

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

**RANGEN, INC.**

Petitioners,

vs.

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

Respondents.

vs.

**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, TWIN  
FALLS CANAL COMPANY AND THE CITY  
OF POCA TELLO.**

Intervenors.

**Case No. CV-2014-1338**

(Consolidated Gooding County  
Cases CV-2014-179)

**SURFACE WATER COALITION'S JOINT RESPONSE BRIEF**

On Appeal from the Idaho Department of Water Resources

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Honorable Eric Wildman, Presiding

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## INTRODUCTION

The Surface Water Coalition<sup>1</sup> is involved in these proceedings for the limited purpose of addressing the use of the Eastern Snake Plain Aquifer Model 2.1 (“ESPAM 2.1”) in the administration of water rights by the Idaho Department of Water Resources (“IDWR” or “Department”). In the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Groundwater Rights Junior to July 13, 1962* (Jan. 29, 2014) (“*Rangen Order*”), R. Vol. 21 at 4158, the Director affirmed the use of ESPAM 2.1 in administration. The undisputed testimony at the hearing agreed that ESPAM 2.1 is a significant scientific advancement over ESPAM 1.1.

The results of ESPAM 1.1 were qualified through the use of a “trim line” – a geographical demarcation outside which junior groundwater rights were not subject to administration. According to the Director, a 10% trim line was necessary under ESPAM 1.1 due to uncertainties in certain model inputs. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812-13 (2011). Since ESPAM 2.1 is a significant improvement over ESPAM 1.1, it follows, therefore, that ESPAM 2.1 would lead to different results and have a different uncertainty analysis. Importantly, the calibration and results of ESPAM 2.1, or future models, may eliminate the perceived need for any uncertainty based trim line altogether. As technology advances, so too does the Director’s ability to identify the impacts of groundwater diversions and curtailments.

In the *Rangen Order*, the Director made erroneous findings relating to the Supreme Court’s prior treatment of the trim line. According to the Director, “the applicability of a trim-line was previously litigated in the Clear Springs delivery call” and that “the argument that no

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<sup>1</sup> The Surface Water Coalition or Coalition is comprised of 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.

trim line is appropriate was considered and rejected in *Clear Springs*.” R. Vol. 21 at 4224 & 4226. This conclusion errs in its attempt to stretch the finding in *Clear Springs* – affirming a 10% trim line under ESPAM 1.1, only – to apply to any and all groundwater modeling. In truth, there is no law that mandates the use of a trim line in all administrative cases. Any finding that a trim line must be used in all situations – regardless technological advancements in the modeling – is erroneous and must be overturned.

The Idaho Groundwater Appropriators, Inc. (“IGWA”) have also appealed the *Rangen Order*. IGWA would have the Court believe that groundwater users were deceived into developing the State’s groundwater resources. Now that those groundwater diversions have combined to materially injure water users throughout the Eastern Snake Plain, they would have the Court create a rule to allow them to continue diverting, without consequence – regardless of the impacts on senior water rights. Fortunately for Rangen, the Surface Water Coalition and other holders of senior water rights, the law does not create any such defense to administration. If a water user is found to be causing, or contributing to, material injury to senior water rights, then that water use must be curtailed or mitigation must be provided. CM Rules 40, 42 & 43. The law is clear and must be followed.

It is undisputed that ESPAM 2.1 represents the best available science and provides the most scientifically accurate method of predicting the hydrology of the Eastern Snake Plain Aquifer (“ESPA”). In fact, IGWA repeatedly reminds the Court that ESPAM 2.1 “is the best science available.” *E.g. IGWA Br.* at 15. Notwithstanding this assurance, however, IGWA would have the Court believe that the results of ESPAM 2.1 cannot be trusted – that the results cannot accurately or effectively determine impacts to Rangen’s water rights from groundwater diversions. It spends much of its brief attempting to discredit the ESPAM 2.1 results by

challenging the Department's uncertainty analysis, treatment of the Hagerman Rim, Rangen model cell and bias. *IGWA Br.* at 15-20.

IGWA claims that the only solution to these alleged technical problems is the implementation of a 10% trim line. *Id.* at 56-62. According to IGWA, Supreme Court decisions have determined that the Director must always apply a trim line of 10% - if not more – to modeling results. Yet, the law does not support this contention. Importantly, neither does the science. The undisputed and overwhelming testimony and evidence at hearing was that there is no scientific or technical justification for any trim line on ESPAM 2.1 results. For example, the City of Pocatello – another groundwater user participating in the administrative proceedings – argued before the Director that “there does not appear to be a basis to adopt a trim line based on specific technical uncertainty analysis.” R. Vol. 18 at 3808; Tr. at 1641, 11.12-16 (Sullivan testimony) (Pocatello's engineering testifying that there is no technical basis for a trim line as it is “largely a policy decision”). IGWA's own experts agreed. *Id.* at 2697, 11.3-4 (Brendecke testimony) (“the trim line is a policy matter and not a technical one”); *e.g.*, *Id.* at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a “policy decision”).

