

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
DISTRIBUTUION 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,

v.

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.

RESPONDENTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
A. NATURE OF THE CASE.....	1
B. COURSE OF PROCEEDINGS	1
C. STATEMENT OF FACTS	4
II. ISSUES PRESENTED ON APPEAL	6
III. STANDARD OF REVIEW	7
IV. ARGUMENT.....	8
A. THE DIRECTOR ACTED WITHIN HIS AUTHORITY BY DEFERRING CONSIDERATION OF INJURY ISSUES TO THE TRANSFER PROCEEDING AND CONDITIONALLY APPROVING THE FOURTH MITIGATION PLAN.	8
B. THE FOURTH MITIGATION PLAN ORDER INCLUDES ADEQUATE CONTINGENCY PROVISIONS TO ASSURE PROTECTION OF RANGEN’S SENIOR WATER RIGHTS.....	15
C. THE DIRECTOR’S REQUIREMENTS THAT RANGEN STATE WHETHER IT WOULD ACCEPT WATER PURSUANT TO THE MAGIC SPRINGS PROJECT AND ALLOW CONSTRUCTION RELATED TO THE DELIVERY PIPE DID NOT EFFECTUATE A TAKING OF RANGEN’S PROPERTY.....	17
V. CONCLUSION.....	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases

<i>Barron v. Id. Dept. of Water Resources</i> , 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).....	7
<i>Chisholm v. Twin Falls County</i> , 139 Idaho 131, 132, 75 P.3d 185 (2003)	7
<i>Idaho Power Co. v. Idaho Dep't of Water Res.</i> , 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).....	7
<i>In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.</i> , 155 Idaho at 654, 315 P.3d 842 (2013).....	15
<i>Mann v. Safeway Stores, Inc.</i> , 95 Idaho 732, 518 P.2d 1194 (1974).....	7
<i>Rife v. Long</i> , 127 Idaho 841, 848, 908 P.2d 143, 150 (1995).....	8, 10
<i>Row v. State</i> , 135 Idaho 573, 580, 21 P.3d 895, 902 (2001)	12
<i>State ex rel. Parsons v. Bunting Tractor Co.</i> , 58 Idaho 617, 77 P.2d 464, 466 (1938).....	8, 10
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516, 523, n. 11 (1982)	17
<i>White v. Bannock Cnty. Commissioners</i> , 139 Idaho 396, 401, 80 P.3d 332, 337 (2003).....	11, 17
<i>Young Elec. Sign Co. v. State ex rel. Winder</i> , 135 Idaho 804, 807, 25 P.3d 117, 120 (2001).....	7

Statutes

I.C. § 42-108	13
I.C. § 42-1766	11
I.C. § 42-222	10, 11, 12, 13, 14
I.C. § 67-5279(1)	7
I.C. § 67-5279(3)	7

Rules

I.R.C.P. 84(t)(2).....	5, 12
IDAPA 37.03.11	1
IDAPA 37.03.11.040.01.b	8
IDAPA 37.03.11.043.01.d	9
IDAPA 37.03.11.043.02	10
IDAPA 37.03.11.043.03	4, 8, 10
IDAPA 37.03.11.043.03.a	8, 9
IDAPA 37.03.11.043.03.b	8, 9
IDAPA 37.03.11.043.03.c	6, 8, 9, 15, 17
IDAPA 37.03.11.043.03.h	9
IDAPA 37.03.11.043.03.i	12
IDAPA 37.03.11.043.03.j.....	6, 10, 11, 13

Constitutional Provisions

Idaho Const. article I, § 14.....	6, 17, 18
U.S. Const. amend. V	6, 17

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out an appeal filed by Rangen, Inc. (“Rangen”), of a final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) approving a mitigation plan filed by the Idaho Ground Water Appropriators, Inc. (“IGWA”), pursuant to the Department’s Conjunctive Management Rules (“CM Rules”).¹ The final order is the *Order Approving IGWA’s Fourth Mitigation Plan* (“Fourth Mitigation Plan Order”).

Rangen presents three issues on appeal. Two of the issues presented challenge the Director’s analysis of IGWA’s mitigation plan pursuant to the CM Rules. Rangen asserts as a third issue that particular requirements in the Fourth Mitigation Plan Order effectuate a taking of Rangen’s property in violation of the United States and Idaho Constitutions. For the reasons set forth below, the Court should affirm the District Court’s May 13, 2015, *Memorandum Decision and Order and Judgment* regarding the Fourth Mitigation Plan Order.

