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

RANGEN, INC.

Petitioner,

vs.

GARY R. SPACKMAN, in his official  
capacity as Director of the Idaho Department  
of Water Resources, and THE IDAHO  
DEPARTMENT OF WATER RESOURCES

Respondents,

and

THE IDAHO GROUND WATER  
APPROPRIATORS, INC.

Intervenor.

**Case No. CV-2014-272**

**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

COME NOW, Respondents Gary R. Spackman, in his official capacity as Director (“Director”) of the Idaho Department of Water Resources (“Department”), and the Department, an executive agency of the State of Idaho, by and through their attorneys of record, and respectfully submit the following memorandum in support of their motion to dismiss the August 5, 2014, *Amended Complaint for Declaratory Judgment Regarding Constitutionality of Conjunctive Management Rules and Petition for Writ of Mandate* (“Complaint”) filed by Rangen, Inc. (“Rangen”). As set forth below, each cause of action in the Complaint should be dismissed.

## I.

### **SUMMARY OF DEFENSES PRESENTED BY THIS MOTION**

Respondents move for dismissal of the Complaint on the grounds that: (1) Rangen is not entitled to issuance of a writ of mandate because the Director has performed his lawful duties under the provisions of chapter 6, title 42, Idaho Code, to administer water and Rangen has a plain, speedy, and adequate remedy in the ordinary course of law to challenge those actions; (2) Rangen’s request for declaratory judgment should not be heard by this Court because constitutional challenges to the Conjunctive Management Rules (“CM Rules”)<sup>1</sup> presented by Rangen have either already been decided or should be decided by appeals currently pending before this Court; and (3) any challenge related to Rangen’s June 27, 2014, delivery call must be dismissed for failure to exhaust administrative remedies.

## II.

### **STANDARD OF REVIEW**

Where a motion to dismiss for failure to state a claim upon which relief can be granted is

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<sup>1</sup> The term “Conjunctive Management Rules” or “CM Rules” refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

supported by information outside of the pleadings, the motion is treated as a motion for summary judgment. I.R.C.P. 12(b); *see also Allen v. State ex rel. Dept. of Parks and Recreation*, 136 Idaho 487, 488, 36 P.3d 1275, 1276 (2001). The standard of review on appeal from an order granting summary judgment is the same standard that is used by the district court in ruling on the summary judgment motion. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c).

### III.

#### STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

On December 13, 2011, Rangen filed a *Petition for Delivery Call* (“Petition”) with the Department alleging it is not receiving all of the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694, and is being materially injured by junior-priority ground water pumping in the areas encompassed by Enhanced Snake Plain Aquifer Model (“ESPAM”) version 2.0.<sup>2</sup> *Petition* at 3-4.<sup>3</sup> The Petition requested the Director administer and distribute water in the areas encompassed by ESPAM 2.0 in accordance with the prior appropriation doctrine and curtail junior-priority ground water pumping as necessary to deliver Rangen’s water. *Id.* at 7.

The hearing on Rangen’s delivery call commenced on May 1, 2013, and concluded on May 16, 2013. On January 29, 2014, the Director issued the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*

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<sup>2</sup> ESPAM 2.0 was updated after it was issued. The latest version is referred to as ESPAM 2.1.

<sup>3</sup> Rangen’s Petition is attached to its Complaint as Exhibit 4.

("Curtailment Order").<sup>4</sup> The Curtailment Order concluded that junior-priority ground water users are causing material injury to Rangen and ordered curtailment of ground water rights junior to July 13, 1962. The Curtailment Order also recognized holders of junior-priority ground water rights could avoid curtailment if they participate in a mitigation plan.

On February 11, 2014, IGWA filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("First Mitigation Plan") to avoid curtailment imposed by the Curtailment Order.

On February 12, 2014, IGWA filed *IGWA's Petition to Stay Curtailment, and Request for Expedited Decision*. On February 21, 2014, the Director issued an *Order Granting IGWA's Petition to Stay Curtailment* ("Stay Order") which stayed enforcement of the Curtailment Order until a decision was issued on the First Mitigation Plan.<sup>5</sup>

During the pendency of the First Mitigation Plan proceeding, on March 10, 2014, IGWA filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("Second Mitigation Plan").

