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ATTORNEYS FOR THE CITY OF POCATELLO

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

IN THE MATTER OF DISTRIBUTION) Docket No. CM-DC-2011-004
OF WATER TO WATER RIGHT NOS.)
36-02551 AND 36-07694 [REMAND]) **CITY OF POCATELLO’S BRIEF IN RESPONSE**
) **TO THE DIRECTOR’S FEBRUARY 3, 2015**
(RANGEN, INC.)) **ORDER [FUTILE CALL STANDARDS]**
_____)

COMES NOW, City of Pocatello (“Pocatello”), by and through its undersigned attorneys,
to submit a brief in response to the Director’s February 3, 2015 *Order Setting Briefing
Deadlines*.

INTRODUCTION AND PROCEDURAL POSTURE

In Judge Wildman’s October 24, 2014, *Memorandum Decision and Order On Petitions
for Judicial Review*, CV-2014-1338 (“Memorandum Order”), the Court set aside the Director’s
application of the trim line in the captioned matter on the ground that the Director’s discretion
did not extend to adopting a trim line based on *inter alia*, Rule 20.03, Article VII of the Idaho
Constitution and an interpretation of *Schodde* that was rejected by the Idaho Supreme Court.

Memorandum Order at 35–40, Case No. CV-2014-1338 (CV-2014-179). After rejecting the legal bases for the exercise of the Director’s discretion in adopting the Great Rift trim line, the Court found that the additional rationale of model uncertainty (which lacked a quantifiable measurement of error) improperly shifted the burden to Rangen, Inc. (“Rangen”) to demonstrate “that junior ground [water] pumpers east of the Great Rift were causing injury.” *Id.* at 40. The Court concluded “the Director’s application of the trim line in this matter is set aside and remanded for further proceedings as necessary.” *Id.*

In its analysis, the Court noted several times that the Director had not justified the Great Rift trim line based on the futile call doctrine, and indeed, that the Director’s findings on the trim line were based on disparity of quantities of water, and not the futile call doctrine:

the Director did not expressly address or rely on futile call in the final order appealed to this Court. The Director also did not implicitly rely on futile call in his determination. This is apparent from the Director including rights located in the zone of curtailment west of the Great Rift where the predicted depletion percentage of 0% to 1% is the same as that of the water rights east of the Great Rift. Further, the Director did not make findings regarding the timing of the simulated volume that would accrue to the Martin-Curren Tunnel as a result of curtailment east of the Great Rift. Likewise, the issue of futile call was not raised in the proceedings before this Court.

Order Denying Petitions for Rehearing at 2, Case No. CV-2014-1338 (CV-2014-179), Dec. 5, 2014 (emphasis added). On rehearing, the Court clarified that

in rejecting the Director’s justifications [for a trim line], the Court deemed it necessary to qualify that its ruling was not addressing the futile call doctrine which may take into account the disparity in conjunction with other factors such as timing. The intent of the qualification was not to remand the case for the purposes of applying the futile call doctrine. Accordingly, the Court finds that what further proceedings are necessary on remand in this case can be determined by the Director on remand.

Id. at 3 (emphasis added).

In response to the remand, the Director requested the parties respond to certain questions posed at the January 29, 2015 status conference, as summarized in the February 3, 2015 *Order Setting Briefing Deadlines*.¹ The Director's questions are answered below, in order.

I. SCOPE OF AUTHORITY OF THE AGENCY ON REMAND

The authority of the Idaho Department of Water Resources ("IDWR") to take additional evidence on remand is a function of the District Court's Memorandum Order. Here, the Court remanded the matter to the Director for "further proceedings as necessary," after finding that "if the Director is going to apply a trim line to administer to less than the full amount of water Rangen would otherwise be entitled to, such a determination must be supported by law and by clear and convincing evidence." Memorandum Order at 40, 37. The Court found that the evidence identified by the Director in justifying the trim line did not meet the clear and convincing evidence standard: "[b]y its very nature [model] uncertainty does not support a finding of clear and convincing evidence." *Id.* at 40.