B. COURSE OF PROCEEDINGS

Issues raised in this appeal stem from the *Petition for Delivery Call* filed by Rangen with the Department on December 13, 2011, alleging Rangen is not receiving all the water it is entitled to pursuant to water right numbers 36-2551 and 36-7694, and is being materially injured by junior-priority ground water pumping. *1_AR_2014-2935* at 1.² In the delivery call

¹ The term “Conjunctive Management Rules” or “CM Rules” refers to the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

² The record on appeal contains the record, exhibits, hearing transcripts, and the Clerk’s Record on Appeal from judicial review proceedings of IGWA’s Fourth Mitigation Plan (labeled as *1_AR_2014-4633*, *2_Supp. AR_2014-4633*, *3_2nd Supp. AR_2014-4633*, and *Appeal 4633*); the record, exhibits, and hearing transcripts from judicial review proceedings of IGWA’s Second Mitigation Plan (labeled as *1_AR_2014_2935*); and the transcripts from judicial review

proceeding, the Director issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”).³ *Id.* at 1-102. The Director ordered curtailment of junior-priority ground water rights, but further ordered that such curtailment could be avoided if the junior ground water users participated in a mitigation plan that would mitigate for material injury to Rangen’s senior water rights caused by junior ground water pumping. *Id.* at 42.

IGWA filed a series of mitigation plans proposing to mitigate for material injury to Rangen’s senior water rights. The mitigation plan at issue in this appeal is *IGWA’s Fourth Mitigation Plan and Request for Expedited Hearing* (“Fourth Mitigation Plan”) filed with the Department on August 27, 2014. *1_AR_2014-4633 Ex. 1000*. The Fourth Mitigation Plan consists of the “Magic Springs Project.” *Id.* at 3. The Magic Springs Project calls for IGWA to lease or purchase ten cubic feet per second (“cfs”) of water right number 36-7072 owned by SeaPac of Idaho (“SeaPac”) and pipe water approximately two miles from SeaPac’s Magic Springs facility to the fish and research propagation facility owned by Rangen (“Rangen Facility”). *Id.* at 3, 12. A letter of intent executed by IGWA and SeaPac states that SeaPac will agree to lease or sell to IGWA up to ten cfs of “first use” water from water right number 36-7072 for mitigation purposes (“IGWA/SeaPac agreement”). *1_AR_2014-4633 Ex. 1003* at 2. One contingency of the IGWA/SeaPac agreement is that IGWA secure an order approving the

proceedings of Rangen’s delivery call (labeled as *1_AR-2014_1338*). Citations to records, exhibits, and transcripts herein are consistent with the above-described labels.

³ The Curtailment Order was appealed to the District Court in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-1338. The District Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* (“Decision”) on October 24, 2014, which affirmed the Director on a number of issues, but held the Director erred by applying the Great Rift trim line to reduce the zone of curtailment. *Decision* at 28. The Decision is currently on appeal before this Court, Docket Nos. 42772-2015, 42775-2015, and 42863-2015.

transfer of the place of use from the Magic Springs facility to the Rangen Facility. *Id.* at 2-3. On September 12, 2014, IGWA submitted an Application for Transfer of Water Right (“Transfer Application”) to the Department to add the Rangen Facility as a new place of use for up to ten cfs from water right number 36-7072. *1_AR_2014-4633 Ex. 1001.*

The Director held a hearing for the Fourth Mitigation Plan on October 8, 2014. *1_AR_2014-4633* at 181. On October 29, 2014, the Director issued the Fourth Mitigation Plan Order, approving the Fourth Mitigation Plan upon several conditions and with contingencies to protect Rangen. *Id.* at 197-98. The Director approved the Fourth Mitigation Plan conditioned upon approval of the Transfer Application or an authorized lease through the Water Supply Bank (“WSB”) and upon all necessary agreements being reduced to final written agreements. *Id.* at 197-98. The Director also ordered that IGWA purchase an insurance policy for the benefit of Rangen to cover any fish losses attributable to failure of the Magic Springs pipeline system. *Id.* at 198. The Director reiterated that IGWA must provide the required mitigation to Rangen by January 19, 2015, or certain junior-priority ground water rights would be curtailed. *Id.*⁴

