IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 43370-2015

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 No. CM-MP-2014-006, "MAGIC SPRINGS PROJECT"

RANGEN, INC.

Petitioner / Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources

Respondents / Respondents on Appeal,

v.

IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenors / Respondents on Appeal.

IGWA's Response to Rangen's Opening Brief

Appeal from Twin Falls County Case No. CV-2014-4633

Honorable Eric J. Wildman, District Judge, Presiding.

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STATEMENT OF THE CASE

1. Nature of the Case

Rangen Inc. (Rangen) brings this appeal in an attempt to reverse a water right mitigation plan approved by the Director of the Idaho Department of Water Resources (IDWR). The plan, submitted by Idaho Ground Water Appropriators, Inc. (IGWA), enables junior-priority groundwater users to avoid having their wells shut off by delivering water to Rangen from a spring known as Magic Springs. The plan protects the supply of water to 157,000 acres of farmland, fourteen cities, and several dairies, cheese factories, and other businesses in the Magic Valley.[1]

2. Statement of Facts

Rangen receives water from the Martin-Curren Tunnel, a horizontal well that siphons water from the Eastern Snake Plan Aquifer (ESPA).[2] Water from the Tunnel is diverted through a series of pipes and other structures into Rangen's fish hatchery adjacent to Billingsley Creek.[3] After flowing through the hatchery the water discharges into Billingsley Creek.[4]

IGWA's members, like Rangen, get their water from the ESPA.[5] Their water rights are generally later in time than Rangen's.

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[1] *See* Agency R. (CV-2014-2935), Vol. I, p. 49-102 (listing water rights subject to being shut off if IGWA does not implement an approved mitigation plan).

[2] Agency R. (CV-2014-2935), Vol. I, p. 4.

[3] Agency R. (CV-2014-2935), Vol. I, pp. 46, 48 (showing a photo and an aerial drawing of the Martin-Curren Tunnel and pipeline system at Rangen's fish hatchery).

[4] Agency R. (CV-2014-2935), Vol. I, p. 48.

[5] Agency R. (CV-2014-2935), Vol. I, p. 1.

In December of 2011, Rangen filed a delivery call with the Director of the IDWR, claiming it had been injured by junior-priority groundwater diversions from the ESPA.[6] On January 29, 2014, the Director issued an order finding that junior pumping contributed to decreased flows from the Martin-Curren Tunnel and injured Rangen's water use.[7] Consequently, the Director ordered the juniors' wells be shut off (referred to as curtailment) unless they provide mitigation to Rangen to remedy the injury.[8] Rather than have their wells shut off, IGWA and its members developed various plans to provide Rangen water to mitigate the effect of junior-priority pumping.[9]

One of these mitigation plans, IGWA's Fourth Mitigation Plan, was approved by the Director on October 29, 2014, under the *Order Approving IGWA's Fourth Mitigation Plan* (the Final Order).[10] The Fourth Mitigation Plan is commonly known as the Magic Springs Project because it delivers water to Rangen from a spring roughly two miles away known as Magic Springs.[11] IGWA engineered and constructed a pipe and pump system, at great expense, to transport water from Magic Springs to Rangen. This system has been operating since February of 2015 to fully satisfy the mitigation obligation of junior

[6] Agency R. (CV-2014-2935), Vol. I, p. 1.
[7] Agency R. (CV-2014-2935), Vol. I, p. 36.
[8] Agency R. (CV-2014-2935), Vol. I, p. 42.
[9] Agency R. (CV-2014-4633), Vol. II, pp. 178-80.
[10] Agency R. (CV-2014-4633), Vol. II, pp. 197-99.
[11] Agency R. (CV-2014-4633), Vol. II, pp. 180-81, 189.

groundwater users.[12] Rangen's appeal seeks to reverse the Final Order and put an end to the delivery of mitigation water from Magic Springs.

