

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION	)	
OF WATER TO WATER RIGHT NOS.	)	
36-02551 & 36-07694 (RANGEN, INC.)	)	
IDWR DOCKET CM-DC-2011-004,	)	
	)	
RANGEN, INC.,	)	
	)	
Petitioner/Appellant	)	Supreme Court
	)	No. 42772
vs.	)	
	)	
THE IDAHO DEPARTMENT OF WATER	)	
RESOURCES and GARY SPACKMAN, in his	)	
Capacity as Director of the Idaho	)	
Department of Water Resources,	)	
	)	
Respondents/Respondents,	)	
	)	
and	)	
	)	
IDAHO GROUND WATER APPROPRIATORS,	)	
INC., FREMONT MADISON IRRIGATION	)	
DISTRICT, A&B IRRIGATION DISTRICT	)	
BURLEY IRRIGATION DISTRICT, MILNER	)	
IRRIGATION DISTRICT, NORTH SIDE	)	
CANAL COMPANY, TWIN FALLS CANAL	)	
COMPANY, AMERICAN FALLS RESERVOIR	)	
DISTRICT #2, MINIDOKA IRRIGATION	)	
DISTRICT, and THE CITY OF POCA TELLO,	)	
	)	
Intervenors.	)	
	)	

T R A N S C R I P T O N A P P E A L

Fifth Judicial District

State of Idaho

HON. ERIC J. WILDMAN

DISTRICT JUDGE

APPEARANCES:

MS. ROBYN M. BRODY, Brody Law Office
P.O. Box 554, Rupert, Idaho 83350
MR. FRITZ X. HAEMMERLE, Haemmerle & Haemmerle
P.O. Box 1800, Hailey, ID 83333
MR. J. JUSTIN MAY, May, Browning & May
1419 W. Washington, Boise, ID 83702

Attorneys on behalf of Rangen.

MR. GARRICK BAXTER and MS. EMMI BLADES,
Deputy Attorneys General,
Idaho Department of Water Resources
P.O. Box 83720, Boise, ID 83720-0098

Attorneys on behalf of IDWR.

MR. RANDALL C. BUDGE, Racine, Olson, Nye, Budge &
Bailey, P.O. Box 1391, Pocatello, ID 83204

Attorneys on behalf of IGWA.

MS. SARAH KLAHN, White & Jankowski
511 16th St., Suite 500, Denver, CO 80202

Attorneys on behalf of Pocatello.

MR. W. KENT FLETCHER, Fletcher Law Office,
P.O. Box 2148, Burley, ID 83318
MR. JOHN K. SIMPSON, Barker, Rosholt & Simpson
P.O. Box 2139, Boise, ID 83701-2139

Attorneys on behalf of the Coalition.

MR. JERRY R. RIGBY, Rigby, Andrus & Rigby
P.O. Box 250, Rexbury, ID 83440

Attorneys on behalf of Fremont Madison.

REPORTED BY: Sabrina Vasquez, CSR #377
Official Court Reporter

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

IN THE MATTER OF THE DISTRIBUTION	)	
OF WATER TO WATER RIGHT NOS.	)	
36-02551 & 36-07694 (RANGEN, INC.)	)	
IDWR DOCKET CM-DC-2011-004,	)	
	)	
RANGEN, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Twin Falls County
	)	Case No. 2014-1338
	)	
THE IDAHO DEPARTMENT OF WATER	)	(Consolidated with
RESOURCES and GARY SPACKMAN, in his	)	Gooding County
Capacity as Director of the Idaho	)	Case No. 2014-179)
Department of Water Resources,	)	
	)	
Respondents,	)	REPORTER'S
	)	TRANSCRIPT
and	)	
	)	
IDAHO GROUND WATER APPROPRIATORS,	)	
INC., FREMONT MADISON IRRIGATION	)	
DISTRICT, A&B IRRIGATION DISTRICT	)	
BURLEY IRRIGATION DISTRICT, MILNER	)	
IRRIGATION DISTRICT, NORTH SIDE	)	
CANAL COMPANY, TWIN FALLS CANAL	)	
COMPANY, AMERICAN FALLS RESERVOIR	)	
DISTRICT #2, MINIDOKA IRRIGATION	)	
DISTRICT, and THE CITY OF POCA TELLO,	)	
	)	
Intervenors.	)	
	)	

ORAL ARGUMENTS ON PETITION FOR
JUDICIAL REVIEW
August 28, 2014

HON. ERIC J. WILDMAN
DISTRICT JUDGE

APPEARANCES:

MS. ROBYN M. BRODY, Brody Law Office
P.O. Box 554, Rupert, Idaho 83350
MR. FRITZ X. HAEMMERLE, Haemmerle & Haemmerle
P.O. Box 1800, Hailey, ID 83333
MR. J. JUSTIN MAY, May, Browning & May
1419 W. Washington, Boise, ID 83702

Attorneys on behalf of Rangen.

MR. GARRICK BAXTER and MS. EMMI BLADES,
Deputy Attorneys General,
Idaho Department of Water Resources
P.O. Box 83720, Boise, ID 83720-0098

Attorneys on behalf of IDWR.

MR. RANDALL C. BUDGE, Racine, Olson, Nye, Budge &
Bailey, P.O. Box 1391, Pocatello, ID 83204

Attorneys on behalf of IGWA.

MS. SARAH KLAHN, White & Jankowski
511 16th St., Suite 500, Denver, CO 80202

Attorneys on behalf of Pocatello.

MR. W. KENT FLETCHER, Fletcher Law Office,
P.O. Box 2148, Burley, ID 83318
MR. JOHN K. SIMPSON, Barker, Rosholt & Simpson
P.O. Box 2139, Boise, ID 83701-2139

Attorneys on behalf of the Coalition.

MR. JERRY R. RIGBY, Rigby, Andrus & Rigby
P.O. Box 250, Rexbury, ID 83440

Attorneys on behalf of Fremont Madison.

REPORTED BY: Sabrina Vasquez
IDAHO CSR #377

I N D E X

August 28, 2014

Page

PETITION FOR JUDICIAL REVIEW:

Argument by: Ms. Brody.....	8, 125
Mr. Budge.....	34, 135
Ms. Klahn.....	65
Mr. Baxter.....	76
Mr. Fletcher.....	108
Mr. Rigby.....	122

Reporter's Certificate.....	141
-----------------------------	-----

1 COURTROOM OF THE SRBA COURT 2 Twin Falls County, Twin Falls, Idaho 3 Thursday, August 28, 2014 4 5 THE COURT: All right. Good afternoon. Let's 6 go on the record in two consolidated cases combined 7 under Twin Falls County case number CV 2014-1338. The 8 other case is Gooding County case number CV 2014-179. 9 It's August 28th, 2014, 1:30 P.M. 10 This is the time and place set for oral 11 argument on petitions for judicial review that were 12 filed in this matter. 13 I'll start by identifying the parties. On 14 behalf of Rangen? 15 MS. BRODY: Good afternoon. Robyn Brody, Fritz 16 Haemmerle, and Justin May. 17 THE COURT: And who will be arguing today? 18 MS. BRODY: I will. 19 THE COURT: And on behalf of IGWA? 20 MR. BUDGE: Your Honor, T.J. Budge. Thank you. 21 THE COURT: And the department? 22 MR. BAXTER: Your Honor, Garrick Baxter appearing 23 for the department. I do have with me today Emmi Blades 24 and Deputy Director Matt Weaver. 25 THE COURT: Who will be arguing today? 6	1 MR. BAXTER: I will be arguing today, Your Honor. 2 THE COURT: Fremont Madison Irrigation District? 3 MR. RIGBY: Your Honor, Jerry Rigby, and I will 4 be arguing. 5 THE COURT: Okay. And A & B Irrigation District, 6 et al? 7 MR. FLETCHER: Your Honor, Kent Fletcher and John 8 Simpson are here on behalf of the Coalition, and I will 9 be arguing. 10 THE COURT: Okay. And the city of Pocatello? 11 MS. KLAHN: Sarah Klahn for the city of 12 Pocatello. 13 THE COURT: Okay. Is there anyone else 14 appearing, I guess that would be by telephone, who I 15 did not call who wishes to make an appearance? 16 (No response.) 17 THE COURT: Okay. All right. Then have the 18 parties discussed an order of oral argument? I do have 19 a suggestion, but I'll hear from the parties. 20 MR. BAXTER: Your Honor, we did talk a little 21 bit about it beforehand, and we're going to recommend 22 to the court that we would have the petitioners go 23 first. I think it was Rangen was going to go first, 24 followed by IGWA, and then the respondents would come 25 in and argue. Then, of course, the two petitioners 7
1 would have the reply opportunity at the end. 2 THE COURT: That was precisely going to be my 3 recommendation. So then we'll proceed in that fashion. 4 A couple of things: I won't limit you on 5 the time of the oral argument. Experience has shown 6 that everybody is pretty good about getting to the point 7 and not gilding the lily, so to speak, but I will take a 8 break at 3:00 for the benefit of my court reporter and 9 everybody else. 10 Also, if you do get going a little too fast, 11 if I don't slow you down, my court reporter will. 12 So with that, is there anything else we 13 need to take up before we start? 14 (No response.) 15 THE COURT: All right. Then we'll start with 16 Rangen. Ms. Brody. 17 And before, I will also say that the court 18 has extensively reviewed all the briefing and the 19 records that have been filed in this matter. 20 You may proceed. 21 MS. BRODY: May it please the court: Good 22 afternoon, Your Honor, Counsel. My name is Robyn Brody, 23 and I'm here this afternoon with Fritz Haemmerle and 24 Justin May on behalf of Rangen, Inc. 25 I would also like to introduce to the court, 8	1 we have Christopher Rangen, the president and owner of 2 Rangen, Inc., and we also have Wayne Courtney, the 3 executive vice president of Rangen. 4 Actual historical and beneficial use. Those 5 words have been the mantra of this court since its 6 inception. The entire purpose of the SRBA was to 7 basically catalog, to capture actual historical and 8 beneficial use of water in the Snake River Basin and 9 put it down on paper so that it could be administered 10 by the state and for the people. The way that actual 11 historical and beneficial use was supposed to be 12 cataloged was in the partial decrees that have been 13 entered by the court. 14 Interestingly enough, there actually isn't 15 a dispute about Rangen's actual historical and 16 beneficial use of the water in this case. It's 17 undisputed that for the past 50 years Rangen has been 18 capturing the spring water that feeds its Research 19 Hatchery over in Hagerman and has been putting the water 20 to beneficial use to raise trout and to do feed research 21 for its feed company. There is no dispute about that 22 for 50 years. 23 There's also no dispute that the spring 24 water flows that once supplied Rangen's Research 25 Hatchery have also decreased dramatically over the past 9

1 50 years. There's also no dispute that junior water 2 ground water pumping throughout the ESPA is one of the 3 causes of that decline. There's also no dispute that 4 if you stopped junior priority ground water pumping 5 throughout the ESPA that a substantial amount of water 6 would return to Rangen's springs. 7 So why are we here? From our perspective, 8 we're here largely because Director Spackman, through 9 the order that he entered in January of 2014, largely 10 disregarded actual historical and beneficial use and 11 took away more than half of Rangen's water. 12 Now don't get me wrong. All of the issues 13 that have been briefed by the parties, they're all 14 important, and they all need to be decided by the court. 15 But the issue that's really driving this case, 16 particularly as it relates to Rangen and the Idaho 17 Ground Water Appropriators and the department, is about 18 the interpretation of the partial decrees. 19 I don't want to rehash what's in the briefs 20 so I'm going to incorporate those arguments hereby 21 referenced, and I'm going to focus on four things. I 22 want to: One, I want to orient the court to where this 23 facility is, how it's laid out, and how it's been used. 24 I'll try to do that in a reasonable fashion and without 25 delaying things, but I want you to have a sense of what 10	1 this facility looks like on the ground. 2 The next thing I want to do is address the 3 latent ambiguity doctrine and walk through those back 4 files, walk through the testimony and evidence that's 5 been presented. 6 The third thing I want to do is I want to 7 address in short fashion why it is that Rangen contends 8 that IDWR should be estopped from changing how it 9 interprets Rangen's decrees, and let me emphasize what 10 we're asking for. To estop them from changing how it 11 interprets Rangen's decrees. 12 And finally, we would like to address IGWA's 13 reasonable -- or doctrine of reasonable use argument. 14 So let me turn to the Research Hatchery 15 itself. If you take a look at Exhibit 1001, it's 16 actually a map that gives you some idea of where the 17 facility is located. This line here -- Sarah ought to 18 be in charge of my pointer -- is the I-84 corridor, and 19 it runs from Bliss up here all the way down to Wendell. 20 Basically, if you were driving to the 21 Research Hatchery from right here in Twin Falls, you'd 22 head out on I-84, pass the first Wendell exit, and you'd 23 go to the second Wendell exit, and you'd go left 24 southwest down to Vader Grade. Right before you head 25 down the steep part of that hill, you'd make a quick 11
1 left-hand turn and you'd be at the Research Hatchery. 2 So it's just a few miles southwest of Hagerman. 3 If you take a look at Exhibit 1014, this is 4 actually a cover of U.S. Trout News Magazine from May 5 and June of 1965. You'll see in the right-hand, on the 6 right-hand side of the page, that's Thorleif Rangen. 7 This was his baby. It was his dream. Thorleif loved 8 aquaculture, and he built a beautiful state of the art 9 facility in the early 1960s. 10 He's standing actually above the facility 11 on the canyon rim. This facility is actually sort of 12 nestled into the canyon rim, and you'll see here, right 13 there, that -- whoops -- over a little bit, Justin. 14 That's the Bridge Dam that you'll hear quite a bit 15 about. That's it. 16 This was and is a world class facility. 17 Rangen has used it for 50 years to grow trout and to 18 do feed research, to bring researchers from all over 19 the world to its facility to highlight the research 20 that it's done, to highlight its feed products. It's 21 got a beautiful conference facility. It's a very cool 22 place. If you stepped in, it's like a time capsule 23 back to about 19-Brady Bunch, and it's a fantastic place 24 to be. 25 Let's go to Exhibit 1006. This is an aerial 12	1 photograph of the Research Hatchery in 1986. If you 2 notice up in the left-hand corner, this is all the 3 canyon rim that we've been talking about, and this is 4 the area where most of Rangen's water comes from. 5 These are the small raceways. These are 6 the large raceways, and these are the CTRs, raceways, 7 the CTR raceways. So that gives you some orientation 8 to where we're at. Now take a look. One thing about 9 1986, all the raceways are full. 10 Let's take a look at Exhibit 1206A. This 11 is Rangen's Research Hatchery today. If you did the 12 math, I think the testimony would show that probably 13 80 percent, or close thereto, of Rangen's raceways are 14 dry. 15 Take a look at Exhibit 1074, which is 16 actually a diagram of the facility layout. Let's go 17 back up here to the top where we see the tunnels, the 18 tunnel to the springs, Justin. There's the head of 19 Rangen's hatchery. We've got the canyon rim all along, 20 and there's springs all over the place. All of the 21 water gets sort of funneled down here to this point, 22 the bridge. 23 Okay. Justin, go back up to the full 24 exhibit, and I want to draw the court's attention to 25 two measuring points because the measuring points 13

1 become important in this case. They're here at the 2 CTRs. That's one measuring point. 3 All right, Justin, and let's go to the 4 second measuring point at the dam. This is actually 5 over at the end of the large raceways. These are the 6 two measuring points that Rangen actually adds together 7 to measure the total flows that come through its 8 facilities and that it puts to beneficial use. 9 So let's talk about Rangen's water. Let's 10 start with the water rights table that's actually in 11 Rangen's opening brief. Justin, can you blow that up 12 slightly. Rangen actually has five different water 13 rights with different priorities, some differences in 14 beneficial use, but you see basically the 1957, the 15 1962, and the 1977 rights are all for fish propagation. 16 These two rights, the 15501, the 1957 right, 17 is actually a companion to the 02551 right. When Rangen 18 filed its first application for a permit to appropriate 19 water, it filed for 50 cfs. So these two rights go 20 together. They just have a different priority date, but 21 those two rights go together. 22 All of these rights have the same source 23 designated, and the source is Martin-Curren Tunnel 24 tributary to Billingsley Creek. 25 On their face and, Your Honor, the two 14	1 rights that are actually the subject of the call are the 2 1962 right and the 1977 right, not the '57. 3 If you look at the partial decrees for the 4 '62 right and the 1977 right and you look at the source, 5 Martin-Curren Tunnel tributary to Billingsley Creek, on 6 its face nothing necessarily jumps out as being wrong 7 with the description. It is worth noting, though, that 8 Martin-Curren Tunnel, it's a proper noun like you might 9 see for Lake Michigan or Tampa Bay or Puget Sound, 10 Martin-Curren Tunnel. 11 In order to understand or to know what the 12 Martin-Curren Tunnel is, even just if you're looking 13 at the face of the decree, I don't know what the 14 Martin-Curren Tunnel necessarily is and you've got to 15 look to something. When you start looking at the 16 something to figure out what it is, if you start looking 17 at the back files for these water rights to try to 18 understand what the Martin-Curren Tunnel is, what you 19 quickly figure out is the Martin-Curren Tunnel can mean 20 different things depending upon the context. 21 The Ground Water Appropriators and the 22 department have taken the position that Rangen's decree 23 is unambiguous. There's no dispute that there's no way 24 to interpret Martin-Curren Tunnel in any other way other 25 than to say it is the hole in the side of the canyon 15
1 wall above the hatchery, and there's nothing else to 2 look at. There's nothing else to worry about. There's 3 nothing else to consider. 4 The latent ambiguity doctrine tells us 5 though, and this is defined in the Snoderly case, that 6 there's a two-step process for examining potential 7 ambiguities. The first step -- actually both steps 8 involve the use of extrinsic evidence. And the first 9 step is to actually look at that extrinsic evidence, 10 and if that extrinsic evidence starts to point to the 11 fact that the term in the decree is ambiguous or can be 12 interpreted in different ways, if it, in the court's 13 language, loses clarity, then the document is ambiguous 14 as a matter of law. And that is a legal matter. That's 15 not something that the court has to defer to the 16 department about. It's a legal matter over which you 17 get absolute free review. 18 So let's look at some of the extrinsic 19 evidence. How the heck -- and Rangen's position has 20 been the same throughout the litigation. The water 21 that feeds that hatchery, it's ours. We've been using 22 it for 50 years. It's ours. That's what we're entitled 23 to use. That's what we put to beneficial use, and 24 Martin-Curren Tunnel encompasses that tunnel. 25 So how does Rangen get there? The first 16	1 place and probably the best place to start is the water 2 right license that was issued in connection with the 3 1977 right. When you take a look at this water license, 4 it says right here towards the top that the source of 5 Rangen's water is springs tributary to Billingsley 6 Creek. That's what the license says. 7 Let's go to the next page, the back side of 8 the water license, and let's look at the note. The 9 note says, "Source known locally as Curren Tunnel." 10 The water license in 1977 said that the source was 11 springs and that those springs are locally known as the 12 Curren Tunnel. We believe that this is the explanation 13 that gives rise to why Rangen's partial decrees say 14 Martin-Curren Tunnel when it really means all of the 15 water that's out there. 16 So let's go to the back files themselves, 17 the rights actually starting with 1962. When you start 18 examining all of the different filings that are made 19 for the 1962 right, for the 1977 right, what you'll find 20 is that Rangen's water has been described in all kinds 21 of different ways: sometimes Billingsley Creek, 22 sometimes head of Billingsley Creek, sometimes springs, 23 sometimes underground springs. The names and labels 24 that are used are not consistent throughout the ages. 25 They're not consistent. 17

