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DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
TWIN FALLS COUNTY

RANGEN, INC.,

Petitioner,

vs.

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

Respondent,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., FREMONT-MADISON IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT NO. 2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, and CITY OF POCATELLO.

Intervenors.

Case No. CV-2014-1338
(Consolidated Gooding County
Case No. CV-2014-179)

IGWA's Reply Brief

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, through counsel, hereby replies to *Idaho Department of Water Resources' Brief in Response to IGWA's Opening Brief* ("IDWR Response to IGWA"), *Rangen Inc.'s Response Brief* ("Rangen Response"), and *Surface Water Coalition's Joint Response Brief* ("SWC Response"), all of which were filed August 8, 2014.

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1. The SRBA decrees for Rangen's water rights do not control the applicability of the Ground Water Act.

IDWR and Rangen dispute IGWA's claim that the Martin-Curren Tunnel must be administered as a groundwater diversion under the Ground Water Act (the "Act").[1]

First, IDWR contends the *Musser v. Higginson* decision conclusively decided the Martin-Curren Tunnel is not subject to the Act because it refers to the Mussers' water source (Martin-Curren Tunnel) as "springs."[2] However, the applicability of the Act was not at issue in *Musser*. The sole issue in that case was whether the trial court properly issued a writ of mandate ordering the Director of the IDWR "to comply with I.C. § 42-602 and distribute water in accordance with the doctrine of prior appropriation."[3] The Director had not held a hearing or taken other action on the Musser delivery call because he believed the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules") needed to be completed first.[4]

The *Musser* decision indicates the Director may have believed the Musser call was subject to the Act, since he opposed the writ of mandate on the basis it was "an inappropriate method by which to litigate the relationship between *senior and junior ground water rights*."[5] However, there had been no litigation of the issue, and no decision by the Director.

Accordingly, the issue of whether the Musser's call was subject to the Act was not on appeal, and the Supreme Court's reference to the source as "springs" is not *res judicata* as to that issue.[6]

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[1] *See* IGWA Opening Brief at 35-42.

[2] IDWR Response to IGWA at 8.

[3] *Musser v. Higginson*, 125 Idaho 392, 393 (1994).

[4] *Musser*, 125 Idaho at 394.

[5] *Musser*, 125 Idaho at 394.

[6] *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007) (There are five factors for determining whether *res judicata* bars re-litigation of an issue, one of which is

Rangen makes the same argument as IDWR, but also quotes a footnote from a brief filed by IGWA in the *Musser* case that opined the Curren Tunnel is "probably" a surface water source. Yet, that same footnote points out that this issue had not been decided, and that any discussion of the issue by the judiciary was "without the benefit of an adequate factual record or legal analysis."[7] This further verifies that the issue of whether the Curren Tunnel diversion is subject to the Act was not decided in the *Musser* case.

Second, IDWR contends the Court's recent *A& B Irrigation District v. Idaho Department of Water Resources* decision ruled that the Curren Tunnel is a surface water source.[8] Again, however, whether the Tunnel is subject to the Act was not an issue in that case.[9] While the *A& B* decision refers to the Musser diversion is a surface water source, it is based on the Court's prior reference to the source as "springs," which, as explained above, had not been litigated.

Moreover, the *A& B* decision affirms that "[t]he thrust of the [*Musser*] opinion dealt with the Director's duties under I.C. § 42-602 and the principles of mandamus," discounting discussion of anecdotal matters as dicta.[10] Thus, *A& B* is also inconclusive of whether Rangen's diversion of groundwater via the Curren Tunnel is subject to the Act.

Third, IDWR claims "IGWA is challenging an element of Rangen's water rights as decreed by the SRBA District Court."[11] Not so. IGWA is not asking this Court to change the name of the decreed source; it is asking that the comply with the Act by *administering* the Curren Tunnel as a ground-

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that "the issue decided in the prior litigation was identical to the issue presented in the present action." Because the issue of whether the Martin Curren Tunnel is subject to the Act was not decided in the *Musser* case, the issue is not barred in the present case.).

