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

RANGAN, INC., Petitioner, vs. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and 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 POCATELLO, Intervenors.	Case No.: CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179) **MEMORANDUM DECISION AND ORDER ON PETITIONS FOR JUDICIAL REVIEW**

Appearances:

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I.

STATEMENT OF THE CASE

A. Nature of the case.

The matter concerns a petition for delivery call filed by Rangen, Inc. ("Rangen") with the Idaho Department of Water Resources ("IDWR" or "Department"). In its call, Rangen alleges it is not receiving all of the water it is entitled to under its senior water rights as a result of junior priority ground water use in the Eastern Snake Plain Aquifer ("ESPA"). On January 29, 2014, the Director issued his *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("*Curtailment Order*") in IDWR Docket No. 2011-004. R., pp.4188-4291. The Director concluded that Rangen's senior water rights are being materially injured by junior ground water pumpers, and ordered curtailment of certain ground water rights located in the ESPA junior to July 13, 1962. Petitions seeking judicial review of the Director's *Curtailment Order*, and his subsequent *Order on Reconsideration*, were filed by Rangen and the Idaho Ground Water Appropriators, Inc. ("IGWA"). Those parties ask this Court to set aside and remand various aspects of the Director's orders.

B. Statement of facts and procedural background.

i. The Rangen Facility.

Rangen owns and operates a fish research and propagation facility ("Rangen Facility") in the Thousand Springs area near Hagerman, Idaho. R., p.4190. In the Rangen Facility, Rangen raises fish for commercial processing, research, and for public sale. R., p.4200. The Rangen Facility is situated below a canyon rim at the headwaters of Billingsley Creek. R., p.4190. The Rangen Facility was developed in stages beginning in 1962. *Id.* The facility started with a series of concrete raceways for fish rearing, commonly referred to as "the small raceways" and "large raceways," and a hatchery for the incubation of fish eggs. *Id.* Earthen ponds were also constructed for fish rearing and holding. *Id.* In 1976, additional raceways, commonly referred to as the "CTR" raceways, were constructed. *Id.* In 1992, a greenhouse was added to the back of the hatch house to expand hatching and research capabilities. *Id.* Other buildings were added over time but are not relevant to this proceeding. *Id.*

ii. Rangen's source of water and diversions.

Immediately east of the Rangen Facility, water discharges from numerous springs on the talus slopes just below the canyon rim which form the headwaters of Billingsley Creek. R., p.4191. Water also discharges from what is referred to as the "Martin-Curren Tunnel" or the "Curren Tunnel." *Id.* The Martin-Curren Tunnel is a large excavated tunnel located high on the canyon rim that extends approximately 300 feet into the canyon wall. *Id.* The first 50 feet of the tunnel is supported by a corrugated metal pipe approximately 6 feet in diameter. *Id.* The remaining 250 feet of the excavation is an open tunnel unsupported by any structure. *Id.* Approximately 150-200 feet into the tunnel from its mouth, the main tunnel forks into two tunnels. *Id.* The record does not establish when the tunnel was built, but it predates the construction of the Rangen facility. *Id.*

A concrete collection box located near the mouth of the Martin-Curren Tunnel collects water for delivery to Rangen and holders of senior priority irrigation water rights via pipelines. *Id.* The concrete box is commonly referred to as the "Farmer's Box." *Id.* Since 2002, the water historically diverted by the senior-priority irrigation right holders has been replaced with surface water delivered through a pipeline referred to as the Sandy pipeline. *Id.* Currently, only Rangen

diverts from the Farmer's Box, but senior priority irrigation right holders may call for delivery of water from the Martin-Curren Tunnel in the future. *Id.*

Further down the talus slope is a second concrete water collection box with an open top, commonly referred to as the "Rangen Box." *Id.* Rangen rediverts water from the Farmer's Box through two plastic pipes down to the Rangen Box. *Id.* Water is then delivered from the Rangen Box through a 12-inch diameter steel pipe to the small raceways. *Id.* The water can then be routed from the small raceways down through the large and CTR raceways. *Id.* Water can also be spilled out of the side of the Rangen Box and returned to the talus slope. *Id.*

In the early 1980's, Rangen installed a 6-inch PVC pipeline to divert water from inside the Martin-Curren Tunnel and deliver it to the hatch house and greenhouse buildings. *Id.* The water is used in the hatch and/or greenhouse buildings and then can be discharged either into Billingsley Creek or directly into the small raceways and be used in the large and CTR raceways. *Id.* The main diversion for the large raceways is located downstream from the talus slope, where the defined channel for Billingsley Creek begins. *Id.* This diversion is commonly referred to as the "Bridge Diversion." *Id.* The Bridge Diversion collects and diverts the spring flows that arise on the talus slope below the Martin-Curren Tunnel and water spilled from the Rangen Box. *Id.*

iii. Rangen's water rights.

Rangen holds five water rights for the Rangen Facility. The five water rights were decreed through the Snake River Basin Adjudication ("SRBA"). Rangen's decreed rights are summarized as follows:

Right	Source	Purpose and Period of Use	Quantity	Priority	Point of Diversion
36-00134B	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31) Irrigation (03/15 – 11/15)	0.07 cfs 0.05 cfs	10/09/1884	T07S R14E S32 SESWNW
36-00135A	Martin-Curren Tunnel Tributary Billingsley Creek	Domestic (01/01 – 12/31)	0.05 cfs	04/01/1908	T07S R14E S32 SESWNW
36-15501	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	1.46 cfs	07/01/1957	T07S R14E S32 SESWNW
36-2551	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31) Domestic (01/01 – 12/31)	48.54 cfs	07/13/1962	T07S R14E S32 SESWNW
36-7694	Martin-Curren Tunnel Tributary Billingsley Creek	Fish Propagation (01/01 – 12/31)	26.0 cfs	04/12/1977	T07S R14E S32 SESWNW

R., p.4192. In its delivery call, Rangen alleges material injury to water right numbers 36-2551 and 36-7694 due to junior ground water use. It does not allege injury to its other three water rights.

iv. Procedural background.

Rangen first filed a delivery call in September of 2003. R., p.105. In February of 2004, a previous Director of the Department, Karl Dreher, ordered curtailment of all ground water rights in Water District 130 with priority dates junior to July 13, 1962, which is the priority date of Rangen's water right no. 36-2551. R., p.130. However, shortly thereafter, the Enhanced Snake Plain Aquifer Model ("ESPAM") version 1.0, which was developed by the Department in working with the Eastern Snake Hydrologic Modeling Committee ("ESHMC"), was released. On May 19, 2005, based on the curtailment predictions of ESPAM 1.0, Director Dreher concluded that the Rangen delivery call was futile and withdrew his curtailment order. R., p.189. Thereafter the ESHMC began work on an updated version of the model that would be referred to as ESPAM 2.0.

On December 13, 2011, Rangen renewed its delivery call by filing the instant *Petition for Delivery Call* ("*Petition*") with the Department alleging it is not receiving all of the water it is entitled to pursuant to water right nos. 36-2551 and 36-7694, and is being materially injured by junior-priority ground water pumping in the areas encompassed by ESPAM version 2.0. R., pp.4-5. Rangen did not allege injury to water right nos. 36-00134B, 36-00135A, and 36-15501. *Id.* The *Petition* requested the Director administer and distribute water in the areas encompassed by ESPAM 2.0 in accordance with the prior appropriation doctrine and curtail junior-priority ground water pumping as necessary to deliver Rangen's water. R., p.8.

On January 4, 2012, IGWA petitioned to be designated as a respondent or alternatively to intervene in the proceeding. R., pp.225-228. The Director granted IGWA's petition to intervene on January 13, 2012. R., pp.232-234. On May 21, 2012, the City of Pocatello ("Pocatello") petitioned to be designated as a respondent or alternatively to intervene in the proceeding. R., pp.241-244. The Director granted Pocatello's petition to be designated as a respondent on May 29, 2012. R., pp.252-253. On July 24, 2012, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, the "Coalition" or

"SWC") petitioned for limited intervention in the proceeding. R., pp.298-304. The Director granted the Coalition's petition for limited intervention on August 14, 2012. R., pp.368-373. On August 21, 2012, Fremont-Madison Irrigation District ("Fremont-Madison") petitioned to be designated as a respondent or alternatively to intervene in the proceeding. R., pp.449-454. The Director granted Fremont-Madison's petition to be designated as a respondent on September 11, 2012. R., pp.602-604.

Several dispositive motions were filed prior to the hearing on the delivery call. Of relevance to this proceeding, Rangen filed a *Motion for Partial Summary Judgment Re: Source* on March 8, 2013. R., pp.2566-2568. The source identified on the SRBA partial decrees for water right nos. 36-02551 and 36-07694 is the "Martin-Curren Tunnel." Ex. 1026 & 1028. The point of diversion for both water rights is described to the ten acre tract: SESWNW T07S R14E S32. *Id.* In its *Motion*, Rangen argued that it "is not limited only to water from the mouth of the Martin-Curren Tunnel itself." R., p.2570. Rangen also argued it was authorized to divert water from the entire spring complex that supplies the Rangen Facility, including those springs located outside the ten acre tract point of diversion described in the decree. R., p.2585.

The Director first examined whether Rangen was entitled to divert water from the spring complex outside the ten acre tract point of diversion. In his *Order Granting in Part and Denying in Part Rangen, Inc.'s Motion for Partial Summary Judgment* ("*Order on Summary Judgment*"), dated April 22, 2013, the Director concluded Rangen could not call for water from those springs located outside the decreed point of diversion:

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

R., p.3176. As to the question of whether Rangen was limited to diverting water only from the Martin-Curren Tunnel, the Director denied summary judgment in his *Order on Summary*

Judgment, concluding there were questions of material fact related to how water is diverted by Rangen from the Martin-Curren Tunnel. R., pp.3176-3177.

The hearing on Rangen's delivery call was bifurcated. R., p.4190. The first part of the hearing focused on issues of material injury and beneficial use, and the second part of the hearing focused on issues related to ESPAM 2.1. *Id.* On January 29, 2014, the Director issued the *Curtailment Order*. R., pp.4188-4291. The Director first addressed the issue left unresolved by Rangen's motion for summary judgment. The Director concluded his material injury determination could only focus on water diverted by Rangen from the Martin-Curren Tunnel because the source element on Rangen's partial decrees is unambiguously described as "Martin-Curren Tunnel." R., pp. 4219-4220.