On March 17-19, 2014, the Director conducted a hearing for the First Mitigation Plan. On April 11, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("First Mitigation Plan Order").<sup>6</sup>

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<sup>4</sup> The Curtailment Order is attached to Rangen's Complaint as Exhibit 5.

<sup>5</sup> The Stay Order is attached to Rangen's Complaint as Exhibit 6.

<sup>6</sup> The First Mitigation Plan Order is attached to Rangen's Complaint as Exhibit 7.

On March 24, 2014, Rangen filed a petition for judicial review of the Curtailment Order (“First Petition for Judicial Review”).<sup>7</sup> On April 17, 2014, IGWA filed *IGWA’s Second Petition to Stay Curtailment, and Request for Expedited Decision* (“Second Petition”). The Second Petition asked the Director to “stay implementation of the [Curtailment Order]. . . until the judiciary completes its review of the Curtailment Order in *IGWA v. IDWR*, Gooding County Case No. CV-2014-179, and *Rangen v. IDWR*, Twin Falls County Case No. CV-2014-1338.” *Second Petition* at 1.<sup>8</sup>

On April 28, 2014, the Director issued an *Order Granting IGWA’s Second Petition to Stay Curtailment* (“Second Stay Order”) indicating the Director would revisit the stay at the time a decision on IGWA's Second Mitigation Plan was issued.<sup>9</sup>

Motions for Reconsideration were filed regarding the First Mitigation Plan Order. On May 16, 2014, the Director issued his *Final Order on Reconsideration* in Case Nos. CM-MP-2014-001 and CM-DC-2011-004 (“Final Order on Reconsideration”).<sup>10</sup> The Director issued simultaneously therewith an *Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (“Amended First Mitigation Plan Order”).<sup>11</sup>

On June 4-5, 2014, the Director conducted a hearing on the Second Mitigation Plan.

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<sup>7</sup> This petition for judicial review is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 1.

<sup>8</sup> This Court issued its *Memorandum Decision and Order on Petitions for Judicial Review and Judgment* on October 24, 2014. *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-1338. The Memorandum Decision is not yet final.

<sup>9</sup> The Second Stay Order is attached to Rangen’s Complaint as Exhibit 8.

<sup>10</sup> This order is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 2.

<sup>11</sup> This order is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 3.

On June 13, 2014, Rangen filed a petition for judicial review of the Stay Order, First Mitigation Plan Order, Second Stay Order, Amended First Mitigation Plan Order, and Final Order on Reconsideration (“Second Petition for Judicial Review”).<sup>12</sup>

On June 20, 2014, the Director issued the *Order Approving IGWA’S Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* (“Second Mitigation Plan Order”).<sup>13</sup> The Director conditionally approved the Second Mitigation Plan. The Director ordered that, because mitigation would be provided to Rangen as required by the Curtailment Order up to January 19, 2015, the stay issued April 28, 2014 was lifted. *Id.* No motions for reconsideration were filed.

On June 27, 2014, Rangen filed with the Department *Rangen, Inc’s Petition for Delivery Call* alleging Rangen is not receiving all of the water it is entitled to pursuant to three other water rights, water right nos. 36-134B, 36-135A, and 36-15501, and is being materially injured by junior priority ground water pumping.<sup>14</sup> On July 22, 2014, a status conference was held on this petition for delivery call wherein a hearing date was agree upon for November 17-21, 2014.<sup>15</sup> The Director subsequently granted the parties’ request to vacate the hearing date and reschedule it to March 2-6, 2015.

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<sup>12</sup> This petition for judicial review is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 4.

<sup>13</sup> The Second Mitigation Plan Order is attached to Rangen’s Complaint as Exhibit 9.

<sup>14</sup> This delivery call is attached to Rangen’s Complaint as Exhibit 10.

<sup>15</sup> On October 21, 2014, Rangen filed a *Notice of Withdrawal of Rangen, Inc.’s Petition for Delivery Call as to Water Right Nos. 36-134B and 36-135A*.