IGWA's claim that the 10% trim line is etched in stone and must be used into perpetuity cannot withstand scrutiny. It claims that groundwater users must have certainty moving forward – certainty that can only be provided by using a 10% trim line. In the end, IGWA's arguments are nothing more than an effort to avoid responsibility for the injurious depletions caused by groundwater diversions. The law does not condone such actions and, therefore, IGWA's appeal should be rejected.



## ISSUE PRESENTED ON APPEAL

Pursuant to Idaho Appellate Rule 35(b)(4), the Coalition asserts the following issue:

a. Whether the Director erred in concluding that “the applicability of a trim-line was previously litigated in the Clear Springs delivery call” and that “the argument that no trim line is appropriate was considered and rejected in *Clear Springs*?”

## ARGUMENT

### **I. ESPAM 2.1 Represents the Best Science Available and the “Most Robust” Model for Administering Water Rights Along the ESPA.**

Although IGWA admits that ESPAM 2.1 is the best science, it spends much of its brief attempting to cast doubt on the modeled results in these proceedings. These arguments, however, do not discredit the model or its results – rather, as the testimony at the hearing confirmed, these questions only confirmed the “robust” nature of ESPAM 2.1.

Prior to the hearing, the Department issued a *Staff Memorandum*, concluding that ESPAM 2.1 represents the best available science. Ex. 1319. After listening to the testimony at the hearing – including concerns raised by IGWA– the Department’s expert witness, Dr. Alan Wylie, testified that, although there may be shortcomings, the model is the “best science” and is well suited for administration:

Q. MR. MAY: Do you believe that Exhibit 2300 shows, in your opinion, that the model is well calibrated and does a good job of predicting the impact of curtailment at Rangen Springs?

A. DR. WYLIE: I'm very pleased with the calibration we got. I agree with Mr. Hinckley and Dr. Brendecke that there are shortcomings. I think from participating here – well, from observing that I got some pearls of wisdom that I can work on to try to improve. It always – criticizing someone else's model is the easiest job you can get paid to do.

*Q. Do you believe that it is, however, well calibrated and it's the best science that we have?*

**A. It's the best science we have, yes.**

**Q. And did anything that you heard while you were sitting through the hearing today change that opinion?**

**A. No.**

Tr. at 2949-50 (emphasis added). Pocatello's witness, Gregory Sullivan, testified that he has no "specific criticisms of ESPAM 2.1," Tr. at 1465, ll.21-23, and that ESPAM 2.1 represents "the best available science," *id.* at 2739, ll.9-14.

The final report for ESPAM 2.1 concluded:

Although every model represents a simplification of complex processes, with the ESPAM being no exception, ***ESPAM 2.1 is the best available tool for understanding the interaction between groundwater and surface water on the Eastern Snake Plain.*** The science underlying the production and calibration of ESPAM 2.1 ***reflects the best knowledge of the aquifer system available at this time.*** ESPAM 2.1 was calibrated to 43,165 observed aquifer levels, 2,248 river gain and loss estimates, and 2,845 transient spring discharge measurements collected from 14 different springs. Calibration parameters indicate an excellent representation of the complex hydrologic system of the eastern Snake Plain.

Exhibit 1273A at 89 (emphasis added).

Through its *Staff Memorandum*, the Department further stated:

Numerical models are recognized by the U.S. Geological Survey as the most robust approach for predicting the effects of groundwater pumping on surface-water discharge (Barlow and Leake, 2012). A numerical model is able to account for spatial variation in hydrogeologic features and aquifer stresses, and the temporal variation of aquifer stresses. ESPAM2.1 accounts for these features within the constraints of a one-square-mile model grid and one-month stress periods, which is superior to any other predictive method developed for the ESPA to date. Geologic controls on hydrologic responses to aquifer stress are reflected in the discharge and aquifer head data used to calibrate the model. ESPAM2.1, like all groundwater models, is an imperfect approximation of a complex physical system, ***but it is the best available scientific tool for predicting the effects of groundwater pumping on discharge at the Rangen spring cell and other spring and river reaches.*** ESPAM2.1 is a regional groundwater model and is suitable to predict the effects of junior groundwater pumping on discharge at the Rangen spring cell because the spring discharge

responds to regional aquifer stresses, and junior groundwater pumping is a dispersed, regional aquifer stress.

