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

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

(RANGEN, INC.)

CM-DC-2011-004

**SURFACE WATER COALITION'S
REPLY BRIEF ON FUTILE CALL
ISSUE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, (collectively, the "Surface Water Coalition" or "Coalition") by and through their undersigned attorneys of record, and submit this Reply Brief addressing futile call issues. This brief is filed pursuant to the *Order Setting Briefing Deadlines* ("Briefing Order"), dated February 3, 2015, in the above-captioned matter.

The Coalition submits this reply to address a few points raised in the opening briefs filed by the Idaho Ground Water Appropriators ("IGWA"), City of Pocatello ("Pocatello"), and Fremont Madison Irrigation District ("FMID"). In addition, the Coalition agrees with the discussion provided in *Rangen, Inc.'s Response Brief Regarding Scope of Remand*.

As explained in the Coalition's opening brief, and Rangen's response brief, the law of the case prevents the Director from taking new evidence and addressing new arguments relating to issues that were previously litigated before the Director but were not challenged on appeal. As explained by Rangen, "[p]ursuant to the doctrine of law of the case, courts will not consider errors or issues following remand that might have been raised as issues in an earlier appeal." *Rangen Br.* at 3 citing *Capps v. Wood*, 117 Idaho 614, 618 (Ct. App. 1990). This is similar to the doctrine of *res judicata*. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123 (2007) ("The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action ... which might have been made.' Issue preclusion protects litigants from litigating an identical issue with the same party or its privy.").

The Director is bound to follow clear legal precedent on this issue, and the Court's decision cannot be misinterpreted to allow otherwise. Both FMID and Pocatello argue that the Director has broad discretion in light of the Court's order on remand, which provided that "the case is remanded for further proceedings as necessary consistent with this decision." *FMID Br.* at 2; *Pocatello Br.* at 3-5. They argue that the "decision of how to proceed after the remand is left to the discretion of the Director." *FMID Br.* at 2. These arguments overstate the Director's authority on remand, particularly in regards to what was already decided and yet not appealed.

While the Director has limited discretion to address certain issues on remand, that discretion does not allow the Director to ignore the well-settlement doctrines of law of the case and *res judicata*. As explained in the Coalition's opening brief and Rangen's response brief,

IGWA, FMID and Pocatello each extensively litigated the futile call defense. Nothing in the law, or the Court's remand order, allows those parties to reargue those issues on remand.

Furthermore, it is clear that no new evidence will be presented. Indeed, while FMID asserts that the Director must consider "the most current evidence" and the "best available evidence," it admits that all it anticipates providing are "reports from Bryce Contor regarding the results of various runnings of the ESPAM 2.1 model" "which has already been admitted." *FMID Br.* at 3-4. In other words, "a significant amount of the evidence which is proposed to be submitted by FMID's expert ... is not 'new' evidence." *Id.* at 5. Likewise, Pocatello does not anticipate providing any new evidence. *Pocatello Br.* at 5 (Pocatello only intends to offer revised versions of existing exhibits).

FMID's brief goes to great lengths to ask the Director to rehash failed arguments. For example, FMID argued that the Director should "reconsider" findings in the prior administrative orders. *FMID Br.* at 5-7. Remarkably, FMID even goes so far as to assert that, under a strained reading of CM Rule 30, the Director has no authority to order mitigation or curtailment in response to Rangen's call. *Id.* at 9-12. These arguments are clearly untimely given the procedural posture of this case. Indeed, if it were true that the Director had no authority to order curtailment or mitigation, then that issue should have been raised on appeal to the District Court. However, the argument completely lacks merit and is now barred as a matter of law. Further, FMID wholly ignores CM Rule 30.09, which provides that "the use of water shall be administered in accordance with the priorities of the various water rights *as provided in Rule 40.*" (Emphasis added).

In conclusion, the Coalition respectfully submits that the Director does not have authority to take new evidence and testimony on the application of futile call doctrine in these proceedings.

Dated this 27th day of February, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February, 2015, the above and foregoing document was served on the following via email:

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