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,

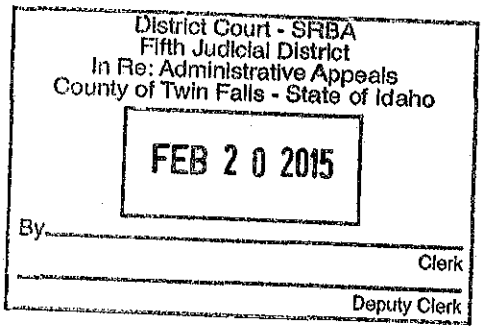
Respondents,

and

IDAHO GROUND WATER APPROPRIATORS, INC.

Intervenor.

Case No. CV-2014-4633



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 fourth in a series of mitigation plans filed by Idaho Ground Water Appropriators, Inc. ("IGWA"). IGWA filed the mitigation plans in an attempt to avoid curtailment resulting from the Director's determination that junior ground water pumping from the Eastern Snake Plain Aquifer ("ESPA") is materially injuring Rangen's water rights. IGWA's Fourth Mitigation Plan sought approval of a plan to pump water from "Magic Springs" and pipe it approximately 2 miles to Rangen's Research Hatchery. *IGWA's Fourth Mitigation Plan and Request for Expedited Hearing* (A.R., pp. 1-24). This appeal is taken from the Director's *Order Approving IGWA's Fourth Mitigation Plan.* (A.R., pp. 178-240).

II. INTRODUCTION AND COURSE OF PROCEEDINGS

A. Overview

On January 29, 2014, the Director issued an Order on Rangen's 2011 Petition for Delivery Call finding that junior ground water pumping from the ESPA is materially injuring Rangen. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (the "*Curtailment Order*") (Tucker Springs A.R., p.36, Conclusions of Law ¶¶ 32 and 36)[1]. The Director ordered curtailment of ground water rights junior to July 13, 1962. (Tucker Springs A.R., p. 42).

Shortly after the *Curtailment Order* was issued, members of the Idaho Legislature, the Governor's Office, and the Idaho Department of Water Resources started strategizing to find a way to address Rangen's Call. The Deputy Director of the Department of Water Resources was

[1] The record for the Fourth Mitigation Plan also includes the record, exhibits and hearing transcripts for IGWA's Second Mitigation Plan (the "Tucker Springs" Mitigation Plan) which previously came before the Court on a *Petition for Judicial Review* in CV-2014-2935. All records, exhibits and hearing excerpts from the Tucker Springs Mitigation Plan are noted as such.

summoned to a meeting with state legislators within days of the issuance of the *Curtailment Order*. (Tucker Springs Hrg. Tr. Vol.II, P.426 L.9 – P.426 L.24). The Deputy Director, other Department Staff, the Governor's office, various legislators, and Clive Strong, the Chief of the Natural Resource Division of the Office of the Attorney General, collaborated on what they dubbed the "Thousand Springs Settlement Framework" ("Settlement Framework"). (Tucker Springs Ex. 1110); (Tucker Springs Hrg. Tr. Vol. II, P.428 L.8 – P.428 L.23, P.429 L.5 – P.430 L.8).

The State's Settlement Framework spawned a series of plans to move water between declining Hagerman Valley springs. The Settlement Framework was built around the idea of "enhancing" Billingsley Creek water flows by 25 cfs using water from other springs. (Tucker Springs Ex. 1110). The State first proposed a pipeline to take water from Tucker Springs and deliver it to the Rangen facility at the headwaters of Billingsley Creek. (Tucker Springs Ex. 1110; *see also* Tucker Springs A.R., p. 4, ¶¶ 16, 20). IGWA took the State's idea and filed its Second Mitigation Plan for the Tucker Springs project. (Tucker Springs A.R., pp. 124-127). The Director approved the Tucker Springs Plan. (Tucker Springs A.R., pp. 537-560).

Bob Hardgrove, IGWA's pipeline engineer, testified that IGWA may have abandoned the Tucker Springs Plan before it was even approved by the Director. (Hrg. Tr., P.189 L. 15-20). He explained that IGWA "transitioned" to its Third Mitigation Plan which would have involved pumping water from a state-owned hatchery called "Aqua Life" to Rangen's facility. (*Id.*). IGWA abandoned the Aqua Life plan and in August 2014 filed the Fourth Mitigation Plan to pump water from Magic Springs to Rangen. (A.R., pp. 1-24).

Rangen's protests to each of these plans has sparked IGWA's outrage. How can Rangen be opposed to the delivery of water to its facility? IGWA paints Rangen's protests as being motivated by greed and an attempt to "command" the aquifer. What IGWA refuses to

acknowledge is that moving water from one declining spring source to another as proposed is not a solution for the damage caused by junior ground water pumping. The State can dress up the proposals as an "Intermediate Water Supply Measure" in the Settlement Framework, but the plans provide nothing more than temporary compensation while junior users continue to pump and damage the aquifer and Rangen's springs. By approving the Fourth Mitigation Plan, the Director allowed pumping to continue while refusing to consider the damage done to Snake River flows when the water that is pumped to Rangen does not return to the Snake River. He also refused to consider that his decision enables continued mining of the aquifer. (Tucker Springs A.R., p. 18, Findings of Fact ¶ 88) (finding that the aquifer is being mined at a rate of approximately 270,000 acre feet per year).

B. Fourth Mitigation Plan

IGWA filed the Fourth Mitigation Plan on August 27, 2014. (A.R., pp. 1-24). Under the Plan, IGWA will lease or purchase up to 10 cfs of spring water from SeaPac of Idaho, Inc., a fish hatchery located near the Snake River. (A.R., p. 184 at ¶ 8). The water will be pumped from what is called "Magic Springs" and then piped to the Rangen Research Hatchery approximately 2 miles away. In exchange, IGWA will lease or purchase the water rights at a state-owned facility called Aqua Life and make them available to SeaPac.[2] (A.R., p. 184, Findings of Fact ¶¶ 9-10). The Director conditionally approved the Fourth Mitigation Plan on October 29, 2014. (A.R., pp. 178-240). Rangen filed a Petition for Judicial Review on November 25, 2014. (A.R., pp. 313-321).

The issues raised in Rangen's Petition for Judicial Review are about the Director's failure to protect the senior's interests. Approximately two weeks before the hearing on IGWA's Fourth Mitigation Plan, this Court issued a *Memorandum Decision and Order on Petitions for Review*,

[2] It is unclear whether IGWA is supposed to make the Aqua Life facility itself available to Seapac. Finding of Fact ¶ 9 implies that IGWA is supposed to secure ownership or a long term lease of the Aqua Life facility for SeaPac.

invalidating the Director's Methodology Order in the Surface Water Coalition's delivery call because the Director's decision did not have a contingency plan to protect the senior's interests. *See, Memorandum Decision and Order on Petitions for Judicial Review, In The Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company*, CV-2010-382, pp. 13, 15 which is attached hereto as Appendix 1.[3] The Director stated during the October 8th hearing that given the Court's recent decision, he felt a "heightened" obligation to protect senior users such as Rangen. (Hrg. Tr., P. 133 L. 19-23). From Rangen's perspective, the Director's efforts to protect Rangen's interests fell short of the Court's mark and give rise to this appeal.

Despite the Director's unequivocal Curtailment Order and IGWA's filing of five separate mitigation plans[4], nothing changed in 2014. IGWA did not satisfy it's 3.4 cfs mitigation obligation, and not a single junior-priority ground water right was curtailed. When IGWA finally started delivering water to Rangen in February 2015, more than a year after the Director determined that Rangen was suffering material injury, IGWA did so under a "conditionally" approved Fourth Mitigation Plan with no contingencies or backup plan if the project was not completed or fails in the future and no determination as to whether the plan's implementation will cause material injury to other water users or whether it constitutes an enlargement of the

[3] Rangen moves the Court pursuant to IRE 201(d) to take judicial notice of the *Memorandum Decision and Order on Petition for Judicial Review* issued in CV-2010-382 (attached hereto as Appendix 1). If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d). "Judicial notice may be taken at any stage of the proceeding." IRE 201 (f).

[4] IGWA's Fifth Mitigation Plan was filed on December 18, 2014 with IDWR.

underlying Magic Springs water right or whether it allows mining of the aquifer to continue. How was this accomplished? And more importantly, is it consistent with Idaho law?

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. ISSUES PRESENTED

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

2. Whether the Director erred by failing to address Rule 43.03j criteria.

3. Whether requiring Rangen to "allow construction on its land related to placement of the delivery pipe" is a taking of Rangen's property rights without authority and without compensation.

4. Whether the "conditional" approval of the Fourth Mitigation Plan puts all risks on Rangen and does not provide any contingency provisions.

5. Rangen's substantial rights are prejudiced by the Order Approving the Fourth Mitigation Plan.

V. 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 once a determination of material injury has been made, out-of-priority pumping may only be allowed if there is a properly approved mitigation plan that delivers water at the time of need. *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, the Director made a finding of material injury in Rangen's favor on January 29, 2014. (Tucker Springs A.R., pp. 1-102). His *Curtailment Order* provided that junior-priority ground water users could avoid curtailment by delivering 3.4 cfs of water the first year. (Tucker Springs A.R., p. 42). Through a series of decisions that culminated with the decision to approve the Fourth Mitigation Plan, the Director allowed out-of-priority ground water pumping to continue for over a year without satisfaction of the juniors' mitigation obligation through a properly approved mitigation plan. This was improper.

IGWA filed its first *Petition to Stay Curtailment* on February 12, 2014 – two weeks after the *Curtailment Order* was entered. (Tucker Springs A.R., p. 103). The Director granted IGWA's first stay request because he found that IGWA's First Mitigation Plan, on its face, appeared to satisfy IGWA's mitigation requirement for the first year. (Tucker Springs A.R., p. 106). The Order granting the stay stated: "Cumulatively, the proposed measures, once implemented, will

fully satisfy the requirements of the Director's Order and it appears that IGWA will be able to demonstrate that it has satisfied the requirement for direct delivery of water to Rangen." (Tucker Springs A.R., p. 105). The Order cautioned, however: "Ground water users are advised that in the event the mitigation plan is not approved, the curtailment order will go into effect immediately." (Tucker Springs A.R., p. 107) (emphasis added). Those words proved hollow.

On March 17-19, 2014, the Director conducted a hearing on IGWA's First Mitigation Plan. (Tucker Springs A.R., p. 292). IGWA's First Mitigation Plan contained nine different proposals for credit. (Tucker Springs A.R., p. 294). The Director rejected most of the proposals, but granted IGWA 1.2 cfs credit for certain aquifer enhancement activities and 1.8 cfs credit for water delivered to Butch Morris through the Sandy Pipeline in lieu of using Martin-Curren Tunnel rights (the "Morris Exchange Water credit"). (Tucker Springs A.R., pp. 297-303). [5] Even with those credits, IGWA was still .40 cfs short of satisfying the junior's 2014 mitigation obligation. (Tucker Springs A.R., p. 307).

On April 17, 2014, less than a week after the Director entered his initial *Order Approving in Part and Rejecting in Part IGWA's First Mitigation Plan*, IGWA filed a *Second Petition to Stay Curtailment* because of the .40 cfs shortfall. (Tucker Springs A.R., p. 178). The Director granted

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[5] This Court actually reversed the credits granted by the Director and has remanded the matter back to the Department. The Court found that certain "soft conversion" credits were improper because there was no requirement that the ground water pumpers refrain from using ground water if surface water is unavailable. (*See* Appendix 2, pp. 6-10). The Court also found that the Morris Exchange Water credit was improperly based on historical averages that overestimated flows and was improperly calculated based on a calendar year rather than during the irrigation season. (*See* Appendix 2, pp. 12-15).

Rangen moves the Court pursuant to IRE 201(d) to take judicial notice of the *Memorandum Decision and Order on Petition for Judicial Review* issued in CV-2014-2446 (attached hereto as Appendix 2) If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d). "Judicial notice may be taken at any stage of the proceeding." IRE 201 (f).

IGWA's *Second Petition* based on mere "conceptual viability" of the Tucker Springs Mitigation Plan even though no hearing had been held:

> Curtailment of diversions of ground water for irrigation in April and May would provide little benefit to Rangen because significant irrigation with ground water does not normally intensify until late May or June. In contrast, curtailment of the irrigation of 25,000 acres during the period of reduced ground water use is significant. IGWA's Second Mitigation Plan has been published and a pre-hearing status conference is scheduled for April 30, 2014. 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.*** All of the standard of the conjunctive management rules will apply at the hearing.

(Tucker Springs A.R., p. 180) (emphasis added).

Rangen told the Director at the outset of the Tucker Springs hearing that IGWA had no intention of ever building the pipeline to deliver water to Rangen:

> MR. HAEMMERLE: Director, I think I'm glad that Mr. Budge took this opportunity to vent his frustrations with this entire process because, frankly, we have frustrations as well.
>
> Our biggest frustration, I guess, Director, is that we keep coming before you in all these administrative processes for the approval of plans that are never going to be built.
>
> Now, what IGWA is here to do, Director, is they're here to have a mitigation plan approved and say "There, Director, see, we can have a plan approved." "What do you think, Rangen?"
>
> What we think is that IGWA has gone around with respect to the Tucker Springs plan and advised the whole world that they have no intent of developing this plan. None. If there's no intent to develop this plan and get Rangen any actual water, then this whole process is frankly a farce. That's what it is.
>
> That's our frustration, Director, is that we keep slopping things up against the wall. IGWA keeps doing that. And the reason they're doing that is they want you to issue stay after stay after stay without the delivery of one drop of water that satisfies your call -- that satisfies the order on our call.

(Tucker Springs Hrg. Tr. Vol. I, P. 56, L. 1-25). Nonetheless, the Director approved the Tucker Springs Plan and out-of-priority pumping continued.

One of the express conditions of the Director's Order approving the Tucker Springs Mitigation Plan was that the pipeline had to be built so that water would be delivered by January 19, 2015. (Tucker Springs A.R., pp. 537-560). The Director realized that the Tucker Springs pipeline, if it were built, would not provide water immediately because the water rights had to be transferred and the pipeline had to be constructed. The Director also realized that the junior pumpers were still short of mitigation water. Understanding the .40 cfs shortage and not wanting to enforce his own curtailment order, the Director creatively recalculated the credit for the Morris Exchange Water that he previously gave in the First Mitigation Plan. Instead of allocating the credit over a period of 365 days, he calculated the credit over a period of 293 days so that junior pumpers could get maximum credit until January 2015. This would ensure that the farmers would get through the 2014 season without facing curtailment. The Director justified the recalculation of the Morris Exchange Water because of the expectation that the Tucker Springs pipeline would be built:

> Because there is an expectation of additional water being delivered to Rangen by the Second Mitigation Plan, (a) recalculate the period of time the Morris exchange water is recognized as mitigation to equal the number of days that the water will provide full mitigation to Rangen, and (b) require curtailment or additional mitigation from IGWA under the Second Mitigation Plan after the time full mitigation under the First Mitigation Plan expires.

(Tucker Springs A.R., pp. 542-543). Just as Rangen predicted, however, IGWA withdrew the State's mitigation plan completely. (*See* Appendix 3, p. 2).[6]

[6] Rangen moves the Court pursuant to IRE 201(d) to take judicial notice of the Order Granting Motion to Dismiss issued in CV-2014-2935 (attached hereto as Appendix 3). If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties

The Director's decision to, *sua sponte*, recalculate the time period over which the Morris Exchange Water credit was calculated was arbitrary and capricious. The only reason it was done was to avoid enforcing the *Curtailment Order*. The Director perpetuated this error when he approved IGWA's Fourth Mitigation Plan on October 29, 2014 using the same recalculation of the Morris Exchange Water credit. There was no justification for the Director to simply adopt what he had done in the Tucker Springs Plan other than to justify out-of-priority pumping.

The Director was aware of the objections that Rangen had against the Morris Exchange Water recalculation since Rangen filed its *Opening Brief* in the appeal of the Tucker Springs Mitigation Plan while the Director's decision on the Fourth Mitigation Plan was still pending. (*See* Appendix 4 attached hereto).[7] During this same October 2014 timeframe the irrigation season ended and the actual Martin-Curren Tunnel flows for the 2014 irrigation season were available. The Director could, and should, have used actual Martin-Curren Tunnel flow measurements when determining Morris Exchange Water credits in the Fourth Mitigation Plan.

The Director's original order approving the Morris Exchange Water credit in the First Mitigation Plan did not provide any mechanism for monitoring or making adjustments to the amount of credit as Martin-Curren Tunnel Measurements became available during the year as required by IDAPA. 37.03.11.043.03.k. Instead of the Department making necessary adjustments as the flow data became available, Rangen had to file a *Motion to Determine Morris Exchange Water Credit and Enforce Curtailment.* (A.R., pp. 262-312). The Motion was granted on

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copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d). "Judicial notice may be taken at any stage of the proceeding." IRE 201 (f).

[7] Rangen moves the Court pursuant to IRE 201(d) to take judicial notice of *Rangen's Opening Brief* in CV-2014-2935 (attached hereto as Appendix 4). If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d). "Judicial notice may be taken at any stage of the proceeding." IRE 201 (f).

November 21, 2014. (A.R., 263-312). The Director found that actual flow measurements were considerably lower than the historical average that was used for the credit granted in the Fourth Mitigation Plan. (A.R., pp. 264-265, Conclusion of Law ¶ 4). The Director determined that junior-priority ground water users actually ran out of mitigation credit on October 1st. (A.R., p. 264, Finding of Fact ¶ 6 and pp. 264-265, Conclusion of Law ¶ 4).

Even though the Director found that junior ground water users ran out of mitigation credit on October 1st, he did not correct and amend the *Order Approving IGWA's Fourth Mitigation Plan.* The Department's Rules of Procedure provide that "[t]he agency head may modify or amend a final order of the agency . . . at any time before notice of appeal to the District Court has been filed or the expiration of the time for appeal to the District Court, whichever is earlier . . . ." IDAPA 37.01.01.760. The Order Approving IGWA's Fourth Mitigation Plan was entered on October 29, 2014. Rangen did not file a Petition for Judicial Review in this case until November 25, 2014 (*see* A.R., p. 313) which means that the Director had another window of opportunity to bring his *Order Approving IGWA's Fourth Mitigation Plan* into compliance with Idaho law.

Instead of amending the *Order Approving IGWA's Fourth Mitigation Plan*, the Director entered a separate order again permitting out-of-priority pumping outside of a properly enacted mitigation plan:

> Sufficient time must be granted to junior ground water users to prepare for curtailment. Many of the junior ground water users diverting water this time of year are dairies and stockyards. It is not reasonable to order curtailment that would immediately eliminate what is likely the sole source of drinking water for livestock. Time should be afforded to allow these industries to sell or otherwise make plans for their livestock. Other water users such as commercial and industrial water users should also be afforded time to plan for elimination of what may be their sole source of water. This delay in curtailment is reasonable because instantaneous curtailment will not immediately increase water supplies to Rangen. The flow from the Martin-Curren Tunnel has been gradually declining over a number of years. Curtailment will not quickly restore the tunnel flows.

(A.R., p. 265, Conclusion of Law ¶ 5).