In determining flows from the Martin-Curren Tunnel, the Director relied on historic water flows. R., p.4198. The Director determined that because Rangen used a nonstandard measuring device with an inaccurate rating curve to determine flow rates, Rangen's reported historic flows were lower than actual flows. R., p.4198. As a result, the Director used a regression analysis to determine the relationship between Martin-Curren Tunnel discharge and the corrected historic measurement of total spring complex discharge. R., p.4210. The Director concluded that, notwithstanding the measurement error, the declines in flows at the Rangen Facility "have been dramatic" and that Rangen is being materially injured by ground water pumping. R., pp.4220 & 4223.

As to the application of ESPAM 2.1,[1] the Director determined in his *Curtailment Order* that:

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

R., p.4224. Whether there should be a "trim line" associated with ESPAM 2.1 and if so, what the trim line should look like was an issue raised at the hearing. The Director concluded:

> The Curren Tunnel and the Rangen spring complex are located west of the Great Rift, a low transmissivity feature that impedes the transmission of water through the aquifer. Finding of Fact 108, Figure 4. While there is some simulated depletion of Curren Tunnel discharge attributable to points of diversion east of the

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

> Great Rift, the contribution is small. ESPAM 2.1 establishes, by clear and convincing evidence, that the portion of benefits of curtailed ground water use east of the Great Rift that would accrue to the Rangen spring complex is generally less than 1%. Finding of Fact 105, Figure 1. The benefit of curtailment with respect to the number of acres curtailed diminishes significantly if areas east of the Great Rift are included in the curtailment. Finding of Fact 107, Figure 3. The argument that no trim line is appropriate was considered and rejected in *Clear Springs*. The effect of the Great Rift on propagation of impacts to Curren Tunnel should be taken into consideration when deciding on a trim line.

R., p.4226.

ESPAM 2.1 simulations predicted that 14.4 cfs of the decline in the flow to the spring complex within the Rangen model cell can be attributed to junior-priority ground water pumping west of the Great Rift and in the area of common groundwater supply. *Id.* at 41, *Id.* at 4228. The predicted benefit to the Martin-Curren Tunnel, computed as 63% of the simulated benefit to the Rangen model cell was 9.1 cfs. *Id.* The Director ordered that holders of junior-priority ground water rights could avoid curtailment if they participate in a mitigation plan which provides "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id.* at 42, *Id.* at 4229. The *Curtailment Order* explains that mitigation provided by direct flow to Rangen "may be phased-in over not more than a five-year period pursuant to CM Rule[2] 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year." *Id.*

Rangen, IGWA and Pocatello filed motions for reconsideration of the *Curtailment Order*. On March 4, 2014, the Director issued an *Order on Reconsideration* denying IGWA's and Pocatello's motions and partially denying and partially granting *Rangen's* motion.

On March 24, 2014, Rangen timely filed its *Petition for Judicial Review* in Twin Falls County Case No. CV-2014-1338. The Court granted *Motions to Intervene* filed by the Coalition, IGWA and Fremont-Madison. On March 28, 2014, IGWA timely filed it *Petition for Judicial Review* in Gooding County Case No. 2014-179. The Court granted Motions to Intervene filed by Rangen, the Coalition, Pocatello and Fremont-Madison. Both *Petitions for Judicial Review* were

[2] The term "Conjunctive Management Rules" or "CM Rules" refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

reassigned to this Court.[3] On April 10, 2014, the Court granted a motion to consolidate the agency record in both cases. On June 20, 2014, the Court ordered that Gooding County Case No. 2014-179 be consolidated into Twin Falls County Case No. CV-2014-1338 in order to avoid duplication, promote judicial economy and avoid confusion with the record.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the Court in this matter was held on August 28, 2014. The parties did not request the opportunity to submit additional briefing nor does the Court require any. Therefore, this matter is deemed fully submitted for decision on the next business day or August 29, 2014.

III.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a

[3] The reassignments were made pursuant to the Idaho Supreme Court's *Administrative Order* dated December 9, 2009, issued *In the Matter of the Appointment of the SBRA District Court to Hear All Petitions for Judicial Review from the Department of Water Resources Involving Administration of Water Rights.*

substantial right of the party has been prejudiced. Idaho Code § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[4] *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

IV.
ANALYSIS

A. The Director's determination that Rangen may only call for water discharging from the Martin-Curren Tunnel is affirmed.

Immediately east of the Rangen Facility water discharges from numerous springs located on the talus slope, as well as from the Martin-Curren Tunnel. R., p.4191. The water emanating from this spring complex forms the headwaters of Billingsley Creek. In responding to Rangen's call, the Director had to determine from which of these water sources Rangen is authorized to divert. The issue was whether Rangen's call for water was limited to the amount of water that would emanate from the Martin-Curren Tunnel itself, or whether Rangen could more broadly call for that amount of water that would emanate from the entire spring complex that forms the headwaters of Billingsley Creek. The Director concluded that under water right numbers 36-2551 and 36-7694, Rangen may only call for water discharging from the Martin-Curren Tunnel itself, and not the entire spring complex forming the headwaters of Billingsley Creek. R., pp.4219-4220. In so holding, the Director relied upon the plain language of the *Partial Decrees* entered for water right numbers 36-2551 and 36-7694 in the SRBA. R., p.4219.

On judicial review, Rangen argues that this Court should set aside the Director's determination in this respect. Rangen argues that the source of its water rights (i.e., "Martin-Curren Tunnel") is ambiguous in light of extrinsic evidence. Further, that the source of the rights should be interpreted to include all water emanating from spring complex that forms the

[4] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

headwaters of Billingsley Creek, including but not limited to that water emanating from the Martin-Curren Tunnel. For the reasons set forth herein, the Court affirms the Director's determination that Rangen may only call for water discharging from the Martin-Curren Tunnel itself.

i. The authorized source set forth in the *Partial Decrees* for water right numbers 36-2551 and 36-7694 is plain and unambiguous, and limits Rangen to diverting and calling for water discharging from the Martin-Curren Tunnel.

Rangen filed claims for rights 36-2551 and 36-7694 in the SRBA, and *Partial Decrees* were entered for those rights on December 29, 1997, and December 30, 1997, respectively. The SRBA *Final Unified Decree* was subsequently entered on August 26, 2014. The source on both *Partial Decrees* is identified as: "Martin-Curren Tunnel[;] Tributary: Billingsley Creek" Ex.1026 & 1028. Under Idaho law, a decree entered in a general adjudication "shall be conclusive as to the nature and extent of all water rights in the adjudicated water system . . . ." I.C. § 42-1420(1). The Director is charged with administering water rights in accordance with the elements as described in Rangen's *Partial Decrees*.[5] Therefore, the Court must determine the legal effect of the *Partial Decrees* entered for water right numbers 36-2551 and 36-7694.

The Idaho Supreme Court has directed that the same rules of interpretation applicable to contracts also apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). If a decree's terms are clear and unambiguous, the decree's meaning and legal effect are questions of law to be determined from the plain meaning of its own words. *Cf., Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). Whether a decree is ambiguous is a question of law over which this Court exercises free review. *Id.* "Ambiguities can be either patent or latent." *Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). "Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous." *Sky Cannon Properties, LLC*, 155 Idaho at 606, 315 P.3d at 794. "A

[5] At the time Rangen filed the instant delivery call in 2011, the SRBA Court had authorized the interim administration of water in basin 36 in accordance with the *Director's Reports* and the *Partial Decrees* that have superseded the *Director's Reports* in that basin. *Order Granting State of Idaho's Motion for Order of Interim Administration*, SRBA subcase no. 92-00021 (Jan. 8, 2002). Pursuant to that Court *Order*, the Department has and will continue to administer water in basin 36 pursuant to the terms of the *Partial Decrees* entered in that basin in the SRBA.

latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." *Id.*

Rangen does not argue that a patent ambiguity exists, and this Court finds no such ambiguity on the face of Rangen's *Partial Decrees*. The term "Martin-Curren Tunnel" refers to a specific, identifiable and known diversion structure located within the 10 acre authorized point of diversion of Rangen's two senior water rights. The term does not create a patent ambiguity on the face of either *Partial Decree*. Rather, it is Rangen's position that the source of its senior water rights is latently ambiguous. It contends that the term "Martin-Curren Tunnel" when applied to the facts as they exist gives rise to a latent ambiguity regarding its authorized water source. The Director found that "[t]he name Martin-Curren Tunnel is not ambiguous and does not create a latent ambiguity in the partial decree." R., p.4460. This Court agrees, and finds that Rangen has failed to establish a latent ambiguity with respect to its *Partial Decrees*.

The Court finds that the *Partial Decrees* at issue here do not lose clarity when applied to the facts as they exist. *See*, *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) (providing that "[a] latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist"). First, this is not a case where two or more tunnels exist within Rangen's authorized point of diversion, and it is unclear to which one the *Partial Decrees* refer. *See*, *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-1049 (1952) (holding that a latent ambiguity arose when a writing referred to a pump and it was shown that there were two or more pumps to which it might properly apply). Here, unlike in *Williams*, the record establishes there is only one tunnel to which the term "Martin-Curren Tunnel" can possibly apply. Second, under no conceivable use can the term "tunnel" mean the greater springs complex that forms the headwaters of Billingsley Creek. If this Court were to hold that the term "Martin-Curren Tunnel" referred not only to the actual physical tunnel located within Rangen's authorized point of diversion commonly known as the Martin-Curren Tunnel, but also to the entirety of the spring complex that forms the headwaters of Billingsley Creek, the *Partial Decrees* would not gain clarity, but would lose it. Such an interpretation would offend the common meaning and understanding of the term "tunnel."[6] While the Idaho Supreme Court has previously found a latent ambiguity where the strict definition of a word

[6] The common definition of the term "tunnel" is "[a]n underground or underwater passage." *The American Heritage Dictionary of the English Language*, p.1856 (4th ed., 2000).

would lead to illogical or absurd results, such is not the case here. *Mountainview Landowners Cooperative Assoc., Inc. v. Dr. James Cool, D.D.S.*, 139 Idaho 770, 86 P.3d 484 (2004). The Director's determination that the term "Martin-Curren Tunnel" means the actual physical tunnel located within Rangen's authorized point of diversion commonly known to be the Martin-Curren Tunnel is neither illogical nor absurd. Rather, the Director's determination is consistent with the plain language of the *Partial Decrees*, consistent with the common meaning and understanding of the term tunnel, and consistent with the facts as they exist as established by the record.