1 For example, if you look at this next 2 exhibit, which is Exhibit 1027A, this is page five, 3 this is an examination for completion of works on a 4 1962 right. It's a little tough to read, but over here 5 this is the examination that was done of Rangen in 6 connection with the 1962 right. The source that is 7 handwritten in here is "headwaters Billingsley Creek." 8 The next exhibit I would like to draw the 9 court's attention to is actually page seven of 10 Exhibit 1027A. That's also the 1962 right. This is 11 actually a survey that was done by Phillip Pukner for 12 the Rangen property and this addresses one of IGWA's 13 points. IGWA says, well, the Martin-Curren Tunnel, it 14 has to be -- the Martin-Curren Tunnel has to be the 15 point of diversion and the source and nothing else. 16 But if you look at this particular survey 17 that was done for Rangen's water right, you'll actually 18 see that over here it shows mouth of cave. A reasonable 19 interpretation of that is that's the Martin-Curren 20 Tunnel, and then we show the concrete box that is part 21 of Rangen's diversion structure. And then over here 22 you see the point of diversion labeled on the map, which 23 is probably the Bridge Dam. 24 But the Martin-Curren Tunnel and the Bridge 25 Dam, it's not a situation where it was ever anticipated 18	1 that the Martin-Curren Tunnel would be both the source 2 and the single point of diversion for Rangen. This 3 point of diversion actually captures all of the water 4 coming into the facility. 5 Let's take a look at page eight of 6 Exhibit 1027A. This is the examination for beneficial 7 use for Rangen's 1962 right. Again, we see here on the 8 right-hand side that the source of Rangen's water is 9 Billingsley Creek. 10 Let's go to page 12 of Exhibit 1027A. This 11 is an advertisement for proof of beneficial use. Again, 12 here we've got Billingsley Creek as the source. Justin, 13 it's up towards the -- it's in the advertisement itself 14 up towards the top. We'll see again that they're 15 applying for 50 cubic feet per second of the waters of 16 Billingsley Creek. 17 If you take a look at page -- this is 18 actually page 32 of Exhibit 1027A. Justin, can you 19 highlight the source on that application. This is the 20 application for the 1962 right, and what you see as the 21 source of water supply, the headwaters of Billingsley 22 Creek which is derived from underground springs. That's 23 how the source is described there. 24 Let's take a look at page 22 of 25 Exhibit 1027A. Oh, I'm sorry. I thought that was 32. 19
1 The point is this: you can walk through every single 2 one of the documents that's in the 1962 file. You'll 3 see that the source of Rangen's water is described 4 differently. Different nomenclature is used throughout 5 the file, and you'll see it also in connection with the 6 1977 right. 7 I do want to draw the court's attention to 8 one remark in the 1977 file. This is Exhibit 1029, page 9 25. 10 THE COURT: Page what? 25? 11 MS. BRODY: 1029, page 25. And let's focus on 12 the remark, Justin, that's there. The remark in 13 Rangen's application for the 1977 right says that this 14 is a supplement to the 1962 right, and it's to include 15 the total spring flow for beneficial use of fish 16 propagation. It's clear from this remark that what 17 Rangen is doing is trying to get, to make sure that it 18 has the total spring flow that's there on its property 19 to use for fish propagation. 20 Now when we started out and we were looking 21 at the diagram of the facility, I asked Justin to 22 actually focus on those two measurement points at the 23 end of the facility. When Rangen filed for the 1977 24 right, Lynn Babington, its manager at the time, was 25 actually involved in that filing. Lynn Babington wrote 20	1 a letter to the department, and this letter is actually 2 Exhibit 1029, page 52. Mr. Babington wrote this letter 3 to IDWR asking for permission to measure Rangen's water, 4 not at the inlets like IDWR wanted but at the outlet. 5 And the reason, and Lynn explains this 6 when he testified at trial, and it's explained in the 7 letter, if we actually highlight these two paragraphs. 8 He says with the terrain and collection system of the 9 water, it's not feasible to have a measuring device at 10 the inlet. Mr. Babington explained that Rangen's water 11 comes from all over the hillside. It's not just the 12 mouth of the opening of the tunnel itself, but it comes 13 from all over the place. 14 He recognized as a facility manager, well, 15 I can't measure, I can't go up and measure all of these 16 springs wherever they come from. Heck, if you go up to 17 the facility, you'll see that in a lot of cases you 18 can't even see the spring water. You can hear it. You 19 know it's running, but you don't even know where it's 20 coming from or where it's going to, other than when it 21 gets down to the bottom of the facility you know it's 22 going to end up in Rangen's raceways. So Lynn knew 23 that, and he asked for this filing that Rangen be given 24 special permission to measure the flows not at the inlet 25 but at the outlet. 21

1 If Rangen's source was limited to the mouth 2 of the Curren Tunnel, there would have been no reason 3 whatsoever for this sort of exchange to be taking place 4 between Rangen and IDWR, because sticking a measuring 5 device up at the top at the mouth of the Curren Tunnel 6 itself, that can be done. This problem is because the 7 source of Rangen's water is all over that hillside. If 8 you take a look at page 30 of Exhibit 1029, the 9 department actually entered an order approving that 10 request. 11 Now Rangen's water rights have been 12 scrutinized throughout the call process that actually 13 started in 2003. Rangen made its first delivery call 14 in September or October of 2003. And subsequent to 15 that, Cindy Yenter and Brian Patton for IDWR actually 16 went out to the facility for the purpose of 17 investigating Rangen's water rights. That was the whole 18 purpose of it. It was done in connection with Rangen's 19 delivery call. 20 If we take a look at -- Cindy Yenter 21 actually generated a written memo, and this is 22 Exhibit 1129. Exhibit 1129 is Cindy's memorandum. If 23 you look just at the beginning section of the memorandum 24 where it sets out the re, you know, what is this memo 25 about, you'll see right in that it's about the 22	1 investigation of Rangen's water rights. This wasn't 2 just a cursory courtesy visit from the department or 3 something like that. This was a full-on investigation 4 of Rangen's water rights, how it measures water, how it 5 goes through the facility, and the whole nine yards. 6 That memorandum was actually used by the department to 7 subsequently issue an order regarding Rangen's 2003 8 delivery call. 9 And if we take a look at exhibit -- let's 10 see. It's the second amended order, Justin, that was 11 issued. This is in the record. The Bates number is 12 000151. And let's highlight paragraph 54. This is 13 actually Director Dreher's second amended order 14 regarding Rangen's first delivery call, and he's 15 discussing the results of the Yenter/Patton 16 investigation. And what he says is, "The flow 17 measurements that are considered to be representative 18 of the total supply of water available to the Rangen 19 hatchery facilities under water rights number 15501, 20 2551, and 36-07694 consists of" -- and I won't go on 21 reading. But what he's talking about is those two 22 measuring points on that facility diagram that we 23 talked about in the very beginning. 24 What Director Dreher found in 2005 when the 25 department investigated the water rights is that those 23
1 outflow measurements are representative of what Rangen 2 has under its water rights. In 2005 when the department 3 had to consider Rangen's water rights, its water usage, 4 the department found and interpreted Rangen's decrees 5 exactly like we're saying they should be interpreted. 6 That the flows that are available under the rights are 7 what come out of the hatchery is what Rangen measures. 8 And that's what Dreher found, and that's why Rangen is 9 arguing that IDWR should be estopped from changing its 10 interpretation. 11 They've already looked at this. And now by 12 saying, no, Martin-Curren Tunnel on the decrees don't 13 cover, that term doesn't cover anything but what comes 14 from the tunnel itself, you've changed everything about 15 paragraph 54. You can't reconcile the two. You can't 16 reconcile Director Spackman's opinion with this. It's 17 a 180-degree turn. 18 When you look, even as recently as March of 19 2013, if you searched the department's website at that 20 time -- I haven't done it today, but I did it in March 21 of 2013, but you'll actually find that the 1957 right, 22 whenever you search on it, the department's database 23 shows the source of Rangen's water as springs. 24 So why does all of this matter? Why do the 25 back files matter? Why does all the data matter? It 24	1 matters because when you start, when you take the 2 document and you see Martin-Curren Tunnel and you wonder 3 what is that -- because we can't find it in the 4 dictionary, we can't find it on the map, we've got to 5 look outside the record -- when you start to take a 6 look at the documents, the pictures, the diagrams, when 7 you start to look at prior IDWR rulings, that term 8 Martin-Curren Tunnel is not so clear. It loses clarity. 9 It doesn't gain it. It loses it. 10 So what do you do? You have to construe 11 the document to determine the intent. And the intent 12 goes back to the SRBA's mantra when it started, which 13 was actual historical beneficial use. That's what the 14 decrees were supposed to do. 15 THE COURT: And I agree with that, but that was 16 part of the process. If there was a disagreement with 17 the recommendation, for instance, Rangen claimed it as 18 Martin-Curren Tunnel. I know they claimed the point of 19 diversion in the 40-acre tract that was recommended in 20 the ten-acre tract, there has been this history of 21 describing the source differently as springs, in the 22 early ones it says underground springs. I mean I've 23 been through the file numerous times, the back files. 24 This isn't the only time this issue has arisen. The 25 recommendation comes out, that's the purpose of this 25

1 process that the claimant disagrees with or there is a 2 problem with it, file an objection. 3 I can see the argument with respect to the 4 scope of what does Martin-Curren Tunnel include, but 5 what about the recommendation of ten-acre tract that 6 just includes Martin-Curren Tunnel, but it does not 7 include the rest of the spring complex? I mean is 8 this just an oversight on Rangen's part when the 9 recommendation came out? 10 MS. BRODY: It's not clear. I mean the record 11 doesn't develop that particular issue about how did the 12 ten-acre, or how did that occur. I think what is fair 13 to say is if you look at the IDAPA regulations at that 14 time, even for the description of the ten-acre tract and 15 you look at the nearest, that word nearest ten-acre 16 tract, you can find an interpretation that justifies 17 Rangen not raising some objection to the description. 18 The issue is when you start this whole 19 analysis with a note on their 1977 right that shows 20 that this source is known locally as the Curren Tunnel, 21 there's no reason for Rangen to think that there's 22 something wrong with that particular descriptor of its 23 water right. 24 THE COURT: Well I understand the argument with 25 respect to the nomenclature and the scope of the tunnel. 26	1 What I'm talking about in terms of also the legal 2 description for the point of diversion, because we're 3 not just talking about Rangen's concerns here. But when 4 the director's report goes out, that's notice basin-wide 5 to all the other water users, and that gives them a 6 meaningful opportunity to review the director's report, 7 go back and review the claim, if need be, and then file 8 an objection. 9 So if it's described in one manner and it's 10 recommended with a smaller point of diversion, smaller 11 geographic area for source and Rangen intended a larger 12 legal description, the parties look at that, you have 13 to look at the standpoint from the other litigants to 14 the adjudication, did they have a meaningful opportunity 15 to review that and object? 16 The question is if -- and the water right -- 17 Basin 36 down there wasn't short of water disputes, and 18 water rights were being scrutinized. If I'm a water 19 user down there and I look and see that it's claimed 20 and reported as Martin-Curren Tunnel and this is the 21 ten-acre tract point of diversion, you may be satisfied 22 with that and not inclined to object . 23 Then the question is, well, if the intent 24 was that it also included the adjacent ten-acre tract 25 and the spring complex, would other parties have a 27
1 meaningful opportunity to come in and object and say, I 2 know you're saying Rangen has historically used it now, 3 but that was the purpose of the SRBA was for parties to 4 get notice of the recommendation and then be able to 5 come in and object and litigate that. 6 So I guess the question is, by taking 7 Rangen's broad interpretation, particularly when you 8 consider the additional ten-acre tract, was there 9 somehow a notice deficiency to other users in the SRBA? 10 Typically when something like that arises, you know, 11 there's a motion to set aside the partial decree. 12 Basin-wide notice is given and the parties are given an 13 opportunity to come in and litigate that. 14 MS. BRODY: I don't think it has to be construed 15 that narrowly. I think what that analysis does is it 16 unnecessarily confuses the point of diversion with the 17 source. I don't think Rangen's source has to be limited 18 because it's saying that another point of diversion is 19 over here in a different ten-acre tract. I don't think 20 that impacts what the source and the interpretation of 21 the Martin-Curren Tunnel that Rangen is advocating for. 22 I guess what I would say is if the court 23 doesn't buy Rangen's position that the point of 24 diversion that's listed would include that bridge 25 diversion, and if that's where the court is headed, I 28	1 would say, you know, separate the two issues. The point 2 of diversion is something separate from the source. It 3 doesn't necessarily define what Rangen's source is. The 4 court can separate those two issues. The court can 5 still find that Rangen's source includes the spring 6 complex that it's claiming. 7 THE COURT: Thank you. 8 MS. BRODY: So at the end of all of this, what 9 the court has to do is ask itself, does the term 10 Martin-Curren Tunnel lose clarity? 11 Lynn Babington's testimony when he gave it 12 at the trial, the department characterized it as being 13 mixed. I think it was dead on. It was a simple 14 acknowledgement that depending upon the context in 15 which one talks about the tunnel, it can mean the mouth 16 of that cave, and it can also mean that spring complex. 17 And Lonnie Tate, the fish culturist who has 18 been growing fish out there for 35 years, when counsel 19 for IGWA asked him do you measure water out of the 20 Martin-Curren Tunnel, he said -- and he wasn't being a 21 jerk and he wasn't trying to be evasive -- he said, how 22 do you define the Martin-Curren Tunnel? And counsel 23 went on to explain and said I'm talking about the hole 24 in the side of the wall, because the guy out there 25 knows that you can talk about the tunnel in different 29

1 ways. 2 I want to -- I've probably beaten the issue 3 of latent ambiguity to death, and I would like to 4 address the issue of estoppel. I touched on it. We 5 are not arguing that the department should somehow be 6 prevented from enforcing a partial decree. But what we 7 are arguing, and I think what the case law leaves the 8 door open for is that in the right case the government 9 can and should be stopped from changing its 10 interpretation of that decree. The department 11 scrutinized that right for that 2003 call and Dreher 12 made his findings in 2005. And they can't, the 13 department can't change how it's interpreting the rights 14 now. 15 The department goes out to that facility 16 all the time to take water measurements. Tim Luke, he 17 said no one has ever told Rangen, before now, that its 18 use of the water was somehow improper. And when you 19 have findings from Karl Dreher and you have a history 20 where the department is out at that property 21 consistently and no one ever tells you that it's wrong, 22 the department should be stopped from changing its mind 23 about how to interpret the decree. That's what we're 24 asking the court to do. That's what we're asking the 25 court to stop. That's what's not right. 30	1 I would also like to touch on IGWA's 2 argument concerning the doctrine of reasonable use or 3 the law of reasonable use. When we received IGWA's 4 brief, we had a conversation among ourselves trying to 5 figure out where does this come from. Justin, he's 6 really techie, so he got on the internet and plugged in 7 a bunch of searches. 8 Me, I found -- when we closed John 9 Hepworth's office here in Twin, I found this Idaho Law 10 of Water Rights book from 1956 and took it. So I went 11 looking for this doctrine, and we couldn't find 12 anything. 13 And the court's not, I don't think the court 14 is going to find anything. You can see bits and pieces 15 of the idea of reasonable use. You see it in the 16 Beesley case when it talks about waste. There's some 17 reasonable use of water analysis, but you don't see 18 this overarching doctrine that IGWA is advocating 19 exists. It doesn't. 20 Really, when you unpack the argument that 21 IGWA is making, it's this: It would be unfair to 22 curtail tens of thousands of junior water rights in the 23 ESPA that are valuable and involves too many acres for 24 a single spring user. That's really what they're 25 saying. 31
1 And if the court adopts that, that means 2 that there is no conjunctive management in Idaho. 3 They're asking the court to rule as a matter of law 4 that spring water use is per se unreasonable, and you 5 can't curtail valuable ground water use that will hurt 6 the economy of Southern Idaho. 7 Now I know we don't talk about dollars. I 8 know it's not in there. I know you don't see dollars. 9 That's the upshot of the whole argument, and it's not 10 supported by Idaho law. 11 I think it's also a tough position for the 12 ground water users to make because, you know, the secret 13 is out about Idaho and the world is coming to this area, 14 and the highest and best use of water today may be 15 agriculture at the moment, but commerce and industry and 16 cities, it's all coming. So I don't know that we want 17 to go down that road that whoever wins is whoever has 18 the best use of the water at the moment. 19 You know, the firm that I grew up with, and 20 we handled, man, a lot of cases where people got hurt 21 in a lot of different ways. And doing jury work, you 22 get bad decisions. You get decisions that make you cry 23 . You get decisions that make you mad. But I've racked 24 my brain, and I cannot think of a case where I have ever 25 said, that's just unjust. I don't use that term 32	1 loosely. I used it five months ago when the department 2 sent us a letter on a Friday afternoon telling us that 3 the next Monday that Rangen wasn't going to be allowed 4 to participate in an objection to a mitigation plan 5 because we didn't pay a \$25 fee. I used it then. 6 And I use that term today because if this 7 court allows the director's interpretation of Rangen's 8 partial decrees to stand, it will perpetuate an enormous 9 injustice, one that makes me want to take my shoe off, 10 Nikita Khrushchev style, and pound the table. Because 11 what's happened as a result of the director's 12 interpretation is IGWA's ground water districts, two of 13 them, and the irrigation district have actually filed on 14 the water right, the spring water rights saying Rangen 15 you're limited to the Curren Tunnel, we're going to take 16 your water. We're going to condemn your property. 17 We're going to gain access, and then we're going to give 18 it back to you to satisfy our mitigation obligation. 19 We're going to give you back the water that you have 20 been using for 50 years to mitigate our damage to you. 21 Man, as a lawyer I've seen a lot of bad 22 situations, but this is one that would be unjust. It's 23 wrong. The latent ambiguity doctrine enables this court 24 to reverse the director's determination. The back filed 25 evidence, the testimony of Lynn Babington, the testimony 33

