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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

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IN THE MATTER OF THE PETITION	)	Docket No. CM-DC-2011-004
DELIVERY CALL OF RANGEN,	)	
INC.'S WATER RIGHT NOS. 36-02551	)	<b>FREMONT MADISON IRRIGATION</b>
& 36-7694	)	<b>DISTRICT'S BRIEF ON REMAND</b>
	)	
	)	
	)	

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Comes now Fremont-Madison Irrigation District ("FMID"), by and through its counsel, Jerry R. Rigby, of Rigby, Andrus & Rigby Law, PLLC, and hereby submits its brief on remand consistent with the Director's Order Setting Briefing Deadlines issued February 3, 2015.

**1. The Director may consider new evidence on remand.**

The decision of what proceedings are necessary, and whether those proceedings will involve the introduction of new evidence, is discretionary to the Director. The Director should allow for the introduction of new evidence and argument regarding the margin of error associated with ESPAM 2.1, and the futility of Rangen's call as it applies to various areas of the ESPA.

**a. The Director has discretion to determine what proceedings are necessary on remand – including what evidence to allow.**

The Director's discretion on remand is made explicit in the district court's orders and in

the judgment. In the district court's Memorandum Decision, entered October 24, 2014, the court ends by stating "The case is remanded for further proceedings as necessary consistent with this decision." Similarly, in its Judgment, entered the same day, the court states the matter is "remanded for further proceedings as necessary in part." In its Memorandum Decision the court did not address what proceedings would occur on remand. The decision of how to proceed after the remand is left to the discretion of the Director.

The district court was even clearer in its Order Denying Petition for Rehearing entered December 5, 2014. The court specifically rejected the implication that its Memorandum Decision amounted to an order that the Director apply the futile call doctrine and was clear that what is appropriate on remand is to be determined by the Director "[T]he Court finds that what further proceedings are necessary on remand in this case can be determined by the Director on remand." *Ord. Denying Pet. For Rehearing*, 3. The district court's orders do not limit in any way the Director's discretion on remand.

The district court's instructions that the Director is to exercise his discretion to determine what, if any, additional proceedings are necessary is consistent with the Idaho Administrative Procedures Act. Idaho Code § 67-5279 sets out the relief a district court may provide on an appeal from an agency. It states as follows:

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

I.C. § 67-5279(2) (identical language in subsection (3)). The district court's order is consistent with the applicable section of IDAPA.

The district court's instructions that the Director is to exercise his discretion to determine

what, if any, additional proceedings are necessary is also consistent with general practice in Idaho's courts. On remand, trial courts are given the discretion to determine whether their existing record is sufficient, or whether it is necessary to supplement the record. *Akers v. D.L. White Const., Inc.*, 156 Idaho 37, 44-45, 320 P.3d 428, 435-36 (2014); *Mecham v. Mecham*, 123 Idaho 219, 220 n. 1, 846 P.2d 221, 222 n.1 (1993) (citing *Capps v. Wood*, 117 Idaho 614, 790 P.2d 395 (Ct.App.1990)).

- b. The Director should exercise his discretion to hear evidence and argument regarding the degree and nature of uncertainty in ESPAM 2.1 and the futility of the water call as it relates to specific areas of the ESPA.**

It is in everyone's best interest that the Director consider the newest and best data available. The hearing in this matter was held May 1, 2013 – nearly two years ago. If department staff or the parties have evidence that is available now that was not available in 2013, the Director should consider it. This is particularly true when there are currently other contested cases, with similar parties and similar issues, before the Director and the courts which will include the most current evidence as to the model and which have the potential of causing different outcomes or decisions among the various cases dealing with the same aquifer. The Director must hear and consider the best available evidence in each contested matter, or at a minimum, take notice of relevant evidence presented in related contested cases. If he does not, he invites the possibility of divergent rulings in related cases – not because the underlying facts or law are different, but because the evidence presented in the matter is different based on the initial hearing date. All parties, and Idaho as a whole, will benefit by the Director having access to the best evidence available in a case of this magnitude and from consistency across related cases.