Rangen filed a *Petition* with the District Court seeking judicial review of the Director’s Fourth Mitigation Plan Order. *Appeal 4633* at 768-69. The District Court issued its *Memorandum Decision and Order and Judgment* on May 13, 2015, affirming the Fourth Mitigation Plan Order “save the Director’s recalculation” of certain mitigation credit granted to IGWA. *Id.* at 780.⁵ The District Court found the Fourth Mitigation Plan Order is consistent with the CM Rules because it did “not permit out-of-priority water use prior to the conditions of

⁴ The Director originally set the January 19, 2015, deadline in the June 20, 2014, *Order Approving IGWA’s Second Mitigation Plan, Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order.* See *1_AR_2014-2935* at 537-560.

⁵ The Director’s recalculation of mitigation credit is not at issue in this appeal.

approval being satisfied” and “contains adequate contingencies.” *Id.* at 774-76. The District Court also found the Director did not abuse his discretion under CM Rule 43.03 by deferring “a full blown transfer and injury analysis” to the administrative proceeding on the Transfer Application. *Id.* at 776-77. Finally, the District Court found the Director’s requirements that Rangen state, in writing, 1) whether it would accept water delivered pursuant to the Magic Springs Project, and 2) whether it would allow construction on its land related to placement of the delivery pipe, “[did] not effectuate an unlawful taking of Rangen’s property without just compensation.” *Id.* at 778-79. Rangen filed its *Notice of Appeal* to this Court on June 24, 2015, seeking review of the District Court’s May 13, 2015, *Memorandum Decision and Order and Judgment.* *Id.* at 782-86.

C. STATEMENT OF FACTS

As discussed above, the Director approved the Fourth Mitigation Plan conditioned upon approval of the Transfer Application or an authorized lease through the WSB and upon all necessary agreements being reduced to final written agreements. *1_AR_2014-4633* at 197-98. A rental agreement was executed between IGWA and the Idaho Water Resource Board (“IWRB”) on January 15, 2015, authorizing IGWA to rent a portion of water right number 36-7072 from the WSB. *Appeal 4633* at 289-92. By January 18, 2015, IGWA submitted to the Department all necessary written agreements. *Id.* at 339-474; 689; 709-20.

The Magic Springs Project was not completed by the January 19, 2015, deadline. *Id.* at 773. Facing imminent curtailment, IGWA motioned the District Court to stay the Director’s curtailment until February 7, 2015. *Id.* at 773-74. The District Court granted IGWA’s motion and required that IGWA provide additional water to Rangen for failing to meet the January 19, 2015, deadline. *Id.* at 690, 774. In order to deliver the additional water owed to Rangen, an

amended WSB rental agreement was executed between IGWA and the IWRB on January 27, 2015, to increase the authorized rental rate. *Id.* at 694-95.

In approving the Fourth Mitigation Plan, the Director also ordered that IGWA purchase an insurance policy for the benefit of Rangen to cover any fish losses attributable to failure of the Magic Springs pipeline system. *1_AR_2014-4633* at 198. IGWA obtained that insurance policy on February 5, 2015. *Id.* at 690, 721-24.

The Magic Spring pipeline has been delivering the required mitigation water to Rangen since February 6, 2015. *Id.* at 690. IGWA is fully mitigating for material injury caused to Rangen's senior water rights by delivering "first use" water from SeaPac's Magic Springs facility to the Rangen Facility pursuant to the Fourth Mitigation Plan in compliance with the Fourth Mitigation Plan Order. *1_AR_2014-4633 Ex. 1000* at 3; *1_AR_2014-4633 Ex. 1009* at 4; *Appeal 4633* at 690.

In addition, on March 18, 2015, the Director issued the *Amended Final Order Approving Application for Transfer* ("Transfer Order"), approving the Transfer Application. *Appeal 4644* at 699-708. The Director recognized the proposed transfer could injure other water users and, therefore, approved the transfer conditioned upon continuation and documentation into the future of IGWA and Southwest Irrigation District's aquifer enhancement activities sufficient to offset any depletion of flow due to the transfer. *Id.* at 704-05. The District Court affirmed the Director's determination that the transfer will not result in injury to other water rights in its October 8, 2015, *Memorandum Decision* and *Judgment* issued in Case No. CV-2015-1130.⁶ Because no appeal was filed by November 19, 2015, the *Judgment* is final. *See* I.R.C.P. 84(t)(2).

