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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 REPLY BRIEF IN**
) **RESPONSE TO THE DIRECTOR’S FEBRUARY**
(RANGEN, INC.)) **3, 2015 ORDER [FUTILE CALL STANDARDS]**
_____)

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

The Director is not precluded from making findings regarding the futile call doctrine in this remand. Contrary to the representations of the Surface Water Coalition (“SWC”) and Rangen, Inc. (“Rangen”), the futile call doctrine was not “decided” by the Director, and therefore no futile call finding was “affirmed” by the district court. *Rangen’s Response Brief Regarding Scope of Remand* at 5; *see also SWC’s Opening Brief on Forfeiture Issue* at 4. It is true that the issue of futile call was raised by Pocatello in the 2011 delivery call proceeding. *Pocatello’s*

Closing Brief at 7; 13–16. However, the Director did not make any findings regarding a futile call; the issue did not need to be reached, as the Director imposed a trim line based on uncertainty in the model, rather than the futile call doctrine. *Memorandum Decision and Order on Petitions for Judicial Review* (“*Memorandum Decision*”) at 40, Twin Falls County Case No. CV-2014-1338 (consolidated with Gooding County Case No. CV-2014-179), Oct. 24, 2014. The district court found error with this finding, and specifically noted that the Director did not justify the trim line based on the futile call doctrine because model uncertainty did not support a trim line by clear and convincing evidence.

Accordingly, because the Director’s imposition of a trim line did not meet the necessary evidentiary standard, the issue of the trim line/futile call are not somehow precluded on remand by the doctrines of issue or claim preclusion—this would mean that any conclusions that are found inadequate on appeal can never be revised by the Director. *Cf. SWC’s Opening Brief* at 5. This is directly contrary to the purpose of an agency remand—indeed, when an agency fails to make necessary findings to meet the necessary standard of review, courts routinely remand to the agency to make new findings to meet said standards. “The reviewing court must vacate and remand for further agency action if the agency’s findings, inferences, conclusions, or decisions are . . . not supported by substantial evidence on the record as a whole” *Jasso v. Camas County*, 151 Idaho 790, 793, 264 P.3d 897, 900 (2011) (internal quotation marks and citation omitted).

Furthermore, the district court’s decision was the first announcement of its determination that the clear and convincing evidence standard precludes reliance on model uncertainty to support excluding an area of the ESPA from curtailment. At the time the Director made his determination in the final order below, the SRBA Court had affirmed imposition of a trim line

based on the Director's discretion and employing model uncertainty—and the Idaho Supreme Court had not foreclosed it. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 816, 252 P.3d 71, 97 (2011).

As explained by the district court in another delivery call proceeding, the law of the case does not control when there is a significant case law development clarifying the standards applicable in a delivery call. *Memorandum Decision and Order on Petitions for Judicial Review* at 34, Gooding County Case No. CV-2010-382, Sept. 26, 2014. Accordingly, given the district court's decision invalidating uncertainty as a basis for a trim line—a basis previously affirmed by the SRBA Court—the Director is authorized and the parties are entitled to an opportunity to examine a futile call justification for a trim line.

This is consistent with the Court's decision to remand the matter for any proceedings determined to be necessary by the Director. If the Director finds a trim line to be proper, based on evidence the record and/or new evidence that may be accepted on remand that is unrelated to model uncertainty, it is within the scope of the remand to issue an order establishing a trim line based on clear and convincing evidence. For example, Idaho law makes clear that geological barriers, such as the Great Rift, which prevent water from reaching a senior could be justification for imposition of a futile call. *Gilbert v. Smith*, 97 Idaho 735, 737, 552 P.2d 1220, 1222 (1976).

Contrary to Rangen's arguments, Rule 10.08 makes clear that to find a futile call in conjunctive management, the Director must find that the call:

[A] 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

[B] that would result in waste of the water resource.

IDAPA 37.03.11.10.08 (emphasis added). In other words, a futile call is consistent with a finding either that (A) there is (i) a physical barrier, such as the Great Rift, that causes a delay in

water reaching a senior such that (ii) their call is not met within a reasonable time, or (B) the call will result in waste. It is Pocatello's contention that there is clear and convincing evidence in the record to support a futile call finding under either option A or B. Curtailment of certain users, such as Pocatello, will result in a negligible quantity of water accruing at the Curren Tunnel over an unreasonably extended period of time because of the attributes of the Eastern Snake Plain Aquifer and the Great Rift (5–8 gpm over 30 years, Exhibit 3650, Table 2-1 and Figure 2-1).¹ Alternatively, there is evidence in the record to find that curtailment will result in waste of the resource, given the lack of ability to shepherd water to the calling senior, with the majority of curtailed water going to water rights junior to Rangen. Exhibit 3650, Figure 2-1 and Table 2-1.

Finally, Rangen and SWC misrepresent the district court's decision, claiming its finding that 1.5 cfs of water is “neither [an] insignificant nor de minimis” amount prevents a finding of futile call. *SWC's Opening Brief* at 9, *Rangen's Response Brief* at 10 (quoting *Memorandum Decision* at 40). In clarifying this finding on rehearing, the district court specifically rejected this argument and said that it was error

[to] assum[e] that portion of the Court's analysis pertains to the futile call doctrine. It does not. The subject analysis is part and parcel with this Court's larger analysis addressing the legality of the Director's implementation of the trim line. . . . The Court's analysis was based only on findings of the Director and evidence in the record.

Order Denying Petitions for Rehearing at 4, Twin Falls County Case No. CV-2014-1338 (consolidated with Gooding County Case No. CV-2014-179), Dec. 5, 2014.

As made clear by the Court, the Director did not make any findings regarding futile call, and while the Court clarified that it was not specifically remanding with instruction that the Director had to apply the futile call doctrine, the Court also said that “its ruling was not

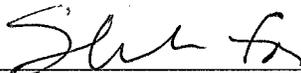
¹ As requested in *Pocatello's Opening Brief*, if permitted it would submit evidence to the Director on remand to refine Figure 2-1 and Table 2-1, which are currently part of the record.

addressing the futile call doctrine which may take into account the disparity in conjunction with other factors such as timing.” *Id.* at 3. “Accordingly, the Court finds that what further proceedings are necessary on remand in this case can be determined by the Director on remand.”

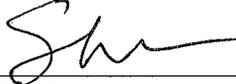
Id.

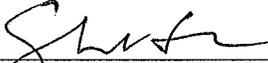
Respectfully submitted this 27th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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 27, 2015 ORDER [FUTILE CALL STANDARDS]** in Docket No. **CM-DC-2011-004** upon the following by the method indicated:



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