1 of Lonnie Tate, that's the basis for overturning the 2 director's ruling. 3 We cannot send the message from this case 4 that the only party who gets hurt in a water call is 5 the one who dares to assert their rights against 6 powerful agricultural interests. That cannot be the 7 message. 8 Thank you. 9 THE COURT: Thank you. 10 Mr. Budge. 11 MR. BUDGE: Thank you, Your Honor. 12 I'm going to get my projector ready. 13 Good afternoon, Your Honor. My name is 14 T.J. Budge on behalf of Idaho Ground Water 15 Appropriators. As I know you're aware, IGWA as we 16 commonly call it, is an umbrella organization, and it 17 represents ground water users primarily on the Eastern 18 Snake River Plain. Among its members are the three 19 irrigation districts that cover all of the Magic Valley 20 and it's their members that are being curtailed under 21 this curtailment order. So I'm here today on behalf of 22 the pumpers whose water rights are going to be 23 curtailed. 24 I'll first respond to Rangen's appeal 25 argument. I appreciate the time the court has spent 34	1 with the briefs. It's clear that the court understands 2 the issue very well, and I will not dwell on items that 3 I may have spent more time explaining. Then I'll turn 4 to IGWA's appeal and address that separately. 5 As this court is aware, Rangen's decrees 6 only have a single source and a single point of 7 diversion. These are copies on the screen of both of 8 the decrees issued by this court. This is a little 9 difficult to see, but this is a map prepared by one of 10 Rangen's engineers at their facility, and it shows two 11 different ways water gets into the raceways. 12 Water from the tunnel can come out into some 13 collection boxes and then be piped to the smaller 14 raceways, from there to the large, and from there to 15 the CTR raceways. So tunnel water can serve the whole 16 system. There's a second point of diversion on 17 Billingsley Creek that diverts water just to the lower 18 two sets of raceways. 19 There isn't any dispute, as Ms. Brody said, 20 that Rangen has been diverting water from Billingsley 21 Creek for a long time. There's no dispute about that. 22 That's not the issue that's on appeal either. There's 23 also no dispute that Rangen's decrees do not contain a 24 point of diversion from Billingsley Creek, nor do they 25 have Billingsley Creek identified as a source. 35
1 This is a map that was actually prepared by 2 one of Pocatello's engineers, and I don't know that 3 it's been attached to any brief, but it shows the 4 ten-acre tract that the Curren Tunnel is located in and 5 that is identified on the decrees. And then it's 6 difficult to see, but down here well outside of that 7 tract is the diversion point from Billingsley Creek. 8 We've argued at length the law of this 9 court and the state that the point of diversion defines 10 the source, and that the legal description has a very 11 important purpose, and that you cannot divert water 12 from a different source outside of the legally described 13 point of diversion without filing a transfer application 14 or coming and trying to amend the decree. 15 In the adjudication rules of the department, 16 it requires claimants to identify the source by the 17 name listed on the USGS map, and this bridge diversion 18 is on Billingsley Creek. It's not on springs. It's 19 not on the Curren Tunnel. It's on Billingsley Creek. 20 And what's obvious is that Rangen made a mistake in the 21 SRBA, and we're not doubting that. Now that mistake was 22 probably inadvertent. Some people speculate it may have 23 been intentional. 24 At the time Rangen filed its claims in the 25 SRBA, there was litigation brewing between the Mussers, 36	1 who also used the Curren Tunnel, and ground water 2 pumpers. The Mussers filed the first conjunctive 3 management call in the state. So some people wonder if 4 perhaps Rangen thought it would improve its position 5 relative to the Mussers to claim the Curren Tunnel for 6 its full water right even though it has historically 7 diverted water from Billingsley Creek. 8 Ms. Brody pointed out that its old water 9 rights did not identify the source as the Curren Tunnel. 10 It identified springs in the department's records. 11 Rangen in its claim filed with this court decided to 12 change the source that it claimed, and it clearly made 13 an error in not claiming its obvious point of diversion 14 from Billingsley Creek. 15 Either way, the issue for this court to 16 decide is when somebody makes a mistake in the SRBA -- 17 Rangen is not the only person who has -- can the 18 director simply circumvent the terms of the decree and 19 go back into his back files and administer the water 20 right in a way that is patently inconsistent with the 21 terms of the decree? That argument has some appeal. 22 I've met with numerous water users over the 23 last few years who have come to me and said I either 24 failed to file a claim or I've discovered a mistake on 25 my partial decree. I met with one in Basin 29 just 37

1 last week and they asked me, can we fix this? I 2 explained to them the SRBA closed claims taking and most 3 of the set aside partial decrees some time ago, and it's 4 very unfortunate that a mistake was made, but that 5 decree is binding. It's a final judgment, and the only 6 way to fix the mistake now is to file a transfer 7 application with the Department of Water Resources. 8 Rangen certainly has that opportunity, and 9 Rangen is not alone in having made a mistake in the 10 SRBA. By and large, the vast majority of water rights 11 were decreed correctly, but there were a few where 12 generally the claimant was not paying as much attention 13 as he or she should have. 14 Now I think it's also helpful to note, 15 Ms. Brody pulled up Exhibit 1029, and that was the 16 license issued for its water right. She focused on 17 some language near the top that referred to the source 18 as underground springs. It was a condition that was on 19 that water right or a remark on that license. What she 20 didn't point out was there was another remark on that 21 license that says this water right is subject to Policy 22 32 of the State Water Plan. 23 This court will remember when the first two 24 major delivery calls under the conjunctive management 25 cases by spring users came before. That was Blue Lakes 38	1 and Clear Springs. And IGWA put on a great deal of 2 evidence in that case that for 40 or 50 years the 3 state of Idaho had assured ground water users that fish 4 propagators in the Hagerman area and the Thousand 5 Springs area were not permitted to curtail ground water 6 development on the Snake River Plain. 7 The State Water Plan, Policy 32, which is 8 in the record, what it says for aquaculture is that they 9 may develop water where supplies exist, but development 10 of the aquifer was going to require spring flows to 11 decline, and when that happens, they would have to deal 12 with it by changing their diversion and their conveyance 13 facilities to use water more efficiently. 14 We put on evidence from public hearings 15 that were held throughout the state to generate public 16 support for the State Water Plan where questions were 17 raised, what about the fish farmers and Thousand 18 Springs? The Idaho Water Resource Board told the 19 pumpers at those meetings in public -- and these were 20 recorded -- that the minimum flows established by the 21 Swan Falls agreement would provide the adequate supply 22 for fish farmers, and as long as those minimums were 23 met, fish farmers would not be shutting down the Snake 24 River Plain Aquifer . 25 We made these arguments to the Supreme 39
1 Court, and the unjust response that came back was that 2 it is unfortunate that the representations that were 3 made were not codified in statute or memorialized on 4 the decrees of the water rights of the aquaculture 5 users down here. So because of that, the pumpers find 6 themselves ever since with their backs against the wall, 7 so to speak, and scrambling in all kinds of ways to find 8 ways to mitigate and avoid curtailment. Certainly 9 unjust. 10 If we want to go back and revive the 11 department's past policies and back filed documents, we 12 would gladly include on Rangen's water rights a 13 condition that was in its license that it was subject 14 to the policy of the State Water Plan, and we would not 15 be here today. 16 Rangen actually threw this argument in our 17 face arguing that if we thought that they were subject 18 to the Ground Water Act, it was our duty to put a 19 condition on their water right decree that said they 20 were. But they said to us, ground water users, you 21 should have been here in the SRBA when we were filing 22 our claim and asked for that. Since you didn't, tough 23 luck. They later discovered the shoe moved to the 24 other foot and they now know what that feels like. 25 Just to address a few other arguments, if 40	1 the director were permitted to go back and look through 2 his back files and change, administer water the way 3 people had intended even though it violates the decree, 4 the department is going to be very busy. I know a 5 number of water users who would gladly take that 6 opportunity. That would certainly open a Pandora's box 7 for water administration, undermine the stature of the 8 decree issued by this court. 9 Rangen also argues about ambiguity. The 10 director heard all the evidence about what the tunnel 11 means. He heard all of the witnesses talk about the 12 tunnel, and he found that the tunnel refers to the 13 tunnel. He was certainly in the best position to weigh 14 that evidence and the credibility of that testimony. 15 He said there's no ambiguity despite what one Rangen 16 employee may have suggested leads to some confusion. 17 As for the measuring point that Rangen 18 refers to, the argument they're making is that because 19 we measured water that includes Billingsley Creek, we 20 must have a right to it. That does not overcome the 21 problem with their decree. 22 And, as a side note, their measuring point 23 on Billingsley Creek captures water that Rangen has 24 never used, water in Billingsley Creek that Rangen 25 doesn't put through to any of its raceways, and water 41

1 from above the rim from Northside Canal Company that 2 spills over the rim through this ditch right here. You 3 can see it, and it goes over the rim and down into 4 Billingsley Creek, and then Rangen measures it as if it 5 was theirs and something they had used. That argument 6 certainly does not overcome the partial decree. 7 The paragraph from Director Dreher's 2004 8 order that Ms. Brody quoted the first sentence, if you 9 read beyond that, this was on page 54 I believe she 10 said, Director Dreher's actually pointing out that their 11 measuring points reflect water that Rangen doesn't use. 12 He's not saying that it means their water right includes 13 Billingsley Creek. He's saying their measurements 14 reflect water that Rangen has not ever actually used in 15 its raceways. 16 With that, I'll complete my remarks 17 concerning Rangen's appeal and simply ask this court to 18 not set aside the director's ruling that Rangen's 19 partial decrees do not authorize a point of diversion 20 from Billingsley Creek. 21 Now I'm going to take a moment to switch 22 PowerPoint presentations. Moving on to IGWA's appeal 23 of the curtailment order, I won't repeat the arguments 24 made in the brief and much of the legal background 25 that's provided in there. 42	1 There's really three primary arguments that 2 IGWA has raised on appeal. The first is whether the 3 director erred by excusing Rangen from complying with 4 the Ground Water Act. The second is whether the 5 director inadequately applied the doctrine of beneficial 6 use. And third is whether the director misapplied the 7 phased-in curtailment rule under the Conjunctive 8 Management Rules. 9 I don't intend to address the third issue 10 here today, but if the court has any questions, I would 11 certainly take those. I'll instead focus on the Ground 12 Water Act issue and also the beneficial use argument. 13 What I want to do first is just review 14 quickly why the Curren Tunnel meets the definition of a 15 ground water well under the act. This is laid out in 16 the brief, but I want to point out some exhibits that 17 illustrate this very well, and then, second, why that 18 matters. 19 I've got here a few excerpts from the Ground 20 Water Act. It governs all rights to the use of ground 21 water. It defines ground water as all water under the 22 surface of the ground, and then it defines a well as 23 any excavation that's at least 18 feet below ground 24 surface. 25 You've probably seen this picture of the 43
1 Curren Tunnel. It's on the outer 50 feet or so. It's 2 lined in a corrugated pipe. There's no water that 3 enters the tunnel on that outer 50 feet. It all comes 4 from deeper inside. There's water flowing out of the 5 tunnel itself, and then Rangen also has a six-inch pipe 6 that is referred to in this case as just a white pipe. 7 That's what that's referring to. 8 Everyone knows the location of the tunnel. 9 This is a picture looking further into it. And then 10 beyond the end of the corrugated pipe, you can see the 11 rocks and the tunnel, and that white pipe continues on. 12 Nobody really knew the distance. 13 Rangen did provide this. It tells us the 14 tunnel is about 300 feet deep to its right fork. Its 15 left fork was a little bit less. These hashmarks show 16 where water primarily comes into the tunnel. And then 17 Mr. Hinckley created cross-sections just to explain how 18 this works. He measured the elevation of the water 19 table and the Rangen monitoring well, which is just a 20 few hundred feet or yards east of the tunnel, and 21 compared that to the tunnel elevation. 22 And then most of the water at Rangen 23 presently comes out of what's called the lower springs 24 or the talus slope. This shows that the tunnel goes 25 back and intercepts the ground water table and then 44	1 conveys it by gravity flow to land surface. 2 Under the statutory definition of ground 3 water, this is obviously water under the ground. This 4 tunnel is 40 to 70 feet below ground surface. 5 Mr. Hinckley explained that. And it captures ground 6 water conveys to the surface. 7 It's interesting, Dr. Brockway, who is an 8 expert of Rangen's, he actually explained that these 9 types of tunnels are quite common in some parts of the 10 world, including the southwest U.S., and especially the 11 Middle East. There they call them qanats is how he 12 described it. You can't read this, but a qanat is a 13 method for developing and supplying ground water and 14 consists of a gently sloping tunnel that captures water 15 and brings it to the surface. That's kind of how that 16 works. 17 So if we look at the construction of the 18 tunnel, just the facts, it clearly meets the definition 19 of a ground water diversion. Then there's no real 20 dispute about that. 21 What's significant about this, and I 22 explain this in the brief, is that once you fall under 23 the purview of the act you're subject to some 24 obligations that exist for ground water pumpers and 25 ground water users that don't exist on streams and 45

1 rivers and surface water diversions. 2 As explained in the brief, ground water can 3 be channeled from a junior to a senior through ditches 4 and creeks and rivers, and so the legislature created a 5 paradigm for administering based on reasonable water 6 levels. The significance of that is that if the water 7 table drops from maybe its peak level and your well no 8 longer produces, you may be required to deepen your 9 well. And the act says as long as it's at a reasonable 10 level, you've got to chase your water, you've got to 11 deepen your well to get to the abundant water supply. 12 In the case law that we quoted, the Supreme 13 Court explained we are not going to allow the owner of 14 one shallow well that just touches the surface of the 15 aquifer to prevent everyone else from using the 16 resource. 17 What we asked our witnesses to do, a few of 18 them, is to evaluate the water supply in the Rangen 19 area and tell us, is there more water at a deeper depth? 20 Is there a reason to think that Rangen could get water 21 at a lower elevation? So they did a couple of different 22 things. First, they looked at the difference between 23 the flow out of the tunnel compared to the flow out of 24 the springs down at a lower elevation. 25 And this is illustrative. The colors don't 46	1 come up on here very well, but there's a maroon line 2 that reflects the spring flow from the talus slope to 3 the lower springs, and then there's this blue line that 4 reflects the tunnel flow. 5 When you look at them side by side, you 6 realize that the tunnel flow is much more volatile and 7 has declined much more than spring flow. Because the 8 springs are at a lower elevation, they are much less 9 responsive to changes in the elevation of the water 10 table. By contrast, the tunnel essentially skims water 11 off the top of the aquifer, so small fluctuations in 12 the water table have a big effect on flows from the 13 tunnel. 14 They also -- they didn't to have to look at 15 this so much, but North Snake Ground Water District, 16 which covers most of the Magic Valley, much of it north 17 of the Snake River, they have for about eight years been 18 measuring water levels in 20 wells throughout their 19 district. These are the 20 wells. They hired a 20 consultant to go out and take water measurements every 21 year, and they did this really for their own benefit. 22 Ground water levels are important to 23 pumpers. The deeper your well is the more you have to 24 spend, and they don't want to use up their lifeblood. 25 So we asked the consultant to provide an updated report 47
1 of what water levels are doing, especially in this 2 Hagerman/Jerome area. 3 I'll just briefly point out the hydrographs 4 from these six wells that are closest along the western 5 edge. They all kind of look like this. You can see 6 them continuing to decline in the 2006/2007 range. 7 You'll recall the state had its worst drought on record 8 from 2000 to 2005, but since then they've either leveled 9 off or even increased slightly. That's the Meyers' 10 well. The Faulkner well showed the same pattern, as 11 does the Astorquia well. It's increased a little more 12 it looks like. The Glanbia well the same, the Slade 13 well you can see the same pattern, and the Scarrow well. 14 That was important to tell us that the 15 aquifer in this region is not on a perennial decline, 16 but it looks to have stabilized, maybe even improved. 17 We attribute that to just the effects of the conversion 18 from flood to sprinkler having really been realized by 19 now, and then the record drought that we're beyond. And 20 then lastly, North Snake Ground Water District does a 21 lot of recharge and conversions, and that's helped the 22 aquifer in the area. 23 Mr. Hinckley also looked at the wells right 24 in the vicinity of Rangen. This is difficult to read. 25 This is Exhibit 2206, but it has diversion rates and 48	1 well depths. The wells aren't particularly deep in 2 that area, and what he pointed out is there's some 3 really highly producing wells. There's a lot of water 4 in the aquifer right here. This indicates that there's 5 an abundant supply of ground water available for those 6 that are willing to get at it. So we asked the director 7 to require Rangen to deepen its well, the same thing 8 that IGWA's members have had to do when the water table 9 declined. 10 What perhaps is most compelling is that 11 Rangen had hired an engineer to look at this itself a 12 number of years ago. I think that was about six or 13 seven years ago. And their engineering firm also 14 concluded that Rangen could get substantially more 15 water by deepening its well, which they thought would 16 be considered a ground water well deepening. 17 The director refused to require Rangen to 18 deepen its well, and the reasoning is explained in the 19 brief that the director said, well, the Ground Water 20 Act does not apply to Rangen. This is because Rangen's 21 water right does not say ground water. It says 22 Martin-Curren Tunnel. As we've argued at length in our 23 brief, we don't believe the decrees issued by this court 24 tell the director whether the act does or does not apply 25 to a given diversion or delivery call. 49

1 THE COURT: But if it was ground water, wouldn't 2 it say ground water? 3 MR. BUDGE: Yeah. Certainly -- 4 THE COURT: We are in the situation now where 5 we're relitigating these decrees, but go ahead. 6 MR. BUDGE: Yeah. By and large, I mean, all, 7 maybe all but this water, this well, or maybe most, 8 there are some other tunnels in the area. Certainly 9 most ground water levels identify the source typically 10 as ground water. I explained in the brief that it makes 11 obvious sense the aquifers don't have generally specific 12 names, and people typically refer to the source as 13 ground water when they have the traditional vertical 14 well. 15 This is certainly unique. There aren't many 16 of these horizontal tunnels; although, the Curren Tunnel 17 is not the only one. Now these tunnels have existed 18 for, most of them over a century, and have had unique 19 names assigned to them: the Hoagland Tunnel, the Curren 20 Tunnel. So this is a unique situation. We don't 21 disagree with that. 22 Our position is that when this court had 23 these water rights come across its desk, it was not 24 asking itself, does the Ground Water Act apply or not? 25 It was asking itself, is this an appropriate descriptor 50	1 for this source of water? 2 And what we would ask this court to do is 3 confirm to the director that the legislature decided 4 where the Ground Water Act applies. It said in the 5 statute what is ground water, what a well is. 6 THE COURT: And it's because of the artificial 7 enhancement -- 8 MR. BUDGE: Right. 9 THE COURT: -- if you will, so that's what your 10 position is that's what distinguishes it from the 11 springs, and like the Clear Springs decision where the 12 Supreme Court already said that it's surface water. 13 MR. BUDGE: Absolutely. We would be happy if 14 Rangen wants to plug the tunnel and fill it in. We 15 don't think there will be any water that comes out of 16 there, and we won't have to deal with it. That will be 17 fine by us. 18 What's unjust is that Rangen has an 19 excavation, a manmade excavation that goes into the 20 aquifer. It captures ground water. It pulls it out 21 just like our clients' wells do, but when the water 22 table drops a little bit, Rangen doesn't have the 23 responsibilities that the act imposes. So it's that, 24 the artificial reaching in, excavating into the aquifer, 25 capturing ground water, and pulling it out. 51
1 As we explained, this well is right at the 2 surface and is really susceptible to small changes in 3 the water table. The director has clear authority under 4 the Conjunctive Management Rules, under Rule 42.01(g) to 5 require somebody to improve their means of diversion. 6 It even says to convert from surface water to ground 7 water. And the director didn't rely on that Conjunctive 8 Management Rule. What he said instead is the Act does 9 not apply because the SRBA Court ordered me to 10 administer this water as a surface water right even 11 though the legislature tells me to administer it as a 12 ground water right. 13 THE COURT: What about the Supreme Court's 14 characterization of the Curren Tunnel? 15 MR. BUDGE: Right. So the department and Rangen 16 brought that up. The Supreme Court referred to the 17 Curren Tunnel as, I think, a springs or surface water 18 in the Musser call. There had been no hearing in the 19 Musser case. There had been no evidentiary hearing 20 before the department. It was a writ of mandate order, 21 and so that came without any evidentiary record. 22 I don't think any parties had gone through 23 discovery, had investigated this, had any idea how far 24 the tunnel went and the things we've learned in this 25 case. So we explain in our brief that the court 52	1 certainly made that reference and was probably under 2 that assumption, but it's not res judicata because it 3 was not an issue before the court, and there was no 4 evidentiary record one way or the other. 5 Unless you have any other questions 6 regarding the applicability of the Ground Water Act, we 7 would ask the court to clarify to the director that the 8 legislature defined when the Act doesn't apply and does 9 apply, and that this court's decrees are not 10 determinative of that issue. 11 Then moving on to the other primary issue 12 on appeal that the ground water users have raised, and 13 that's this doctrine of reasonable use. Ms. Brody says 14 she doesn't know where this came from and can't find 15 anything to support it. I think our brief is more than 16 adequate in laying out a century worth of cases 17 referring to this, and I won't repeat those. I will 18 simply say that the most recent Supreme Court case on 19 dealing with this issue came out less than a year ago 20 in the A&B Irrigation District case. The court called 21 the doctrine of beneficial use a bedrock principle of 22 Idaho water law. 23 And to summarize what's always been the 24 rule in Idaho law, a senior can take water from a junior 25 in priority. We don't doubt that one bit, but there is 53