⁶ Filed concurrently with this Respondents' Brief is a *Stipulated Motion to Augment the Record* requesting the Court augment the record with the District Court's October 8, 2015, *Memorandum Decision* and *Judgment* affirming the Transfer Order issued in Case No. CV-2015-1130.

II. ISSUES PRESENTED ON APPEAL

The issues presented by Rangen are as follows:

1. Whether the Director erred in failing to conduct any analysis of CM Rule 43.03.j factors.
2. Whether the Director's Fourth Mitigation Plan 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.

Respondents' formulation of the issues presented is as follows:

1. Whether the Director acted within his authority by deferring consideration of issues of injury to other water users to the Transfer Application proceeding and conditionally approving the Fourth Mitigation Plan.
2. Whether the Fourth Mitigation Plan Order includes adequate contingency provisions to satisfy CM Rule 43.03.c.
3. Whether the Director's requirements that Rangen state, in writing, whether it would accept water delivered pursuant to the Magic Springs Project and whether it would allow construction on its land related to placement of the delivery pipe effectuates a taking of Rangen's property in violation of the United States and Idaho Constitutions.

III. STANDARD OF REVIEW

In an appeal from a decision of the district court acting in its appellate capacity under the Idaho Administrative Procedure Act, the Supreme Court reviews the agency record independently of the district court's decision. *Chisholm v. Twin Falls County*, 139 Idaho 131, 132, 75 P.3d 185, 187 (2003). The Court does not substitute its judgment as to the weight of the evidence presented, Idaho Code § 67-5279(1), but instead defers to the agency's findings of fact unless they are clearly erroneous. *Chisholm*, 139 Idaho at 132, 75 P.3d at 187. When conflicting evidence is presented, the agency's findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether the Court might have reached a different conclusion. *Barron v. Id. Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The agency's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the agency reached. *See, e.g., Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974).

“A strong presumption of validity favors an agency's actions.” *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001). The agency's action may be set aside, however, if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron*, 135 Idaho at 417, 18 P.3d at 222. In addition, the Court will affirm an agency action unless a substantial right of the appellant has been prejudiced. *Id.* If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. **THE DIRECTOR ACTED WITHIN HIS AUTHORITY BY DEFERRING CONSIDERATION OF INJURY ISSUES TO THE TRANSFER PROCEEDING AND CONDITIONALLY APPROVING THE FOURTH MITIGATION PLAN.**

1. **The Director is vested with authority to determine which CM Rule 43.03 factors to consider in evaluating a mitigation plan.**

The CM Rules require that, when a delivery call is made, and upon a finding by the Director as provided in CM Rule 42 that injury is occurring, the Director may allow out-of-priority diversion of water by junior-priority ground water users pursuant to an approved mitigation plan. IDAPA 37.03.11.040.01.b. CM Rule 43.03 establishes factors that “*may* be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03 (emphasis added). The Rule’s use of the term “*may*” leaves it to the discretion of the Director to determine which of the Rule 43.03 factors to consider when evaluating a mitigation plan. *See Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995); *State ex rel. Parsons v. Bunting Tractor Co.*, 58 Idaho 617, 77 P.2d 464, 466 (1938) (explaining the term “*may*” is “*permissive*” and expresses the “*right to exercise discretion*” whereas the terms “*must*” or “*shall*” carry an “*imperative or mandatory meaning*.”).

Here, consistent with CM Rule 43.03, the Director exercised his authority to determine which of the Rule’s factors to consider in evaluating the Fourth Mitigation Plan. The Director determined factors 43.03(a) through 43.03(c) are necessary components of a mitigation plan that calls for the direct delivery of mitigation water, and are “*threshold factors against which IGWA’s Magic Springs Project must be measured.*” *I_AR_2014-4633* at 182-83. Accordingly, the Director explained that IGWA bore the burden of proving:

- (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).

Id. To meet its burden of proof, the Director determined IGWA had to present sufficient factual evidence to prove that (1) the Magic Springs proposal is legal, and will provide the quantity of water required by the Curtailment Order; (2) the components of the Fourth Mitigation Plan will be implemented to timely provide mitigation water as required by the Curtailment Order; and (3)(a) the Magic Springs Project is geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated. *Id.* at 183.

