IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE FOURTH MITIGATION PLAN FILED BY THE IDAHO GROUND WATER APPROPRIATORS FOR THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 IN THE NAME OF RANGEN, INC., IDWR DOCKET CM-MP-2014-006, "MAGIC SPRINGS PROJECT"	SUPREME COURT DOCKET NO. 43370-2015 Snake River Basin Adjudication No. CV-2014-4633
RANGEN, INC., Petitioner/Appellant, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, Respondents/Respondents, and IDAHO GROUND WATER APPROPRIATORS, INC., Intervenor/Respondent.	

APPELLANT RANGEN, INC.'S OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

Honorable Eric J. Wildman, Presiding

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See Certificate of Service for Other Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF CASE

A. NATURE OF CASE.

This appeal by Rangen, Inc. ("Rangen") involves Director Spackman's approval of the fourth in a series of mitigation plans filed by Idaho Ground Water Appropriators, Inc. ("IGWA"). IGWA filed the mitigation plans in an attempt to avoid curtailment resulting from the Director's determination that junior-priority ground water pumping from the Eastern Snake Plain Aquifer ("ESPA") is materially injuring Rangen's senior water rights. IGWA's Fourth Mitigation Plan (referred to as the "Magic Springs Project") involves leasing or purchasing up to 10 cfs of spring water from SeaPac of Idaho, Inc., pumping the water from what is called the "Magic Springs", and piping it approximately 2 miles to Rangen's Research Hatchery. The issues presented involve the Director's failure to protect Rangen's senior interests.

B. COURSE OF PROCEEDINGS.

On December 13, 2011, Rangen filed a *Petition for Delivery Call* alleging that it is not receiving all of the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694 because of junior-priority ground water pumping in the ESPA. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (the "*Curtailment Order*") (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 1, Findings of Fact ¶ 1).[1]

[1] The Clerk's Record on Appeal (R_Appeal 4633) consists of several discs labeled as set out herein and includes the record, exhibits and hearing transcripts for the Judicial Reviews of IGWA's Fourth Mitigation Plan (1_AR_2014-4633, 2 Supp. AR_2014-4633, 3_2nd Supp. AR_2014-4633) and IGWA's Second Mitigation Plan (1_AR_2014-2935), and the transcripts from the Judicial Review of Rangen's First Delivery Call (1_AR_2014-1338). Citations to these records, exhibits and hearing excerpts will be referred to in accordance with the disc labels as set out herein.

The Director held a hearing on Rangen's delivery call in May 2013. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 3, Findings of Fact ¶ 11). On January 29, 2014, the Director entered an Order finding that junior-priority ground water pumping from the ESPA is materially injuring Rangen's senior water rights. *Curtailment Order*, (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 36, Conclusions of Law ¶¶ 32 and 36).

In an effort to avoid curtailment after the Curtailment Order was entered, IGWA filed a series of mitigation plans. IGWA filed the Fourth Mitigation Plan, the plan at issue in this appeal, on August 27, 2014. *Curtailment Order*, (1_AR_2014-4633, pp. 1-24). The Director held a hearing on the matter on October 8, 2014 and conditionally approved the Fourth Mitigation Plan on October 29, 2014 in his *Order Approving IGWA's Fourth Mitigation Plan* (the "Director's Final Order"). (1_AR_2014-4633, pp. 178-240).

Rangen filed a Petition for Judicial Review on November 25, 2014 (1_AR_2014-4633, pp. 313-321 or R_Appeal 4633, pp. 5-13), asserting that the Director's Final Order is contrary to law in several respects and should be set aside and remanded for further proceedings. The parties briefed the issues raised on Judicial Review and a hearing on the Petition was held on April 16, 2015. On May 13, 2015, the SRBA Court issued its *Memorandum Decision and Order* (R_Appeal 4633, pp. 768-781) and accompanying *Judgment* (R_Appeal 4633, pp. 766-767) affirming the Director's Final Order. Rangen is seeking reversal of the Judgment.

C. STATEMENT OF FACTS.

Rangen is a family-owned agricultural company located in Buhl, Idaho. (1_AR_2014-1338, Tr., Vol. I, p. 53, L. 13-16). Rangen's aquaculture division operates a fish facility called the

"Research Hatchery." (*Id.*); (1_AR_2014-1338, Tr., Vol. I, p. 58, L. 10-11). The Research Hatchery is located near Hagerman. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 3, Findings of Fact ¶ 13). The facility is situated below a canyon rim at the headwaters of Billingsley Creek. (*Id.*). Rangen built the Research Hatchery in about 1962 and has been raising fish there for 50+ years. (1_AR_2014-1338, Tr., Vol. II, p. 522, L. 8-10). The facility was built to develop and test Rangen's fish feeds and showcase Rangen's involvement in the aquaculture industry. (*Id.*).