Ex. 1319 at 2 (emphasis added); *id* at 3 (ESPAM 2.1 is the best available science).

ESPAM 2.1 is a significant improvement over ESPAM 1.1, as Dr. Charles Brockway, expert for Rangen, testified:

Q. MR. HAEMMERLE: And what was the – what was driving a better model better than 1.1? In other words, why was 2.0 created?

A. DR. BROCKWAY: Well, various reasons it was created. I think it was recognized that there were some deficiencies in ESPAM-1.1. It had been a number of years since the datasets for ESPAM-1 and – 1.0 and 1 were developed. We had more and better data, both on measured discharges, well measurements. There was a feeling that – I believe that the ESPAM-1.1, the grid spacing could be improved to – to enhance the precision of simulations from the groundwater model. So there were a number of things driving the development of an updated or enhanced ESPAM model.

Tr. at 2296-97.

The process of developing the model was a rigorous one, spanning several years and involving several parties representing various interests. Dr. Brockway discussed one aspect of that process – calibration:

Q. MR. HAEMMERLE: Was there any point in time when Mr. Wylie presented you with a calibration run that he thought this is it?

A. DR. BROCKWAY: Yeah, ultimately he did.

Q. And I think that was under the ESPAM-2.0?

A. Yes.

Q. How was that presented to the committee?

A. Well, Mr. Wylie at every meeting would present the calibration runs he had done since the last meeting, at which time he received input from the committee members as to “Well, why don't you try this. Why don't you do this.” And he would always point out areas that he was having troubles with. If a certain output wasn't matching as well as he thought, he had some ideas he wanted to try to make it fit better. And he would review those with the

committee, and the committee would say “Why don't you go ahead and try that.” And then the next meeting he would report the results of those additional calibration runs, presenting the simulated output versus the measured output for springs and for specific hydrographs of water levels, and eventually he reached the point where, I believe as modelers do, he felt that he was awfully close and the time and effort to get much closer was probably not warranted. And so he would – he ultimately said, “I believe this is – this is the one.”

Tr. at 2308-11. According to Dr. Brockway, the entire modeling committee agreed that the model was reasonably calibrated:

Q. Okay. Dr. Bredecke, Mr. Sullivan agreed that number 8 seemed to present a calibrated run?

A. I think everybody on the committee was convinced that this was as good as we were going to get in the time frame we had and the resources we had, and it was a reasonable calibration.

*Id.* at 2311.

Rangen's witness, David Colvin, further testified, the result of this process is a model that can be described as “robust”:

Q. MR. MAY: Okay. In general with regard to ESPAM-2.1, do you have an opinion upon the general quality of the modeling process that went into producing ESPAM-2.1?

A. MR. COLVIN: I do. I think that the modeling process with IDWR leading and within the open environment of the committee, that process of development and just the model procedure development resulted in a very robust model.

Q. Okay. And could you tell me what it is that you mean by “robust.”

A. “Robust,” by that I mean the ability of the model to provide accurate predictions. Because of the overall model quality of the model at large, even though you might make changes to some smaller parts of the model, but it – through those changes it would retain the ability to make accurate predictions.

Q. Okay. And do you have an opinion with regard to ESPAM-2.1 with regard to the quality of the model itself?

A. I do.

Q. Okay. And what is that?

A. I believe that the model itself is a high-quality model with good calibration results and accurate predictions.

...

A. ... And to me, this shows that the modeling process led up to ESPAM-2.0 that is a robust model, and was even further improved with ESPAM-2.1.

Tr. 2403-06; *see also Id.* at 2327, ll.14-16 (Brockway Testimony) (describing ESPAM 2.1 as “robust”).

During the hearing, IGWA attempted to challenge the model’s ability to predict impacts at the particular spring from which Rangen diverts its water rights. However, no party challenged ESPAM 2.1’s use as a regional model. Indeed, although alternative models were provided by Dr. Brendecke, on behalf of IGWA, Dr. Wylie testified that they merely illuminated the robust nature of ESPAM 2.1:

A. DR. WYLIE: It made me pretty confident that what we’ve done at Rangen is fairly robust.

Q. MR. MAY: And why did it give you that confidence?

A. The AMEC 1 had almost exactly the same sum of squared residuals for Rangen and a very, very similar value for the whole model curtailment. And AMEC 2, the residuals were higher for Rangen, but they changed the weights. So I don’t know how much of that was a result of changing the weights. But they also – that also had very similar curtailment values for Rangen.