After evaluating all the evidence, the Director concluded the "Fourth Mitigation Plan is an acceptable plan under the CM Rules." *Id.* at 195. The Director stated:

The Fourth Mitigation Plan adequately describes the actions that will be taken by IGWA to mitigate material injury to Rangen by pumping water from Magic Springs to the Rangen Facility for the beneficial purpose of fish propagation. CM Rule 43.01.d. The plan is in compliance with Idaho law. CM Rule 43.03.a. The plan has been geographically located and engineered. While IGWA has not finalized some aspects of the plan, for instance IGWA offered two possible points of diversion and also offered at least two alternative pipeline alignments, this does not render the plan unapprovable. In fact, because some aspects of the plan have not yet been finalized, this will provide Rangen an opportunity to offer additional input on issues such as how to integrate the Magic Springs water into Rangen's system.

Id. at 195-96. The Director also stated that, "[i]f implemented, the plan will provide water to Rangen 'at the time and place required by the senior priority water right' CM Rule 43.03.b." *Id.* at 196. In addition, the Director determined the proposed pipeline system satisfies necessary standards of "temperature, water chemistry, reliability, and biosecurity" and the proposed pumping and power "system design is reliable. CM Rule 43.03.h." *Id.*

The Director recognized that CM Rule 43.03.j provides the Director may consider issues of injury to other water users as part of a mitigation plan proceeding. *Id.* at 182. However, the Director exercised his discretion pursuant to CM Rule 43.03 and deferred consideration of issues of injury to other water users to the proceeding on the Transfer Application. *Id.* at 196.

2. The Director did not err in conditionally approving the Fourth Mitigation Plan.

CM Rule 43.02 requires the Director to consider a mitigation plan under the procedural provisions of Idaho Code § 42-222. Idaho Code § 42-222 provides that approval may be granted “in whole, or in part, or upon conditions.” Accordingly, the Director is statutorily authorized to conditionally approve mitigation plans. Here, consistent with his statutory authority, the Director conditionally approved the Fourth Mitigation Plan upon approval of the Transfer Application because the Director concluded issues of injury to other water users “are most appropriately addressed in the transfer contested case proceeding.” *I_AR_2014-4633* at 197.

Rangen asserts the Director “must” conduct an “analysis of CM Rule 43.03.j factors,” including an analysis of issues of injury to other water users, in evaluating a mitigation plan. *Rangen, Inc.’s Opening Brief* at 8-11. This assertion is contrary to the plain language of CM Rule 43.03, which establishes factors that “*may* be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03 (emphasis added). Again, the Rule’s use of the term “may” leaves it to the discretion of the Director to determine which of the Rule 43.03 factors to consider in evaluating a mitigation plan. *See Rife*, 127 Idaho at 848, 908 P.2d at 150; *State ex rel. Parsons*, 58 Idaho 617, 77 P.2d at 466.

Rangen also asserts “the Director refused to consider or address the consequences of the Fourth Mitigation Plan on water rights holders.” *Rangen, Inc.’s Opening Brief* at 10. This

assertion is false. The Director only deferred consideration of issues of injury to other water users to the administrative proceeding on the Transfer Application, where such considerations “are most appropriately addressed.” *I_AR_2014-4633* at 196. As the District Court explained, “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 fourth mitigation plan.” *Appeal 4633* at 777. Further, “[i]t 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.” *Id.* Because the Director is statutorily authorized to approve a mitigation plan upon conditions pursuant to Idaho Code § 42-222, and because consideration of Rule 43.03.j in evaluating a mitigation plan is discretionary, the Court should affirm the District Court’s holding that the Director did not err by deferring consideration of issues of injury to other water rights to the transfer proceeding and conditionally approving the Fourth Mitigation Plan upon approval of the Transfer Application. *See id.*

Moreover, IGWA was not allowed to implement the Fourth Mitigation Plan without an analysis of injury to other water users. Issues of injury due to IGWA’s delivery of water to Rangen pursuant to the Magic Springs Project were analyzed in proceedings related to the WSB rental (*see Appeal 4663* at 294, 320)⁷ and in the Director’s Transfer Order (*see Appeal 4663* at 704-05). In the Transfer Order, the Director recognized the proposed transfer could injure other

⁷ To the extent Rangen seeks to challenge approval of the WSB rental in this appeal, the Court should not consider such arguments because Rangen has not exhausted its administrative remedies. *See White v. Bannock Cnty. Commissioners*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (“ . . . the doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered.”). *Rangen, Inc.’s Petition to Revoke Rental Agreement*, filed pursuant to Idaho Code § 42-1766, is currently pending before the Department.

