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 COMBINED REPLY BRIEF

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

Honorable Eric J. Wildman, Presiding

ATTORNEYS FOR RANGEN, INC:

Robyn M. Brody (ISB No. 5678) Brody Law Office, PLLC PO Box 554 Rupert, ID 83350 Telephone: (208) 434-2778 Facsimile: (208) 434-2780 robynbrody@hotmail.com	Fritz X. Haemmerle (ISB No. 3862) Haemmerle Law Office, PLLC P.O. Box 1800 Hailey, ID 83333 Telephone: (208) 578-0520 Facsimile: (208) 578-0564 fxh@haemlaw.com	J. Justin May (ISB No. 5818) May, Browning & May, PLLC 1419 W. Washington Boise, Idaho 83702 Telephone: (208) 429-0905 Facsimile: (208) 342-7278 jmay@maybrowning.com

ATTORNEYS FOR THE IDAHO DEPARTMENT OF WATER RESOURCES AND GARY SPACKMAN:

Garrick Baxter (ISB No. 6301)
Emmi Blades (ISB No. 8682)
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
kimi.white@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

See Certificate of Service for Other Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Rangen, Inc. ("Rangen") submits the following Combined Reply Brief to address the arguments made by Respondent Idaho Department of Water Resources ("IDWR") and Respondent Idaho Ground Water Appropriators, Inc. ("IGWA") (collectively referred to as "Respondents"). Their response briefs are referred to as "IDWR's Brief" and "IGWA's Brief" respectively.

I. ARGUMENT

IGWA contends that Rangen is seeking to put an end to the mitigation water from Magic Springs. They improperly couch their argument in terms of the impact that curtailment would have on junior-priority users, including municipalities and businesses, in what seems to be an emotional or political appeal against the potentially harsh reality of the prior appropriation doctrine. Idaho law gives priority to Rangen's senior water rights. Junior-priority ground water users can continue to use water from the ESPA so long as their proposed mitigation plan adequately protects Rangen's interests. In this case, Rangen objects to the Fourth Mitigation Plan because it does not adequately protect Rangen's senior rights. At best, the Fourth Mitigation Plan provides temporary compensation to Rangen while the injury caused by junior-priority pumping continues and places the risk of a plan failure on Rangen. Rangen has a direct and substantial interest in the approval of the Fourth Mitigation Plan and has standing to object to all aspects of the Plan.

The Conjunctive Management Rules define a "Mitigation Plan" as follows:

> **Mitigation Plan.** A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

IDAPA 37.03.11.010.15. IGWA's Fourth Mitigation Plan does not propose any "actions and measures to prevent" the material injury caused by junior-priority ground water pumping. Such actions and measures include efforts such as aquifer recharge, conversion from ground water to surface water, and targeted voluntary curtailments. These types of actions and measures prevent material injury by actually addressing the depletions and reversing the declining aquifer levels that are causing material injury to the senior-priority right.

IGWA has sought and obtained approval of a mitigation plan that proposed preventative actions and measures. IGWA's First Mitigation Plan sought mitigation credit for what it refers to as "aquifer enhancement activities," which consist of recharge, conversions, and voluntary curtailment. (1_AR_2014-2935, p. 315). IGWA has been given credit for the actions and measures that have actually been undertaken, but these efforts fall far short of the junior-priority users' mitigation obligation to Rangen.

Because of the insufficiency of IGWA's efforts to prevent material injury, IGWA has proposed a series of other mitigation plans. The Fourth Mitigation Plan that is at issue does not propose any *preventative* actions. Instead, IGWA proposes to temporarily compensate Rangen for the material injury caused by out-of-priority pumping by piping water from another spring complex to Rangen's facility. This focus on temporary compensatory actions rather than prevention has serious consequences that must inform any consideration of the adequacy of the Fourth Mitigation Plan.

To understand the fundamental problem with the Fourth Mitigation Plan one has to look at what would happen to Rangen's senior water rights if the prior appropriation doctrine were

enforced and junior-priority rights were curtailed. If junior-priority users want to continue to use the ESPA out-of-priority, then they have to put Rangen in the same position it would have been in had curtailment been ordered. The Fourth Mitigation Plan does not do that.

It is well understood that out-of-priority ground water pumping is contributing to the withdrawal of water from ESPA at a rate that exceeds recharge.

> 73. Based on averages for the time period from October of 1980 through September of 2008, the ESPA receives approximately 7.7 million acre feet of recharge on an average annual basis from the following sources: incidental recharge associated with surface water irrigation on the plan (5.3 million acre feet), infiltration of precipitation on non-irrigated lands (0.7 million acre feet), underflow from tributary drainage basins (1.1 million acre feet), and seepage losses from rivers and streams (0.6 million acre feet).
>
> 74. Based on averages for the time period from October of 1980 through September of 2008, the ESPA discharges approximately 8.0 million acre feet on an average annual basis through the Snake River and tributary springs (5.4 million acre feet), evapotranspiration in wetlands (0.1 acre feet), and ground water withdrawals (2.5 million acre feet).
>
> 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.