[7] Rangen Response at 5.

[8] IDWR Response to IGWA at 9.

[9] *A& B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500 (2012)

[10] *A& B Irr. Dist.*, 153 Idaho at 509.

[11] IDWR Response to IGWA at 10.

water diversion under the Act since it meets the statutory definition of a groundwater diversion under the Act.[12]

As IGWA pointed out in its opening brief, the administration of water rights does not constitute a re-adjudication of the senior's right because "water rights adjudications neither address, nor answer, the questions presented in delivery calls."[13] IDWR claims this statement is "taken out of context" because the Court "was discussing the Director's application of the material injury factors . . . ."[14] The applicability of the Act, however, is an essential component of the material injury analysis, since the analysis for groundwater diversions requires consideration of reasonable groundwater levels, while the analysis for surface water diversions does not. The Director cannot properly evaluate injury without determining whether the Act applies. Thus, the applicability of the Act clearly falls within the scope of issues that were not presented or decided in the SRBA.

Fourth, while the Director cited Adjudication Rule 60 as the basis for the ruling the Curren Tunnel is a surface water source,[15] IDWR now retreats from that position, arguing that "AJ Rule 60 simply highlights the naming convention used in the SRBA," and "does not serve as the legal authority declaring Rangen's water source as surface water."[16] IGWA agrees wholeheartedly with IDWR's characterization of AJ Rule 60. And since AJ Rule 60 is not determinative, IDWR must have some other basis for administering the Tunnel as a surface water diversion in violation of the Act.

IDWR's new theory is that the SRBA practice of identifying groundwater sources with the generic name "ground water" obligates the Director to

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[12] See IGWA Opening Brief at 35 ("The Curren Tunnel meets the statutory definition of a groundwater well, and must be *administered* as such.")

[13] *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 876 (2007) ("*AFRD2*").

[14] IDWR Response to IGWA at 10.

[15] Order on Summary Judgment at 4, ¶ 4 (R. Vol. 15, p. 3174).

[16] IDWR Response to IGWA at 11.

administer the Tunnel as a surface water diversion.[17] IDWR argues that "if the Court had intended the source to be ground water, the decrees would have said ground water."[18]

There is an obvious reason why the source of most groundwater diversions is identified as "ground water," while the Curren Tunnel is not: most groundwater diversions do not have unique names like the Curren Tunnel does. Where no unique name exists, "ground water" is a natural fit. In contrast, where a unique, well-known name does exist, the claimant would be expected to identify the source as such.

The SRBA could have been more specific by listing the name of the particular aquifer from which each groundwater right diverts (ESPA, Lower Portneuf Aquifer, etc.), but, considering the technical nature of that determination and its implications for water rights administration, the court decided to leave that to the Director to address in the context of administration. The applicability of the Act is left to the Director for similar reasons.

The issue for this Court to decide is whether the SRBA court analyzed the applicability of the Act every time it decreed the source of a water right. In other words, do SRBA decrees, simply by giving a water source a common name, obligate the Director to administer the water right as a surface water diversion, even if it violates the Act, or is the decreed name of a source inconclusive as to whether administration of a given right is subject to the Act? This is a question of law, and should be reviewed *de novo*.[19]

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[17] IDWR Response to IGWA at 9.

[18] IDWR Response to IGWA at 11.

[19] *Kinghorn v. Clay*, 153 Idaho 462, 465 (2012) (citing *Karle v. Visser*, 141 Idaho 804, 806 (2005)).

2. The Final Order unreasonably applies (or fails to apply) the "bedrock principle" of beneficial use by allowing Rangen to command 100 times more water than it can put to beneficial use.

IGWA contends the Great Rift trim line allows Rangen to hoard excessive amounts of the ESPA in violation of the law of beneficial use of water.[20] IDWR, Rangen, and the Surface Water Coalition (SWC) contend there is no problem with Rangen taking 100 times more water than it uses. Their responses defy a century of jurisprudence, necessitating corrective guidance from this Court.