Rangen opposed IGWA's Fourth Mitigation Plan when it was first presented to the Director.[13] After the Director approved the Plan in his Final Order,[14] Rangen appealed the Final Order to the district court.[15] The district court affirmed the Final Order.[16] Rangen then appealed the district court decision to this Court despite the fact that the Magic Springs Project is fully mitigating the impacts of junior groundwater pumping.[17]

In fact, the mitigation water supply from Magic Springs enables Rangen to raise more fish than it could from curtailment because the rate of flow from the pumps at Magic Springs can be adjusted to offset fluctuations in Rangen's water supply from the Martin-Curren Tunnel, thereby providing Rangen with a more stable supply of water.

[12] *See* 2d Supp. Agency R. (CV-2014-4633), Vol. I, p. 150.
[13] Agency R. (CV-2014-4633), Vol. I, p. 43.
[14] Agency R. (CV-2014-4633), Vol. II, p. 178.
[15] Agency R. (CV-2014-4633), Vol. II, p. 313.
[16] Clerk's R., p. 780.
[17] Clerk's R., p. 782.

STANDARD OF REVIEW

The standard of review set forth in Rangen's Opening Brief is adequate.

SUMMARY OF THE ARGUMENT

All of Rangen's arguments concerning the Director's application of CM Rule 43.03.j should be denied because Rangen has failed to demonstrate prejudice to its substantial rights, as required by Idaho Code § 67-5279(4).

Should the Court consider the substance of Rangen's arguments, Rangen's argument that the Director erred by not addressing certain CM Rule 43.03.j factors is mistaken because (a) the consideration of such factors is not mandatory, (b) the factors relating to conservation of water and rate of groundwater withdrawal are inapplicable to the Fourth Mitigation Plan, (c) the Director properly deferred analysis of injury to his future review of the water right transfer from Magic Springs, and (d) the Director implicitly found the Magic Springs Project to be in keeping with the public interest.

Rangen's argument that the Final Order constitutes a taking without just compensation fails because the Final Order did not obligate Rangen to provide an easement. Further, the issue is moot because Rangen gave IGWA a license to construct the Magic Springs pipe. And even if a taking did occur, it would not invalidate the Final Order.

Lastly, Rangen's argument that the Director abused his discretion when he determined insurance would be an adequate contingency under CM Rule 43.03.c is mistaken because the Director recognized the issue is discretionary, acted

through the exercise of reason, and acted within the outer limits of his discretion. Furthermore, Rangen's arguments concerning specific terms of IGWA's insurance policy are not properly before this Court in this appeal.

The district court properly upheld the Final Order. Its decision should be affirmed.

ARGUMENT

1. The Director did not abuse his discretion with respect to CM Rule 43.03.j.

Rangen claims the Director erred by not addressing the mitigation plan factors in CM Rule 43.03.j.[18] This rule reads:

> 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:
>
> . . . .
>
> 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.[19]

Rangen contends the Director "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 rate of future natural

[18] *Rangen's Opening Br.* at 10.

[19] IDAPA 37.03.11.043.03.j.

resources."[20] Rangen also says the Director erred by deferring evaluation of injury to the related water right transfer proceeding.[21]

As explained below, Rangen's arguments do not require reversal of the Final Order because (a) Rangen has failed to show prejudice to its substantial rights with respect to the Director's application of CM Rule 43.03.j, (b) the CM Rule 43.03.j factors are not mandatory, (c) the conservation of water and rate of ground water withdrawal factors are inapplicable to this case, (d) the Director did not abuse his discretion when he deferred consideration of injury, and (e) the Director implicitly found the Magic Springs Project to be in the public interest.

