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**DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
GOODING COUNTY**

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WA-
TER RESOURCES,

Respondent,

vs.

RANGEN, INC., ET AL.

Intervenors.

Case No. CV-2014-179

(Consolidated with Twin Falls
County Case No. CV-2014-1338)

**IGWA’s Brief in Support of
Petition for Rehearing and
Clarification**

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (RANGEN, INC.), IDWR DOCKET NO. CM-DC-2011-004

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this brief, pursuant to Idaho Rules of Civil Procedure 84(t)(2)(b) and 84(r) and Idaho Appellate Rule 42(b), in support of *IGWA’s Petition for Reconsideration and Clarification* filed November 7,

2014, concerning the Court's *Memorandum Decision and Order on Petitions for Judicial Review* ("Memorandum Decision") issued October 24, 2014.

IGWA respectfully requests clarification of the Court's ruling concerning the futile call doctrine, and rehearing of IGWA's argument concerning the reasonableness of Rangen's means of appropriation.

ANALYSIS

1. Futile call.

The *Memorandum Decision* sets aside the Great Rift trim line and remands the issue "for further proceedings as necessary."¹ While it 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."² IGWA respectfully asks the Court to confirm the Director should apply the doctrine on remand.

As the Court knows, the futile call doctrine is a time-honored component of Idaho water law. CM Rule 20.04 affirms the "principle of the futile call applies to the distribution of water under these rules."³ And CM Rule 10.08 defines a futile call as a delivery call "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*."⁴

It is undisputed, and the record shows, that groundwater wells far away from Rangen have an infinitesimally small impact on water flows from the Curren Tunnel, and the effects of curtailing these wells will not be realized

¹ Memorandum Decision p. 40.

² Memorandum Decision p. 36.

³ IDAPA 37.03.11.040.

⁴ IDAPA 37.03.11.010.08 (emphases added).

for decades.⁵ Yet, despite this evidence, and IGWA's argument that curtailment violates the futile call doctrine,⁶ the Director did not apply the doctrine. While the *Curtailment Order* mentions the futile call doctrine, it does not cite CM Rules 20.04 or 10.08, nor does it decide the point at which the anticipated benefit of curtailment will not accrue within a reasonable time, or is so small as to result in waste of the water resource.

Consequently, *IGWA's Opening Brief* contends the Great Rift trim line violates the futile call doctrine.⁷ While the *Memorandum Decision* acknowledges the Director did not apply the doctrine, IGWA is concerned the lack of an instruction that the Director should consider the doctrine on remand will result in unnecessary litigation over the issue. Therefore, IGWA respectfully asks the Court to confirm the Director should apply the doctrine on remand.

2. CM Rule 20.03.

IGWA's Opening Brief contends 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.⁸ The *Memorandum Decision* does not address this argument.

The *Memorandum Decision* acknowledges that the Idaho Supreme Court upheld the part of CM Rule 20.03 that states, “[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface and ground water source to support his appropriation contrary to the public policy of reasonable use of water . . . ,”⁹ but the *Memorandum Decision* concludes

⁵ See IGWA's Opening Brief pp. 9-10.

⁶ IGWA's Post-Hearing Brief pp. 22, 33 (R. Vol. 19, pp. 3835, 3846).

⁷ IGWA's Opening Brief pp. 56.

⁸ IGWA's Opening Brief pp. 53-56.

⁹ Memorandum Decision p. 33 (citing *Clear Springs Foods v. Spackman*, 150 Idaho 790, 809 (2011)).

the rule does not apply because the Director found Rangen's means of diversion to be reasonable.¹⁰

The problem is the Director did not consider CM Rule 20.03 in evaluating the reasonableness of Rangen's means of appropriation.^{11, 12} The Director considered only whether Rangen is efficiently using the water it diverts from the Curren Tunnel.¹³ While this certainly bears on the reasonableness of its appropriation, it does not end the inquiry. The Director must also consider, under CM Rule 20.03, whether Rangen is commanding large amounts of water without diverting it at all. The Director's failure to consider this facet of Rangen's appropriation is at the heart of IGWA's appeal.¹⁴

The *Memorandum Decision* addresses the reasonableness of Rangen's means of appropriation in two parts. On page 26, it upholds the Director's finding that Rangen was efficiently using the water it diverts, and, therefore, should not be required to recirculate water. Then, on page 37, it acknowledges IGWA's argument that the *Curtailment Order* violates CM Rule 20.03 by allowing Rangen to command hundreds of thousands of acre-feet of water without diverting it at all, but does not address the argument, pointing to its prior ruling on page 26. The result is there is no ruling from the Director or this Court as to whether, or to what extent, Rangen's means of appropriation is unreasonable as a result of Rangen commanding huge amounts of water without diverting it at all.