Tr. at 2925-26.<sup>2</sup> In the end, although IGWA “heroically” attempted to discredit the results of ESPAM 2.1, its actions only confirmed that ESPAM 2.1 is the best science available:

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<sup>2</sup> IGWA accuses the Director of violating due process and discretionary standards by treating “Model predictions as if they are perfect, while acknowledging they are not.” *IGWA Br.* at 57. No one claims that ESPAM 2.1 is perfect – there was never any such testimony at hearing. However, the model is the best available science. “The limitations of the model are identifiable and important but they do not preclude reliance upon it.” *Clear Springs*, 150 Idaho at

Q. And how about the composite model, did that lend comfort to you as well?

A. Well, I guess in a way. They heroically tried to change things drastically, and there's still significant water coming to Rangen from curtailment.

*Id.*

The end result of this process is a model that is appropriate for use in conjunctive administration, including the Rangen Call:

Q. MR. HAEMMERLE: Okay. Based on what you know about the model, based on your experience on the committee, based on your life – or your 40-some, 50 years of experience doing modeling, do you believe ESPAM-2.1 can be used for all administrative purposes for the Department?

A. DR. BROCKWAY: Yes.

Q. Can ESPAM-2.1 be used in curtailment situations like we have in this case?

A. I believe it can be used for water calls. It can be used for impact evaluations in response to – or to evaluate transfer applications, which require a model. So yes, I think it's the best available tool we have. It's based on good science. I think it's properly calibrated and validated, so we ought to use it.

Tr. at 2340-41.

As discussed below, IGWA's attempt to discredit the modeling results cannot withstand scrutiny and, certainly, do not justify the automatic and perpetual application of a 10% trim line based upon a prior model version's uncertainty.

## **II. There is no Law in Idaho that Mandates the use of a "Trim Line" in Administration.**

In the *Rangen Order*, the Director concluded that "the applicability of a trim-line was previously litigated in the Clear Springs delivery call" and that "the argument that no trim line is

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813. IGWA made nearly identical arguments relative to ESPAM 1.1 and the Director's decision to limit the ESPAM 1.1 trim line to 10%. *Id.* (IGWA asserts that the Director must "assign a more accurate level of predictive uncertainty between 20 and 30%"). These arguments were rejected there, *id.*, and should be rejected here.

appropriate was considered and rejected in *Clear Springs*.” R. Vol. 21 at 4224 & 4226.

Although this may be true as to ESPAM 1.1, specifically, nothing in the *Clear Springs* decision – or any other case law – mandates the use of a trim line with every model or its subsequent application.

IGWA makes similar arguments. It asserts that, although ESPAM 2.1 is the best available science, its results cannot be trusted due to certain “errors” in the model. *IGWA Br.* at 15-20. According to IGWA, therefore, case law mandates the use of a trim line to adjust for these alleged errors. *Id.* at 57-62.

The hallmark of lawful administration is that junior water rights cannot take water that would otherwise be put to beneficial use by a senior water right. IDAHO CONST. art. XV, § 3; I.C. §§ 42-602 & -607. The SRBA Court has determined that all water rights in the basin must be administered as connected sources, unless excepted with a separate streams general provision. *Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management), Memorandum Decision and Order of Partial Decree* (Subcase No. 91-00005) (Feb. 27, 2002). Further, junior groundwater users carry the burden to prove, by clear and convincing evidence, no injury to seniors as a result of their out-of-priority diversions – whether the defense is legal, factual or technical. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500(2012). This is because defenses impeding administration to deliver the full amount of the senior water right impinge upon and unlawfully diminish a senior’s property right.

The Conjunctive Management Rules do not excuse any injurious out-of-priority pumping. CM Rules 20 & 40. The rules require administration of all junior priority groundwater rights located within the ESPA, an area of common groundwater supply. CM Rule

50. The Director and watermaster must administer junior groundwater rights causing injury to a senior water right within an organized water district. CM Rule 40.

The concept of a “trim line” was contrived to qualify the modeled results of ESPAM 1.1, an older and outdated version of the model. As discussed above, however, ESPAM 2.1 is a *different model* – a much more “robust” model, with more accurate results calibrated to specific springs. Unlike version 1.1, here the Director found that any uncertainty with ESPAM 2.1 could not be quantified. R. Vol. 21 at 4226, ¶ 49. As such, there is no technical basis to apply a trim line to ESPAM 2.1. *See* Tr. at 1641, 11.12-16 (Sullivan testimony) (Pocatello’s engineering testifying that there is no technical basis for a trim line as it is “largely a policy decision”); *Id.* at 2697, 11.3-4 (Brendecke testimony) (“the trim line is a policy matter and not a technical one”); *Id.*, e.g., at 2551, ln. 17 (Hinckley testimony) (frequently referring to the trim line as a “policy decision”).