1.1 Rangen has not demonstrated prejudice to its substantial rights from the Director's application of CM Rule 43.03.j.

As a threshold matter, Idaho Code § 67-5279 allows Rangen to challenge the Director's application of CM Rule 43.03.j only if Rangen's substantial rights have been prejudiced. Rangen has not made this showing. Its opening brief does not assert its substantial rights have been prejudiced, nor does it allege facts showing prejudice to substantial rights as a result of the Director's application—or, according to Rangen, inapplication—of CM Rule 43.03.j. Rangen's failure to address this issue requires denial of all of its arguments concerning CM Rule 43.03.j.[22]

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[20] *Rangen's Opening Br.* at 10.

[21] *Id.* at 12.

[22] *See Rangen's Opening Br.* at 10-18.

Rangen's ignorance of the requirement of prejudice to substantial rights is not inadvertent. It was a central issue in Rangen's recent petition for judicial review of the Director's order approving the water right transfer from Magic Springs, which was necessary to implement the Magic Springs Project. There, the district court held that Rangen's substantial rights were *not* prejudiced since Rangen only stands to benefit from the water it receives from Magic Springs:

> Rangen . . . argues that its senior water rights are prejudiced by the *Final Order* [approving the water transfer]. However, the record establishes that Range's senior water rights . . . are not diminished in any way as a result of the Director's *Final Order*. Indeed, in his *Final Order* the Director expressly finds that no water rights, including those held by Rangen, are injured as a result of his approved transfer. To the contrary, the purpose of the transfer is to increase the water supply available to Rangen under its senior rights pursuant to a mitigation plan previously approved by the Director. Therefore, Rangen has failed to establish that its rights are prejudiced by the *Final Order*.[23]

Rangen has presumably ignored the requirement of prejudice to substantial rights with respect to the Director's application of CM Rule 43.03.j because there is none. In any case, Rangen's failure to demonstrate such prejudice requires denial of its arguments concerning CM Rule 43.03.j. Should this Court so rule, it need not consider the following subsections of Part 1 of this brief.

1.2 The Director's consideration of the CM Rule 43.03.j factors is discretionary.

Rangen's entire argument concerning CM Rule 03.43.j is premised on the assumption that the Director must in every instance explicitly address these

[23] *Mem. Dec.*, Oct. 8, 2015, Twin Falls County Case No. CV-2015-1130 (excerpt attached hereto as ***Appendix A***).

factors.[24] However, this assertion conflicts with the plain language of CM Rule 43.03, which reads: "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: . . ."[25] "[T]he word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'"[26] Thus, CM Rule 43.03 gives the Director discretion in determining whether a proposed mitigation plan will prevent injury to senior rights.

Rangen contends all CM Rule 43.03 factors are mandatory based on the following statement in this Court's *A& B Irrigation v. Spackman* decision: "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.'"[27] Rangen contends this Court judicially modified CM Rule 43.03 to impose a mandatory obligation for the Director to explicitly address every factor in every case. IGWA contends the *A& B Irrigation* decision did not go so far.

First, the Court made the statement quoted above with respect to the factors in subpart c of CM Rule 43.03 specifically.[28] As subpart c contains multiple factors, the "several" factors the *A& B Irrigation* decision refers to are presumably

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[24] *Rangen's Opening Br.* at 8.

[25] IDAPA 37.03.11.043.03 (emphasis added).

[26] *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995); *see also Boyd-Davis v. Macomber Law, PLLC*, 342 P.3d 661 (Idaho 2015) (applying this rule of construction to IDAPA rules).

[27] 155 Idaho 640, 654, 315 P.3d 828, 842 (2013) (quoted in *Rangen's Opening Br.* at 8).

[28] *Id.*

those listed in subpart c specifically. In fact, subpart c does contain mandatory language: "The mitigation plan *must* include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.[29] Accordingly, the Director determined the subpart c factors are "threshold factors against which IGWA's Magic Springs Project must be measured."[30]

The *A& B Irrigation* decision does not state that all CM Rule 43.03 factors are mandatory. Had this Court intended to judicially modify the rule, an explicit statement to that effect would be expected. Not only does the language of the decision not go so far, IDWR has not revised the rule in response to it either.

