

A. Dean Tranmer, I.B. #2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn, I.B. #7928
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com
mitrap@white-jankowski.com

Attorneys for City of Pocatello

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

RANGEN, INC.,)
)
Petitioner,)
)
vs.)
)
THE IDAHO DEPARTMENT OF WATER)
RESOURCES and GARY SPACKMAN in)
His capacity as Director of the Idaho)
Department of Water Resources,)
)
Respondents,)
)
IDAHO GROUND WATER)
APPROPRIATORS, INC., FREMONT)
MADISON IRRIGATION DISTRICT, A&B)
IRRIGATION DISTRICT, BURLEY)
IRRIGATION DISTRICT, MILNER)
IRRIGATION DISTRICT, AMERICAN)
FALLS RESERVOIR DISTRICT #2,)
MINIDOKA IRRIGATION DISTRICT,)
NORTH SIDE CANAL COMPANY, TWIN)
FALLS CANAL COMPANY, and the)
CITY OF POCATELLO)
)
Intervenors.)
_____)

Case No. CV-2014-1338
(Consolidated Gooding County Case
No. CV-2014-179)
**CITY OF POCATELLO'S BRIEF IN
SUPPORT OF ITS PETITION FOR
REHEARING**

On October 24, 2014 the Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* in this matter (“Memorandum Decision”). On November 7, 2014 the City of Pocatello (“City” or “Pocatello”) submitted its *Petition for Rehearing*. Pocatello hereby submits its brief in support of its Petition pursuant to I.A.R. 42.

INTRODUCTION

The Court’s Memorandum Decision notes that the Director did not make a finding regarding futile call in the Rangen Delivery Call. Memorandum Decision at 36, 37. Yet, despite the lack of a finding of fact to review, the Court evaluated whether 1.5 cfs is a “meaningful” amount of water to Rangen:

In this case, the model predicts that curtailment of junior rights east of the Great Rift are causing material injury and curtailment of such rights would produce a quantity of water to the Martin-Curren Tunnel in the amount of 1.5 cfs. Indeed, while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren Tunnel, the meaningfulness of the quantity becomes readily apparent. The Director found that the average annual flow available from the Martin-Curren tunnel in 1997 was 19.1 cfs. R., p. 4215. The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. *Id.* And that the average annual flow has not exceeded 7 cfs since 2002. *Id.* From that perspective, the additional 1.5 cfs is neither insignificant nor *de minimis*.

Memorandum Decision at 39–40 (emphasis added) (hereinafter “1.5 cfs “Paragraph”). The Memorandum Decision pre-judges the amount of water that is “meaningful” to Rangen—i.e., whether that amount is futile to call for—and effectively stands in the shoes of the juniors who are obligated to show by clear and convincing evidence that the call is futile and precludes the Director from evaluating the evidence himself on remand. Pocatello respectfully requests that the Court delete the 1.5 cfs Paragraph from its decision.

ARGUMENT

This Court’s jurisdiction in this matter is limited to record review of the Director’s findings of fact,¹ rather than *de novo* review²—the Court cannot re-try or re-determine the substance of the Director’s Final Order. “[J]udicial review of disputed issues of fact must be confined to the agency record for judicial review” I.C. § 67-5277. “The district court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011).

In rejecting the imposition of a trimline, the Court’s Memorandum Order notes that the Director did not make any findings regarding whether Rangen’s call is futile for any part of the Eastern Snake Plain Aquifer; nor did the Director make a finding regarding what amount of water is “meaningful” to Rangen. Given the lack of findings, the “proper procedure for filling the lacunae” is to remand the matter to the Director for evaluation. *Mercy Med. Ctr. v. Ada County, Bd. of County Comm’rs of Ada County*, 146 Idaho 226, 231, 192 P.3d 1050, 1055 (2008). “The resolution of factual issues cannot be made for the first time by the district court” *Id.* at 232, 192 P.3d at 1056 (“[W]hen a board fails to make a factual determination on a necessary issue, the district court must not make its own factual determination but must rather remand the case to the board to make that determination.”). *See also Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 77, 156 P.3d 573, 578 (2007) (“[W]e cannot review the findings for these errors because the City’s revised findings of fact do not actually consist of

¹ “A finding of fact is a determination of a fact by the court [or agency], which fact is averred by one party and denied by the other and this determination must be founded on the evidence in the case.” *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 77, 156 P.3d 573, 578 (2007) (internal quotation marks and citation omitted). At trial, the issue of futile call was disputed. R. Vol. 19, p. 4089; R. Vol. 18, p. 3807.

