

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

RANGEN, INC.)	Case No. CV 2014-2935
)	
Petitioner,)	ORDER GRANTING MOTION
)	TO DISMISS
vs.)	
)	
)	
THE IDAHO DEPARTMENT OF WATER)	
RESOURCES and GARY SPACKMAN in)	
his capacity as Director of the Idaho)	
Department of Water Resources,)	
)	
Respondents,)	
)	
and)	
)	
IDAHO GROUND WATER)	
APPROPRIATORS, INC. and SALMON)	
FALLS LAND & LIVESTOCK CO.,)	
)	
Intervenors.)	
_____)	

I.

BACKGROUND

1. On July 17, 2014, Rangen, Inc. (“Rangen”) filed a *Petition* in the above-captioned matter seeking judicial review of a final order of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”). The final order under review is the Director’s *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order (“Final Order”)* issued in IDWR Docket Nos. CM-MP-2014-003 and CM-DC-2011-004 on June 20, 2014.

2. On October 31, 2014, the Department filed a *Motion to Dismiss*, requesting that this Court dismiss Rangen's *Petition* as moot. Rangen opposes the *Motion*. The Intervenors have not taken a position on the *Motion*. A hearing on the *Motion* was held before this Court on November 12, 2014.

II. ANALYSIS

The administrative proceeding underlying this action concerns a delivery call filed by Rangen. On January 29, 2014, the Director issued a curtailment order in response to the call.¹ The Director concluded that Rangen's senior water rights are being materially injured by junior users, and ordered curtailment of certain ground water rights located in the Eastern Snake Plain Aquifer. In response, the Idaho Ground Water Appropriators, Inc. ("IGWA") submitted mitigations plans to the Director pursuant to the CM Rules,² seeking to mitigate the material injury in lieu of curtailment. In his *Final Order*, the Director conditionally approved IGWA's second proposed mitigation plan. That plan proposed delivery of 9.1 cfs of mitigation water from Tucker Springs through a 1.3 mile pipeline to Rangen ("Tucker Springs Project"). The Director's *Final Order* instructed that the Tucker Springs Project must be completed and deliver water to Rangen no later than January 19, 2015. *Final Order*, p.18. Further, that "[f]ailure to provide water by January 19, 2015, to Rangen will result in curtailment of water rights junior or equal to August 12, 1973, unless another mitigation has been approved and is providing water to Rangen at its time of need." *Id.*

Rangen initiated the instant proceeding on July 17, 2014, seeking judicial review of the Director's *Final Order*. On October 30, 2014, during the pendency of this proceeding, IGWA withdrew its second mitigation plan before the Department. Prior to withdrawal, IGWA submitted and had approved its fourth mitigation plan as an alternative to its second mitigation plan. The fourth mitigation provides for the direct delivery of up to 10 cfs of mitigation water

¹ The Director issued his *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 ("Curtailment Order")* on January 29, 2014, in IDWR Docket No. 2011-004. The Director's *Curtailment Order* is not at issue in this proceeding. However, it was subject to judicial review by this Court in Twin Falls County Case No. CV-2014-1338. This Court entered its *Memorandum Decision and Order and Judgment* in that case on October 24, 2014.

² The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

from Seapac's Magic Springs facility through a pipeline to Rangen ("Magic Springs Project"). The Director approved IGWA's fourth mitigation plan in the stead of its second mitigation plan via the issuance of his *Order Approving IGWA's Fourth Mitigation Plan* on October 29, 2014. To dovetail the January 19, 2015, water delivery deadline set forth in the second mitigation plan with the newly approved plan, the Director ordered that the Magic Springs Project must be completed and deliver water to Rangen by January 19, 2015, or junior water users will be curtailed. *Order Approving IGWA's Fourth Mitigation Plan*, p.21.

In its *Motion to Dismiss*, the Department argues that the issues raised by Rangen in this proceeding have become moot as a result of the Director issuance of his *Order Approving IGWA's Fourth Mitigation Plan*, and IGWA's subsequent withdrawal of its second mitigation plan. Under Idaho law, an issue becomes moot "if it does not present a real and substantial controversy that is capable of being concluded" through judicial relief. *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 624,626 (2005). The Idaho Supreme Court has recognized 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." *Kock v. Canyon County*, 145 Idaho 158, 163, 177 P.3d 372, 377 (2008).

In this case, Rangen's *Petition* raises two categories of issues related to the Director's *Final Order*. First, it raises issues concerning the propriety of the Director's approval of the Tucker Springs Project as an authorized mitigation plan under the CM Rules. The Court finds that these issues are now moot and thereby preclude judicial review. The Tucker Springs Project has been withdrawn as a mitigation plan, and is not being pursued by IGWA. Likewise, the Director's *Final Order* approving the second mitigation plan has been superseded by his *Order Approving IGWA's Fourth Mitigation Plan*. The factual and legal issues associated with the Tucker Springs Project have been rendered moot as a result. The Court finds that the issues are no longer live, and that a judicial determination by this Court on the factual and legal issues associated with the Tucker Springs Project will have no practical effect.