The fact that certain factors become mandatory by their specific language or importance does not mean that all factors are mandatory. Rangen has not shown precedent requiring a higher, mandatory standard to CM Rule 43.03.j factors or a good reason to do so. Moreover, this Court normally defers to agency interpretation of rules.[31]

IGWA maintains that the plain language of CM Rule 43.03—and the word "may" specifically—remains the law. As the district court recognized, "[CM Rule 43.03's] use of the term 'may' leaves it to the discretion of the Director to determine which of the 43.03 factors he will consider."[32] Accordingly, IGWA

[29] IDAPA 37.03.11.043.03.c (emphasis added).
[30] Agency R. (CV-2014-4633), Vol. II, p. 182 (quoting IDAPA 37.03.11.043.03).
[31] *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 4, 232 P.3d 322, 325 (2010).
[32] Clerk's R., p. 777.

respectfully urges the Court deny Rangen's argument that the Director erred by treating the CM Rule 43.03.j factors as discretionary.

1.3 The factors relating to conservation of water and rate of groundwater withdrawal are inapplicable to IGWA's Fourth Mitigation Plan.

Without giving it much attention, Rangen makes the statement that the Director "ignored the conservation of water resources, . . . and whether the plan would result in the diversion and use of ground water at a rate beyond the reasonably anticipated rate of future natural resources."[33] These factors, however, are inapplicable to the Magic Springs Project.

Rangen advances an interpretation of the "conservation of water resources" factor that would prohibit mitigation plans that result in water consumption. This notion is antithetical to the very concept of mitigation, which is to enable water consumption by junior users. Instead, the "conservation of water resources" factor must be read consistent with its statutory definition in Idaho Code §§ 42-203A, 42-222, 42-222A, and 42-240, each of which refers to the "conservation of water resources *within the state of Idaho*."[34] By this definition, the Director may consider whether a mitigation plan proposes to transfer water out-of-state or impair its use in-state. This consideration is irrelevant to the Fourth Mitigation Plan because the Magic Springs Project enables only in-state water use by both juniors and seniors. Thus, the Director did not abuse his discretion by not denying

[33] *Rangen's Opening Br.* at 10.

[34] Emphasis added.

the Magic Springs Project based on the conservation of water factor in CM Rule 43.03.j.

Next, the rate of groundwater withdrawal factor is also irrelevant because the Magic Springs Project does not involve the withdrawal of groundwater but rather the delivery of surface water from Magic Springs.[35] Despite Rangen's wish, CM Rule 43.03.j does not force all mitigation plans to address global aquifer management issues—there are other mechanisms for that, such as delivery calls, Ground Water Management Areas, and Critical Ground Water Areas. The purpose of groundwater withdrawal language in CM Rule 43.03.j is simply to ensure that mitigation plans that utilize groundwater do not cause withdrawals to exceed recharge. Since the Magic Springs Project does not involve groundwater withdrawals, this factor is irrelevant.

As the district court concluded, the Director did not abuse his discretion by not denying IGWA's Fourth Mitigation Plan based on the conservation of water resources factor or the groundwater withdrawal factors in CM Rule 43.03.j.[36]

1.4 The Director did not abuse his discretion by deferring his analysis of injury for the water right transfer proceeding.

The bulk of Rangen's brief is dedicated to the argument that the Director erred by deferring his analysis of injury to the water right transfer proceeding.[37] To understand this decision, one must understand that development of the Magic

[35] Agency R. (CV-2014-4633), Vol. II, p. 184.

[36] Clerk's R., p. 777.

[37] *See Rangen's Opening Br.* at 8-18.

Springs Project required IDWR approval of both (i) IGWA's Fourth Mitigation Plan under CM Rule 43, and (ii) an associated water right transfer under Idaho Code § 42-222. Though related, these are separate administrative proceedings.