2.1 IGWA relies on law, not "fairness" or "economic impact."

Rangen argues 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."[21] It is certainty unfair for the State of Idaho to heavily encouraging development of groundwater through legislation, the State Water Plan, and the Swan Falls Agreement, then pull out the rug and shut off groundwater rights across the Magic Valley as if they shouldn't have been issued in the first place, but IGWA doesn't rely on "fairness" to support its appeal. It relies on the "bedrock principle" of Idaho law that requires reasonable beneficial use of the State's water resources. As the Idaho Supreme Court recently stated in *A& B*, "[t]he prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use."[22]

Rangen argues "the broad 'doctrine of reasonable use' as described by IGWA does not exist," saying "there is no broad authority to refuse to administer water rights based upon the perceived unreasonableness of the scope of curtailment."[23] This is remarkable, considering the numerous

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[20] IGWA Opening Brief at 42-49.

[21] Rangen Response at 4.

[22] *A& B Irrigation v. Spackman (In re A& B Irrigation Dist.)*, 155 Idaho 640, 650 (2013).

[23] Rangen Response at 9.

court decisions that denied the exercise of priority because it would result in unreasonable use of the resource,[24] the CM Rule that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water,"[25] and the Supreme Court's thorough ruling in *AFRD2* that the Director has an affirmative duty "to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development."[26] Rangen tellingly cites no law to support its assertion that the Director has no authority to refuse administration by priority if it will result in unreasonable use of the resource.

Rangen also claims IGWA's appeal is based on "the disproportionate impact of curtailment,"[27] yet there is no reference to economics in IGWA's brief. The Supreme Court ruling in *Clear Springs Foods* made clear that the exercise of priority cannot be denied on the basis of economic harm, though it also confirmed a senior's means of appropriation may be deemed unreasonable if it enables the senior to command exponentially more water than the senior beneficially uses.[28]

IGWA's appeal relies wholly on beneficial use of the resource. Allowing Rangen to command 100 times more water than it uses speaks for itself.

2.2 IDWR's defense of the Director's perception of "limited discretion" defies common sense.

IGWA contends the Director's forthright admission that he "perceives this issue of a trim line as one of limited discretion" reflects a mistaken assumption that he has limited autonomy to curb the exercise of priority to

[24] *See* IGWA Opening Brief at 43-46.

[25] CM Rule 20.03 (IDAPA 37.03.11.020.03).

[26] American Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 876 (2007).

[27] Rangen Response at 4.

[28] *Clear Springs Foods, Inc. v. Idaho Dept. of Water Resources*, 150 Idaho 790, 809-10 (2011).

protect against excessive hoarding of the ESPA.[29] IDWR defends the "limited discretion" statement by arguing it "simply signals the Director's discretion is not 'unfettered.'"[30] This defense is contrary to a common sense reading of the Final Order.

Of course the Director does not have unfettered discretion. All his decisions are subject to judicial review under the "abuse of discretion" standard,[31] which requires him to reasonably interpret and apply the laws and regulations that govern his decision.[32]

A common sense reading of the "limited discretion" statement indicates the Director perceived limited autonomy to restrict the exercise of priority—that his hands are tied, so the speak. This is not the law. The Director has an affirmative duty to apply both bedrock principles of water distribution. They stand on equal ground, and applying them simultaneously means a senior may exercise priority to curtail juniors only so long as the senior puts the curtailed water to beneficial use, without excessive waste or hoarding of the resource.[33]

The SWC disputes this, arguing the principle of reasonable beneficial use cannot override distribution by priority.[34] In their view, beneficial use must yield to priority. But this is not the law. The SWC has often made the argument that priority trumps all else, but has been denied at every turn. The Director's duty is to reasonably apply both bedrock principles.

What is significant is the Director did not say he perceived limited discretion to apply the principle of priority; he only perceived limitation discretion to apply the principle of beneficial use. The clear indication is he

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[29] IGWA Opening Brief at 51-53.