1 one qualifier, and that is, as long as the senior puts 2 it to use. Senior can't take water that they're not 3 going to use at all, and they can't hoard vastly larger 4 amounts of water than they're going to use, and we've 5 explained that at length in our brief. It's certainly 6 been reaffirmed by recent Supreme Court decisions. 7 There's two implications from this bedrock 8 principle. One is that you don't curtail a junior if 9 you think it might benefit the senior. You may curtail 10 a junior if you know it's going to benefit the senior. 11 That relates to the issue of model uncertainty. 12 And then a second implication, and this one 13 is right in the Conjunctive Management Rules, it's 14 Conjunctive Management Rule 20.03. It says that the 15 senior can't command vastly more water than the senior 16 is going to put to beneficial use, and there's numerous 17 cases that we've quoted that deny delivery calls 18 effectively because the senior was going to control a 19 lot more water than they were actually going to use. I 20 won't dwell on that. 21 The court has seen this, the Great Rift 22 trim line that was imposed by the final order. It 23 encompasses all of the Magic Valley. Over here is 24 American Falls, and this is Burley, and everything west 25 is curtailed. That there is 157,000 acres of irrigated 54	1 farmland. That's a big chunk of the farmland in the 2 Magic Valley, most of the dairy, 11 cities. In total 3 it's more than 3,000 cubic feet per second of water that 4 could be used, but instead is curtailed with the hope 5 that in 50 years Rangen will get 9.1 second feet of 6 water. 7 The department, or the final order explains 8 this Great Rift trim line enables Rangen to curtail 100 9 times more water than it will use. We argue in our 10 brief, and it seems obvious to us and to most, that 11 this is an unreasonable application of the bedrock 12 principle of beneficial use, and the director abused 13 his discretion by extending curtailment that far. 14 Now Ms. Brody said what we're asking is 15 this court do away with conjunctive management. That 16 is not at all true. Our farmers, many of them have 17 surface water rights and ground water rights. They 18 understand priority. They respect it. They realize 19 that if a junior is going to have a significant impact 20 on a senior and the senior can get the water in a 21 reasonable time, they're subject to curtailment. What 22 they don't understand is how the farmer in Twin Falls 23 or Burley or Jerome or Rupert has their well shut off 24 because hopefully in 50 years less than one percent of 25 the water from that well will get to Rangen. 55
1 The doctrine of beneficial use is predicated 2 on the public interest. It's not just IGWA's members. 3 It's everybody else that relies on their use of water, 4 whether that's the implement dealer, the lender, or 5 anybody else in the Magic Valley, and the case law 6 explains this. That there is a limit on the exercise 7 of priority and that limit is imposed by the public's 8 interest in maximizing beneficial use of a resource. 9 We want this court -- we think the time 10 has come for the judiciary to provide some guidance on 11 this issue to the department. We point out in our brief 12 the Supreme Court has never sanctioned anything less 13 than a ten percent benefit to the senior to justify 14 curtailment. Up until these recent years, the court 15 used this hypothetical and said if the senior only gets 16 ten percent of the curtailed water, that is 17 unreasonable. Now we know that since then the court 18 has been willing to say ten percent is acceptable. 19 We also know the court has been unwilling 20 to say one percent for Clear Springs or three percent 21 for Blue Lakes is acceptable. When the Supreme Court 22 affirmed the director's order in that case, what is 23 important is the court did not say we will affirm the 24 director's ruling that it's reasonable to curtail if 25 the senior only gets one percent or three percent. What 56	1 they said is we're not going to address that issue. It 2 was not properly raised on appeal, which was a hard pill 3 to swallow, but the clear message is the court was 4 unwilling to go that far. 5 All precedent in this state is that the 6 line is drawn at ten percent. And when this curtailment 7 order came out and the calls came into me, not only from 8 IGWA's members but from lenders and dairymen and Glanbia 9 Foods and the media asking me to explain what happened 10 from the first curtailment order from Rangen to this 11 one, I have to explain, well, the first curtailment 12 order had a ten percent trim line that exposed 735 acres 13 to curtailment. This curtailment order has a less than 14 one percent trim line, so that moves it from 700 to 15 157,000 acres. And they say explain this, you mean the 16 state is going to shut off a well because in 50 years 17 less than one percent may get to the senior? The public 18 does not understand that, and it's unbelievable to them 19 and to many of them upsetting. 20 And so on the issue of beneficial use, we 21 would ask this court to rule that it is inadequate 22 application of the doctrine of beneficial use to 23 curtail, to allow Rangen to curtail 100 times more water 24 than it would beneficially use. 25 Then the related issue deals with model 57

1 uncertainty, and this court knows all about it. I 2 don't want to spend too much time, but there was a lot 3 of discussion in this case by experts about the 4 different types of uncertainty in this model. It's an 5 improvement over the first version, no doubt about it, 6 but we asked an engineer and a hydrologist to look at 7 how well the model models Rangen. We know that on a 8 regional scale this model is great. We want to know, 9 well, what about when you're talking about one specific 10 model cell, how accurate is it? 11 I just want to point out a few exhibits. 12 This first one shows the depth of the aquifer. There's 13 two different views. This is just kind of a rendition 14 of the aquifer across the Snake River Plain, the 15 different depths. And what was explained is when you 16 get to the edge where the aquifer thins, the base of 17 the aquifer has a significant effect of where the ground 18 water flows. Not so much out here, but when you get to 19 the edge, the base of the aquifer has a major control on 20 ground water flow. 21 This was an exhibit by a department 22 employee, Neal Farmer. What he explained is in the 23 Hagerman area there's a geologic formation called the 24 Glenns Ferry Formation. It's not very permeable and 25 has low conductivity, but the real productive aquifer 58	1 is this basalt aquifer that's above it. So all of these 2 irrigation wells and everything that run the farms, they 3 are getting water out of this basalt aquifer. This is a 4 barrier to ground water flow. 5 When you get to the Hagerman Rim, these 6 pinch down. So along the rim water comes out at 7 different locations. Some places in this Glenns Ferry 8 Formation is blocking ground water discharge. Other 9 places there's rivets and ravines in the base of the 10 aquifer that allows water to discharge. 11 Mr. Farmer testified and explained here is 12 the Curren Tunnel right here. Rangen's facility is not 13 depicted on here, but it's right here below the rim. 14 He said this Glenns Ferry Formation -- he had actually 15 done on his own before this case a lot of research in 16 this case. The Glenns Ferry Formation in these two 17 locations just kind of funnels ground water in this 18 area, but it also has an effect when you get beyond 19 that of affecting ground water flow. 20 Then Mr. Hinckley created this 3D 21 rendition. This is kind of what it looks like. 22 Mr. Farmer said this is the best rendition based on 23 the available data. 24 At Rangen here is the base of the aquifer 25 coming up and pinching down, and there's a little notch 59
1 in it. At the bottom there's a notch. There's some 2 gravel deposited, and that's where most of the flow 3 comes out at Rangen. Then there's also this tunnel up 4 on the surface. There's two discharge points. 5 The model -- you can't see this very well -- 6 it does not show two discharge points. We talked 7 earlier about how the tunnel is much more responsive to 8 ground water levels than the springs. The model doesn't 9 reflect that they create an artificial discharge point 10 kind of in the middle. 11 If you run the model and compare the actual 12 elevation of the tunnel to the amount of water it says 13 is coming out of the tunnel, there's a lot of times the 14 limit says there's no water coming out even though there 15 is water coming out. 16 This is the difference between -- the blue 17 line is all of the measured flow that comes out of the 18 Rangen model cell. So this is what's measured down in 19 Billingsley Creek. The red line is what's modeled. So 20 they turn the knobs on the model to try to get it to 21 match up with measured flows in Billingsley Creek, and 22 they did a pretty good representation on the whole, but 23 when you actually look at the difference, it's quite 24 stark and can be off by as much as 10 or 15 cubic feet 25 per second. 60	1 Then this is -- there was a lot of 2 discussion about this exhibit. This is a graph of the 3 calibration for the model where they make adjustments 4 to the model and its assumptions to try to get it to 5 match measured flows. And the colors are difficult, but 6 this is a red line, but what appears kind of a lighter 7 line shows that during the -- when you calibrate the 8 model, the spring flows in the '80s, it underestimates 9 spring flow. It's pretty close here in the '90s, and 10 the 2000s it overestimates spring flow. 11 This is a graph of the residuals, which is 12 kind of difficult for someone like me to understand, but 13 the experts explained that this pattern reflects the 14 error up here. And then one of the experts actually 15 drafted out that in the early period the model under 16 predicts flows of Rangen by six second feet and in 17 recent years over by four or five second feet. This 18 isn't to say the model can't be used, but it's to say 19 that there was a fair amount of uncertainty that what 20 the model says is going to happen is really going to 21 happen. 22 Something that was even perhaps more 23 concerning for the ground water pumpers is this is a 24 line showing how much more water the model predicts 25 will come out of the Rangen spring cell for every one 61

1 foot rise in elevation of the water table. So as the 2 ground water table goes up, the model is going to 3 predict -- this has actually got a slope of 4.85 cubic 4 feet per second. So the model is going to say, you 5 raise the water table, Rangen is going to get 4.85 cubic 6 feet per second. 7 If you compare that with actual measurements 8 in a nearby well, it's much less. I need to look at my 9 notes. This is explained in the brief. But if you 10 compare the Rangen monitoring well, which is very close, 11 a one foot rise in the water table in reality, using 12 measured water levels, produces a three second foot gain 13 to Rangen. So the model is off by 38 percent. 14 If you look at the comparison for the Curren 15 Tunnel discharge specifically, the model predicts Rangen 16 would get an additional three second feet out of the 17 tunnel. Measured flows, using the regression line for 18 this data, is 1.3 second feet. The model is off by 19 about twice. 20 Now what does that mean? We didn't argue 21 to the director that these are, this is the rule, this 22 is absolute. The model is absolutely off by this much. 23 What we argued to the director is you need to take this 24 uncertainty into account. You need to do what every 25 prior director has done and have some type of meaningful 62	1 application of model uncertainty. The prior directors, 2 they all said that the stream gages they used to put 3 data in the model have a ten percent uncertainty factor 4 and so we're going to use that as our model uncertainty 5 factor. 6 The second version of the model, Model 2, 7 it also was calibrated based on stream gages just like 8 Model 1. Model 1 stream gages were in the Snake River. 9 They had a ten percent error rating. Model 2 stream 10 gages are in Billingsley Creek, and I believe they had 11 an eight percent error rating. It's in the final 12 order. 13 So there's an eight percent error rating in 14 the stream gages. Maybe the trim line would have gone 15 eight percent if the director used the same reasoning. 16 Maybe considering these other factors, he would have 17 picked a different number. The final order assigns no 18 uncertainty factor to the model. There's no meaningful 19 application of model uncertainty. We're left to believe 20 that the model has an uncertainty factor of less than 21 one percent. 22 I'll tell you the farmers who know how to 23 measure water and deal with weirs, that is unbelievable. 24 With water that we can measure in streams and pipes, we 25 can get better than five percent with a pipe. The state 63
1 of the art measuring device on a pipe, five percent 2 uncertainty. Yet we're taking a computer model that 3 tries to predict a reality that isn't seen, that isn't 4 measured, and assigning essentially no uncertainty 5 factor. 6 My clients are used to the doctrine of a 7 futile call where if you shut off a junior but the 8 senior doesn't get their water within one irrigation 9 turn, usually within a few hours or a few days, it's a 10 futile call, maybe within a season. They don't 11 understand how we can use a computer model to imitate 12 something that is unmeasured, unobservable, and assume 13 that in 50 years half of one percent or one percent is 14 going to get to the senior. 15 In conclusion, the model is a great tool. 16 Those that developed it should be proud of it. We 17 participated in it. We want the best science available. 18 It is the best science available. There is no question 19 about it. We're not debating that. We think it should 20 be used, but we think its limitations have to be taken 21 into account in a meaningful way. 22 The long and the short of it is, it comes 23 back to the doctrine of beneficial use. When you 24 consider model uncertainty, in addition to the fact 25 that the Great Rift trim line allows Rangen to take 100 64	1 times more water than it uses, that's not reasonable. 2 We would ask this court to set aside the curtailment 3 order and remand it with an instruction to correct 4 that. 5 I have nothing further unless the court has 6 any questions. 7 THE COURT: I don't. 8 MR. BUDGE: Thank you. 9 THE COURT: It's a little after 3:00. As I 10 indicated earlier, we'll take about a ten-minute recess. 11 We'll be back here at 3:15. 12 (Court recessed and reconvened.) 13 MR. BAXTER: Judge, we're going to switch up the 14 order. Ms. Klahn has an airplane that she needs to 15 catch so I was going to let her go first, and then I'll 16 follow up after her if that's okay with you. 17 THE COURT: That's just fine. 18 MS. KLAHN: Good afternoon, Your Honor. Sarah 19 Klahn for the city of Pocatello. 20 Your Honor, this case involves a fish 21 hatchery in the Thousand Springs area, as we've heard, 22 and their attempts to obtain additional water for their 23 beneficial uses. Their arguments in all regards have 24 been aimed at attempting to get water, additional water 25 for beneficial uses. 65

1 Pocatello may be the only party in the case 2 that believes the director's order in this case was 3 properly entered, and we would ask you to affirm the 4 order in all regards. 5 What I would like to do today is just spend 6 a little bit of time talking about four issues. I would 7 like to touch on the latent ambiguity and trim line 8 issues, which you've heard about in great detail from 9 Rangen and IGWA. There are two additional issues that 10 haven't been raised yet by Rangen but which were in 11 their briefs and which we responded to, and I would 12 like to provide just a little bit of context for those. 13 One is an argument that the director's reliance on the 14 Pocatello's expert Greg Sullivan's regression analysis 15 for purposes of determining the amount of water that 16 Rangen could obtain through curtailment was not based 17 on substantial evidence, and we disagree with that for 18 reasons that are in our brief, but I wanted to expand 19 on that a little bit. 20 And the second issue which was in Rangen's 21 brief was an issue about the juniors showing under Rule 22 40.03 in their argument that the director didn't have 23 substantial evidence to make a finding regarding that. 24 I'm going to start with those last two issues and end 25 with discussion of latent ambiguity and the trim line. 66	1 In the course of the case, in the course of 2 Rangen's delivery call, there was an opportunity that 3 the director gave us all for motions practice, and 4 there were several motions for summary judgment filed. 5 One of them was a motion regarding, that Rangen filed, 6 and it was a motion that requested that the director 7 determine the source of water for Rangen's beneficial 8 uses. In the context of that, Mr. Sullivan had done 9 some analysis of the measurements. And the director, of 10 course, ultimately ruled in that summary judgment motion 11 that Rangen was limited to the Martin-Curren Tunnel. 12 In the context overall of the measurement 13 issues in the case, Mr. Sullivan had looked at whether 14 or not Rangen's measurements adequately described the 15 amount of water that they were actually receiving. So 16 there were two issues in the measurement portion of 17 Mr. Sullivan's analysis. One was overall measurements 18 taken at the bottom of the system, which Ms. Brody 19 described; and then there was the issue of whether or 20 not there were adequate measurements from the 21 Martin-Curren Tunnel and what we could do about that. 22 Mr. Sullivan discovered that there was an 23 erroneous rating table. Now there's two parts to 24 measuring water, as the court probably is aware. The 25 first is measuring the head of the water, past a 67
1 structure, basically the energy of the water. And then 2 there's something, normally a rating table is used to 3 convert that into the flow of water. Rangen spends a 4 lot of time in their brief explaining that their 5 measurement of the head of water is adequate, and at the 6 end of the day there was no dispute about that. 7 The issue arose because of the rating 8 tables. Rangen admitted that the rating tables that 9 it used were not -- their providence was unknown, and 10 so there was an extensive analysis performed by 11 Mr. Sullivan using USGS measurements at the bottom of 12 the hatchery to develop a comparison so he could 13 determine the amount of error in Rangen's measurements. 14 That error analysis was separate and apart 15 from a separate analysis Mr. Sullivan did involving the 16 amount of water that would accrue at the Curren Tunnel 17 from curtailment. When Mr. Sullivan first put on his 18 evidence, it involved the measurement analysis, and the 19 director was quite engaged about that analysis. We got 20 to the part in his testimony about the Curren Tunnel, 21 and the director pointed out that Mr. Sullivan's 22 analysis of the amount of water that would accrue at 23 the Martin-Curren Tunnel didn't take into account the 24 errors he had identified in the measurement. 25 I want to point out two things. First is 68	1 that Rangen has not appealed the director's finding that 2 their measurements were erroneous and that the analysis 3 that Mr. Sullivan did of the measurement data was clear 4 and convincing, in the director's view, to demonstrate 5 that Rangen's measurement methods were erroneous. That 6 finding is the basis of the director's next step which 7 he took during Mr. Sullivan's direct examination, which 8 was to say, if I find that that measurement analysis is 9 erroneous, don't we also have to incorporate that 10 erroneous, or fix it, basically? We have to correct the 11 data in order to do a regression analysis to compare 12 the amount of water that would accrue at the Curren 13 Tunnel versus the amount of water that would accrue to 14 the springs as a whole from curtailment. 15 At the director's request, Mr. Sullivan 16 performed that analysis, provided it to the parties in a 17 somewhat unusual fashion during the trial. He was 18 deposed a second time during trial, and then we put the 19 evidence on. The very last day of trial he was called 20 back up to put that on in direct. The director accepted 21 the regression analysis as a basis to calculate the 22 amount of the water that would accrue to the Curren 23 Tunnel for purposes of his curtailment analysis. 24 And I'm going to end with the trim line, so 25 I think this is all going to fit together in a big 69

