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ATTORNEYS FOR THE CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION) Docket No. CM-DC-2011-004
OF WATER TO WATER RIGHT NOS.)
36-02551 AND 36-07694) **CITY OF POCATELLO’S MOTION TO**
) **RECONSIDER**
(RANGEN, INC.))
_____)

COMES NOW, City of Pocatello (“Pocatello”) by and through its undersigned attorneys to move the Director to reconsider a portion of the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Final Order”).

ARGUMENT

Rangen, Inc.’s (“Rangen”) delivery call requested curtailment of the Eastern Snake Plain Aquifer to deliver water to satisfy water right numbers 36-02551 and 36-07694. Final Order, Findings of Fact (“FOF”) ¶ 1. The partial decrees for water right numbers 36-02551 and 36-07694 entitle Rangen to 74.54 cfs. *Id.*, FOF ¶ 21. Further, the Final Order confirmed that Rangen’s source of water was limited to amounts arising at the Curren Tunnel. *Id.*, FOF ¶¶

CITY OF POCATELLO’S MOTION TO RECONSIDER

27–30. Evidence at trial established that Rangen had not diverted 74.54 cfs at the Curren Tunnel because even if 74.54 cfs was available at the Curren Tunnel, such flows were subject to delivery first to prior irrigation rights. Exhibit 3650, Figure 2-6b; Exhibit 3334. Put another way, evidence at trial demonstrated that 74.54 cfs was never legally available to Rangen for diversion from the Curren Tunnel.

In evaluating Rangen’s right to curtail juniors to avoid injury, the Final Order properly found: “[b]eneficial use acts as a measure and limit upon the extent of a water right. . . . ‘Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use.’” Final Order, Conclusions of Law (“COL”) ¶ 11 (citations omitted). However, the Final Order went on to conclude that, given this limitation under Idaho law, the question of whether Rangen could properly call for amounts of water under 36-07694 was “moot” because curtailment would not produce amounts in excess of 50 cfs. *Id.*, COL ¶ 25. Pocatello respectfully suggests that mootness is the wrong basis to decline to decide this question.

Pocatello suggests the following revisions to COL paragraphs 24 and 25, and the addition of an additional subparagraph:

Paragraph 24 (as written): Rangen is authorized to divert up to 76 cfs pursuant to water rights 36-15501, 36-02551, and 36-07694. Rangen asserts it is not receiving the quantity of water authorized for diversion by water rights 36-02551 and 36-07694. Water rights 36-02551 and 36-07694 authorize a total diversion of 74.54 cfs.

New paragraph 24a: Rangen’s diversion records reflect measurements of 70 cfs. However, such flows included amounts of water that were required to be delivered to senior irrigation rights that relied on the Curren Tunnel supply at that time. Exhibit 3334.

Paragraph 25: An issue was raised at the hearing regarding Rangen’s junior fish propagation water right, water right no. 36-07694, and the extent of its beneficial use at the time of licensing. The Director declines to resolve the question of Rangen’s extent of beneficial use of water right no. 36-07694 because ~~the~~ predicted increase in discharge to the Curren Tunnel from curtailing ground water rights junior to July 13, 1962 (the priority date for water right no. 36-02551)

within the ESPAM 2.1 model boundaries, within the area of common ground water supply, and west of the Great Rift is 9.1 cfs. Finding of Fact 109. The average annual discharge from Curren Tunnel after several years of curtailment within the model boundary is expected to be less than 17 cfs. Finding of Fact 111. ~~Because~~ Furthermore, Rangen’s two senior fish propagation rights, water right nos. 36-15501 and 36-02551, authorize diversion of a total of 50 cfs from Curren Tunnel, ~~it is not expected that curtailment will ever result in more water than the two additional senior water rights are authorized to divert. Thus, the issue of extent of beneficial use for water right no. 36-07694 is never likely to arise and is moot.~~ The approximately 17 cfs to be realized by curtailment will not result in more water than the two additional senior water rights are authorized to divert, so the extent of beneficial use of water right no. 36-07694 need not be determined to resolve the conflict in this matter.

By anchoring this conclusion in facts related to beneficial use, the Idaho Department of Water Resources’ determination regarding this contested issue is less susceptible to the difficulties of qualifying under the mootness doctrine. A moot issue is one that, as a matter of law, “‘does not present a real and substantial controversy that is capable of being concluded’ by judicial relief.” *State v. Barclay*, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (citations omitted). The Director’s determination that he need not examine the extent of beneficial use of water right no. 36-07694 because he found it irrelevant to the delivery call does not make the examination of that issue moot as a matter of law—indeed, the issue could be properly raised in other contexts in examining Rangen’s decrees, for example, in an action before the SRBA Court. A finding by the Director that this issue is moot could potentially bind the parties from raising this issue in contexts before a court where there is in fact “a real and substantial controversy that is capable of being concluded by judicial relief.” *Id.*

Further, “[e]ven where a question is moot, there are three exceptions to the mootness doctrine: ‘(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest.’” *Id.* (citations omitted). Thus, the Director’s finding of mootness is potentially

vulnerable to review under exceptions to the mootness doctrine. By contrast, Pocatello's proposed language for Conclusions of Law paragraphs 24, 24a and 25 provides an alternative basis for the Director's determination regarding issues related to the beneficial use of water right no. 36-7694, and will avoid future review of the determination based on exceptions to mootness.

Respectfully submitted this 12th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Motion to Reconsider** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:



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