The Director also held that:

> The Director concludes that sixty (60) days is a reasonable timeframe for junior ground water users to plan for curtailment. Sixty days from today is January 20, 2015. As described above, the Director previously ordered that junior ground water users be curtailed on January 19, 2015, once the Morris Exchange Agreement credit expired unless additional mitigation is provided. Junior ground water users should have already been planning for the contingency that curtailment could occur on January 19, 2015. For consistency, the Director will adopt January 19, 2015, as the curtailment date.

(A.R., p. 265, Conclusion of Law ¶ 6).

The Director's decision to allow out-of-priority ground water pumping outside of a properly enacted mitigation plan injures Rangen and is contrary to the Idaho Supreme Court's decision in *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013) and CM Rule 40.01.b. The water rights subject to the *Curtailment Order* are primarily irrigation rights. The 2014 irrigation season is now over. Rangen did not receive any additional water during 2014 and the Martin-Curren Tunnel flow continues to go down. While the opportunity to reverse that decline and see the 3.4 cfs increase predicted by the Director has passed, the Court should still reverse the *Order Approving Fourth Mitigation Plan* and remand this matter to the Director for determination of a proper remedy.

B. The Director erred by failing to address Rule 43.03j criteria.

Rule 43.03 of the Conjunctive Management Rules requires the Director to consider whether the implementation of the Fourth Mitigation Plan is consistent with the conservation of water resources and the public interest or whether it will injure other water users or result in mining of the aquifer. The rule states in relevant part:

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

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

IDAPA 37.03.11.043.03.

Rangen put on evidence at the October 8th hearing that implementation of the Fourth Mitigation Plan will injure other water rights, constitute an enlargement of SeaPac's water right, allow ground water pumping to continue without proper mitigation, and is not consistent with the conservation of water resources or the other Rule 43.03j criteria. (*See* A.R., pp. 129-133 for Rangen's Post-Hearing Brief addressing these issues). Rangen explained that SeaPac's water right is a non-consumptive fish propagation right. The water comes from Magic Springs, flows through SeaPac's facility which is located next to the Snake River, and then immediately flows to the river. The Magic Springs Mitigation Plan does NOT protect the return flow. After the Magic Springs water goes through the Rangen facility it will flow down Billingsley Creek where it will be used by irrigators who are short of water. The water will not return to the Snake River which means that SeaPac's non-consumptive water right will be turned into a consumptive right. Rangen argued the Plan allows non-consumptive water to be consumed, the aquifer will continue to be used by junior users at a rate that exceeds recharge, and junior users will have done nothing to actually mitigate for the damage caused by their pumping. Rangen's opposition to the Plan boils down to one basic concept – IGWA cannot fix a decades long water shortage by moving water from one area of the Hagerman Valley to another.

The Director's *Order Approving IGWA's Fourth Mitigation Plan* did not address Rangen's Rule 43.03j arguments. Instead, Director Spackman confined his analysis to what he characterized as three threshold issues. The *Order Approving IGWA's Fourth Mitigation Plan* stated:

> While Rule 43.03 lists factors that "may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior

> rights," factors 43.03(a) through 43.03(c) are necessary components of mitigation plans that call for the direct delivery of mitigation water. A junior water right holder seeking to directly deliver mitigation water bears the burden of proving that (a) the "delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law," (b) "the mitigation plan will provide replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source," and (c) "the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage." IDAPA 37.03.11.043.03(a-c). These three inquiries are threshold factors against which IGWA's Magic Springs Project must be measured.
>
> To satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the curtailment order; (2) the components of the proposed mitigation plan can be implemented to timely provide mitigation water as required by the curtailment order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.

(A.R., pp. 182-183).

In fact, Director Spackman expressly declined to rule on the Rule 43.03j issues, finding that material injury was better addressed in the transfer proceeding. The Order stated:

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

(A.R., p. 196, Conclusion of Law ¶ 12).

The Director's decision to defer the Rule 43.03j analysis enabled IGWA to implement the Fourth Mitigation Plan without a proper injury analysis. On January 20, 2015, IGWA filed a *Motion for Stay of Curtailment Order* with this Court in CV-2014-4970. (*See* Appendix 5 for a

copy of IGWA's Motion).[8] During the hearing on that Motion, IGWA advised the Court that it was issued a rental agreement for the Magic Springs water so that it could begin pumping water to Rangen under the Fourth Mitigation Plan. (*See* Appendix 6 for a copy of *Rangen's Memorandum in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order, p. 3).*[9] The Director's failure to address the Rule 43.03j factors when coupled with the rental agreement allowed IGWA to do an end-run of Idaho law. This was improper.

The Director's decision to defer the Rule 43.03j analysis is perplexing and problematic. He made it clear in the hearing on the Tucker Springs Mitigation Plan hearing that he would consider injury when reviewing IGWA's Second Mitigation Plan:

> And I will tell you that with respect to the issue of injury that – an, TJ, you stated this yourself, that the Director had in the past ruled and referred to the conjunctive management rules that require that the Director consider injury in its review of – or in his review of the mitigation plan.
>
> Now, the distinction, I guess, I draw is that the issue of injury and the presentation of evidence doesn't – in a mitigation hearing does not need to rise to the level of proof that would be required in a transfer proceeding. And I don't want to mischaracterize the standard, other than to say that the issue, in my opinion, should be is there a reasonable possibility that – or is there a way in which the mitigation plan can be implemented so that it does cause injury to other water users or IGWA in general.
>
> So when I started my narrative here, I said that I would not rule on the issues. ***But at least with respect to injury, the Director has a responsibility to consider***

[8] Rangen moves the Court pursuant to IRE 201(d) to take judicial notice of *IGWA's Motion for Stay of Curtailment Order* in CV-2014-4970 (attached hereto as Appendix 5). If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d). "Judicial notice may be taken at any stage of the proceeding." IRE 201 (f).

[9] Rangen moves the Court pursuant to IRE 201(d) to take judicial notice of *Rangen's Memorandum in Support of Motion for Reconsideration of Order Granting Stay of Curtailmen*t filed in CV-2014-4970 (attached hereto as Appendix 6). If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d). "Judicial notice may be taken at any stage of the proceeding." IRE 201 (f).

injury as part of the mitigation hearing, and I will consider injury and take evidence related to that subject.

(Hrg. Tr., P. 32 L.15 – P. 33 L. 12) (emphasis added). It is unclear why the Director made the decision to defer the analysis in this case. His decision was improper and violated the requirements of CM Rule 43 and Idaho law. His decision also enabled IGWA to implement their Plan through a water rental agreement before the Director even ruled on the issues. Rangen respectfully requests that the Director's Order be reversed and this matter remanded.

C. Requiring Rangen to "allow construction on its 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." (A.R., 198). 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 without compensation in violation of the United States and Idaho Constitutions. *See* Idaho Const. Art. I, § 14; U.S. Const. amend. V.

D. The "conditional" approval of the Fourth Mitigation Plan puts all risks on Rangen and does not provide any contingency provisions.

The Director "conditionally" approved IGWA's Fourth Mitigation Plan. (A.R, pp. 197-199). 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." *See In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013) and IDAPA 37.03.11.040.01. The Director has exceeded his authority and violated CM Rule 40.01.b and the doctrine of prior appropriation by allowing out-of-priority ground water pumping with only a "conditionally" approved mitigation 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 was no requirement that the plan actually be implemented and no recourse for Rangen if it was not.

Conjunctive Management Rule 43.03.c also requires that a mitigation plan have a **"contingency provision"** to protect the senior user in the event that mitigation water becomes unavailable. *See* IDAPA 37.03.11.43.03.c. 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). In its September 26, 2014 *Memorandum Decision and Order on Petitions for Review*, this Court invalidated the Director's Methodology Order in the Surface Water Coalition's delivery call because the Director's decision did not have a contingency plan to protect the senior's interests. *See, e.g., Memorandum Decision and Order on Petitions for Judicial Review, In The Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company*, CV-2010-382, pp. 13, 15. The Director stated during the hearing on IGWA's Fourth Mitigation Plan that given the SRBA's Court recent decision, he feels a "heightened" obligation to protect senior users such as Rangen. (Hrg. Tr., P. 131 L. 18 – P. 132 L. 6).

As the proponent of the Fourth Mitigation Plan, IGWA had the burden of showing at the hearing that the Magic Springs Project satisfies the criteria of CM Rule 43.03 and should be approved before out-of-priority ground water pumping can commence. At the close of the evidence, IGWA's proposed plan raised more questions than it answered:

* **Who is going to acquire the water rights from SeaPac and who will be the owner/holder of those rights?** The Letter of Intent specified that IGWA is going to acquire the

water rights from SeaPac (Exh. 1003 at ¶ 1). The Transfer Application shows that the applicant is "IGWA for North Snake GWD, Magic Valley GWD, and Southwest ID". (Exh. 1001). Who will be shown as the owner/holder of the rights? IGWA? The Districts? This is important and needs to be the same as the party constructing and operating the Magic Springs pipeline.

* **What are the terms of the water acquisition from Sea Pac?** The only document that IGWA submitted at the hearing was a "Letter of Intent" with SeaPac. (*See* Exh. 1003). The Letter of Intent is not a contract. It does not specify whether the water will be leased or purchased and does not spell out any of the terms or conditions. Although Lynn Carlquist, the Chairman of the North Snake Ground Water District and the IGWA Board Member who testified at the hearing, offered the opinion that he expected to sign an agreement "in the near future," he acknowledged that IGWA and the Districts had not yet agreed upon a price with SeaPac. (Tr., p. 39, l. 23 – p. 40, l. 22). IGWA also presented no evidence of how long the agreement with SeaPac would last.

* **What are the terms of the lease of the Aqua Life facility from the Idaho Water Resource Board?** Part of the anticipated agreement with SeaPac also requires IGWA to obtain a long-term lease of the Aqua Life facility that it will then assign to SeaPac. (Tr., p. 41, ll. 9-13). Mr. Carlquist acknowledged that IGWA had not agreed on a price with the Idaho Water Resource Board for the lease of the Aqua Life facility. (Tr., p. 89, l. 18 – p. 90, l. 20). No lease agreement was offered as evidence.

* **How does IGWA propose to construct the pipelines across the various parcels of land?** The Magic Springs Project involves the construction of a pipeline that is nearly two miles in length. It requires multiple easements which were not secured at the time of the hearing. For example, IGWA produced two option agreements for easements signed by the Candys and Butch Morris. (Exhs. 1012 and 1013). Those option agreements, however, are specific to the Tucker Springs Mitigation Plan that IGWA submitted and do not give IGWA the option to build the Magic Springs pipeline over the property belonging to the Candys or Morris. (*See id.* at ¶¶ 1, 3 & 4 of Water Delivery Agreement).

* **Who is responsible for constructing the pipelines?** IGWA? The Districts? IGWA did not address this issue.

* **If IGWA is going to be responsible for constructing the pipelines, how will it fund construction?** No evidence was submitted. Mr. Carlquist testified that the three impacted Districts will pay for the pipelines, but who are they going to pay? The contractors? IGWA?

* **What is the agreement among the three impacted Districts for sharing those costs and how can it be enforced and by whom?** No evidence was submitted.

* **What remedy does IGWA or the Districts have if one of the Districts does not pay its share of construction?** No evidence was submitted.

* **Did the Districts approve the construction of the pipelines?** No evidence was submitted.

* **Have the Districts approved to pay for the construction of the pipelines**? No evidence was submitted. The only evidence submitted was the testimony of Lynn Carlquist that the North Snake Ground Water District has increased its assessments by approximately $170,000 per year. (Tr., p. 111, ll. 6-8).

* **How will the funds be raised to pay for construction of the pipelines?** Mr. Carlquist's testimony that they have been discussing a loan with the Idaho Water Resource Board and are not worried about funding the project either through private or public loans was not sufficient for the Director to determine that they have the capital necessary to construct and maintain the pipelines. (*See* Tr., p. 108, l. 4 – p. 109, l. 13).

* **Who is going to own the pipelines**? No evidence was submitted.

* **Who is going to control the operation of the pipeline and decide how much water is delivered to Rangen and when?** No evidence was submitted.

* **Who is going to pay for the electricity to operate the pipelines?** No evidence was submitted.

* **Who is responsible for maintaining the pipelines?** No evidence was submitted.

* **Who is responsible for monitoring the pipelines?** No evidence was submitted.

* **Who is going to pay for on-going monitoring and maintenance?** No evidence was submitted.

* **Who is responsible for obtaining and paying for insurance for the pipeline?** No evidence was submitted.

* **Who is responsible for obtaining and paying for insurance for any damages sustained by Rangen in the event of a pipeline failure of any kind?** No evidence was submitted.

* **Who is responsible for paying for damages suffered by Rangen in the event water is not delivered through the pipelines for some reason that is not covered by insurance (e.g., electricity is turned off for non-payment)?** No evidence was submitted.

Even with all of these unanswered questions, the Director "conditionally" approved the Fourth Mitigation Plan. Rangen has all of the risk associated with non-performance, including the risk that the Magic Springs Project would not be built,[10] that one or more components of the project will fail after construction, and that pumping will cease in the future because the proponents of the

[10] The Magic Springs pipeline became operational about February 7, 2015, but this does not eliminate Rangen's concerns. *See* p. 21 below.

plan lose interest in the project or there are disputes among the proponents or there are financial problems.

Joy Kinyon, the General Manager of Rangen's aquaculture division, testified at the hearing that Rangen will have to make significant changes to its operation to gear up for the delivery of 9.1 cfs of water. (*See* Tr., p. 238, l. 2 – p. 239, l. 9). It will have to hire additional professional and technical personnel and make capital investments in the facility itself. (*See id.*). Mr. Kinyon testified that he cannot start planning to make those changes because he has no idea when the water will be delivered, how much water will be delivered, or how long the company can expect that water to continue. (Tr., p. 240, ll. 2-9). Mr. Kinyon explained that it would impact Rangen substantially if it made these types of investments and then the water were not delivered. (Tr., p. 239, l. 19 – p. 240, l. 1).

The Director recognized some of the risks of the Magic Springs Project in his closing remarks:

> But, Mr. Budge, in response to your suggestion that there's some parallel reasoning that I should apply to this latest proposal, I guess I would turn around and say I view it as just more of the same. And I'm not perhaps being as disparaging about it as Mr. Haemmerle is, but what I guess my problem is that I'm not certain with an April 1 deadline that Rangen will -- or that IGWA will have the pipeline half built or a third built or that any of it will be built at all.

(Hrg. Tr., P. 262, L. 16-21). The Director should not have simply accepted the notion that IGWA will work out all of the details.

It turns out that the Magic Springs pipeline has been constructed and is now delivering water to Rangen. Rangen does not know who owns the pipeline or who is supposed to maintain and operate it, but it is delivering water. The current delivery of water does not eliminate the issues that Rangen has raised here. Just by way of example, what remedy does Rangen have if water is delivered for a period of two years, but then there is a disagreement within IGWA or among the

Districts concerning the payment of electricity or maintenance of the system and the pumps are shut off? Fish will be dead within a very short period of time and Rangen will be out of water because there is no backup delivery plan. If this type of scenario occurred in January, simply curtailing junior rights would be inadequate. The *Order Approving the Fourth Mitigation Plan* fails to protect Rangen's interests because of its lack of contingencies, and, as such, it should be reversed and this matter remanded to the Director.

E. Rangen's substantial rights are prejudiced by the Order approving the Fourth Mitigation Plan.

The Idaho Administrative Procedure Act provides that the "agency shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). The Order Approving the Fourth Mitigation Plan prejudices Rangen's substantial rights. To be sure, the conditional approval of this type of plan with no backup or contingency provisions does not protect Rangen's senior interests. Beyond these problems, however, the implementation of this Plan is problematic because it allows the damage to Rangen's spring water flows and the mining of the aquifer to continue. The State's plan to re-plumb Billingsley Creek is ill-conceived. The Fourth Mitigation Plan is, at best, a band-aid that will not stop the damage that is being done by junior ground water pumping. As such, Rangen respectfully requests that the *Order Approving the Fourth Mitigation Plan* be reversed and this matter remanded.

VI. CONCLUSION

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

DATED this 20th day of February, 2015.

BRODY LAW OFFICE, PLLC

By _____
for Robyn M. Brody

HAEMMERLE LAW, PLLC

By _____
for Fritz X. Haemmerle

MAY, BROWNING & MAY, PLLC

By _____
for J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 20th day of February, 2015 he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Original: State of Idaho SRBA District Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121	Hand Delivery ☑ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☐
Garrick Baxter Emmi Blades Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑
Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 201 E. Center Street P.O. Box 1391 Pocatello, ID 83204 rcb@racinelaw.net tjb@racinelaw.net tps@racinelaw.net	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑
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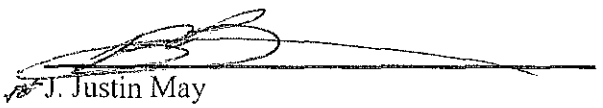

J. Justin May

APPENDIX 1

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

IDAHO GROUND WATER APPROPRIATORS, INC.,	Case No.: CV-2010-382
Petitioner,	(consolidated Gooding County Cases CV-2010-382, CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, Twin Falls County Cases CV-2010-3403, CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, CV-2013-4417 and Lincoln County Case CV-2013-155)
vs.	
CITY OF POCATELLO,	
Petitioner,	
vs.	
TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and MINIDOKA IRRIGATION DISTRICT,	**MEMORANDUM DECISION AND ORDER ON PETITIONS FOR JUDICIAL REVIEW**
Petitioners,	
vs.	
GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE DEPARTMENT OF WATER RESOURCES,	
Respondents.	
IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF	

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY AND TWIN FALLS CANAL COMPANY

Appearances:

Travis Thompson of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for American Falls Reservoir District #2 and Minidoka Irrigation District.

Randall Budge of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc.

Mitra Pemberton of White & Jankowski, LLP, Denver, Colorado, attorneys for the City of Pocatello.

Michael Orr and Garrick Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This matter involves a dispute between senior surface water users and junior ground water users over the conjunctive administration of water in the Snake River Basin. The dispute arises in the context of a delivery call initiated by the A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, "Coalition" or "SWC") against certain junior ground water rights located in the Eastern Snake Plain Aquifer ("ESPA"). At issue is the methodology utilized by the Director of the Idaho Department of Water Resources ("Department") for determining material injury to reasonable in-

season demand and reasonable carryover to Coalition members, and his subsequent application of that methodology. The Coalition, Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello seek judicial review of the Director's methodology and his application of that methodology. Those parties ask this Court to set aside and remand various aspects of the Director's final orders.

B. Course of proceedings and statement of facts.[1]

1. This judicial review proceeding involves a number of *Petitions for Judicial Review*. They seek review of a series of final orders issued by the Director in relation to the Coalition's delivery call. What follows is a recitation of those final orders, the resulting *Petitions for Judicial Review*, and the subsequent proceedings on those *Petitions* before this Court.

2. On June 23, 2010, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*"). 382 R., pp.564-604. *Petitions* seeking judicial review of the *Methodology Order* were filed by the Coalition in Gooding County Case No. CV-2010-384, IGWA in Gooding County Case No. CV-2010-383, and the City of Pocatello in Gooding County Case No. CV-2010-388.