The transfer was necessary because the water IGWA delivers from Magic Springs was previously used by Seapac of Idaho under its water rights.[38] IGWA had to acquire a portion of Seapac's water rights, then file an application under Idaho Code § 42-222 to change the place of use from Seapac's fish hatchery at Magic Springs to Rangen's hatchery near Billingsley Creek.[39]

Idaho Code § 42-222 requires the Director to consider injury to other water rights. Rather than prejudge this issue in the mitigation plan proceeding, which progressed in advance of the transfer, the Director elected to defer the issue for the transfer proceeding.

The question for this Court is not whether the Director failed to address injury, but whether he abused his discretion by deferring the analysis for the transfer proceeding.

An agency properly exercises its discretion if "the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason."[40]

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[38] Agency R. (CV-2014-4633), Vol. II, p. 180.

[39] Agency R. (CV-2014-4633), Vol. II, p. 197.

[40] *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 502, 337 P.3d 655, 661 (2014) (quoting *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006)).

There is no legal rule that bars the Director from deferring the injury analysis for the companion transfer proceeding. Perceiving the issue as discretionary, the Director provided a reasoned statement for deferring the analyses for the transfer proceeding, explaining: "Issues of potential injury to other water users due to a transfer are most appropriately addressed in the transfer contested case proceeding."[41] The district elaborated on the wisdom of this decision:

> It is understandable that the Director would, in his discretion, refrain from engaging in a full blown transfer and injury analysis in the context of the administrative proceeding on the mitigation plan under these circumstances. This is because a separate administrative proceeding on the transfer application itself was also pending before Department, wherein those same issues would be addressed. The Director's approval of the [Magic Springs Project] was made in part contingent upon the approval of the transfer. Given the nature of a transfer proceeding, notice and the opportunity to be heard would need to be afforded to a lot more water users than just those who were already a party to the administrative proceeding on the [Magic Springs Project]. It would have been untenable for the Director to make a determination on the transfer in conjunction with the mitigation plan, and then make a separate determination in conjunction with the transfer proceeding. 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.

The Director's decision to defer the injury analysis was both reasonable and practical, avoiding a duplicative and, more importantly, prejudicial analysis. Therefore, this Court should uphold his decision.

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[41] Agency R. (CV-2014-4633), Vol. II, p. 196.

1.5 The Director implicitly found the Fourth Mitigation Plan to be in the public interest.

Rangen argues that the Director ignored the public interest and "refused to even consider or address the consequences of the [Magic Springs Project] on the water rights holders and the aquifer."[42] Rangen's argument concerning the public interest is the same as its argument concerning injury—that water from Magic Springs may be diverted from Billingsley Creek and consumed by downstream water users after leaving Rangen's fish hatchery.

As mentioned above, the diversion of water from Billingsley Creek by downstream water users has no adverse effect on Rangen and can be denied on the basis it does not prejudice Rangen's substantial rights.

Notwithstanding, it bears mentioning that the public interest was also considered in the transfer proceeding under Idaho Code §42-222. The Director thoroughly considered the implications of water diverted from Billingsley Creek, and found no injury to the public interest.

In addition, the fact that the Director could have denied the Fourth Mitigation Plan based on the public interest factor, but did not, demonstrates the Director did find the Plan to be in the public interest. Indeed, it cannot reasonably be argued that it is not in the public interest to protect the water supply to 157,000 acres of farmland, fourteen cities, and several dairies, cheese factories, and other businesses in the Magic Valley, while also providing water to Rangen.

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[42] *Rangen's Opening Br.* at 10.

For all of these reasons, IGWA respectfully urges the Court to reject Rangen's arguments concerning CM Rule 43.03.j.

2. Rangen's argument that the Final Order constitutes a taking is misplaced.

Rangen claims the Final Order constitutes a taking since it required Rangen to notify IDWR whether it would permit IGWA to install the section of the Magic Springs pipe located on Rangen's property.[43] As explained below, no taking occurred, and even it had, it would not affect the validity of the Final Order.