The water that supplies the Research Hatchery is spring water that comes from the canyon wall at the head of the facility. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 46). The source of Rangen's water rights listed in the Partial Decrees is "Martin-Curren Tunnel". A hotly contested legal issue is whether the term "Martin-Curren Tunnel" refers only to a tunnel structure or whether that term is a local name for all of the spring water coming from the canyon wall at the head of the Research Hatchery. A separate appeal of that issue is now pending before this Court. *See* Supreme Court Docket No. 42772-2015.

Rangen has been measuring and recording the spring water flows at the Research Hatchery since 1966. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 7, ¶ 32). The flows have been steadily declining for decades. The Director found:

> It is clear that the spring flows have declined significantly. One of IGWA's own experts, who first visited the Rangen property back in 1967, described the declines as significant. Rangen's reported hatchery flows in 1966 averaged 50.7 cfs. In 2012, spring complex flows averaged just 14.6 cfs. Notwithstanding Rangen's estimated measurement error of 15.9% since 1980, the declines have been dramatic. Even if the 15.9% is applied to the 2012 spring complex discharge, flows declined by over 33 cfs between 1966 and 2012. Based on the relationship between Curren Tunnel flow and total spring complex flow, the corresponding decline in Curren Tunnel discharge between 1966 and 2012 would have been approximately 21 cfs.

> This decline in flow is substantial, resulting in Rangen diverting significantly less than allowed under its water rights.

Curtailment Order, (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 33-34, Conclusion of Law ¶ 23) (citations omitted). Wayne Courtney, Rangen's Executive Vice President, testified at the delivery call hearing that the water measurements for the week of May 1, 2013, showed flows at 11.73 cfs. (1_AR_2014-1338, Tr., Vol. I, p. 91, l. 15-22). The week before the flows had been 12.44 cfs. (*Id.*). Rangen has been trying to get more water to its facility for more than a decade. *See Curtailment Order*, (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 3, Findings of Fact ¶ 15).

Most recently, Rangen filed a *Petition for Delivery Call* in December 2011. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 1, Findings of Fact ¶ 1). The Director conducted a nearly three week trial of the matter in May 2013. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 3, Findings of Fact ¶ 11). On January 29, 2014, the Director entered the *Curtailment Order,* finding that junior-priority ground water pumping in the ESPA is materially injuring Rangen's senior spring water rights. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 36, Conclusions of Law ¶¶ 32 and 36).

IGWA filed the Fourth Mitigation Plan on August 27, 2014. (1_AR_2014-4633, pp. 1-24). Under the Plan, IGWA will lease or purchase up to 10 cfs of spring water from SeaPac of Idaho, Inc., a fish hatchery located near the Snake River. (1_AR_2014-4633 p. 184 at ¶ 8). The water will be pumped from what is called "Magic Springs" and then piped to the Rangen Research Hatchery approximately 2 miles away. In exchange, IGWA will lease or purchase the water rights

at a state-owned facility called Aqua Life and make them available to SeaPac. (1_AR_2014- 4633, p. 184, Findings of Fact ¶¶ 9-10). The Director conditionally approved the Fourth Mitigation Plan on October 29, 2014. (1_AR_2014-4633, pp. 178-240). Rangen filed a Petition for Judicial Review on November 25, 2014. (1_AR_2014-4633, pp. 313-321). The Magic Springs pipeline was built and became operational on February 6, 2015. (3_2nd Supp. AR_2014-4633, p. 150).

II. ISSUES PRESENTED ON APPEAL

1. Whether the Director erred in failing to conduct any analysis of CM Rule 43.03.j factors.

2. Whether the Director's Final Order constitutes a taking of Rangen's property without just compensation in violation of Article I, Section 14 of the Idaho Constitution and the Fifth Amendment of the U.S. Constitution.

3. Whether the Fourth Mitigation Plan contains contingency provisions that assure protection of Rangen's Senior Rights as required by CM Rule 43.03.c.

III. STANDARD OF REVIEW

This Court reviews legal issues de novo. *Polk v. Larrabee*, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000). The standard of review for factual matters is as follows:

> The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. In an appeal from the decision of district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review... The Court may overturn the Board's decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion.. The party

> attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary."

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted).

IV. ARGUMENT

The Director has a clear legal duty to distribute water in accordance with priority. *Musser v. Higginson,* 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). The Director "is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the **priorities of the rights of the users** thereof." I.C. § 42-603 (emphasis added). Pursuant to this authority the Department promulgated Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 (the "CM Rules").