In support of its argument that a latent ambiguity exists, Rangen directs the Court to various extrinsic evidence, including: (1) the testimony of a former Rangen employee that he understood the term "Martin-Curren Tunnel" to describe the entire spring complex; (2) the fact that historically Rangen has beneficially used water emanating from the entire spring complex; and (3) the prior license and IDWR back file for water right number 36-7694. In considering the extrinsic evidence proffered by Ranger, the Court does not find that it gives rise to a latent ambiguity in the subject *Partial Decrees*. The Court's analysis of this evidence will be contained in this section and the succeeding sections of this decision.

Rangen relies first on testimony given by Lynn Babington, a former Rangen employee, before the Director. When asked what he understood the "Curren Tunnel" to be, Babington testified as follows:

> The Curren Tunnel was the -- up on the hillside, a tunnel there. But it was known to me to be all of the -- all of the water up there. Whether it be called Curren Tunnel or head of Billingsley Creek or Curren Springs, they were all -- all meant the same thing. It was the -- all the springs that was a source to the hatchery.

Tr., p.190-191. While the Director considered the testimony of Babington, he found it mixed and unpersuasive. R., p.4460. More importantly, he found that the record contained evidence in the form of testimony and exhibits to the contrary. *Id.* The Director stated, "the record is replete with references and exhibits specifically identifying the Martin-Curren Tunnel as a unique structure at a specific location, thereby distinguishing between the spring complex and the Martin-Curren Tunnel itself." *Id.* For example, the testimony of the watermaster for Water District 36A, Frank Erwin, distinguished between the Martin-Curren Tunnel and the springs that feed Billingsley Creek. Tr., pp.232, 237-238. The Director also found throughout the course of the administrative proceedings "there was no confusion by the witnesses between the Martin-Curren Tunnel and the rest of the spring complex." *Id.* Further, that "[w]hen the topic was the

Martin-Curren Tunnel, the witnesses would testify about the physical structure itself, not the spring complex as a whole." *Id.* Thus, the Director found that the Babington testimony did not give rise to ambiguity or confusion when the term Martin-Curren Tunnel is applied to the facts, and that Rangen's *Partial Decrees* are plain and unambiguous. The Court finds that the Director's finding in this respect is supported by substantial evidence in the record and must be affirmed. *See e.g.*, Tr., pp.232, 237-238; Ex.1290; Ex.1446A and B; Ex.2408A and B; Ex.2286; Ex.2328; Ex.3277; Ex.3278; Ex.3648 and Ex.3651.

ii. The authorized point of diversion set forth in the *Partial Decrees* for water right numbers 36-2551 and 36-7694 is plain and unambiguous, and further supports the Director's determination that Rangen may only call for water discharging from the Martin-Curren Tunnel.

Further bolstering the Director's determination that Rangen's call is limited to water discharging from the Martin-Curren Tunnel is the point of diversion identified on Rangen's *Partial Decrees*. The authorized point of diversion under the subject *Partial Decrees* is plain and unambiguous. It is identified as the following ten-acre tract located in Gooding County, Idaho: "T07S R14E S32 SESWNW." Ex.1026 & 1028. The Martin-Curren Tunnel is located within that ten-acre tract. Ex.1446B and 1446C. However, the spring complex that forms the headwaters of Billingsley Creek stretches over at least two ten-acre tracts. *Id.* Those include the ten-acre tract identified on the face of Rangen's *Partial Decrees* (i.e., T07S R14E S32 SESWNW), as well as the ten-acre tract to the immediate west (i.e, T07S R14E S32 SWSWNW). *Id.* More importantly, the diversion structure known as the Bridge Diversion, through which water emanating from the spring complex not conveyed through the Martin-Curren Tunnel is collected and diverted, is located in the ten-acre tract to the immediate west of Rangen's authorized point of diversion. *Id.* Of significance, the facially plain language of Rangen's *Partial Decrees* does not authorize Rangen to divert water from that ten-acre tract where the Bridge Diversion is located. Ex.1026 & 1028.

In determining the appropriate scope of Rangen's call, the Director evaluated the authorized water source identified in Rangen's *Partial Decrees* in conjunction with the authorized point of diversion:

> The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract:

> SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7S, R14E, *Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E. . . . Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.*

R., p.4219 (emphasis added). The Director added:

> If Rangen truly believed that Martin-Curren Tunnel was the common name for the entire spring complex, Rangen should have sought and had its water right decreed with addition points of diversion because the entire spring complex stretches over at least two ten-acre tracts. Rangen Ex. 1446B. *The fact that only a single ten-acre tract was decreed and the Martin-Curren Tunnel is located in that single ten-acre tract suggests that the reference to the Martin-Curren Tunnel was not understood to describe the entire spring complex.*

R., pp.4460-4461 (emphasis added). The Court finds that the Director's findings in this respect is supported by substantial evidence in the record and must be affirmed.

Rangen admits that the Bridge Diversion lies outside its decreed point of diversion. Notwithstanding, Rangen argues that the Bridge Diversion, Farmers Box, Rangen Box and talus slope constitute one continuous diversion structure, and that this diversion structure "lies mostly within the 10 acre tract described in the Partial Decrees." This Court rejects this argument. The authorized point of division identified on Rangen's *Partial Decrees* is plain and unambiguous. The record establishes that the Bridge Diversion is a separate and distinct diversion structure that is not physically connected to the Farmers' Box or the Rangen Box. The record further establishes that the Bridge Diversion is located outside of the ten-acre tract identified on Rangen's *Partial Decrees* as its authorized point of diversion. Ex.1446B and 1446C . There is simply no legal basis for Rangen's argument that it can use the Bridge Diversion to collect and divert water even though that diversion structure is not located within its decreed point of diversion. Such an argument ignores the purpose of the identifying with particularity the point of diversion element of a decreed water right. If Rangen believed that the ten-acre tract identified in its *Partial Decrees* inadequately described its historic points of diversion, or that its *Partial Decrees* inadequately described its water source, it was Rangen's responsibility to raise those issues at the proper time, and in the proper venue – the SRBA.

iii. Rangen failed to raise issues regarding its decreed source of water and point of diversion in the appropriate forum – the SRBA.

In light of Rangen's arguments in this matter, it is necessary to review the SRBA process undertaken in relation to the two water rights at issue here. Attached as Appendix A to Rangen's *Opening Brief* is a copy of the SRBA Court's *Order Denying Motion to File Late Claim* entered in SRBA Subcase No. 36-16977 on October 2, 2013. The procedural and historical background set forth in that *Order* details the SRBA proceedings undertaken in relation to water right claims 36-2551 and 36-7694. That background is incorporated herein by reference. In brief, Rangen filed *Notices of Claim* for water right numbers 36-2551 and 36-7694 in the SRBA.[7] In its *Notices*, Rangen claimed the following source: "Curran Tunnel Trib. to: Billingsley Creek." With respect to point of diversion, Rangen claimed the following forty-acre tract: T07S R14E S32 SWNW within Gooding County. On November 2, 1992, the Director issued his *Director's Report, Part I, Reporting Area 3 (Basin 36)*, which included recommendations for the claims. A review of the recommendations shows that they diverged from the claims in two material respects. First, the Director recommended the source of the claims as "Martin-Curren Tunnel," as opposed to the claimed source of "Curran Tunnel." Second, the Director recommended the point of diversion as the following ten-acre tract located in Gooding County, Idaho: "T07S R14E S32 SESWNW," as opposed to the larger forty-acre tract claimed by Rangen. No objections were filed to the Director's recommendations for the claims. As such, *Partial Decrees* were subsequently entered for the claims consistent with the unopposed recommendations. Rangen did not appeal from the issuance of either *Partial Decree* nor did Rangen move to set aside either *Partial Decree* in the SRBA.

In this judicial review proceeding, Rangen now argues that the facially plain language of the *Partial Decrees* does not accurately reflect its historical use of water, and that a latent ambiguity must exist as a result. Rangen asserts that it has historically used all of the spring flows that form the headwaters of Billingsley Creek under its senior rights. And, that it has historically used the Bridge Diversion to collect and divert a large portion of those spring flows. However, the simple fact in this case is that the language of Rangen's *Partial Decrees* is plain

[7] The brief summary set forth herein is taken from the SRBA Court's *Order Denying Motion to File Late Claim* entered in SRBA Subcase No. 36-16977 on October 2, 2013, a copy of which is attached as Appendix A to Rangen's *Opening Brief*.

and unambiguous. Under those *Decrees*, Rangen is authorized to the divert water from the Martin-Curren Tunnel within the following ten-acre tract located in Gooding County, Idaho: T07S R14E S32 SESWNW. It is clear that Rangen believes the facially plain language of its *Decrees* does not accurately reflect its historic use of water under those rights. However, if Rangen disagreed with how its water rights were recommended and ultimately decreed, it had an opportunity and responsibility to voice such concerns in the appropriate forum – the SRBA.

When Rangen filed its claims for water right numbers 36-2551 and 36-7694 in the SRBA, the Department fully examined those claims. I.C. § 42-1410. As a result of its examination, the Department determined to file recommendations in the SRBA that diverged from the claims in several respects. The Director recommended the source of the claims as "Martin-Curren Tunnel," and also recommended the point of diversion for both claims as a ten-acre tract, as opposed to the larger forty-acre tract claimed by Rangen. The manners in which the recommendations diverged from the claims were of consequence. For instance, the Bridge Diversion is located within the larger forty-acre tract Rangen claimed as its point of diversion, but is not located within the ten-acre tract point of diversion recommended by the Department. The Director's recommendations constituted *prima facie* evidence of the nature and extent of Rangen's water rights. I.C. § 42-1411(5). If Rangen disagreed with the Department's recommendations, it was incumbent upon it to timely file objections to the recommendations in the SRBA, and then present the SRBA Court with evidence to rebut the recommendations. *Id.* Rangen did not do so, and no other party to the SRBA came forth with objections to the recommendations. Therefore, the SRBA Court entered *Partial Decrees* for water right claims 36-2551 and 36-7694 consistent with the uncontested recommendations. I.C. § 42-1412(7)(providing the district court shall enter a partial decree as to those portions of the director's report for which no objection has been filed); *SRBA Administrative Order 1, Rules of Procedure,* §14. Under Idaho law, those *Partial Decrees* are conclusive as to the nature and extent of Rangen's water rights. I.C. § 42-1420.

