adequate factual record or legal analysis, that the Mussers' spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho's water code lumps springs and lakes together with surface rights. I.C. § 42-101. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226. This distinction is discussed in *Branson v. Miracle*, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: "The water flow did not issue naturally from the surface of the earth; thus it was not a spring." In contrast, the Mussers' water source is a natural spring (albeit one which has been improved with an artificial tunnel).