2.1 The Final Order does not constitute a taking.

Rangen argues that the Final Order "condition[ed] enforcement of Rangen's water rights upon the relinquishment of its real property rights."[44] Rangen bases this on the Final Order's requirement that Rangen "submit its written acceptance/rejection" of the Magic Springs Project, and that if "Rangen refuses to allow construction in accordance with an approved plan, IGWA's mitigation obligation is suspended."[45]

The Final Order does not constitute a taking for two reasons. First, the plain language of the Final Order does not order a taking of Rangen's real property. As the district court pointed out, the Final Order does not

> 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

[43] *Rangen's Opening Br.* at 18.

[44] *Id.*

[45] Agency R. (CV-2014-4633), Vol. II, p. 198.

> the fourth mitigation plan may be affected. IGWA would then be required to taking further steps to implement the plan, including but not limited to condemnation proceedings . . . .[46]

The Director recognized that if Rangen were willing to accept the water yet refuse construction on its property, the Director could exercise his equitable authority to stay curtailment of junior water users in the ESPA until IGWA obtained an easement by eminent domain.

Second, Rangen's taking claim is moot because Rangen provided IGWA a written license to construct the Magic Springs pipe on its property.[47] Rangen argues that it was pressured into granting a license, fearing that IDWR would take its property.[48] However, Courts have explained that the mere assertion by a governmental entity of the right to interfere with a private party's property does not constitute a taking.[49] Similarly, whatever pressure Rangen felt does not constitute a taking of its property rights.

2.2 This appeal is not the proper forum for Rangen's taking claim.

Finally, even if Rangen had not granted IGWA a license and the Final Order actually constituted a taking, an appeal of the Final Order is not the proper forum to seek redress from a taking.

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[46] Clerk's R., p. 779.

[47] 2d Supp. Agency R. (CV-2014-4633), Vol. I, pp. 110-20.

[48] *Rangen's Opening Br.* at 19.

[49] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking.").

The Idaho Regulatory Takings Act[50] explains that a private landowner claiming an agency taking must file with that agency a written request for a taking analysis "not more than twenty-eight (28) days after the final decision concerning the matter at issue."[51] If the landowner does not timely file this request, it forfeits its taking claim.[52]

If Rangen believes the Director took its property, it must exhaust the administrative remedies provided for in the Idaho Regulatory Taking Act in a separate proceeding. Rangen cannot bootstrap that issue into this appeal.

Therefore, IGWA respectfully urges the Court to deny Rangen's takings argument.

3. The Director did not abuse his discretion by imposing curtailment coupled with insurance as contingency provisions under CM Rule 43.03.C.

Rangen claims that curtailment, coupled with insurance, does not adequately protect its rights.[53] Under the CM Rules, "[a] mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable."[54] In satisfaction of this requirement, the Director conditionally approved the Magic Springs Project,

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[50] Idaho Code § 67-8001 *et seq.* The Act defines a regulatory taking as "a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution." *Id.* § 67-8002.

[51] *Id.* § 67-8003(2).

[52] *Hehr v. City of McCall*, 155 Idaho 92, 98, 305 P.3d 536, 542 (2013).

[53] *Rangen's Opening Br.* at 19.

[54] IDAPA 37.03.11.043.03.c.

requiring—among other things—that IGWA install backup pumps, a backup power supply, and "purchase an insurance policy for the benefit of Rangen to cover any loss of fish attributable to the failure of the temporary or permanent pipeline system to the Rangen facility.[55] The Director also explained that groundwater users would be curtailed if they failed to provide mitigation water.[56] For the reasons explained below, the Director did not abuse his discretion by imposing these contingencies; therefore, Rangen's argument should be dismissed.