The CM Rules and doctrine of prior appropriation mandate that once a determination of material injury has been made, out-of-priority pumping may only be allowed pursuant to a properly approved mitigation plan. *In the Matter of Distribution of Water to Various Water Rights,* 155 Idaho 640, 653, 315 P.3d 828, 841 (2013); IDAPA 37.03.11.040.01. "Where a mitigation plan is the response to material injury, the Rules provide that the Director **must** consider several factors to determine whether the proposed plan 'will prevent injury to senior rights,' . . . ." *Id.* at 653, 315 P.3d at 842 (emphasis added).

CM Rule 43.03 provides the factors to be considered by the Director when evaluating a mitigation plan:

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

* * *

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

IDAPA 37.03.11.043.03. These are the rules that the Director should have applied when considering whether to approve IGWA's Fourth Mitigation Plan.

A. THE DIRECTOR ERRED BY FAILING TO CONDUCT ANY ANALYSIS OF CM RULE 43.03.J FACTORS.

CM Rule 43.03.j requires the Director to consider:

> j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.43.03.j.

Despite the language of the rule, the Director refused to even consider or address the consequences of the Fourth Mitigation Plan on water rights holders and the aquifer. The Director simply ignored the conservation of water resources, the public interest, and whether the plan would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. Instead, Director Spackman confined his analysis to the first three of the CM Rule 43.03 factors, which he characterized without explanation as "threshold issues." The *Order Approving IGWA's Fourth Mitigation Plan* stated:

> While Rule 43.03 lists factors that "may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights," factors 43.03(a) through 43.03(c) are necessary components of mitigation plans that call for the direct delivery of mitigation water. A junior water right holder seeking to directly deliver mitigation water bears the burden of proving that (a) the "delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law," (b) "the mitigation plan will provide replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source," and (c) "the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage." IDAPA 37.03.11.043.03(a-c). These three inquiries are threshold factors against which IGWA's Magic Springs Project must be measured.

> To satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the curtailment order; (2) the components of the proposed mitigation plan can be implemented to timely provide mitigation water as required by the curtailment order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.

(1_AR_2014-4633, pp. 182-183).

The Director deferred any consideration of injury concluding that:

> 12. The Fourth Mitigation Plan should be approved conditioned upon the approval of the IGWA's September 10, 2014 Application for Transfer of Water Right to add the Rangen Facility as a new place of use for up to 10 cfs from water right number 36-7072 or an authorized lease through the water supply bank. The consideration of a transfer application is a separate administrative contested case evaluated pursuant to the legal standards provided in Idaho Code §§42-108 and 42-222. Issues of potential injury to other water users due to a transfer are most appropriately addressed in the transfer contested case proceeding.

(1_AR-2014-4633, p. 196). The District Court upheld this deferral stating:

> So the Director determined to engage in the injury analysis at what he determined to be the most appropriate time – in the context of the transfer proceeding. The Court holds that the Director did not abuse his discretion under Rule 40.03 in so determining.

(R_Appeal 4633, p. 777) *(footnote omitted)*. The Court also noted that:

> The record established that the administrative proceeding on the transfer has concluded and that the transfer has been approved. In his order approving the transfer, the Director engaged in an injury analysis. The Director's final order is presently before this Court on judicial review in Twin Falls County Case No. CV-2015-1130.

Id. at n. 6.

The Director's failure to consider the 43.03j factors when deciding whether to approve the Fourth Mitigation Plan was improper for a number of reasons. First, the analysis that may be

undertaken in the transfer proceeding pursuant to Idaho Code §§ 42-108 and 42-222 is different than the analysis required by 43.03j. Second, given the evidence introduced at the hearing on this matter, the Fourth Mitigation Plan should have been denied pursuant to the CM Rule 43.04.j criteria. Finally, given the scope and cost of the Fourth Mitigation Plan, it was unlikely that the Department would deny the transfer application once the pipeline was in place and was delivering water.

The transfer proceeding is governed by Idaho Code § 42-222. The criteria for approval of a transfer under this provision are similar, but not the same as the criteria for a mitigation plan found in CM Rule 43.03j. There is, for instance, no explicit requirement in § 42-222 to consider whether the aquifer is being mined. The issue under 43.03.j is not as simple as whether the transfer considered in isolation would injure water users. The injury caused by the mitigation plan must be considered in context. This is especially true here where the purpose of the mitigation plan is not simply to mitigate for a discreet water user that is causing injury to another water user. This mitigation plan purports to mitigate for all junior-priority ground water use and to allow ground water pumping to continue unabated.