¹⁰ Memorandum Decision p. 37.

¹¹ See IGWA's Opening Brief pp. 53-36.

¹² Some cases refer to the reasonableness of a means of appropriation, while others refer to the reasonableness of the means of diversion. The distinction, if any, is debatable. In the interest of brevity, this brief refers to the unreasonableness of Rangen's means of appropriation, the intent being that the arguments encompass the unreasonableness of its means of diversion.

¹³ Curtailment Order p. 13 ¶¶ 63-64 (R. Vol. 21 p. 4171).

¹⁴ See IGWA's Opening Brief pp. 55 (arguing the Director erred by not deciding argued the Director erred by not deciding "how much waste or hoarding of water is too much—i.e., at what point does the exercise of priority unreasonably impede the policy of Idaho law to secure the maximum beneficial use, and least wasteful use, of the ESPA.").

Clarification is needed as to whether the Court (a) simply overlooked the second facet of the reasonable use analysis dealing with how much water Rangens commands without using, (b) implicitly ruled that commanding a large amount of water without diverting it is not a valid basis to declare a means of appropriation unreasonable, or (c) implicitly conditioned the applicability of CM Rule 20.03 on whether the Director decides to require the senior to more efficiently use the water it does divert.

In light of the foregoing, below is a very brief discussion of the two different facets of the reasonableness of a means of appropriation. As mentioned above, one deals with whether the appropriator is wasting the water it diverts, while the other deals with whether the appropriator is controlling large amounts of water without diverting it at all.

To illustrate, the *Clark v. Hansen* and *Basinger v. Taylor* decisions cited in IGWA's *Opening Brief* deemed the appropriators' means of diversion unreasonable because they were not efficiently using the water they diverted.¹⁵ By contrast, the appropriator in *Schodde* was efficiently using all of the water he diverted, yet his means of appropriation was nonetheless deemed unreasonable because he was controlling a large amount of water that he did not divert at all.¹⁶

CM Rule 20.03 deals with this second facet of reasonable use. It is not focused on how the appropriator uses the water he diverts, but whether he is controlling large amounts of water without diverting it at all, and thereby preventing other members of the public from making use of that water.

The Idaho Supreme Court was referring to this second facet of the reasonableness of a means of appropriation in *Clear Springs* when it held, "the Groundwater Users' arguments regarding reasonable aquifer levels and full

¹⁵ See IGWA's *Opening Brief* pp. 45-46 (citing *Clark v. Hansen*, 35 Idaho 449, 455 (1922) and *Basinger v. Taylor*, 36 Idaho 591, 597 (1922)).

¹⁶ See IGWA's *Opening Brief* p. 44 (citing *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 117-18 (1912)).

economic development must challenge the Spring Users' means of diversion."¹⁷ The Court clearly acknowledged that a means of appropriation may be unreasonable if it unreasonably impedes public use of the resource.

In sum, the Director's conclusion that Rangen is efficiently using the water it diverts does not answer the question of whether Rangen is unreasonably commanding large amounts of water without diverting it at all.

If the Court simply overlooked this second facet of the reasonableness of Rangen's means of appropriation, IGWA asks the Court to acknowledge the *Curtailment Order* does not contain a reasoned statement evaluating this as required by Idaho Code § 67-5248, and instruct the Director to address this issue when reviewing the trim line on remand.

If the Court does not recognize CM Rule 20.03 as a valid basis to declare Rangen's means of appropriation unreasonable, or if the Court views CM Rule 20.03 as being dependent on the Director's analysis of alternate means of diversion under CM Rule 42.01.h, IGWA respectfully requests clarification of this.

CONCLUSION

Whether it is an issue of futile call, reasonable means of appropriation, or both, the central objective of IGWA's defense to Rangen's delivery call was to obtain a ruling from the Director as to how much water Rangen can command without putting it to beneficial use. This argument occupied most of IGWA's briefing to the Director, yet the Director refused to decide the issue. Consequently, this became the central focus of IGWA's petition for judicial review, occupying most of IGWA's briefing to this Court. Yet still there is no answer.

¹⁷ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809 (2011).

Unless there is no limit to the amount of water a senior can command without putting it to beneficial use, junior groundwater users deserve an answer from the Director on this important issue.

RESPECTFULLY SUBMITTED November 20, 2014

RACINE OLSON NYE BUDGE
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A handwritten signature in blue ink that reads "Thomas J. Budge". The signature is written in a cursive style with a long horizontal line extending from the start of the name.

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CERTIFICATE OF MAILING

I certify that on this 20th day of November, 2014, the foregoing document was served on the following persons in the manner indicated.



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