1 circle, but the point here is that there was substantial 2 evidence. The director found there was substantial 3 evidence, and that there isn't any reason for the court 4 to examine counsel's arguments on Rangen's side that 5 somehow or other that regression evaluation should be 6 changed. 7 I realize Rangen is looking for all kinds 8 of different ways to find more water, but that is not a 9 route for them to find a way to get the director to 10 order more curtailment because what the director found 11 was sound based on the record. 12 The second point relates to the argument 13 under Rule 40.03. Rule 40.03 is what I call the sauce 14 for the goose sauce for the gander rule. That says that 15 the director's authorized to evaluate whether or not the 16 senior is using water efficiently and reasonably in the 17 context of a delivery call. And it goes on, almost as a 18 non sequitur in the second sentence, and the director 19 can also examine what the juniors doing. 20 The argument that Rangen makes is that the 21 director found that the juniors were using water 22 efficiently and reasonably and yet there wasn't 23 substantial evidence for that. And this is an issue, I 24 believe, one of maybe very few under the Conjunctive 25 Management Rules that hasn't been extensively briefed 70	1 and argued to various finders of facts and courts. 2 Rule 40.03 is not self-executing. Rule 3 40.03 authorizes the director to make an evaluation. 4 It doesn't tell the director how to make the evaluation. 5 Indeed, as we know from the Surface Water Coalition 6 delivery call, when the director looks at issues of 7 reasonable use, the evaluation is fairly relaxed and 8 fairly lenient. I think that arises because under 9 AFRD#2, we know that the senior is entitled or presumed 10 to be entitled to his decreed amount. It can be shown 11 maybe that he doesn't require the decreed amount, but 12 that presumption of the decreed amount is something 13 that AFRD says is part of the senior's bundle of sticks. 14 But I would submit it's a part of every 15 water user's bundle of sticks. Every water user that 16 has a decree -- there's not two classes of decrees based 17 on your priority date. The assumption is, the 18 presumption is you're entitled to that water. 19 Pocatello and the ground water users put on 20 witnesses to describe the nature and extent of ground 21 water use by the various water users. Rangen had the 22 opportunity to cross-examine. Rangen even had the 23 opportunity to develop evidence in discovery that would 24 have undermined any claim by Pocatello and IGWA that 25 water wasn't being used efficiently. None of that 71
1 happened. 2 So the argument that the director somehow 3 didn't have substantial evidence or failed in his 4 finding that the juniors were using water consistently 5 with Rule 40.03, I think, should be rejected. 6 The third issue, latent ambiguity. The 7 latent ambiguity doctrine is described by the Idaho 8 Supreme Court as a narrow exception. If the latent 9 ambiguity doctrine is analyzed in the way that Rangen 10 has suggested, it will become a means for any contract, 11 decree, agreement, presumably trusts or wills to be 12 evaluated based on extrinsic evidence just because 13 somebody can find a document or somebody can find a 14 human body that will stand up and say it's not really 15 what it means. It's not really what it means. It loses 16 clarity to me. 17 I think that however the court views the 18 latent ambiguity arguments, you have to start from the 19 precept that documents are interpreted by their four 20 corners, and that the court or the -- in this case the 21 court, or the director as it was before, can look at 22 the four corners of the document and determine whether 23 they think it's ambiguous or not. 24 The director made a finding that the partial 25 decrees were not ambiguous, and I think he did it 72	1 appropriately, because despite the fact that Rangen has 2 copious back filed documents which they say stand for 3 the proposition that somehow or other the Martin-Curren 4 Tunnel is in doubt, the meaning of the term 5 Martin-Curren Tunnel is in doubt, the fact is we're 6 interpreting the partial decree. The only thing that's 7 the extrinsic document that's directly related to the 8 partial decree is the statement of claim. 9 The statement of claim requested a water 10 right in the Curran Tunnel, C-u-r-r-a-n. The 11 recommendation was made by the director for the 12 Martin-Curren Tunnel as the source of water. The 13 statement of claim requested a diversion point of a 14 40-acre tract that you've seen on the map attached to 15 Pocatello's brief. The director's recommendation came 16 back with a ten-acre tract. 17 The time to have the discussion about what 18 the source was would have been at that time, but I 19 suspect that there really wasn't any ambiguity to 20 anybody. They maybe perhaps didn't know what the source 21 of their water was, but they thought it all came out of 22 the Curren Tunnel. Now it begs the question about why 23 they didn't litigate the issue of the 10 versus the 24 40-acre tract, but that's -- to coin a phrase -- water 25 under the bridge. The decree is what it is. 73

1 The extrinsic evidence that we have related
2 to the decree doesn't seem to support any sort of
3 ambiguity as far as the source of the water. And it
4 does, I think, support a finding that there was an
5 opportunity to litigate these issues and it wasn't
6 taken.

7 The last point is the trim line, and as much
8 as I respect co-counsel for IGWA and think the world of
9 him for a variety of reasons, I have to respectfully
10 disagree with his arguments about the trim line. I
11 guess the way I would put it is that if the exercise of
12 the agency's discretion is what Clear Springs authorized
13 for purposes of the trim line, the Clear Springs case
14 did not authorize or did not limit, sorry, the agency's
15 discretion in any manner. And that goes for IGWA's
16 arguments, and that goes for the Surface Water
17 Coalition's arguments, and that goes for Rangen's
18 argument, although they didn't make much argument about
19 that.

20 The reality is the Supreme Court basically
21 said we're going to trust the director on this one. If
22 he thinks there's uncertainty and he can articulate a
23 basis for it, the trim line is adequate .

24 Now as a representative of a ground water
25 user, do I wish the trim line was larger? Of course I

74

1 arguments made like that, but the director didn't accept
2 them, I think. I think the trim line is, at the end of
3 the day, an adequate expression of the agency's
4 discretion.

5 I apologize, Your Honor, I have a flight in
6 Boise at 6:00, so I'll be leaving before the end of the
7 proceedings. I have a promise from the Surface Water
8 Coalition lawyers they won't disagree with me in any
9 way. So I should be fine.

10 THE COURT: So noted.

11 MS. KLAHN: Thank you.

12 MR. FLETCHER: Actually, we stipulated she could
13 get out of town if she wanted.

14 THE COURT: Mr. Baxter.

15 MR. BAXTER: Thank you, Your Honor. Garrick
16 Baxter appearing on behalf of the Idaho Department of
17 Water Resources and its Director Gary Spackman.

18 I promised Sabrina I would do my best to
19 talk very slowly today.

20 THE COURT: She'll let you know.

21 MR. BAXTER: She always does.

22 Your Honor, we've gone over a lot of
23 information so far today already. And what I'm going
24 to go ahead and do is split up my presentation into two
25 parts. First I want to focus on issues related to the

76

1 do. Does the record support the finding that the trim
2 line should be based on the Great Rift? I believe it
3 does. The Great Rift is a geologic feature that the
4 record reflects is of limited transmissivity.

5 Transmissivity is one of those ground watery words that
6 means water doesn't cross it very easily. The director
7 found, if I draw the line there, I'm going to be safely
8 exercising my discretion.

9 And in addition to that, he had evidence
10 from the Fremont Madison Irrigation District and from
11 Pocatello indicating the amounts of water that would
12 accrue to Rangen if those areas which were to the east
13 of the Great Rift were curtailed. In the case of
14 Pocatello, the testimony was there would be less water
15 accruing to Rangen than comes out of a garden hose. In
16 the case of the Fremont Madison District, it would have
17 been even less than that, and it would have taken
18 several years to get there.

19 So the hyperbole that's been in some of the
20 briefs about the director somehow turning this into a
21 referendum on economic impact and, you know, somehow
22 using the Ground Water Act inappropriately, et cetera,
23 et cetera, I just think it isn't reflected in the order.
24 It isn't reflected in the arguments that the parties
25 made that the director accepted. There was some

75

1 decrees themselves. It's a clear break in a lot of the
2 issues we're talking about here. And then I'll talk
3 about the issues related to the trim line.

4 Now Ms. Klahn addressed the issues with
5 regards to the regression line and whether or not the
6 juniors are using water adequately without wasting it.

7 I'm going to rest on our briefs with regards to that,
8 and agree with the arguments made here by Ms. Klahn. In
9 fact, I'll agree with Ms. Klahn on her arguments about
10 the trim line and other things as well.

11 THE COURT: I don't hear that very often.

12 MS. KLAHN: No, you don't.

13 MR. BAXTER: But that's how I plan to split up
14 my time up here today, if that's okay, Your Honor. So
15 with that, I'll go ahead and jump in.

16 When the director receives a delivery call
17 filed with them, one of the first things he has to do
18 is take a look at the senior's water rights and
19 interpret those water rights and take a look at those
20 elements. Here, the director reviewed the decrees, and
21 as to the source, specifically concluded that the plain
22 language of the source element only allows Rangen to
23 divert water from the Curren Tunnel.

24 I would like to talk about legal standard
25 of review. Now the Idaho Supreme Court has made it

77

1 clear that when interpreting a decree you start with 2 the four corners of that document. You start with the 3 face of the decree. You do not start by looking outside 4 of the decree as argued by Rangen here today. 5 The cases cited by Rangen about latent 6 ambiguity are not decree cases; they're contract cases. 7 And I'm not a huge fan of string cites so I didn't 8 throw all the string cites in our brief, but the court 9 goes back and looks at cases of courts interpreting 10 decrees. You'll see that's where they start with the 11 face of the decree. 12 We cited the DeLancey case at 110 Idaho 65. 13 You could also look to the Pike case, 139 Idaho at 408; 14 the Toyama case, 129 Idaho 142; and the Smith, the 15 Borley vs. Smith case we did cite, 149 Idaho at 177; and 16 the McKoon case, 146 Idaho at 109, that's a Court of 17 Appeals case. These are examples of courts interpreting 18 decrees, and all of these start at the face of the 19 decree. 20 Now under DeLancey and these other cases, 21 only where the decree is, "reasonably subject to 22 conflicting interpretations is it considered ambiguous." 23 Here the decree is unambiguous. It says Martin-Curren 24 Tunnel. The tunnel is a specific, identifiable 25 structure up on the hillside. Rangen does not contest 78	1 this. Everyone agrees there is one tunnel on that 2 hillside, and it's called the Martin-Curren Tunnel. 3 Now Rangen also argues it should include other things, 4 but nobody disagrees there's only one tunnel up there. 5 Now Rangen points to the Idaho Potato Starch 6 case, and what I'm going to call the Peerless case, and 7 somehow says, well, those should be considered here and 8 those should be binding. Well when you look at the 9 facts of those cases, they can be distinguished. 10 The Idaho Potato Starch case, the issue 11 there was that they entered into a contract about a 12 ten-inch pump, and the issue was that there was more 13 than one type of ten-inch pump. Here again, there is 14 only one Curren Tunnel. 15 In the Peerless case the contract referred 16 to a ship named Peerless and the parties had contracted 17 that to transport their goods on the ship that was 18 entitled the Peerless. The problem was there was more 19 than one ship titled the Peerless. Again, 20 distinguishable. We only have one Curren Tunnel here. 21 These cases actually argue against Rangen's point. 22 In this circumstance where the director's 23 administering water, the director's obligation is clear. 24 A decree from the SRBA Court is binding as to the nature 25 and extent of the water right, and the director must 79
1 administer water consistent with that decree. And here 2 the director correctly interpreted the decree in the 3 matter, and the court should affirm the matter in this 4 issue. 5 Now for the sake of argument, if this court 6 was to conclude that the decree is ambiguous, it still 7 does not change the outcome. I respectfully disagree 8 with counsel for Rangen that this is a question of law. 9 Once the court determines it is ambiguous, it becomes a 10 question of fact for the fact finder to decide. Here 11 the director did go through and decide the issue. 12 Now the director in his order pointed to 13 the testimony of the watermaster himself. Who better 14 to understand this issue than the watermaster himself. 15 Frank Erwin, who not only is the long-time watermaster, 16 but grew up in Hagerman and lived there all of his life, 17 he distinguished between the Curren Tunnel and the 18 springs that fed Billingsley Creek. 19 As the director also pointed out, the record 20 is replete with references and exhibits specifically 21 identifying the Curren Tunnel as a unique structure at 22 a specific location. And within the order, Your Honor, 23 there is a string cite of exhibits that go through that 24 description there and identify it. And I point that 25 actually was in the order on reconsideration at page 80	1 two. 2 Even Rangen's only expert, Dr. Brockway, 3 clearly identified the tunnel and did not suggest that 4 somehow the tunnel was anything other than a physical 5 structure there on the hillside. 6 And I think it was a good point that IGWA 7 made on page six of its response brief, there's a 8 handful of other water rights from the Curren Tunnel: 9 the Musser right, Butch Morris water rights. All of 10 them only take water from the Curren Tunnel. All of 11 them only have Martin-Curren Tunnel as part of their 12 decree. That's the only place that they divert from. 13 Now the director even recognized there's 14 conflicting testimony on the record on this one. As to 15 the employee Lynn Babington, long-time employee of 16 Rangen, the director simply disagreed -- or didn't 17 disagree -- he simply found that the testimony wasn't 18 credible. 19 But more significantly, just because there's 20 conflicting evidence in the record doesn't mean this 21 court overturns a determination of the director as to a 22 finding of fact. The question is whether there's 23 substantial evidence in the record. Here there is 24 substantial evidence in the record with references to 25 the Martin-Curren Tunnel, that it means the tunnel 81

1 itself, not Billingsley Creek and other springs up 2 there. 3 Now you're probably asking yourself why is 4 this important? Why is the department up here really 5 concerned about this issue? Well, I think the other 6 counsel for IGWA and Pocatello alluded to this. I 7 shouldn't say that. They didn't allude to it. They 8 came out and said it. If what is on the face of the 9 decree doesn't govern, this will leave the door wide 10 open for others to raise endless arguments and 11 challenges to how that decree should be interpreted. 12 Folks will do exactly as Rangen did here today and go 13 through files, tear out files, and say, hey, I know 14 it's what it says there, but look at this, look at this, 15 look at this. 16 We need to have finality of the decrees. We 17 need to have confidence that we look to the face of the 18 decree when the director has to go forward and interpret 19 it. To interpret the -- to do otherwise would only 20 introduce confusion into the interpretation of the 21 decrees and would undermine the integrity of all of the 22 court's decrees. 23 Now I would like to talk a little bit about 24 the point of diversion. I think the court correctly 25 divides those two issues up. I'm happy you identified 82	1 that there's really the two different issues here 2 because I think Rangen was trying to combine the issue 3 of the source and the point of diversion together, and I 4 think they're two distinctly different issues. 5 Even if the court was to agree the source 6 isn't only limited to the Curren Tunnel, that still 7 doesn't mean all of a sudden the bridge diversion 8 becomes an appropriate point of diversion for them to 9 use. That's why again I think it's important that the 10 court recognizes that important distinction here. 11 I agree there is no question that the bridge 12 diversion has been historically used by Rangen, but 13 there's also no question that the bridge diversion is 14 not physically located within Rangen's ten-acre point of 15 diversion. Rangen admits it. 16 This court -- or, actually, I'll take a step 17 back. I agree with counsel from IGWA that it appears 18 that this was an error, probably in error. And this 19 court has already identified, pointed out to IGWA, or 20 excuse me, to Rangen, the pathway for correcting that 21 error. 22 When Rangen came in and filed for a late 23 claim in the SRBA, this court denied that claim and 24 pointed out that the avenue to correct perceived errors 25 in decrees is to set aside a partial decree. Rangen 83
1 has not done that in this circumstance. 2 Instead of following this proper procedure 3 and asking the court to set aside the partial decree, 4 what Rangen is doing is really asking this court to 5 adopt a confounding interpretation of points of 6 diversion. Again, such interpretation will only 7 undermine the integrity of all future decrees of this 8 court. I shouldn't say all future decrees -- of the 9 decree just, the final unified decree entered this past 10 Monday and the previously issued partial decrees by 11 this court. 12 Rangen here today talked about how the 13 purpose of the SRBA was to grab and recognize actual 14 historical beneficial use. That was the whole purpose 15 in putting it in decrees. I agree. That was the 16 purpose and the intent behind the SRBA. But I think as 17 this court correctly recognized, the issue really lies 18 back with the claim. Rangen had an obligation to come 19 in and claim the water right consistent with that 20 historical beneficial use, and whether through mistake 21 or for whatever reason, did not do so. 22 THE COURT: What about the argument with respect 23 in 2005 with Director Dreher's opinion and recognizing 24 he had the right and treat it differently, then at that 25 point maybe Rangen would have been put on notice that 84	1 they had an error in their partial decree? 2 MR. BAXTER: First off, Your Honor, the issue of 3 the point of diversion didn't come up there. The 4 information that Rangen pointed to today was information 5 about measurements and where Rangen was taking 6 measurements. This is very different from an issue of 7 where the actual point of diversion is located. We 8 recognize because all the springs are out there, that 9 is not practical to take measurements up there. You 10 have to measure the water at the bottom of the system. 11 That is distinctly different from a question of where 12 is Rangen legally entitled to divert water. So I would 13 distinguish that situation. 14 And as to the timing, Rangen has known about 15 this issue for quite some time. It was raised to them 16 about, I think, I'm trying to remember correctly. It 17 was probably right about the time we started in on 18 getting ready for the delivery call proceeding. Rangen 19 has had -- they filed that in what? In December 2011. 20 It took a while for us to come up and get ready for the 21 hearing. They've known about this issue for a while. 22 Again, even the court pointed out to them the issue. 23 They have failed to take advantage of the proper 24 opportunity to correct the error. 25 I would like to talk a little bit about 85

1 quasi-estoppel. As pointed out in the briefs, both the
2 Idaho Supreme Court and the Idaho Court of Appeals have
3 held that estoppel may not ordinarily be invoked against
4 a government agency functioning in its government
5 capacity. We cited the Floyd case and the Naranjo case
6 there.

7 This case presents a perfect example of why
8 that should -- why that is the rule. To do so would
9 require the director to act contrary to statute,
10 contrary to court decree, contrary to Idaho
11 constitution.

12 I know Rangen in here said today, we're not
13 asking IDWR to act contrary to the decree, but I don't
14 see a distinction. If the director is not allowed to
15 implement the plain language of the decree, that
16 violates the statute in Chapter 6 that tells him he has
17 to administer water rights consistent with the prior
18 appropriation doctrine. It violates the statute that
19 tells the director that he has to administer water
20 rights consistent with decrees of this court in Chapter
21 14, and the constitution which also requires the
22 director to apply water consistent with the prior
23 appropriation doctrine.

24 Here, the director has been acting -- is
25 acting consistent with that obligation in seeking to

86

1 department's actions to be unconscionable. Regulation
2 of Rangen's diversions consistent with partial decrees
3 entered by this court simply cannot meet the level of
4 conscionability identified by the court cases that talk
5 about that issue.

6 I do want to talk a little bit, while I'm
7 on this issue, about the end of the decree or the
8 decrees that Rangen raised about injustice on this issue
9 and brought up the example of the department and said it
10 was unjust how the department sent a letter to Rangen
11 saying that because it didn't file or pay a \$25 fee,
12 they wouldn't be able to participate. As this court
13 understands, sometimes the department has to enforce
14 the rule of the law and the rule required a \$25 fee.

