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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
OPENING BRIEF ON FORFEITURE
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 Opening Brief addressing forfeiture issues. This brief is filed pursuant to the *Order Setting Briefing Deadlines* ("Briefing Order"), dated February 3, 2015, in the above-captioned matter.

PROCEDURAL BACKGROUND

Through its October 24, 2014 *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision") and December 5, 2014 *Order Denying Rehearing*

("Rehearing Order"), the District Court reversed in part the Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Rangen Order").

The Court's decision discussed the futile call doctrine in a very limited fashion – solely in relation to the Great Rift trim line. For example, the Court recognized that the Director did not "find, or rely upon, the doctrine of futile call in justifying the implementation of the trim line." Memorandum Decision at 36. The Court further found that "the Director did not make the finding that curtailing water rights east of the Great Rift would result in a futile call." *Id.* at 37. Rather, as the Court held,

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. The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. And that the average annual flow has not exceeded 7 cfs. ***From that perspective, the additional 1.5 cfs is neither insignificant nor de minimis.***

Id. at 39-40 (emphasis added).

Junior groundwater users requested rehearing before the Court, asking the Court to order the Director to consider futile call on remand. Rehearing Order at 2. The junior groundwater users argued that the Court's recognition that the Director did not "find, or rely upon the doctrine of futile call" in establishing the trim line constituted an inference that the Director must apply futile call on remand. *Id.* The Court rejected this argument, advising the parties that "the Court did not order that the Director apply the futile call doctrine on remand." *Id.*

During the January 27, 2015 status conference on this matter, despite objections from the parties, the Director determined that he would consider futile call issues on remand. The subsequent Briefing Order identified three issues to be briefed by the parties:

1) The Director's authority to supplement the record in this matter with additional evidence on remand.

2) Identification of what additional evidence parties would seek to supplement the record with on remand.

3) The standard for reviewing a conjunctive management delivery call in light of the definition of the term "futile call" set forth in IDAPA 37.03.11.010.08 and discussion of the futile call doctrine in IDAPA 37.03.11.020.04.

Briefing Order at 1-2. This brief will discuss issues 1 and 3.

DISCUSSION

I. The Director has No Authority to Consider Additional Arguments and Evidence on Futile Call on Remand.

Nothing in the law or the District Court's orders warrants the consideration or admission of additional evidence regarding futile call on remand. To the contrary, the law on this matter is quite clear. The parties have already had their opportunity to present evidence and arguments with respect to a futile call defense to Rangen's delivery call. *See, e.g., IGWA's Post Hearing Brief at 33; City of Pocatello Closing Brief at 13-16; Freemont Madison Irrigation District's Proposed Findings of Fact and Post-Hearing Brief at 8; Rangen, Inc.'s Closing Reply Brief at 27-29* (each discussing the law and evidence regarding futile call in this matter); *see also Pocatello Closing Brief at 7* ("Curtailment for 20 years to produce 15 cfs after would not materially change Rangen's position, and that makes curtailment futile under Idaho Law").

After considering all of the arguments and evidence, the Director entered the final order, finding material injury and curtailing junior groundwater rights. The parties cannot now, at this point in

the proceedings, attempt to augment the record by submitting additional evidence on futile call. The alleged defense was argued and rejected by the Director.

Further, after all the evidence and arguments were presented and the Director had entered his final order, no party appealed the Director's consideration of the futile call doctrine to the District Court. *See Petition for Judicial Review*, Fifth Dist. Ct. (Gooding Cty. Case No CV-2014-0179) (March 28, 2014). In other words, all parties accepted the Director's treatment of the futile call doctrine as to the Rangen call. Since there was no challenge relating to the futile call doctrine, the Court's discussion of futile call was limited to merely recognizing that the Director did not use futile call as a justification for the Great Rift trim line. Memorandum Decision at 36. Although the junior groundwater users attempted to extrapolate from this language an implied order to consider futile call on remand, the Court refused the invitation and clarified that "the Court did not order that the Director apply the futile call doctrine on remand." Rehearing Order at 2.

Rather, on rehearing, the Court recognized that the futile call doctrine did not limit 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.***

Rehearing Order at 2 (emphasis added).

The junior groundwater users have already had their opportunity to present and argue a futile call defense to Rangen's delivery call. They chose not to challenge the Director's prior treatment of the futile call doctrine in these proceedings. Nothing in the Court's orders gives the

Director the authority to reopen the record and accept new testimony and evidence on the application of the futile call doctrine. To the contrary, the law expressly prohibits the Director and parties from reopening the issue of futile call in these proceedings. *See 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 Court’s *Memorandum Decision on Petition for Judicial Review*, issued in *A&B Irrigation District v. IDWR* (5th Jud. Dist., Minidoka Cty. Case No. CV-2011-512) (April 25, 2013), is instructive on this issue. In that case, A&B appealed the Director’s order on remand regarding the District’s groundwater delivery call. A&B asserted 7 issues on appeal. *Id.* at 6-7. The Department and junior groundwater users then urged the Court to dismiss A&B’s appeal because, in part, A&B had asserted issues that could have been raised in prior proceedings but were not. *Id.* at 10-11. The Court granted the Department’s and junior groundwater users’ request and dismissed the appeal, holding:

In this judicial review proceeding, A&B now raises the following issue for the first time, identified above as issue no. 4: “Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were ‘wasting’ water.” This is an issue that could have been raised in the first Petition/or Judicial Review in Minidoka County Case No. CV-2009-647 but was not. Since A&B failed to raise this issue in the prior proceeding it is deemed waived for the limited scope of the purpose of this appeal. *See e.g., Taylor v. Maile*, 146 Idaho 705, 709 (2009) (“The ‘law of the case’ doctrine ... prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.”).

