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DEPARTMENT OF  
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

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IN THE MATTER OF THE PETITION	)	Docket No. CM-DC-2011-004
DELIVERY CALL OF RANGEN,	)	
INC.'S WATER RIGHT NOS. 36-02551	)	<b>FREMONT MADISON IRRIGATION</b>
& 36-7694	)	<b>DISTRICT'S REPLY BRIEF ON REMAND</b>
	)	
	)	
	)	

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Comes now Fremont-Madison Irrigation District ("FMID"), by and through its counsel, Jerry R. Rigby, of Rigby, Andrus & Rigby Law, PLLC, and hereby submits its reply brief on remand consistent with the Director's Order Setting Briefing Deadlines issued February 3, 2015.

- 1. The law of the case has no application in this matter. Even if it did, it would not bar the director from considering new evidence.**

Rangen asserts that the Director may not consider new evidence or reconsider any previous decisions based on the doctrine of the law of the case. *Rangen, Inc. 's Resp. Br. Reg. Scope of Remand.* pp. 3-5. However, it provides no authority for the application of the doctrine to this administrative proceeding. The Director's discretion on remand is controlled by I.C. § 67-5279, and the district court's order on remand. Neither provides any support for Rangen's assertion that the Director is without discretion to determine how to proceed. Idaho Code § 67-

5279 states that the matter is to be “remanded for further proceedings as necessary.” The district court expressly left the decision of how to proceed to the discretion of the Director. “[T]he Court finds that what further proceedings are necessary on remand in this case can be determined by the Director on remand.” *Ord. Denying Pet. For Rehearing*, 3. There is no reason to apply the doctrine of law of the case to this matter.

Even if the doctrine of the law of the case applied, the Director would have the discretion to determine how, or if, it applied. The doctrine of the law of the case is premised primarily on public policy grounds – it prevents relitigation of identical issues. *See* 47 Am. Jur. 2d Judgments § 469, Law of the Case. Those public policy grounds do not exist in this matter in the same way they do in most litigation handled by the courts. Although there is a need for a timely resolution of this matter, the termination of this “case” will not resolve this matter. Even if Rangen is successful in their petition as it relates to Fremont Madison, no benefit will accrue to Rangen for many decades. If Rangen is successful this call will be in effect for many years. Surely Rangen does not suggest that the entire life of the call will be governed by the hearings held in May of 2013. Public policy dictates that the doctrine of the law of the case has no applicability in this matter.

If the Director does determine to apply the doctrine in this proceeding, the application of the law of the case is “purely discretionary” to the lower court. *State v. Thorngren*, 149 Idaho 729, 736 n.1, 240 P.3d 575, 582 n.1 (2010). The court may, in its discretion choose not to apply it. *Id.*, 149 Idaho at 736, 240 P.3d at (quoting the Georgia Supreme Court as follows: “[T]he ‘law of the case’ rule is subject to the power of the court, and the court may, in a proper case disregard or correct its former decision where the cause remains pending before it.” *Ritter v. State*, 272 Ga.

551, 553, 532 S.E.2d 692, 695 (2000) (quoting *Bradley v. Tattnell Bank*, 170 Ga.App. 821(1), 318 S.E.2d 657 (1984)). It is not a limit of a court's power. *State v. Hawkins*, 155 Idaho 69, 72, 305 P.3d 513, 516 (2013); *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318, 333 (1983). Even if the Director determines to apply the doctrine of the law of the case, the Director would have the discretion to determine precisely how it applies.

**2. Rangen's attempt to rely on the doctrine of the law of the case ignores the practical realities of the matter.**

Rangen's attempt to prevent the Director from considering new evidence or argument ignores the reality that the parties, and the Director, have been involved in other contested cases, with nearly identical parties and issues, subsequent to the hearings in May of 2013. In those cases the parties have presented, and the director has heard, new evidence and argument. All parties will be better off if the record in this case is clear, the evidence upon which the Director's relies is the best available, and the legal arguments take into account the most recent decisions by the Idaho Supreme Court and Judge Wildman.

**3. Fremont Madison is not proposing the matter be retried or challenging the Director's decision to apply ESPAM 2.1. Rather, Fremont Madison seeks to introduce evidence, not available in 2013, for limited purposes, and to make argument in light of Judge Wildman's decision.**

Rangen seems to imply that Fremont Madison desires to retry the entire matter, or that it intends to challenge the Director's decision to apply ESPAM 2.1 to this proceedings. That is not the case. Rather, Fremont Madison seeks to introduce evidence, developed using ESPAM 2.1, to address the proper location of a trim line or, alternatively, the futility of Rangen's call as it relates to the Fremont Madison service area. Attached hereto as Attachment A and B are maps demonstrative of the type of evidence Fremont Madison seeks to introduce. They were produced

using ESPAM 2.1 and show the predicted impact curtailment in areas serviced by Fremont Madison would have on the Rangen water rights. It shows that, even according to ESPAM 2.1, for the area serviced by Fremont Madison, less than .1% of the water curtailed would ever benefit Rangen. In addition, Fremont Madison seeks to have its expert, Bryce Contor, testify regarding the need for a trim line based on uncertainty in areas where the predicted response is exceptionally low. The Director may allow such testimony and may limit the scope if he believes it duplicative or otherwise unnecessary in light of the prior hearings.