The Court's remand provides the Director with authority to determine in this action whether there is an alternative legal or factual basis "to administer to less than the full amount of water Rangen would otherwise be entitled to" through a futile call determination (or otherwise). *Id.* at 37. The Director's authority to take additional evidence and make additional findings of fact arises out of the scope of remand specified by the District Court: neither statute nor case law circumscribes the agency's authority on remand beyond that bestowed on it by the District Court and the law of the case.

As a practical matter, upon final agency action, timely judicial review of a final agency order transfers to the district court jurisdiction over the proceeding that was conducted before the

¹ The deadlines for the briefing were clarified in a subsequent order, but the substance of the briefing has not changed.

agency. Thus, the agency loses jurisdiction of final orders once they are under consideration by the district court on judicial review; by the same token, it regains jurisdiction to the extent a final order or portions of it is remanded back to the agency. American Jurisprudence (2d ed.) explains the scope of an agency's jurisdiction after remand as follows:

unless the remand to an agency limits the issues to be considered, the case should be viewed in its entirety. . . .

. . . .

The administrative agency is bound to act on and respect and follow the court's determination of questions of law, but it is not foreclosed, after its error has been corrected, from enforcing the legislative policy committed to its charge, and it may take such further proceedings as the statute permits. Once a court remands to the administrative agency, the agency's jurisdiction over the matter is revived, and the agency may conduct further proceedings and render a new decision. . . . an agency is free on remand to reach the same result by applying a different rationale.

2 AM. JUR. 2D *Administrative Law* § 550 (2015) (emphasis added).

In *Sahni v. Lujan* (unpublished opinion of the Ninth Circuit Court of Appeals, considering an appeal from an Interior Board of Land Appeals' ("IBLA") agency decision), the issue before the district court was whether the IBLA had exceeded the scope of remand by considering new information regarding the disputed issues before it at hearing. On agency authority to determine the scope of remand, the Ninth Circuit stated:

If a remand is broadly written and contains no language which expressly or impliedly forecloses consideration of an issue, the agency is free to rule upon other relevant issues.

No. 91-15398, 961 F.2d 217, *3 (9th Cir. Apr. 27, 1992). While the Ninth Circuit's decision is not controlling on an Idaho state agency, it is instructive and persuasive of the question at hand. The Ninth Circuit's reasoning is consistent with that of the Idaho Supreme Court in discussing the scope of remands to a trial court: "[t]he general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the

actions directed by the appellate court.” *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000).

Contrary to Rangen’s arguments at the last status conference, the question for the Director is not whether the Director should “augment” the record. Augmenting the record refers to the process under Idaho Code section 67-5276 which provides for the standards under which the district court may consider evidence on appeal that was not presented in the first instance before the agency. *See, e.g., Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487 (2008) (reversing district court’s order allowing additional evidence to be added to the record where the appellants request was untimely made). Here, the record relevant to the Director’s prior order has already been settled and formed the basis for judicial review. The District Court rejected the Director’s justification for the trim line and remanded the matter with no restrictions: “what further proceedings are necessary on remand in this case can be determined by the Director on remand.” *Order Denying Petitions for Rehearing*, CV-2014-1338 at 3. Thus, if the Director would find additional evidence helpful to support the trim line, he is authorized to take additional evidence.

II. ADDITIONAL EVIDENCE REQUIRED ON REMAND

Pocatello has evidence in the record that supports futile call; however, it would also like to submit a revised version of Exhibit 3650, Figure 2-1 and Table 2-1. These figures as currently formulated apply to the results of curtailing all Eastern Snake Plain Aquifer (“ESPA”) ground water rights junior to 1962; Pocatello would likely revise the existing analyses to demonstrate the results of curtailing only Pocatello’s junior ground water rights. Pocatello does not object to additional evidence being submitted by other parties.