[30] IDWR Response to IGWA at 22.

[31] Idaho Code § 67-5269.

[32] *Univ. of Utah Hosp. v. Ada County Bd. of Comm'rs*, 143 Idaho 808, 811 (2007); *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91 (2007).

[33] *See* IGWA Opening Brief at 42-49.

[34] SWC Response at 18.

perceived greater autonomy to distribute water by priority than to prevent excessive hoarding of the resource. This is an error of law.

Rangen apparently reads the "limited discretion" statement the same way IGWA does, for Rangen does not attempt to defend it as a simple acknowledgement that the Director's discretion is not unfettered. Rather, Rangen attempts to distinguish the statement, contending it pertains only to the trim line, which Rangen says "has nothing to do with reasonable use of water."[35]

The trim line has everything to do with reasonable use of water resources. But for that bedrock principle, water would be administered strictly by priority, and there would be no basis for a trim line. The trim line is (or at least should be) a direct application of the principle of beneficial use.

Therefore, this matter should be remanded back to the Director with an instruction to apply the bedrock principle of beneficial use, without assuming "limited discretion."

2.3 IDWR's assertion that the Director directly determined the point at which the exercise of priority becomes unreasonable is not supported by the record.

IDWR disagrees with IGWA's assertion that the Final Order lacks a "reasoned statement," as required by Idaho Code § 67-5248, explaining the Director's application of the rule that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable water use."[36] IDWR argues "the Director directly determined the point at which the exercise of priority in this matter becomes unreasonable" by implementing the Great Rift trim line which restricts curtailment

[35] Rangen Response at 11.

[36] IGWA Opening Br. at 55 (quoting CM Rule 20.03).

to junior rights for which "the calling party is predicted to receive at least 0.63% of the benefits of curtailment."[37]

IDWR's argument suggests the Director made a deliberate decision that as long as the senior receives at least 0.63 percent of the curtailed water, then that satisfies the principle of reasonable beneficial use. Nowhere does the Final Order say this. If that had happened, it would at a minimum require an explanation of how such an odd figure was arrived at.

Furthermore, the Great Rift trim line is not based on consistent application of a 0.63 percent Modelled impact to Rangen. The trim line was not created by running ESPAM 2.1 to define a zone of curtailment that encompasses all junior rights for which at least 0.63 percent of the curtailed water is predicted to accrue to Rangen; rather, a line was drawn across the Easter Snake Plain through the Great Rift (a geographic feature), and that line just happens to encompass junior rights where as little as 0.63 percent of the curtailed water is predicted to benefit Rangen. Along some sections of the Great Rift trim line, junior rights with a predicted impact greater than 0.63 percent are located *outside* the line.

Because the Final Order does not explain how the Director applied the rule that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable water use,"[38] this matter should be remanded with an instruction to provide a reasoned statement, with supporting facts and underlying inferences sufficient to enable meaningful judicial review, explaining his application of the rule.

[37] IDWR Response to IGWA at 22.

[38] CM Rule 20.03 (IDAPA 37.03.11.020.03).

2.4 The Director must exercise discretion to assign a margin of uncertainty to ESPAM 2.1 predictions for Rangen.

IGWA contends that before the Director shuts off a well, he must be reasonably certain curtailment will materially benefit Rangen; that this requires the Director to assign a margin of uncertainty to ESPAM 2.1 predictions for Rangen; and the Director abused discretion by failing to account for uncertainty in ESPAM 2.1 predictions for Rangen.[39]

As explained in IGWA's Opening Brief, ESPAM 2.1 is programmed so that a hydraulic change in any Model cell will cause a hydraulic change in every other Model cell, whether or not there is a measurable impact.[40] The farther away a well is from Rangen, the more uncertainty there is that it has any material impact on water flows at Rangen, even though ESPAM 2.1 is programmed to say it does.