Rangen's attempt to point this Court to extrinsic evidence of its historic use of water and its prior licenses does not give rise to latent ambiguities, but rather is an attempt to now raise issues that should have been raised and litigated in the SRBA. If Rangen believed the facially plain language of its *Partial Decrees* does not reflect it actual historic use, those issues needed to be raised in the SRBA. Arguing instead, in a subsequent proceeding outside of the SRBA, that

extrinsic evidence creates a latent ambiguity is problematic for a host of reasons. First, it fails to provide proper notice of the alleged latent ambiguity to the parties to the SRBA. When the Director files a Director's Report in the SRBA containing a recommendation for a certain water right claim, that Director's Report acts as notice basin-wide to all parties to the adjudication regarding that claim. I.C. § 42-1411(6). It appears on the SRBA Court's monthly docket sheet, and is distributed for display and review at the office of the clerk of the district court for each county in which any part of the water system is located. *SRBA Administrative Order 1, Rules of Procedure*, §6; I.C.§42-1411(6). Through this process, the filing of a Director's Report gives all parties to the adjudication a meaningful opportunity to review the Director's Report, the recommendations it contains, and to file an objection if they disagree with a recommendation.

It follows that all parties to the SRBA had a meaningful opportunity to review the Director's recommendations for Rangen's two senior water rights.[8] Those parties were able to look at the Director's recommendation and see that the source element of those rights was being recommended as "Martin-Curren Tunnel," and that the point of diversion element was being recommended as a specific ten-acre tract located in Gooding County, Idaho. All parties to the adjudication, including Rangen, were satisfied with that recommendation, as evidenced by the fact that no party filed an objection to either recommendation. Given that no objections were filed, all parties to the adjudication understood that by operation of law the claims would be, and in fact were, partially decreed by the SRBA Court consistent with facially plain language contained the recommendations. Rangen now argues, in a proceeding outside the SRBA that the facially plain language of its *Partial Decrees* does not represent its actual historic water use. That even though the decreed source of its water right is facially identified as "Martin-Curren Tunnel," this Court should interpret its *Decrees* to allow it to divert from sources in addition to the Martin-Curren Tunnel. And, that even though its decreed point of diversion is facially identified as a specific and identifiable ten-acre tract, that this Court should interpret its *Decrees* to allow it to divert not only from that ten-acre tract, but also an adjacent ten-acre tract. These arguments needed to be raised in the SBRA forum, a forum where all parties to the adjudication would have been afforded appropriate notice of these arguments and been given the opportunity

[8] Basin 36 was a highly contested basin, and the Director's recommendations for water right claims in that basin were highly scrutinized by parties to the SRBA. *See e.g., Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) (In 1994, the Idaho Supreme Court addressed a previous and similar water distribution case involving senior water rights from the Martin-Curran Tunnel not held by Rangen in Basin 36).

to respond. For Rangen to now argue, in a proceeding outside the scope of the SRBA, that the decrees do not accurately reflect its historical beneficial use constitutes an impermissible collateral attack on the decrees. To allow parties to contest a partial decree outside of the SRBA based on the argument that the partial decree is not consistent with historical beneficial use undermines any certainty or finality in the partial decree as well as one of the primary purposes of the SRBA.

Another reason why it is problematic for Rangen to raise its present arguments outside the scope of the SRBA is that the Martin-Curren Tunnel is not a water source that is unique to Rangen. R., p.4191. It is a common water source which was subject to the SRBA general stream adjudication. The SRBA Court entered numerous *Partial Decrees* to water users other than Rangen that identify the Martin-Curren Tunnel as an authorized water source from which those users may divert.[9] Ex.2315. Those water users have not been made a party to this proceeding. If this Court were to adopt Rangen's sprawling interpretation of the term "Martin-Curren Tunnel," Rangen has failed to address how this Court's adoption would affect the Director's administration of all other *Partial Decrees* that identify the "Martin-Curren Tunnel" as the decreed water source. For these reasons, Rangen's contention that it can point this Court to extrinsic evidence of its historic use of water, and its prior licenses, to establish a latent ambiguity is unavailing. The Director correctly determined that the source and point of diversion elements of Rangen's *Partial Decrees* contains language that is plain and unambiguous, and limits Rangen's call to water discharging from the Martin-Curren Tunnel itself.

iv. There is no basis for the application of the doctrine of quasi-estoppel in this matter.

Rangen argues that the Director should be estopped from determining that its delivery call is limited to water discharging from the Martin-Curren Tunnel under the doctrine of quasi-estoppel. Under Idaho law, the doctrine of quasi-estoppel "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken."

[9] *See e.g., Partial Decrees* entered in SRBA subcase numbers 36-102, 36-134A, 36-134D, 36-134E, 36-135B, 36-135D, 36-134E, 36-10141A, and 36-10141B.

Allen v. Reynolds, 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). It applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Id.* Estoppel theories generally present mixed questions of law and fact. *Id.* Because mixed questions of law and fact are primarily questions of law, this Court exercises free review. *Id.* Rangen argues that certain prior and historic acts on the part of the Department should preclude the Director from now interpreting its *Partial Decrees* to limit it to calling for water discharging from the Martin-Curren Tunnel. The Director rejected Rangen's quasi-estoppel arguments at the administrative level. R., p.4461. For the following reasons, this Court finds that quasi-estoppel does not apply in this matter.

First, the Court finds that quasi-estoppel may not be invoked against the Director under the facts and circumstances presented here. The decisions of the Idaho Supreme Court evidence a clear reluctance to invoke quasi-estoppel against a governmental agency in the exercise of its governmental functions. *See e.g., Floyd v. Bd. of Comm'rs of Bonneville County*, 137 Idaho at 727, 52 P.3d at 872 (2002) (holding, "Nor may the defense of [quasi] estoppel be applied against the state in matters affected its governmental or sovereign functions"); *Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 200-201, 207 P.3d 169, 176-177 (2009) (providing that neither equitable nor quasi-estoppel may ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity). While an exception exists where a governmental agency acts in a purely business and proprietary capacity, such is not the case here. *Murtaugh Highway Dist. v. Twin Falls Highway Dist.*, 65 Idaho 260, 268, 142 P.2d 579, 582 (1943). By administering water in accordance with the plain language of Rangen's *Partial Decrees*, the Director acted in his governmental capacity to fulfill the statutory and governmental duties required of him in responding to a delivery call. When the Director made the determination that Rangen may only call for water discharging from the Martin-Curren Tunnel, the Director was carrying out his statutory obligation under Idaho Code § 42-602 to distribute water in accordance with the prior appropriation doctrine. Rangen has failed to establish that under Idaho law quasi-estoppel is available against a governmental agency in the exercise of its governmental functions, or that it may be invoked against a governmental agency that is

discharging its statutory duties. Therefore, this Court finds that quasi-estoppel is not available here.

Second, even if quasi-estoppel could be invoked against the Director, Rangen has not demonstrated that its application is merited. Rangen has failed to establish that the Director has previously taken a different position with respect to the interpretation of the source and point of diversion elements contained in its *Partial Decrees*. Rangen relies on an *Order* from the Department dated January 4, 1979, wherein the Department allowed Rangen the right to measure its water flows at the "outlet works" as opposed to the "inlet works," under permit no. 36-7694. Ex.1029, p.30. This act on the part of the Department is not relevant to the instant analysis. It did not address the question of where Rangen is legally entitled to divert water and from what source. It certainly did not address the interpretation of the source and point of diversion elements of Rangen's *Partial Decrees*, which did not exist at that time. Rangen additionally relies upon former Director Karl Dreher's *Amended Order* dated March 10, 2004. R., pp.133-161. The Court has reviewed that *Amended Order* and does not find that issues regarding the interpretation of source and point of diversion elements of Rangen's *Partial Decrees* were raised or addressed. Those issues were addressed for the first time by the Director in relation to the instant delivery call, as evidenced by the fact that Rangen filed a *Motion for Summary Judgment* regarding source and point of diversion and the Director denied summary judgment on the grounds that genuine issues of material fact existed with respect to those elements. R., pp.2566-2568 & 3171-3177. Therefore, the Court finds that Rangen has failed to establish that the Director has previously taken a different position with respect to the interpretation of the source and point of diversion elements contained in its *Partial Decrees*. The Court further finds that Rangen has failed to establish that the Director's determination is unconscionable. Administration of Rangen's *Partial Decrees* consistent with their plain language is not unconscionable. Therefore, the Director's determination must be affirmed.

B. The Director's adoption of Sullivan's regression analysis is supported by substantial evidence and must be affirmed.

In responding to Rangen's delivery call, the Director utilized ESPAM 2.1 to simulate the effects of junior ground water pumping on the aggregate flows from springs located within the Rangen model cell. R., pp.4209-4216. ESPAM 2.1 is a regional groundwater model of the

Eastern Snake Plain Aquifer. The Director found "based upon clear and convincing evidence, that ESPAM 2.1 is the best technical scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell." R., p.4209. While the model can predict the effects of junior ground water pumping to the Rangen model cell, it cannot distinguish the water discharging from the Martin-Curren Tunnel, which is located within the Rangen model cell, from water discharging from other natural springs located within that model cell. R., p.4209. Under the plain language of Rangen's senior rights, Rangen is only entitled to the portion of the total curtailment benefit that accrues to the Martin-Curren Tunnel itself. Therefore, the Director was tasked with further deducing that percentage of the total accruing curtailment benefit which would accrue more specifically to the Martin-Curren Tunnel. R., pp.4209-4216.