The Director has heard other contested matters with facts and argument substantially related to this case since the hearing in this matter. The parties should not expect the Director to ignore the evidence that he has heard in those matters as it is relevant to this matter. Rather than try to pretend that the Director has not heard related evidence since the 2013 hearings, the Director should allow the parties to present all relevant evidence, create an appropriate record, and make argument using the best available information. This is especially true when the evidence is derived from running the very model which has been determined to be the “model of the case” and which evidence the Director could obtain by running certain aspects of the model himself.

The Director’s final order, the appeal, and the district court’s decision have served to limit and clarify the issues now before the Director. The parties are in a much better position to provide evidence directly on the issues the Director and district court have determined to be relevant. The Director will benefit from hearing evidence and argument from parties after the parties have had the opportunity to review the Director’s order and the district court decision.

- c. Much of the evidence provided by FMID and its expert, Bryce Contor is not “new” evidence – rather it is simply examples of the workings of ESPAM 2.1 which has already been admitted.**

FMID anticipates that most of the evidence it will present on remand will consist of reports from Bryce Contor regarding the results of various runnings of the ESPAM 2.1 model. The report will address the time necessary for curtailments from various locations within the ESPAM boundary to result in increased flow to the Rangen spring complex. The report will also address the uncertainty of the model and the manner in which that uncertainty can be quantified and accounted for.

As addressed above, a significant amount of the evidence which is proposed to be submitted by FMID's expert, Bryce Contor, is not "new" evidence. Rather, it is the result of running the ESPAM 2.1 model in several specific areas and comparing several different cells within the model.

- d. The Director should hear evidence regarding a trim line. FMID can show, by clear and convincing evidence, that a trim line is necessary and that FMID is outside the trim line.**

The Director's final order contains a number of findings and conclusions that make clear that substantial uncertainty exists within ESPAM 2.1 and that a trim line should be used when applying it for the purpose of curtailment. Those findings and conclusions are quoted, in relevant part, below:

Findings of Fact

- #85. "ESPAM 2.1 . . . is an imperfect approximation of a complex physical system[.]"
- #91. "There is generally higher uncertainty on the eastern side of the Great Rift, however impacts from several pumping locations evaluated on the eastern side of the Great Rift had negligible impacts on Clear Lakes."
- #96. "The Director acknowledges that there is uncertainty in the model predictions."

Conclusions of Law

- #46 The district court in the Clear Springs delivery call affirmed the application of a trim line on appeal: "The evidence also supports the position that the model *must* have a factor for uncertainty as it is only a simulation or prediction of reality . . . ." *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97 (emphasis added). Because the model is just a "simulation or prediction of reality", the district court held that "it would be inappropriate to apply the [model] results independent of the assigned margin of error." *Id.* The district court concluded the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model...the Director did not abuse discretion by apply the 10% margin of error "trim line." *Id.* The Idaho Supreme Court affirmed the Director's application of the trim line, finding that the Director properly

exercised discretion in making the trim line determination: “The Director perceived the issue as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and reached his decision through an exercise of reason. The district court did not err in upholding the Director’s decision in this regard.” *Id.* at 817, 252 .3d at 98.

- #49 The Director concludes that there is uncertainty in the predicted increase in spring flow resulting from curtailment and that the actual response may be lower or higher than predicted. This variance should be taken into consideration when considering a trim line.
- #52 The Idaho Supreme Court stated, “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls*, 143 Idaho at 875, 154 P.3d at 446. The Director perceives this issue of a trim line as one of limited discretion and applies the legal standards established by Idaho courts. *Clear Springs*, 150 Idaho at 813, 252 P.3d at 94.
- #55 “. . . [T]here is uncertainty in the model. There is lower predictive uncertainty on the western side of the Great Rift. Finding of Fact 91. There is generally higher predictive uncertainty on the eastern side of the Great Rift[.] . . . Uncertainty in the model justifies use of a trim line.”