IDWR responds by pointing out "the Director did not err in concluding model uncertainty is unquantifiable,"[41] and that errors in ESPAM 2.1 predictions do not "rise to such a level as to prevent application of the model."[42] IGWA agrees with both statements, neither of which explain why the Director did not exercise discretion to assign a margin of uncertainty to ESPAM 2.1 predictions for Rangen.

IGWA agrees that uncertainty in ESPAM 2.1 predictions is not mathematically definite. This is why the Director must *exercise discretion* to assign an uncertainty factor, as was done in all prior conjunctive management cases. In the Clear Springs Foods, Blue Lakes Trout, and Surface Water Coalition cases, Director Dreher acknowledged that Model uncertainty was not mathematically quantifiable, so he exercised discretion to assign a 10

[39] IGWA Opening Brief at 56.

[40] Brendecke, Tr. Vol. 11, p. 2561:22-25.

[41] IDWR Response to IGWA at 22.

[42] IDWR Response to IGWA at 15.

percent uncertainty factor. The Idaho Supreme Court upheld his decision as a reasonable exercise of discretion.[43]

The argument that uncertainty does not "rise to such a level as to prevent application of the model" does avoid the need to exercise discretion to assign an uncertainty factor based on the uncertainty that does exist. IGWA does not claim ESPAM 2.1 should not be used in this case; it claims the uncertainty in its predictions must be taken into account by assigning an uncertainty factor and reducing the zone of curtailment accordingly.

IDWR claims the Director did take Model uncertainty into account by implementing the Great Rift trim line. IGWA does not doubt uncertainty was on the Director's mind when he placed a trim line at the Great Rift, but merely contemplating uncertainty is not enough. The Director must take the issue head-on and actually assign an uncertainty factor based on the evidence presented.

IDWR and Rangen also suggest there is no need to assign an uncertainty factor to ESPAM 2.1 because of its improvements over ESPAM 1.1.[44] This argument is hardly persuasive to IGWA's members, who heard all about the accuracy of ESPAM 1.1, only to have IDWR now admit to major defects in it was calibrated. IDWR defends the monumental disparity between ESPAM 1.1 (735 acres curtailed) and ESPAM 2.1 (157,000 acres curtailed) by explaining that "spring discharge values used to estimate discharge for Thousand Springs and the springs in the Thousand Springs to Malad spring reach for calibration of ESPAM 1.1 were inaccurate," and "corrections resulted in a significant decrease in the spring discharge target at Thousand Springs and a significant increase in spring discharge targets in the Billingsley Creek area."[45] The "best science available," it turns out, can be terribly inaccurate.

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[43] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814 (2011).

[44] IDWR Response to IGWA at 14-15, 17; Rangen Response at 26-27.

[45] IDWR Response to IGWA at 13.

In fact, the "corrections" made to ESPAM 2.1 now cause it to over-predict the affect of groundwater pumping on flows at Rangen. IGWA analyzed the hydrogeology in the Rangen area and hydrologic data to evaluate how well ESPAM 2.1 models actual water conditions. This inquiry revealed a number of errors in how ESPAM 2.1 is structured,[46] and, more importantly, biases that cause it to substantially over-predict the effect of groundwater pumping on water flows at Rangen.[47]

Moreover, the Director continues to apply a 10 percent trim line to the SWC delivery call using ESPAM 2.1, without explaining why a less than one percent trim line applies here.

The Director rejected the evidence of bias because the over-prediction exists post-2000, whereas an under-prediction exists pre-2000.[48] The past under-prediction, however, does not negate the current over-prediction. Rather, it highlights a systematic error in Model predictions for Rangen.[49]

IDWR's modelling expert Alan Wylie agreed there is appears to be an over-prediction of spring flows in the Rangen area:

> Q. So one place where the model doesn't reflect measured flows very well is in the seasonal variation. But the other thing Mr. Hinckley pointed out is that the model predicts about 900 cfs of reach gains more than what is actually measured, if you take out the seasonal variation. And I don't know if you remember reading that from his report or not.
>
> A. I don't remember reading that, but I'd say it's possible, yes.
>
> . . .
>
> Q. But I understand that if the model over-predicts in one area, it kind of has to compensate that or offset that in some other area. Is that right?