The Director adopted a regression analysis which predicted that approximately 63% of the total curtailment benefits accruing to the Rangen model cell would accrue to the Martin-Curren Tunnel. R., p.4210. This regression analysis was proposed by Greg Sullivan, an expert for the City of Pocatello. *Id.* On judicial review, Rangen argues that the Director's adoption of this regression analysis is not supported by substantial evidence, and that the Director should have adopted an alternative regression analysis proposed by Department staff. That alternative analysis predicted that approximately 70% of the curtailment benefits accruing to the Rangen model cell would accrue to the Martin-Curren Tunnel. This Court disagrees, and finds that the Director's adoption of the regression analysis proposed by Sullivan is supported by substantial evidence and must be affirmed.

The main distinguishing factor between the regression analyses proposed by Department staff and Sullivan is the historical measurement data on which they are based. The Department based its regression analysis on historical measurement data provided by Rangen. Sullivan based his regression analysis on historical measurement data taken by the United States Geological Survey ("USGS"). At the administrative level, the Director recognized deficiencies with basing a regression analysis on the Rangen data. Namely, the Director found that Rangen's measurement methods resulted in the under-reporting of flow rate values. R., p.4198. The record reflects that Rangen uses a nonstandard method of measurement referred to as "sticking the weir," wherein a Rangen employee measures the depth of water flowing over wooden check board dams using a ruler placed on top of the board. R., p.4195; Agency Tr., pp.270-273.

Thereafter, the Rangen employee consults a rating table to identify the flow value corresponding to the measured depth of water. R., p.4196. The flow value measurements are then provided to the Department. All parties agreed that there were problems with the rating tables relied upon by Rangen employees in this case. And, that these deficiencies resulted in the under-reporting of flow rate values by Rangen. The Director found that "[t]he employment of a nonstandard measuring device and the under-reporting of flow rate values due to the uncalibrated rating table is cause to review other available flow rate measurement values." R., p.4197. Therefore, the Director determined to consider measurements taken by the USGS out of Billingsley Creek, at a site just downstream of the Rangen Facility. *Id.* The Director found:

> Pocatello compared the USGS measurements taken downstream from Rangen with Rangen's reported flows closest to the date of the USGS measurement. Pocatello's expert, Greg Sullivan, testified that comparison of Rangen's reported flows with flows measured by the USGS below the Rangen Facility show a systematic under-measurement of Rangen's flows, especially since 1980. Sullivan estimated the measurement error to be 15.9% based on the comparison of 45 measurements by the USGS between 1980 and 2012.

R., p.4198. The Director ultimately held that "based upon clear and convincing evidence, Rangen's use of a nonstandard measuring device with an inaccurate rating curve has resulted in the under-reporting of flows at the CTR raceways and Rangen's lodge pond dam." *Id.*

The Director then proceeded to adopt the regression analysis proposed by Sullivan. R., p.4210. The Director's reasoning for adopting the Sullivan analysis is set forth in his *Curtailment Order*. In part, the Director reasoned:

> There are two reasons why the Director should apply the 63% proportion to determine the increase in the Curren Tunnel flow from the total simulated increase in flow to the Rangen model cell. First, all parties agree that the data used to calculate the 75% proportion were under-reported. The alternative regression line plotted by Sullivan is a credible method to correct the under-reported data. Second, applying a 75% proportion to determine the increase in the Curren Tunnel flow may result in Rangen benefitting from its own under-reporting of flows if mitigation by direct flow to Rangen in provided in lieu of curtailment.

R., p.4210. Under Idaho law, a reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, and shall not overturn an agency's decision that is based on substantial competent evidence in the record. I.C. § 67-5279(1); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). In this case, the Court finds that the

Director's adoption of the regression analysis proposed by Sullivan is supported by substantial evidence in the record including, but not limited to: Exhibit 3650 (Sullivan Expert Supplemental Report dated May 5, 2013), Exhibit 3654 (Sullivan Expert Second Supplemental Report dated May 13, 2013), Exhibit 3349 (Sullivan Comparison of Spring and Fall USGS and Rangen Flow Measurements 1970-2013), Exhibit 3358 (Sullivan Comparison of USGS and Rangen Hatchery Flow Measurements 1970-2013), Exhibit 3345 (Sullivan Expert Response to IDWR Staff Memo dated April 5, 2013, & Tr., pp.1428-1430 & 1438-1439 (Sullivan Hearing Testimony).

C. The Director's determination that junior ground water users are using water efficiently and without waste is supported by substantial evidence and must be affirmed.

Rule 40.03 of the CM Rules provides that in responding to a delivery call, "[t]he Director will also consider whether the respondent junior-priority water holder is using water efficiently and without waste." IDAPA 37.03.11.040.03. In his *Curtailment Order*, the Director concluded that "junior-priority water right holders are using water efficiently and without waste." R., p.4228. Rangen asserts on judicial review that the Director's determination in this respect is not supported by substantial evidence and must be set aside. This Court disagrees.

Consistent with Rule 40.03 of the CM Rules, the record establishes the Director did consider the evidence presented to him concerning whether affected junior users are using water efficiently and without waste. With respect to IGWA, the Director considered the testimony of Lynn Carlquist, President of North Snake Ground Water District, and Tim Deeg, President of IGWA. Tr., pp.1670-1673, 1692-1693, 1727, 1739-1740, 1748 & 1751. Those individuals testified as to the diversion methods of IGWA members, conversions that the district has undertaken to reduce reliance on ground water pumping and increase recharge, and the steps IGWA has taken to monitor diversions to ensure its members are not using more water than they have a right to, among other things. *Id.* With respect to the City of Pocatello, the Director considered the testimony of Pocatello's Water Superintendent. Tr., pp.1104-1107. This evidence is uncontested in the record. Rangen did not submit any conflicting evidence for the Director's consideration as to junior water users it believes are using water inefficiently or wasting water. Therefore, the Court finds that the Director's determination in this respect is supported by substantial evidence in the record and must be affirmed.

D. The Director's determination that the source of Rangen's two senior water rights is surface water is affirmed.

At the administrative level, the Director held that "[t]he plain language of Rangen's partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water." R., p.3174. Further, that Rangen's senior rights "should be administered as surface water." R., p.3176. On judicial review, IGWA asks this Court to set aside the Director's determination in this respect, and remand the matter with instructions that the Director administer Rangen's senior rights as ground water rights subject to Idaho's Ground Water Act, Idaho Code § 42-226. This Court affirms the Director's determination that the source of Rangen's senior rights is surface water and must be administered as such.

IGWA's argument that the source of Rangen's senior rights should be ground water is an issue that needed to be raised in the SRBA. The SRBA Court has already made the legal determination that the source of Rangen's senior rights is surface water via the issuance of the *Partial Decrees*. Those *Partial Decrees* are conclusive as to the nature and extent of Rangen's rights. I.C. § 42-1420(1). The *Decrees* identify the source of water as: "Martin-Curren Tunnel[;] Tributary: Billingsley Creek," a surface water source. Ex.1026 & 1028. The Adjudication Rules for the SRBA provided:

> 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 or common 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.i. (emphasis added).

Simply put, if the source of Rangen's senior rights was ground water, the SRBA Court would have decreed the source as "ground water," the same as every other ground water right in the SBRA. The SRBA Court did not; it entered *Partial Decrees* for Rangen's senior rights that identified a surface water source tributary to another surface water source. Ex.1026 & 1028. As discussed in greater detail above, those *Partial Decrees* were entered pursuant to, and consistent with, the unobjected to Director's recommendations for the claims contained in the *Director's Report, Part I, Reporting Area 3 (Basin 36)*. The recommendations for the claims did not

identify the source of the rights as ground water. If IGWA disagreed with the Department's recommendations, it was incumbent upon it to timely file objections to the recommendations in the SRBA, and then present the SRBA Court with evidence to rebut the recommendations. I.C. § 42-1411(5). Timely raising the issue in the SRBA would have afforded all parties to that adjudication appropriate notice of the issue and the opportunity to respond. Raising the issue at this time, in a proceeding outside the SRBA, constitutes an impermissible collateral attack on the *Partial Decrees* for the reasons set forth by this Court in Section IV.A.iii. of this decision.

Additionally, the Idaho Supreme Court has previously indicated that the Martin-Curren Tunnel is a surface water source. In *Musser v. Higginson*, 125 Idaho 392, 394, 871 P.2d 809, 811 (1994), the Idaho Supreme Court addressed a delivery call filed by Alvin and Tim Musser concerning "a decreed right for 4.8 cubic feet per second (cfs) of water *from the Martin-Curran Tunnel.*" The Court in that case identified the Mussers' source as "springs," not as ground water. *Id.* It has also instructed, in conjunction with a subsequent analysis of its previous decision in *Musser*, that "I.C. § 42-226 has no application in delivery calls between senior spring users and junior ground users." *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 509, 284 P.3d 225, 234 (2012) (citing, *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011)). For these reasons, the Director's determination that the source of Rangen's senior rights is surface water and must be administered as such is not contrary to law, but rather is consistent with the plain language of the *Partial Decrees*, is supported by substantial evidence, and must be affirmed.

E. The Director's determination that Rangen's water use and method of diversion is reasonable is affirmed.

In responding to Rangen's delivery call, the Director may consider various factors under Rule 42 of the CM Rules, including the extent to which the senior's needs (1) "could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices," and (2) could be met using alternate reasonable means. IDAPA 37.03.11.042.01.g & h. In the *Curtailment Order*, the Director considered those factors. He found that "Rangen's water use is reasonable." R., p.4222. Further, that Rangen employs "reasonable diversion and conveyance efficiency and conservation practices in diverting water from the Curren Tunnel," and that "Rangen is diverting and using

water efficiently, without waste and in a manner consistent with the goal of reasonable use." R., pp.4223 & 4228. IGWA argues on judicial review that the Director abused his discretion in finding that Rangen's water use and diversion methods are reasonable. It asserts that the Director should require Rangen to install a recirculation system before it is entitled to seek the curtailment of juniors. Additionally, that the Director's decision on the recirculation system fails to provide a reasoned supporting statement contrary to I.C. § 67-5248. This Court disagrees.

