

Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
tjb@racinelaw.net

Attorneys for IGWA

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION
OF WATER TO WATER RIGHT NOS.
36-02551 & 36-07694

(RANGEN, INC.)

Docket No. CM-DC-2011-004

IGWA’S Opening Remand Brief

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this opening remand brief pursuant to the Director’s *Order Setting Briefing Deadlines* dated February 3, 2015. The order asks the parties to address the following issues:

- 1) The Director’s authority to supplement the record in this matter with additional evidence on remand.
- 2) What additional evidence parties would seek to supplement the record with on remand.
- 3) The standard for reviewing a conjunctive management delivery call in light of the definition of the term “futile call” set forth in IDAPA 37.03.11.010.08 and discussion of the futile call doctrine in IDAPA 37.03.11.020.04.

For the reasons that follow, IGWA does not at this time advance a position concerning these issues. Rather, IGWA believes the Director should withhold making a futile call ruling until the Idaho Supreme Court decides the pending appeal of this matter.

Analysis

The Director should withhold making a futile call ruling because the District Court has entwined the futile call doctrine with the related prohibition against hoarding of water resources, which is squarely on appeal before the Supreme Court. IGWA does not believe the issues can be decided in a vacuum. A decision now on one issue alone will complicate the issues and force additional appeals.

A delivery call has traditionally been deemed futile if curtailment will not provide a usable quantity of water to the senior. The Idaho Supreme Court described the doctrine this way in *Gilbert v. Smith*, 97 Idaho 735, 739 (Idaho 1976):

... if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.¹

The CM Rules arguably go a step further, defining “futile call” not only by whether water will be put to beneficial use by the senior, but also by whether waste of the resource will occur:

08. Futile Call. 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.²

Waste can occur either of two ways: (i) the appropriator can divert the curtailed water but not put it to beneficial use, or (ii) the appropriator can fail to divert the curtailed water at all. The issue of a “reasonable time” is related to the issue of waste, but focuses more on the speculative nature of a hoped-for benefit that will not be realized for years.

Concerning the first type of waste, the Director and the District Court have spoken. The *Final Order Regarding Rangen, Inc.’s Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (the “Final Order”) states: “The Director concludes Rangen is diverting and using water efficiently, without waste and in a manner consistent with the goal of

¹ *Gilbert v. Smith*, 97 Idaho 735, 739 (Idaho 1976):

² IDAPA 37.03.11.010.08.

reasonable use.”³ The District Court upheld this ruling: “the Director did not abuse his discretion in determining that Rangen’s water use and method of diversion are reasonable.”⁴

Concerning the second type of waste (curtailing water that the senior does not divert at all), the futile call doctrine overlaps the prohibition against hoarding of water resources—a longstanding common law rule reflected in CM Rule 20.03: “An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water” The issue in both instances is how much water the senior can curtail without beneficially using.

The Director did not directly address the second type of waste in the *Final Order*, and IGWA petitioned the District Court reverse the *Final Order* as a result. The District Court declined, however, ruling that “the Director did not abuse his discretion in determining that Rangen’s water use and method of diversion is reasonable.”⁵ The Court concluded that the Director’s decision was a proper application of CM Rule 20.03.⁶

The District Court decision in this regard has been appealed to the Idaho Supreme Court.⁷

Because the prohibition against hoarding described in CM Rule 20.03 substantially overlaps the prohibition against waste under CM Rule 10.08, IGWA believes the Director should withhold making a futile call ruling until the Supreme Court provides guidance under the pending appeal of this matter. As mentioned above, IGWA does not believe the issues can be decided in a vacuum, and a decision now on one issue alone will complicate the issues and force additional appeals.

While IGWA does not at this time take a position concerning the issues outlined in the February 3, 2015, *Order Setting Briefing Deadlines*, IGWA reserves the right to participate fully in the remand of this matter, including the right to present evidence and make legal arguments related to the issues, at such time as the Director notifies the parties he intends to make a futile call ruling.

³ *Final Order* (Jan. 29, 2014) p. 41 ¶ 59.

⁴ *Memo. Decision and Order on Petitions for Jud. Rev.*, Twin Falls County case no. CV-2014-1338 (consolidated Gooding County case no. CV-2014-179) (Oct. 24, 2014) p. 28.

⁵ *Id.* at 28.

⁶ *Id.* at 33.

⁷ *IGWA’s Notice of Appeal*, Twin Falls County case no. CV-2014-1338 (consolidated Gooding County case no. CV-2014-179) (Dec. 23, 2014) p. 2.

RESPECTFULLY SUBMITTED this 10th day of February, 2015.

RACINE OLSON NYE BUDGE & BAILEY, CHTD.

By: _____

Randall C. Budge

T.J. Budge

Attorneys for IGWA

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of February, 2015, the foregoing document was served on the following persons in the manner indicated.



 Signature of person mailing form

Original: Director, Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Chris Bromley Emmi Blades Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Robyn M. Brody Brody Law Office, PLLC PO Box 554 Rupert, ID 83350 rbrody@cablone.net robynbrody@hotmail.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC PO Box 1800 Hailey, ID 83333 fxh@haemlaw.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, ID 83702 jmay@maybrowning.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Sarah Klahn Mitra Pemberton WHITE JANKOWSKI, LLP 511 16 th St., Suite 500	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery

Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	<input checked="" type="checkbox"/> E-Mail
Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
C. Thomas Arkoosh Capitol Law Group PO Box 32 Gooding, ID 83330 tarkoosh@capitollawgroup.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Jerry R. Rigby Hyrum Erickson Robert H. Wood Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail