IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

RANGEN, INC.'S OPENING BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF THE CASE

This is an appeal from a decision made by the Director of the Idaho Department of Water Resources ("IDWR") relating to the second in a series of "mitigation plans" filed by Idaho Ground Water Appropriators, Inc. ("IGWA"). The "mitigation plans" have been filed by IGWA in an attempt to avoid curtailment resulting from the Director's determination that junior ground water pumping on the Eastern Snake Plain ("ESPA") is materially injuring Rangen's water rights. IGWA's Second Mitigation Plan sought approval to mitigate for material injury to Rangen's water rights by pumping water from Tucker Springs approximately 1.8 miles to Rangen's Research Hatchery. *IGWA's Second Mitigation Plan and Request for Hearing* (A.R., p.124-127). This appeal is taken from the Director's *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* issued in Case Nos. CM-MP-2014-003 and CM-DC-2011-004 on June 20, 2014 ("*Order on IGWA's Second Mitigation Plan*").

II. INTRODUCTION AND PROCEDURAL BACKGROUND

On January 29, 2014, the Director of the Idaho Department of Water Resources ("IDWR") concluded that "Ground water diversions have reduced the quantity of water available to Rangen for beneficial use of water pursuant to its water rights." *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (the "*Curtailment Order*") (A.R., p.36, Conclusion of law 32). This "pumping by junior ground water users has materially injured Rangen." *Curtailment Order* (A.R., p. 36, Conclusion of law 36). The Director ordered curtailment of ground water rights junior to July 13, 1962. (A.R., p. 42).

Since the *Curtailment Order* was issued, members of the Idaho Legislature, the Governor's Office, and the Idaho Department of Water Resources have strategized to find a way to avoid the

curtailment of junior ground water pumping. The Deputy Director of the Department of Water resources was summoned to a meeting with state legislators within days of the issuance of the *Curtailment Order*. (Hrg. Tr. Vol.II, P.426 L.9 – P.426 L.24) The Deputy Director of the Department of Water Resources, other Department Staff, the Governor's office, various legislators, and Clive Strong collaborated on a Thousand Springs Settlement Framework. (Ex. 1110); (Hrg. Tr. Vol. II, P.428 L.8 – P.428 L.23, P.429 L.5 – P.430 L.8). The State's objectives include providing "safe harbor" meaning that "[n]o ground water user participating in the Thousand Springs plan will be subject to a delivery call by water users below the rim as long as the provisions of the plan are being implemented." (Ex. 1110); (Hrg. Tr. Vol. II, P.432 L.20 – P.433 L.3). There is nothing inherently wrong with the government of the State of Idaho including the Department of Water Resources seeking creative possible resolutions to the state's dwindling water resources. However, the interests of the politicians in providing safe harbor to voters are in direct conflict with the Department's legal duty to conjunctively manage the state's water resources in accordance with the doctrine of prior appropriation. The Department's increasingly arbitrary decisions to avoid enforcing its curtailment orders can only be understood in light of this conflict.

The short term mechanism that the state has proposed for avoiding curtailment is the re-plumbing of the Hagerman Valley. (Ex. 1110, section II). This re-plumbing includes the "[d]irect delivery of 10 cfs of water from Tucker Springs to Billingsley Creek." (Ex. 1110, section II.B.1). This Tucker Springs proposal includes a number of interconnected parts. Idaho Fish and Game owns and operates the Hagerman State Fish Hatchery. (Ex. 1106). The Hagerman State Fish Hatchery has water rights to take water from Tucker Springs for fish propagation. (Ex. 1111). Idaho Fish and Game proposes to lease 10 cfs of its Tucker Springs water rights to IGWA. (Ex.

1106, ¶2.) Idaho Parks and Recreation owns a fish hatchery known as Aqua Life. (Ex. 1106, ¶1). The Idaho Legislature has authorized Parks and Recreation to sell Aqua Life to the Idaho Water Resource Board. *Id.* The Idaho Water Resource Board agrees to transfer Aqua Life to Idaho Fish and Game. *Id.* IGWA will also "pay for the costs to upgrade the Aqua Life (sic) to a condition acceptable to IDFG for use as a hatchery." (Ex. 1106, ¶5). IGWA will then construct a pipeline to pump the water leased from Idaho Fish and Game from Tucker Springs through a pipeline approximately 1.8 miles long to Rangen's Research Hatchery located at the head of Billingsley Creek. (Ex. 1106, ¶3) (Ex. 1111).

IGWA first learned of the Tucker Springs proposal when it was presented with the Thousand Springs Settlement Framework. (Hrg. Tr. Vol. I, P.118 L.1 – P.118 L.13). IGWA filed its Second Mitigation Plan seeking approval of the Tucker Springs proposal on March 10, 2014 (A.R., pp. 124-127). IGWA proposed to begin delivery of water to Rangen with a "target completion date" of April 1, 2015. (Ex. 1111, P.13).

Rangen filed a protest on April 3, 2014. *Rangen, Inc.'s Protest to IGWA's Second Mitigation Plan* (A.R., pp. 137-144). Other water users with water rights from Tucker Springs as well as downstream from Tucker Springs and the Hagerman State Fish Hatchery also filed protests including Big Bend Irrigation & Mining Co. (A.R., pp. 145-151), Buckeye Farms, Inc. (A.R., pp. 152-155), Big Bend Trout, Inc. (Leo E. Ray) (A.R., pp. 156-160) and Salmon Falls Land & Livestock Co. (A.R., pp.161-165).

The Department held a hearing on June 4 & 5, 2014. On June 20, the Director conditionally approved IGWA's Second Mitigation Plan in tandem with IGWA's First Mitigation Plan to require curtailment or additional mitigation from IGWA under the Second Mitigation Plan after the full mitigation under IGWA's First Mitigation Plan expires. The Director ordered the Tucker Springs

project to deliver water to Rangen no later than January 19, 2015, at which time the Morris exchange water will no longer provide mitigation to Rangen under IGWA's First Mitigation Plan. *Order on IGWA's Second Mitigation Plan*, (A.R., pp. 537-602).

III. STANDARD OF REVIEW

Idaho Code § 67-5279 governs judicial review of agency decisions. The District Court shall affirm the agency:

> [U]nless it finds that the agency's findings, inferences, conclusions, or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion."

In the Distribution of Water to Various Water Rights, 155 Idaho 640, 647, 315 P.3d 828, 835 (2013) (quoting *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011)). "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung Ass'n of Idaho/Nevada v. State, Department of Agriculture,* 142 Idaho 544, 130 P.3d 1062 (2006), citing *Enterprise, Inc. v. Nampa City,* 96 Idaho 734, 536 P.2d 729 (1975).

The "agency shall be affirmed unless substantial rights of the appellant have been prejudiced." *I.C.* § 67-5279(4).

IV. ARGUMENT

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

authority the Department promulgated Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 (the "CM Rules").

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

> 03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:
>
> a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
>
> b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
>
> c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
>
> . . .
>
> j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.
>
> k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

IDAPA 37.03.11.043.03.

A. The Director exceeded his authority by allowing continued out-of-priority ground water pumping without a properly approved mitigation plan.

The CM Rules and the doctrine of prior appropriation mandate that upon a determination of material injury, out-of-priority pumping may only be allowed pursuant to a properly approved "mitigation plan." *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013); IDAPA 37.03.11.040.01. In this case, On January 29, 2014, the Director made a determination that Rangen is suffering material injury due to "pumping by junior ground water users." *Curtailment Order* (A.R., p.36, Conclusion of law 36). The *Curtailment Order* provided for curtailment of out-of-priority ground water pumping beginning March 14, 2014. On February 11, 2014, IGWA filed its First Mitigation Plan. On February 21, 2014, the Director stayed curtailment.

> Given that IGWA has submitted a mitigation plan, which appears on its face to satisfy the criteria for a mitigation plan pursuant to the Conjunctive Management Rules and the requirements of the Director's curtailment order, and because of the disproportional harm to IGWA members when compared with the harm to Rangen if a temporary stay is granted, the Director will approve a temporary stay pending a decision on the mitigation plan.

Order Granting IGWA's Petition to Stay Curtailment, p.5. IGWA's First Mitigation Plan was only partially approved on April 11, 2014. *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order.* The Director set a new date for curtailment, this time May 5, 2014. *Id., pp. 20-21.* IGWA filed its Second Mitigation Plan on March 10, 2014. (A.R., p. 124-127) On April 28, 2014, the Director granted IGWA's Second Petition to Stay Curtailment on the basis that

> The Second Mitigation Plan proposes direct delivery of water from Tucker Springs to Rangen. The plan is conceptually viable, and given the disparity in impact to the ground water users if curtailment is enforced versus the impact to Rangen if curtailment is stayed, the ground water users should have an opportunity to present evidence at an expedited hearing for their second mitigation plan.

Order Granting IGWA's Second Petition to Stay Curtailment (A.R., p. 180). The Director approved IGWA's Second Mitigation Plan on June 20, 2014. *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* (A.R., pps. 537-602). The Director allowed out-of-priority ground water pumping to continue unabated from the January 29, 2014 through June 20, 2014 without even a nominally approved mitigation plan.

Since June 20, 2014, out-of-priority ground water pumping has continued pursuant to the approved Second Mitigation Plan. Yet, despite the Director's finding of material injury, there has not been a single change to the status quo existing when Rangen filed its call in 2011. Not a single acre of junior ground water pumping has been curtailed. Not a single drop of additional water has been provided to Rangen. The Director approved only two of the nine proposals contained in IGWA's First Mitigation Plan. The first of these was credit for 1.2 cfs for the residual benefit related to previously undertaken "aquifer enhancement activities". The second approved aspect of the First Mitigation Plan was 1.8 cfs of credit related to the so-called Morris exchange water. The Morris exchange water credit is related to the construction of the Sandy Pipeline in approximately 2005 in response to a call filed by other senior water right holders in the Curren Tunnel.[1] The Second Mitigation Plan did not even propose to provide water during 2014. The approval of the Second Mitigation Plan was based upon nothing more than the arbitrary recalculation of the Morris exchange water credit that was already found insufficient in the First Mitigation Plan and the Director's misplaced hope that IGWA would pump water from Tucker Springs in the future.

[1] *See Musser v. Higginson.* The result of credit being granted in the First Mitigation Plan for this "Morris Water" is that the water is no longer available to Rangen's more senior 1957 water right resulting in Rangen being required to file a new call. See IDWR Docket No. CM-DC-2014-004.

B. The Director's manipulation of Morris exchange water credit for the purpose of allowing continued out-of-priority pumping was arbitrary and capricious.

At the time of the hearing on the Second Mitigation Plan, IGWA's First Mitigation Plan had already been found insufficient by 0.4 cfs for April 1, 2014 through March 31, 2015 under the terms of the Curtailment Order. The Curtailment Order provides that any mitigation plan must provide at least 3.4 cfs of direct flow during the first year. In the *Order on IGWA's First Mitigation Plan,* the Director clarified that 3.4 cfs must be provided from April 1, 2014 through March 31, 2015. The Director approved mitigation credit for two aspects of IGWA's First Mitigation Plan for the first year: 1) 1.2 cfs for "aquifer enhancement activities", and 2) 1.8 cfs for Morris exchange water. The total credit of 3.0 cfs is 0.4 cfs less than the amount required by the Director's own Curtailment Order.

IGWA's Second Mitigation Plan did not propose to provide any additional water from April 1, 2014 through March 31, 2015. IGWA's engineer, Bob Hardgrove, was given a target date by IGWA of April 1, 2015 to begin delivering water. (Ex. 1111, p.13). During the hearing, Hardgrove indicated that it might be possible to deliver some water by January 2015, but he could not be more specific. (Hrg. Tr. Vol. I, P.181 L.19 – P.182 L.4). No water could be delivered pursuant to the Second Mitigation Plan during 2014. Thus it is clear that no new water will be provided pursuant to the Second Mitigation Plan during the 2014 irrigation season.

Given the Director's Order on the First Mitigation Plan, there would seem to be no basis for allowing continued out-of-priority pumping. Yet, rather than simply enforcing the curtailment determined in the *Order on First Mitigation Plan*, the Director decided *sua sponte* to "recalculate how the Morris exchange water is averaged." *Order on IGWA's Second Mitigation Plan* (A.R., p. 551 ¶45). The Director did not determine that there was any reason to change the amount of water that could be attributed to the Morris exchange or determine that there had been any actual change

in the timing of when the water was expected to be provided. The Director simply decided to change the manner in which the water was "averaged" in order to allow out-of-priority ground water pumping to continue through the end of the irrigation season. The Director's determination to change how the "Morris exchange water is averaged" is arbitrary and capricious and an abuse of discretion.

The Director determined the Morris exchange water credit estimating the quantity of water available in the Curren Tunnel. The *Order on the First Mitigation Plan* was issued before data was available on actual flows in the Curren Tunnel for 2014. Consequently the Director attempted to estimate the expected flows in order to calculate credit for the Morris exchange water. The Director first determined the average monthly flow in the Curren Tunnel from April 15 through October 15 for the years 2002-2013 and made the assumption that flows in 2014 would be similar. This the average for those years was 3.7 cfs. The Director then subtracted 0.2 cfs to account for water rights in the Curren Tunnel senior to Morris's rights. Based upon this calculation, the Director estimated that 3.5 cfs of Morris water would be expected in the Curren Tunnel for the 184 day period from April 15, 2014 through October 15, 2014. Since the mitigation obligation to Rangen is year round, the Director decided to spread the Morris water credit throughout the year by multiplying 3.5 cfs by 184/365, which results in an annual credit of 1.8 cfs. This 1.8 cfs combined with 1.2 cfs of first year credit for "aquifer enhancement activities" totals 3.0 cfs, which is 0.4 cfs less than the 3.4 cfs mitigation obligation for April 1, 2014 through March 31, 2014.

The Second Mitigation Plan does not change in any way the quantity of Morris exchange water or the timing of its availability. The Director's recalculation merely allocates the water to a 293 day time period rather than 365 days. Over the course of April 1, 2014 through March 31,

2015, there will still be a shortage of 0.4 cfs unless the Tucker Springs Project is built and water is actually delivered on January 19, 2015.

The Director also failed to provide any mechanism for monitoring or adjustments to the amount of Morris exchange credit as Curren Tunnel Measurements become available during the year. IDAPA. 37.03.11.043.03.k. The actual Curren Tunnel flows from April 15, 2014 until the present are proving to be substantially less than the 3.7 cfs that the Director estimated based upon previous years.

C. The Director erred by allowing continued pumping pursuant to a conditionally approved plan.

The Director "conditionally" approved IGWA's Second Mitigation Plan. This "conditional" approval is problematic because the Director has allowed continued out-of-priority pumping based upon the plan. By its very nature, a "conditionally" approved plan may never be implemented. "Conditional" approval also allowed the Director to avoid addressing the most troubling aspects of the plan merely by putting conditions on the plan that those issues be dealt with in the future. There is no requirement that the plan actually be implemented and no recourse for Rangen when it is not.

The Director concluded that the plan "provides replacement water of sufficient quantity, quality, and temperature in the time needed by Rangen." *Order on IGWA's Second Mitigation Plan,* (A.R., p. 554). The quantity of replacement water required during the first year is 3.4 cfs. According to the Director, this phased in mitigation obligation is based upon the quantity of additional water expected to accrue at the Curren Tunnel if Curtailment had occurred. The water rights subject to the Curtailment Order are primarily irrigation rights. The first irrigation season after the issuance of the Curtailment Order began in April 2014. By the time this appeal is heard, that irrigation season will be over. Curtailment of junior ground water pumping did not occur and

cannot occur until next year. The Curren Tunnel flow continues to go down. The opportunity to reverse that decline and see the 3.4 cfs increase predicted by the Director has already passed. The effects of ground water pumping and the benefits of curtailment are cumulative and occur over time, which is the justification used by the Director for phased in curtailment. Even if curtailment is ordered now for the next irrigation season beginning April 2015, the impacts of failing to curtail in 2014 will be felt for years. The damage has already been done. Unless water is delivered pursuant to the Second Mitigation Plan on January 19, 2015 under the Director's own analysis Rangen will not receive 3.4 cfs from the period April 1, 2014 through March 31, 2015. *Order on First Mitigation Plan.*

The CM Rules and the doctrine of prior appropriation mandate that upon a determination of material injury, out-of-priority pumping may only be allowed pursuant to a properly approved "mitigation plan." *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013); IDAPA 37.03.11.040.01. The Director has exceeded his authority and violated the CM Rules and the doctrine of prior appropriation by allowing out-of-priority ground water pumping with only a "conditionally" approved mitigation plan.

1. The Second Mitigation Plan may never be implemented.

The Second Mitigation Plan may never be implemented either because IGWA decides not to implement it or because IGWA is unable to implement it. IGWA has always maintained that the Second Mitigation Plan is only one option among many it is considering. (Hrg. Tr. Vol. I, P.136 L.17 – P.137 L.5). The Second Mitigation Plan was filed based upon an idea put forward by the state. **Cite.** It involves many interrelated parts, each of which is quite costly. (Hrg. Tr. Vol. I, P.134 L.7 – P.135 L.4). The total cost could be in the neighborhood of $10 million. *Id.* It seems likely as Rangen laid out during opening statements at the hearing that no water will ever

be delivered from Tucker Springs. (Hrg. Tr. Vol.I, P.56 L.1-25). IGWA's engineering report contains a proposed project schedule, specifying the following deadlines:

> 90% design documents by 8/27/2014;
> 100% construction documents by 9/3/2014;
> Bidding by 9/17/2014;
> Issue Contract by 9/24/2014;
> Project Construction was to begin 10/2/2014.

Ex. 1111, p.16).

Since the approval of the Second Mitigation Plan, those deadlines have come and gone with no action from IGWA. IGWA has taken no action to pursue the transfer application that would be necessary to implement the Second Mitigation Plan. Conditional approval of the Second Mitigation Plan has allowed IGWA to get through another irrigation season without curtailment. That was its only purpose. IGWA never had any intent to actually deliver water from Tucker Springs. Even if IGWA wanted to implement the plan, it may not be able to. For instance, one of the conditions of approval of the plan is obtaining a transfer for the water rights. IGWA is not actively pursuing its transfer application and may be unable to get approval.

2. The Director did not adequately consider the issue of injury.

The CM Rules indicate that one of the factors for approval of a mitigation plan is "[w]hether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge." IDAPA 37.03.11.043.03.j.

a) The Director erred by failing to adequately address injury to other users of water from Tucker Springs.

There are a number of water rights that take water either directly from Tucker Springs or downstream from the Hagerman State Fish Hatchery on Riley Creek. There is currently not

sufficient water to fill all of those water rights. Frank Erwin, Watermaster, testified to this as follows:

> Q: So it's fair to say that for every single diversion out of the Upper Tucker Springs complex or the lower upper springs complex there's not a single water right that is able to divert at the adjudicated rate; is that a true statement?
> A: That's a true statement, yes, sir.
> Q: And your testimony is that you believe that's true simply because there's not enough water?
> A: Yes, sir.

(Hrg. Tr. Vol. II, P.390 L.12 – L.20).

Taking water from Tucker Springs and pumping that water to Billingsley Creek will further reduce the flow of water available to those water rights. The holders of several of those water rights filed protests to the Second Mitigation Plan. The Director recognized that injury would occur. "During the hearing, IGWA and Buckeye stipulated that the Second Mitigation Plan will reduce flows available to Buckeye and that the reductions would need to be mitigated prior to development of the plan, if approved." *Order on IGWA's Second Mitigation Plan,* (A.R., pp.548-549, Finding of Fact 32). "IGWA is still analyzing potential impacts of the transfer on Salmon Falls." *Id.* IGWA agreed to mitigate for Buckeye Farms injury, but provided no details about that mitigation. The Director abused his discretion and failed to comply with the CM Rules by failing to require the details of any such mitigation and ensure that injury to other users was addressed prior to approval of the Second Mitigation Plan.

The Director also found that "[a] gravity based diversion out of the lower pool will not affect the water rights that diver from the upper pool" and that a "diversion for the lower pool of Upper Tucker Springs will not affect the Lower Tucker Springs." *Order on IGWA's Second Mitigation Plan,* (A.R., pp.548-549, Finding of Fact 32). This finding of fact is not supported by substantial competent evidence. There was no evidence presented regarding any hydrologic

studies related to the relationship between the various pools of Upper and Lower Tucker Springs. This is especially true viewed in light of the condition imposed by the Director that "IGWA, in its final design plans, shall move the collection box closer to the spring source . . .." *Order on IGWA's Second Mitigation Plan,* (A.R., p.553, paragraph 9). This condition fundamentally alters the design of this system and affects any testimony regarding the impact of the system as proposed by IGWA. One of the primary reasons for Big Bend Ditch's involvement in this case was to ensure that the collection box was not located near the spring in a manner that would impact the amount of water available to their water rights. *Notice of Protest filed by Big Bend Irrigation & Mining Co.* (A.R., p.145-151) (Hrg. Tr. Vol. II, P.544 L.1-19). The requirement that the collection box be moved as part of the "final design" renders any testimony regarding impact of the design proposed at the hearing inapplicable.

The Director also ignored any potential impact to wildlife and the environment. In 1998, Buckeye Farms filed an application to appropriate 16 cfs of water from Riley Creek downstream from Tucker Springs. Idaho Fish and Game filed a protest to that application to appropriate on the grounds that "[r]emoval of . . . 16 cfs from Riley Creek will result in flows which may not support dissolved oxygen levels and flowing water in pools and interstitial spaces which are utilized by fish and other aquatic organisms for reproductive or security habitats." (Ex. 2017). The transfer of 10 cfs from Tucker Springs to Billingsley Creek would similarly reduce the flow of water in Riley Creek causing the same concerns. In fact, the current flows are lower than in 1998. The Director abused his discretion by failing to even consider the impact that the Second Mitigation Plan would have on the environment and aquatic life.

b) The Director failed to address the impact of continued pumping.

The Director made no findings of fact regarding whether the Second 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." The only evidence in the record on this issue is the Director's determination in the Curtailment Order that the aquifer is presently being mined by an average of 270,000 acre feet per year. (A.R., p. 16, ¶73-75).

> 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.

(A.R., p. 16, ¶75).

The result of this is that water rights in Hagerman continue to go down. Frank Erwin, Watermaster, testified that the flows have declined by about 25 percent since the time he started and that his board of directors has essentially directed him to enforce the prior-appropriation doctrine and in times of shortage to start curtailing people who are out of priority. (Hrg. Tr. Vol. II, P.395 L.8 – P.298 L.19).

The Director abused his discretion and acted in violation of the CM Rules and the prior appropriation doctrine by failing to consider the impact of continued pumping under the Second Mitigation Plan.

c) The Director abused his discretion by conditionally approving a mitigation plan that will likely introduce new disease into Rangen's Research Hatchery.

The Hagerman State Fish Hatchery has experienced problems with proliferative kidney disease, which is referred to as PKD. Tucker Springs is suspected as one of the sources of PKD in the Hagerman State Fish Hatchery. PKD is a pathogen that causes high mortality in fish. (Hrg. Tr. Vol. II, P.465 L.22-25). The infective agent of PKD is transmitted from an intermediate host known as a bryozoan and could be transmitted by water pumped from Tucker Springs to the Rangen Research Hatchery. (Hr. Tr. Vol. II, P.466 L.13-16; P.466 L.22- P.467 L.6). Rangen does not currently have PKD in its Research Hatchery although they test for it frequently in fish.