It should also be noted that pumping began in this case prior to approval of the transfer application. Pumping began on February 6, 2015 under a lease of the SeaPac water through the water bank. (R_Appeal 4633, p.775). The transfer application was approved on February 19, 2015 and then amended March 18, 2015. (R_Appeal 4633, p. 689). The water bank rental enabled pumping to begin under the Fourth Mitigation Plan without an analysis of the Rule 43.03j criteria. The comment in the ruling on the water bank lease makes this clear: "The rental of water right 36-

7072 is to cover mitigation activities specifically identified in IDWR's order approving IGWA's fourth mitigation plan. The mitigation plan is in the local public interest." (R_Appeal 4633, p. 295). The problem with this conclusion is that the Director never considered whether the Fourth Mitigation Plan was in the public interest when he entered the Final Order approving the Plan. The lease rental agreement concluded that it was in the public interest simply because the Fourth Mitigation Plan had been approved.

The Magic Springs Project does not satisfy the 43.03.j criteria and should have been denied on that basis. The Plan is inconsistent with the conservation of water resources, will likely injure other water rights, and will allow junior-priority ground water pumping to continue at a rate that exceeds the rate of future natural recharge of the ESPA.

Frank Erwin is the water master of Water District 36A where Rangen's Research Hatchery is located. (1_AR_2014-4633, Exh 2013, Tr., p. 5, ll. 17-18). Rangen took Mr. Erwin's deposition on September 25, 2014, and his testimony was submitted as Exhibit 2013 at the Hearing. Mr. Erwin explained during his deposition that the Fourth Mitigation Plan involves the lease or purchase of water rights from the Magic Springs facility owned by SeaPac and the delivery of a portion of that water (up to 9.1 cfs) through a pipeline to Rangen. (1_AR_2014-4633, Exh 2013, Tr., p. 6, l. 17 – p. 7, l. 4). The water rights involved in the lease or purchase show "fish propagation" as the beneficial use on their partial decrees. (1_AR_2014-4633, Exh 2013, Tr., p. 8, l. 25 – p. 9, l. 13). "Fish propagation" rights are "non-consumptive" rights. (*Id.*).

The SeaPac facility is located close to the Snake River (1_AR_2014-4633, Exh 2013, Tr., p. 10, ll. 8-11). There is no dispute that the Magic Springs water is used by SeaPac in its raceways

and the water then flows directly to the Snake River with no intervening uses. During his deposition, Mr. Erwin was asked to address whether the water diverted from SeaPac, if delivered through a pipeline to Rangen's Research Hatchery, would make its way to the Snake River. Mr. Erwin explained that it would not during the irrigation season:

> Q. I want you to walk through with me, Frank -- and this whole discussion today is about if 10 cfs is delivered to the Rangen facility, what happens to the 10 cfs of water. Okay?
>
> A. Okay.
>
> Q. All right. Frank, I want you to walk through with me -- I want to get an opinion whether the delivery of this nonconsumptive water to the Rangen facility would, in fact, make its way down to the Snake River through Billingsley Creek.
>
> A. From my standpoint, as a watermaster, I would assume that once the 10 cubic foot per second of water, or whatever quantity was provided, left the Rangen facility and entered Billingsley Creek, I would assume that that -- at that point, it would become waters of the State of Idaho, and it would be up to the watermaster to administer it by priority.
>
> So therefore, that water would be diverted to the particular diversions that are in priority and in season with the water rights. ***So part of the year, I would assume that that water would not make it to the Snake River, it would be diverted and used for either irrigation or other beneficial uses, possibly.***
>
> Q. ***So you said during a given "part of the year." I take it you mean the irrigation season?***
>
> A. ***Yes.***

(1_AR_2014-4633, Exh 2013, Tr., p. 10, l. 18 – p. 11, l. 19) (emphasis added).

Mr. Erwin went on to explain that where the water would actually be used depended on how much water was being delivered through the proposed pipeline and when. (1_AR_2014-4633, Exh 2013, Tr., p. 11, l. 20 – p. 12, l. 12). He explained that during the Spring and Fall most

of the water would likely be used in the Curren Ditch after it left Rangen's Research Hatchery. (1_AR_2014-4633, Exh 2013, Tr., p. 12, l. 23 – p. 13, l. 17). He explained that the water would likely be used by the Buckeye, another water user that is short of water, and very little of it would return to the Snake River. (1_AR_2014-4633, Exh 2013, Tr., p. 14, l. 23 – p. 15, l. 5).

