

the Pocatello subsequently filed briefs in support of their *Petitions*. A hearing on the *Petitions* was held before this Court on December 2, 2014.

II. ANALYSIS

Under Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 42 the decision to grant or deny the *Petitions for Rehearing* at issue here is left to the discretion of this Court. In this case, the Court in an exercise of its discretion, and for the reasons set forth herein, denies the *Petitions*.

In their *Petitions*, both IGWA and Pocatello assert that the *Memorandum Decision* infers that the Director should apply the futile call doctrine on remand. In its *Petition* IGWA states:

While [the *Memorandum Decision*] does not explicitly instruct the Director to apply the futile call doctrine on remand, it infers as much stating: ‘It is important to note that the Director did not find, or rely upon, the doctrine of futile call in justifying the implementation of the trim line.’

IGWA and Pocatello request that the Court clarify whether or not the Court intended that the Director apply the futile call doctrine on remand. In its *Judgment*, the Court “affirmed in part and set aside and remanded for further proceedings as necessary in part” the Director’s *Curtailment Order*.

For clarification purposes, the Court did not order that the Director apply the futile call doctrine on remand. As an initial matter, to the extent futile call may have been raised in the administrative proceedings, 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.

CM Rule 10.08 addresses futile call as follows:

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.

CM Rule 20.04 also addresses futile call in relevant part, as follows:

The principle of futile call applies to the distribution of water under these rules. 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 the 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.

For reasons set forth in the *Memorandum Decision*, this Court rejected the Director's justifications for the implementation of the trim line. The Court ruled that the CM Rules do not provide the Director discretion to reduce the decreed quantity of a senior right based on the disparity between the number of acres curtailed and the accrued benefit to a senior surface right, provided the means of diversion is reasonable as per the *Schodde* line of cases, and the water received is put to beneficial use. However, in rejecting the Director's justifications, 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.

In its *Petition*, IGWA argues that this Court failed to address the argument that the *Curtailment Order* "violates CM Rule 20.03 by allowing Rangen to control hundreds of thousands of acre feet of water in the ESPA without putting it to beneficial use." IGWA asserts that it desired a ruling "as to how much water Rangen can command without putting it to beneficial use." This Court finds that the issue was addressed in Section IV.f of its decision. Further, that IGWA's premise that Rangen is not putting to beneficial use the water it receives as a result of its call is flawed, and contrary to the record. This Court affirmed the finding that Rangen is putting the water it receives to beneficial use, and is doing so efficiently, without waste and in a manner consistent with the goal of reasonable use. *Memo Decision*, pp.26-27. If IGWA is asserting that the Director cannot curtail in the cumulative more water than is received


by Rangen as a result of that curtailment, such an argument attacks the very concept of conjunctive management, and was rejected under the circumstances here. As this Court found, “the very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefit to a senior surface right.” *Id.* at 37. However, the Court further found that the CM Rules do not provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled based on such a disparity, provided the means of diversion is reasonable and the water received is put to beneficial use. *Id.* at 33 & 37. The Court affirmed the Director’s findings that Rangen is putting the water it receives to beneficial use and without waste, and that its method of diversion is reasonable. *Id.* at 26-27. As a result, the Court ultimately held that “the Director’s reliance on CM Rule 20.03 and Article XV, § 7, as partial support for the use of a trim line is in error.” *Id.* at 37. Following review of IGWA’s *Petition*, the Court does not find reason or cause to revisit that issue on rehearing.

In its *Petition*, Pocatello asks this Court to remove as dicta a portion of its trim line analysis concerning the amount of water Rangen would receive if junior rights east of the Great Rift are curtailed. Pocatello first errs in assuming 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. Pocatello next errs in asserting that the analysis is dicta. To the contrary, the analysis responds directly to issues raised by IGWA in its opening brief. Among others, one of the issues raised by IGWA in relation to the trim line was whether “curtailing junior users from which less than one percent of the curtailed water will ever reach Rangen” is a “reasonable use of the resource.” *IGWA Opening Br.*, pp.57-59. IGWA’s argument in this respect pertained to its larger arguments under CM Rule 20.03, governing “reasonable use of surface and ground water.” While IGWA’s argument focused only on the effects of curtailment on junior users’ individually, this Court responded, in small part, by also reviewing the cumulative effects on the senior. The Court found that while the amount of water from each individual junior user that accrues to the senior is small, the cumulative effect to senior given the facts of this case is meaningful. The Court’s analysis was based only on findings of the Director and evidence in the record. The Court finds that the issue was placed before the Court and argued by the parties in this judicial review proceeding. Therefore, Pocatello’s *Petition for Rehearing* is denied.

III.
ORDER

Therefore, IT IS ORDERED that the *Petitions for Rehearing* filed in the above-captioned matter **are hereby denied**.

Dated December 5, 2014


ERIC I. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING PETITIONS FOR REHEARING was mailed on December 05, 2014, with sufficient first-class postage to the following:

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