15 Now Rangen forgot to let you know that
16 Rangen sought to intervene in that proceeding and the
17 director did ultimately allow Rangen to intervene in
18 this proceeding. But more importantly, I think, for
19 the point here, is this points to a pattern.

20 Rangen has -- the problems that come up are
21 not if Rangen points to everybody else and blames them
22 for these issues, there has to be some ownership. If
23 you miss a filing fee associated with filing a document,
24 there has to be some responsibility there. If you
25 misfile your claim, as the court noted, the claims are

88

1 try to enforce or implement the decrees of this court.
2 Estoppel would only require the director to administer
3 water rights contrary to the very decrees of this court
4 and contrary to the constitution. Estoppel should not
5 serve to eliminate the agency's statutory or
6 constitutional requirements because exactly, as it
7 happens here, the severe impact on everybody else's
8 ownership interest as well.

9 Now again for the sake of argument, if this
10 court concludes that quasi-estoppel can apply to
11 governmental agencies, I do not believe the elements of
12 quasi-estoppel are met here. First, IDWR is not
13 asserting a right in this proceeding but again is trying
14 to interpret the SRBA partial decrees as required by
15 law.

16 As we've kind of already talked about, the
17 issue of Rangen's point of diversion was not previously
18 raised. The first time the legality of Rangen's points
19 of diversion was raised was in this proceeding. Rangen
20 points to measurements and said, well, the director told
21 us to measure down there. That's not the same thing as
22 determining what the point of diversion is for this
23 water right. Not regulating is different from taking a
24 prior position in another proceeding.

25 Lastly, quasi-estoppel requires the

87

1 filed with Curren Tunnel themselves, and find out later
2 that was a mistake, Rangen has to accept some
3 responsibility for taking care of its own actions. So I
4 just didn't want the court to be left with a belief of
5 injustice by the department's half taking Rangen through
6 this proceeding.

7 Now I'll talk a little bit about an issue
8 IGWA raised with regards to the decrees itself, and
9 that's the issue of the source being ground water. The
10 director correctly concluded that the source of this
11 water right is ground water by again looking to the face
12 of the decree.

13 The director noted that the name and
14 convention that was used in the SRBA, for surface water
15 sources, he put source, surface water source and the
16 tributary; for example, Portneuf River tributary to
17 Snake River. For ground water it says ground water.
18 As the court has already identified, if this was ground
19 water, the decree would have said it on its face, and
20 we would have known that.

21 Now IGWA goes on and says, well, you still
22 must apply the Ground Water Act. IGWA argues -- and
23 let me make sure I get it, the quote here correct --
24 that the SRBA decree for Rangen's water rights do not
25 control the applicability of the Ground Water Act. The

89

1 SRBA decree decides what that water is. The decree says 2 that this is ground water. The department administers 3 it as ground water. If it is not ground water, Clear 4 Springs tells us, the Clear Springs case from the Idaho 5 Supreme Court tells us if it's not ground water, the 6 Ground Water Act does not apply. 7 So again, sticking with this principle, we 8 look to the face of the decree, and the director 9 interprets it and administers it consistent with the 10 face of the decree. 11 In summary on these issues, the partial 12 decrees for these water rights were issued in 1997 and 13 no challenge was brought by either Rangen or IGWA with 14 regards to these decrees. And these challenges today by 15 both parties are simply collateral attacks on the 16 partial decrees. That's why these challenges must be 17 rejected by this court. 18 Now, Your Honor, I would like to talk a 19 little bit about the trim line. Rangen and IGWA 20 represent the polar extremes on this issue. On one 21 hand, you have Rangen over here saying that the 22 department cannot impose a trim line. That you must 23 curtail every junior ground water pumper within the 24 ESPA. 25 On the other hand, you have IGWA here saying 90	1 in the briefing, the director must apply a ten percent 2 trim line. They're saying that it's too large. The 3 trim line is too large, and it must be reduced to some 4 point. This point, if the court was to enforce this ten 5 percent trim line that IGWA has been asking for, would 6 subject only 23 acres to regulation and would only 7 provide .01 cfs to the Rangen cell, and I'll talk a 8 little more about that in a little bit. 9 The director correctly rejected these 10 extreme positions, establishing a trim line based on 11 sound, technical evidence. It also applied the policy 12 of optimum development and maximum use of the state's 13 water resources, and this court should affirm the 14 director's application of the trim line as a proper 15 exercise of his discretion. 16 I'll go through the parties' arguments in 17 greater detail. First, Rangen argues that the 18 application of the trim line is, "contrary to Idaho law 19 which requires the water resources of the state to be 20 managed conjunctively." Trim line is not contrary to 21 Idaho law, as pointed out in the Clear Springs case. 22 In the Clear Springs case the court 23 specifically rejected the very argument Rangen is making 24 here today, making in its brief. That the director 25 lacked any authority to apply a trim line at all. That 91
1 was the question in the case. This court, this court on 2 appeal in Clear Springs recognized the model is just, "a 3 simulation of prediction of reality," and because of 4 this, use of the trim line is acceptable, "based upon 5 the function and application of a model." 6 The Idaho Supreme Court itself affirmed the 7 director's application of the trim line, finding the 8 director properly exercised his discretion in making the 9 trim line determination. 10 The Idaho Supreme Court stated in AFRD#2, 11 "Given the nature of the decisions which must be made in 12 determining how to respond to a delivery call, there 13 must be some exercise of discretion by the director." 14 Here, in this case, the application of a 15 trim line rests appropriately within the director's 16 exercise of his discretion, and he appropriately applied 17 that discretion. 18 Rangen also argued that the trim line lacked 19 any scientific basis. This court only has to look to 20 the order and see that this is false. Findings of Fact 21 70 through 75 talk about the aquifer itself and the fact 22 it is 60 miles wide, 170 miles long. Finding of Fact 71 23 talks about the geology that makes up the aquifer and 24 how it's characterized as a high hydraulic conductivity 25 in many sections, but how there is lower hydraulic 92	1 conductivity in the vicinity of the Great Rift zone. 2 The director said, "The zones of lower 3 hydraulic conductivity impede the transmission of water 4 through the aquifer." And this is shown in the model 5 runs and reflected in Findings of Fact 105 through 110. 6 These findings show that the benefit of curtailment in 7 the areas east of the Great Rift drops off 8 significantly. This drop off is tied directly to the 9 low transmissivity -- transmissive nature -- 10 THE COURT: I have the same problem. 11 MR. BAXTER: -- of the aquifer in that area and 12 the water through the Great Rift. 13 This information all taken together shows 14 that there is sound technical science and a basis for 15 the application of the trim line and is supported by 16 clear and convincing evidence. 17 Now let's talk about IGWA's arguments with 18 regards to the trim line. I think counsel for Pocatello 19 used the word hyperbole, and I will -- maybe not in this 20 direct context -- but there is a lot of hyperbole 21 surrounding the characterization of this trim line, 22 saying that Rangen is taking 100 times more water than 23 it uses, saying that Rangen is attempting to hoard 24 water. That is not what is occurring here, Your Honor. 25 Director found that Rangen is actually able to 93

1 beneficially use all the water that arises in the Curren 2 Tunnel. So they are using everything that they divert. 3 What Rangen is asking for in this case is 4 for the state to conjunctively administer water. Now 5 conjunctive administration of surface water is easy. I 6 think we were here, what was it? Last week, I think. 7 THE COURT: Two weeks. 8 MR. BAXTER: Two weeks ago talking a little about 9 that, and it's a similar issue here. In surface water 10 you go out, you look and say, okay, find somebody down, 11 a junior upstream, senior not getting their water, you 12 turn them off so the water gets down to there. 13 Administration, conjunctive administration 14 of both surface and ground water is severely more 15 complex. An administration of ground water is more 16 difficult because curtailment won't bring immediate 17 satisfaction to the senior, but just because you don't 18 get immediate satisfaction does not mean that we do not 19 conjunctively administer water rights in this state. 20 As pointed out in Conjunctive Management 21 Rule 20, just because a resource is large and no direct 22 and immediate relief would be achieved if the junior is 23 curtailed, we still administer ground water rights. 24 In Clear Springs the Supreme Court discussed 25 Justice Schroeder's discussion on futile call on his 94	1 order that he authored while he was a hearing officer 2 for the department in the Clear Springs matter. Justice 3 Schroeder highlighted the fact that we do not declare a 4 call futile just because curtailment will not bring 5 immediate delivery or immediate relief. 6 He said that if future calls, if a future 7 call is applied -- if a futile call is applied in ground 8 water cases in the same way and fashion as in a surface 9 water case, "most calls would be futile." He went on to 10 say that, "In effect, ground water pumping could 11 continue uncurtailed despite the deleterious effects 12 upon surface water use because curtailment would not 13 have the immediate effect traditionally anticipated." 14 Musser tells us that the director must 15 conjunctively administer water in this state, and Clear 16 Springs affirms this. IGWA ignores this and tries to 17 impose a standard similar to a surface water delivery 18 context. IGWA is trying to say that because the 19 response isn't immediate, it's unreasonable. In its 20 brief IGWA argues for a ten percent trim line. 21 Now as pointed out at page four of 22 Attachment A to the staff memo, which is Exhibit 23 Number 3203, so again this is page four of Attachment A, 24 Exhibit 3203, it shows what administration would look 25 like under a ten percent trim line for the delivery 95
1 call. And I have a blow-up of it for you here, Your 2 Honor, off to the side. You have to squint because in 3 that yellow square there's 24 acres of irrigated land 4 that would be subject to administration. 5 The director concluded that would not be 6 conjunctive administration of water rights in Idaho. 7 Trying to impose the same standard used for surface 8 water administration in a ground water proceeding should 9 not be allowed and cannot be allowed. 10 What the director did apply here was the 11 policy of securing maximum use and benefit of the state 12 water resources. The director must recognize and 13 respect the priority of the senior, but also must 14 recognize that the doctrine of maximum use and benefit 15 acts as an outer limit of what is reasonable for 16 administration. 17 As the Idaho Supreme Court said in Clear 18 Springs, "It is clearly state policy that water be put 19 to a maximum use and benefit. That policy has long 20 been recognized in this state. It was reinforced in 21 1964 by the adoption of Article XV Section 7 of the 22 Idaho Constitution." 23 The court went on to say, "The policy of 24 securing maximum use and benefit, the least wasteful 25 use of the state's water resources applies both to 96	1 surface water and underground waters and it requires 2 they be managed conjunctively." 3 So again, that tells us that conjunctive 4 administration must occur both to surface water and 5 ground water. Must apply this doctrine of maximum and 6 beneficial use. 7 Now this policy is an outgrowth and I think 8 a recognition of the doctrines of waste and futile call. 9 Now waste we have to be careful about in this context 10 because I think at times it has been mixed up. In one 11 sense we have to look at when a senior is using their 12 water right, the water that they have diverted, have 13 they wasted it? They've diverted their water. Are they 14 adequately putting it to beneficial use so that there is 15 not waste. 16 That's a separate definition or application 17 of waste in this context. We're looking at the water 18 that is out there and saying, is it reasonable to 19 administer this? It's important to make that 20 distinction there. 21 In this case, as to the individual water 22 user, the first circumstance of waste, the director 23 found that Rangen is adequately and appropriately 24 putting all the water they divert to beneficial use. 25 Rangen is not wasting the water that they actually 97

1 divert. Waste, as applied in this context, is that 2 there is some point it becomes so unreasonable to 3 curtail someone because so little water would benefit 4 the senior. 5 This policy is also reflected in the futile 6 call doctrine which says that at some point again it 7 becomes unreasonable to curtail a junior user. The 8 doctrines of waste and futile call and this policy of 9 the maximum use and benefit of the state's resources are 10 all implicitly part of the prior appropriation doctrine 11 and consistent with the Idaho Constitution. 12 The director's order links these as 13 consistent with these legal doctrines, and they're not 14 contrary to the law as suggested by both IGWA and 15 Rangen. 16 Here the director applied the rule of law 17 to the delivery call. The director discussed how 18 transmissivity impedes the transmission of water through 19 the aquifer at the Great Rift. The director discussed 20 how low transmissivity causes the benefits of 21 curtailment compared to the number of acres curtailed 22 to diminish significantly east of the Great Rift. And 23 the director discussed how uncertainty east of the 24 Great Rift is higher on the eastern side on the Great 25 Rift. And based on this, the director concluded, "To 98	1 curtail junior ground water users east of the Great Rift 2 would be counter to the optimum development of Idaho's 3 water resources in the public interest and the policy of 4 securing the maximum use and benefit and the least 5 wasteful use of the state's water resources." 6 So given the facts and the evidence 7 presented at the hearing, the director's application of 8 this doctrine is appropriate and within the director's 9 exercise of his discretion. 10 I would like to touch on a couple of things 11 I believe are kind of tangential issues, but I think 12 they're important issues nonetheless for the court to 13 understand. IGWA in its briefs talks a lot about the 14 bedrock principles and cites back to the Surface Water 15 Coalition case, and I think you have to be careful in 16 analyzing that case and its applicability here. I think 17 IGWA is mixing concepts and is saying that that case 18 stands for something it does not, and you have to look 19 at that actual case in the first instance to understand 20 that. 21 In the Surface Water Coalition, the issue 22 there was the decree. Do you administer to the full 23 amount of the decree, or do you administer to the amount 24 the water user needs for the beneficial use? That was 25 the whole litigation. The Surface Water Coalition said 99
1 decree. Other folks said, you know, you look to 2 beneficial use, how much that person is beneficially 3 using the water. And that's what that, the bedrock 4 principles talk about how you focus in on the beneficial 5 use of how much water the water user is using. 6 Here again, the director has already held 7 that Rangen is beneficially using all the water it's 8 diverting. That's not being challenged here. The 9 question in this case really relates to a different 10 doctrine of law, and that's the policy of maximum use 11 and benefit and the futile call and waste and how those 12 all play with regards to the constitution. And these 13 are really separate legal grounds in this case, and the 14 director appropriately applied those legal doctrines in 15 the face of the facts in this matter. 16 Now the other kind of tangential issues that 17 again, you know, you have some issues that you go is it 18 really worth arguing about? What I'm talking about here 19 is the characterization of the trim line versus what was 20 done in ESPAM1 versus ESPAM2. ESPAM1, as this court is 21 very familiar with, out of the Surface Water Coalition 22 arguments, Surface Water Coalition came in and argued to 23 this court that, hey, the department should be 24 administering down to the spring cells. And the 25 department said at that time under ESPAM1, we can't do 100	1 it. This model isn't set up to be able to do it. It's 2 not appropriate to undertake that activity with this 3 model, knowing that we had ESPAM2 coming up, which 4 actually was intended to be able to have that finer 5 resolution associated with how the delivery calls are 6 made. 7 So when we come to talk about a trim line, 8 the court will understand the issue about the spring 9 reaches in ESPAM1 and then the Clear Springs. Yes, 10 there was a ten percent trim line to the spring reach, 11 but even then the director had to say, okay, somebody 12 gets less. We've got to figure out how much an 13 individual user or senior would benefit associated with 14 this product. And so you still had to do the math to 15 get it down smaller when it came down to administration 16 figuring out how much would come to each individual 17 user, and that was done. 18 Now this new model, we don't need to go 19 through the issue of is it the full spring reach. The 20 model looks to the individual spring cells. As the 21 director's order points out, the bottom line, if you 22 compare the benefits to the calling party, the Clear 23 Springs delivery call case and this case are very close, 24 I think it's a couple hundredths of a difference in 25 percentage-wise. 101

1 This underscores that the department is not 2 moving the field goal, and mixing all of my metaphors, 3 that's been suggested how the department is changing 4 things and upsetting the apple cart. 5 Now the department did go ahead and say, 6 okay, fine. And I believe it was on page -- I lost it 7 here on my notes. The order on reconsideration said, 8 well, fine, even if you want us to back calculate it and 9 figure out what it would be applied to the whole reach, 10 we don't need to just look at the cell. We can take it 11 back to the entire reach and see what it would look 12 like. The department did that. And in our 13 consideration we said, guess what, the trim line looks 14 the same as the Great Rift trim line. So again, it just 15 underscores whether you go ten percent to the reach or 16 one percent to the cell, it has the same effect. 17 Now also IGWA insists on pointing out that, 18 well, the earlier delivery call maybe it was a futile 19 call, now there has been this huge change and that 20 should be justification for changing how the director 21 determines the trim line. 22 Again, this fails to recognize that there 23 was a significant error found under ESPAM 1.1. That 24 the errors resulted -- when they were found and 25 corrected, resulted in a significant decrease in the 102	1 spring discharge in the Thousand Springs reach, which 2 then resulted in a significant increase in the discharge 3 from the Rangen cells. So the revised model showed that 4 the ground water pumping had a much larger impact on the 5 Rangen springs than previously thought. 6 So again, this idea that it's all the 7 department's fault the director is changing things, 8 there's reasons behind all this, and IGWA forgets that 9 there are these reasons behind a lot of these changes 10 out there. I just want the court to be aware of those. 11 This isn't just the director acting arbitrary in the 12 way he's applying this matter. 13 I think it's necessary to talk a little bit 14 about uncertainty. It was really only briefly touched 15 on. I will say that the director did, as pointed out 16 in the order, consider the arguments raised by IGWA 17 with regards to the concerns they raised about the 18 model. The director spent quite a bit of time in the 19 order going through those points and explaining why he 20 disagreed with them or why they weren't of a significant 21 magnitude to cause him to change his thinking on any of 22 this issue. That's laid out there in the order. 23 Now as to uncertainty itself, both Rangen 24 and IGWA said the director did not properly consider a 25 model of uncertainty. Rangen argues that the director 103
1 cannot use uncertainty as a basis for a trim line, and 2 in their brief, reply brief, they cite the staff memo. 3 Rangen misinterprets the staff position on this issue. 4 Rangen agreed the model could be used to determine a 5 trim line. The staff report, I think it was Exhibit 6 3203, again, I think it is. Yeah, 3203. 7 The staff said, "Delineation of a trim line 8 based on a steady state response function is a direct 9 application of ESPAM 2.1 predicted responses." That's 10 page six of that staff report. 11 Regarding uncertainty, what they said 12 however was that they, "Do not recommend attempting to 13 quantify model uncertainty," when making a trim line 14 decision. 15 Now I enjoyed myself the other day at the 16 SRBA proceeding, the end of the SRBA celebration, and 17 we had the opportunity to listen to Director Dreher 18 there. And consistent with what he said, and this is 19 how the director viewed it and as outlined in his order, 20 the ten percent uncertainty based on gage error was a 21 starting point for model uncertainty, and it was what 22 was used in ESPAM 1.0 and 1.1. And it was, in fact, 23 what was relied upon by Director Dreher and applied in 24 the Clear Springs case. However, it's just a starting 25 point, and as improved information comes in and 104	1 understanding is developed, that information must be 2 considered. 3 ESPAM 2.0 went through a more rigorous 4 uncertainty analysis. The uncertainty analysis showed 5 that uncertainty was more complicated than as originally 6 suggested by Director Dreher. 7 The impact of stress at one point in a model 8 can be more or less uncertain from another point. It 9 doesn't always just rely upon distance. There can be 10 other reasons for that uncertainty. That is why the 11 director did not simply say I have to apply a ten 12 percent gage error and apply it system wide. He 13 couldn't. The director did not base the trim line 14 solely on model uncertainty but on that physical 15 geologic reality, the Great Rift. 16 As I've already probably beaten it into the 17 ground, he emphasized the lower transmissivity in the 18 area east of the Great Rift, but staff did recognize 19 that model uncertainty varied a little bit more out on 20 the eastern side of the Great Rift. 21 Now as pointed out in Finding of Fact 91, 22 in there it says the ESPAM uncertainty analysis showed 23 that uncertainty on the east side of the Great Rift was 24 generally higher than uncertainty on the west side. So 25 the director did use uncertainty a bit to justify the 105