The use of a trim line to qualify the results of ESPAM 1.1 was a hotly contested issue in the Surface Water Coalition, Clear Springs Foods and Blue Lakes Trout call proceedings. This issue was addressed by the Supreme Court in *Clear Springs*, 150 Idaho 790. Whereas the Spring Users argued that a trim line was not warranted because uncertainly cuts both ways (i.e. it is a plus or minus uncertainty), the groundwater users asserted that the trim line should be higher than 10% – i.e. 20% or 30%. 150 Idaho at 812-14 & 816-17. The Director, District Court and Supreme Court rejected all of these arguments. Speaking of ESPAM 1.1, the Supreme Court stated:

The district court held that “the Court concludes that 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 court stated, “The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality. ... Given the function and purpose of a model it would be inappropriate to apply the results independent of the



assigned margin of error.” The court concluded, “Accordingly, the Director did not abuse discretion by applying the 10% margin of error ‘trim line.’” The issue is whether the district court erred in upholding the Director on the ground that he did not abuse his discretion in not curtailing groundwater appropriators who are within the model’s margin of error.

...

The Director concluded that there was up to a 10% margin of error in the groundwater model due to the margin of error in the stream gauges, and he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material injury to the Spring Users' water rights. The Director perceived the issue as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason. The district court did not err in upholding the Director's decision in this regard.

*Id.* at 816-17. Accordingly, the results of ESPAM 1.1 were qualified based on the 10% trim line.

Both the Department and IGWA attempt to extrapolate from this factual decision a rule of law that mandates the use of a trim line in all administrative proceedings using all models – no matter how accurate or “robust.” These assertions are wrong. The Supreme Court did not address whether a trim line would be appropriate in any other modeling – including ESPAM 2.1 or any future model iterations. Indeed, that question was never before the Court. Rather, the sole question before the Court dealt with the applicability of a trim line to the specific results of a specific model (ESPAM 1.1).

Relying on several cases, IGWA asserts that the law of “reasonable use” compels a 10% trim line mandate. Yet, these cases do not speak to the use of a trim line in administration. They do not establish a bright line rule where administration that only produces 10% of the curtailed water results in prohibited “waste” or “hoarding.” Perhaps most importantly, none of the cases establishes a legal basis to assign a 10% “trim line” to the results obtained from ESPAM 2.1. Rather, as the Idaho Supreme Court specifically noted in *Clear Springs*, each case addressed the means of diversion of particular water users under specific facts. 150 Idaho at 809 (“The senior

appropriator in *Van Camp* was entitled to his water right; he simply had to change his *unreasonable means of diversion*. ... The issue in *Schodde* was whether the senior appropriator was protected *in his means of diversion*, not in his priority of water rights”) (emphasis added).

IGWA first relies on *Van Camp v. Emery*, 13 Idaho 202 (1907). In that case, the Court held that the holder of a water right should not be authorized to dam a stream “so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much.” 13 Idaho at 754. This holding – dealing with the water user’s means of diversion – cannot be read to extend to a balancing of water rights in administration and certainly cannot be read as creating a right to alter a groundwater model’s results when junior priority water rights are found to be contributing to material injury suffered by a senior surface water user. Indeed, the case merely held that the water user “had to change his unreasonable means of diversion.” *Clear Springs*, 150 Idaho at 809.

Likewise, *Schodde v. Twin Falls Land & Water Company*, 224 U.S. 107 (1912), did not address water right administration and did not establish the right to alter modeled results by 10% when conjunctively administering water rights. Rather, as in *Van Camp*, it addressed the reasonableness of a diversion that required the entire flow of the river in order to fulfill one person’s water right. To that extent, the Court recited, as a hypothetical example, a situation wherein 90% of the current of a river was needed in order to divert the other 10%. Again, the example dealt with the water user’s means of diversion and the appropriation of new water rights – it did not create any rule dealing with the results of modeling in administration. *See Clear Springs*, 150 Idaho at 809 (*Schodde* only concerned “his means of diversion”).

IGWA further attempts to extrapolate a trim line mandate from *Clark v. Hansen*, 35 Idaho 449 (1922), and *Basinger v. Taylor*, 36 Idaho 591 (1922). *IGWA Br.* at 45-46. In *Basinger*,

the Court was asked to determine the priority of water rights on Dry Creek. According to the Court, Dry Creek and the “Farmers’ Ditch” had historical losses of 10% and 50% respectively. 36 Idaho at 596. The construction of a pipeline by the most junior water user on the system resulted in a savings of these historical losses. *Id.* The most junior water user claimed that it was entitled to the water saved as a result of its pipeline. *Id.*<sup>3</sup> The Court agreed as to the savings of the 10% loss on Dry Creek. *Id.* at 596-97. However, as to the Farmers’ Ditch, the Court held that 50% loss was “not a reasonable loss.” *Id.* at 597. Importantly, this was not because the loss was 50% (i.e. it was not a matter of the number). *Id.* Indeed, the Court recognized that the loss could be prevented by installing a “cement lined ditch at the cost of \$100,000” – which was “not reasonably” expected. *Id.* The reason that the 50% loss was considered unreasonable was due to the water users’ failures to take “reasonable” steps to prevent the loss. *Id.* (“But they could have been reasonably expected to prevent the water spreading out at several places as shown by the evidence”). Again, *Basinger* is about reasonableness of diversion – not limitations on administration.