3. On June 24, 2010, the Director issued his *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* ("*As-Applied Order*"). 382 R., pp.605-625. *Petitions* seeking judicial review of the *As-Applied Order* were filed by the Coalition in Twin Falls County Case No. CV-2010-3403, IGWA in Gooding County Case No. CV-2010-382, and the City of Pocatello in Gooding County Case No. CV-2010-387.

4. The six *Petitions for Judicial Review* previously mentioned were reassigned to this Court.[2]

---

[1] **Footnote Re: Citations to Agency Record.** The agency record in this proceeding consists of two subparts: (1) the previously-compiled record for the judicial review proceeding under Gooding County Case No. CV-2008-551, and (2) the more recently compiled record for the judicial review petitions consolidated under Gooding County Case No. CV-2010-382. For clarity and convenience, citations of the former record will use form "551 R., p. ___," while citations to the latter record will use the form "382 R., p.___."

[2] The reassignments were made pursuant to the Idaho Supreme Court's *Administrative Order* dated December 9, 2009, issued *In the Matter of the Appointment of the SBRA District Court to Hear All Petitions for Judicial Review from the Department of Water Resources Involving Administration of Water Rights.*

5. On July 29, 2010, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the six *Petitions for Judicial Review* into Gooding County Case No. CV-2010-382 ("Consolidated 382 Case").

6. On September 17, 2010, the Director issued his *Final Order Revising April 2010 Forecast Supply (Methodology Step 7)*. 382 R., pp.636-645. A *Petition* seeking judicial review of that *Final Order* was filed by the Coalition in Twin Falls County Case No. CV-2010-5520. The *Petition* was reassigned to this Court.

7. On November 30, 2010, the Director issued his *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)*. 382 R., pp.684-692. A *Petition* seeking judicial review of that *Final Order* was filed by the Coalition in Twin Falls County Case No. CV-2010-5946. The *Petition* was reassigned to this Court.

8. On December 13, 2010, the Court issued an *Order* staying proceedings in the Consolidated 382 Case pending the Idaho Supreme Court's issuance of its written decision in Idaho Supreme Court Docket No. 38193-2010. The stay was entered pursuant to the request and agreement of the parties.

9. On January 3, 2011, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the Coalition's *Petitions* in Twin Falls County Case Nos. CV-2010-5520 and 2010-5946 into consolidated the Consolidated 382 Case.

10. On April 13, 2012, the Director issued his *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)*. 382 R., pp.728-742. On May 9, 2012, the Director issued his *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 1-8)*. 382 R., pp.753-757. A *Petition* seeking judicial review of that *Final Order* and *Order Denying Petition for Reconsideration* was filed by the Coalition in Twin Falls County Case No. CV-2012-2096. The *Petition* was reassigned to this Court.

11. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology 1-4)*. 382 R., pp.829-846. On May 22, 2013, the Director issued his *Order Denying Petition for Reconsideration; Denying Request for Hearing; Denying Motion to Authorize Discovery (Methodology Steps 1-4)*. 382 R., pp.888-893. A *Petition* seeking judicial review of that *Final Order* and *Order Denying Petition for Reconsideration* was filed by

the Coalition in Twin Falls County Case No. CV-2013-2305. The *Petition* was reassigned to this Court.

12. On June 17, 2013, the Director issued his *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5).* 382 R., pp.922-928. On July 18, 2013, the Director issued his *Order Denying AFRD2's Petition for Reconsideration of Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5).* 382 R., pp.937-943. A *Petition* seeking judicial review of that *Order* and *Order Denying Petition for Reconsideration* was filed by American Falls Reservoir District #2 in Lincoln County Case No. CV-2013-155. The *Petition* was reassigned to this Court.

13. On August 27, 2013, the Director issued his *Order Revising April 2013 Forecast Supply (Methodology 6-8).* 382 R., pp.948-957. On September 27, 2013, the Director issued his *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 6-8).* 382 R., pp.1037-1044. A *Petition* seeking judicial review of that *Order* and *Order Denying Petition for Reconsideration* was filed by the Coalition in Twin Falls County Case No. CV-2013-4417. The *Petition* was reassigned to this Court.

14. On November 12, 2013, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the Coalition's *Petitions* in Twin Falls County Case Nos., CV-2012-2096, CV-2013-2305, 2013-4417 and Lincoln County Case No. CV-2013-155 into the Consolidated 382 Case.

15. On December 17, 2013, the Idaho Supreme Court issued its written decision in Idaho Supreme Court Docket No. 38193-2010. Thereafter, the Court lifted the stay in the Consolidated 382 Case. The parties subsequently briefed the issues, and a hearing on the *Petitions* was held before this Court on August 13, 2014.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the Court in this matter was held on August 13, 2014. The parties did not request the opportunity to submit additional briefing nor does the Court require any. Therefore, this matter is deemed fully submitted for decision on the next business day or August 14, 2014.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court 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.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

IV.

HISTORY AND PRIOR DETERMINATIONS

The *Petitions for Judicial Review* filed in this case arise in the context of an ongoing delivery call. Before the Court is the methodology established by the Director for determining

[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer'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 hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

material injury to the Coalition's reasonable in-season demand and reasonable carryover caused by junior ground water rights, and his subsequent application of that methodology. Consideration of the issues requires a review of the prior administrative and judicial proceedings undertaken in relation to this call.

A. 2005 Delivery call.

The delivery call at issue here was filed by the Coalition in 2005. 551 R., pp.1-52. On May 2, 2005, the Director issued an *Amended Order* finding that junior ground water diversions from the ESPA were materially injuring the Coalition's natural flow and storage rights. 551 R., pp.1359-1424. The Director's *Amended Order* utilized a "minimum full supply" methodology in determining material injury. 551 R., pp.1382-1385. That methodology relied upon a baseline analysis to determine material injury based upon shortfalls to a chosen baseline quantum of the Coalition's in-season irrigation and reasonable carryover needs. *Id.*

Various parties sought an administrative hearing before the Department on the *Amended Order*. *See e.g.,* 551 R., pp.1642-1657; 551 R., pp.1704-1724. However, that was put on hold while members of the Coalition filed a declaratory judgment action challenging the constitutionality of the Conjunctive Management Rules ("CM Rules").[4] The declaratory judgment action culminated in the Idaho Supreme Court's written decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD#2*"), which upheld the CM Rules as facially constitutional. Thereafter, the Department proceeded with an administrative hearing on the *Amended Order*. The Director appointed the Honorable Gerald F. Schroeder as the presiding hearing officer ("Hearing Officer").

B. Director's *2008 Final Order.*

The Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* on April 29, 2008. 551 R., pp.7048-7118. The Hearing Officer's *Recommendation* analyzed the Director's use of a minimum full supply methodology in determining material injury to the Coalition. 551 R., pp.7086-7095. The Hearing Officer generally approved the Director's use of a minimum full supply methodology, including his use

[4] The term "Conjunctive Management Rules" or "CM Rules" refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

of a baseline as a starting point for the consideration of the call and in determining material injury. *Id.* But, the Hearing Officer noted that "[t]here have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained," and that "there must be adjustments as conditions develop if any baseline supply concept is to be used." 551 R., pp.7091 & 7093. Exceptions to the Hearing Officer's *Recommendation* were subsequently filed with the Director by various parties. *See e.g.,* 551 R., pp.7126-7134; 551 R., pp.7141-7197.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call* ("*2008 Final Order*"). 551 R., pp.7381-7395. The *2008 Final Order* adopted the findings of fact and conclusions of law of the Hearing Officer's *Recommendation* except as specifically modified therein, including his recommendation that certain refinements be made to the minimum full supply methodology for determining material injury. 551 R., p.7387. Of significance to the instant proceeding, the Director abandoned the "minimum full supply" methodology in his *2008 Final Order* in favor of a "reasonable in-season demand" methodology. 551 R., p.7386. Although the Director adopted the Hearing Officer's recommendation that refinements be made, he did not address those refinements or the details of his new "reasonable in-season demand" methodology in his *2008 Final Order*, stating:

> Because of the need for ongoing administration, the Director will issue a separate final order . . . detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season.

551 R., p.7386. *Petitions* seeking judicial review of the Director's *2008 Final Order* were subsequently filed in Gooding County Case No. CV-2008-551.

C. District court decision in Gooding County Case No. CV-2008-551 and Director's orders on remand.

The district court entered its *Order on Petition for Judicial Review* in Gooding County Case No. CV-2008-551 on July 24, 2009. 551 R., pp.10075-10108. The district court upheld the Director's adoption of a baseline methodology for determining material injury. It held that "[t]he Director did not abuse discretion or act outside his authority in utilizing a 'minimum full supply' or 'reasonable in-season demand' baseline for determining material injury." 551 R., p.10099. However, the court did find that the Director abused his discretion by waiting to issue a separate

final order detailing his approach for determining material injury to reasonable in-season demand and reasonable carryover. The case was therefore remanded to the Director. 551 R., pp.10106-10107. On remand, the Director complied with the district court's instruction. On June 23, 2010, the Director issued his *Methodology Order*, which by its terms provides the Director's methodology for determining material injury to reasonable in-season demand and reasonable carryover. 382 R., pp.564-604. Additionally, on June 24, 2010, the Director issued his *As-Applied Order*, wherein he applied his methodology to determine material injury to members of the Coalition in 2010. 382 R., pp.605-625. Both *Orders* are presently before the Court in this proceeding.

D. Idaho Supreme Court's decision in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*

Meanwhile, the Coalition appealed the District Court's *Order on Petition for Judicial Review* in Gooding County Case No. CV-2008-551. On December 17, 2013, the Idaho Supreme Court issued its written decision in *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr., Dist.*, 155 Idaho 640, 315 P.3d 828 (2013) ("*2013 SWC Case*"). In that decision, the Court held that the Director may employ a baseline methodology for management of water resources, and as a starting point in administration proceedings for considering material injury. *2013 SWC* Case, 155 Idaho at 650, 315 P.3d at 838. Although the Director's *Methodology Order* had been issued prior to the Supreme Court's consideration of the *2013 SWC Case*, the Court in its opinion made clear that "since the district court did not review this final methodology order, the findings of fact that shape that methodology and any modifications to the methodology are not properly before this Court." *2013 SWC Case*, 155 Idaho at 649, 315 P.3d at 837.

V.

METHODOLOGY ORDER ANALYSIS

The stated purpose of the Director's *Methodology Order* "is to provide the methodology by which the Director will determine material injury to [reasonable in-season demand] and reasonable carryover to members of the SWC." 382 R., p.591. Section II of the *Methodology Order* details the Director's approach for determining material injury to reasonable in-season

demand. 382 R., pp.565-585. Section III of the *Methodology Order* details the Director's approach for determining material injury to reasonable carryover. 382 R., pp.585-590. The *Methodology Order* then sets forth a ten step process to be undertaken annually for purposes of determining material injury. 382 R., pp.597-601. The Coalition, IGWA and the City of Pocatello seek judicial review of various aspects of the Director's methodology.

A. The *Methodology Order* fails to provide a proper remedy for material injury to reasonable in-season demand when taking into account changing conditions.

The Coalition argues that the signature flaw of the *Methodology Order* is its failure to properly remedy material injury to reasonable in-season demand based on changing conditions during the irrigation season. It asserts that if material injury to its reasonable in-season demand is greater than originally determined by the Director, the *Methodology Order's* failure to remedy that injury through either curtailment or the requirement of a mitigation plan is contrary to Idaho law. For the reasons set forth below, this Court agrees.

i. Overview of the Director's methodology for determining material injury to reasonable in-season demand.

Reasonable in-season demand is defined under the *Methodology Order* as "the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity." 382 R., p.575. Under steps 1 and 2 of the *Methodology Order,* the Director calculates the crop water needs of the Coalition for that year.[5] However, the Director's initial determination of reasonable in-season demand is not based on those calculations, but rather is based on a historic demand baseline analysis. The *Methodology Order* makes this clear, providing that reasonable in-season demand is initially "equal to the historic demands associated with a baseline year or years ("BLY") as selected by the Director, but will be corrected during the season to account for variations in the climate and water supply between the BLY and actual conditions." 382 R., p.568. The *Methodology Order* uses the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. 382 R., p.574.

[5] The term "crop water need" is defined in the *Methodology Order* as "the project wide volume of irrigation water required for crop growth, such that crop development is not limited by water availability, for all crops supplied with surface water by the surface water provider." 382 R., p.579.

Under step 3, the Director makes his initial determination of water supply. Step 3 occurs after the United States Bureau of Reclamation ("USBOR") and the United States Corps of Engineers ("USACE") issue their Joint Forecast predicting unregulated inflow volume at the Heise Gage. 382 R., p.598. The Joint Forecast is typically released within the first two weeks of April. *Id.* Thereafter, the Director issues an April Forecast Supply for the water year. *Id.* The Director also determines in step 3 whether a demand shortfall to any member of the Coalition will occur in the coming season. *Id.* Demand shortfall is the difference between reasonable in-season demand and the April Forecast Supply. *Id.* If reasonable in-season demand is greater that the April Forecast Supply, a demand shortfall exists. *Id.*

Under step 4, if the demand shortfall is greater than the reasonable carryover shortfall from the previous year,[6] material injury exists or will exist, and junior users are required to establish their ability to mitigate that injury to avoid curtailment. 382 R., pp.598-599. To mitigate, junior users only need establish their ability to secure mitigation water to be provided to the Coalition at a later date, which the Director refers to as the "Time of Need." The Director then makes adjustments to his calculations throughout the irrigation season as conditions develop. These adjustments are provided for in steps 6 and 7 of the *Methodology Order*, which provide that at various times throughout the irrigation season, the Director will recalculate reasonable in-season demand and adjust demand shortfall for each member of the Coalition. 382 R., pp.599-600. The Director's recalculations are based on actual crop water need up to that point and a revised Forecast Supply, among other things. *Id.*

Step 8 addresses the obligations of junior water users after the Director makes his in-season recalculations and adjustments. These obligations generally trigger when Coalition members have exhausted their storage water rights to where all that remains in the reservoirs is an amount of water equal to their reasonable carryover. The Director refers to this as the "Time of Need."[7] Step 8 provides:

> Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and the

[6] Junior water users will have previously mitigated for any reasonable carryover shortfall from the previous year under step 9 of the *Methodology Order*. 382 R., pp.600-601.

[7] The *Methodology Order* provides that "[t]he calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between the 06/08 average demand and the 02/04 supply. The Time of Need will not be earlier than the Day of Allocation." 382 R., p.584 fn.9.

[reasonable in-season demand] volume calculated at the Time of Need. **If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.**

382 R., p.600. While junior user's original mitigation obligation for material injury to reasonable in-season demand may be adjusted downward under the plain language of step 8, it may not be adjusted upward.

ii. Idaho law requires that out-of-priority diversions can only be permitted pursuant to a properly enacted mitigation plan.

The Coalition takes issue with step 8 of the *Methodology Order*. They assert that it unlawfully permits out-of-priority water use to occur without remedy of curtailment or a properly enacted mitigation plan. This Court agrees. In the *2013 SWC Case*, the Idaho Supreme Court held that the CM Rules "require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan." *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. Further, that when the Director responds to a delivery call "the Director shall either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion." *Id.* at 654, 315 P.3d at 842. The Court's holding in this respect was based on the plain language of Rule 40 of the CM Rules, which provides that once the Director makes a determination of material injury, the Director shall:

> a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . .; or
>
> b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.040.01.a, b.

This Court finds that step 8 of the *Methodology Order* is inconsistent with Rule 40 of the CM Rules and the precedent established in the *2013 SWC Case*. Step 8 effectively caps junior users' mitigation obligations for material injury to reasonable in-season demand to that amount determined in step 4. This determination is made in or around April. The cap remains in place even if changing conditions during the irrigation season establish that material injury to reasonable in-season demand is greater than originally determined. When that scenario arises,

step 8 provides that junior users are required to deliver to the Coalition the water they previously secured as mitigation under step 4. Even though that amount of water will be insufficient to remedy the full extent of material injury, the plain language of step 8 provides that "no additional water is required." The result is that material injury to reasonable in-season demand is realized by the Coalition, out-of-priority junior water use occurs, and no remedy of curtailment or the requirement of a mitigation plan exists to address that injury. The endorsement of such unmitigated out-of-priority water use is contrary to Idaho's doctrine of prior appropriation.

The Director justifies his decision as follows. First, he states that "the purpose of predicting need is to project an upper limit of material injury at the start of the season." 382 R., p.569. He then provides:

> Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need . . . . **If it is determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based upon the Director's discretion and his balancing of the principle of priority of right with the principles of optimum utilization and full economic development of the State's water resources. Idaho Const. Art XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226.**

382 R., p.594 (emphasis added).

The justifications relied upon by the Director do not permit out-of-priority water use in contravention of CM Rule 40 and the *2013 SWC Case*. Neither Article XV, Section 3, nor Article XV, Section 7 of the Idaho Constitution permits such water use to occur under the circumstances presented. The Idaho Supreme Court has held that nothing in Article XV, § 7 "grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, §3, which states, 'Priority of appropriation shall give the better right as between those using the water [of any natural stream].'" *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 807, 252 P.3d 71, 88 (2011). With respect to Idaho Code § 42-226, the Idaho Supreme Court has directed that it, and its reference to "full economic development," has no application in delivery calls between senior surface water users and junior ground water users, such as the one at issue here. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 509,

284 P.3d 225, 234 (2012). The Court therefore finds that the legal justifications expressly relied upon by the Director do not support his determination to refrain from requiring further mitigation or curtailment from junior users if material injury to reasonable in-season demand is greater than originally determined in step 4 due to changing conditions.

iii. The Director's "total water supply" argument does not justify out-of-priority diversions without a properly enacted mitigation plan.

In briefing and at oral argument, counsel for the Department asserts another justification for step 8 of the *Methodology Order*. Counsel argues that under a "total water supply" theory, "the Director is not required to determine material injury to in-season demand and 'reasonable carryover' separately, nor is he required to order separate mitigation for each."[8] Counsel suggests that if material injury to reasonable in-season demand is greater than originally determined under step 4, the Department need not curtail or require a mitigation plan to make up the difference. Rather, it can require Coalition members to exhaust their reasonable carryover to cure the material injury. Then, at a point later in the year, make a subsequent determination as to material injury to reasonable carryover and mitigation at that time. In so arguing, counsel refers to steps 9 and 10 of the *Methodology Order*, wherein the Director in or around November 30th determines material injury to reasonable carryover and establishes the mitigation obligations of the juniors. This Court rejects this argument.

As an initial matter, counsel's total water supply argument appears contrary to the plain language of the Director's *Methodology Order*. The *Methodology Order* itself contains separate and unique methodologies for determining material injury to reasonable in-season demand (Section II) and reasonable carryover (Section III).[9] 382 R., pp.565 & 585. The methodologies described in Sections II and III of the *Methodology Order* establish that a determination of material injury will be conducted for both reasonable in-season demand and for reasonable carryover, and that such determinations will be conducted and mitigated separately. *Id.* For

[8] The Court notes that this justification was not set forth by the Director in his *Methodology Order*. Notwithstanding, the Court will address the argument.