*Curtailment Order (*1_AR_2014-2935, p. 16, FN and citations omitted). If curtailment of junior-priority rights were enforced, not only would the decline of the aquifer stop, but it would actually cause an increase in spring flows available for Rangen's water rights.

The Fourth Mitigation Plan only proposes to compensate Rangen for the increased flow projected as a result of curtailment. IGWA has proposed nothing to address the continually declining flows. Consequently, the actual quantity of water available to satisfy Rangen's water

rights will continue to decline and the quantity of water that Rangen will receive pursuant to the Fourth Mitigation Plan is less than would be received through either curtailment or preventative actions and measures. The continued decline also affects the impact of future curtailment should water stop being delivered pursuant to the Fourth Mitigation Plan either due to a physical failure or simply because IGWA decides not to continue pumping. Curtailment at that future date will be less effective and any benefit from such curtailment delayed. The Director erred by failing to address these critical issues.

During oral argument in the district court, the Department's counsel seemed to suggest that the Department has a separate mechanism for addressing these issues:

> So bringing this back around, might the aquifer continue to go down? There's a possibility, but if that happens, we already have in place the mechanism for Rangen. If the aquifers continue to go down, we know they are being materially injured and we have the ability to make adjustments, to identify that and adddress that issue should that continue to go forward. So I think this argument ultimately about the continued injury, you know, if the aquifer continues to go down means you cannot approve a plan, I don't think that's correct, Your Honor.

(1_AR_2014-4633, 20150416 Hrg. Tr., p. 38, l. 11-21). It appears that the Department believes that a new call would be necessary to address these issues. Rangen has made a delivery call and the Director has found that junior-priority ground water pumping is materially injuring Rangen's senior rights. Rangen should not have to make another delivery call to compensate for ongoing injuries caused by the approval of the Fourth Mitigation Plan. The Fourth Mitigation Plan does not adequately protect Rangen's senior interests, and therefore, the Director's approval of the Plan should be reversed.

A. THE DIRECTOR MAY NOT SIMPLY IGNORE APPLICABLE RULE 43.03.J FACTORS.

The Respondents attempt to improperly narrow the scope of the Director's inquiry into the adequacy of a proposed mitigation plan. Respondents argue that the Director has the authority to simply ignore relevant 43.03 factors when evaluating a mitigation plan. Respondents rely upon the Rule's use of the word "may", arguing that it leaves it to the absolute and unfettered discretion of the Director to determine which of the Rule 43.03 factors to consider when evaluating a mitigation plan. *IDWR's Brief,* p. 8; *IGWA's Brief,* p. 12. However, the language of the rule must be read in light of the Director's obligations to protect senior water rights and distribute water in priority. "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' . . . ." *In the Matter of Distribution of Water to Various Water Rights,* 155 Idaho 640, 653, 315 P.3d 828, 842 (2013) (emphasis added). The Director may not refuse to even consider a relevant factor simply because such consideration would dictate denial of a mitigation plan the Director would like to approve in order to avoid enforcing the prior appropriation doctrine.

B. RANGEN'S CHALLENGE TO THE ADEQUACY OF INSURANCE IS PROPERLY BEFORE THE COURT.

The Respondents contend that Rangen's challenge to the adequacy of insurance should be dismissed because Rangen has failed to exhaust administrative remedies. They contend that Rangen's challenge is aimed at the terms of insurance rather than the final order requiring insurance, and therefore, Rangen should be required to file a petition with the Director before

seeking the Court's review. Their position misconstrues Rangen's arguments and places an improper burden on Rangen.

To begin with, Rangen's position is that the Director did not adequately specify the terms of insurance in the Final Order. The Final Order only stated: "IT IS FURTHER 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 temporary or permanent pipeline system to the Rangen facility." IGWA acknowledges that this provision ". . . merely required IGWA to obtain appropriate insurance." *IGWA's Brief,* p. 24. The order does not specify critical factors such as the form of insurance to be purchased (e.g., a fault-based policy vs. a multi-peril type policy or "claims made" policy vs. occurrence based policy), the limits of insurance to be provided, or even the named insured. There is no way that Rangen can challenge the terms of the insurance when no specific terms have been required by the Director. IGWA's response to such a challenge would simply be what it has laid out in its Response Brief – insurance was required and it was purchased. The lack of specificity is a fundamental flaw in the Director's Final Order and is an issue that is properly before this Court.

Second, Rangen should not be required to petition the Director for a determination that the insurance is inadequate. The Director conditionally approved the Fourth Mitigation Plan. Under CM Rule 43.03, junior-priority users should have been required to prove satisfaction of the condition before they were ever allowed to begin pumping. The only thing that IGWA has done to satisfy the insurance condition is to file a certificate of insurance with the Department. The Director has not reviewed the terms of the insurance or made a determination that the insurance

satisfies the condition of the Fourth Mitigation Plan. Requiring Rangen to challenge the adequacy of the insurance improperly shifts the junior-priority users' burden to Rangen.