In finding of fact number 49, the Director found that “the margin of error associated with model predictions cannot be quantified.” FMID encourages the Director to take additional evidence regarding the level of uncertainty in the model and reconsider that finding. FMID can show a quantifiable level of uncertainty by clear and convincing evidence and it can show, by the same standard, that FMID is outside the appropriate trim line.

FMID can reach this high evidentiary burden because of the nature of the model. As was testified to at the initial hearing, ESPAM 2.1 demands that some impact be shown regardless of actual hydrological impact. According to ESPAM 2.1, pumping at every single location within the ESPAM boundary will result in some impact to the Rangen spring complex. Similarly, curtailment or recharge at every single location within the ESPAM boundary will result in some

positive impact to the Rangen spring complex. Given the nature of the model, FMID, and the other ground water users, are entitled to present clear and convincing evidence that a trim line is necessary, and they fall outside of an appropriate trim line.

The fact that model uncertainty does not provide a definitive location for a trim line is not a reason not to employ one. Nothing regarding ESPAM 2.1, or any similar model, allows for certainty. It is the prerogative and duty of the Director to use the best evidence available and make a decision based on that evidence. The fact that the evidence does not allow the Director to be 100% certain of his decision is not a basis for the Director not to exercise his discretion. The Director should use the best evidence available to him and make a determination regarding the uncertainty of the model that can then be applied to a trim line.

FMID recognizes that the district court's decision seems to disapprove of the use of a trim line based on uncertainty. *Mem. Dec. And Ord. On Pet. For Jud. Rev.* p. 38-40. However, if such a use is supported by clear and convincing evidence, it would meet the district court's standard. In making his initial decision, the Director did not have the benefit of the district court's explanation regarding the evidentiary standards. Similarly, the parties did not have the benefit of the Director's order or the district court's decision. They are now in a much better position to address the issue of uncertainty and trim line and should be given an opportunity to do so both with evidence and argument.

**2. If the Director declines to hear additional evidence, he must find that Rangen's call is futile as it applies to FMID based on the current record.**

If the Director determines not to hear additional evidence, the evidence currently in the requires him to find that the Rangen call is futile as applied to the FMID and other appropriators

similarly situated.

The definition of Futile Call is supplied by Rule 10.08 of the Conjunctive Management

Rules as follows:

A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.

Under the CM rules, a call is futile if it cannot be satisfied within “a reasonable time of the call by immediately curtailing diversion under junior-priority ground water rights.” The evidence in the record or as contained in Bryce Contor’s recent reports shows that even if all pumping of junior ground water rights in FMID was curtailed, no benefits would accrue to Rangen for at least 50 years. The Idaho Supreme Court has not had occasion to provide guidance regarding what constitutes a reasonable time in the context of conjunctive management<sup>1</sup>. It may be true, as Justice Schroeder pointed out in his Order on the Clear Springs call, that the time frame ordinarily applicable in a surface water futile call analysis is not applicable in a conjunctive management context. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011). The nature of conjunctive management requires a wider view – a reasonable time frame may be measured in years, not days or weeks. *Id.* However, it is difficult to imagine an argument for a reasonable time frame running over a century. Given the unreasonable amount of time before Rangen would benefit from curtailment of FMID, the Director must determine the

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<sup>1</sup>In *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811-12, 252 P.3d 71, 92-93 (2011), the Court stated related facts and the holding of the lower court on the issue, but as it was not properly raised on appeal, did not rule in the matter.



call to be futile as it relates to FMID and similarly situated appropriators.