(Hrg. Tr. Vol. II, P.467 L.7-10; P.492 L.21- P.493 L.17). There is no known way to test for PKD in water. (Hr. Tr. Vol. II, P.494 L.6-14). If PKD were transported to the Rangen Research Facility, it would only be apparent once the fish contracted it and by that point it would be too late. If PKD were transmitted to the Rangen Research Hatchery it would be difficult to remove. (Hrg. Tr. Vol. II, P.467L.11-24). There is no approved drug for treating PKD and no cure for the fish once they get it. (Hrg. Tr. Vol.II, P.472 L.8-12). The Director abused his discretion by approving a mitigation plan that will likely result in the willful transmission of a previously unknown and untreatable disease from Tucker Springs to the Rangen Research Hatchery and Billingsley Creek.

3. No contingency to protect Rangen in the event water is not delivered.

The Director erred by failing to include require any protection for Rangen in the event water is not delivered under the Second Mitigation Plan. The CM Rules require a **"contingency provision."** This is a mandatory part of any approved mitigation plan. *In the Matter of Distribution of Water to Various Water Rights,* 155 Idaho 640, 315 P.3d 828 (2013).

The conditionally approved Second Mitigation Plan contains no mechanism to ensure that Rangen receives water. Approval of the Second Mitigation Plan does not obligate IGWA to deliver water from Tucker Springs. IGWA's representative, Lynn Carlquist, made it clear that IGWA may not decide to pursue the Second Mitigation Plan even if confirmed. (Hrg. Tr. Vol. I, P.136 L.17-25). If IGWA does decide to begin delivery of water under the Second Mitigation Plan, Rangen has no practical recourse in the event the delivery of water stops at some point. As discussed above in section C, IGWA's members primarily use water during the irrigation season. Rangen's fish require water year round. An interruption in service for as little as ten minute to half an hour could be catastrophic. (Hrg. Tr. Vol. II, P.480 L.9-15). The only incentive that IGWA would have to continue providing water is the threat of curtailment. As discussed above in section C, such a threat carries little weight during the non-irrigation season. Delivery of water might stop

for any number of reasons in the future. Portions of the pipeline or pumping system or pipeline might break. IGWA could simply decide that it no longer wants to pay the approximately $250,000 yearly cost that is anticipated for operation and maintenance of the system. (Hrg. Tr. Vol. I, P.134 L.15-19). The Director's Order improperly places the entire risk that water will not be delivered in the future upon Rangen, the senior water right holder.

D. Requiring Rangen to "allow construction on it land related to placement of the delivery pipe" is a taking of Rangen's property rights without authority and without compensation.

The Director ordered Rangen accept the plan an allow construction on its real property. "If the plan is rejected by Rangen or Rangen refuses to allow construction in accordance with an approved plan, IGWA's mitigation obligation is suspended." The Director effectively granted IGWA an easement across Rangen's real property. The Director cited no authority allowing him to take Rangen's property for IGWA's benefit. This is a taking in violation of the Fifth Amendment to the United States Constitution as well as Article 1, section 14 of the Idaho State Constitution.

E. Rangen's substantial rights have been prejudiced.

Rangen's substantial rights have been prejudiced by the Department's Order. As a result of the order, junior priority ground water pumping continues unabated while Rangen continues to suffer material injury to its water rights.

V. CONCLUSION

For the reasons specified above, Rangen requests that the Court find that the Order was in violation of Idaho law, in excess of the statutory authority or administrative rules of the Department, arbitrary capricious, and an abuse of discretion. Rangen requests that the Order be reversed and this matter remanded for further proceedings.

DATED this 3 day of October, 2014.

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By _____
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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 3 day of October, 2014 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

Original to: SRBA District Court 253 3rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121	Hand Delivery ☑ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☐
Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.gibson@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑
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