water users and, therefore, approved the transfer conditioned upon continuation and documentation into the future of IGWA and Southwest Irrigation District's aquifer enhancement activities sufficient to offset depletion of flow due to the transfer. *Appeal 4664* at 704-05. Therefore, the Director's conditional approval requires ongoing mitigation to ensure the transfer will not injure other water users. In its October 8, 2015, *Memorandum Decision and Judgment* affirming the Transfer Order issued in Case No. CV-2015-1130,⁸ the District Court affirmed the Director's determination that the transfer will not result in injury to other water users.⁹ Because no appeal was filed by November 19, 2015, the *Judgment* is final. See I.R.C.P. 84(t)(2). To the extent Rangen seeks to challenge the Transfer Order or argue against the Director's determination that the transfer will not result in injury to other water users, such challenges are

⁸ As discussed in footnote 6, filed concurrently with this Respondents' Brief is a *Stipulated Motion to Augment the Record* requesting the Court augment the record with the District Court's October 8, 2015, *Memorandum Decision and Judgment* affirming the Transfer Order issued in Case No. CV-2015-1130.

⁹ In its *Memorandum Decision* affirming the Transfer Order, the District Court also affirmed the Director's determination that the transfer will not result in enlargement of water right number 36-7072. Here, similar to Rangen's argument in the Transfer Order appeal, Rangen asserts that approval of the Fourth Mitigation Plan "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." *Rangen, Inc.'s Opening Brief* at 15. However, instead of concluding the increased consumptive use is an improper enlargement under Idaho Code § 42-222, Rangen concludes the increased consumption "is an improper enlargement of the existing right that is prohibited under CM Rule 43.03.i." *Id.* Rangen did not raise this argument to the Director or to the District Court in the underlying appeal at issue in this case. Thus, the Court should not consider Rangen's argument. See *Row v. State*, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001) ("The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal."). Further, CM Rule 43.03.i only refers to "enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan." IDAPA 37.03.11.043.03.i. There is no increase in the rate of diversion, seasonal quantity, or time of diversion under water right number 36-7072 as a result of the Fourth Mitigation Plan Order. In addition, the concept of "consumptive use" is something the Director "may consider . . . as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right" under Idaho Code § 42-222, not CM Rule 43.03.i. The Court should reject Rangen's argument.

now foreclosed as Rangen did not appeal the District Court's *Judgment* issued in Case No. CV-2015-1130.

Rangen argues the Director erred by examining issues of injury to other water users in the Transfer Application proceeding instead of the Fourth Mitigation Plan proceeding because "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." *Rangen, Inc.'s Opening Brief* at 11-12. Specifically, Rangen argues there is "no explicit requirement in § 42-222 to consider whether the aquifer is being mined." *Id.* at 12. There is also no explicit requirement in CM Rule 43.03.j. "to consider whether the aquifer is being mined." While the language of CM Rule 43.03.j provides the Director may consider whether a mitigation plan "would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge," Rangen continues to overlook that the Director's consideration of Rule 43.03.j in evaluating a mitigation plan is discretionary.

Rangen also argues "the purpose of the mitigation plan is not simply to mitigate for a discreet water user that is causing injury to another water user" but "purports to mitigate for all junior-priority ground water use and to allow ground water pumping to continue unabated." *Rangen, Inc.'s Opening Brief* at 12. Rangen asserts the Fourth Mitigation Plan is flawed because it "does nothing to address the injury caused by junior-priority ground water pumping within the [Eastern Snake Plain Aquifer ("ESPA").]" *Id.* at 16. IGWA filed the Fourth Mitigation Plan to "provide additional ways of satisfying the mitigation obligation imposed by the [Curtailment Order], and thereby prevent curtailment of junior-priority groundwater use." *1_AR_2014-4633 Ex. 1000* at 1. In other words, the purpose of the Fourth Mitigation Plan is exactly what Rangen says it is not: to mitigate for junior-priority ground water use that is causing injury to Rangen.