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[46] *See* IGWA's Opening Brief at 19-20.

[47] *See* IGWA's Opening Brief at 20-23.

[48] IDWR Response to IGWA at 17 (quoting Final Order p. 21-22, ¶95.2 (R. Vol. 21, p. 428-09)).

[49] Ex. 2300; Hinckley, Tr. Vol. 10, pp. 2447, 2481-2487.

A. Yes. The model is really strict about the water balance.

Q. Okay.

A. So it won't allow more to leave the model than comes in. So if it's got too much coming out one place, it's got to have less coming out another.

Q. Okay. And so if it's over-predicting reach gains to this reach of the river, does that also suggest it may be over-predicting spring gains to the springs that feed this reach?

A. It would be -- so it has to be over-predicting something in this reach, yes.[50]

The abundant, undisputed evidence that ESPAM 2.1 over-predicts the effects of pumping on flows at Rangen cannot be ignored by the Director.

IGWA is not asking the Director to abandon the Model. It is only asking that its uncertainty be taken into account by limiting curtailment to wells that ESPAM 2.1 predicts have a significant impact on flows at Rangen.

2.5 Implementation of a trim line is the most logical application of the principle of beneficial use.

IDWR contends "IGWA's suggested 10% trim line is not supported by the record," citing a "key difference in the way ESPAM 1.1 and ESPAM 2.1 are calibrated."[51] Arguing differences between computer models, however, misses the point. Even if ESPAM 2.1 were perfect, the Director has a duty to ensure that priority is not exercised in a manner that allows Rangen to command exponentially more water than it beneficially uses. The existence of uncertainty and bias in ESPAM 2.1 predictions simply adds weight to the need to limit curtailment to junior rights that ESPAM 2.1 predicts have a significant impact on Rangen's water supply.

Rangen claims IGWA's assertion that Model uncertainty justifies the use of a trim line "is simply false and directly contrary to the testimony of

[50] Wylie, Tr. Vol. 12, pp. 2928-32.

[51] IDWR Response to IGWA at 24.

IGWA's own experts."[52] Their argument is predicated on a mischaracterization of hand-picked excerpts from the hearing. A full reading of their testimony tells a much different story. Dr. Brendecke testified:

> Q. Are you advising the Director to use any particular zone of exclusion?
>
> A. I think I made a statement in my December report that he should not curtail people that have less than a 10 percent impact on Rangen. But I haven't expressed any other opinions about how a zone of exclusion should be defined specifically.
>
> Q. Okay. And so you're advising the Director to use a 10 percent trim line?
>
> A. I advised him to not curtail people that don't have at least 10 percent effect on Rangen because I'm not convinced that the model is accurate enough to distinguish effects smaller than that. But I didn't tell -- I didn't say he should use a 10 percent trim line.
>
> Q. Well, I think in your deposition you said that the Director should use no less than a 10 percent trim line.
>
> A. Well, that was consistent with the opinion in my report.[53]

Bern Hinckley offered similar testimony:

> Q. Mr. Hinckley, yesterday during your testimony you gave a list of errors in ESPAM's reflection of the hydrogeologic conditions in the Rangen area. And is it fair to characterize your conclusion from that that ESPAM, as presently configured, overestimates flows at Rangen?
>
> A. Yes. I identified some things that were incongruent with the geology, but then I also, I believe, highlighted those that I thought would give it a bias towards overestimating the impact of curtailment.
>
> Q. Okay. And then at the end of your testimony, you were asked what you -- what the Director could do with this criticism, and you made a number of suggestions. The first one – I'm not going to go into this, but that involved the zone of exclusion. And just so the record's clear on this, there was some

[52] Rangen's Response at 24.

[53] Brendecke, Tr. Vol. 11, pp. 2740-41.