The Court finds that the Director's *Curtailment Order* complies with Idaho Code § 67-5248. The Director considered and rejected IGWA's arguments that Rangen's use of water and diversion methods are unreasonable, and its argument that Rangen should be required to install a recirculation system before it may seek curtailment. The Court finds that the Director supported his decision with a reasoned statement. The Director provided:

> 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 and $46,000. *Id.* Because of the significant costs to build the project, and other concerns about the issues of water quality and water temperature associated with a pump-back system, Rangen ultimately rejected the idea of a pump-back system. Courtney, Vol. I, p. 113. The cost of building redundant systems along with annual operating costs makes a pump-back system cost prohibitive.

R., p.4201. The Director's analysis is reasoned, is based on evidence, and contains appropriate citations to the record. At various other points in the *Curtailment Order*, the Director also discussed and found that Rangen's water use and means of diversion are reasonable. *See. e.g.*, R., pp.4222, 4223 & 4228. IGWA's argument that the Director's decision is not supported by a reasoned statement is unavailing.

The factors the Director may consider in determining material injury and whether the senior is using water efficiently and without waste under Rule 42 of the CM Rules "are decisions properly vested in the Director." *American Falls Res. Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). Therefore, the Director's consideration of the factors set forth in Rule 42 are reviewed by this Court under an abuse of discretion standard. In this case, the Director did not abuse his discretion in determining that Rangen's water use and method of diversion are reasonable. Nor did he abuse his discretion by rejecting IGWA's argument that Rangen must install a recirculation system prior to any curtailment. The Director recognized the issue of one of discretion. For the reasons set forth above, the Director acted within his discretion and reached his decision through an exercise of reason. Therefore, the Director's determination that Rangen's water use and method of diversion are reasonable must be affirmed.

F. The Director erred by applying a trim line to reduce the zone of curtailment.

i. The Director's application of the trim line.

The Director found by clear and convincing evidence that ESPAM 2.1 constitutes the best science currently available for simulating the effect of ground water pumping from the ESPA on the spring flows located in the Rangen cell. R., p.4209. Although some of the parties offered criticisms of the model, no party advocated the use of an alternative model. R., p.4207. However, in applying ESPAM 2.1, the Director imposed a "trim line" or a geographical demarcation defining an area of the ESPA that would be subject to curtailment and excluding from curtailment the area of the ESPA located outside of the trim line. R., pp.4224-4228. The trim line imposed by the Director corresponds with a geological feature referred to as the "Great Rift." *Id.* The Great Rift is a volcanic rift zone comprised of less permeable basalts having lower hydraulic conductivity which impedes the transmission of water through the aquifer. R., p.4202. The Great Rift runs north to south across the Eastern Snake River Plain extending from Craters of Moon to just west of American Falls Reservoir. *Id.* The Director determined that due to the low transmissivity of the Great Rift zone the benefit of curtailment to senior rights with respect to the number of acres curtailed diminishes significantly if areas east of the Great Rift are included in the curtailment. R., p.4226. As a result and for reasons explained more fully below,

the Director determined that junior rights located east of the Great Rift would be excluded from curtailment. Both Rangen and the SWC argue the Director erred by imposing the trim line. IGWA, the City of Pocatello and Fremont-Madison argue the trim line should be expanded to exclude more than just those junior rights east of the Great Rift. For the reasons explained below, this Court holds that the Director erred in imposing a trim line.

ii. The *Clear Springs* decision.

As the basis for imposing a trim line, the Director relied on the Department's response to two prior delivery calls, one brought by Clear Springs Foods, Inc. and the other brought by Blue Lakes Trout Farm, Inc. against junior groundwater pumpers on the ESPA, which culminated in the holding in *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 252 P3d 71 (2011) ("*Clear Springs*"). The applicability of a trim line was one of the issues litigated in *Clear Springs*. *Id.* at 812, 252 P.3d at 93. Because the *Clear Springs* decision addresses numerous legal principles that are germane to the issues relating to the use of a trim line, an in depth discussion of the various holdings of the case is required.

In *Clear Springs*, the Department responded to the two delivery calls using ESPAM 1.1 in order to determine the effects of groundwater pumping just as ESPAM 2.1 was applied in this proceeding. *Id.* at 814, 252 P.3d at 97. Unlike ESPAM 2.1, which is calibrated to predict the benefits of curtailment to the square mile "cell" within which the calling party's spring is located, ESPAM 1.1 was limited to predicting the benefits to a spring reach containing multiple cells. R., p.4204. The former Director found that the degree of uncertainty or margin of error associated with the application of ESPAM 1.1 was 10%. [10] *Clear Springs* at 813, 252 P.3d at 94.

The former Director then imposed a trim line delineating those rights where it was predicted at least 10% of the benefit of curtailment would accrue to the spring reach in which the springs alleged to be injured were located. R., pp.4203-4204. With respect to Clear Springs, the Director found that Clear Springs would receive 6.9% of the benefits accruing to the Buhl to Thousand Springs reach. R., p.4204. The trim line limited curtailment to areas of the ESPA where Clear Springs would receive at least 0.69% (6.9% of 10%) of the benefits of curtailment. *Id.* With respect to Blue Lakes, the 10% trim line was applied based on the accrual of benefits to the Devil's Washbowl to Buhl reach. Blue Lakes was estimated to receive 20% of the benefits

[10] The margin of error or level of uncertainty was based on the finding that surface stream gauges have a margin of error of plus or minus 10%.

accruing to the reach. *Id.* The trim line limited curtailment to areas of the ESPA where Blue Lakes would receive at least 2% (20% of 10%) of the benefits of curtailment. *Id.*

The former Director based his determination to impose a trim line to exclude water rights within the margin of error on the "full economic development" language contained in Idaho Code § 42-226 and the "public interest" considerations contained CM Rule 020.03. *Clear Springs* at 816, 252 P.3d at 97. The district court affirmed the former Director's use of the trim line, albeit on different grounds. *Id.* The district court affirmed the use of the trim line based on the function and application of the model which the former Director found to have a margin of error or level of uncertainty of 10% and that it would be inappropriate to apply the model independent of its assigned margin of error. *Id.*

On appeal, the Idaho Supreme Court affirmed the district court's ruling on this issue recognizing that the district court did not affirm the former Director's use of the trim line based on the application of Idaho Code § 42-226 and CM Rule 20.03. *Id.* at 816, 252 P.3d at 97. The Supreme Court ruled that the Director's decision not to curtail groundwater appropriators within the 10% margin of error was a matter of discretion and that the former Director acted within the bounds of his discretion. *Id.* at 817, 252 P.3d at 98. Although the Supreme Court upheld the former Director's use of the trim line to account for model uncertainty, one issue that was left unresolved pertained to the application of the burden of proof applied in the context of a delivery call. The calling spring users in *Clear Springs* argued that the former Director's decision not to curtail junior appropriators within the 10% margin of error would result in a shifting of the burden of proof to the senior appropriator. The Supreme Court declined to hear the issue on the basis that it was not raised in the district court. *Id.* at 817, 252 P.3d at 98. That issue has again been raised in this case and is addressed later in this discussion.

The Supreme Court also addressed and expressly rejected the application the "full economic development" language of Idaho Code § 42-226 as a basis for imposing the trim line. *Id.* at 816, 252 P.3d at 97. Idaho Code 42-226 provides in relevant part:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in in reasonable amounts through appropriations, is affirmed with respect to the ground water resources of this state *. . . while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this rights hall not block full economic development of underground water resources.*

I.C. § 42-226 (emphasis added). The Court instructed that the "full economic development" language of Idaho Code § 42-226 had no application to the delivery call because the language refers to promoting full economic development of underground water resources by protecting a senior groundwater appropriator only in the maintenance of reasonable pumping levels. *Id.* at 803, 252 P.3d at 84. The Supreme Court held further that Idaho Code § 42-226 did not even apply to the delivery call because the statute had no application to surface spring rights. *Id.* at 804, 252 P.3d at 85. Likewise, because surface spring rights are at issue in this case, Idaho Code § 42-226 has no application to this case.

The Supreme Court also addressed the meaning and application of CM Rule 20.03.[11] The Court first addressed the reference to Article XV, Section 5, of the Idaho Constitution in CM Rule 20.03, which states:

> These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of *reasonable use* of both surface and ground water. *The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may prescribe as provided in Article XV, Section 5, Idaho Constitution. . . .*

Id. at 805, 252 P.3d at 786 (emphasis added). The Supreme Court addressed that Section 5 of the Constitution also refers to Section 4 of the Constitution but held that neither section applies to water that has been directly appropriated from the water source. Rather, both sections apply to the situation where "water was appropriated, used, or intended to be used 'under a sale, rental, or distribution, thereof'" and that both sections apply only to water that was intended to be used for agricultural purposes. *Id.* at 806, 252 P.3d at 87. And that both sections apply only where water is distributed by a ditch or canal owner for use by others. *Id.* at 807, 252 P.3d at 88. Finally, the Court concluded that both sections only govern the distribution of certain surface waters and neither section governs conjunctive management. *Id.* The Court's ruling makes clear that Article XV §§ 4 and 5 do not apply to the facts of this particular delivery call.

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[11] CM Rule 20.03 provides in its entirety:

> **Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to the conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

The Supreme Court next addressed the reference in CM Rule 20.03 to Article XV, Section 7, of the Idaho Constitution, which states:

> [O]ptimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution. . .

Id. at 805, 252 P.3d at 86. The Supreme Court discussed the meaning of the "optimum development in the public interest," stating in relevant part as follows:

> There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public's interest. Likewise, there is not material difference between 'full economic development' and the 'optimum development of water resources in the public interest.' They are two sides of the same coin. Full economic development is the result of optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Id. at 808, 252 P.3d at 89. Ultimately, however, the Supreme Court instructed:

> *There is nothing in the wording of Article XV § 7, that indicates that it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV § 3, which states, 'Priority of appropriation shall give the better right as between those using the water [of any natural stream]. . . .'*

Id. at 807, 252 P.3d at 88 (emphasis added). The Court's ruling clarifies that any reliance on of Article XV § 7 as a justification for modifying a senior appropriator's existing water right to promote maximum use or optimum development of the state's water resources is misplaced. [12]

The Supreme Court also addressed the provision of CM Rule 20.03, which provides:

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[12] Although Article XV § 7 does not grant the Idaho Water Resource Board or the Idaho legislature the authority to modify existing rights, it does grant the power to formulate and implement a state water plan for "optimum development of water resources in the public interest," which can affect the licensing of future rights. In this regard, it bears mentioning that at the time Rangen's license was issued for water right 36-02551, the state water plan in effect at the time recognized that full development of the ESPA may result in a reduction in the spring flows relied on by the aquaculture industry. With respect to aquaculture, policy 32 of the 1976 state water plan provided in relevant part:

> 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.