Finally, the decision in *Clark* had nothing to do with priority administration at all. 35 Idaho 449. That case dealt with the issuance of a water right after diversion works were not completed within the statutory timeframe. Other water users claimed that since irrigation works were not completed within the statutory timeframe, any water right authorizing the diversion of water through those irrigation works was not valid. Although the Court found that a 90% loss through a particular ditch was “against public policy” and considered “waste,” the Court did not

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<sup>3</sup> “A person who, by removing obstructions from a stream and constructing artificial works, prevents the loss of water flowing therein through seepage and evaporation, and materially augments the amount of water available from the stream for a beneficial use, has the right to make use of the amount of water so conserved by his efforts in excess of the natural flow of the stream.” *Basinger*, 36 Idaho at 596 (internal citation omitted).

conclude that a junior priority water right should be able to avoid administration because of the 90% loss.

IGWA contorts the holdings in these cases, concluding that they “draw the line at 10 percent,” and that “the Idaho Supreme Court has determined it strikes a reasonable balance between the doctrines of priority and reasonable use of water.” *IGWA Br.* at 58. Yet, none of these cases creates any rule allowing the Director to limit or qualify ESPAM 2.1 for the purposes of conjunctive administration. IGWA is simply wrong to claim these cases reach waste, hoarding, and reasonable use in the context of a 10% trim line for the use of ESPAM 2.1 in conjunctive administration. Simply put, none of these cases stand for the proposition that a trim line must be implemented in every delivery call or that junior priority water users may avoid administration because of some undefined and unquantified uncertainty in the modeling. Cases, such as these, which address the reasonableness of diversions (not trim lines) have no application here, where Rangen’s diversions have been found reasonable. *R.* Vol. 21 at 4223.

There is simply no law that mandates the use of a trim line in every delivery call proceeding. Technologies will advance. Models will improve. With these advancements, the ability of the Director to anticipate impacts from groundwater diversions increases. The Director may determine in such cases, as he did in the application of ESPAM 2.1 here, that uncertainty cannot be quantified. As such, the uncertainty defined with a prior model and its application has no relevance, and certainly does not create a rule of law regarding a trim line. Accordingly, the Director’s and IGWA’s attempt to create a trim line mandate must be rejected. *See* I.C. § 67-5279(3) (agency decisions reversed when they are contrary to law or arbitrary and capricious).

### **III. If the Director Can Use a Trim Line, Then IGWA's Arguments Against the Great Rift Trim Line Lack Merit.<sup>4</sup>**

IGWA's frustration with the Great Rift trim line boils down to one complaint: It is too harsh. It complains that the Great Rift trim line strays too far from the 10% trim line associated with ESPAM 1.1. *IGWA Br.* at 59.<sup>5</sup> According to IGWA, the failure to simply stay with the 10% trim line violates Idaho law – regardless of the science or other information available. *Id.* at 59-60. IGWA accuses the Department of being inconsistent and unreliable in its decision making process. *Id.* at 60. IGWA would have the Court force the Director to apply a 10% trim line – even though the science does not support such a trim line in this case and may not support any such trim line in future cases.

Not only is there no evidence to support IGWA's demands, these demands defy logic and are contrary to Idaho law. The demands are merely a ruse to push the burden of a depleted resource on the senior water user contrary to Idaho water law. *See, e.g.,* I.C. § 43-106 ("First in time is first in right").

Priority administration may be a harsh doctrine but it is a fair doctrine.

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

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

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<sup>4</sup> The Coalition does not concede that the Director's use of a trim line for the results of ESPAM 2.1 is appropriate or necessary.

<sup>5</sup> This argument is especially confusing given IGWA's repeated recognition that ESPAM 2.1 is a better product than ESPAM 1.1. *See supra* Part I. If ESPAM 2.1 is better than ESPAM 1.1, it follows that any trim line that may be applied will be less than the 10% trim line imposed under ESPAM 1.1.