1 trim line, but he did not use it as the sole basis for 2 a trim line, as Director Dreher did, and found legally 3 he could not, and this is supported by clear and 4 convincing evidence. 5 Now let's jump to IGWA's argument on 6 uncertainty. IGWA argues the director must assign a 7 percent of uncertainty to the model. Again, the 8 director concluded this is not possible. He said, 9 "Because of the complexity of the model, the margin of 10 error associated with the model predictions cannot be 11 quantified." 12 Even IGWA's own expert said this was not 13 possible, testifying, and I quote, "Any application of 14 ESPAM 2.1 must acknowledge and accept that there is an 15 inherent and unquantifiable level of uncertainty in the 16 predictions generated by the model." 17 So the director cannot put a specific number 18 on model uncertainty model-wide, but this is not to say 19 that uncertainty has no place. As just discussed, there 20 is an increased uncertainty surrounding the benefits 21 east of the Great Rift, and recognizing this is an 22 appropriate use of uncertainty and was properly 23 considered by the director in his determination related 24 to the policy of maximum use and benefit. 25 So in conclusion, Your Honor, the director 106	1 applied the trim line based on clear and convincing 2 evidence that is anchored in solid technical 3 information, and its application is supported by the 4 case law. Thus the director did not abuse his 5 discretion or act contrary to the law in implementing 6 the trim line. 7 As to the decrees, the director correctly 8 interpreted and applied the elements of the SRBA decrees 9 for the Rangen water rights. The director should be 10 affirmed on all issues related to the decrees. 11 I would be happy to answer any questions you 12 have, Your Honor. 13 THE COURT: You covered it. 14 MR. BAXTER: Thank you. 15 Oh, I'm sorry, Your Honor. I did want to 16 make one last point. I forgot I put it on the back of 17 my stack here and forgot to get back to it. 18 THE COURT: Go ahead. 19 MR. BAXTER: Can I add one thing, Your Honor? 20 THE COURT: Go ahead. 21 MR. BAXTER: I meant to get back with regards to 22 the discussion about how much water will get down to 23 Rangen over a period of time, and I will just point the 24 court again to the staff report, Exhibit 3203, that same 25 Attachment A, this time page two. 107
1 Now on that report the staff actually 2 examined transit time. On that page you'll see a chart 3 showing the transit time for curtailment in 1962 for 4 the entire area of common ground water supply. I don't 5 have it in the record as to what it would be just for 6 the Great Rift area, but I think it's informative 7 because I think it shows you, it kind of gives you the 8 perspective as to how long it takes water to move 9 through this aquifer for the entire area of common 10 ground water supply. 11 On that page two, if you look towards the 12 bottom, it has the time to the interest. So how long 13 would it take to get water down to Rangen. The time to 14 reach 90 percent of the steady state, so 90 percent of 15 the water there to get down to Rangen is 11 years. 16 That's for the entire area of common ground water. 17 Now we're saying that the Great Rift would 18 be much smaller than that, but I don't have it in the 19 record. So this argument about 50 years, I'm not quite 20 sure or understanding how that comes in, but the record 21 supports the speed in which the water moves through this 22 aquifer, and this is something the court can look back 23 to. It's in the record. 24 Thank you, Your Honor. 25 THE COURT: Thank you. 108	1 MR. FLETCHER: Your Honor, did you want me to go 2 next or Mr. Rigby? Does it matter to the court? 3 THE COURT: It doesn't matter. 4 Mr. Rigby? 5 MR. RIGBY: Very good. I don't want to take -- 6 I realize having not come to the actual hearing, I 7 guess I'll take whatever position I can take. And if 8 Kent needs to go first, that's fine. 9 THE COURT: Okay. Well, he's standing at the 10 podium, so I'll let him go, but it won't cut into your 11 time, okay? 12 MR. RIGBY: Very good. All right. Thank you. 13 MR. FLETCHER: It sounds like bathroom talk 14 there, Jerry. 15 May it please the Court and Counsel: I'm 16 Kent Fletcher. I'm here today representing several 17 different irrigation districts and canal companies 18 commonly known as the Surface Water Coalition. 19 We were granted an intervention in this 20 action for a very limited purpose to address the 21 director's use of ESPAM 2.1. Since our original call 22 was decided using ESPAM 1.1, we had a great interest in 23 how the director uses 2.1 and how the use of 2.1 will 24 change the director's analysis. 25 Our brief sets forth our positions in this 109

1 matter, and I would like to address two basic topics. 2 Number one, based upon the Clear Springs decision, 3 there is no real basis and certainly nothing in this 4 record to support the use of a trim line with ESPAM 2.1. 5 And secondly, if the court determines that 6 the director's use of a trim line was properly within 7 his discretion, IGWA is the only party arguing that the 8 director's trim line is inadequate, other than Fremont 9 Madison Irrigation District, which cites 42-226 in its 10 argument, which is the statute that the Supreme Court 11 expressly held does not apply to a spring user call in 12 the Clear Springs decision. 13 Before I start, I would like to briefly 14 comment on the use of ESPAM 2.1 in this proceeding. 15 IGWA spends much of its time attacking the use of the 16 model and the reliability of the model. IGWA's expert 17 and the other experts actually agree on several things. 18 One issue upon which all of them agree is that the model 19 is the most scientifically accurate method of predicting 20 the hydrology of the ESPA. 21 In addition, I would hope that in the 22 analysis of this matter we don't lose sight of 23 longstanding principles that should guide decision 24 making. It can be argued that even though injury is 25 occurring, it appears that there is greater concern over 110	1 minimizing mitigation than there is protecting a senior 2 from injury. 3 As we stand here today, the director has 4 found that Rangen, a senior water right holder, is being 5 injured but has allowed continued, unabated junior 6 diversions. Longstanding Idaho law requires that a 7 junior appropriator is entitled to divert water only 8 when the rights of previous appropriators have been 9 satisfied, and that is not occurring in this case. 10 Some of these issues will be addressed more 11 fully in other proceedings, and I would like to address 12 the issues pertaining to the trim line. The use of a 13 trim line is simply another way to deprive the senior 14 water right holder of water to which it is entitled and 15 to allow juniors to continue diverting, out of priority, 16 while seniors are injured. 17 A review of how the trim line concept 18 developed is important in determining whether a trim 19 line should be incorporated into the use of ESPAM 2.1. 20 When Director Dreher initially determined that he would 21 use a trim line when applying ESPAM 1.1, he did not 22 assign a margin of error to the model. He reasoned 23 that a trim line could be supported by the fact that 24 gages have margins of error, nothing is perfect, and 25 that a trim line was supportable by the full economic 111
1 development language of Idaho Code Section 42-226. He 2 called this, "a degree of uncertainty associated with 3 application of the ground water model." 4 The hearing officer struggled with this 5 concept of applying the degree of uncertainty to a trim 6 line. In fact, at the SRBA conference on Monday, the 7 hearing officer stated that the trim line was the 8 biggest leap of faith he had to deal with in reviewing 9 the director's order. So to buttress the concept, the 10 hearing officer added public interest considerations 11 that are present in the Conjunctive Management Rules 12 when rendering his decision. 13 On judicial review the district court did 14 not uphold the trim line based upon full economic 15 development language or public interest language. 16 Rather, the district court upheld the trim line concept 17 based upon uncertainty and converted the degree of 18 uncertainty language to a margin of error concept. 19 When the issue finally was reviewed by the 20 Idaho Supreme Court in the Clear Springs case, the 21 Supreme Court expressly ruled that Idaho Code Section 22 42-226 has no application to a surface water case and 23 noted that the public interest principle was not relied 24 upon by the district court. Rather, the Supreme Court 25 ruled that when dealing with ESPAM 1.1, the director 112	1 acted within the outer limits of his discretion, was 2 consistent with legal standards applicable to available 3 choices, and reached his decision through an exercise of 4 reason. 5 The Supreme Court steered clear of using 6 the term trim line in its holding, and rather, stated 7 that the director concluded that there was a, "up to a 8 ten percent margin of error in the ground water model 9 due to the margin of error in the stream gages." 10 So the holding in Clear Springs is that the 11 director, when using ESPAM 1.1, can use his discretion 12 in determining a margin of error, even though the 13 director discussed a degree of uncertainty and did not 14 assign a margin of error to the model in that case. 15 I think as the court works through this, if 16 the court will carefully read Clear Springs, it will see 17 how the director in this case has deviated from the 18 margin of error language that is in that case. 19 My belief is that the analysis of a trim 20 line is a good example of why most lawyers are not 21 accountants or statisticians. There's a huge difference 22 between finding that a trim line is allowable based upon 23 full economic development and public interest, 24 principles rejected by the Supreme Court, and finding 25 that it is allowable based upon a margin of error. 113

1 A common definition of margin of error is 2 the permissible or acceptable deviation from the target 3 or specific value; an allowance for slight error or 4 miscalculation; an allowance for changing circumstances. 5 The larger the margin of error, the less reliable the 6 result. Margin of error is a factor of reliability of 7 the result, not of adjusting the results. 8 Although the Clear Springs Supreme Court 9 holding addresses margin of error, the director steers 10 clear of using the term margin of error, I assume for a 11 number of reasons. First, everyone seems to agree that 12 one can't assign a margin of error to ESPAM 2.1, and 13 there is nothing in this record to support assigning a 14 margin of error. 15 Secondly, use of a margin of error is 16 problematic. A margin of error is plus or minus the 17 result. Under ESPAM 1.1, if ten percent was a margin of 18 error, the result may be long ten percent or it may be 19 short ten percent. To only cut ten percent off from the 20 obligation of the juniors without addressing the ten 21 percent that favors the seniors, means only one party to 22 the dispute suffers the loss resulting from this 23 application, and that is the senior. 24 How one-half of a margin of error can be 25 used to only favor the junior water user who was 114	1 injuring his senior water user, while at the same time 2 honoring constitutional and statutory priority 3 principles, has not been explained. 4 The same can be said of the director's 5 language that he uses in this case. Any potential error 6 that may be in his calculations resulting from 7 variations, the benefit of those go to the junior, not 8 to the senior. And there is no explanation of why that 9 is constitutionally allowable. 10 All experts agree there is no scientific 11 basis for assigning a margin of error to ESPAM 2.1 12 results. The director did not find that it was futile 13 to curtail ground water east of the Great Rift. The 14 Supreme Court in Clear Springs upheld the director's 15 discretion based upon a perceived ten percent margin 16 error; however, the director did not make any finding 17 concerning a margin of error in this case. 18 It is not a matter of splitting the baby. 19 Either the model is reliable or it's not reliable. And 20 if it is reliable, as agreed upon by all experts, its 21 result should be used. 22 One other point on the use of the trim line. 23 In Clear Springs, Clear Springs argued that the 24 director's decision to not curtail appropriators within 25 the margin of error results in the shifting of the 115
1 burden of proof from the junior to the senior. The 2 Supreme Court held this argument was not raised in the 3 district court and would not consider it. Rangen has 4 now raised that issue, and that issue is before this 5 court. So we would ask the court address the shifting 6 of the burden of proof resulting from the use of the 7 trim line or a margin of error, whatever this court 8 elects to call it. 9 If the court determines that the record 10 supports the use of a trim line and that the Great Rift 11 trim line is appropriate, IGWA's arguments are not 12 supported by facts or law. IGWA tries to argue that 13 the director is somehow tied to a ten percent trim line 14 margin of error upheld in the Clear Springs decision 15 using ESPAM 1.1. However, IGWA does not address the 16 fact that as the science becomes more reliable, as 17 pointed out by the department, it is only logical that 18 any trim line or margin of error will be reduced, be 19 re-examined, and that because of the changes in the 20 model, any trim line or margin of error should be 21 re-evaluated. 22 One of the arguments made by IGWA on page 16 23 of its reply brief is that the director continues to use 24 a ten percent trim line in the surface water call when 25 using ESPAM 2.1. The problem with this argument is that 116	1 the director has not applied a ten percent trim line in 2 the surface water call using ESPAM 2.1. All of the 3 decisions of the director in the surface water call have 4 been made using ESPAM 1.1, not 2.1. There was no injury 5 determination made this year and, therefore, a trim line 6 did not come into play. Now that ESPAM 2.1 is available 7 for use, it is unknown whether the director will even 8 apply a trim line to the surface water call during times 9 of injury. 10 IGWA also asserts that if a large trim line 11 is not determined to be appropriate by this court, water 12 will be hoarded. There is nothing in the record to 13 support this argument, and there has never been a 14 finding that Rangen or the coalition or any other 15 surface water user involved in a call is hoarding water. 16 If the court determines that the director 17 has discretion to establish a trim line in this call, 18 IGWA's call for a greater percentage is not supported 19 by the record. 20 I am fearful that the state, the department, 21 and many water users are drifting away from the 22 statutory and constitutional principles that allow this 23 state to develop in an orderly fashion for many years. 24 We live in a high desert. Water is scarce, and it is 25 being depleted faster than it's being replaced. 117

1 In deciding these types of issues, there
2 needs to be some type of mission statement, a statement
3 of principles that help guide the result. Once we
4 start cooking up theories that allow junior water right
5 holders to divert while seniors are being injured, we
6 have lost the foundation for proper and legal
7 development of a scarce resource.

8 Greg Hobbs gave a presentation at the
9 conference on Monday, and during that presentation he
10 emphasized how important it is that the state enforce
11 its priority doctrine. In an article that he wrote
12 that was part of the materials, he succinctly stated the
13 principle that should guide decision making. To
14 function effectively, priority must be employed in
15 determining if and how much unappropriated water remains
16 for appropriation by new users, taking into account
17 actual river conditions and the operation of perfected
18 water rights. To function effectively, priorities must
19 be enforced in times of short supply. If not,
20 distribution of water is capricious and water user
21 self-help occurs to the detriment of senior rights.

22 The coalition would ask that the court
23 carefully examine the use of the trim line in this case
24 based upon the record and the careful reading of the
25 Clear Springs decision. We would also ask that in

118

1 2.1 cfs.

2 I guess what I'm struggling with a little
3 bit, I mean, there's a huge disparity and conjunctive
4 management acknowledges that. I mean, the rules
5 acknowledge that there is a large disparity. It's not a
6 one-to-one ratio. But if you're to give effect to 20.03
7 that says that an appropriator is not entitled to
8 command the entirety of large volumes of water, what I
9 just read, is there ever a circumstance where this
10 principle would apply?

11 MR. FLETCHER: Well, from my viewpoint, I look
12 at it a different way. I see the principle you're
13 talking about. I guess the first thing you have to
14 look at, though, is this water that you're talking
15 about, the developed junior to the senior, injuring the
16 senior?

17 Now if the sole basis for the director's
18 decision in applying a trim line falls on that rule, he
19 doesn't say that. I mean he uses, in the Clear Springs
20 call they used all kinds of weighing and balances and
21 economic development language to try to get to where
22 they wanted to go, and the Supreme Court has struck that
23 down.

24 So I go back to what the Supreme Court
25 talked about, and that was dealing with a margin of

120

1 making its decision the court adhere to the longstanding
2 rule in Idaho that a junior appropriator is entitled to
3 divert water only when the rights of previous
4 appropriators have been satisfied.

5 Thank you.

6 THE COURT: Let me ask you a question. Do you
7 ever -- and I'm basing this based on -- we've discussed
8 it a little bit today -- Conjunctive Management Rule
9 20.03 states, "An appropriator is not entitled to
10 command the entirety of large volumes of water in a
11 surface or ground water source to support his
12 appropriation contrary to the public policy of
13 reasonable use of water as described in this rule."

14 Now we look at the director's response to
15 the delivery call, and I believe not using, or if you
16 don't take into account water east of the Great Rift
17 and you focus on the curtailment of the 157,000 acres,
18 that would result in 14.4 cfs to the Rangen's cell, or
19 9.1 cfs to the Curren Tunnel, and you contrast that with
20 not using the Great Rift as a trim line, I believe that
21 the figure was it would result in 17.8 cfs to the cell.
22 You multiply that by the .63 to the tunnel, Curren
23 Tunnel, and that gives you 11.3 cfs. So therein is a
24 difference of what, 2.1 cfs, but the scope of the
25 curtailment is an additional 165,000 acres to get that

119

1 error. In this case there is no finding of a margin
2 of error. So then the question becomes, if one
3 percent -- or whatever percent the director decides to
4 pick -- of the water cannot get to the cell within
5 whatever time frame the director decides is appropriate,
6 is that appropriate for the director to then cut those
7 people off? Right now there is nothing in the law to
8 support that if the water will get to the injured party.

9 If the director thought that the call would
10 be futile as to those people, he could have held that,
11 but he can't hold that because water does get to them.

12 So when you're conjunctively managing it,
13 that will always be the argument that there's thousands
14 of thousands of acres that are going to be curtailed to
15 satisfy these particular water users. But the inverse
16 of that is if you don't deal with those juniors that
17 are creating the injury, then you'll never be able to
18 satisfy the senior water right holder.