> discussion about a 28/40 rule used in some other case. To be clear, you're not offering the opinion that the Director should adopt that rule in this case?
>
> A. No. I was asked if I was familiar with a zone of exclusion being used in other venues, and I offered three examples of where that had happened and apparently been found satisfactory by the parties involved.
>
> Q. Okay. And so is it fair to say that your conclusion is simply that that's one reasonable approach to address these types of issue?
>
> A. Yes, that would be a way to do it.[54]

Thus, both experts agreed that Model uncertainty justifies the use of a trim line, though the location of the trim line is ultimately a discretionary decision that must take into account both Model uncertainty and the principle of reasonable beneficial use.

The SWC argues that trim lines are not required by law,[55] which is true, but the law does prohibit hoarding of water resources, and the use of a trim line, which the Idaho Supreme Court has upheld,[56] is a logical way to do it.

Whether by way of trim line or otherwise, the Director has a duty under Idaho Code § 67-5248 to explain his application of the principle of beneficial use to prevent Rangen from commanding far more water than it uses. Without that, IGWA's members simply cannot understand how the Director went from curtailment of 735 acres under Rangen's first delivery call to curtailment of 157,000 acres under its second call, allowing Rangen to command 100 times more water than it will use, while a 10 percent trim line continues to apply to the SWC.

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[54] Hinckley, Tr. Vol. 11, pp. 2510-2511.

[55] SWC Joint Response Brief at 2.

[56] Clear Springs Foods, 150 Idaho at 812-817.

2.6 IDWR and Rangen seek to eviscerate the bedrock principle of beneficial use.

IDWR and Rangen take issue with IGWA's emphasis that Rangen will use less than one percent of the water it curtails. They claim this does not result in hoarding of water, since the water Rangen does not use will eventually go *somewhere*. This argument threatens to eviscerate the bedrock principle of beneficial use.

The related concepts of "waste" and "hoarding" refer to water an appropriator takes without using. "Waste" typically refers to water that is diverted in excess of the amount needed to accomplish the appropriator's beneficial use. The excess water spills out the end of the delivery system and is said to be "wasted," though others often make use of it thereafter. "Hoarding" typically refers to water an appropriator takes control of without diverting at all. For example, holders of storage water rights are not allowed to "stor[e] away excessive amounts in times of shortage . . . despite detriment to others."[57]

IGWA's appeal focuses on hoarding, though the concepts overlap and may be used interchangeably. Both are predicated on the bedrock principle of beneficial use. As explained in *AFRD2*, "Concurrent with the right to use water in Idaho 'first in time,' is the obligation to put that water to beneficial use."[58] The Court reaffirmed this in *A& B*, holding Idaho law does not allow water users "to waste water or unnecessarily hoard it without putting it to some beneficial use," and that a senior "is only entitled to the amount of water he actually puts to beneficial use . . . ."[59]

IDWR, Rangen, and the SWC posit there is no such thing as waste or hoarding, since the water not used by the senior will eventually go some-

[57] *AFRD2*, 143 Idaho at 880.

[58] *Id.*

[59] *A& B Irr. Dist. v. Spackman*, 155 Idaho 640, 650 (2013).

where.[60] Their argument rests on the false premise that the water Rangen curtails without using will end up in a place it is needed, at a time it is needed, by someone who has a right to is it. This is naïve, and is certainly not supported by the record. Dr. Brendecke analyzed where water that Rangen curtails without using will go, and found that nearly all of it will accrue to springs and river reaches where there are no water diversions or no delivery calls, or to senior users who are already being mitigated, or to holders of junior or subordinated water rights that have no legal right to the water.[61]

Not only is the notion that others will make beneficial use of the water that Rangen does not use factually unsupported, it has never been part of the beneficial use analysis. It did not matter in *Schodde* that downstream users would be able to use the water Schodde commanded without using, nor did it matter in *Van Camp*, *Basinger*, and *Clark* that other water users would benefit from their excess diversions.[62] In each case, the senior's means of appropriation or diversion was deemed unreasonable because of the large amount of water the senior would divert without using themselves. What became of the water they didn't use was not considered.