Mr. Erwin testified that during the Summer months if the water were delivered down Billingsley Creek it would likely be consumed by irrigation before it reached the Snake River. (1_AR_2014-4633, Exh 2013, Tr., p. 19, l. 15 – p. 20, l. 12). He explained that the Billingsley Creek water users are short of water. (1_AR_2014-4633, Exh 2013, Tr., p. 22, ll. 15-18). He has been able to avoid delivery calls by Billingsley Creek water users in the past only because of agreements to rotate water use. (1_AR_2014-4633, Exh 2013, Tr., p. 23, ll. 9-16). Mr. Erwin testified that he has no way to ensure the delivery of the additional 10 cfs from Rangen's Research Hatchery to the Snake River. (1_AR_2014-4633, Exh 2013, Tr., p. 20, l. 13 – p. 21, l. 1). The bottom line of Mr. Erwin's testimony is as follows:

> Q. **If you were required to deliver by priority beginning 2015, do you have an opinion as to whether the 10 cfs that we're talking about of additional water from Magic Springs would ever make it to the Snake River?**
>
> **A. I don't believe that it would, no.**

(1_AR_2014-4633, Exh 2013, Tr., p. 23, l. 22 – p. 24, l. 1) (emphasis added).

Mr. Erwin's testimony makes it clear that if the Fourth Mitigation Plan is approved and actually implemented by IGWA, it will effectively turn a 10 cfs non-consumptive right that supplies the Snake River into a consumptive right that does not make its way to the river. That is an improper enlargement of the existing right that is prohibited under CM Rule 43.03.i. The impact

of the enlargement is that the Snake River, which is presently flowing at historically low levels, will be short an additional 10 cfs of water and ground water users will continue to pump even though the rate of aquifer depletion exceeds the rate of natural recharge. The Director found in his *Curtailment Order* on Rangen's Delivery Call that:

> 75. For the time period from October of 1980 through September of 2008, average annual discharge from the ESPA exceeded annual average recharge by approximately 270,000 acre feet, resulting in declining aquifer water levels and declining discharge to hydraulically connected reaches of the Snake River and tributary springs.

(1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 16, ¶ 75). This means that so long as junior-priority ground water pumping is allowed to continue unabated, spring flows will continue to decline and the Snake River flows will continue to be reduced.

Minimum stream flows are guaranteed by the State of Idaho to Idaho Power Company through the Swan Falls Agreement (*see Clear Springs v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) for a discussion of the Swan Falls Agreement). The Department of Water Resources recognizes that it has an obligation to manage the ESPA-Snake River system to ensure compliance with the Swan Falls Agreement and avoid injuring trust water rights. *See IDWR Actions Related to the Swan Falls Agreement*, presented by Brian Patton on August 6, 2013 to the Legislative Natural Resources Interim Committee (1_AR_2014-4633, Appendix A, pp.144-163). The Fourth Mitigation Plan does nothing to address the injury caused by junior-priority ground water pumping within the ESPA. The Fourth Mitigation Plan runs afoul of the Department's obligation to manage and protect the ESPA and, is, therefore, contrary to public interests and the conservation of resources.

The Magic Springs Project does not add any new water to the Hagerman Valley and does not reduce ground water pumping. In fact, the Plan, if actually implemented, further exacerbates the water shortage because it takes water from an area that is already short and puts it in a Snake River tributary where it will be consumed before it reaches the river. Rather than mitigating for the impact of ground water pumping, the Fourth Mitigation Plan compounds that impact and would allow continued mining of the ESPA. The Director may not disregard the injury that continues to be done to the ESPA and allow junior ground water pumping to continue under such a plan. IGWA cannot fix a decade's long water shortage by moving water from one area of the Hagerman Valley to another.

If unappropriated water were available at Magic Springs and IGWA applied for a new water right to pump water from Magic Springs to the head of Billingsley Creek for the purpose of raising fish and irrigating, such a water right would almost certainly be denied. There is currently a moratorium on such new consumptive rights. *See, Amended Moratorium Order Re: ESPA, April 30, 1993.* If the Department were to approve such a new water right, it would require mitigation for the impact of the new water right.

The Director's decision to defer the injury determination effectively made the approval of the transfer application a foregone conclusion. There was no way that the Director would approve the Fourth Mitigation Plan and then deny the transfer application after the pipeline had already been constructed and was delivering water. The Director's decision to defer the injury analysis was improper and resulted in the implementation of the Fourth Mitigation Plan without meaningful

consideration of whether the Rule 43.03j criteria were satisfied. The Rule 43.03.j. criteria and not satisfied by the Plan, and the Judgment affirming the Fourth Mitigation Plan should be vacated.