III. FUTILE CALL UNDER IDAHO LAW:

A. Idaho Supreme Court decisions:

In the context of conjunctive management, the Idaho Supreme Court has described the futile call doctrine as an appropriate “defense” to a delivery call to be raised by a junior. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.* (“AFRD#2”), 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). This determination was rendered in the context of the proper apportioning of the burden of proof between juniors and seniors:

Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.

Id. (emphasis added).² However, the elements of a futile call in conjunctive management are not the same as those applied in a surface water-to-surface water context.

In the surface water right context, the Idaho Supreme Court has defined futile call as the condition where “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.” *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Thus, futility in the surface water context is judged by whether the junior’s diversion is sufficient for beneficial use by the senior and whether the amount in question can be shepherded to the calling senior immediately (or nearly so). If a tiny amount of water is being diverted by the junior, but it can be delivered to the senior and

² The standard of proof to show that a call is futile was not passed on by AFRD#2 (“the failure to state which standard [clear and convincing or preponderance] applies does not mean the CM Rules can never be applied in a constitutional fashion . . .”). 143 Idaho at 874, 154 P.3d at 445. In *A & B Irrigation District v. Idaho Department of Water Resources*, the Supreme Court concluded: “It is Idaho’s longstanding rule that proof of ‘no injury’ by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.” 153 Idaho 500, 524, 284 P.3d 225, 249 (2012). Because futile call is a defense to a claim of injury, the clear and convincing evidence standard applies.

beneficially used, the call is not futile. *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966) ([If the water] would reach Spring Creek in *usable quantities*, plaintiffs are entitled to enjoin defendant’s interference therewith.” (emphasis added)).

While not directly comparable due to the physical distinctions between a surface water-to-surface water call and a conjunctive management call, the District Court has already noted that disparity of amounts is not enough. Memorandum Order at 37. And, while the Idaho Supreme Court has not directly reviewed a decision that curtailing juniors to satisfy a senior spring right would be futile,³ the Supreme Court has suggested that disparity based on timing alone is not sufficient to find a futile call in conjunctive management:

“The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile. In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.”

. . . “[T]he fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks.”

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011) (quoting Hearing Officer Schroeder, C.J., ret.).

³ The Court declined to address the futile call issue on its merits in *Clear Springs* because it was raised for the first time on appeal. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011).

IV. THE CONJUNCTIVE MANAGEMENT RULE PROVISIONS REGARDING FUTILE CALL MUST BE INTERPRETED AND APPLIED BY REFERENCE TO THE PHYSICAL REALITIES OF CURTAILMENT OF JUNIOR GROUND WATER RIGHTS TO SATISFY SENIOR SPRING WATER RIGHTS.

A. Conjunctive Management Rules:

Against this legal backdrop, the Conjunctive Management Rules (“CMR”), IDAPA 37.03.11, provide:

Rule 10.08:

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.

Rule 20.04:

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.

B. The CMR standards for futile call include an additional element not necessarily present in surface water-to-surface water calls: waste.

Synthesizing the existing judicial decisions (district court and supreme court) in the various administrative settings (surface water versus conjunctive administration), futile call in the context of conjunctive management of hatchery spring rights requires evaluation of quantity and timing together. As an initial matter, neither evidence that the quantity is merely negligible, *or* that it will take an unreasonably long period of time for curtailment to deliver a non-negligible amount of water accrues to the senior is adequate to support futile call in conjunctive administration.

Rule 10.08 acknowledges that both disparity of quantity and disparity of time are necessary to find futile call in conjunctive administration. The effect of curtailment of junior ground water rights to satisfy senior spring-users' water rights is temporally distinct based on a junior's location. In other words, curtailment of ground water rights pumping near the seniors' spring source results in accrual to the spring water right more quickly than curtailment of remote junior ground water rights. Thus, as evidence presented in the 2011 Delivery Call demonstrated, curtailment of the Upper Valley Pumpers to satisfy the Rangen 1962 water right would allow accruals of 1.9 af over *150 years* (Tr. Vol. XII (Contor), p. 2855:1–23, Aug 31, 2012); curtailment of Pocatello's municipal and culinary wells to satisfy the 1962 water right would allow accruals of 5 to 8 gpm over 30 years. Exhibit 3650, Table 2-1 and Figure 2-1. Thus, if curtailment results in a negligible quantity of water accruing at the senior's source over an unreasonably extended period of time, and if the evidence of negligible quantity and unreasonably extended period of time are clear and convincing, the junior has demonstrated futile call under Rule 10.08.