Further, the Fourth Mitigation Plan does not purport, nor would it be appropriate to purport, that it mitigates for injury due to all junior-priority ground water pumping within the ESPA. The Curtailment Order requires junior-priority ground water users to mitigate for injury to Rangen, not for injury caused by all junior-priority ground water pumping within the ESPA. IGWA has been fully delivering the required mitigation water to Rangen pursuant to the Fourth Mitigation Plan since February 6, 2015. *Appeal 4633* at 690. The Magic Springs Project fully mitigates for material injury caused to Rangen's senior water rights by junior-priority ground water pumping. Rangen's assertion that the Fourth Mitigation Plan must address all injury caused by junior-priority ground water pumping within the ESPA is an inappropriate attempt to expand the junior ground water users' mitigation obligation through this proceeding.

Finally, the Director's deferral of the injury determination to the Transfer Application proceeding did not make approval of the transfer a foregone conclusion. Rangen's argument that "[t]here was no way 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" improperly theorizes that the Director would approve the Transfer Application simply due to construction of the Magic Springs Project. *Rangen, Inc.'s Opening Brief* at 17. The Director demonstrated his commitment to protect Rangen's senior water rights in the face of a nearly completed Magic Springs Project by denying IGWA's motion for stay when it became clear IGWA would not complete the project by the January 19, 2015, deadline. *Appeal 4633* at 773-774. Furthermore, the Director evaluated IGWA's Transfer Application consistent with Idaho Code § 42-222. *Id.* at 699-708. The Director recognized the transfer could cause injury to water users, and approved the Transfer Application upon condition that IGWA and Southwest Irrigation District continue into the future aquifer enhancement activities sufficient to offset any depletion of

flow due to the transfer. *Id.* at 704-05. Rangen’s speculative argument that the Director would approve the Transfer Application because IGWA constructed the Magic Springs Project must be rejected.

B. THE FOURTH MITIGATION PLAN ORDER INCLUDES ADEQUATE CONTINGENCY PROVISIONS TO ASSURE PROTECTION OF RANGEN’S SENIOR WATER RIGHTS.

The Director may only approve a mitigation plan if it includes “contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.” IDAPA 37.03.11.043.03.c; *see In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013). Consistent with this requirement, the Director approved the Fourth Mitigation Plan with contingency provisions to protect Rangen. *I_AR_2014-4633* at 197-98. Specifically, the Director ordered “that failure to provide water by January 19, 2015, to Rangen to satisfy the . . . mitigation deficiency will result in curtailment of junior water rights.” *Id.* at 198. The Director also ordered “that IGWA is required to purchase an insurance policy for the benefit of Rangen to cover any losses of fish attributable to the failure of the . . . permanent pipeline system to the Rangen Facility.” *Id.* As the District Court determined, “the contingencies of curtailment coupled with insurance are adequate contingencies to satisfy Rule 43.03.c of the CM Rules.” *Appeal 4633* at 776.

Rangen argues that, if the Magic Springs Project fails to deliver water through the pipeline, curtailment “would not assure protection of Rangen’s senior rights.” *Rangen Inc.’s Opening Brief* at 21. That is precisely why the Director ordered IGWA to obtain an insurance policy for the benefit of Rangen and why the District Court determined that “curtailment coupled with insurance” is adequate to satisfy CM Rule 43.03.c. If the Magic Springs Project fails to

deliver water to Rangen as required, junior-priority ground water rights will be curtailed and the insurance policy will supply secondary mitigation to protect Rangen's senior rights.

Rangen also argues "[t]he pipeline does not fix the injury that junior-priority ground water pumping is causing to Rangen's senior spring water rights" *Rangen Inc.'s Opening Brief* at 21. As explained above, in the Curtailment Order, the Director ordered curtailment of junior-priority ground water rights, but further ordered that such curtailment could be avoided if the junior ground water users participated in a mitigation plan that would mitigate for injury to Rangen's water rights caused by junior ground water pumping. *1_AR_2014-2935* at 1 at 42. Rangen cannot challenge the amount of mitigation ordered by the Director in the Curtailment Order in this appeal from the Fourth Mitigation Plan Order. Again, the Magic Springs pipeline has been delivering the required mitigation water to Rangen since February 6, 2015. *Appeal 4633* at 690. The Magic Springs Project fully mitigates for material injury caused to Rangen's senior water rights by junior-priority ground water pumping.