Throughout Idaho's history, water users have diverted and developed Idaho's water resources with the express knowledge and understanding that, in times of shortage, those who diverted the water first had a prior right to the continued use of that water. Each subsequent water user diverted water subject to the "long-standing rule in Idaho" that "each junior appropriator is entitled to divert water *only when the rights of previous appropriators have been satisfied.*" *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26(Ct. App. 1988) (emphasis added). These subsequent water users include the groundwater users now complaining that they must be held responsible for their injurious depletions to the water supply.

This "underlying basic principle of water rights in the State of Idaho," *Application of Boyer*, 73 Idaho 152, 161(1952), existed prior to statehood and is engrained in Idaho's Constitution, statutes and regulations:

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

*Joyce Livestock Co. v. United States*, 144 Idaho 1, 7-8(2007) (emphasis added); *see also Nielson v. Parker*, 19 Idaho 727(1911) ("The doctrine prevailed prior to statehood, and in the earliest territorial history, that the 'first in time is the first in right,' in the diversion and use of the public waters"); *Dunniway v. Lawson*, 6 Idaho 28 (1898) ("plaintiffs were entitled, by virtue of a prior location, to the waters of Alder creek").

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

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

(Emphasis added). Indeed, as early as 1891, the Court recognized that the right to the use of water "has been decided so often in favor of the prior appropriator that it has been generally considered, both by professionals and profanes, as a settled question." *Hillman v. Hardwick*, 3 Idaho 255 (1891); *Nielson, supra* (if a water users "should actually divert the water and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired").

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

IGWA asserts that "there was no reason to think a computer model upgrade ... would instead cause the IDWR to abandon the 10 percent trim line altogether." *IGWA Br.* at 61. Yet, IGWA's own expert – who sat on the model development committee – confirmed that there was

no technical basis for a trim line. Tr. P. at 2697, 11.3-4 (Brendecke testimony) (“the trim line is a policy matter and not a technical one”).

IGWA complains that the Great Rift is “so far removed from the 10 percent trim line that junior users are left with no predictability as to how trim lines may be implemented in the future” and accuses the Department of admitting “there is no reason to expect the Director will apply the Great Rift trim line to other calls.” *IGWA Br.* at 61 (citing IDWR’s response in opposition to the motion to augment the record). This argument ignores the fact that delivery calls are fact dependant – depending on the location, priority and diversion rate of the senior water right(s) among other factors.

As the Department explained in its response to the motion to augment the record, most of IGWA’s assertions on this issue are speculative – “there have been no determinations of material injury for the water rights listed, no determinations of whether the calling parties are using water consistent with the conjunctive management rules, no decisions on whether curtailment of junior groundwater pumping would result in a benefit to the calling party, and no determinations regarding whether full curtailment to the water right priority date would be required to fulfill a given water right.” *Response in Opposition to Augment Record* at 5 (June 26, 2014).

IGWA complains that “after a decade of conjunctive management, there is no reliable standard or rationale from the IDWR concerning trim lines” – thus leaving IGWA to “assume” that there will not be any “consistent application of trim lines in the future.” *IGWA Br.* at 61-62. Importantly, “junior rights outside the [trim] line are not” administered – regardless of their impacts on the materially injured senior water right. *Id.* at 59. Such rights receive a “free pass” to continue depleting the resource and contributing to the material injury. IGWA’s argument that not enough water users are given that “free pass” is offensive to the holders of senior water



rights who are suffering from the material injury caused by those junior groundwater diversions. Furthermore, the groundwater users cannot expect that all delivery calls will be subject to the same trim line, if any trim line at all. As stated above, delivery calls are fact dependant – one cannot create a bright line rule that will subject all calls to the same trim line.

IGWA wraps up its arguments with the following statement:

If it was previously unreasonable for Rangen to curtail juniors beyond a 10 percent trim line, and if it is still unreasonable for the Surface Water Coalition to curtail juniors beyond a 10 percent trim line, then the IDWR must provide a rational, reasonable and factually grounded explanation as to why Rangen is now being permitted to curtail juniors if less than one percent of the curtailed water is expected to ever reach the Curren Tunnel.

*IGWA Br.* at 62. The response to this argument is simple: ESPAM 2.1 is a superior model with superior results. It is undisputed – indeed, IGWA agrees – that ESPAM 2.1 is a marked improvement over ESPAM 1.1. *Supra* Part I. Under ESPAM 1.1’s inferior results, the first Rangen call was denied. However, ESPAM 2.1 has now been released and has been applied to this Rangen Call. The superiority of ESPAM 2.1 was thoroughly and exhaustively addressed in the hearing. *Supra* Part I. It is a superior product that provides better and more reliable results. IGWA simply disagrees with the Director’s decision relative to the Great Rift. This disagreement does not mean that the Director has failed to provide a “rational, reasonable and factually grounded explanation” for the use of the Great Rift trim line. IGWA’s demands for more information or justification are not necessary and are not supported by law.