On July 17, 2014, Rangen filed a petition for judicial review of the Second Mitigation Plan Order (“Third Petition for Judicial Review”).<sup>16</sup>

On August 5, 2014, Rangen filed the Complaint at issue in this matter. The Complaint was served upon Respondents on August 13, 2014.<sup>17</sup> On September 2, 2014, Respondents filed an Answer in the present action asserting affirmative defenses. Respondents now file this memorandum in support of their motion to dismiss requesting the Court dismiss each cause of action in the Complaint.

#### IV.

#### ARGUMENT

##### **A. Writ of Mandate is not an Appropriate Remedy as the Director has Performed his Lawful Duties to Administer Water Rights and Rangen has an Adequate Remedy at Law Available**

Rangen argues that, even though the Director found in the Curtailment Order that Rangen is being materially injured, the Director is allowing out of priority diversions in violation of his duty to administer water rights pursuant to the prior appropriation doctrine and conjunctively manage water rights on the Eastern Snake Plain Aquifer (“ESPA”) in accordance with their relative priorities. *Complaint* at 11-12. Rangen asserts it “does not have a plain, speedy or adequate remedy” and “is entitled to the issuance of a writ of mandate pursuant to I.C. § 7-302 mandating Director Spackman and [the Department] to comply with the clear legal duty to

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<sup>16</sup> This petition for judicial review is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 5. On October 30, 2014, IGWA filed with the Department *IGWA’s Notice of Withdrawal of Second Mitigation Plan* and *IGWA’s Notice of Withdrawal of Transfer Application* with respect to water right no. 36-2055. Given these filings, the Department filed a motion to dismiss Rangen’s Third Petition for Judicial Review on October 31, 2014, asserting Rangen’s appeal should be dismissed as moot. While this Court entered an *Order Granting Motion to Dismiss* and *Judgment* to that effect on November 19, 2014, the order is not yet final.

<sup>17</sup> On August 27, 2014, IGWA filed with the Department *IGWA’s Fourth Mitigation Plan and Request for Expedited Hearing*. A hearing was held on the Fourth Mitigation Plan on October 8, 2014. The Director issued the *Order Approving IGWA’s Fourth Mitigation Plan* on October 29, 2014. This order is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 6.

distribute water under the prior appropriation doctrine and conjunctively manage water rights on the ESPA in accordance with their relative priorities.” *Id.* at 12.

1. The Director has performed his lawful duties to administer water rights.

Idaho Code § 7-302 provides that a district court may issue a writ to an inferior tribunal to compel the performance of a lawful duty. The party seeking a writ of mandate must establish a “clear legal right to the relief sought.” *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997). “A writ of mandamus will lie if the officer against whom the writ is brought has a clear legal duty to perform and if the desired act sought to be compelled is ministerial or executive in nature, and does not require the exercise of discretion.” *Cowles Pub. Co. v. Magistrate Court*, 118 Idaho 753, 760, 800 P.2d 640, 647 (1990). A writ of mandate may not issue if an administrative agency is complying with its statutory duty. *See Almgren v. Idaho Dep't of Lands*, 136 Idaho 180, 184, 30 P.3d 958, 962 (2001).

Idaho Code § 42-602 imposes a duty on the Director to distribute water in water districts in accordance with the prior appropriation doctrine as established by Idaho law. *See, e.g., Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (Idaho Code § 42-602 considered by the Court in *Musser* was amended in 1994 to apply only to the distribution of water within water districts, 1994 Idaho Sess. Laws 1434). Respondents do not dispute that Idaho Code § 42-602, together with the CM Rules adopted pursuant to Idaho Code §§ 42-603 and 42-1805(8), impose a duty on the Director to distribute water in water districts in accordance with the prior appropriation doctrine as established by Idaho law. Unlike the situation before the Court in *Musser*, however, the state of Idaho now has administrative rules governing the conjunctive management of water which the Director applies whenever a delivery call is made



by a senior water right holder against junior ground water rights from areas having a common ground water supply in a water district. *See* IDAPA 37.03.11.040.