B. THE DIRECTOR'S FINAL ORDER CONSTITUTES A TAKING OF RANGEN'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF ARTICLE I, SECTION 14 OF THE IDAHO CONSTITUTION AND THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The Director ordered Rangen to accept the Fourth Mitigation Plan and allow construction on its real property or forgo priority enforcement of its senior water rights:

> IT IS FURTHER ORDERED that, within seven (7) days from the date of this order, Rangen must state, in writing, whether it will accept water delivered pursuant to the Magic Springs Project. Rangen must submit its written acceptance/rejection to the Department and IGWA. The written acceptance/rejection must state whether Rangen will accept the Magic Springs water and whether Rangen will allow construction on its land related to the placement of the delivery pipe. If the Fourth Mitigation Plan is rejected by Rangen or Rangen refuses to allow construction in accordance with an approved plan, **IGWA's mitigation obligation is suspended**.

(1_AR_2014-4633, p. 198) (emphasis added). The Director cited no authority to condition enforcement of Rangen's water rights upon the relinquishment of its real property rights. Such a condition constitutes an unlawful and unconstitutional taking of Rangen's property. *See* Idaho Const. Art. I, § 14; U.S. Const. amend. V; *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed. 2d 304 (1994).

The District Court held that:

> A plain reading of the provision establishes that it did not effectuate a taking of Rangen's real property by the Department. Nor is it a mandate that Rangen provide IGWA an easement or other legal access for delivery of mitigation water. Rather, it is an inquiry as to whether Rangen is determined to refuse IGWA the access necessary to mitigate its injury under the plan. If so, the logistics and timing of the fourth mitigation plan may be affected. IGWA would then be required to take further steps to implement the plan, including but not limited to

> commencement of condemnation proceedings by it or its member ground water districts under Idaho Code 42-5224(13).
>
> In any event, the record is clear that no taking of Rangen's property by the Department has occurred. Rangen and various IGWA participating ground water districts have entered into a license agreement, wherein for good and valuable consideration Rangen has granted the districts a license "to install, operate, maintain and replace as needed, at their expense, buried pipelines for the conveyance of water from Magic Springs to Rangen's hatchery . . . ."

(R_Appeal 4633, p. 779).

The District Court's conclusion that the Director's Final Order merely constituted an "inquiry" ignores the fact that Rangen was given a choice between the enforcement of the priority of its water rights or the grant of a property right to IGWA. The District Court states, if Rangen had not complied with the Director's order, "IGWA would then be required to take further steps to implement the plan, including but not limited to commencement of condemnation proceedings." However, this is not correct and illustrates the problem with the District Court's reasoning. There would be no reason for IGWA to condemn anything because the obligation to mitigate would have been suspended. The District Court's reliance upon the "license" granted to IGWA is also misplaced. This "license" was granted under protest due solely to the Director's Order. (1_AR_2014-4633, p. 241-246).

C. CURTAILMENT COUPLED WITH INSURANCE ARE NOT ADEQUATE CONTINGENCY PROVISIONS UNDER CM RULE 43.03.C BECAUSE THEY WILL NOT ASSURE PROTECTION OF RANGEN'S SENIOR RIGHTS.

The Magic Springs pipeline began delivering replacement water to Rangen's Research Hatchery on February 6, 2015. (3_2nd Supp. AR_2014-4633, p. 150). Conjunctive Management Rule 43.03.c requires that a mitigation plan have **"contingency provisions"**. *See* IDAPA

37.03.11.43.03.c. The Rule states in relevant part: "The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." *Id.* (emphasis added). This Court has made it clear that contingency provisions are a mandatory part of any approved mitigation plan and that it will invalidate a plan if they are not part of it. *In the Matter of Distribution of Water to Various Water Rights,* 155 Idaho 640, 654, 315 P.3d 828, 842 (2013).

Moving forward, if water is not delivered through that pipeline for any reason, the Fourth Mitigation Plan does not provide any other source of replacement water for Rangen. The only remedies available to Rangen will be curtailment of junior-priority ground water rights and possibly a civil claim for the damages Rangen suffers. The District Court found that curtailment coupled with the insurance ordered by the Director are adequate contingencies to satisfy the requirements of CM Rule 43.03.c. The issue that must be decided by this Court is whether curtailment and insurance will assure protection of Rangen's senior rights.

1. Curtailment Will Not Assure Protection of Rangen's Senior Priority Rights.

The District Court ruled that the first contingency in the Fourth Mitigation Plan is curtailment. (R_Appeal 4633, p. 776). The District Court explained that it had previously invalidated mitigation plans where the Director had expressly stated that he would not order curtailment even if the mitigation water became unavailable. (*See id.*). The Court reasoned that because the Fourth Mitigation Plan did not contain any such provision, then curtailment was

available and was an adequate contingency. (*See id.*). The District Court's analysis misses the mark.

To begin with, curtailment is not a contingency plan – it is the natural, legal and administrative consequence that occurs under the prior-appropriation doctrine when mitigation is not provided as required. While much could be said about whether IDWR will ever impose curtailment to protect senior interests, even if curtailment were ordered, it would not assure protection of Rangen's senior rights.