[9] Section II of the *Methodology Order* is entitled "Methodology for Determining Material Injury to Reasonable In-Season Demand." 382 R, p.565. Section III of the *Methodology Order* is entitled "Methodology for Determining Material Injury to Reasonable Carryover." 382 R., p.585.

example, when detailing his methodology for determining material injury to reasonable in-season demand in Section II, the Director sets forth his calculation of demand shortfall and directs:

> The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April, **and if necessary, at the middle of the seasons and at the time of need.**

382 R., p.585 (emphasis added). The argument is also contrary to steps 3 and 4 of the *Methodology Order*, wherein the Director mitigates for material injury to reasonable in-season demand by requiring junior users to establish their ability to secure mitigation water or face curtailment. 382 R., pp.598-599.

More importantly, the total water supply argument is contrary to law. The concept of a "total water supply" arises out of Rule 42 of the CM Rules. The Rule permits the Director to consider the Coalition's natural flow and storage rights in conjunction with one another when determining material injury. IDAPA 37.03.011.042.g. Indeed, the Director does so in his *Methodology Order* when determining material injury to reasonable in-season demand as well as in determining the Coalition's "Time of Need." However, problems arise when the Coalition is required to deplete its reasonable carryover, *in addition to its other storage water*, to address its material injury to reasonable in-season demand. Under Idaho law the holder of a surface water storage right is entitled to maintain a reasonable amount of carryover-over storage to assure water supplies for future dry years. IDAPA 37.03.011.042.g; *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. Counsel's argument fails to address what happens if the Coalition's reasonable carryover is insufficient to address the full extent of material injury to reasonable in-season demand. Additionally, while the Coalition will have been required to deplete its reasonable carryover under counsel's argument, out-of-priority water use will have occurred without curtailment or the enactment of a mitigation plan. If junior users are unable to secure all or part of their mitigation obligation in November due to cost, scarcity or unwillingness, the remedy of curtailment is lost, as the out-of-priority water use will have already occurred. In that scenario, there is no contingency to protect senior rights as required by the *2013 SWC Case*. Such a result is not contemplated by the CM Rules, and is in contravention of the plain language of CM Rule 40 and the Idaho Supreme Court's precedent in the *2013 SWC Case*.

iv. The Director may require use of reasonable carryover pursuant to a properly enacted mitigation plan that contains appropriate contingency provisions to protect senior rights.

In conjunction with step 8, if the Director determines a greater volume of water is necessary than the previously determined to address material injury to reasonable in-season demand, the ability of junior users to secure additional in-season water during what is typically the most water intensive stage of the irrigation season is problematic. Further problematic is that curtailment at that stage would not only have a devastating impact on junior users but may not timely provide sufficient water to the Coalition. Accordingly, curtailment may still not prevent the Coalition from relying on its reasonable carryover to help get through the remainder of the irrigation season. Nonetheless, a viable mitigation plan is still possible.

In conjunction with a properly enacted and approved mitigation plan, the Director could require the Coalition to rely on its reasonable carryover provided that: 1) existing carryover storage allocations meet or exceed the additional shortfall to the revised reasonable in-season demand; and 2) junior users secure a commitment at that time for a volume of water equal to the shortfall to the revised reasonable in-season demand to be provided the following season if necessary. This could be accomplished through an option or lease to provide water. The water would provide mitigation for any shortfalls to reasonable carryover determined to exist at the end of the season. If no shortfall is determined to exist due to changing conditions, then the option or lease need not be exercised. If a shortfall is determined to exist, then the option or lease is in place to be exercised in whole or in part as required to mitigate for any shortfall. The water would be secured but not have to be provided until such time as it can be determined whether or not the storage allocations will fill next season. This process eliminates the risk of the Director not being able to compel junior users to secure water at the end of the season in lieu of curtailment the following season. And, curtailment the following season may not provide sufficient water in storage to remedy the injury to storage, particularly if curtailment will also be required as a result of a demand shortfall to reasonable in-season demand the following season.

The process is consistent with the requirement set forth in the *2013 SWC Case* "that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan." *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. It also eliminates the problem of securing water that will not be put to beneficial use because the water is being secured for the next season and

the amount secured can be adjusted down at the end of the instant season thereby leaving plenty of time for the unneeded water to be used elsewhere. Following any adjustment at the end of the instant season the amount of water that ultimately be secured would be the same as is currently required under Step 9.

B. The *Methodology Order's* use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is supported by substantial evidence.

The Coalition argues that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is not supported by substantial evidence and must be set aside. 382 R., p.574. The Idaho Supreme Court has already approved the Director's employment of a baseline methodology as a starting point in administration proceedings and for determining material injury. *2013 SWC Case*, 155 Idaho at 648-653, 315 P.3d at 836-841. The Court finds that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year is supported by substantial evidence.

The *Methodology Order* explains that a baseline year is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. 382 R., p. 569. To capture current irrigation practices, the *Methodology Order* limits the identification of a baseline year to 1999 and beyond. *Id.* Additionally, the *Methodology Order* instructs as follows:

> [A] BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

382 R., p.570. The Director found that "using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the Coalition."[10] 382 R., p.574. In so holding, the Director made findings that the 06/08 average has below average precipitation, near average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. *Id.* These findings are supported by the record.

[10] The Director determined that using values from a single year would not fit the selection criteria for all members of the Coalition. 382 R., p.574.

See 551 R., Ex. 8000, Vol. IV, Appdx. AS-1-8. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

Furthermore, the Court's holding regarding step 8 of the *Methodology Order* should alleviate the concerns raised by the Coalition on this issue. The baseline year should only be used as a starting point. As set forth above, it cannot result in the implementation of a cap on junior users' mitigation obligations. If changing conditions establish that material injury is greater than originally determined pursuant to the baseline analysis, then adjustments to the mitigation obligations of the juniors must be made when the Director undertakes his mid-season recalculations. The Coalition's concerns should be addressed since the mid-season adjustments include recalculating reasonable in-season demand for each member of the Coalition based on, among other things, actual crop water need to that point. 382 R., p.599.

C. The *Methodology Order's* provision for the consideration of supplemental ground water does not violate Idaho law. However, the Director's finding regarding ground water fractions is not supported by substantial evidence and must be remanded.

Step 1 of the *Methodology Order* provides in part that "[i]n determining the total irrigated acreage [of Coalition members], the Department will account for supplemental ground water use." 382 R., p.597. The Coalition argues that the *Methodology Order's* consideration of supplemental ground water use violates Idaho law and has no relevance to the administration of the Coalition's senior rights. This Court disagrees. The Idaho Supreme Court has directed that in responding to a delivery call, the Director has the authority "to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. If it is established that acreage accounted for under the Coalition's senior surface water rights is being irrigated from a supplemental ground water source, that is a factor the Director has the authority to consider in the context of a delivery call. If the supplemental ground water rights being used are themselves subject to curtailment under the senior call, (as suggested may be the case here by the Hearing Officer[11]), that factor should also be accounted for by the Director. However, the *Methodology Order's* instruction that the Department will consider supplemental ground water use when determining the total irrigated

[11] 551 R., p.7507

acreage of Coalition members does not violate Idaho law. The Director's decision to include that instruction in the *Methodology Order* is affirmed.

That said, the Court finds that the Director's assignment of an entity wide split for each member of the Coalition of the ground water fraction to the surface water fraction is not supported by substantial evidence in the record. In the *Methodology Order*, the Director makes the following finding:

> All acres identified as receiving supplemental ground water within the boundaries of a single SWC entity will initially be evaluated by assigning an entity wide split of the ground water fraction to the surface water fraction as utilized in the development of the ESPA Model. *See Ex. 8000 Vol. II, Bibliography at II,* referencing *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017.* For each entity the ground water fraction to the surface water fraction is as follows: A&B 95:5; AFRD2 30:70; BID 30:70; Milner 50:50; Minidoka 30:70; NSCC 30:70; & TFCC 30:70. If these ratios change with a subsequent version of the ESPA Model, the Department will use the values assigned by the current version of the ESPA Model.

382 R., p.576 fn.6. The Coalition argues that there is no factual support in the record justifying these ground water fractions, and that the Director's finding is arbitrary and capricious. The Department, IGWA and the City of Pocatello do not respond to the Coalition's argument in this respect.

A review of the record supports the Coalition's position. The record does not contain evidence that acres accounted for under the Coalition's senior surface water rights are being irrigated from a supplemental ground water source. Or that the ground water fractions utilized by the *Methodology Order* reflect such supplemental ground water use. If the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's *Partial Decrees*, such a determination must be supported by clear and convincing evidence. *See. e.g., A&B Irr. Dist., v. Idaho Dept. of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence"). Here, the parties fail to cite the Court to anything submitted before the Department in either written form or via oral testimony establishing the use of supplemental ground water by individual irrigators within the Coalition. That such was the case is illustrated by the Hearing Officer's limited findings on the issue. He found only that "an undetermined number of individual irrigators within SWC *may hold supplemental ground water rights. . . .*" and that "[i]t would seem that any

such ground water rights would be junior to the surface irrigations rights and subject to curtailment." 551 R., p.7507 (emphasis added). The Director did not address the Hearing Officer's findings in his *Methodology Order*, or include any further analysis on his findings. Rather, to support his ground water fraction finding, the Director cites to a document entitled *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017*, which is not in the record. Therefore, the Court finds the Director's finding is not supported by substantial evidence in the record. The Director's ground water fractions as set forth in the *Methodology Order* are hereby set aside and remanded for further proceedings as necessary.

D. The *Methodology Order's* reliance upon the Joint Forecast, and its use of the Heise Gage, to determine the available water supply for the Twin Falls Canal Company is set aside and remanded for further proceedings as necessary.

The Coalition argues that the Director's reliance upon the Joint Forecast, and its focus on the Heise Gage, to predict the available water supply for the Twin Falls Canal Company is arbitrary and capricious and not supported by substantial evidence. In response to this argument, the Department concedes the following in its briefing:

> The Department recognizes that while the Joint Forecast is a "good indicator" for predicting the supplies of most Coalition members, it is "not the best evidence" for purposes of predicting TFCC's supply. *SWC Methodology Brief* at 36. The Director has "previously expressed to TFCC that the Department is willing to work with the TFCC to improve the predictors for TFCC for future application in the Methodology Order and Department staff have even met with TFCC consultants on this issue."

Corrected Br. of Respondents, p.37 fn.30 (July 30, 2014). As a result, the Coalition's argument on this issue is unopposed. Therefore, the Director's decision in this respect is set aside and remanded for further proceedings as necessary.

E. The Director in his discretion may use the U.S. Department of Agriculture's National Agriculture Statistics Service data as a factor in determining crop water need, but should also take in account available data reflecting current cropping patterns.

Under steps 1 and 2 of the *Methodology Order*, the Director calculates the crop water needs of the Coalition for that year. In determining crop water need, the *Methodology Order* instructs that among other things the Director "will utilize crop distributions based on

distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS")." 382 R., p.580. The *Methodology Order* goes onto provide:

> NASS reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e., irrigated, non irrigated, non irrigated following summer fallow, etc. *Crop distribution acreage will be obtained from NASS by averaging the "harvested" area for "irrigated" crops from 1990-2008.* Years in which harvested values were not reported will not be included in the average. In the future, the NASS data may not be the most accurate source of data. The Department prefers to rely on data from the current season if and when it becomes usable.

Id. (emphasis added). The Coalition argues that the *Methodology Order's* designation of NASS data for 1990-2008 average crop distribution fails to capture current cropping patterns, resulting in under-determined crop water need. Specifically, that changes in cropping patterns have resulted in the planting of more water intensive crops such as corn and alfalfa in recent years which is not reflected in the 1990-2008 data.

The Court finds that the Director's decision to use NASS data as a factor in determining the Coalition's crop water need is a matter within his discretion. That said, while the Director may use historic cropping data as a starting point in determining crop water need, he should also take into account available data reflecting current cropping patterns. The *Methodology Order* provides that "the Department prefers to rely on data from the current season if and when it becomes usable." 382 R., p.580. Likewise, the Hearing Officer in addressing the issue of crop water need made the following recommendation which was adopted by the Director:

> **If there have been significant cropping changes resulting in either greater or less need for water, those factors should be factored.** This is an area of caution. Cropping decisions are matter for the irrigators acting within their water rights. Those decisions should be driven by the market. The fact that a particular crop may take less water does not dictate that it be planted.

551 R., p.7099. Taking in account available data reflecting current cropping patterns also addresses the Coalition's concerns regarding the Director's decision to factor in only "harvested" area when considering historic NASS data. Since the *Methodology Order* already provides that the Director prefers to use data from the current seasons if and when it becomes usable, no remand is necessary on this issue.

F. The *Methodology Order's* timing for initial determinations of water supply and material injury to reasonable in-season demand do not run afoul of Idaho law.

The Coalition takes issue with the timing of the Director's initial determinations of water supply and material injury to reasonable in-season demand under the *Methodology Order*. Under step 3 of the *Methodology Order*, the Director makes his initial determination of water supply through the issuance of his April Forecast Supply. 382 R., p.598. This occurs after the USBOR and USACE issue their Joint Forecast, which is typically released within the first two weeks of April. Then, the Director first determines whether a demand shortfall will occur for any member of the Coalition for the coming season. *Id.* If material injury exists or will exist, step 4 of the *Methodology Order* provides the juniors another fourteen days or until May 1st, whichever is later, to establish their ability to mitigate that material injury or face curtailment. *Id.* The Coalition asks this Court to set aside steps 3 and 4 of the *Methodology Order* and remand with instructions that the Director's initial determinations of water supply and material injury to reasonable in-season demand be made prior to the irrigation season (i.e., prior to March 15th).

The Coalition relies on the *2013 SWC Case* for the proposition that these initial determinations must occur prior to the irrigation season. In that case, the Court distinguished the two ways the Director may utilize a baseline methodology. *2013 SWC Case*, 155 Idaho at 650, 315 P.3d at 838. First, the Court directed that such a methodology may be used in a management context in preparing a pre-season management plan for the allocation of water resources. *Id.* Second, the Court directed that the Director may also use such a methodology in an administrative context "in determining material injury in the context of a water call." *Id.* The Court instructed that if the Director chooses to utilize a baseline methodology to "develop and implement a pre-season management plan for allocation of water resources," it must "be made available in advance of the applicable irrigation season . . . ." *Id.* at 653, 315 P.3d at 841. The irrigation season delineated on the Coalition's senior surface water rights begins March 15th.

The parties dispute whether the *Methodology Order* could be considered a pre-season management plan as contemplated in the *2013 SWC Case*. However, it is plain that the baseline methodology set forth in the *Methodology Order* is utilized by the Director in an administrative context in this case. Specifically, it is used a starting point for consideration of the Coalition's call for administration, and as a starting point in determining the issue of material injury. The

procedural background of the *Methodology Order* makes clear that it was issued in response to the Coalition's 2005 call. In his 2008 *Final Order*, the Director explained he would be issuing a separate final order because of the need for ongoing administration. 551 R., p.7386. The stated purpose of the *Methodology Order* is "to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC." 382 R., p.565. Therefore, the Court finds that the *Methodology Order's* baseline methodology is used in an administrative context "in determining material injury in the context of a water call." *2013 SWC Case*, 155 Idaho at 650, 315 P.3d at 838.

The Idaho Supreme Court has directed that "[w]hile there must be a timely response to a delivery call, neither the Constitution nor statutes place any specific timeframes on this process," and that it is "vastly more important that the Director have the necessary and pertinent information and the time to make a reasoned decision based on the available facts." *AFRD#2*, 143 Idaho at 875, 154 P.3d at 446. In this case, the Director found that it is necessary to wait until the Joint Forecast is issued to make the initial determinations at issue here. 382 R., p.572. He held that "given current forecasting techniques, the earliest the Director can predict material injury to RISD 'with reasonable certainty' is soon after the Joint Forecast is issued." 382 R., p.582. In so finding, the Director held that the Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." 382 R., p.572. And, that it is "a good indicator of the total available irrigation water supply for a season." *Id.* The Director's holding is supported by the record. *See. e.g.*, 551 R., p.1379. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

G. The Director's use of the ESPA Model boundary to determine a curtailment priority date in steps 4 and 10 of the *Methodology Order* is set aside and remanded.

The Coalition argues that steps 4 and 10 of the *Methodology Order* unlawfully and arbitrarily reduce junior ground water acres subject to administration in the event of curtailment. Step 4 provides in part as follows:

> If junior ground water users fail or refuse to provide this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users. Modeled curtailment shall be consistent with previous Department

> efforts. The ESPA Model will be run to determine the priority date necessary to produce the necessary volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

382 R., p.598-599.

The plain language of step 4 directs that the Director will use the ESPA Model to determine the curtailment priority date necessary to remedy material injury "within the model boundary of the ESPA." *Id.* Step 4 then notes that under the CM Rules, the Director "can only curtail junior ground water rights within the area of common ground water supply." *Id.* Thus, step 4 recognizes a conflict between the model boundary of the ESPA and the area of common ground water supply. The conflict arises from the fact that the ESPA Model boundary and the boundary of the area of common ground water supply – as it is defined by the CM Rules – are not consistent with one another. The ESPA Model boundary is larger, and contains ground water rights that are not within the area of common ground water supply. This fact is undisputed by the parties. It is the Coalition's position that the *Methodology Order* wrongly uses the ESPA Model boundary, instead of the boundary of the area of common water supply, to determine a curtailment priority date. And, that the Director's practice in this respect results in unmitigated material injury contrary to law. This Court agrees.

When a senior water user seeks the conjunctive administration of ground water rights under the CM Rules, the senior user is seeking administration within the area of common ground water supply. The plain language of CM Rules make this clear. The Rules prescribe the procedures for responding to a delivery call made "in an area having a common ground water supply."[12] IDAPA 37.03.11.001. Likewise, the Rules provide for administration when a delivery call is made by the holder of a senior-priority water right "alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights ... from

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[12] An "area having a common ground water supply" is defined as:

> A ground water source within which the diversion and use of ground water or changes in in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01

an area having a common water supply in an organized water district the petitioner is suffering material injury." IDAPA 37.03.11.040.01 (emphasis added). As a result, the *Methodology Order's* use of the ESPA Model to determine the curtailment priority date necessary to remedy material injury to the Coalition's water rights "within the model boundary of the ESPA" is problematic. Absent further analysis, which the *Methodology Order* does not provide for, it will result in unmitigated material injury and out-of-priority water use to the detriment of the Coalition in the event of curtailment.

The Director's application of step 4 in 2010 is illustrative. Under steps 3 and 4 of the *Methodology Order*, the Director determined a demand shortfall to reasonable in-season demand of 84,300 acre-feet to various Coalition members. 382 R., p.186. As permitted in step 4, the Director gave the junior users 14 days to mitigate by establishing their ability to secure 84,300 acre-feet of water. 382 R., p.188. In the event the juniors could not, the Director utilized the ESPA Model boundary to determine the curtailment priority date necessary to increase appropriate reach gains in the Snake River by 84,300 acre-feet. 382 R., p.187. This exercise resulted in a curtailment priority date of April 5, 1982. *Id.* However, the Director then provided that "[c]urtailing only those ground water rights located within the area of common ground water supply [junior to April 5, 1982] , IDAPA 37.03.11.050.01, will increase reach gains . . . by 77,985 acre-feet." *Id.* The amount of 77,985 acre-feet would not have fully mitigated the material injury. Notwithstanding, the *Methodology Order* does not provide further analysis or a mechanism to adjust the curtailment priority date upward within the boundary of the area of common water supply to provide enough water to fully mitigate the injury.

Therefore, the Court finds that the *Methodology Order's* use of the ESPA Model boundary to determine a curtailment priority date is arbitrary and contrary to the CM Rules. It includes ground water rights in the modeling that are not subject to curtailment under the plain language of the CM Rules to the detriment of the Coalition. The Court further finds that the use of the ESPA Model boundary results in out-of-priority water use contrary to law. The Director should either (1) use the boundary of the area of common water supply to determine a curtailment priority date, or (2) add further analysis to the *Methodology Order* to convert the curtailment priority date arrived at by using the ESPA Model boundary to a priority date which will provide the required amount of water to the Coalition when applied to the boundary of the

area of common water supply. The Director's decision in this respect is set aside and remanded for further proceedings as necessary.

H. The Coalition's argument that mitigation water for material injury to reasonable carryover must be provided up front has previously been addressed and will not be revisited.

With respect to the issue of mitigation of material injury to reasonable carryover, the Coalition argues that the *Methodology Order* is contrary to Idaho law in that it does not require the transfer of actual mitigation water to the Coalition's storage space up front to "carryover" for use in future years. This Coalition's argument in this respect has previously been addressed and rejected. In Gooding County Case No. CV-2008-551, the district court held that as long as assurances are in place, such as an option for water, that mitigation water could be acquired and transferred the following irrigation season, then junior users need not transfer that mitigation water up front to be carried over:

> In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement. ... *This does not mean that juniors must transfer replacement water in the season of injury,* however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example. Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment.

Order on Petition for Judicial Review, Gooding County Case No. CV-2008-551, p.19 (July 24, 2009) (emphasis added). Given that the decision of the district court in this respect was not overturned by the Idaho Supreme Court in the *2013 SWC Case*, this Court sees no reason to revisit the issue. The Director's decision in this respect is affirmed.

I. The *Methodology Order's* process for determining reasonable carryover does not violate the CM Rules.

The CM Rules provide that in determining reasonable carryover, "the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system." IDAPA 37.03.11.042.g. The Coalition argues that the Director's *Methodology Order* fails to consider

these factors in its process for determining reasonable carryover, and asks this Court to set aside and remand the same. Section III of the *Methodology Order* sets forth the Director's methodology for determining material injury to reasonable carryover. 382 R., pp.585-590. A review of Section III reveals that the Director does consider and analyze, consistent with CM Rule 42.g, the projected water supply, average annual rate of fill and average annual carryover of the Coalition members. The *Methodology Order* first considers the projected water supply. 382 R., pp.585-586. It uses the values of Heise Gage natural flow data for the years 2002 and 2004 to establish a projected typical dry year supply as the projected water supply. 382 R., p.585. In so doing, the Director notes that "[t]he Heise natural flow, for the years 2002 and 2004, were well below the long term average . . . ." *Id.* The *Methodology Order* then considers and sets forth the annual percent fill of storage volume by Coalition members from 1995 to 2008. 382 R., pp.586-587. Last, the *Methodology Order* considers and sets forth actual average carryover of Coalition members from 1995-2008. 382 R., pp.587-588.

The CM Rules do not limit the Director's determination of reasonable carryover to consideration of the factors enumerated in CM Rule 42.g, but only require that the Director consider those enumerated factors. The Court finds based on a review of the *Methodology Order* that the Director's process for determination reasonable carryover does consider the enumerated factors. Therefore, the Court finds that the Director's process was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

J. Step 10 of the *Methodology Order* is set aside and remanded for further proceedings.

The Coalition argues that the transient modeling provision of step 10 of the *Methodology Order* is contrary to law. Step 10 provides in part as follows:

> As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model. The modeling effort will determine total annual reach gain accruals due to curtailment over the period of the model exercise. In the year of injury, junior ground water users would then be obligated to provide the accrued volume of water associated with the first year of the model run. In each subsequent year, junior ground water users would be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided.

382 R., p.601 (internal citations omitted). The Director justifies his determination in this respect as follows:

> Because of the uncertainty associated with this prediction, and in the interest of balance priority of right with optimum utilization and full economic development of the State's water resources, Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226, the Director will use the ESPA Model to simulate transient curtailment of the projected reasonable carryover shortage.

382 R., pp.596-597. For reasons stated elsewhere in this decision (see Section V.A.ii above), the Court finds that the articles and code sections relied upon by the Director do not justify his decision. The Department acknowledges as much in its briefing, providing that "the Director did not have the benefit of the guidance in *Clear Springs* and the 2012 and 2013 *A&B* decisions when the *Methodology Order* was issued."[13] *Corrected Brief of Respondents*, p.68. The Department thus suggests that "a remand to the Director with instructions to apply the Idaho Supreme Court's guidance is the appropriate remedy if this Court determines that the *Methodology Order* does not provide an adequate explanation of the basis for the transient modeling provision of Step 10." *Id.*

This Court agrees that the transient modeling provision of step 10 must be set aside and remanded for further proceedings. Counsel for the Department argues that the provision is supported by the CM Rules' provisions for phased-in curtailment. However, this justification was not contemplated or detailed by the Director in the *Methodology Order*. Rather, it is being raised for the first time on judicial review. The Court does question the viability of phased curtailment as a justification for the practice outlined in step 10. Reasonable carryover is surface water "which is retained or stored for future use in years of drought or low-water." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. As the *Methodology Order* is currently constituted, the out-of-priority use resulting in the material injury to the Coalition's reasonable carryover will have already occurred by the time the Director reaches step 10 of the *Methodology Order*. It is questionable whether after-the-fact phased curtailment, as contemplated by the CM Rules, would be consistent with Idaho law or satisfies the purpose of reasonable carryover. For the reasons set

[13] Counsel refers to the Idaho Supreme Court's decisions in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012), and *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr., Dist.*, 155 Idaho 640, 315 P.3d 828 (2013), respectively.

forth in this section, the transient modeling provision of step 10 will be set aside and remanded for further proceedings as necessary.

K. The *Methodology Order's* procedures for determining Coalition members' reasonable in-season demand are consistent with Idaho law.

The City of Pocatello and IGWA both argue that the Director's methodology for determining the Coalition's reasonable in-season demand, as set forth in the *Methodology Order*, are contrary to law. They assert several arguments in support of their position. Each will be addressed in turn.

i. The Director did not act contrary to law or abuse his discretion in considering the Coalition's historic use in determining reasonable in-season demand.

The primary argument asserted by IGWA and the City of Pocatello is that the *Methodology Order* unlawfully considers the Coalition's historic use in initially determining reasonable in-season demand. As discussed above, the Director uses a historic demand baseline analysis that utilizes the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. 382 R., p.574. However, the *Methodology Order* also provides that the initial reasonable in-season demand determination "will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions." 382 R., p.568. Further, that "[g]iven the climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences." 382 R., p.575. The Director's consideration of the Coalition's historic use in this context is not contrary to law. The Idaho Supreme Court has already affirmed "the Director's use of *a predicted baseline of a senior water right holders' needs* as a starting point in considering the material injury issue in a water call." *2013 SWC Case*, 155 Idaho at 656, 315 P.3d at 844 (emphasis added). Therefore, the Court finds that the *Methodology Order's* use of a baseline analysis as the starting point in determining the Coalition's reasonable in-season demand is not contrary to law.

In conjunction with their argument, the City of Pocatello and IGWA assert that the *Methodology Order's* process for determining reasonable in-season demand fails to consider

various contemporary factors. IGWA argues that it fails to consider acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. IGWA and the City of Pocatello additionally argue that it fails to consider certain factors listed in CMR Rule 42, including the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. This Court disagrees.

A review of the *Methodology Order* reveals that the Director's calculation of reasonable in-season demand provides for the consideration of all the factors raised by IGWA and the City of Pocatello. For instance, the Director's consideration of project efficiency and crop water need includes the following:

> Monthly irrigation entity diversion ("Q_D") will be obtained from Water District 01's diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. *Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity.* Examples of adjustments include the removal of diversions associated with in-season recharge *and diversion of irrigation water on the behalf of another irrigation entity.* Adjustments, as they become known to the Department, will be applied during the mid-season updates and in the reasonable carryover shortfall calculation. Examples of adjustments that can only be accounted for later in the season include SWC deliveries for flow augmentation, SWC Water placed in the rental pool, and SWC private leases. *Adjustments are unique to each irrigation season and will be evaluated each year. Any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume.* Water that is purchased or leased by a SWC member may become part of IGWA's shortfall obligation; to the extent that member has been found to have been materially injured. . . . *Conversely, adjustments will be made to assure that water supplied to private leases or to the rental pool will not increase the shortfall obligation.*

382 R., p.578 (emphasis added). Therefore, the Court finds that the *Methodology Order* takes into consideration acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. Furthermore, both the Hearing Officer and the Director found, in considering the Rule 42 factors, that the Coalition members operate reasonable and efficient irrigation projects. The Director found that "as found by the hearing officer in his recommended order, members of the SWC operate reasonably and without waste," and that he will not "impose greater project efficiencies upon members of the SWC than have been historically realized." 382 R., p.551; 551 R., pp.7102-7104.

In conjunction with IGWA's and the City of Pocatello's argument in this respect, it is necessary to reiterate the presumptions and evidentiary standards that apply to a delivery call. *See e.g., 2013 SCW Case*, 155 Idaho at 650, 315 P.3d at 838 (providing, "when utilizing the baseline in the administration context, the Director must abide by established evidentiary standards, presumptions, and burdens of proof"). First, when a call is made "the presumption under Idaho law is that the senior is entitled to his decreed water right." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. Then, "[o]nce a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *A&B Irr., Dist.*, 153 Idaho at 524, 284 P.3d at 249. Finally, "[o]nce the initial determination is made that material injury is occurring *or will occur*, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (emphasis added).

These presumptions and evidentiary standards are instructive on this issue. The *Methodology Order* provides for the Director's consideration of the factors with which IGWA and the City of Pocatello are concerned. However, if the junior users believe for some reasons that the seniors will receive water they cannot beneficially use, it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence. For example, the juniors may assert that the Director in their opinion is considering some, but not *all* acres that are no longer irrigated by the seniors. Or it may be their opinion that the Director is considering some, but not *the full extent* of water diverted by the seniors for use by others. In that scenario, it is then their burden under the established evidentiary standards and burdens of proof get evidence supporting their position before the Director in an appropriate fashion.

ii. The Director did not abuse his discretion or act contrary to law in declining to adopt a water budget methodology to determine the Coalition's water needs.

IGWA and the City of Pocatello argue that the Director's *Methodology Order* should have adopted a water budget methodology to determine the water needs of the Coalition. At the hearing before the Hearing Officer, the parties each proposed a water budget methodology for

determining the water needs of the Coalition. The Director declined to adopt any such methodology, favoring instead the use of a baseline demand analysis as the starting point in determining reasonable in-season demand. 382 R., pp.575-577. The Director's decision in this respect is supported by law, the record, and is within his discretion.

The Idaho Supreme Court has already affirmed "the Director's use of a predicted baseline of a senior water right holders' needs as a starting point in considering the material injury issue in a water call." *2013 SWC Case*, 155 Idaho at 656, 315 P.3d at 844. Furthermore, the Director's reasoning for declining to adopt a water budget method is supported by the record. The record establishes that both the Hearing Officer and the Director questioned the validity of using a water budget methodology under the facts and circumstances presented, recognizing the wildly differing results reached by the surface water and ground water experts under such an approach. In addressing the issue, the Hearing Officer stated:

> The irony in this case is that surface water and ground water expert testimony used much of the same information and in some respects the same approaches and came up with a difference of 869,000 acre-feet for an average diversion budget analysis of SWC districts for the period from 1990 through 2006. . . . The total under the SWC analysis is 3,274,948 acre-feet as compared to the Pocatello analysis of . . . 2,405,861[acre-feet].

551 R., p.7096. The Hearing Officer concluded that such results do "not promote much faith in the science of the water budget analysis," and declined to adopt any of the presented water budget approaches. 551 R., pp.7096-7097. The Director echoed these sentiments in his *Methodology Order* when making the determination to utilize a baseline methodology. 382 R., pp.576-577. As set forth in detail above, the Court finds that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is supported by substantial evidence. In reviewing the Director's assessment and rejection of the water budget methodology, this Court finds that the Director's decision was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

iii. The *Methodology Order's* use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is not contrary to law.

The City of Pocatello and IGWA allege that the *Methodology Order* impermissibly overestimates the reasonable in-season demand of the Coalition. They point to the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of a reasonable in-season demand determination. They assert that the Director's use of those values results in the selection of a baseline year of above average temperatures and evapotranspiration and below average precipitation, which in turn impermissibly results in overestimated reasonable in-season demand. It is their position that the Director must determine the needs of the Coalition based on historic use data associated with a year with average temperatures, evapotranspiration and precipitation. This Court disagrees.

The Director's adoption of a baseline year intentionally utilizes above average temperatures and evapotranspiration and below average precipitation. In selecting a baseline year, Director notes that "demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration ("ET"), and lower precipitation." 382 R., p.569. He then explains that it is necessary to select a baseline year of above average temperatures and evapotranspiration and below average precipitation in order to protect senior rights:

> Equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury. The incurrence of actual demand shortfalls by a senior surface water right holder resulting from pre-irrigation season predictions based on average data *unreasonably shifts the risk of shortage to the senior surface water right holder*. Therefore, a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other facts.

382 R., pp.569-570 (emphasis added). In his *Methodology Order*, the Director found that "using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the SWC." 382 R., p.574.

The Director did not err in his intentional adoption of a baseline year based on above average temperatures and evapotranspiration and below average precipitation. The Court agrees that use of such data is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights. The arguments set forth by the City of Pocatello and IGWA that the Director must use data associated with an average year fail to take into account the legal limitations placed on the Director in responding to a

delivery call. The senior is entitled to a presumption under Idaho law that he is entitled to his decreed water right. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If the Director is going to administer to less than the full quantity of the decreed water right, his decision must be supported by clear and convincing evidence in order to adequately protect the senior right. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

If the Director determined the needs of the Coalition based on historic use data associated with an average year, any decision to administer to less than the full quantity of the Coalition's decreed rights based on that data would not adequately protect its senior rights. Using data associated with an average year by its very definition would result in an under-determination of the needs of the Coalition half of the time. The Director simply cannot rely upon such data if he is going to administer to less than the decreed quantity of the Coalitions' water rights as his analysis would not be supported by clear and convincing evidence.

The City of Pocatello and IGWA additionally argue that the Director's use of the values of 2006 and 2008 violates the law of case. Specifically, they argue that the use of such data violates the Hearing Officer's recommendation, which they interpret as requiring use of data associated with an average year. Whether this interpretation of the Hearing Officer's recommendation is accurate need not be addressed. What is important is that after the Hearing Officer issued his *Recommendation*, but before the Director issued his *Methodology Order*, case law developed instructing the Director concerning the significance of a decreed water right in a delivery call. *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647 (May 4, 2010). In that case, the district court held that if the Director determines to administer to less than the decreed quantity of water, such a determination must be supported by clear and convincing evidence. *Id.* at 38. The Director in issuing his *Methodology Order* was bound to follow this case law.[14] As set forth above, using data associated with an average year in order to administer to less than the full decreed quantity of the Coalitions' water rights would not meet a clear and convincing evidence standard. Therefore, the arguments set forth by IGWA and the City of Pocatello are unavailing.

[14] The district court's decision in this regard was ultimately affirmed by the Idaho Supreme Court on appeal. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012).

L. The *Methodology Order's* procedures for determining water supply are consistent with Idaho law.

IGWA and the City of Pocatello additionally argue that the Director wrongly underestimates the forecasted water supply in the *Methodology Order*. The *Methodology Order* explains that in determining water supply "[t]he actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply." 382 R., p.582. Further,

> By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. . . . The Director's prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for the juniors to carry. Idaho Const. Art. XV, § 3, Idaho Code § 42-106.

382 R., p.594. IGWA and the City of Pocatello argue that the Director's intentional underestimation of the forecasted water supply is an abuse of discretion and contrary to Idaho law. This Court disagrees for the reasons set forth in the preceding section regarding the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. The analysis set forth in that preceding section is incorporated herein by reference. The Court finds that the Director did not abuse his discretion or act contrary to law in finding that the use of one standard error below the regression line is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights. The Court finds that the Director's decision to utilize such a regression analysis was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

M. Neither the City of Pocatello nor IGWA were denied due process.

The City of Pocatello and IGWA argue that the Director denied them due process by declining to allow them to present evidence challenging the *Methodology Order* after his issuance of that *Order*. This Court disagrees. Idaho Code Section 42-1701A provides in part that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing

before the director to contest the action." In this case, the City of Pocatello and IGWA were previously afforded an opportunity for hearing. On January 16, 2008, a hearing was commenced before the Hearing Officer that resulted in the development and issuance of the *Methodology Order*. 551 R., p.7382. For approximately fourteen days, evidence and testimony was presented to the Hearing Officer by the parties, including IGWA and the City of Pocatello. Both IGWA and Pocatello had the opportunity at that hearing to present their theories and testimony on how material injury to the Coalition should be determined. Among other things, those parties had the opportunity to present their water budget analysis, which was rejected by the Hearing Officer and Director for reasons stated in the record. After considering the parties' evidence and arguments, the Director adopted the methodology for determining material injury set forth in the *Methodology Order*. The question of whether the *Methodology Order's* process for determining material injury is contrary to law, or inconsistent with the record, is a matter for judicial review. This Court has taken up those arguments in this decision. As a result, the IGWA and the City of Pocatello are not entitled to the relief they seek on this issue.

VI.
ANALYSIS OF METHODOLOGY AS APPLIED

The Director issued his *Methodology Order* in June 2010. Since that time, the Director has issued several final orders applying his methodology to subsequent water years. Those final orders have resulted in the filing of a number of *Petitions* seeking judicial review of the Director's applications.

A. The Director's application of the *Methodology Order* in 2013 failed to adjust the mitigation obligations of the juniors to take into account changing conditions.

The Coalition argues that the Director's application of the *Methodology Order* in 2013 was contrary to law. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*. 382 R., pp.829-846. In that *Order*, the Director concluded that the Twin Falls Canal Company would experience material injury to reasonable in-season demand in the amount of 14,200 acre-feet. 382 R., p.831. He also determined that the rest of the Coalition members would experience no material injury to reasonable in-season

demand. *Id.* Consistent with step 4 of the *Methodology Order*, the Director gave IGWA fourteen days to secure 14,200 acre-feet of mitigation water to avoid curtailment. 382 R., p.835. IGWA filed its *Notice of Secured Water* with the Director on April 22, 2013. 382 R., pp.848-853.