4. **The Director can and should reconsider his decision regarding trim line and futile call. Most aspects of the Director's decision, as set out in the Final Order, were impacted by the existence of the Great Rift trim line. It is appropriate for the Director to reconsider all aspects of his decision in light of the Judge Wildman's rejection of the Great Rift trim line.**

Rangen asserts that no new proceedings are necessary and the Director should simply issue a curtailment order without a trim line. *Rangen, Inc. 's Resp. Br. Reg. Scope of Remand.* p. 8. However, it is clear from the Director's Final Order that he believed a trim line was appropriate. The fact that Judge Wildman rejected the Great Rift trim line as set out in the Final Order does not preclude the Director from concluding that a trim line is appropriate and so ruling on remand.

The Director could not have been more clear regarding the propriety of a trim line. "Uncertainty in the model justifies use of a trim line." *Final Ord.*, Finding of Fact No. 55. The Rather than simply ignore the need for a trim line, the Director should consider the appropriate trim line in light of Judge Wildman's decision and allow the parties to present evidence and argument to facilitate that decision. The Director did not address the futile call doctrine in his Final Order. However, in light of Judge Wildman's decision he should do so now and should

allow the parties to present evidence and argument on point.

### CONCLUSION

The Director should allow the parties to present evidence and argument regarding trim line and futility in light of the district court's decision. Alternatively, the Director should determine, based on the current record, that Rangen's call is futile as against FMID.

DATED this 27<sup>th</sup> day of February, 2015.



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Hyrum Erickson

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OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 27<sup>th</sup> day of February, 2015.

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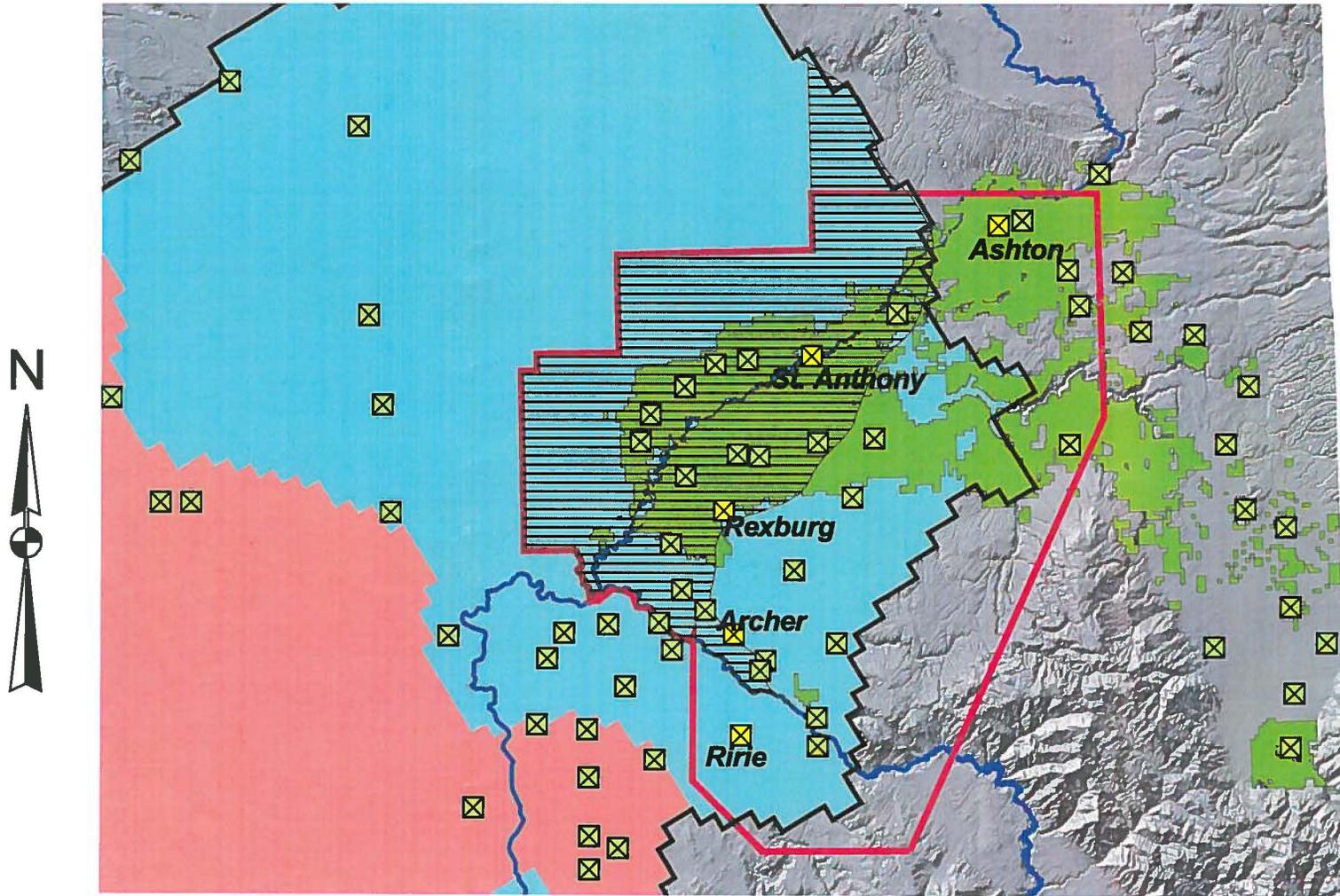
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## Upper Valley Pumpers Geographic Extent