Rangen complains about the adequacy of the insurance policy obtained by IGWA to comply with the Fourth Mitigation Plan Order.¹⁰ *See Rangen Inc.'s Opening Brief* at 23-27. For example, Rangen complains about who is listed as a named insured on the insurance policy and the type of policy coverage purchased by IGWA. *Id.* at 25-26. Rangen should have raised any complaints regarding IGWA's insurance policy with the Director, not in this appellate proceeding, as such complaints concern implementation of the Director's requirement in the

¹⁰ Of note, Rangen argues it does not have "enough information" to determine who should be named insureds under the insurance policy because Rangen asserts it does not know who was responsible for constructing the pipeline, who will own the pipeline, who will control operation of the pipeline, who will pay for electricity, or who is responsible for maintaining and monitoring the pipeline. *Rangen, Inc.'s Opening Brief* at 24. However, the Fourth Mitigation Plan Order expressly states that "IGWA is required to pay for all costs of building, operating, maintaining, and monitoring the pipeline." *1_AR_2014-4633* at 197.

Fourth Mitigation Plan Order that IGWA purchase an insurance policy for the benefit of Rangen, not whether insurance itself is an adequate contingency under CM Rule 43.03.c. Therefore, the Court should not consider Rangen's complaints about the adequacy of the insurance policy obtained by IGWA because Rangen has not exhausted its administrative remedies. *See White v. Bannock Cnty. Commissioners*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (“... the doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered.”).

C. THE DIRECTOR'S REQUIREMENTS THAT RANGEN STATE WHETHER IT WOULD ACCEPT WATER PURSUANT TO THE MAGIC SPRINGS PROJECT AND ALLOW CONSTRUCTION RELATED TO THE DELIVERY PIPE DID NOT EFFECTUATE A TAKING OF RANGEN'S PROPERTY.

In approving the Fourth Mitigation Plan, the Director stated:

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.

I_AR_2014-4633 at 198. Rangen argues the Director's requirement that Rangen “allow construction on its real property” constitutes a taking of Rangen's property in violation of the Fifth Amendment of the United States Constitution as well as Article 1, section 14 of the Idaho State Constitution. *Rangen, Inc.'s Opening Brief* at 18.

The United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. Amend. V. The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Texaco, Inc. v. Short*, 454 U.S. 516, 523, n. 11 (1982). The Idaho Constitution provides that “[p]rivate property may be taken for

public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.” Idaho Const. Art. I, § 14.

The Director’s requirements that Rangen state, in writing, whether it would accept water delivered pursuant to the Magic Springs Project and whether it would allow construction on its land related to placement of the delivery pipe did not constitute a taking of Rangen’s property under the United States or Idaho Constitutions. As the District Court stated, the Director’s requirements are “an inquiry as to whether Rangen is determined to refuse IGWA the access necessary to mitigate its injury under the plan.” *Appeal 4633* at 779. The requirements are not “a mandate that Rangen provide IGWA an easement or other legal access for delivery of mitigation water.” *Id.* Rangen cannot have it both ways; it cannot demand water and then refuse to allow access for the purpose of providing the water it has demanded.

In addition, the record demonstrates that Rangen and certain ground water districts participating in IGWA entered into a license agreement where, “in consideration of the mutual covenants and agreements” contained therein and “other good and valuable consideration,” Rangen granted the ground water 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.” *Id.* at 710-11. The ground water districts have also instituted a condemnation proceeding against Rangen (Twin Falls County Case No. CV-2015-123) seeking to condemn two easements on Rangen’s property. *Id.* at 779. As the District Court explained, “if the action is pursued and the districts are successful, the issue of just compensation due Rangen will be addressed by the Court in that proceeding.” *Id.* The Director’s requirements in the Fourth Mitigation Plan Order did not result in a taking of Rangen’s property by the Department under the United States or Idaho Constitutions.

V. CONCLUSION

The Director acted within his authority by deferring consideration of injury issues to the Transfer Application proceeding and conditionally approving the Fourth Mitigation Plan. The Fourth Mitigation Plan Order includes adequate contingency provisions to assure protection of Rangen's senior water rights. The Director's requirements that Rangen state, in writing, whether it would accept water delivered pursuant to the Magic Springs Project and whether it would allow construction on its land related to placement of the delivery pipe did not effectuate a taking of Rangen's property under the United States or Idaho Constitutions. The Director and Department respectfully request the Court affirm the District Court's *Memorandum Decision and Order and Judgment* regarding the Fourth Mitigation Plan Order.

RESPECTFULLY SUBMITTED this 25th day of November 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by United States mail, first class, with the correct postage affixed thereto on this 25th day of November 2015.

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