After the Director undertook his in-season recalculations, he issued his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* on August 27, 2013. 382 R., pp.948-957. In that *Order*, the Director revised his original material injury determination based on changing conditions. He increased the material injury to reasonable in-season demand for the Twin Falls Canal Company from 14,200 acre-feet to 51,200 acre-feet. 382 R., p.953. He also increased the material injury to reasonable in-season demand for American Falls Reservoir District No. 2 from no material injury to 54,000 acre-feet of material injury. *Id.* Consistent with step 8 of the *Methodology Order*, the Director did not require the junior users to secure additional mitigation water to address the increased material injury, nor did he provide for curtailment. 382 R., p.954. Rather, the Director required the juniors to release the 14,200 acre-feet of mitigation water they had previously secured. *Id.* He then directed the Watermaster for Water District 01 to allocate 6,900 acre-feet to the Twin Falls Canal Company, and 7,300 acre-feet to American Falls Reservoir District No. 2 to address their respective material injuries. *Id.* As a result, the Twin Falls Canal Company did not get the amount of mitigation water that the Director ordered was to be secured for it under his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*.

The Coalition argues that the Director's refusal to adjust the juniors' mitigation obligation in 2013 is contrary to law. This Court agrees. In 2013, the Director did not provide a proper remedy for material injury to the reasonable in-season demand of the Twin Falls Canal Company or American Falls Reservoir District No. 2 when taking into account changing conditions. Namely, the Director improperly capped the mitigation obligations of junior users to that amount of material injury determined under step 4 (i.e., 14,200 acre-feet) even though changing conditions resulted in an increase of material injury to both the Twin Falls Canal Company and American Falls Reservoir District No. 2 (i.e., 51,200 acre-feet and 54,000 acre-feet, respectively). The analysis and justifications for the Court's finding in this respect are set forth above under Section V.A. of this decision. They will not be repeated here, but are incorporated by reference. The Court finds that the Director's failure to adjust the mitigation

obligations of the juniors to take into account changing conditions in 2013 resulted in prejudice to the Coalition's senior water rights and was contrary to law.

The Department argues that no further mitigation or curtailment was required in 2013 because "the April forecast and the in-season adjustments to it were predictions of material injury . . . not final determinations of actual material injury." Respondents' Br., pp.29-30. First, this argument is internally inconsistent with the *Methodology Order*, and the Director's application of the *Methodology Order* in 2013. In contravention of this argument, the *Methodology Order* itself provides for mitigation or curtailment if material injury to reasonable in-season demand is determined to exist in April. In fact, contrary to the Department's current argument, the Director required IGWA to secure mitigation water in 2013 following his initial April determination that the Twin Falls Canal Company would experience material injury to reasonable in-season demand in the amount of 14,200 acre-feet. 382 R., p.836. Second, the Department's argument is contrary to law. The Idaho Supreme Court has made clear that the burden of proof in a delivery call switches to the junior users once a determination has been made that material injury "is occurring *or will occur*." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (emphasis added). When the Director makes his April and mid-seasons calculations of material injury to reasonable in-season demand, he is making the determination under the plain language of the *Methodology Order* that material injury is or will occur. Therefore, the proper burdens of proof and evidentiary standards must be applied. The Director's *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* is set aside and remanded for further proceedings as necessary.

B. The Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination based on changing conditions. However, the Director failed to follow that timeframe in 2013.

The Coalition argues that in 2012 and 2013 the Director failed to timely make adjustments to his initial material injury determinations to take into account changing conditions. When and how often the Director adjusts his initial material injury determination to reasonable in-season demand based on changing conditions is a matter with which the Director exercises great discretion. The Director makes his initial material injury determination in or around April. The Director then makes adjustments to his initial determination throughout the irrigation season

as conditions develop, as provided for in steps 6 and 7 of the *Methodology Order*. These occur "approximately halfway through the irrigation season." 382 R., p.599. The Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination. It would be unreasonable, for example, to require the Director to update his material injury determination to reasonable in-season demand on a daily or weekly basis as a result of changing conditions. If the Director determines that changing conditions require earlier, or more frequent adjustments, than that provided for in his *Methodology Order*, the Director may undertake such adjustments in his discretion.

The Coalition argues that in 2012 the Director failed to timely make adjustments to his initial material injury determination to reasonable in-season demand. It points to the fact that shortly after the USBOR and USACE issued their Joint Forecast on April 5, 2012, the USBOR and USACE issued a revised Joint Forecast on April 16, 2012 that reduced predicted water flows. The Director made his initial material injury determination based on the April 5, 2012, Joint Forecast, and then declined to update his initial material injury again in April following the issuance of the revised Joint Forecast. 382 R., p755. The Court finds that the Director did not abuse his discretion in this respect. As stated above, the Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination. When the Director makes his in-season adjustments pursuant to steps 6 and 7 of the *Methodology Order*, he issues a revised forecast supply. That revised forecast supply will take into account the changing water conditions that differ from his initial April Forecast Supply. The Director must then adjust the mitigation obligations of the junior users accordingly. It is noted that the Court's holding regarding step 8 of the *Methodology Order* should alleviate the concerns raised by the Coalition on this issue, since the initial material injury determination will not result in a cap of the junior users' mitigation obligations. The Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

With respect to 2013, the Court finds that the Director acted arbitrarily and capriciously by waiting until August 27 to apply step 6 of the *Methodology Order*. Step 6 provides that "approximately half way through the irrigation season" the Director will revise the April forecast and determine the "time of need" for purposes of providing mitigation. 382 R., p. 599. In 2013, the Director did not issue his *Order Revising April 2013 Forecast Supply (Methodology 6-8)*

until August 27, 2013. 382 R., pp.948-957. The Coalition argues the Director's delay in applying step 6 required its members to make water delivery decisions for the remainder of the irrigation season without the benefit of the revised forecast and any related mitigation obligation. The Coalition argues the Director acted arbitrarily and capriciously by delaying the application of step 6. This Court agrees.

The Director identifies the "irrigation season" as running from "the middle of March to the middle of November - an eight month span." 382 R., p. 1039. Therefore, mid-July is halfway through the irrigation season. The word "approximately" is defined as "almost correct or exact: close in value or amount but not precise." *See e.g.* www. merriam-webster.com /dictionary/ approximately. Although step 6 provides for some flexibility by not requiring the revision to be made precisely halfway through the irrigation season, a delay of close to a month and half does not even fit under a generous interpretation of the word "approximately." In this regard, the Director acted arbitrarily and capriciously. The Director should apply his established procedure as written or further define and/or refine the procedure so that Coalition members relying on the procedure know when to anticipate its application and are able to plan accordingly.

C. The Director's calculation of crop water need of the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company in 2013, as set forth in his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* is set aside and remanded for further proceedings as necessary.

The Coalition asserts that the Director has erroneously refused to use certain irrigated acreage information provided by it when determining its crop water need under steps 1 and 2 of the *Methodology Order*. The Coalition's argument focuses primarily on the 2013 water year. Step 1 of the *Methodology Order* requires the Coalition "to provide electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%" on or before April 1. 382 R., p.597. Step 2 provides that starting at the beginning of April, the Department will calculate the cumulative crop water need volume for all land irrigated with surface water within the boundaries of each member of the SWC. *Id.* It further provides that volumetric values of crop water need will be calculated "using ET and precipitation values

from the USBR's AgriMet program, *irrigated acres provided by each entity*, and crop distributions based on NASS data." *Id.*

The record establishes that in March of 2013, the members of the Coalition provided the Director with shape files showing the acres being irrigated within the water delivery boundaries for the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company. 382 R., pp.821-828; *see also* 20130329 BID & TFCC Folder (in Bastes Stamped OCR Docs) (382 R., Disc 1). With respect to the A&B Irrigation District, Milner Irrigation District and North Side Canal Company, the Coalition informed the Director that the acres being irrigated within the water delivery boundaries for those entities was the same as the previous year. *Id.* Therefore, the Court finds that the Coalition timely complied with the *Methodology Order's* step 1 requirements. The Director also found that the Coalition complied with step 1 in 2013. 382 R., p.830.

The record further establishes that even though the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company timely complied with the step 1 requirements, the Director did not use the irrigated acreage data provided by those entities data to calculate their crop water needs in 2013. IDWR 8-27-13_August Background Data Folder, document entitled "DS RISD Calculator" (in Bastes Stamped OCR Docs) (382 R., Disc 1). Rather, the Director used irrigated acreage data for the Burley Irrigation District and Minidoka Irrigation District contained in a report prepared by SPF Water Engineering in 2005 (i.e., 551 Ex. 4300). *Id.* With respect to the Twin Falls Canal Company, the Director used irrigated acreage data contained in a report from 2007 (i.e., 551 Ex. 4310). *Id.* In doing so, the Director calculated the crop water needs of those entities based on less irrigated acres than that provided by those entities. *Id.* The Director provides no reasoning or rationale in his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* for deviating from step 2 of the *Methodology Order* in this respect. 382 R., pp.948-957. As set forth above, if the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's *Partial Decrees*, such a determination must be supported by clear and convincing evidence. *See. e.g., A&B Irr. Dist., v. Idaho Dept. of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence"). Since

the Director's decision to deviate from step 2 in this respect is not supported by reasoning it is hereby set aside and remanded for further proceedings as necessary.

D. The Coalition is not entitled to the relief it seeks on the issue of the Director's process for the use of storage water as mitigation.

The Coalition argues that the Director has failed to require that the use of storage water for mitigation be accomplished in accordance with the Water District 01 Rental Pool rules and procedures. Further, that the Director has provided no formal defined process for interaction between IDWR, Water District 01, and junior ground water users when addressing storage water leased, optioned, or otherwise contracted for mitigation purposes. The Coalition complains specifically of the mitigation water secured by IGWA in 2010 and 2013. With respect to storage water secured by IGWA under its 2010 mitigation plan, this Court has already held that mitigation plan, and its use of storage water located in the Upper Snake Reservoir System for mitigation, complied with the requirements of the CM Rules. *Memorandum Decision and Order on Petition for Judicial Review*, Twin Falls County Case No CV-2010-3075 (Jan. 25, 2011). This Court's holding in that case will not be revisited.[15] With respect to the mitigation water secured by IGWA in 2013, the Court finds that the Director reviewed leases and contracts evidencing that IGWA had secured the required amount of mitigation water. 382 R., pp.881-887. Based on his review, the Director found that those leases and contracts would provide water to the Coalition at the Time of Need, and concluded that IGWA had satisfied its mitigation obligation. 382 R., p.884. The Court finds the Director's holding in this respect complied with the requirements of the CM Rules, as well as this Court's decision in Twin Falls County Case No. CV-2010-3075. In addition, the Court finds that the Coalition is not entitled to the relief its seeks on this issue, as it has failed to establish that its substantial rights have been prejudiced as a result of the mitigation water secured in 2010 and 2013. I.C. § 67-5279(4).

[15] A final judgment was entered in Twin Falls County Case No CV-2010-3075 on January 21, 2011. No appeal was taken from that final judgment.

E. The Director's decision to deny the Coalition the opportunity for a hearing in 2012 and 2013 is in violation of Idaho Code § 42-1701A.

At the administrative level, the Coalition requested hearings before the Department with respect to several final orders issued in 2012 and 2013, wherein the Director applied his methodology to the facts and circumstances presented by those water years. Those final orders include the Director's (1) *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)* dated April 13, 2012, (2) *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* dated April 17, 2013, and (3) *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* dated August 27, 2013. 382 R., pp.728-742; 382 R., pp.829-846; and 382 R., pp.948-957. The Coalition argued it was entitled to such hearings under Idaho Code § 42-1701A, asserting that no administrative hearing had previously been held on those matters. The Director denied the requests, finding that the Coalition had been afforded hearings on the issues raised. 382 R., p.757; 382 R., pp.890-891; and 382 R., p.1040. The Director held that hearings conducted in 2008 and 2010 constituted hearings previously afforded to the Coalition on the matters. *Id.* This Court holds that the Director's decision in this respect was made in violation of Idaho Code § 42-1701A.

Idaho Code § 42-1701A provides in part that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action." I.C. § 42-1701A. The plain language of the statute is mandatory. The Director does not specify the previous hearings in 2008 and 2010 on which he relies in denying the Coalition's requests for hearing. However, the Director likely refers to the hearing held before Hearing Officer commencing on January 18, 2008, and the hearing on the *Methodology Order* held on May 24, 2010. Those two hearings pertained specifically to the development and issuance of the *Methodology Order*. However, the Director thereafter issued a series of final orders, listed above, applying his methodology to the facts and circumstances arising in the 2012 and 2013 water years. The hearings conducted in 2008 and 2010 did not address his application of his methodology to the 2012 and 2013 water years. And, a review of the Coalition's *Requests for Hearing* establishes that the Coalition raised issues, and requested hearings on issues, not previously addressed in the 2008 and 2010 hearings.

The Coalition's *Request for Hearing on Order Revising April 2013 Forecast Supply (Steps 6-8)* is illustrative. 382 R., pp.969-979. The Coalition requested a hearing on the Director's issuance of his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* on August 27, 2013. It asserted that waiting until August 27 to issue a revised forecast was contrary to step 6 of the *Methodology Order*, which provides that "[a]pproximately halfway through the irrigation season" the Director will issue a revised forecast supply. 382 R., pp.970-971. The Coalition also requested a hearing on the Director's decision to apportion the 14,200 acre-feet of mitigation water secured by IGWA to give 7,300 acre-feet to American Falls Reservoir District No. 2 and 6,900 acre-feet to the Twin Falls Canal Company. 382 R., pp.971-972. It asserted that such an apportionment was in error, given that the entirety of the mitigation water was initially secured to address material injury to the Twin Falls Canal Company. *Id.* The record establishes that neither of these matters had been previously addressed in a prior administrative hearing. These arguments do not attack the *Methodology Order* itself, but rather challenge whether the Director complied with the terms of the *Methodology Order* in his application of his methodology to the 2013 water year. Therefore, the Director was statutorily required to afford the Coalition a hearing under the plain language of Idaho Code § 42-1701A.

Since the Director did not previously afford the Coalition a hearing on the issuance raised in the subject *Requests for Hearing*, the Director's decisions to deny the Coalition the opportunity for a hearing on those *Requests* were made in violation of Idaho Code § 42-1701A. The Court further finds that substantial rights of the Coalition members were prejudiced in the form of their statutory right to an administrative hearing. As a result, the Director's decisions in this respect are hereby set aside and remanded for further proceedings as necessary.

F. The City of Pocatello is not entitled to the relief it seeks with respect to the Director's *As-Applied Order*.

The City of Pocatello seeks judicial review of the Director's *As-Applied Order* on several grounds. It first argues that the *As-Applied Order*, wherein the Director applied steps 3 and 4 of the *Methodology Order* to the 2010 water year, is arbitrary and capricious. Specifically, that the *As-Applied Order* arbitrarily and capriciously based its initial material injury determination to the Coalition's reasonable in-season demand upon a historic demand baseline analysis and an intentional underestimation of water supply. This argument is not an attack on the *As-Applied*

Order, but rather another challenge to the Director's methodology for determining material injury to reasonable in-season demand as set forth in the *Methodology Order*. This Court addressed and rejected the City's argument in this respect above under Sections V.K. and V.L.

The City of Pocatello next argues that requiring junior users to secure mitigation water that is ultimately not required for beneficial use is contrary to Idaho law.[16] Again, this is not a challenge to the *As-Applied Order*, but rather a challenge to steps 4 and 8 of the *Methodology Order*. If the Director determines that material injury to reasonable in-season demand exists or will exist under steps 3 and 4, then the junior users are required under step 4 to establish their ability to mitigate that injury to avoid curtailment. 382 R., pp.598-599. To avoid curtailment, junior users only need establish their ability to secure mitigation water to be provided to the Coalition at a later date (i.e., the "Time of Need"). Step 8 then provides that if the Director's in-season recalculations and adjustments establish that material injury to reasonable in-season demand is less than initially determined due to changing conditions, the juniors will not need to provide the full amount of water initially secured to the Coalition. 382 R., p.600. The City's argument that this result is contrary to law is unavailing, and fails to account for the burdens of proof and evidentiary standards established by Idaho law.

As stated in more detail above, when the Director makes his initial material injury determination to reasonable in-season demand in April, he is making the determination that material injury is occurring or will occur. Under the CM Rules and established Idaho law, the Director must curtail at that point, or allow out-of-priority water use pursuant to a properly enacted mitigation plan. *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. There is no presumption that administering to the full quantity of the Coalition's decreed water rights will result in waste. To the contrary, since the Coalition's water rights are decreed rights, Idaho law dictates that proper weight must be given to the decreed quantity of those rights. As a result, the presumption under Idaho law is that the Coalition members are entitled to their decreed quantities in times of shortage. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If junior users believe that administering to the full decreed amount of the Coalition's water rights will result in waste, they must come forth with clear and convincing evidence establishing that fact. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

[16] As set forth in further detail below, the Director's *As-Applied Order* did not require or result in the City of Pocatello securing mitigation water in 2010 that was not ultimately required for beneficial use.

It is against these legal presumptions, burdens of proof, and evidentiary standards that the Director's *Methodology Order* must be analyzed. In the *Methodology Order*, the Director recognizes that "[i]f the Director predicts that the SWC will be materially injured, the consequence of that prediction is an obligation that must be borne by junior ground water users." 382 R., p.593. And, that:

> By requiring that junior ground water users provide of have options to acquire water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to provide mitigation water until the time of need, the Director ensures that junior ground water users provide only the amount of water necessary to satisfy the reasonable in-season demand.

Id. The Court finds that the Director's analysis in this respect protects senior rights in times of shortage by appropriately accounting for the legal presumptions, burdens of proof, and evidentiary standards required by Idaho law. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

The City of Pocatello next argues that in determining the reasonable in-season demand of the Coalition in his 2010 *As-Applied Order*, the Director failed to account for all water diverted by Coalition members for delivery to other entities (i.e., wheeled water). The *Methodology Order* provides that in calculating the Coalition's reasonable in-season demand, "any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume." 382 R., p.578. The City argues that the Director erroneously failed to subtract all wheeled water from the Coalition's reasonable in season demand calculations. This Court disagrees. The City relies on Exhibit 3000 from the hearing on the *As-Applied Order* in 2010. That exhibit provides that "Wheeled water transactions for A&B, AFRD2, Minidoka, and TFCC *may have occurred*, but values were less than 1% of total demand and therefore were not considered." 382 Ex. 3000, *Hearing on the As-Applied Order*. That exhibit only establishes that wheeled water transactions "may have occurred." The fact that such transaction may have occurred is not is not sufficient if the Director is going to use that data to administer to less than the full amount of the Coalition's decreed rights. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to

that decree, permanent or temporary, must be supported by clear and convincing evidence"). The City points to no clear and convincing evidence in the record establishing that such transactions did occur. Therefore, the City is not entitled to the relief it seeks on this issue.

The City of Pocatello next argues that the Director improperly limited the scope of a hearing held on one of the Director's orders applying his methodology to the 2010 water year. This Court disagrees. On April 29, 2010, the Director issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)*. 382 R., pp.185-198. Unlike the Coalition's requests for hearings in 2012 and 2013, which were improperly denied, the Director acted consistent with Idaho Code § 42-1701A in 2010 by granting a hearing following the issuance of his April 29, 2010, *Order* when requested. The April 29, 2010, *Order* was limited to applying steps 3 and 4 of the *Methodology Order* to the 2010 water year. Therefore, the Director did not err in limiting the evidence presented at that hearing to information relevant to whether the Director's application of steps 3 and 4 to the 2010 water year complied with the *Methodology Order*. 382 R., p.466. The Court finds, after a review of the record in this case, that the Director complied with the requirements of Idaho Code § 42-1701A, and that the City of Pocatello had a meaningful opportunity to be heard at that hearing, as Department staff familiar with the *Order* were present at that hearing to present evidence and testimony and to be subject to examination. Therefore, the City of Pocatello's request for relief on this issue is denied.