IGWA’s arguments are essentially an effort to avoid administration. Use of a 10% trim line, as demanded by IGWA, would be especially egregious in this case, where, even though the senior water right is materially injured, even less water would be provided to Rangen, R. Vol. 19 at 3901 ¶ 99, while junior water right holders would continue to divert their entire water right(s). There is simply no legal basis for applying a 10% trim line to the results of ESPAM 2.1.

#### **IV. IGWA Misconstrues the Law of “Waste” and “Hoarding,” Defenses it Failed to Prove by Clear and Convincing Evidence at Hearing.**

IGWA repeatedly asserts that following the results of ESPAM 2.1 will lead to “waste” and “hoarding” – a problem that can only be tempered with a larger trim line. IGWA misreads Idaho law on these subjects and wrongly attempts to meld them into the concept of model uncertainty and application of a trim line.

No water user has the right to “waste” water. Beneficial use is the measure and limit upon the extent of a water right. *A&B Irr. Dist. v. Spackman*, 315 P.3d 828, 155 Idaho 640 (2013). Waste or the “failure to put the decreed quantity to beneficial use is a defense to a delivery call.” *In the Matter of the Petition for Delivery Call of A&B Irrigation District*, Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. CV-2009-647 at 33 (May 4, 2010) (Hon. E. Wildman) (“*A&B Order*”). Waste by the senior is a defense that must be proven by junior appropriators by clear and convincing evidence. 315 P.3d at 841; *A&B Irr. Dist.*; 153 Idaho at 524. IGWA failed to carry this burden at hearing, and the Director found that Rangen beneficially uses available water. R. Vol. 21 at 4222 ¶ 30.

IGWA confuses the concept of a senior’s “waste” and “hoarding” with water that a junior appropriator does not have a right to use. IGWA is wrong. If groundwater rights junior to Rangen’s July 13, 1962 surface water right are curtailed, water that does not arrive for use at Rangen’s facility is not “wasted” or “hoarded” by Rangen. Instead, that water either remains in the aquifer for use by other groundwater users or will flow to other springs and river reaches where that water can be put to beneficial use by other senior surface water rights. In light of the

continued moratorium<sup>6</sup> on new appropriations in the ESPA, and the fact that certain senior surface water rights are curtailed every year, water that improves aquifer levels or flows to other springs and river reaches is needed and will be put to beneficial use. In no sense is this curtailed water “wasted” or “hoarded” by Rangen. IGWA simply misses the point on how those issues apply to analyze a senior’s water use in administration.<sup>7</sup>

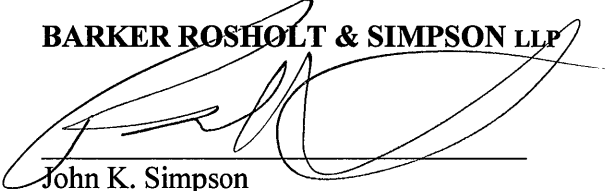
Moreover, as found by the Director, the ESPA suffers from a continued state of deficit of nearly 300,000 acre-feet per year. R. Vol. 21 at 4203, ¶ 75. This annual deficit, causes declining groundwater levels and reduced discharge to hydraulically connected reaches of the Snake River and tributary springs. Accordingly, curtailment that sustains and improves the health of the ESPA is not “waste” in any sense, and certainly not in the context of a senior user wasting water under Idaho law. IGWA’s misinterpretation of this issue should be rejected.

### CONCLUSION

There is no law that mandates the use of a trim line in priority administration. Any effort by the Director or IGWA to alter the law should be rejected.

Dated this 8<sup>th</sup> day of August, 2014.

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<sup>6</sup>See *Amended Moratorium Order* (Eastern Snake Plain Area) (April 30, 1993); available on-line at IDWR’s website: [http://www.idwr.idaho.gov/WaterManagement/Orders/Moratorium/orders\\_moratorium.htm](http://www.idwr.idaho.gov/WaterManagement/Orders/Moratorium/orders_moratorium.htm).

<sup>7</sup> Furthermore, IGWA fails to mention the opportunity that groundwater users have submit mitigation plans pursuant to CM Rule 43 if they do not want to face curtailment based on ESPAM 2.1 results.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of August, 2014, the above and foregoing document was served on the following via email:

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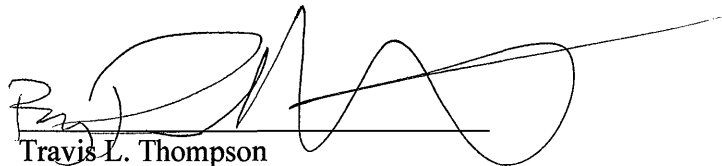
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