² “This Court has stated that on an appeal from an administrative agency ‘a trial de novo is not a possible course of action.’” *Clow v. Bd. of County Comm’rs of Payette County*, 105 Idaho 714, 716, 672 P.2d 1044, 1046 (1983) (quoting *Hill v. Bd. of County Comm’rs*, 101 Idaho 850, 852, 623 P.2d 462, 464 (1981)).

factual findings made by the City. Therefore, we remand to the City to make proper factual findings.”).

On remand the Director should be instructed to make findings of fact regarding futile call under CMR 10.08, taking additional evidence as necessary. The futile call doctrine involves complicated questions of fact, *State ex rel. Cary v. Cochran*, 138 Neb. 163, 292 N.W. 239, 245 (1940) (“Whether a definite quantity of water passing a given point on the stream would, if not diverted or interrupted in its course, reach the [senior] in a usable quantity creates a very complicated question of fact.”). In the context of conjunctive management, these complicated questions of fact are defined by the elements of Conjunctive Management Rule 10.08, and the Director is charged with determining whether Rangen’s delivery call “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.” IDAPA 37.03.11.010.08. Further, the Director must examine the point at which curtailment will produce sufficient water such that the senior user could achieve *additional* beneficial use for its decreed purpose. *Albion-Idaho Land Co. v. Naf Irrigation Co.*, 97 F.2d 439, 445 (10th Cir. 1938). Such a determination is fact specific and dependent on the senior’s beneficial use. *Id.* (finding that curtailment must provide not only more water to a senior, but enough to afford the senior a “practical head for irrigation”).

The 1.5 cfs Paragraph is dicta, that is not necessary for the Court’s conclusion in Section IV.F that the Director erred in applying the trim line. The Court reversed the Director’s decision to impose a trim line based on unquantified uncertainty associated with the Department’s model, rejecting the idea that the Director could impose a trimline based “heavily on a policy determination.” Memorandum Decision at 38. In the context of the Court’s Memorandum

Decision, whether or not 1.5 cfs is a “meaningful” amount of water to Rangen is unnecessary to its findings regarding the trimline.

CONCLUSION

Only the fact finder—not this Court—is in a position to determine whether 1.5 cfs of water, or some other amount, is a “meaningful” amount of water for Rangen to achieve additional beneficial use. The 1.5 cfs Paragraph makes a new finding of fact about the “meaningful” nature of 1.5 cfs in the context of Rangen’s operations, and amounts to a de novo decision by this Court that is outside of the Court’s jurisdiction. Given the Director made no findings related to futile call, Pocatello requests that the Court revise its Memorandum Decision to delete the 1.5 cfs Paragraph quoted *supra*, and remand this matter to the Department pursuant to I.C. § 67-5279(3) for further proceedings regarding futile call.

Respectfully submitted, this 21st day of November, 2014.

CITY OF POCATELLO ATTORNEY’S OFFICE

Attorneys for the City of Pocatello

By  _____
A. Dean Tranmer

WHITE & JANKOWSKI, LLP

Attorneys for the City of Pocatello

By  _____
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Brief in Support of Its Petition for Rehearing in SRBA Case No. CV-2014-1338 (Consolidated Gooding County Case No. CV-2014-179)** upon the following by the method indicated:



Sarah Klahn, White & Jankowski, LLP

SRBA District Court 253 – 3 rd Ave North PO Box 2707 Twin Falls ID 83303-2707	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail (Phone 208-736-3011) <input checked="" type="checkbox"/> Facsimile 208-736-2121 <input type="checkbox"/> Email
J. Justin May May Browning 1419 W Washington Boise ID 83702 jmay@maybrowning.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-342-7278 <input checked="" type="checkbox"/> Email
Robyn Brody Brody Law Office PO Box 554 Rupert ID 83350 robynbrody@hotmail.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-434-2780 <input checked="" type="checkbox"/> Email
Fritz Haemmerle Haemmerle & Haemmerle PO Box 1800 Hailey ID 83333 fxh@haemlaw.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-578-0564 <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge Racine Olson Nye Budge & Bailey 201 E Center St / PO Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-232-6109 <input checked="" type="checkbox"/> Email
Garrick L. Baxter Emmi L. Blades Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email

<p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-234-6297 <input checked="" type="checkbox"/> Email</p>
<p>Jerry Rigby Rigby Andrus & Rigby Law Attorneys at Law 25 North Second East Rexburg ID 83440 jrigby@rex-law.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-356-0768 <input checked="" type="checkbox"/> Email</p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com jff@idahowaters.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-735-2444 <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-878-2548 <input checked="" type="checkbox"/> Email</p>