3.1 Rangen advocates for strict priority with no right to mitigate.

Rangen disapproves of insurance as a proper element of a contingency plan by arguing that "[i]f the Magic Springs pipeline were to stop delivering water [at some future time], there is no way that curtailment, even if it were ordered and enforced immediately, would deliver . . . water that Rangen is entitled to receive at that time."[57] Along the same lines, Rangen complains that "junior users have opted to provide replacement water rather than immediately remedy the harm they are causing [through curtailment]."[58] These arguments not only oppose the Magic Springs Project but mitigation plans generally.

Rangen misunderstands its rights. This Court has explained that the doctrine of first in time is first in right "is not an absolute rule without

[55] Agency R. (CV-2014-4633), Vol. II, p. 198.
[56] Agency R. (CV-2014-4633), Vol. II, p. 198.
[57] *Rangen's Opening Br.* at 23.
[58] *Id.*

exception."[59] The CM Rules grant the Director discretion to approve mitigation plans in order to "protect the public's interest in this valuable commodity."[60] Accordingly, this Court has held the CM Rules to be constitutional.[61] Within these rules is the well-established practice of mitigation, which promotes the maximum beneficial use of Idaho's water resources.[62]

Notably, Idaho is not the only state that uses reasonable accommodations to maximize the use of water resources among water users. For example, under the physical solution doctrine in California, "a court adjudicating a water rights dispute may, 'within limits,' exercise its equitable powers to 'impose a physical solution to achieve a practical allocation of water to competing interests.'"[63]

Both the Martin-Curren Tunnel and Magic Springs discharge water from the ESPA. Both have for decades been used to raise trout under essentially identical circumstances. The Magic Springs Project maximizes beneficial use of Idaho's water resources by 1) providing Rangen the water it is entitled to under its rights, and 2) avoiding curtailment of junior groundwater use. Rangen cannot justifiable

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[59] *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007).

[60] *Id.*

[61] *Id.*

[62] IDAPA 37.03.11.043.

[63] *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189 (2006) (quoting *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000)).

protest on the basis that it now obtains water from the ESPA through a different spring than it would through curtailment. It is entitled to water, not curtailment.

3.2 Insurance is an adequate contingency, and Rangen's complaints regarding the insurance IGWA obtained are not properly on appeal.

Rangen claims insurance will not adequately protect its interests.[64] Rangen cites eight reasons it disapproves of insurance, but with the exception of the eighth and final reason, each complaint is directed at the terms of the insurance policy IGWA provided, not the Final Order's directive that insurance be procured.

This distinction is important because Rangen's disapproval of specific provisions of the insurance policy is not grounds for invalidating the Final Order. The Final Order merely required IGWA to obtain appropriate insurance.[65] A policy was obtained in due course and submitted to the Director. If Rangen believes the policy obtained is not sufficient to meet the Director's directive, Rangen must petition the Director for redress.

Rangen has not followed this process. Rather than exhaust its administrative remedies, Rangen seeks to have this Court review an insurance policy that was neither obtained nor submitted to IDWR until after the Final Order was issued.

For the purpose of this appeal, Rangen is limited to challenging the insurance condition generally without reference to specific terms of the policy. The only argument Rangen makes that arguably goes to that issue is the assertion

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[64] *Rangen's Opening Br.* at 23.

[65] Agency R. (CV-2014-4633), Vol. II, p. 197.

that "an insurance policy is unlikely to cover all damages Rangen will sustain if the Magic Springs pipeline stops delivering water and curtailment has been ordered."[66] Rangen lists "fish kill, lost profits, possible exposure to breach of contract claims . . . , and loss of good will and reputation" as potential damages.[67] Of course, this is dependent on the amount of coverage under the policy, which Rangen would need to challenge to the Director before raising on appeal.

With respect to insurance generally, CM Rule 43.03.c explicitly states that Director can approve of "replacement water supplies *or other appropriate compensation* to the senior-priority water right" as acceptable contingency provisions.[68] Thus, the Director has discretion to approve monetary compensation as an appropriate contingency provision.