Id.

The same logic applies here. The futile call defense was presented and argued in the proceedings below. The parties presented evidence on this issue for the Director to consider – including extensive briefing discussing their arguments. *See supra*. However, no party challenged the Director’s treatment of the futile call doctrine on appeal. The law does not now provide an opportunity to backfill the record with additional arguments and testimony. Accordingly, the Director should preclude any further evidence relating to a futile call defense in these proceedings.

II. The Conjunctive Management Rules Limit the Impact of the Futile Call Doctrine.

The Conjunctive Management Rules provide the following relative to the definition and application of futile call in the context of conjunctive management:

08. 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 10.08.¹ Further,

04. Delivery Calls. ... The principle of the 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 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.

CM Rule 20.04. The Idaho Supreme Court has determined the CM Rules are constitutional on their face. *See American Falls Reservoir Dist. #2 v. IDWR*, 143 Idaho 862 (2007).

¹ The Coalition reserves the right to challenge this rule and its application in the Coalition’s delivery call proceedings.

Although there is no known case law interpreting Rules 10.08 or 20.04 as to the futile call doctrine and conjunctive management, the futile call doctrine has been discussed by the Idaho Supreme Court:

As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion. We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators ***the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.*** Nevertheless, it was appellants' burden here to show that neither the surface nor underflow of Densmore or Birch Creeks, if uninterrupted, would reach the point of diversion of the respondents, as senior appropriators. This the district court found the appellants had failed to do and we hold that the evidence sustains such a finding.

Gilbert v. Smith, 97 Idaho 735, 739 (1976) (emphasis added); *see also Albion-Idaho Land Co. v. Naf. Irr. Co.*, 97 F.2d 439 (1938) (same); *Neil v. Hyde*, 32 Idaho 576 (1919) (same). The law on this point is well settled.

The conjunctive management rules provide three considerations for the futile call analysis. Rule 10.08, the definition of futile calls, asks whether (1) the senior water right can be “satisfied within a reasonable time of the call by immediately curtailing diversions;” and (2) whether curtailment would result in a “waste of the water resource.” In addition, Rule 20.04 provides that, even if a call would be considered futile, curtailment and mitigation may still be required.

The question of whether or not a water right can be satisfied within a reasonable time and will result in waste is different as between surface water to surface water administration. Whereas, a watermaster can see the impacts of surface water curtailment, the impacts of groundwater curtailment cannot be seen and, in some cases, can take several years to materialize.

The fact that the benefits may take years to materialize does not mean that a call is futile as recognized by the Idaho Supreme Court:

[C]urtailing ground water pumping does not provide the immediacy of delivery to the senior user that would be present in the curtailment of surface water. Surface water travels in a channel from one source that may be seen to a destination that can be seen. It can be routed to a particular point. Ground water does not fall into this model. Its route is determined by the contours of fractured basalt interspersed at times with soil of a different composition. Part of the water curtailed may travel one direction, part another. The effects of curtailment may be years to be realized. ***The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile.*** In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.

The hearing officer concluded that “the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. **A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks.**”

Clear Springs Food, Inc. v. Spackman, 150 Idaho 790, 811-12 (2011) (emphasis added).

The operative question, therefore, is whether the water will “reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use.” *Gilbert, supra*. If yes, then administration through curtailment or mitigation is required under the law. This is the case, even when “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.” CM Rule 20.04; *see also Id.* (“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 ...”).

In this case, a usable quantity of water would be delivered to Rangen through curtailment:

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. The lowest average flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. And that the average annual flow has not exceeded 7 cfs. ***From that perspective, the additional 1.5 cfs is neither insignificant nor de minimis.***

Memorandum Decision at 39-40 (emphasis added). According to the case law and Conjunctive Management Rules, therefore, curtailment or mitigation would be required to satisfy Rangen's senior priority water rights. In sum, the juniors did not prove futile call and there is no basis to find Rangen's call futile under the CM Rules or other Idaho law.

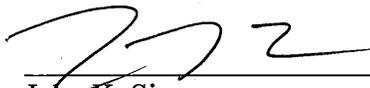
CONCLUSION

The Director does not have authority to take new evidence and testimony on the application of futile call doctrine in these proceedings. Furthermore, the operative question in considering whether a call is futile is whether a usable quantity of water will be delivered to the senior water user. If the answer to that question is yes, then the law demands administration through curtailment or mitigation.

Dated this 10th day of February, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2015, the above and foregoing document was served on the following as noted:

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