Finally, and perhaps most importantly, insurance for a fish kill will not adequately protect Rangen's interests. As explained in Rangen's Opening Brief, dead fish are only one consequence if the Magic Springs pipeline stops delivering water. Rangen may also suffer lost profits, lost goodwill, lost capital investments, and be subject to contractual damages suffered by customers like Idaho Power Company. IDWR does not address these losses. IGWA appears to argue that if these types of losses occur, then the Director can award Rangen damages under CM Rule 43.03.c. CM Rule 43.03.c does not give the Director authority to award Rangen damages for losses caused by a breach of a mitigation plan. The Rule states:

> 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:
>
> 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 . . . .

IDAPA 37.03.11.043.c. There is nothing in this Rule or any provision of Idaho law that gives the Director the authority to award a senior user monetary damages in the event a mitigation plan is breached. IGWA's reliance on this rule is misplaced, and the rule will not adequately protect Rangen's interests in the event the Magic Springs pipeline stops delivering water. For these reasons, the Director's approval of the Fourth Mitigation Plan should be reversed.

C. THE DIRECTOR DOES NOT HAVE THE AUTHORITY TO TAKE RANGEN'S PROPERTY FOR IGWA.

Both IGWA and the Department argue that the Director's Order does not constitute a taking. Quoting the District Court, the Department argues that the Director merely "'inquir[ed] as to whether Rangen is determined to refuse access necessary to mitigate its injury under the plan.'" *IDWR's Brief*, p. 18. The Department contends that it did not "'mandate that Rangen provide IGWA an easement or other legal access for delivery of mitigation water.'" Yet in the next sentence, the Department confirms that, in fact, Rangen was given a mandate: "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." *Id.* It is this requirement that Rangen choose between its water rights and its real property rights that constitutes a taking.

Both IGWA and the Department also argue that Rangen cannot complain because Rangen voluntarily granted IGWA a license. *IGWA's Brief,* p. 20, *IDWR's Brief,* p. 18. As noted in Rangen's Opening Brief, this license was not in fact given voluntarily, but as a result of the Director's Order that it must grant access to IGWA or forfeit the right to proceed with its call.

IGWA makes the additional argument that this appeal is not the proper forum for Rangen's taking claim (*IGWA's Brief,* p. 20-21). This argument misses the point. The issue in this case is the propriety of the Director's Order -- not what compensation might be due as a result of a taking. The Director does not have the authority to take Rangen's property to IGWA's benefit. Neither IGWA nor the Department have cited any authority granting such authority to the Director.

Because the Director exceeded his authority by requiring Rangen to either grant IGWA access to its real property or forego its delivery call, the Fourth Mitigation Plan should be disapproved.

D. RANGEN'S SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED.

IGWA argues that Rangen has not demonstrated prejudice to its substantial rights by the Director's failure to apply CM Rule 43.03.j and therefore Rangen cannot challenge it. *IGWA's Brief,* p. 10. This argument fundamentally misconstrues the prejudice requirement set forth in I.C. § 67-5279(4).

Section 67-5279(4) of the Idaho Administrative Procedure Act provides that the "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." What is the agency action that is being challenged in this case? Rangen is challenging the Director's decision to approve the Fourth Mitigation Plan. Rangen has a direct and substantial interest in the approval of the Plan since it enables junior-priority users who are causing material injury to Rangen's senior water rights to continue to pump out of priority. The Fourth Mitigation Plan was formulated in direct response to Rangen's delivery call, is supposed to address the harm that is being done to Rangen's senior rights, and required Rangen to either grant IGWA access to its real property to deliver water or give up its delivery call. Rangen has a direct and material interest in the Director's decision to approve the Plan.

Directly interested parties have substantial rights in a reasonably fair decision-making process and in the proper adjudication of the proceeding by application of correct legal standards. *See State v. Kalani-Keegan*, 155 Idaho 297, 302-03, 311 P.3d 309, 314-15 (Ct. App. 2013) (discussing *Hawkins v. Bonneville County Bd. of Comm'rs, 151 Idaho 228, 254 P.3d 1224 (Idaho*

2011)). In this case, the Director's decision to not to do a material injury analysis was an incorrect application of the law and resulted in an unfair decision-making process. Rangen's substantial rights have been prejudiced and all aspects of this appeal are proper.

II. 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 16th day of December, 2015.

BRODY LAW OFFFICE, PLLC

By: _____
Robyn M. Brody

HAEMMERLE LAW, PLLC

By: _____
Fritz X. Haemmerle

MAY, BROWNING & MAY, PLLC

By: _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 16th day of December, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by email:

Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Via email
Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Via email

Garrick Baxter Emmi Blades Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov emmi Blades@idwr.idaho.gov kimi.white@idwr.idaho.gov	Via email

J. Justin May