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DEPARTMENT OF
WATER RESOURCES

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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 & 36-07694
(RANGEN, INC.)

CM-DC-2011-004

**RANGEN, INC.'S RESPONSE
BRIEF REGARDING SCOPE OF
REMAND**

COMES NOW, Rangen, Inc. ("Rangen"), by and through its attorneys, and submits its Response Brief Regarding Scope of Remand in accordance with the Director's February 3, 2015 *Order Setting Briefing Deadlines*.

I. INTRODUCTION AND PROCEDURAL HISTORY

This matter is before the Director following a limited remand pursuant to Judge Wildman's October 24, 2014 *Memorandum Decision and Order on Petition for Judicial Review*

(“Memorandum Decision”) and December 5, 2014 *Order Denying Petitions for Rehearing* (“Order Denying Rehearing”). The *Memorandum Decision* was issued in response to petitions seeking judicial review of the Director’s January 29, 2014, *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”) and the March 4, 2014 *Order on Reconsideration* (“Order on Reconsideration”). *Memorandum Order*, p. 2. Rangen and IGWA filed petitions for judicial review of various aspects of the *Curtailment Order* and *Order on Reconsideration*. Rangen filed its *Petition for Judicial Review* on March 24, 2014. IGWA filed its *Petition for Judicial Review* on March 28, 2014. Neither Fremont-Madison nor the City of Pocatello filed a petition for judicial review of either the *Curtailment Order* or the *Order on Reconsideration*. Fremont-Madison intervened in both Rangen’s and IGWA’s *Petition for Judicial Review*. Pocatello intervened in only IGWA’s *Petition for Judicial Review*.

Judge Wildman affirmed the *Curtailment Order* and *Order on Reconsideration* with one exception. “The Director erred by applying a trim line to reduce the zone of curtailment.” *Memorandum Decision*, p. 28. Consequently, the application of a trim line was “set aside and remanded for further proceedings as necessary.” *Id.* at 40. IGWA and Pocatello filed *Petitions for Rehearing* on November 17, 2014. IGWA and Pocatello both seized upon language in the *Memorandum Decision* that they argued could be read to infer “that the Director should apply the futile call doctrine on remand.” *Order Denying Rehearing*, p. 2. Judge Wildman disagreed. “For clarification purposes, the Court did not order that the Director apply the futile call doctrine on remand.” *Id.* Further, “[t]he intent of the qualification was not to remand the case for the purposes of applying the futile call doctrine.” *Id.* at 3. IGWA also requested the Court to rule “as to how much water Rangen can command without putting it to beneficial use.” *Id.* Judge Wildman

responded “[i]f 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.” *Id.* at 3-4.

On January 27, 2015, the Director held a status conference to discuss further proceedings following remand. Following the status conference, the Director issued its February 3, 2015 *Order Setting Briefing Deadlines*. This order requests that the parties submit briefing on three issue:

- 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 futile call doctrine in IDAPA 37.03.11.020.04.

Order Setting Briefing Deadlines, p. 2. Initial briefs were submitted by IGWA, Fremont-Madison, Pocatello and the Surface Water Coalition. This brief is submitted pursuant to the *Order Setting Briefing Deadlines* and responds to the briefs filed by IGWA, Fremont-Madison and Pocatello.

II. ARGUMENT

A. The law of the case precludes the Director from taking additional evidence on issues that were previously decided or should have been raised on appeal.

The Director has no authority to either revisit issues that have previously been decided in this case or to consider issues raised for the first time following remand. Pursuant 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. *Capps v. Wood*, 117 Idaho 614, 618, 790 P.2d 395, 399 (Ct. App. 1990). The doctrine of law of the case is closely related to the doctrine of *res judicata* and claim preclusion. *Id.*

In *Capps*, the trial court excluded testimony of a witness intended to establish title to a parcel of property through adverse possession. Plaintiff's appealed and the Idaho Supreme Court held that the exclusion of the witness testimony was improper and remanded. Following remand, the plaintiff attempting to assert a claim for specific performance of an oral agreement to convey the property. Following remand, the new Trial Court determined that no new trial was necessary on the oral agreement issue because it was barred by the doctrine of res judicata because it had not been raised in the proceedings that resulted in the first appeal. During the first trial the plaintiffs had presented evidence regarding the oral agreement. The original trial court made findings of fact and conclusions of law that plaintiffs had not proven any right to the disputed parcel, but the Judge's decision did not explicitly refer to the alleged oral agreement. However, plaintiffs did not raise any issue regarding the alleged agreement in the first appeal. The Idaho Supreme Court disagreed that the issue was barred by res judicata because there had been no final judgment. However, the Court affirmed the decision not to allow relitigation of the alleged agreement on the related doctrine of "law of the case." *Capps*, 790 P.2d at 399. "We hold that the alleged settlement agreement is not a viable issue in the present appeal because it was embraced by the judgment from which the first appeal was taken yet was not raised in that appeal." *Id.*