The Magic Springs pipeline provides temporary compensation to Rangen in the form of replacement water. ***The pipeline does not fix the injury that junior-priority ground water pumping is causing to Rangen's senior spring water rights, and, in fact, allows the injury to continue because ground water pumping in the ESPA is allowed to continue at a rate that exceeds natural recharge.*** (*See*, 1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 16, ¶ 75). When the Magic Springs replacement water stops flowing, Rangen will be short not only the quantity of water that was being delivered through the pipeline, but the amount of water flowing from the springs that supply the Research Hatchery will also be less because of the mining of the aquifer that continues under the Fourth Mitigation Plan. A simple example demonstrates these points.

The example begins with the Director's material injury finding entered on January 29, 2014. (1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 36, Conclusions of Law ¶¶ 32 and 36). The Director ordered that ground water pumpers with junior-priority rights located west of the Great Rift must provide Rangen with 9.1 cfs of direct flow of water or curtail their pumping.

(1_AR_2014-2935 or 2_Supp_AR_2014-4633, p. 42). The Director's *Curtailment Order* allowed the junior users to phase-in the direct delivery of water over a five-year period as follows:

- Year 1 – 3.4 cfs by March 14, 2014
- Year 2 – 5.2 cfs by March 14, 2015
- Year 3 – 6.0 cfs by March 14, 2016
- Year 4 – 6.6 cfs by March 14, 2017
- Year 5 – 9.1 cfs by March 14, 2018

(*Id.*). This phase-in tracks the amount of water that ESPAM2.1 predicted would accrue to Rangen's senior rights through curtailment. (2 Supp. AR_2014-4633, pp. 234-235).

If the Magic Springs pipeline were to stop delivering water in April 2017, there is no way that curtailment, even if it were ordered and enforced immediately, would deliver the approximately 6.6 cfs of water that Rangen is entitled to receive at that time.[2] This Court understands that it takes years for the benefits of curtailment to be seen. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 83 (2011). In this case, ESPAM2.1 shows that it would take approximately four years (i.e., April 2021) for curtailment to result in the approximately 6.6 cfs of water that must be delivered in April 2017. This means that Rangen's senior spring water rights will be short this entire time period.

[2] The actual amount that junior-priority users are obligated to provide each year is slightly less than what is reflected in the Director's Final Order because of certain credits for other mitigation activities under IGWA's First Mitigation Plan. The number being used here is for illustrative purposes.

Now that the junior users have opted to provide replacement water rather than remedy the harm they are causing, curtailment will not assure protection of Rangen's senior rights. Curtailment will not supply the missing water at the time that Rangen needs it or in the quantity to which Rangen is entitled. Curtailment will also not compensate Rangen for the ongoing injury that is caused by the junior-priority pumping that is allowed while the replacement water is flowing. Because curtailment will not assure protection of Rangen's senior rights, the District Court should have invalidated the Fourth Mitigation Plan. Rangen requests that this Court reverse the District Court's ruling.

2. **Insurance Will Not Assure Protection of Rangen's** Interests.

The District Court stated in its Memorandum Decision that insurance is the second contingency in the Fourth Mitigation Plan. (R_Appeal 4633, p. 776). The Court noted that insurance was required under the Plan and that it had been purchased based on the certificates of insurance submitted by IGWA. (*See id.*). The Court summarily concluded that: "curtailment coupled with insurance are adequate contingencies to satisfy the requirements of Rule 43.03.c of the CM Rules." (*See id.*). The District Court's summary analysis of this issue was improper for the reasons discussed below.

To begin with, neither the Director nor the District Court has examined the policy of insurance that was obtained and determined that the actual terms of that policy assure protection of Rangen's senior rights. Out-of-priority pumping was allowed to begin under the Fourth Mitigation Plan simply by the filing of a certificate of insurance. The certificates of insurance that were submitted expressly state: "Coverage is limited to only insured activities or operations

identified in the Policy. Contract services – Water Pump station to supply Spring Water. Policy is to cover losses from Rangen, Inc. due to failure of the pump system and supply of spring water resulting in loss of fish stock." IGWA did not submit the policy of insurance when it filed its Notice of Insurance with the Department of Water Resources. There has never been an examination of the policy itself by the agency or the District Court, and therefore, there is no basis upon which to conclude that the insurance will assure protection of Rangen's senior rights.

Second, it is evident from the insurance certificates that are in the record that a commercial *liability* policy has been purchased by the North Snake Ground Water District. (*See* 3_2nd Supp. AR_2014-4633, pp. 122-128). Rangen is not an insured and has no rights under the policy. Liability policies are fault-based. In other words, the North Snake Ground Water District, the named insured, has to be negligent for coverage to apply. A typical liability policy will not provide coverage if the pump that is supplying the Magic Springs pipeline goes down due to a storm or some other act of God. Rangen needs a policy that provides coverage for its damages regardless of why the pipeline stops delivering water.