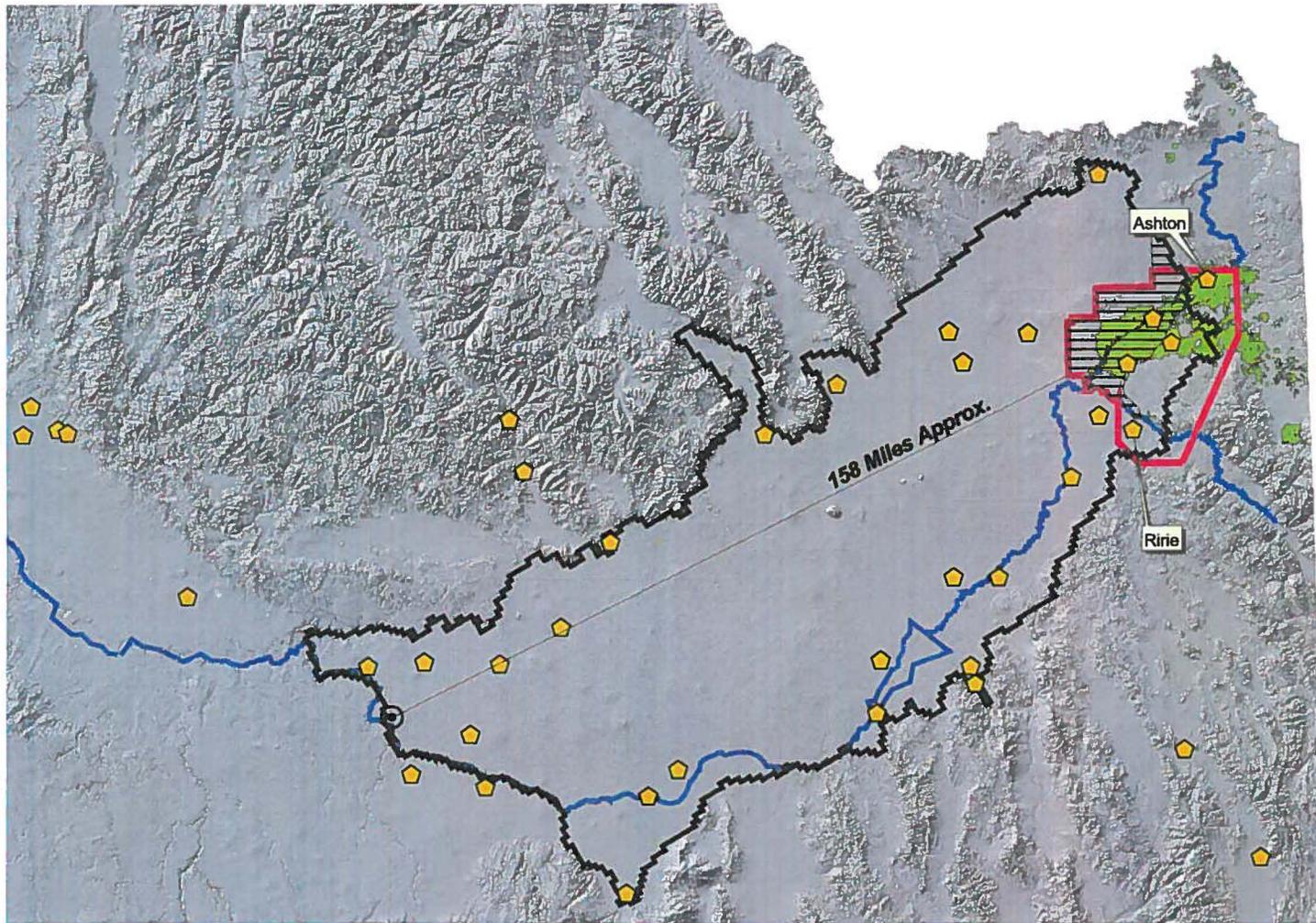


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- ⊙ Current Tunnel
- ▭ Model Boundary
- ▨ Water District 100

- ▭ Upper Valley Pumpers
- ▭ Fremont Madison Irrigation District
- ▬ Snake River

- Thousand Springs - Malad Response
- 0-0.1%
  - 0.1% - 1%
  - 1% - 5%
  - 5% - 10%
  - 10% - 25%



## Upper Valley Pumpers Geographic Extent



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- Current Tunnel
- Model Boundary
- Water District 100
- Towns

- Upper Valley Pumpers
- Fremont Madison Irrigation District
- Snake River