The Director has performed his duties to administer the water rights held by Rangen in this case in accordance with the CM Rules, which implement Idaho Code § 42-602. The Director has responded to the demand for water administration initiated by the December 13, 2011, Petition filed by Rangen by treating the demand as a delivery call and proceeding under CM Rules 40 and 42. After reviewing the appropriate information and applying the CM Rules, the Director issued the Curtailment Order. The Director also responded to proposed mitigation plans submitted by junior ground water users subject to curtailment in accordance with CM Rule 43. The Curtailment Order, Stay Order, First Mitigation Plan Order, Second Stay Order, Amended First Mitigation Plan Order, Final Order on Reconsideration, and Second Mitigation Plan Order, all of which are subject to current and pending petitions for judicial review filed by Rangen, describe in detail actions taken by the Director in order to distribute water under Idaho Code § 42-602 and comply with the CM Rules. Thus, the issue is not whether the Director has exercised his duty, but rather, whether the exercise of his duty is consistent with Idaho law. Review of the Director's actions must be pursued through an appeal under the Idaho Administrative Procedure Act ("IDAPA"), not through a writ of mandate.

2. Rangen has an adequate remedy at law available.

For a writ to issue under Idaho law, Rangen must establish it does not have available an alternative "plain, speedy and adequate remedy in the ordinary course of law." I.C. § 7-303. "Existence of an adequate remedy in the ordinary course of law, legal or equitable in nature, will prevent the issuance of a writ, and the party seeking the writ must prove no such remedy exists." *Musser*, 125 Idaho at 395, 871 P.2d at 812.

In this case, Rangen has a plain, speedy, and adequate remedy available in the ordinary course of law. The remedy available to Rangen is to seek judicial review of decisions made by the Director in the underlying proceedings as provided for by “IDAPA. I.C. §§ 67-5201, et seq.; *See also* I.C. § 42-1701A. Rangen has filed three petitions for judicial review and is taking advantage of rights afforded to aggrieved parties under IDAPA.

Although Rangen appears to assert its rights under IDAPA are not adequate because it must wait for final determinations of the courts through the appellate process, “[a] right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights.” *Smith v. Young*, 71 Idaho 31, 34, 225 P.2d 446, 468 (1950). “The adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. If such a rule were to obtain, the law of appeals might as well be abrogated at once.” *Rufener v. Shaud*, 98 Idaho 823, 825, 573 P.2d 142, 144 (1977).

Rangen has made no showing of exceptional circumstances or inadequacy of appeals to protect existing rights. Supplanting the judicial review process provided for in IDAPA by issuing a writ of mandate in this matter to overrule determinations by the Director would be improper. The issuance of writs does not replace the appeal process. *Smith*, 71 Idaho at 34, 225 P.2d at 468. Because Rangen has a plain, speedy, and adequate remedy available in the ordinary course of law, Rangen’s request for issuance of a writ of mandate should be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

**B. Declaratory Relief is Inappropriate Because the Constitutional Challenges Raised Have Either Already Been Decided or Should Be Decided by Appeals Currently Pending Before this Court**

The Declaratory Judgment Act gives district courts subject matter jurisdiction over claims for declaratory relief. E.g. *Idaho Mutual Benefit Association v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944); *Whitney v. Randall*, 58 Idaho 49, 70 P.2d 384 (1937). A declaratory judgment action is appropriate to declare “rights, status, and other legal relations, whether or not further relief is or could be claimed.” I.C. § 10-1201; *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006). Idaho Code § 67-5278(1) provides:

(1) The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

Rangen asserts it is entitled to “a Declaratory Judgment pursuant to Idaho Code § 67-5278 and § 10-1201, *et seq.*, regarding the validity and constitutionality of the [CM Rules].” *Complaint* at 1. Specifically, Rangen argues “[t]he application of the CM Rules to Rangen’s requests for delivery of water is contrary to law, unconstitutional and does impair, and threatens to interfere with or impair, Rangen’s legal rights and privileges.” *Id.* at 10. Rangen also challenges the Director’s application of the CM Rules in the delivery call proceeding. Rangen argues “[t]he procedure followed by the Director pursuant to the CM Rules results in unreasonable delay in the distribution of water to senior water rights, including Rangen’s water rights, and is contrary to Rangen’s rights, Idaho law, the prior appropriation doctrine, and Idaho Code § 42-602, *et seq.*” *Id.* Rangen further asserts “[t]he procedure followed by the Director pursuant to the CM rules does not properly allocate the burdens of proof and is contrary to Idaho law.” *Id.* Rangen also asserts the Director’s application of CM Rule 43 in the delivery call proceeding was contrary to “Rangen’s rights, Idaho law, the prior appropriation doctrine, and

Idaho Code § 42-602, *et seq.*” *Id.* at 11. Rangen argues the CM Rules as applied to Rangen “contravene Idaho Code § 42-603, which requires that the rules be in accordance with the priorities of the rights of the water users.” Finally, Rangen argues “CM Rule 40.01(a), which allows phasing in of mitigation over time, is contrary to the doctrine of prior appropriation.” *Id.* Rangen appears to present both facial and as-applied constitutional challenges to the CM Rules.

1. Rangen’s facial challenges to the CM Rules have already been decided.

To the extent Rangen presents a facial challenge to the CM Rules by asserting such rules do not provide for timely administration of water rights, the Idaho Supreme Court has already determined the CM Rules are not facially unconstitutional in this regard. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). Also, contrary to Rangen’s assertion that the CM Rules are contrary to the doctrine of prior appropriation, the Court in *AFRD#2* recognized:

CM Rule 20.02 provides that: “[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.” “Idaho law,” as defined by CM Rule 10.12, means “[T]he constitution, statutes, administrative rules and case law of Idaho.” Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules.

*Id.* at 873, 154 P.3d 444. Accordingly, to the extent Rangen asserts that the CM Rules are facially unconstitutional, that challenge should be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

2. Rangen’s as-applied challenges should be addressed by appeals pending before this Court.

With respect to an as-applied challenge to the CM Rules, Rangen must show that, as applied to Rangen, the CM Rules are unconstitutional. *See id.* at 870, 154 P.3d at 441. “[A]n as-applied constitutional challenge is based on the particular facts of a defendant’s case and it is often difficult to ascertain what those facts are without the benefit of a trial.” *State v.*

*Manzanares*, 152 Idaho 410, 427, 272 P.3d 382, 399 (2012) (quoting *State v. Cook*, 146 Idaho 261, 262, 192 P.3d 1085, 1086 (Ct. App. 2008)). In *Ennis v. Casey*, 72 Idaho 181, 185, 238 P.2d 435, 438 (1951), the Court stated:

While it has been held that a declaratory judgment proceedings may be maintained, although such proceedings involve the determination of a disputed question of fact, it cannot be used where the object of the proceedings is to try such fact as a determinative issue and a declaratory judgment should be refused where the questions presented should be the subject of judicial investigation in a regular action.

(citations omitted).

Idaho Rule of Civil Procedure 57 (“Rule 57”) and I.C. § 10-1201 provide that the existence of another adequate remedy does not preclude a judgment for declaratory relief “in cases where it is appropriate.” However, the Idaho Supreme Court held in *V-1 Oil Co. v. County of Bannock*, 97 Idaho 807, 808, 554 P.2d 1304, 1305 (1976), that the proper method of contesting an agency decision is by appeal, and that an order or judgment may not later be collaterally attacked by means of a declaratory judgment action. In *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 702, 652 P.2d 649, 650 (1982), the Court held that a declaratory judgment action is not the proper mechanism to collaterally challenge an agency action which ought to be challenged by appeal. Here, the actions Rangen complains about are directly tied to the Director’s decisions related to Rangen’s 2011 delivery call and are subject to redress by appeal. Because the proper method of contesting the Director’s decisions at issue in this case is by appeal, Rangen’s request for declaratory relief should be dismissed.