In this case, Pocatello and Fremont Madison argue that the Director has the authority on remand to reconsider and hear new evidence regarding the Director's previous determinations that Rangen's call is not futile, that water that may accrue to water rights other than Rangen's is not wasted, and that ESPAM2.1 constitutes the best available science for determining the magnitude and timing of the impact of ground water pumping on springs such as the Curren Tunnel. Each of these issues was addressed by the parties during the hearing in this matter, ruled on by the Director, and could have been raised in a petition for judicial review. The application of ESPAM2.1 was

raised in IGWA's *Petition for Judicial Review* and affirmed. As such, the Director should not consider the issues on remand.

1. Futile Call was decided by the Director and affirmed by the District Court.

IGWA, Pocatello and Fremont Madison vigorously litigated the futile call defense during the May 2013 hearing in this matter. Each presented expert testimony and addressed the doctrine in their closing briefs. *See, IGWA's Post Hearing Brief* at 33; *City of Pocatello Closing Brief* at 7, 13-16; and *Fremont-Madison Irrigation District's Proposed Findings of Fact and Post-Hearing Brief* at 8. The Director rejected these arguments and ordered curtailment. *Curtailment Order*.

The Director started his analysis of the futile call doctrine by pointing out that former Director Dreher found a previous call made by Rangen to be futile:

In determining a previous Rangen delivery call to be a futile call using ESPAM 1.0, former Director Dreher determined that curtailment of water rights junior to July 13, 1962 would not result in a meaningful increase in the quantity of water discharging from springs in the vicinity of the Rangen Facility. *Second Amended Order*, p. 28 (May 19, 2005).

Curtailment Order, ¶ 77, p. 16. The Director recognized that Rangen's current call was a challenge to "the previous determination of a futile call" that was brought based upon adjustments and corrected calibration targets for the ESPAM model. *Curtailment Order*, ¶ 82, p. 17. Utilizing the improved model, Department Staff predicted a "total of 16.9 cfs of reach gains to the Rangen cell attributable to modeled curtailment of junior ground water diversions within the area of common ground water supply at steady state." *Curtailment Order*, ¶ 104, p. 24. Using the Department's 63% regression for the Curren Tunnel, this means that an additional 10.64 cfs would be available at the Curren Tunnel as a result of curtailment. The application of the Great Rift trim line resulted in a reduction of the predicted increase from 10.64 cfs to 9.1 cfs. *Curtailment Order*, ¶ 109, p. 28. Given that 9.1 cfs is clearly a meaningful increase in flow in the Curren Tunnel, the Director

ordered curtailment. *Curtailment Order*. As Judge Wildman noted the additional 1.5 cfs that would be realized from curtailment without the Great Rift trim line is also meaningful. *Memorandum Decision*, pp. 39-40.

IGWA filed a Motion for Reconsideration of the Curtailment Order. In the subsequent *Order on Reconsideration*, the Director stated:

IGWA also contrasts the futile call determination in the first Rangen delivery call in 2005 with the results of the most recent Rangen delivery call. IGWA *Petition* at 203. However, the trim line applied in the first Rangen delivery call also limited curtailment to areas where at least 10% of the curtailed use was predicted to benefit *a river reach* containing Curren Tunnel and numerous other springs. The percentage that would have benefitted *the calling party* also would have been significantly less than 10%. **While Director Dreher determined in the first Rangen delivery call in 2005 that the call was futile, the change in result in this proceeding is not due to changes in the approach used to define the trim line as implied by IGWA.** Model predictions of benefits to springs in the Billingsley Creek area changed significantly in the latest version of the model because important improvements to spring discharge calibration targets were made. For example, errors discovered in spring flow measurements used in the first version of the model were corrected in the new version of the model and additional, more detailed, spring flow data were available for calibration of the new version of the model. To imply as IGWA does that the application of the trim line is the basis for the change in result is simply incorrect.

Order on Reconsideration, p.7 (Italics in original. Bold added).

IGWA, Pocatello and Fremont Madison had ample opportunity to develop the evidence and present argument concerning the futile call doctrine. The Director rejected the Intervenor's position and found that Rangen's call was not futile. The District Court affirmed that determination and there is no basis on remand for re-presenting the issue.