IDWR's advancement of the argument that hoarding does not occur as long as the unused water goes somewhere confirms the Director did not decide how much water Rangen can reasonably curtail without using. The Director apparently assumed there is no limit, which explains how he allowed Rangen to take control of 100 times more water than it will use.

IGWA asks the Court to correct this error by remanding the matter to the Director with an instruction to apply the principle of beneficial use by determining the point at which it becomes unreasonable for Rangen to curtail water that Rangen will not use itself.

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[60] IDWR Response at 27; SWC Response Brief at 21-22; Rangen Response at 14-17.

[61] Ex. 1319 at 6; Ex. 2403 at 8; Brendecke, Tr. Vol. 11, p. 2567-68.)

[62] *See* IGWA Opening Br. at 42-47 (discussing *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912), *Van Camp v. Emery*, 13 Idaho 202 (1907), *Clark v. Hansen*, 35 Idaho 449 (1922), and *Bassinger v. Taylor*, 36 Idaho 591 (1922)).

2.7 There is no evidence in the record to support the Director's ruling that requiring Rangen to construct a recirculation system is cost-prohibitive.

IDWR points out the Director rejected IGWA's argument that Rangen should be required to install a recirculation system before seeking to curtail juniors on the basis such a system would be "cost prohibitive."[63] This ruling is based on Rangen's factually unsupported testimony that it did not want to pay the cost of such an improvement, finding it easier, and strategically advantageous, to curtail juniors instead. The Director's ruling violates due process, because the Director barred IGWA from discovering or putting on any evidence of how profitable Rangen's operation is, depriving IGWA of the ability to challenge Rangen's factually unsupported statement that improving its conveyance system would be too costly.

The State has long recognized that development of the ESPA would result in reduced spring flows in the Thousand Springs area, maintaining a policy that requires fish farmers to improve their conveyance systems:

> Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist.[64]

Accordingly, the Court should remand this matter to the Director with an instruction to decide whether Rangen should install a recirculation system before seeking to curtail juniors, and to take additional evidence as necessary to determine whether it is truly cost-prohibitive.

[63] IDWR Response to IGWA at 29.

[64] 1982 State Water Plan, p. 44 (Ex. 2416 at 53).

3. Phased-In Curtailment.

IGWA's Opening Brief concerning phased-in curtailment thoroughly addresses the issue. Defenses raised by IDWR and Rangen do not necessitate a reply; therefore, nothing will be added here.

CONCLUSION

Based on the foregoing, as well as the arguments in IGWA's Opening Brief, IGWA respectfully asks this Court to set aside the Final Order and remand it to the IDWR with the following instructions:

1. Apply the reasonable pumping level requirement of the Act to the Curren Tunnel.

2. Apply the bedrock principle of reasonable beneficial use, without assuming limited discretion, by deciding the point at which the exercise of priority results in excessive hoarding of the ESPA, and provide a reasoned statement in support of the decision, with reference to underlying facts and inferences, sufficient to provide meaningful judicial review.

3. Assign a margin of error or uncertainty to ESPAM 2.1 predictions for Rangen, and explain how it is taken into account in the remand decision.

4. Allowing a senior to command 100 times more water than it will put to beneficial use is unreasonable as a matter of law, and an abuse of discretion.

5. If disparate trim lines are applied, provide a reasonable, rational, and factually grounded explanation to support the disparity.

6. Decide whether Rangen should be required to improve its diversion and conveyance system by implementing a recirculation system before seeking to curtail juniors.

7. Curtailment may be phased in over five years, but juniors should not be required to provide substantially more mitigation than Rangen would receive from curtailment.

Racine Olson Nye Budge
& Bailey, Chartered

August 21, 2014

Randall C. Budge
Thomas J. Budge

Date

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2014, a true and correct copy of the foregoing document was served on the persons listed below by the method(s) indicated.

Randall C. Budge
Thomas J. Budge

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