Last, with respect to all of the issues raised by the City of Pocatello relating to the Director's *As-Applied Order*, the Court finds that City of Pocatello has failed to establish that its substantial rights were prejudiced as a result of that *Order* under Idaho Code § 67-5279(4). The Director's *As-Applied Order* required no action on the part of the City of Pocatello. The Director did not order the City of Pocatello to mitigate any material injury to the Coalition in 2010 in his *As-Applied Order*. Nor has the City of Pocatello established that it would have been in the curtailment zone in 2010 under the *As-Applied Order*. Only IGWA was required to show it ability to secure mitigation water under the Director's *As-Applied Order* in 2010 in order to avoid curtailment. Therefore, since the City of Pocatello has failed to establish that its substantial rights were prejudiced as a result of the Director's *As-Applied Order*, it is not entitled to the relief it seeks with respect to that *Order*. I.C. § 67-5279(4).

VII.

REMAINING *FINAL ORDERS*

The Coalition filed *Petitions* seeking judicial review of the Director's *Final Order Revising April 2010 Forecast Supply (Methodology Step 7)*, dated September 17, 2010, *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)*, dated November 30, 2010, and *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*, dated June 13, 2013. The Coalition provided no briefing or argument specific to these *Final Orders* on judicial review. However, through these *Final Orders* the Director applied his methodology as set forth in the *Methodology Order*. To the extent these *Final Orders* applied the *Methodology Order* in a manner inconsistent with this Court's analysis and holdings regarding the *Methodology Order* as set forth herein, they are set aside and remanded for further proceedings as necessary.

VIII.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the actions taken by Director in this matter are affirmed in part and set aside in part. The case is remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated September 26, 2014

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITIONS FOR JUDICIAL REVIEW was mailed on September 26, 2014, with sufficient first-class postage to the following:

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Deputy Clerk

APPENDIX 2

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,

and

IDAHO GROUND WATER APPROPRIATORS, INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY

Intervenors.

Case No. CV 2014-2446

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case originated when Rangen, Inc. ("Rangen") filed a *Petition* in the above-captioned matter seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The order under review is the Director's *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014;Amended Curtailment Order* ("*Amended Final Order*") issued on May 16, 2014, in IDWR Docket Nos. CM-MP-2014-001 and CM-DC-2011-004. The *Amended Final Order* approves in part a mitigation plan submitted by the Idaho Ground Water Appropriators, Inc. ("IGWA") in response to a delivery call made by Rangen. Rangen asserts that the *Amended Final Order* is contrary to law in several respects and requests that this Court set it aside and remand for further proceedings.

B. Course of Proceedings and Statement of Facts.

The underlying administrative proceeding in this matter concerns a delivery call. The call commenced in 2011, when Rangen filed a petition with the Department requesting curtailment of certain hydraulically connected junior ground water rights. On January 29, 2014, the Director issued his *Curtailment Order* in response to the call.[1] Ex.2042. The Director concluded that Rangen's senior water right numbers 36-2551 and 36-7694 are being materially injured by junior users. He ordered that certain junior ground water rights bearing priority dates junior to July 13, 1962, be curtailed as a result on or before March 14, 2014. Ex.2042, p.42. However, the Director instructed that the affected junior users could avoid curtailment if they proposed and had approved a mitigation plan that provided "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id.* He further directed that if mitigation is provided by direct flow to Rangen, the mitigation plan "may be phased-in over not more than a five-year period pursuant to Rule 40 of the CM Rules as follows: 3.4 cfs the first

[1] The Director issued his *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("*Curtailment Order*") on January 29, 2014, in IDWR Docket No. 2011-004. It is included in the agency record as Exhibit 2042. The Director's *Curtailment Order* is not at issue in this proceeding. However, it was subject to judicial review by this Court in Twin Falls County Case No. CV-2014-1338. This Court entered its *Memorandum Decision and Order* and *Judgment* in that case on October 24, 2014.

year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year."[2] *Id.*

IGWA filed a proposed mitigation plan with the Director on February 11, 2014. R., pp.1-13. The plan set forth various proposals for junior users to meet their mitigation obligations to Rangen. *Id.* Following hearing, the Director issued his *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("*Final Order*"), wherein he approved IGWA's mitigation plan in part. R., pp.464-489. In so approving, the Director granted IGWA a total mitigation credit of 3.0 cfs. R., p.484. The Director then noted that "the total mitigation credit is 0.4 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015." *Id.* To address the mitigation deficiency, the *Final Order* included a revised curtailment order providing that certain junior ground water rights bearing priority dates junior to July 1, 1983, would be curtailed on or before May 5, 2014. *Id.* Following the filing of motions for reconsideration, the Director issued his *Final Order on Reconsideration* as well as his *Amended Final Order*. The *Amended Final Order* superseded the Director's *Final Order*, but did not materially change the substantive findings of fact or conclusions of law at issue here.

On June 13, 2014, Rangen filed the instant *Petition for Judicial Review*, asserting that the Director's *Amended Final Order* is contrary to law in several respects and should be set aside and remanded for further proceedings. The case was reassigned by the clerk of the court to this Court on June 16, 2014.[3] On August 6, 2014, the Court entered an *Order* permitting IGWA, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company to appear as intervenors in this proceeding. Rangen and the Department subsequently briefed the issues contained in the *Petition*. The Intervenors did not submit any briefing with respect to the *Petition*. A hearing on the *Petition* was held before this Court on November 13, 2014. The parties did not request the opportunity to submit additional briefing

[2] The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

[3] The case was reassigned to this Court pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

and the Court does not require any in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or December 14, 2010.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court 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.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[4] *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

[4] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer'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 hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

III.

ANALYSIS

The Director's *Curtailment Order* allows for phased-in mitigation. Ex.2042, p.42. It contemplates a first year mitigation obligation of 3.4 cfs from junior users for the annual period commencing April 1, 2014, and ending March 31, 2015 ("2014 Period"). *Id.* Thereafter, it contemplates incremental increases in the mitigation obligation of junior users for each of the following four years. *Id.* To determine the mitigation obligation for each year of the five year phase-in, the Director ran ESPAM 2.1 to establish the benefits that would accrue to Rangen if curtailment was implemented under the *Curtailment Order*. Ex.2043, p.5. The exercise revealed that if curtailment was implemented, the predicted benefit to the Martin-Curren Tunnel during each of the first four years would be 3.4 cfs, 5.2 cfs, 6.0 cfs and 6.6 cfs respectively. *Id.* Those numbers thus represent the respective mitigation obligations of junior users during the first four years of phased-in mitigation. *Id.* With respect to the fifth year, ESPAM 2.1 predicted a curtailment benefit to the Martin-Curren Tunnel of 7.1 cfs. Ex.2043, pp.5-6. However, the Director held that the full obligation of 9.1 cfs would nonetheless be required the fifth year because "the Director can only phase in curtailment over five years per Conjunctive Management Rule 20.04." Ex.2043, p.6.

The mitigation plan proposed by IGWA in this case set forth nine proposals for junior users to meet their mitigation obligations to Rangen. In his *Amended Final Order*, the Director approved IGWA's plan in part. He approved IGWA's first proposal to engage in aquifer enhancement activities, including: (a) conversions from ground water irrigation to surface water irrigation, (b) voluntary "dry-ups" of acreage irrigated with ground water through the Conservation Reserve Enhanced Program or other cessation of irrigation with ground water, and (c) ground water recharge. R., p.616. These activities augment the ground water supply in the ESPA, which in turn increases ESPA discharge to springs in the Hagerman area. He also approved IGWA's second proposal to provide direct delivery of surface water from the Martin-Curren Tunnel to Rangen as a result of an exchange agreement between one of its members, the North Snake Ground Water District ("NSGWD"), and Howard Morris ("Morris Water Exchange Agreement"). *Id.* Morris holds water rights senior to Rangen's that authorize the diversion of water from the Martin-Curren Tunnel. With respect to the remaining seven proposals, the

Director rejected those on the grounds that IGWA failed to carry its evidentiary burden. R., pp. 600 & 617.

In full, the Director granted IGWA a total of 3.0 cfs of transient mitigation credit for the 2014 Period in his *Amended Final Order*. R., p.614. Of that total, 1.2 cfs is attributable to aquifer enhancement activities. *Id.* The remaining 1.8 cfs is attributable to the Morris Water Exchange Agreement. *Id.* On judicial review, Rangen raises issues concerning the legality of the Director's approval of both mitigation proposals.

A. The *Amended Final Order's* approval of IGWA's mitigation proposal based on future aquifer enhancement activities is reversed and remanded for further proceedings as necessary.

Rangen seeks judicial review of the Director's approval of IGWA's mitigation proposal to engage in aquifer enhancement activities. Rangen does not take issue with the Director's approval of mitigation credit attributable to past aquifer enhancement activities (i.e., 2005-2013). However, it argues that under the facts and circumstances present here, the Director's approval of mitigation credit for future aquifer enhancement activities is contrary to law and an abuse of discretion. Rangen contends that the Director's approval places an unlawful risk on it as the senior appropriator that the future enhancement activities will not occur. It asserts "there are no provisions in the Director's *Amended Final Order* to ensure that these future activities will occur," and "there are similarly no contingency provisions if the future activities do not or cannot occur." Rangen *Opening Br.*, p.9. This Court agrees.

When material injury to a senior water right is found to exist, the CM Rules permit the Director to allow out-of-priority water use to occur pursuant to an approved mitigation plan. IDAPA 37.03.11.040.01. In this case, the Director's *Amended Final Order* permits out-of-priority water use in part because of anticipated future aquifer enhancement activities that the Director assumes will occur:

> Using the data entered into evidence at the hearing, the Department input data into the model for each year of private party aquifer enhancement activities from 2005 through 2014. The 2005 through 2013 data were compiled from previously documented activities. IDWR Ex. 3001; IGWA Ex. 1025. *For 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero.* The Department determined the average annual benefit from aquifer enhancement activities predicted to accrue to the Curren Tunnel between April 2014 and March

2015 is 871 acre feet, which is equivalent to an average rate of 1.2 cfs for 365 days.

R., p.604 (emphasis added). While the Director has discretion to approve a mitigation plan based on future mitigation activities, such a mitigation plan "must include 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.

This Court finds that the Director's *Amended Final Order* lacks a contingency provision adequate to protect Rangen's senior rights in the event the assumed future aquifer enhancement activities do not occur. The future activities contemplated by the plan consist primarily of conversions by junior users from ground water use to surface water use. Ex. 1025. The record establishes that most of the juniors that have converted to a surface water source also maintain their ground water connections as a safety net. Tr., pp.153-154. If for any reason those junior converters are unable to meet their water needs from their surface source, they assert the right to switch back to using ground water at any time.

That such is the case is evidenced by the testimony of Richard Lynn Carlquist ("Carlquist"). Carlquist is the chairman of the NSGWD. Tr., p.74. The NSGWD is an IGWA member. Tr., p.77. Carlquist also sits as a member of IGWA's executive committee. Tr., p.78. At the hearing before the Director, Carlquist testified that the conversions by junior users are voluntary. Further, that if junior converters do not receive all the water they need from their surface water source, they can and should revert back to using ground water:

Q. [Haemmerle] Now, I want to understand how the conversions might work. You characterized almost all conversions as soft; correct?

A. [Carlquist] Yes.

Q. [Haemmerle] And you described it in such a way that if the people who do those conversions, they have the ability to turn on their pumps if they're not obtaining surface water; correct?

A. [Carlquist] That's correct.

Q. [Haemmerle] Would you say that's a routine practice?

A. [Carlquist] It hasn't happened much, but we have told them that they need to maintain that as an option because we cannot guarantee that we can lease water every year, year in and year out.

Q. [Haemmerle] Okay. Have you leased water in the last several years?

A. [Carlquist] Yes.

Q. [Haemmerle] Have you been able to deliver that leased water through the entire irrigation season routinely?

A. [Carlquist] For the most – most of the years we have been able to do that, yes.

Q. [Haemmerle] Okay. Are there years where you're unable to do that?

A. [Carlquist] There have been where we haven't been able to get as much as has been requested by the converters.

. . .

Q. [Haemmerle] And you in fact expressly tell them that if they're not getting their surface water they need to be able to turn their pumps back on; correct?

A. [Carlquist] Yes, that's what we've told them. If we can't get the water, that's why they need to maintain that connection.

Q. [Haemmerle] All right. And so most everyone maintains a connection to their groundwater pumps; correct?

A. [Carlquist] Yes.

Q. [Haemmerle] And you agree that they -- you, sitting here today, you agree that they should be able to turn their pumps back on when they need water?

A. [Carlquist] Yes.

Tr., pp.152-154.

Following the above-quoted exchange, counsel for Rangen further inquired of Carlquist concerning IGWA's understanding of its proposed mitigation plan:

Q. [Haemmerle] All right. Now, you understand that IGWA is seeking what's called a steady-state credit for these conversions. Do you know what that means?

A. [Carlquist] Basically, yes, I do. We're asking for credit for the amount of converted water that we have been able to put to use.

Q. [Haemmerle] And the steady state concept that I'm talking to you about envisions that water remains off for a long period of time where over a period of time water will appear at the Martin-Curren Tunnel. Do you understand that?

A. [Carlquist] Yes. How the model tells them it will happen.

Q. [Haemmerle] Okay. And that contemplates that water remains unused for a period of time, more than one year. Do you understand that?

A. [Carlquist] Yes.

Q. [Haemmerle] Okay. So it seems to me, Mr. Carlquist, that in order to get credit for the conversions it seems fair that those people who convert cease using their groundwater pumping. Do you agree or disagree?

A. [Carlquist] I disagree.

Q. [Haemmerle] Okay. So if in need, people on groundwater pumping can simply resume?

A. [Carlquist] Yes.

Tr., pp.154-155.

While the Director is assuming that mitigation conversions will continue and be maintained into the future, the testimony of Carlquist establishes that such an assumption is shaky at best. The conversions are voluntary, not compelled. Absent from the Director's *Amended Final Order* is any directive requiring that junior convertors refrain from reverting to ground water use during the implementation of the mitigation plan. As a result, neither the Director nor Rangen has any mechanism to compel compliance with the Director's assumption that mitigation conversions will occur into the future. To the contrary, junior users admit that the conversions will be maintained only so long as IGWA acquires enough surface water to meet their demands. Tr., pp.152-155. IGWA has not always been able to do so. The record establishes that there have indeed been years when IGWA has been unable to secure enough surface water to meet the demands of the convertors. Tr., p.153. When such a scenario arises, IGWA has instructed junior convertors to revert to ground water use to satisfy their water needs. Tr., 153. These instructions persist notwithstanding IGWA's submittal of its mitigation plan. Tr., pp.152-155.

Although the Director has assumed that mitigation conversions will continue into the future, the record establishes there is certainly no guarantee that such will actually be the case. Therefore, the CM Rules require that the mitigation plan include a contingency provision to assure the protection of the Rangen's rights in the event that source of mitigation water (i.e., water accrued to Rangen from ground to surface conversions) becomes unavailable. The Department argues that the *Amended Final Order* contains such a mitigation provision. It provides:

> If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency.

R., p.602.

The Idaho Supreme Court has previously held that the Director abused his discretion in approving a mitigation plan that does not provide an adequate contingency provision. *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013). Such is the case here. If junior convertors choose to revert back to ground water use during a given year, the above provision establishes that the Director will take no action with respect to that reversion, and the resulting mitigation deficiency, during that year. It provides only that the Director will address the deficiency at the beginning of the following irrigation season. And, that the Director will then curtail junior water right holders at that time to cure the deficiency. The Court holds such actions do not ensure the protection of Rangen's senior water rights as required by the CM Rules, and as such prejudice and diminish Rangen's substantial rights. They do not address the mitigation deficiency in the year in which it occurs; that is, the year Rangen's senior water rights will suffer injury. Curtailing ground water rights the following irrigation season is too late. The injury to Rangen's rights, and corresponding out-of-priority water use, will have already occurred. Since the Director's *Amended Final Order* does not contain a contingency provision adequate to assure protection of Rangen's senior-priority water rights, it must be set aside and remanded for further proceedings as necessary.

B. The *Amended Final Order's* approval of IGWA's mitigation proposal concerning the Morris Water Exchange Agreement is reversed and remanded in part for further proceedings as necessary.

Rangen next seeks judicial review of the Director's approval of IGWA's second mitigation proposal concerning the Morris Water Exchange Agreement. It argues that the Director's approval of the Agreement as a source of mitigation is contrary to law in several respects and must be reversed and remanded. Rangen sets forth three primary arguments in support of its position. Each will be addressed in turn.

i. The *Amended Final Order* does not violate the prior appropriation doctrine in approving the Morris Water Exchange Agreement as providing a source of mitigation water to Rangen.

Rangen first argues that the Director's approval of the Morris Water Exchange Agreement runs contrary of the doctrine of prior appropriation and its basic principle of priority administration. Rangen initiated the instant delivery call on the grounds that it is not receiving all the water it is entitled to under water right numbers 36-2551 and 36-7694. Those rights authorize Rangen to divert water from the Martin-Curren Tunnel under a July13, 1962, and April 12, 1977, priority respectively. Morris holds decreed water rights to divert water from the Martin-Curren Tunnel that are senior to those rights. Ex.1049. In February 2014, Morris entered into the Morris Water Exchange Agreement with the NSGWD. Ex.2032. Under the Agreement, Morris authorizes NSGWD to use his Martin-Curren Tunnel water rights "as needed to provide mitigation water to Rangen . . . ." *Id.* In exchange, NSGWD agreed to deliver Morris an equivalent quantity of water via an alternative surface water source referred to as the Sandy Pipeline. *Id.* In his *Amended Final Order*, the Director approved the Morris Water Exchange Agreement as providing a source of mitigation water to Rangen, and granted IGWA 1.8 cfs of mitigation credit for the 2014 Period for the direct delivery of that water to Rangen. R., p.617.

Rangen argues that the Director's approval of the Morris Water Exchange Agreement as mitigation is contrary to the prior appropriation doctrine. It contends that since Morris is not exercising his senior water rights out of the Martin-Curren Tunnel, the prior appropriation doctrine requires that the unused water go to the next user in priority on that source. This Court disagrees. Rangen's argument appears to confuse the concept of one's right as a water right holder to contract with others for the sale or use of water under that right with concepts of forfeiture, abandonment and nonuse. When one forfeits or abandons a water right, the priority of the original appropriator may be lost and junior users on the source may move up the ladder of

priority. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). However, such is not the case here. In his *Amended Final Order*, the Director did not find that Morris' senior rights had been forfeited or abandoned due to nonuse. To the contrary, the Director found that Morris' senior rights are in fact being used in priority, albeit not by Morris. Pursuant to the plain language of the Morris Water Exchange Agreement, those rights are being used in priority by NSGWD to provide direct delivery of mitigation water to Rangen. Such agreements are commonplace in Idaho, and are often utilized by junior users in delivery calls to provide a source of mitigation water in lieu of curtailment. Therefore, the Court finds Rangen's arguments on this issue are unavailing, and the *Amended Final Order* is affirmed in this respect.

ii. The Director's use of flow data associated with an average year to determine the mitigation credits of junior users is reversed and remanded for further proceedings as necessary.