Second, Rangen raises issues related to the Director's decision to re-average Martin-Curren Tunnel flows to calculate the Morris Exchange Water credit. Rangen asserts that these issues have not become mooted, because the Director adopted and incorporated his decision to

re-average those flows in his *Order Approving IGWA's Fourth Mitigation Plan*. This Court disagrees. While the Director's re-averaging is still in effect, it is not in effect pursuant to the *Final Order* at issue in this proceeding. That *Final Order* has been replaced and superseded by the Director's *Order Approving IGWA's Fourth Mitigation Plan*. The re-average is still in effect, but only under the Director's *Order Approving IGWA's Fourth Mitigation Plan*, which is not at issue here. Administrative and judicial proceedings, if any, relating to the Director's *Order Approving IGWA's Fourth Mitigation Plan* will provide the appropriate forum for Rangen to raise these issues.

The Court further finds that Rangen has failed to establish that any of the exceptions to the mootness doctrine apply. First, there are no collateral legal consequences imposed on Rangen. The Director's *Order Approving IGWA's Fourth Mitigation Plan* implements the same mitigation deadlines as the *Final Order*. Therefore, there are no collateral legal consequences or prejudice to Rangen in that respect. Rangen will also have the opportunity to seek judicial review of the Director's *Order Approving IGWA's Fourth Mitigation Plan* at a later date should it so choose. The fact Rangen may have to raise the same or similar issues in a separate judicial proceeding on the Director's *Order Approving IGWA's Fourth Mitigation Plan* is not the type of collateral legal consequence contemplated under this exception. *State v. Barclay*, 149 Idaho 6, 8-9, 232 P.3d 327, 329-330 (2010) (holding, "Potential relitigation of an undecided issue is not the type of collateral consequence contemplated under this exception").

Next, the issues raised by Rangen are not likely to evade judicial review. The Tucker Springs Project issues are factual in nature. They are specific to the facts and circumstances surrounding that individual project. Therefore, they are not capable of repetition. *See e.g., Miller v. Board of Trustees*, 132 Idaho 244, 246, 970 P.2d 512, 514 (1998) (holding that factual issues are "not capable of repetition"). The Court further finds that the re-averaging issues will not evade judicial review. Those issues can, and likely will, be raised by Rangen in a context in which there is still a live controversy – i.e., the filing of a *Petition* seeking judicial review of the Director's *Order Approving IGWA's Fourth Mitigation Plan*. Last, the issues arising out of the Director's *Final Order* do not raise concerns of substantial public interest. Since the Tucker Springs Project will not be pursued or realized, it is not of substantial public interest. The re-averaging issues likewise do not raise concerns of substantial public interest, and, for the reasons set forth above, will not likely evade judicial review.

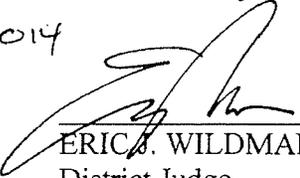
In view of the Director's issuance of his *Order Approving IGWA's Fourth Mitigation Plan*, and IGWA's subsequent withdrawal of its second mitigation plan, this Court concludes that the issues raised in the Petitioner's *Petition* are moot. The Court further finds that none of the recognized exceptions to the mootness doctrine apply. Therefore, the Court will grant the Department's *Motion to Dismiss* and will dismiss the *Petition* as moot.

III.
ORDER

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Respondents' *Motion to Dismiss* is **hereby granted**.
2. The *Petition for Judicial Review* filed on July 17, 2014, is **hereby dismissed**.

Dated November 19, 2014



ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO DISMISS was mailed on November 19, 2014, with sufficient first-class postage to the following:

RANGEN, INC
Represented by:
FRITZ X HAEMMERLE
PO BOX 1800
HAILEY, ID 83333
Phone: 208-578-0520

SALMON FALLS LAND &
Represented by:
TIMOTHY J STOVER
WORST FITZGERALD & STOVER PLLC
PO BOX 1428
TWIN FALLS, ID 83303-1428
Phone: 208-736-9900

IDAHO DEPARTMENT OF WATER
Represented by:
GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

RANGEN, INC
Represented by:
J JUSTIN MAY
1419 W WASHINGTON
BOISE, ID 83702
Phone: 208-429-0905

IDAHO GROUND WATER
Represented by:
RANDALL C BUDGE
201 E CENTER ST STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

RANGEN, INC
Represented by:
ROBYN M BRODY
BRODY LAW OFFICE, PLLC
PO BOX 554
RUPERT, ID 83350
Phone: 208-434-2778

IDAHO GROUND WATER
Represented by:
THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