As the Director addresses the doctrine of futile call in the conjunctive management context, he must keep in mind the difference between surface water calls and conjunctive management calls. In a surface water call, time is of the essence and even if a futile call is made and acted upon, there is much less opportunity to damage lower priority water users. Surface water calls are generally the result of immediate water shortages and are extremely time sensitive. Idaho court's have recognized that conjunctive management calls do not have the same type of urgency. They are the product of years of accumulated reductions and the remedy for the calls will be similarly long. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). The immediacy of surface water calls reduces the damage that could be done by a futile call. When water is turned down a ditch, everyone involved can determine, within hours, days, or at most weeks, if a useable amount of water will reach its destination. If not, the water can be restored to the juniors. However, in this case, if the petitioners are successful, the call could shut down thousands of acres without the ability to determine if the call is effective for many decades.

- a. **If the Director finds the call to be futile as it relates to some water users, CM Rule 20.04 does not require appropriators in areas where a call would be futile to participate in mitigation or staged or phased curtailment. The potential remedies for this call are listed in Rule 30.07 and include no such requirement.**

As stated above, the doctrine of futile call has long been recognized in Idaho water law. The doctrine was incorporated into the conjunctive management rules as Rule 10.08. Based on the evidence, the Director may determine if Rangen's call is futile as it applies to specific ground water users. As long as that decision is based on substantial evidence, it will not be overturned on

appeal. I.C. § 67-5279(3). This is true even if the evidence is conflicting. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

Conjunctive Management Rule 20.04 addresses the relationship between futile calls and the remedies under the conjunctive management rules. It makes clear that, in some cases, water users subject to a futile call may still be required to participate in mitigation or subject to curtailment. The rule states, in relevant part, as follows:

The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

Whether the CM Rules require that pumpers subject to futile calls participate in a mitigation plan or curtailment depends on what section of the CM Rules apply to the call. There are three distinct types of calls anticipated by the CM Rules, each with its own procedures and remedies. CM Rule 30 applies to calls made in areas “not in organized water districts or within water districts where ground water regulation has not been included in the functions of such districts or within areas that have not been designated ground water management areas.” CM Rule 30, Title. CM Rule 40 applies to calls within an organized water district. CM Rule 40, Title. Lastly, CM Rule 41 applies to calls “within a ground water management area.” CM Rule 41, Title. Of the three, only Rule 40 calls for futile calls to be included in mitigation plans or curtailment. CM Rule 40.01(a).

Rangen’s call is subject to CM Rule 30, as it is not within a water district with ground water regulation included in its functions or within a designated ground water management area.

As such, the Director has a wide range of remedies at his discretion as listed in CM Rule 30.07:

**Order.** Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions:

- a. Deny the petition in whole or in part;
- b. Grant the petition in whole or in part or upon conditions;
- c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district;
- d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district;
- e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that the water rights to be included in the new water district have been adjudicated;
- f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code;
- g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or
- h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate

beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights.

The Director may take any or all the listed actions. CM Rule 30.07. None of these potential remedies anticipate that the water users who would be subject to a futile call should, or may, be required to participate in mitigation or curtailment. The Director should avail himself of the first two options and grant the petition in part, but deny the petition as it relates to those ground water users against whom the call would be futile.

### CONCLUSION

The Director should allow the parties to present evidence and argument regarding trim line and futility in light of the district court's decision. Alternatively, the Director should determine, based on the current record, that Rangen's call is futile as against FMID.

DATED this 10<sup>th</sup> day of February, 2015.

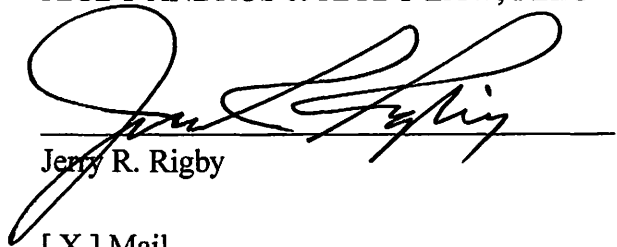
  
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I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 10<sup>th</sup> day of February, 2015.

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