State Water Plan-Part 2, Dec.1976 (www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/PDFs/1976StateWaterPlanPart2.pdf).

To give effect to this policy, the license issued for water right no. 36-07694 was conditioned as follows: "Use of water under this right is subject to policies set forth in the State of Idaho Water Plan, including Policy No. 32F." Exhibit 1029. However, that condition was not recommended by the Department nor included the partial decree. Had the condition been included in the partial decree, no modification of that right would have been implicated in order to give effect to the state water plan in furtherance of promoting the "optimum development of water resources in the public interest."

> An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water . . . .

Id. at 809, 252 P.3d at 90. The Supreme Court held that the provision is consistent with prior holdings in *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) and *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912), which stand for the proposition that senior water right holder is entitled to the decreed quantity of his water right but is not protected in his unreasonable means of diversion. *Id.* at 809, 252 P.3d at 90. The Court noted that "the senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion." *Id.* Similarly in *Schodde*, the Court stated that "[t]he issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not his priority of rights." *Id.* The Supreme Court concluded that the purpose of the provision is to provide that to the extent the means of diversion is determined to be unreasonable, a senior appropriator must change his means of diversion. *Id.* The purpose of the provision is not to modify the decreed quantity of the senior appropriator's right. *Id.* As previously addressed in this opinion, the Director found Rangen's means of diversion to be reasonable.

Finally, the Court instructed that the reference to "full economic development as defined by Idaho law" provision contained in CM Rule 20.03 is a reference to Idaho Code § 42-226, noting that the words "full economic development only appear in Idaho Code § 42-226 and the cases discussing the statute." *Id.* at 808, 252 P.3d at 89. Again, the Court determined that Idaho Code § 42-226 did not apply to the senior spring users making the delivery call. *Id.* at 804, 252 P.3d at 85.

In sum, a plain reading of the various holdings in *Clear Springs* establish that in the context of a delivery call brought by senior springs users against junior ground water pumpers, neither the CM Rules, the common law, Idaho statutes, nor the Idaho Constitution provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled *based on the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior right, provided the means of diversion is reasonable and the water is put to beneficial use.*

iii. The results of ESPAM 2.1 model simulation predictions.

In turning to the instant case, the Director applied ESPAM 2.1 to simulate the curtailment of ground water rights for irrigation within the model boundaries with priority dates later than July 13, 1962, which is the priority date of Rangen's water right no. 36-02551. R., pp.4224-4228. The simulated increase in discharge to the model cell at steady state was predicted to be 17.9 cfs. R., pp.4210 & 4224. After eliminating points of diversion inside the model boundary, but outside the boundary of common water supply, the model predicted a total of 16.9 cfs of reach gains to the Rangen cell based on the curtailment of 479,000 acres. *Id.* The Director next determined the "depletion percentage" for each model cell with respect to the spring discharge in the Rangen cell. R., p.4211. The depletion percentage represents the percentage of water from each cell that would accrue to the Rangen cell as a result of curtailment. When plotted on a graph, the model simulation results predicted that the benefit of curtailment with respect to the number of acres significantly decreased where the depletion percentage approached 1.0% to 1.5 % and the benefit approached 14.3 to 14.6 cfs. R., p.4212. The Director determined that because the Martin-Curren Tunnel would receive only 63% of the benefit accruing to the Rangen cell, when plotted on a graph the model simulation results predicted that the benefit of curtailment with respect to the number of acres significantly decreased where the depletion percentage approached 1.0% to 1.5 % and the benefit to the Martin-Curren Tunnel approached 9.0 to 9.2 cfs. R., p.4213. The Director determined that the diminishing benefits corresponded with the location of the Great Rift where the low transmissivity impedes the transmission of water through the aquifer. And, that if ground water points of diversion located east of the Great Rift were eliminated from the simulation, the remaining junior wells in the common ground water supply would accrue 14.4 cfs to the Rangen model cell and 9.1 cfs (14.4 cfs x .63) to the Martin-Curren Tunnel based on the curtailment of 157,000 acres. R., p4215. By extrapolation, if points of diversion east of the Great Rift were not excluded from curtailment then 16.9 cfs would accrue to the Rangen model cell or 10.6 cfs (16.9 x .63) to the Martin-Curren Tunnel based on the curtailment of 479,000 acres. The result is that the curtailment of the additional 322,000 acres east of the Great Rift would produce an additional 1.5 cfs to the Martin-Curren Tunnel. To illustrate the effect of the low transmissivity in the Great Rift Zone, the Director found:

> Curtailment of junior ground water irrigation west of the Great Rift would curtail irrigation of approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Curren Tunnel.

> Curtailment of junior ground water irrigation east of the Great Rift would curtail irrigation of approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Curren Tunnel.

R., p.4215.

iv. The Director's justification for the use of the trim line.

In addressing the use of a trim line, the Director concluded that the 10% trim line imposed in *Clear Springs* would be not be appropriate because the 10% trim line was based on predictions of impacts to a multi-cell reach (ESPAM 1.1). R. p.,4225. And, that applying a 10% trim line based on model predictions of impacts to a single model cell (ESPAM 2.1) would result in a significantly different standard than was applied in the *Clear Springs* delivery call. *Id.* To illustrate, at oral argument, counsel for the Department explained that if a 10% trim line were applied in this case approximately only 175 acres would be subject to curtailment. The Director acknowledged the holding in *Clear Springs* providing that because a model is only a prediction or simulation of reality it must have some margin of error and that it would be inappropriate to apply the model independent of the assigned margin of error. R., p.4226. However, the Director also concluded that because of the complexity of the ESPAM 2.1 model, the margin of error associated with the model predictions could not be quantified. *Id.* Nonetheless, the Director concluded that the model by its very nature had some level of uncertainty and concluded:

> The lack of a quantifiable margin of error associated with the model does not mean that the model should be abandoned, but simply that its use should be tempered with the fact that it is a 'simulation or prediction of reality.' The Director concludes that there is uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. This variance should be taken into account when considering a trim line.

R., p.4226. The Director concluded further that there is lower predictive uncertainty on the western side of the Great Rift and a higher predictive uncertainty on the eastern side of the Great Rift. R, p.4227. And, that impacts from several pumping locations located east of the Great Rift had negligible impacts on the Rangen spring cell. *Id.* Ultimately, the Director concluded that the uncertainty in the model justifies the use of a trim line. *Id.*

In delineating the Great Rift as the trim line the Director concluded that ESPAM 2.1 establishes by clear and convincing evidence that the portion of the benefits of curtailed water use east of the Great Rift that would accrue to the Rangen cell is less than 1% and that the benefit of curtailment with respect to the number of acres diminishes significantly if areas east of the Great Rift are included in the curtailment. *Id.* In perceiving the determination as one of discretion, the Director concluded:

> Delineating a trim line using the Great Rift will limit the curtailment to an area where the Rangen spring cell is predicted to receive at least 1% of the benefits of curtailment, and the calling party is predicted to receive at least .63% of the benefits of curtailment. This [result] is similar to the trim lines applied to ESPAM 1.1 in the Clear Springs delivery call and the Blue Lakes delivery call, where the calling parties were predicted to receive 0.69% and 2% of the curtailed benefits, respectively.

R., p.4226. The Director also relied on CM Rule 20 and Article XV § 7 of the Idaho Constitution as a basis for considering the diminishing benefits of curtailment beyond the Great Rift. R., p.4227. The Director relied on CM Rule 20 for the proposition 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" and that "[d]emand should be viewed in light of reasonableness and optimum development of water resources in the public interest." *Id.* The Director relied on Article XV § 7 of the Idaho Constitution for the proposition that "[t]he Idaho Constitution enunciates a policy of promoting optimum development of water resources in the public interest." *Id.* The Director concluded: "To curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and the least wasteful use, of the State's water resources." *Id.* It is important to note that the Director did not find, or rely upon, the doctrine of futile call in justifying the implementation of the trim line.

v. The Director erred in applying the trim line.

As an initial matter, this Court recognizes the large disparity between the number of acres curtailed and the predicted benefit that would accrue to the Martin-Curren Tunnel, if junior ground water rights east of the Great Rift are not excluded from the zone of curtailment. As previously discussed, the portion of the benefits of ground water curtailment east of the Great

Rift is predicted to be generally less than 1%. The Court notes however that the Director did not make the finding that curtailing water rights east of the Great Rift would result in a futile call. To the contrary, the Director recognized that the curtailment of the additional 322,000 acres east of the Great Rift is predicted to produce an additional 1.5 cfs to the Martin-Curren Tunnel. While the disparity between curtailed acreage and realized water accruing to the Martin-Curren Tunnel is large, it should be noted that unlike surface to surface administration, the very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefit to a senior surface right. As an example, in this case, the highest depletion percentage predicted to accrue to the Rangen spring complex is 16%. R., p.4211. Nonetheless, Idaho law mandates that ground and surface water be administered conjunctively. It further mandates that if the Director is going to apply a trim line to administer to less than the full amount of water Rangen would otherwise be entitled to, such a determination must be supported by law and by clear and convincing evidence. *See e.g., A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012) ("Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence").

As previously discussed, the Idaho Supreme Court instructed in *Clear Springs* that neither the CM Rules, the common law, Idaho statutes, nor the Idaho Constitution provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled based on the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior right, provided the water is put to beneficial use. *See supra.* Therefore, the Director's reliance on CM Rule 20.03 and Article XV § 7, as partial support for the use of a trim line is in error.