Rule 10.08 provides another route to futile call: an evaluation of whether curtailment will result in waste of the resource. As described above, in the surface water context, the water master can shepherd curtailed junior surface water to satisfy a calling senior surface water right and avoid the curtailed water being "picked off" by intervening ditches. Even in the context of conjunctive administration of ground water to surface water rights (such as the Surface Water Coalition call) the water master can shepherd reach gains accruing from curtailment to the appropriate seniors. By contrast, the water master cannot physically shepherd the accruals of Pocatello's well curtailment to Rangen.⁴ In the context of Rangen's 2011 Delivery Call, Spronk

⁴ Curtailment to deliver water to non-calling rights provides a windfall to those rights that IDWR is not authorized to make. Calls are an element of the prior appropriation system, and are required to ensure that water is not wasted.

Water Engineers, Inc. determined that in the event of curtailment of rights junior to 1962 of the entire ESPA to satisfy Rangen's call, over 99% of the amounts of the water would accrue to other non-calling water rights, and the majority of the spring rights that would see additional water are junior to Rangen's. Exhibit 3650, Figure 2-1, and Table 2-1. This type of evidence demonstrates the wasteful nature of curtailment to satisfy Rangen's delivery call, in addition to the disparate quantities and timing involved.

C. Rule 20.04 is a policy statement regarding the Director's application of futile call in contexts where the Rule 10.08 timing and quantity elements are met, but not the waste element.

Rule 20.04 is a policy statement calling for conservatism in applying the futile call in a conjunctive management context if the Director finds that futile call is based exclusively on negligible quantities delivered over an unreasonably long period of time. Rule 20.04 begins by stating the policy that the Director is authorized to employ the futile call doctrine to deny a call vis a vis particular ground water rights:

“Although a call may be denied under the futile call doctrine”

The remainder of the rule, however, invokes the limitations on futile call in conjunctive management, evincing a preference for mitigation or curtailment even if curtailment is:

not immediately measurable,[sic] 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.

Rule 20.04 (emphasis added). Rule 20.04 focuses only on the timing and quantity elements of futile call; if the Director bases futile call on waste (the other prong of Rule 10.08), Rule 20.04 does not apply.

Second Interim Report of the Special Master (Liability Issues) at 51, *Montana v. Wyoming*, No. 137 (U.S. Dec. 29, 2014). See also *id.* at 50–53. Under Idaho law, the Director is not authorized to order curtailment unless it is required for beneficial uses.

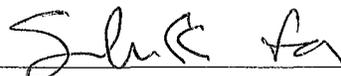
CONCLUSION

The Director is authorized to consider whether additional evidence would be useful to support curtailing less than all the junior ground water rights on the ESPA to satisfy Rangen's shortage. Futile call can be determined by reference to Rule 10.08 which requires evaluation of the temporal and quantity elements of curtailment. If these are the grounds for futile call, the Director has discretion under Rule 20.04 to decide whether to order mitigation or curtailment anyway; however, if the Director finds futile call in part because curtailment will result in waste of the resource, Rule 20.04 does not apply

Pocatello requests oral argument.

Respectfully submitted this 10th day of February, 2014.

CITY OF POCATELLO ATTORNEY'S OFFICE

By 
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WHITE & JANKOWSKI

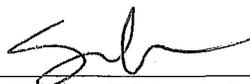
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ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2015, I caused to be served a true and correct copy of the foregoing **CITY OF POCATELLO'S BRIEF IN RESPONSE TO THE DIRECTOR'S FEBRUARY 3, 2015 ORDER [FUTILE CALL STANDARDS]** in Docket No. **CM-DC-2011-004** upon the following by the method indicated:



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