Third, the only named insured under the policy is North Snake Ground Water District. There is not enough information in the record to determine who else should be named insureds. As the proponent of the Fourth Mitigation Plan, IGWA had the burden of showing that the Magic Springs Project satisfies the criteria of CM Rule 43.03 before out-of-priority ground water pumping could commence. At the close of the evidence, IGWA's Fourth Mitigation Plan raised more questions than it answered. For example:

- **Who was responsible for constructing the pipeline?** No evidence was submitted.

- **Who will own the pipeline**? No evidence was submitted.
- **Who will control the operation of the pipeline?** No evidence was submitted.
- **Who will pay for the electricity that supplies the pipeline?** No evidence was submitted.
- **Who is responsible for maintaining the pipeline?** No evidence was submitted.
- **Who is responsible for monitoring the pipeline?** No evidence was submitted.
- **Who will pay for on-going monitoring and maintenance?** No evidence was submitted.

It is impossible to analyze who should be the insured under a liability policy when there is no evidence concerning the roles that various organizations play and the responsibilities that they have.

Fourth, although there are three different certificates of insurance, only North Snake Ground Water District is the insured. (See 3_2nd Supp. AR_2014-4633, pp. 122-128). Magic Valley Ground Water District and the South West Irrigation District are shown as "certificate holders" – not named insureds. The certificates expressly state: "This certificate of insurance is issued as a matter of information only ***and confers no rights upon the certificate holder***." (*See* 3_2nd Supp. AR_2014-4633, pp. 122-128) (emphasis added). This means that the policy provides no coverage for the actions of Magic Valley Ground Water District and the Southwest Irrigation District. If all three of these ground water districts built the pipeline and are responsible for its operation, monitoring, and maintenance, then they need to be named insureds. Rangen should not be in a situation of needing to make a substantial claim against a special district that has no insurance and no assets to speak of.

Fifth, the policy does not name IGWA as an insured. The Director's Order Approving the Fourth Mitigation Plan orders IGWA to carry out the Fourth Mitigation Plan. IGWA did not put on any evidence of its role in the construction and operation of the pipeline, but it is evident that it is playing a substantial role in this entire process and needs to be named to protect Rangen's interests. Again, Rangen does not want to be in a situation of needing to make a claim against an entity that has no insurance and minimal assets.

Sixth, the certificates of insurance show that this is a "claims made" policy. "Claims made" policies are problematic in that they will only provide coverage for a loss if the claim is made while the policy is in place. *See* 20-130 Appleman on Insurance Law & Practice Archive § 130.3 for a discussion of the features of a "claims made" policy. In other words, if a loss occurs on April 1, 2017 and the policy expires on April 2, 2017, there will not be coverage unless the claim is made before the policy expires. This is a serious limitation that could impact the availability of Rangen's remedies in the event of a loss.

Finally, an insurance policy is unlikely to cover all of the damages Rangen will sustain if the Magic Springs pipeline stops delivering water and curtailment has to be ordered. If the pipeline stops delivering water suddenly for a short period of time, there is likely to be a fish kill, lost profits, possible exposure to breach of contract claims from Rangen's business partners if fish cannot delivered, and loss of good will and reputation. If the pipeline is down for a significant period of time or it is shut down permanently, the damages are even more complicated. Joy Kinyon, the General Manager of Rangen's aquaculture division, testified at the hearing that Rangen will have to make significant changes to its operation to gear up for the delivery of water

through the pipeline. (*See* 1_AR_2014-4633, 20141008 Hrg. Tr., p. 238, l. 2 – p. 239, l. 9). It will have to hire additional professional and technical personnel and make capital investments in the facility itself. (*See id.*). If Rangen loses the Magic Springs water for a significant period of time or even permanently, it may be not be able to recoup the value of the capital investments it has made and it may incur personnel costs that cannot be supported by another division. These types of consequential damages are not easily quantified and may, in fact, not be covered depending upon the terms of the insurance policy. Again, without the actual policy it is impossible for the Court to analyze these issues.

The District Court had no basis upon which to conclude that insurance would assure protection of Rangen's senior rights as required by CM Rule 43.03.c. As such, the District Court's decision should be reversed.

V. CONCLUSION

For the reasons set forth above, Rangen respectfully requests that the Judgment entered by the District Court be reversed and the Fourth Mitigation Plan disapproved.

DATED this 27th day of October, 2015.

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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 27th day of October, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by email:

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