Further, reliance by IGWA, City of Pocatello and Fremont-Madison on *Schodde* and *Van Camp* for the proposition that an appropriator is not entitled to command the entirety of large volumes of water to support his or her appropriation is equally misplaced. For reasons previously discussed, in *Clear Springs*, the Idaho Supreme Court instructed that those cases only stand for the proposition that a senior appropriator is not protected in his means of diversion to the extent it is determined to be unreasonable. *See supra.* As discussed elsewhere in this opinion the Director found Rangen's means of diversion to be reasonable. R., p.4223. Hence, the holdings in *Schodde* and *Van Camp* do not apply to the facts of this case.

The Director's remaining support for the use of the trim line concerns the margin of error or level of uncertainty based on the application of the model. Unlike the situation in *Clear Springs* which assigned a margin of error of 10% based upon the limitations of ESPAM 1.1, the Director concluded in this case that: "Because of the complexity of the model, the margin of error associated with model predictions [ESPAM 2.1] cannot be quantified." R., p.4227. But did conclude that "there is uncertainty in the predicted increase in spring flow resulting from curtailment and the actual response may be higher or lower than predicted." *Id.* All experts involved in this case were in general agreement that the use of a trim line would be based more on a policy decision than on a quantifiable level of uncertainty. Tr., pp. 2329 (Brockway hearing testimony), 2551 (Hinckley hearing testimony), 2696-97 (Brendecke hearing testimony), 1641-42 (Sullivan hearing testimony); Exhibit 1369 (*Comments on Trim Line and Model Uncertainty*, Charles M. Brendecke, PhD, PE), R.p.4208 (finding "IGWA's experts acknowledged that model uncertainty does not provide a definitive location for a trim line.).

Consequently, in support of the trim line, the Director relied on the finding that there is a higher level of uncertainty associated with the model on east side of the Great Rift *in conjunction* with CM Rule 20.03 and Article XV § 7 and *in conjunction* with the conclusion that the result of applying a trim line in this case would be similar to the result in the Blue Lakes and Clear Springs delivery calls, which was upheld in *Clear Springs*. As such, the Director's reasoning relies loosely on the application of a quantifiable margin of error associated with the model and more heavily on a policy determination.

More significantly, however, the issue that was not addressed in *Clear Springs*, but was raised again in this proceeding, pertains to the burden of proof that applies in conjunction with a delivery call. Since the holding in *Clear Springs*, the Idaho Supreme Court has weighed in on that issue on two separate occasions. One of the issues raised in *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012), was whether the district court erred in imposing a "clear and convincing" evidence standard on the Director's determination of material injury in a delivery call. *Id.* at 505, 284 P.3d at 230. The district court held that consistent with the established burdens of proof and presumptions that apply in a delivery call, any risk of uncertainty should be borne by the junior. Although the case dealt with the standard of proof applicable to the Director's finding of material injury to a senior water right, the Idaho Supreme Court provided an in depth analysis of the established case law in Idaho regarding the applicable burden of proof

in a delivery call. *Id.* at 517, 284 P.3d at 242. In upholding the district court, the Idaho Supreme Court instructed: "It is Idaho's long standing rule that proof of "no injury" by a junior appropriator in a water delivery call must be by clear and convincing evidence." *Id.* at 524, 284 P.3d at 249. Likewise that "[o]nce a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *Id.*

In *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr., Dist.*, 155 Idaho 640, 315 P.3d 828 (2013), the Supreme Court addressed the application of evidentiary standards, legal presumptions and burdens of proof associated with a delivery call in conjunction with the application of the CM Rules. The Court discussed its prior ruling in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD # 2*), which established that: "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile [,] or to challenge, in some other constitutionally permissible way, the senior call. *Id.* at 653, 315 P.3d at 841 (quoting *AFRD #2*, at 878, 154 P.3d at 449). The Supreme Court then held: "Thus, any determination of a delivery call requires application of established evidentiary standards, legal presumptions and burdens of proof." *Id.* at 653-54, 315 P.3d at 841-42. The Court went on to hold that junior right holders may respond to the delivery call and shall bear the burden of proving by clear and convincing evidence that the call would be futile or is otherwise unfounded. *Id.* at 654, 315 P.3d at 842. Indeed both historical and recent case law addressing the application of the CM Rules clearly establishes that once material injury to a senior right is established, junior right holders bear the burden of establishing by clear and convincing evidence that the call would be futile.

In this case, the model predicts that curtailment of junior rights east of the Great Rift are causing material injury and curtailment of such rights would produce a quantity of water to the Martin-Curren Tunnel in the amount of 1.5 cfs. Indeed, while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren Tunnel, the meaningfulness of the quantity becomes readily apparent. The Director found that the average annual flow available from the Martin-Curren tunnel in 1997 was 19.1 cfs. R., p.4215. The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. *Id.* And that the average annual flow has not exceeded 7 cfs

since 2002. *Id.* From that perspective, the additional 1.5 cfs is neither insignificant nor *de minimis*.

While there is a higher level of predicted uncertainty or margin of error in the model results east of the Great Rift, based on the constitutionally established burdens of proof, any uncertainty or margin of error must operate in favor of Rangen, the senior right holder. By its very nature uncertainty does not support a finding of clear and convincing evidence. To allow model uncertainty to operate in favor of junior ground pumpers would shift the burden of proof to the senior to prove that junior ground pumpers east of the Great Rift were causing injury. Therefore, the Director's application of the trim line in this matter is set aside and remanded for further proceedings as necessary.

G. The Director's determination that any proposed mitigation plan may be phased-in over a five-year period is affirmed.

Rule 40 of the CM Rules provides that once the Director makes a determination of material injury in responding to a call he must take one of two actions. The Director shall either regulate the diversion and use of water in accordance with the priorities of rights, or "[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.a, b. In his *Curtailment Order*, the Director found material injury to Rangen's senior water rights and ordered that on March 14, 2014, certain identified junior ground water rights bearing priority dates junior to July 13, 1962 would be curtailed. R., p.4229. The Director then instructed that those junior users could avoid curtailment if they proposed and had approved a mitigation plan that provided "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id.* The Director then instructed that such proposed mitigation "may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year." *Id.*

On judicial review, IGWA takes issue with the Director's instructions regarding the phasing-in of mitigation. It argues that his instructions require junior users to provide more mitigation water in the fifth year than Rangen would receive if curtailment were to occur. It contends that ESPAM 2.1 predicts that only 7.1 cfs would accrue to the Martin-Curren Tunnel after five years of full curtailment, yet the Director's phased-in mitigation instructions would

require it to provide 9.1 cfs of mitigation water in the fifth mitigation year. IGWA asserts that such a result is contrary to the CM Rules. It asks this Court to set aside the Director's determination in this respect and remand with instructions that "the extent of 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."

Rule 40 of the CM Rules provides that "regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment." IDAPA 37.03.11.040.01.a. Approved mitigation in lieu of curtailment is a form of regulation. The plain language of the rule establishes that the Director's ability to phase-in regulation of junior-priority ground water diversion and use is discretionary. It provides that the Director "may" phase-in such regulation over not more than a five-year period, but is not required to. Further, the CM Rules make clear that the decision to approve or deny a mitigation plan rests in the Director's discretion. IDAPA 37.03.11.040.01.b.

In this case, the Director did not abuse his discretion or act contrary to law in indicating his willingness to consider a phased-in mitigation plan stretching over a five-year period, as set forth in his *Curtailment Order*. The Director found that pumping by juniors has materially injured Rangen over time. R., p.4223. The material injury, and any attempt to fully cure the material injury via curtailment, is both delayed and long range. R., pp.4463-4464. Under the facts and circumstances of this case, it would take many years of full curtailment for the ESPA to return to a state of equilibrium wherein Rangen would receive the full 9.1 cfs the Director found it is entitled to under its senior rights. R., pp.4463-4464. Every year the Director permits out-of-priority water use to occur pursuant to an approved mitigation plan, the amount of time it would take the aquifer to reach that state of equilibrium is further delayed if curtailment were to become necessary in the future. Consistent with the CM Rules, the Director required that full mitigation be effectuated in this case by the fifth year. Indeed, under the CM Rules, the Director could have required IGWA provide the full amount of mitigation in year one in order to avoid curtailment. There is no requirement that he must allow for phased-in regulation. However the Director, in an exercise of his discretion, determined to consider phased-in regulation in this case over a five year period. Such a determination was within his discretion, was not contrary to law, and must be affirmed.

H. Rangen is not entitled to an award of attorney's fees on judicial review.

Rangen seeks an award of attorney fees in this matter pursuant to Idaho Code § 12-117. Under subsection (1) of that statute, upon a petition for judicial review involving as adverse parties a state agency and a person, the court "shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Since Rangen has only prevailed in part on judicial review, it is not considered a "prevailing party" under the statute. *See e.g., Wurzburg v. Kootenai County*, 155 Idaho 236, 248, 308 P.3d 936, 948 (Ct.App. 2013) (providing that where a party has only prevailed in part it is not the prevailing party under Idaho Code § 12-117). On that ground, Rangen is not entitled to an award of fees on judicial review. Further, the Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, Rangen has only prevailed on one issue pertaining to the Director's implementation of a trim line. The trim line issue is one of first impression and presents a legitimate question for this Court to address. Accordingly, Rangen's request for attorney's fees is alternatively denied on the grounds that the Director did not act without a reasonable basis in law or fact.

V.
CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* and subsequent *Order on Reconsideration* are affirmed in part and set aside in part. The case is remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated October 24, 2014

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ***Memorandum Decision and Order on Petitions for Judicial Review*** and ***Judgment*** was mailed on October 24, 2014, by first-class mail to the following:

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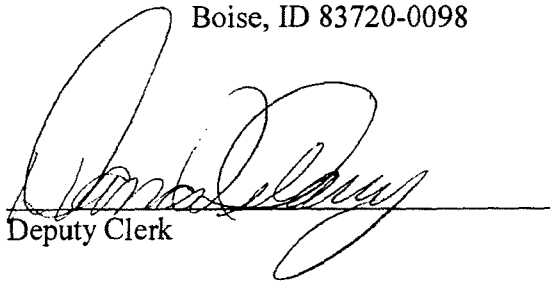

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