The issue for this Court is whether the insurance requirement constitutes "appropriate compensation." In this case, the Director specified that the insurance policy should account for "losses of fish attributable to the failure of the temporary or permanent pipeline system to the Rangen Facility."[69] The entire purpose of Rangen's water rights and the facilities receiving this water is to propagate fish. Thus, the Director required that insurance remedy the specific harm for which mitigation is owed.

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[66] *Rangen's Opening Br.* at 26.

[67] *Id.*

[68] IDAPA 37.03.11.043.03.c (emphasis added).

[69] Agency R. (CV-2014-4633), Vol. II, p. 197.

Moreover, the Director imposed other contingencies that significantly minimize the risk of fish loss, including a backup power supply and backup pumps. Given this, the Director did not abuse his discretion in concluding, as did the district court, that "curtailment coupled with insurance are adequate contingencies to satisfy the requirements of Rule 43.03.c of the CM Rules."[70]

CONCLUSION

For the foregoing reasons, IGWA asks this Court to rule as follows:

A. Decline to reverse the Final Order based on the Director's decision to decline consideration of the CM Rule 43.03.j factors.

B. Decline to reverse the Final Order based on the Rangen's claim that the Final Order constituted a taking.

C. Decline to reverse the Director's conclusion that curtailment and insurance were adequate contingencies.

RESPECTFULLY SUBMITTED this 25th day of November, 2015.

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[70] Clerk's R., p. 776.

CERTIFICATE OF SERVICE

I CERTIFY that on this 25th day of November, 2015, the above document was served on the following persons in the manner indicated:

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APPENDIX A

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

RANGEN, INC., an Idaho Corporation,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources,

Respondents,

and

NORTH SNAKE GROUND WATER DISTRICT, MAGIC VALLEY GROUND WATER DISTRICT, and SOUTHWEST IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF THE APPLICATION FOR TRANSFER 79560 IN THE NAME OF NORTH SNAKE GWD, MAGIC VALLEY GWD, AND SOUTHWEST IRRIGATION DISTRICT

Case No. CV-2015-1130

MEMORANDUM DECISION

B. The Director's *Final Order* is affirmed on the alternative grounds that Rangen has failed to establish its substantial rights have been prejudiced.

Under Idaho Code § 67-5279(4), a decision of the Director must be affirmed unless the petitioner can establish that its substantial rights have been prejudiced. In this case, it cannot be said that the Director's *Final Order* prejudices Rangen's substantial rights. Rangen first argues that its senior water rights are prejudiced by the *Final Order*. However, the record establishes that Rangen's senior water right numbers 36-2551 and 36-7694, which are the subject of its delivery call, are not diminished in any way as a result of the Director's *Final Order*. Indeed, in his *Final Order* the Director expressly finds that no water rights, including those held by Rangen, are injured as a result of his approval of the transfer. To the contrary, the purpose of the transfer is to increase the water supply available to Rangen under its senior rights pursuant to a mitigation plan previously approved by the Director. Therefore, Rangen has failed to establish that its water rights are prejudiced by the *Final Order*.

Rangen's additional argument that its substantial rights to have the correct procedures and legal standards applied to the transfer application proceeding is likewise unavailing. Rangen had a fair and meaningful opportunity to participate in the transfer proceeding and to present evidence before the Department concerning the Districts' transfer application. The Court further finds that the Director, in analyzing the transfer under Idaho Code § 42-222, applied the correct legal standard and properly adjudicated the Districts' application in a manner consistent with Idaho law and within the bounds of his discretion. Since Rangen has failed to establish that its substantial rights have been prejudiced, the Court finds that the Director's *Final Order* must be affirmed via operation of law. I.C. § 67-5279(4).

C. The Districts are not entitled to an award of attorney fees on judicial review.

The Districts seek an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Court holds that the Rangen has presented legitimate questions for this Court to address