19 So to answer your question more directly, I
20 struggle with what that rule says. I'm not sure what
21 it really means, and I'm not sure how you can apply it
22 effectively when you're dealing with a water source as
23 large as the aquifer and a particular water user, unless
24 you're simply going to rule that, gee, this hurts a lot
25 of people, which is basically IGWA's argument, and it's

121

1 not fair, and therefore the senior should suffer. The 2 senior's right doesn't mean what it says. I have a 3 tough time getting to that point. 4 THE COURT: Okay. Thank you. 5 Still with us, Mr. Rigby. 6 MR. RIGBY: I am, Your Honor. 7 THE COURT: Okay. You may go. 8 MR. RIGBY: Thank you, Your Honor. If it please 9 the Court and Counsel: And as the court knows, I 10 represent Fremont Madison Irrigation District, an 11 irrigation district that's in the upper reaches, in 12 fact, the Upper Snake, it's on the Henry's Fork. 13 Why have we become involved and why do we 14 still stay involved when obviously many of our members 15 are members of IGWA? Fremont Madison, in fact, is a 16 parcel member of IGWA, but we believe it's important to 17 have us involved to evidence what can happen if the 18 arguments of Rangen and Surface Water Coalition are 19 taken into account. And, in essence, what we're saying 20 is, in dealing with those juniors who do create the 21 injury, we can't go so far as to curtail those juniors 22 that don't create the injury. Our argument has always 23 been and continues to be that we do not cause that 24 injury for many reasons. 25 Why have we been picked or why do we stay 122	1 involved? Because we are in the upper reaches. 2 Testimony, I think, was there with our testimony of 3 Mr. Contor, Mr. Brendecke, clearly evidencing because 4 of all of the issues involved in that length or that 5 distance, together with all the other hydrological, 6 physical, and geological features that occur between 7 all of those features, that it's impossible, in fact, 8 he said, Mr. Brendecke said, it's lost in the noise. 9 What we're concerned about here is, first 10 of all, do we agree that a determination by the director 11 that the Great Rift is a good use of determining that 12 that is a trim line? Absolutely. So why aren't I good 13 with that? I am good with that because obviously if 14 that's upheld we win the day and we go home. 15 Our concern is, though, because that is a 16 unique geological feature, physical and geological 17 feature that does, we believe, exclude us from this 18 battle, we're concerned with other -- the precedence 19 that this sets and other arguments that will be made 20 and other calls being made upon us up at the upper 21 reaches of the Snake and the Henry's Fork that may not 22 have the Great Rift. Therefore, the argument one should 23 review is assume the Great Rift isn't there. 24 The problem with having then, let's say, a 25 one percent, even if that's what it is, a one percent 123
1 trim line to Fremont Madison is that it goes against 2 even the testimony that was given. The most surprising 3 testimony I heard at the hearing itself, and again, 4 Your Honor, we were there for a limited purpose and it 5 was to deal with this trim line. All of these other 6 arguments as to Curren Tunnel and all of that, we take 7 no stand. We're not involved with that. 8 But the problem with, and what I've learned 9 from and what we've learned from the evidence that was 10 presented is that the rules themselves in the model 11 have a certain aspect to them, and that is, regardless 12 of any major hydrological impact a well actually has 13 upon a spring, the model must find that there is impact. 14 So it's built into the model. You could put a distance 15 connecting the dots between Boise and Rangen's cell, 16 and the model would show that there's a hydrological 17 connection and that there's impact. That itself is 18 evidence why there must be a trim line. 19 So even though we're grateful for the 20 position of the department and we believe that it is 21 within his discretion to determine that the Great Rift 22 is the correct use of his discretion for purposes of a 23 trim line, we don't want it to be lost but for those 24 specific and unique physical geological features that 25 are evidenced by, such as the trim line, or excuse me, 124	1 as the Great Rift, that we lose the perspective that 2 there is uncertainty, and that the uncertainty of the 3 ten percent, we believe, is correct and that our experts 4 testified to and regarded. 5 So, yes, we fully support the decision that 6 we are not impacting Rangen and, therefore, we are out 7 of it. We just don't want the court to, in this 8 precedent setting case, to in any way make a 9 determination that but for this specific geological 10 feature the trim line of ten percent goes away, and 11 that's why we're still involved. 12 But as far as all other arguments, I guess 13 I'll rest, unless the court has any questions. 14 THE COURT: No. Thank you. 15 I believe that got us through all the 16 responses. 17 So, Ms. Brody, your reply. 18 MS. BRODY: Thank you, Your Honor. 19 I certainly can't do much to improve upon 20 the Surface Water Coalition's arguments concerning the 21 trim line and would adopt them as Rangen's position and 22 as otherwise outlined in our briefing. 23 The only point that I would add is a small 24 one, which is the mechanism for arguing for 25 demonstrating that you don't cause injury, that's 125

1 through the futile call process. And there is a burden 2 of proof for that, and it's clear and convincing 3 evidence. When you allow the imposition of a trim line, 4 as the director has in this particular case, what 5 happens is you allow the junior users to sidestep that 6 analysis completely, to sidestep that obligation. 7 With respect to the interpretation of 8 Rangen's decrees, I would like to start by addressing 9 the statement that Rangen has known for a while that 10 there are problems with its decrees. I want to make 11 sure that the record is clear here about what Rangen 12 knew and when and what has gone on since 1997 when those 13 decrees were entered. 14 1997 is when they were entered, and in 15 October, in September or October of 2003, Rangen 16 actually made its first delivery call. You'll find in 17 the record, actually all of this is attached to Rangen's 18 petition for delivery call, and what you'll find is the 19 delivery call itself, that is the one made in 2003. 20 You'll find the letter making the call, and what you'll 21 find is a series of orders. 22 On February 25th of 2004, the department 23 entered its first order regarding Rangen's first 24 delivery call, and they found material injury and they 25 ordered curtailment. On March 10th, 2004, a month 126	1 later, they amended the order. On March 14th, 2005, a 2 year later, they rescinded the order. May 19th, 2005, 3 the second amended order came out, the one that we 4 highlighted here on the screen, the one with paragraphs 5 54 and 55 dealing with the flows that were 6 representative of the water available under Rangen's 7 water rights. 8 So since May 19th, 2005, when that second 9 amended order came out, Rangen has believed that we 10 were on the same page with the department concerning 11 its interpretation of the decrees. Between 1997 and 12 even today, the department has been out to the facility 13 numerous times. And until January of 2014, Rangen did 14 not have any official action whatsoever from the 15 department that there was any problem with the way that 16 it uses or diverts water. 17 Now when we got the reports, the expert 18 witness reports in the winter of 2013 -- now remember 19 this delivery call, the one that's at issue right now, 20 we filed in December of 2011. So it took us two years 21 to get to the point where expert witness reports were 22 being filed. When we got there, we saw that the 23 experts for IGWA were raising issues about what 24 Martin-Curren Tunnel meant, and we filed a motion for 25 summary judgment. Not believing that there was any 127
1 mistake in our decree, not believing that there was any 2 problem with our decree and, in fact, taking comfort in 3 the prior orders that had been entered. Taking comfort 4 in the fact that the department had investigated 5 Rangen's water rights, was out there all the time, had 6 made findings regarding Rangen's use of water. We took 7 comfort in that and filed a motion for summary judgment. 8 Director Spackman came out, I believe it was 9 April 2nd, 2013, and that was the first time that we 10 understood that Rangen and the department were not on 11 the same page regarding the interpretation of the 12 decrees. 13 And Director Spackman, regardless of the 14 characterizations that are being given here now, he 15 didn't outright rule that the only thing that we were 16 entitled to was the water that was coming from the 17 tunnel because of the issues over diversion points. 18 The issue of what water Rangen was actually going to be 19 entitled to was something that had to go to hearing. 20 There were still factual issues to answer. 21 In fact, after Director Spackman made a 22 verbal order or verbal ruling concerning Rangen's 23 motion for partial summary judgment, we actually had 24 Dr. Brockway go out to the facility and determine how 25 much of the water, estimate how much of the water is 128	1 there in that ten-acre tract that is in Rangen's partial 2 decrees. And he determined that it was approximately 97 3 percent of the spring water. So there were still 4 factual issues even running around at the time of the 5 hearing. 6 The only time that Rangen understood the 7 full extent and impact of the director's ruling was in 8 January, on January 29th, 2014, when his final order 9 came out. Now we came to the court in the summer of 10 2013, after the hearing, anticipating that we were going 11 to have an adverse result in some ways. We were worried 12 about it, and so we came to the court and asked for the 13 late claim and it was denied. 14 But the thing that I want to point out is 15 that in that order there wasn't just one remedy that 16 the court talked about. Yes, one remedy that the court 17 discussed was the possibility of setting aside the 18 decrees, but the court also talked about the fact that 19 Rangen could pursue administrative remedies. In fact, 20 we still had the issues with how the department, how 21 Director Spackman was going to interpret Rangen's 22 decrees. And one of the things that Rangen needed to do 23 was exhaust those administrative remedies. That's what 24 we're doing. 25 We waited for the ruling to come out. We 129

1 filed our motion for reconsideration. And now we're
2 here asking for relief. The relief that we're asking
3 for, we are not asking the court to simply disregard
4 what the document says. We're not asking the court to
5 allow IDWR to simply disregard what partial decrees say.
6 What we're saying is that based on the evidence in this
7 case, the partial decrees, when you look at the source,
8 the term Martin-Curren Tunnel loses clarity.
9 The attempts to distinguish the Peerless
10 case, to distinguish the Idaho Potato Starch case, they
11 don't work.
12 THE COURT: Let me just ask you this: What about
13 the other rights, the Morris right and the other rights
14 that are decreed on the Martin-Curren Tunnel? How does
15 the department, you know, you get in a lawsuit over
16 those rights, if they want to start using the adjacent
17 springs on the talus slope, can they do that as well?
18 MS. BRODY: Well none of those rights were in
19 evidence in the hearing of this case, so we don't
20 actually know, based on this record, how other people
21 have been using the water. We do know that there is no
22 evidence, at least that's been presented, that there is
23 any use other than Rangen of the spring water, but I
24 think each case has to be examined on its own. Those
25 records aren't before the court, and they are not issues

130

1 make the common pool. Then the protections that were
2 previously there that protected their perspective point
3 of diversion based where they were located on this
4 spring, those protections were gone. So then the
5 agreement didn't specify how it would be administered,
6 and so then everybody started, when there was an
7 administrative proceeding and the dispute in the SRBA,
8 then everybody starts pointing to the springs coming
9 out of the mountain and saying, this was my spring, this
10 was my spring, and this was my spring.
11 So the only reason I'm making this statement
12 is that, you know, if I make a determination regarding
13 what is meant by Martin-Curren Tunnel, there's potential
14 to resolve one issue, then that creates a potential for
15 issues down the road in other cases.
16 MS. BRODY: And my point would be just that you
17 can't look at the issue of whether this term is
18 ambiguous or not ambiguous simply based on the fact,
19 well, there might be other rights that might get messy
20 or that might have issues come up.
21 You've got to look at -- you've got to look
22 at this particular circumstance in this particular case.
23 And what happened with the director is he just ruled out
24 of hand, it's unambiguous. He didn't examine -- when he
25 started looking at what people had to say about

132

1 before the court.
2 THE COURT: No, I understand that, but I'm
3 looking at the broader principle. When you use the
4 term decree of source and it means one thing for Rangen
5 and then something else for every other user on there,
6 that's somewhat of a problem.
7 MS. BRODY: I can appreciate the difficulty, but
8 the issue here is when you look at the fact of Rangen's
9 historical, beneficial use, and you look at what the
10 SRBA was supposed to do, you can't deprive Rangen of its
11 historical, beneficial use because you're concerned
12 about the other rights.
13 THE COURT: No, but I'm interpreting what is the
14 common usage of the Martin-Curren Tunnel, and as part
15 and parcel of that decision, I may have to make the
16 determination that Martin-Curren Tunnel with the local
17 usage meant all of those springs. Does that mean I'm
18 opening the door to all of those other users or -- and
19 the reason why I'm saying this and you probably also
20 remember, it wasn't --
21 Well, I guess it's been a while when we had
22 the dispute between Clear Lakes and Clear Springs. We
23 know where the water is coming out of the channel and,
24 remember, goes down into the spring, and there's the
25 divided channel. Then they get rid of the channel and

131

1 Martin-Curren Tunnel, his analysis was simply focused on
2 why it was that it was unambiguous. He only focused on
3 their testimony with respect to ambiguity. He never did
4 any sort of analysis of what was the intent, what was
5 actually meant when the term Martin-Curren Tunnel was
6 used in this particular decree.
7 The other point that I would make with
8 respect to those other rights is they don't have the
9 administrative history that Rangen has with this right
10 with the department. This is not a case where Rangen --
11 where simply the department or someone else is pointing
12 the finger at Rangen saying you made a mistake and you
13 won't take responsibility for it.
14 The fact of the matter is we've got a
15 history from 2003 until now where the department has,
16 where no one has ever said that Rangen's usage of the
17 water was illegal, that their diversion was improper,
18 that their source was incorrectly named, nothing
19 whatsoever.
20 And you have the same sort of problem with
21 the department talks about we need finality with respect
22 to the partial decrees. The parties need finality with
23 regard to interpretations of decrees. You can't have a
24 change in the interpretation simply because the
25 administration changes and it's no longer Karl Dreher

133

1 who is interpreting the decree.
2 The issue of whether the decree is
3 ambiguous, that's a question of law for the court. The
4 issue of how to interpret an ambiguous document is
5 normally a question of fact in a contract situation,
6 but in this case it's the court's decree, and so I would
7 submit that the court is in the best position to
8 evaluate. If it's ambiguous, how do you interpret it?
9 How do you reconcile all of the evidence that's been
10 presented? The only way to reconcile the back file,
11 the prior findings, Rangen's ongoing use for 50 years
12 that's been unabated, the only way to reconcile that is
13 to interpret the decrees exactly as Rangen proposes.
14 The only other point that I want to address
15 is IGWA's argument regarding the law of reasonable use,
16 in particular, a statement about beneficial use and how
17 its determined and when you curtail and when you don't.
18 The idea that you don't curtail unless you're sure that
19 the senior is going to be benefitted is actually, it's
20 just the opposite under Idaho law.
21 In this case we've got hydraulically
22 connected sources. The rules state it. The scientists
23 know it. And the burden is on them, the junior ground
24 water users, to show that there's no benefit; not the
25 other way around.

134

1 director can assign a margin of error or uncertainty
2 and impose a trim line as a result. Mr. Fletcher also
3 explained that in this case the director has not done
4 that, and that is our objection.
5 There's a lot of evidence of uncertainty in
6 the record; not so much that the model can't be used
7 but certainly enough to account for. What we expected
8 from the director is some exercise of discretion to
9 assign an uncertainty factor. The model is not going to
10 tell him what it is. It's not going to give him the
11 numbers. He's got to consider the evidence, exercise
12 his discretion, and assign an uncertainty factor. We
13 would ask on the remand that an instruction be given to
14 that effect as explained in our brief.
15 The only other point on that that I'm glad
16 Mr. Rigby made is that the model is programmed to
17 predict an effect on every model cell from a change in
18 every other. Not only does that mean that it predicts
19 that pumping in St. Anthony affects Rangen. It also
20 says a well by Hagerman affects water flows in St.
21 Anthony. Now just because the model is programmed to
22 say that does not mean that's how it works in reality.
23 That's where uncertainty comes into play, and we want
24 the director to say, yes, there's this margin of
25 uncertainty and I'm going to apply it.

136

1 Rangen is asking for the remedy -- one of
2 the remedies that the court set out in its order on the
3 denial of the petition for late claim. We're asking
4 for an interpretation that's consistent with the actual
5 historical and beneficial use. We're asking for an
6 interpretation that's consistent with the way that the
7 department has administered the water with the way that
8 Rangen has used the water. And that's the reason why
9 we're asking the court to reverse the director's ruling.
10 Thank you.
11 THE COURT: Thank you.
12 MR. BUDGE: Your Honor, I typically appreciate
13 having the last word, but after three and a half hours
14 of argument, I'm not so sure that I do. I want to
15 thank the staff for sticking around and I promise them
16 that I've cut out a bunch of my reply arguments and I'm
17 going to keep this very quick.
18 I'm only going to address the trim line
19 issues. There's two bases, rationale for implementing a
20 trim line. One is uncertainty that the model's
21 predictions are accurate, and the other is beneficial
22 use of the resource.
23 Concerning the first uncertainty, I agree
24 with some of what Mr. Fletcher said. He explained that
25 the Supreme Court did affirmatively hold that the

135

1 Turning to the beneficial use argument, the
2 department brought this map which they say illustrates
3 that a ten percent trim line is too small. A ten
4 percent trim line is not on appeal. If in a subsequent
5 proceeding they make that decision, then somebody can
6 appeal that. What is on appeal is a 0.63 percent trim
7 line.
8 The issue isn't whether a ten percent trim
9 line is too small; it's whether a less than one percent
10 trim line is too big. That is a discretionary decision,
11 and that makes it difficult, we understand, to overcome
12 the exercise of discretion by a state agency.
13 I appreciate Pocatello's support of the
14 trim line, noting only that they lie outside of it and
15 would ask this court to recognize, as was explained in
16 the AFRD2, the director has discretion, but it is not
17 unlimited discretion. It is not unfettered discretion.
18 It is discretion subject to judicial oversight, and
19 there are times when courts have to step in and provide
20 correction to administrative agencies who are exercising
21 their discretion unreasonably.
22 When you look at the standards for judicial
23 review which allow a court to overturn a decision for
24 an abuse of discretion, the standard is, if the agency
25 did not exercise its discretion reasonably based on the

137

1 legal doctrines governing that decision, then the
2 judiciary could overturn it.
3 And so what we're arguing is not that there
4 shouldn't be any curtailment. Maybe ten percent isn't
5 the number, but there needs to be some number assigned.
6 We need the director to say at this point it becomes
7 unreasonable. It's unreasonable for Rangen to curtail
8 100 times more water than it uses, but maybe not 10
9 times or 20 times, but we need him to step up and tell
10 us at what point does it become unreasonable.
11 We're left with an assumption that .63
12 percent at steady state -- that's where the 50 years
13 comes from, it takes roughly 50 years -- but at steady
14 state at .63 percent, we don't think that is a
15 reasonable application of the bedrock principle of
16 beneficial use, and we hope this court will provide
17 some guidance in that regard.
18 And with that, I'll take any questions and
19 conclude my comments.
20 THE COURT: I have none.
21 MR. BUDGE: Thank you.
22 THE COURT: Thank you.
23 I'll just throw this out, but I know the
24 answer. Does anybody have any need for additional
25 briefing? The court does not.

138

1 THE COURT: As you know, they are not easy issues
2 to decide.
3 Thanks, Counsel. Thanks for the good
4 briefing and good arguments. With that, we are
5 adjourned.
6 (Court recessed.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

140

1 MR. BUDGE: Your Honor, I don't have any need
2 for additional briefing, but just one related matter.
3 We know the court is very busy, but there
4 are a number of hearings scheduled before the department
5 that are related to this proceeding: three in September
6 and another in November. To the extent the court could
7 expedite the decision, it would be greatly appreciated.
8 THE COURT: When are the hearings?
9 MR. BUDGE: They are September 8th through 10th,
10 16th through 19th, and --
11 MR. BAXTER: Mid-November.
12 MR. BUDGE: We're not necessarily saying it needs
13 to be done before that next hearing.
14 THE COURT: I can pretty much assure you it
15 won't be, but I will get it out as fast as I can. As
16 you know, I have another one I'm working on right now
17 in addition to a host of other things.
18 Given that there is no request for
19 additional briefing and the court needs none, I'll
20 consider the matter fully submitted for a decision and
21 take it under advisement. I will issue an opinion in
22 due course, recognizing that probably -- well, it will
23 be in September, but it may be towards the end of
24 September.
25 MR. BUDGE: I appreciate it.

139

REPORTER'S CERTIFICATE

STATE OF IDAHO)
)
County of Twin Falls)

I, SABRINA VASQUEZ, duly appointed, qualified and acting official reporter of the Fifth Judicial District of the State of Idaho, DO HEREBY CERTIFY that I reported in stenotype the evidence and proceedings adduced in the above and foregoing cause, and that I thereafter transcribed said stenotype notes in longhand typewriting, and that the within and foregoing constitutes and is a true and correct copy of the transcript of said proceedings, said transcript consisting of pages 1 through 141, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of January, 2015.

Official Reporter
Fifth Judicial District
Twin Falls, Idaho
CSR #377