In addition, as described above, Rangen has filed three petitions for judicial review. In its Second Petition for Judicial Review, Rangen states the following as an issue presented for appeal:

Whether the Conjunctive Management Rules, as applied to this case, result in the Petitioner being deprived of its Constitutionally protected property rights and its right to

have its water rights timely administered in accordance with the prior appropriation doctrine.

*Second Petition for Judicial Review* at 5. In its Third Petition for Judicial Review, Rangen states the following are two issues presented for appeal:

r. Whether the [Second Mitigation Plan Order] and/or the Director's application of the Conjunctive Management Rules deprives Rangen of its Constitutionally-protected property rights and its right to have its water right administered and protected under the prior appropriation doctrine.

s. Whether the application of the CM Rules to Rangen's delivery call, including the subsequent mitigation plans submitted by IGWA, is contrary to law, unconstitutional, and impairs or threaten to interfere with Rangen's legal rights and privileges.

*Third Petition for Judicial Review* at 7. Thus, Rangen seeks to have determined on appeal questions it requests be decided here under the declaratory judgment statute. Because Rangen's petitions for judicial review are currently pending before this Court, Rangen's request for declaratory relief should be dismissed based upon Rule 12(b)(8) of the Idaho Rules of Civil Procedure.<sup>18</sup>

**C. Any Challenge Related to Rangen's Delivery Call Filed June 27, 2014, Must Be Dismissed for Failure to Exhaust Administrative Remedies**

In *White v. Bannock Cnty. Commissioners*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003), the Court explained, ". . . the doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered. If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted." (citations omitted).

Here, Rangen challenges the Director's response to the most recent delivery call filed by Rangen on June 27, 2014. Specifically, Rangen states: "The Director has scheduled a hearing for

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<sup>18</sup> Rule 12(b)(8) of the Idaho Rules of Civil Procedure provides a defense to a claim for relief when there exists "another action pending between the same parties for the same cause."

November 17-21, 2014. It appears that once again the Director is prepared to conduct a lengthy hearing regarding the minutia of Rangen's use of water prior to responding to its delivery call." *Complaint* at 10 ¶ 36.<sup>19</sup> As this demonstrates, Rangen's June 27, 2014, delivery call has not run the full gamut of administrative proceedings required before judicial relief may be considered. Any challenge presented by Rangen in this matter related to its June 27, 2014, delivery call must be dismissed for failure to exhaust administrative remedies.<sup>20</sup>

**D. Rangen's Request for Attorney Fees and Costs Should be Denied**

Rangen requests an order awarding reasonable costs and attorney fees "in accordance with Idaho Code Sections 12-117 and 12-121." *Complaint* at 13. Because all causes of action set forth in Rangen's Complaint are without merit, there is no basis for an award in this matter. Accordingly, Rangen's request for an order awarding costs and attorney fees should be denied.

**V.**

**CONCLUSION**

Based on the foregoing, Rangen is not entitled to seek a writ of mandate because it has a plain, speedy, and adequate remedy in the ordinary course of law. Rangen is not entitled to seek a declaratory judgment because Rangen's constitutional challenges to the CM Rules have either already been decided or should be decided by appeals currently pending before this Court. Any challenge related to Rangen's June 27, 2014, delivery call must be dismissed for failure to exhaust administrative remedies. Because the Complaint should be dismissed, Rangen's request for costs and attorney fees should be denied.

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<sup>19</sup> The Director subsequently granted the joint request made by Rangen and IGWA to move the hearing date to March 2-6, 2015. The Director also issued an *Order Denying Motion for Summary Judgment; Order Regarding Presentation of Evidence*, wherein the Director limited the scope of evidence to be presented at the hearing considerably. This order is attached to the *Affidavit of Garrick L. Baxter in Support of Motion to Dismiss* as Exhibit 7.

DATED this 25<sup>th</sup> day of November 2014.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
CLIVE J. STRONG  
Chief, Natural Resources Division  
Deputy Attorney General



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Garrick J. Baxter  
Emmi L. Blades  
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<sup>20</sup> Failure to exhaust administrative remedies may be properly viewed as coming under 12(b)(6) for failure to state a claim. *See Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005).



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of November 2014, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the methods indicated below:

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