2. Waste.

Pocatello also proposes to present evidence and argue once again that curtailment would constitute waste. Pocatello argues that:

Rule 10.08 provides another route to futile call: an evaluation of whether curtailment will result in waste of the resource. As described above, in the surface water context, the water master can shepherd curtailed junior surface water to

satisfy a calling senior surface water right and avoid the curtailed water being “picked off” by intervening ditches. Even in the context of conjunctive administration of ground water to surface water rights (such as the Surface Water Coalition call) the water master can shepherd reach gains accruing from curtailment to the appropriate senior. By contrast, the water master cannot physically shepherd the accruals of Pocatello’s well curtailment to Rangen. In the context of Rangen’s 2011 Delivery Call, Spronk Water Engineers, Inc. determined that in the event of curtailment of rights junior to 1962 of the entire ESPA to satisfy Rangen’s call, over 99% of the amounts of the water would accrue to other non-calling water rights, and the majority of the spring rights that would see additional water are junior to Rangen’s. Exhibit 3650, Figure 2-1, and Table 2-1. This type of evidence demonstrates the wasteful nature of curtailment to satisfy Rangen’s delivery call, in addition to the disparate quantities and timing involved.

City of Pocatello Brief In Response to the Director’s February 3, 2015 Order, p. 9-10. This precise argument was raised during the hearing on Rangen’s Call and in *IGWA’s Petition for Reconsideration*. The Director ruled:

IGWA’s identification of “waste” as an issue arising out of the Rangen curtailment order is incorrect. The fact that a large portion of the water curtailed will not reach Rangen does not mean it is being wasted. Water not reaching Rangen becomes available to other senior water users in the Thousand Springs area. The water also benefits other senior water users with pending delivery calls upstream from the Thousand Springs area (such as the Surface Water Coalition call) because the benefits of curtailment of ground water rights propagate upstream as well as downstream. The real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

Order on Reconsideration, p.8. To the extent the parties wished to challenge this ruling, they had the opportunity. Again, there is no basis for re-litigating the waste issue on remand.

3. ESPAM 2.1

Fremont-Madison also proposes to challenge once again the application of ESPAM2.1 to evaluate the impact of its members’ ground water pumping. This issue was extensively litigated during the hearing in this matter, and the Director’s finding of fact “that ESPAM2.1 constitutes the best science currently available for simulating the effect of ground water pumping from the ESPA on the spring flows located in the Rangen cell” was quoted in the *Memorandum Order* and

was not disturbed on appeal by Judge Wildman. *Memorandum Order*, p. 28. Reconsideration of this issue on remand would not be consistent with the *Memorandum Order*.

B. No further evidence is necessary to issue a curtailment order without a trimline.

There is no reason for further proceedings or new evidence on remand because the Director has already made all determinations and findings necessary for the issuance of a new curtailment order without a trimline. The Director determined in this proceeding that ESPAM2.1 constitutes the best available science for determining the magnitude and timing of the impact of ground water pumping on springs such as the Curren Tunnel.

The Director finds, based upon clear and convincing evidence, that ESPAM2.1 is the best technical scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell.

Curtailment Order, ¶ 96, p.22.

Department Staff have performed the calculations to determine the result of curtailing not only within the Great Rift trim line, but also within the model boundary as well as the area of common ground water supply.

103. Using ESPAM 2.1, Department staff simulated curtailment of ground water rights for irrigation within the model boundaries bearing priority dates later than July 13, 1962, the priority date of Rangen's water right no. 36-02551. The simulated increase in discharge to the Rangen model cell at steady state is 17.9 cfs. IDWR Staff Memorandum, Ex. 3203, p. 6.

104. Department staff eliminated points of diversion inside the model boundary but outside the boundary of common ground water supply as described in Rule 50 of the Department's Conjunctive Management Rules. After the removal of these points of diversion from the simulation, the model predicted a total of 16.9 cfs of reach gains to the Rangen cell attributable to modeled curtailment of junior ground water diversions within the area of common ground water supply at steady state.

Curtailment Order, ¶ 103, p. 23 and ¶ 104, p. 24.

None of the parties have proposed to present any "new" evidence. Fremont-Madison invites the presentation of new evidence:

The hearing in this matter was held May 1, 2013 – nearly two years ago. If department staff or the parties have evidence that is available now that was not available in 2013, the Director should consider it.

Fremont Madison Irrigation District's Brief on Remand, p. 3. But, Fremont-Madison also candidly admits that “[m]uch of the evidence provided by FMID and its expert, Bryce Contor is not “new” evidence – rather it is simply examples of the workings of ESPAM 2.1 which has already been admitted.” Similarly, Pocatello proposes only to submit “a revised version of Exhibit 3650, Figure 2-1 and Table 2-1.” As noted above, the parties simply wish to rehash arguments that have already been made and rejected.

C. Rangen’s call is not futile.

Pocatello addressed the definition of futile call in its closing brief as follows:

The CMR define a futile call as:

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.

IDAPA 3 7.03 .11.0 1 0.08. The Department is authorized to administer waters of public streams" in order to supply the prior rights of others." I.C. § 42-607 (emphasis added). The Idaho Supreme Court described the futile call doctrine as follows:

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.

Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (emphasis added). If curtailment would result in an amount of water reaching the appropriator less than a usable quantity that the appropriator can put to additional beneficial use, the call is futile. *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470,474 (1966) (If the water "would reach Spring Creek in usable quantities, plaintiffs are entitled to enjoin defendant's interference therewith." (emphasis added)).

Pocatello's Closing Brief, p. 13-14 (underline in original). As Pocatello argued in its closing brief in this matter, the focus of a futile call analysis is the quantity of water that would accrue to the senior.

In conjunctive management, the question is how much water in the aggregate is predicted to accrue from curtailment of connected sources. In its closing brief, Pocatello acknowledged that “Rangen would receive between 8 and 11 cfs of water from curtailment of the entire ESPA Common Ground Water area,” but argued that this quantity was not usable by Rangen *Id.* The Director disagreed with this argument and found that Rangen could beneficially use the 9.1 cfs that is predicted to accrue just from curtailment west of the Great Rift trim line. Judge Wildman also recognized that the aggregate quantity of water just from curtailment east of the Great Rift trim line is significant:

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 since 2001. *Id.* ***From that perspective the additional 1.5 cfs is neither insignificant nor de minimis.***

Memorandum Decision, p. 39-40 (emphasis added). Curtailment of out-of-priority ground water pumping for approximately 10.6 cfs of increase in the Curren Tunnel is not futile.

On remand, Pocatello attempts to shift the focus away from an examination of the aggregate impact of pumping to an individualized comparison between a particular curtailed water right and the magnitude and timing of the impact directly attributable to that particular curtailed right. Such an individualized comparison amongst water rights on a connected source is

inconsistent with conjunctive management. As Judge Wildman stated in response to IGWA's *Motion for Reconsideration of the Memorandum Order*:

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."

Order Denying Petitions for Rehearing, p. 4.

Pocatello states that "Rule 10.08 acknowledges that both disparity of quantity and disparity of time are necessary to find futile call in conjunctive administration." *Pocatello Brief on Remand*, p. 9. Pocatello cites no authority for this statement. In fact, Pocatello acknowledges that neither "disparity of amounts" nor "disparity based on timing" justify a futile call. *Pocatello Brief on Remand*, p. 7. Nothing in Rule 10.08 can be interpreted to allow consideration of the "disparity in amounts" between one individual curtailed water right and the amount of impact to a particular senior right directly attributable to that water right. As Judge Wildman recognized, "such an argument attacks the very concept of conjunctive management." The quantity and timing of the impact of out-of-priority pumping must be considered in the aggregate for the purpose of applying the futile call doctrine under the Conjunctive Management Rules.

Although not applicable in this case, even if the aggregate impact of out-of-priority pumping would justify application of the futile call doctrine, curtailment or mitigation may still be required under Rule 20.04 which provides:

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.

Conjunctive Management Rule 20.04, IDAPA 37.03.11.

The interpretation of “waste” that Pocatello suggests has been rejected by the Idaho Supreme Court, Judge Wildman, and the Director. In *Gilbert v. Smith* the Idaho Supreme Court stated:

As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such a 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.

Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). As noted above, Judge Wildman address this argument in response to IGWA’s *Motion for Reconsideration*:

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.”

Order Denying Petitions for Rehearing, p. 4. The Director also addressed the issue in response to a request for reconsideration by IGWA:

IGWA’s identification of “waste” as an issue arising out of the Rangen curtailment order is incorrect. The fact that a large portion of the water curtailed will not reach Rangen does not mean it is being wasted. Water not reaching Rangen becomes available to other senior water users in the Thousand Springs area. The water also benefits other senior water users with pending delivery calls upstream from the Thousand Springs area (such as the Surface Water Coalition call) because the benefits of curtailment of ground water rights propagate upstream as well as downstream. The real issue is to what extent the prior appropriation doctrine as established under Idaho law allows a senior surface water user to call upon an aquifer to satisfy a senior water right. The use of the Great Rift as justification for a trim line strikes an appropriate balance.

Order on Reconsideration, p.8. Rangen’s call is not futile simply because much of the impact from out-of-priority ground water pumping on the Curren Tunnel is indirect and other springs will

increase due to curtailment. This is the very nature of conjunctive management. The futile call standard has already been litigated and properly applied in this case.

III. CONCLUSION

No further evidence or hearings are necessary or warranted following remand. The Director has determined in this proceeding that ESPAM2.1 is the best technical scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell. Department Staff have performed the calculations to determine the result of curtailing not only within the Great Rift trim line, but also within the model boundary as well as the area of common ground water supply. *Curtailment Order, para. 103, p. 23, paras. 104, p. 24.* These findings are sufficient for the Director to issue a new curtailment order pursuant to the *Memorandum Order*.

DATED this 24th day of February, 2015.

MAY, BROWNING & MAY

By 
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 24th day of February, 2015 he caused a true and correct copy of the foregoing document to be served upon the following using the method indicated:

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