In determining the amount of mitigation credit to grant IGWA as a result of the Morris Water Exchange Agreement, the Director had to first predict how much water will emanate from the Martin-Curren Tunnel throughout the implementation of the mitigation plan. To do this, the Director relied upon historical flow data associated with average Martin-Curren Tunnel discharge for the years 2002 through 2013. R., pp.605-606. He noted that "[f]rom 2002 through 2013, the average irrigation season flow has varied between 2.3 cfs and 5.7 cfs." R., p.605. He then determined that "[t]he average of the average irrigation season values for each year from 2002 through 2013 is 3.7 cfs." *Id.* The Director thus awarded mitigation credit to IGWA resulting from the Morris Water Exchange Agreement on the assumption that 3.7 cfs will emanate from the Martin-Curren Tunnel each year the mitigation plan is implemented. Rangen argues that the Director's use of flow data associated with an average year fails to protect its senior rights.

The Idaho Supreme Court has held that the Director may utilize a predictive baseline methodology when responding to a delivery call. *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho at 65o, 315 P.3d at 838 (2013) (holding "[t]he Director may, consistent with Idaho law, employ a baseline methodology for management of water resources and as a starting point in administration

proceedings"). Therefore, the Director's use of a predictive baseline methodology in this context is not inconsistent with Idaho law. However, the Court finds the Director's application of a baseline that utilizes flow data associated with an average year to be problematic.

This Court recently addressed a similar issue in its *Memorandum Decision and Order* ("*Memo Decision*") issued in Gooding County Case No. CV-2010-382 on September 26, 2014. That case, like this one, involved a delivery call. In responding to the call, the Director employed a baseline for purposes of his initial reasonable in-season demand determination. *Memo Decision*, p.33. In so employing, the Director did not use data associated with an average year. *Id.* To the contrary, to determine the water demand of the senior users in that case, the Director intentionally used historic data associated years of above average temperatures and evapotranspiration and below average precipitation. *Id.* To determine water supply, the Director intentionally underestimated supply. *Id.* at 35. When responding to the allegations that he should have used demand and supply data associated with an average year, the Director responded that "equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury." *Id.* at 33. Further, that "the incurrence of actual demand shortfalls by a senior surface water right holder resulting from . . . predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder." *Id.* When juniors users argued on judicial review that the Director was required to use demand and supply data associated with an average year, this Court disagreed. *Id.* at pp.33-35. The Court ultimately upheld the Director's rationale that the use of data associated with an average year would not adequately protect the seniors' rights in that case. *Memo Decision*, pp.33-35.

Such is also the case here. The Director's use of flow data associated with an average year to award mitigation credit to IGWA does not adequately protect Rangen's senior rights. The mitigation credit is awarded on the assumption that 3.7 cfs will emanate from the Martin-Curren Tunnel during each year the mitigation plan is implemented. That assumption is determined based on historic data associated with an average year. Using data associated with an average year by its very definition will result in an over-prediction of Martin-Curren Tunnel flows half of the time. When that occurs, Rangen's senior rights will not be protected, resulting in prejudice and the diminishment of Rangen's substantial rights. This Court agrees with the Director's prior proclamation in Gooding County Case No. CV-2010-382 that "equality in sharing the risk will not adequately protect the senior priority surface water right holder from

injury," and that "predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder." Therefore, the Director's *Amended Final Order* must be set aside in this respect and remanded for further proceedings as necessary.

iii. The Director's use of an annual time period to evaluate the mitigation benefits of the Morris Water Exchange Agreement is reversed and remanded for further proceedings as necessary.

The mitigation obligations set forth by the Director in his *Curtailment Order* are year-round, 365 days a year, mitigation obligations. The obligations are year-round because water right numbers 36-2551 and 36-7694 authorize Rangen to divert water from the Martin-Curren Tunnel year-round. However, the Morris water rights for which the Director granted IGWA mitigation credit do not authorize year-round use. They only authorize Morris, and thus NSGWD via the Agreement, to divert water from the Martin-Curren Tunnel during the irrigation season.[5] Indeed, the Director found that "[t]he contribution of water to Rangen by leaving water in the Curren Tunnel that normally would have been diverted by Morris only benefits Rangen during the irrigation season." *Id.* Notwithstanding, the Director granted IGWA 365 days' worth of mitigation credit in the amount of 1.8 cfs for delivery of water under the Morris rights. On judicial review, Rangen challenges the Director's decision in this respect.

Despite the fact that Morris' senior water rights provide no water to Rangen during the non-irrigation season, the Director's *Amended Final Order* grants IGWA a year-round mitigation credit for delivery of water under those rights. The Director reasoned that "[a]veraging IGWA's mitigation activities over a period of one year will establish consistent time periods for combining delivery of the Morris water for mitigation and the average annual benefit provided by aquifer enhancement activities, and for direct comparison to the annual mitigation requirement." R., p.602. It is reasonable to run ESPAM 2.1 to determine the benefits of aquifer enhancements activities on an annual time period. Conversions from ground water irrigation to surface water irrigation, voluntary "dry-ups," and ground water recharge all augment the ground water supply in the ESPA. The benefits of those activities accrue to Rangen on an annual time period, and so it reasonable to grant IGWA year-round mitigation credit for those activities.

[5] The irrigation season is defined under water right numbers 36-134D, 36-134E and 36-135D as "02-15 to 11-30."

The direct delivery of wet water as mitigation is another story. It is a fiction to conclude that water delivered to Rangen under the Morris Water Exchange Agreement provides mitigation to Rangen on a year-round basis. Since that water is only available to Morris during the irrigation season, it is only available to NSGWD for delivery to Rangen during the irrigation season. In reality, it provides no mitigation water to Rangen during the non-irrigation season. Put differently, during the non-irrigation season, Rangen's rights are senior in priority to receive the water that would otherwise be available to satisfy the Morris Water Exchange Agreement rights during the irrigation season. Therefore, the "foregone diversion" of Morris water during the irrigation season provides no mitigation water to Rangen during the non-irrigation season. Furthermore, Rangen's rights rely on direct flow from the Martin-Curren Tunnel. This is not a situation involving a storage component where the volume of mitigation water delivered during the irrigation season can be mathematically and physically apportioned for use by Rangen over a 365-day period. Absent such a situation, water credited for mitigation during the non-irrigation season is available on paper only. Therefore, the Court holds that the Director abused his discretion in granting IGWA year-round mitigation credit resulting from the Morris Water Exchange Agreement. The Director's decision in this respect prejudices and diminishes Rangen's senior rights and must be reversed and remanded for further proceedings as necessary.

C. Rangen is not entitled to an award of attorney's fees on judicial review.

In its *Petition for Judicial Review*, Rangen seeks an award of attorney fees under Idaho Code § 12-117. While Rangen seeks an award in its *Petition*, it has not supported that request with any argument or authority in its briefing. On that ground, Rangen is not entitled to an award of attorney fees on judicial review, and its request must be denied. *See e.g., Bailey v. Bailey* 153 Idaho 526, 532, 284 P.3d 970, 976 (2012) (providing "the party seeking fees must support the claim with argument as well as authority"). Additionally, the Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the issues presented to this Court are largely issues of first impression under the CM Rules. The Court holds that the Department has presented legitimate questions for this Court to address, and Rangen's request for attorney fees is alternatively denied on those grounds.

IV.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the Director's *Amended Final Order* is affirmed in part and set aside in part. The *Amended Final Order* is remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated December 3, 2014

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

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APPENDIX 3

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, and IDAHO GROUND WATER APPROPRIATORS, INC. and SALMON FALLS LAND & LIVESTOCK CO., Intervenors.	Case No. CV 2014-2935 **ORDER GRANTING MOTION TO DISMISS**

I.
BACKGROUND

1. On July 17, 2014, Rangen, Inc. ("Rangen") filed a *Petition* in the above-captioned matter seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The final order under review is the Director's *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* ("*Final Order*") issued in IDWR Docket Nos. CM-MP-2014-003 and CM-DC-2011-004 on June 20, 2014.

2. On October 31, 2014, the Department filed a *Motion to Dismiss*, requesting that this Court dismiss Rangen's *Petition* as moot. Rangen opposes the *Motion*. The Intervenors have not taken a position on the *Motion*. A hearing on the *Motion* was held before this Court on November 12, 2014.

II.
ANALYSIS

The administrative proceeding underlying this action concerns a delivery call filed by Rangen. On January 29, 2014, the Director issued a curtailment order in response to the call.[1] The Director concluded that Rangen's senior water rights are being materially injured by junior users, and ordered curtailment of certain ground water rights located in the Eastern Snake Plain Aquifer. In response, the Idaho Ground Water Appropriators, Inc. ("IGWA") submitted mitigations plans to the Director pursuant to the CM Rules,[2] seeking to mitigate the material injury in lieu of curtailment. In his *Final Order*, the Director conditionally approved IGWA's second proposed mitigation plan. That plan proposed delivery of 9.1 cfs of mitigation water from Tucker Springs through a 1.3 mile pipeline to Rangen ("Tucker Springs Project"). The Director's *Final Order* instructed that the Tucker Springs Project must be completed and deliver water to Rangen no later than January 19, 2015. *Final Order*, p.18. Further, that "[f]ailure to provide water by January 19, 2015, to Rangen will result in curtailment of water rights junior or equal to August 12, 1973, *unless another mitigation has been approved and is providing water to Rangen at its time of need.*" *Id.*

Rangen initiated the instant proceeding on July 17, 2014, seeking judicial review of the Director's *Final Order*. On October 30, 2014, during the pendency of this proceeding, IGWA withdrew its second mitigation plan before the Department. Prior to withdrawal, IGWA submitted and had approved its fourth mitigation plan as an alternative to its second mitigation plan. The fourth mitigation provides for the direct delivery of up to 10 cfs of mitigation water

[1] The Director issued his *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("*Curtailment Order*") on January 29, 2014, in IDWR Docket No. 2011-004. The Director's *Curtailment Order* is not at issue in this proceeding. However, it was subject to judicial review by this Court in Twin Falls County Case No. CV-2014-1338. This Court entered its *Memorandum Decision and Order* and *Judgment* in that case on October 24, 2014.

[2] The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

from Seapac's Magic Springs facility through a pipeline to Rangen ("Magic Springs Project"). The Director approved IGWA's fourth mitigation plan in the stead of its second mitigation plan via the issuance of his *Order Approving IGWA's Fourth Mitigation Plan* on October 29, 2014. To dovetail the January 19, 2015, water delivery deadline set forth in the second mitigation plan with the newly approved plan, the Director ordered that the Magic Springs Project must be completed and deliver water to Rangen by January 19, 2015, or junior water users will be curtailed. *Order Approving IGWA's Fourth Mitigation Plan*, p.21.

In its *Motion to Dismiss*, the Department argues that the issues raised by Rangen in this proceeding have become moot as a result of the Director issuance of his *Order Approving IGWA's Fourth Mitigation Plan*, and IGWA's subsequent withdrawal of its second mitigation plan. Under Idaho law, an issue becomes moot "if it does not present a real and substantial controversy that is capable of being concluded" through judicial relief. *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 624,626 (2005). The Idaho Supreme Court has recognized three exceptions to the mootness doctrine: "(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest." *Kock v. Canyon County*, 145 Idaho 158, 163, 177 P.3d 372, 377 (2008).

In this case, Rangen's *Petition* raises two categories of issues related to the Director's *Final Order*. First, it raises issues concerning the propriety of the Director's approval of the Tucker Springs Project as an authorized mitigation plan under the CM Rules. The Court finds that these issues are now moot and thereby preclude judicial review. The Tucker Springs Project has been withdrawn as a mitigation plan, and is not being pursued by IGWA. Likewise, the Director's *Final Order* approving the second mitigation plan has been superseded by his *Order Approving IGWA's Fourth Mitigation Plan.* The factual and legal issues associated with the Tucker Springs Project have been rendered moot as a result. The Court finds that the issues are no longer live, and that a judicial determination by this Court on the factual and legal issues associated with the Tucker Springs Project will have no practical effect.

Second, Rangen raises issues related to the Director's decision to re-average Martin-Curren Tunnel flows to calculate the Morris Exchange Water credit. Rangen asserts that these issues have not become mooted, because the Director adopted and incorporated his decision to

re-average those flows in his *Order Approving IGWA's Fourth Mitigation Plan.* This Court disagrees. While the Director's re-averaging is still in effect, it is not in effect pursuant to the *Final Order* at issue in this proceeding. That *Final Order* has been replaced and superseded by the Director's *Order Approving IGWA's Fourth Mitigation Plan.* The re-average is still in effect, but only under the Director's *Order Approving IGWA's Fourth Mitigation Plan,* which is not at issue here. Administrative and judicial proceedings, if any, relating to the Director's *Order Approving IGWA's Fourth Mitigation Plan* will provide the appropriate forum for Rangen to raise these issues.

The Court further finds that Rangen has failed to establish that any of the exceptions to the mootness doctrine apply. First, there are no collateral legal consequences imposed on Rangen. The Director's *Order Approving IGWA's Fourth Mitigation Plan* implements the same mitigation deadlines as the *Final Order.* Therefore, there are no collateral legal consequences or prejudice to Rangen in that respect. Rangen will also have the opportunity to seek judicial review of the Director's *Order Approving IGWA's Fourth Mitigation Plan* at a later date should it so choose. The fact Rangen may have to raise the same or similar issues in a separate judicial proceeding on the Director's *Order Approving IGWA's Fourth Mitigation Plan* is not the type of collateral legal consequence contemplated under this exception. *State v. Barclay,* 149 Idaho 6, 8-9, 232 P.3d 327, 329-330 (2010) (holding, "Potential relitigation of an undecided issue is not the type of collateral consequence contemplated under this exception").

Next, the issues raised by Rangen are not likely to evade judicial review. The Tucker Springs Project issues are factual in nature. They are specific to the facts and circumstances surrounding that individual project. Therefore, they are not capable of repetition. *See e.g., Miller v. Board of Trustees,* 132 Idaho 244, 246, 970 P.2d 512, 514 (1998) (holding that factual issues are "not capable of repetition"). The Court further finds that the re-averaging issues will not evade judicial review. Those issues can, and likely will, be raised by Rangen in a context in which there is still a live controversy – i.e., the filing of a *Petition* seeking judicial review of the Director's *Order Approving IGWA's Fourth Mitigation Plan.* Last, the issues arising out of the Director's *Final Order* do not raise concerns of substantial public interest. Since the Tucker Springs Project will not be pursued or realized, it is not of substantial public interest. The re-averaging issues likewise do not raise concerns of substantial public interest, and, for the reasons set forth above, will not likely evade judicial review.

In view of the Director's issuance of his *Order Approving IGWA's Fourth Mitigation Plan*, and IGWA's subsequent withdrawal of its second mitigation plan, this Court concludes that the issues raised in the Petitioner's *Petition* are moot. The Court further finds that none of the recognized exceptions to the mootness doctrine apply. Therefore, the Court will grant the Department's *Motion to Dismiss* and will dismiss the *Petition* as moot.

III.

ORDER

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Respondents' *Motion to Dismiss* **is hereby granted.**
2. The *Petition for Judicial Review* filed on July 17, 2014, **is hereby dismissed.**

Dated November 19, 2014

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO DISMISS was mailed on November 19, 2014, with sufficient first-class postage to the following:

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APPENDIX 4

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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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:

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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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J. Justin May

APPENDIX 5

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DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
TWIN FALLS COUNTY

RANGEN, INC, an Idaho corporation, Petitioner, vs. IDAHO DEPARTMENT OF RESOURCES, and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, Respondent.	Case No. CV-2014-4970 **IGWA's Motion to Stay Curtailment Order**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Court pursuant to Idaho Code § 67-5274 and Idaho Rule of Civil Procedure 84(m) to stay implementation of the *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* ("Second Amended Curtailment Order") issued by the Idaho Department of Water Resources (IDWR) on November 21, 2014,[1] until IGWA completes construction of its Magic Springs

[1] Second Amended Curtailment Order (Ex. A to Budge Aff.).

mitigation project. This motion is supported by the affidavits of Thomas J. Budge, Robert Hardgrove, and Charles Brendecke filed herewith.

BACKGROUND & PROCEDURAL HISTORY

Rangen, Inc. (Rangen) filed a Petition for Delivery Call with IDWR on December 13, 2011, for water right nos. 36-2551 and 36-7694 which are appurtenant to Rangen's fish hatchery in the Thousand Springs area near Hagerman, Idaho. These water rights have as their source the Martin-Curren Tunnel (a/k/a Curren Tunnel). The Curren Tunnel is a horizontal tunnel dug into a basalt cliff above Rangen's fish hatchery to access groundwater from the Eastern Snake Plain Aquifer (ESPA). Rangen's delivery call sought to curtail all use of groundwater from the ESPA so that more water would infiltrate and discharge from the Curren Tunnel.

An evidentiary hearing was held by IDWR from May 1 to May 16, 2013. On January 29, 2014, IDWR issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* ("Curtailment Order"), which imposed a permanent mitigation obligation on IGWA of 9.1 cubic feet per second (cfs).[2] The Curtailment Order includes a mitigation schedule that allows junior groundwater users to avoid curtailment during the first year by providing 3.4 cfs of mitigation (the same amount of water Rangen would get from curtailment).

The Curtailment Order has been amended twice, the most recent being the Second Amended Curtailment Order issued on November 21, 2014. For the purpose of this motion, two rulings in the Curtailment Order, which are perpetuated in the Second Amended Curtailment Order, are particularly significant.

First, it orders curtailment of all groundwater diversions from the ESPA under water rights junior to July 13, 1962, from points of diversion located

[2] Curtailment Order p. 42 (Ex. B to Budge Aff.).

west of the Great Rift.[3] The Great Rift is between American Falls and Rupert. Thus, the curtailment essentially covers the Magic Valley, eliminating the use of water to dozens of cities, dairies, food producers, and other businesses, as well as 157,000 acres of cropland.[4] As mentioned, the curtailment of these water rights is projected to increase the supply of water to Rangen by 9.1 cfs once steady-state condition is reached (after more than 50 years of curtailment).[5]

Second, the Curtailment Order ruled that Rangen's water rights are limited to water that discharges from the Curren Tunnel.[6] Accordingly, two days after the Curtailment Order was issued, IDWR issued a *Notice of Violation and Cease and Desist Order* ("Cease & Desist Order") that would have prohibited Rangen from diverting water from Billingsley Creek, had it been enforced.[7] On February 21, 2014, IDWR issued a *Consent Order and Agreement* allowing Rangen to use water from Billingsley Creek without a water right. This provided Rangen with 10-12 cfs of water – far more than groundwater users are currently required to provide as mitigation.

On February 12, 2014, IGWA filed its first mitigation plan with IDWR in attempt to avoid curtailment by delivering water to Rangen from different sources. The same day, IGWA filed a petition to stay the Curtailment Order until a decision was entered on IGWA's mitigation plan. On February 21, 2014, IDWR stayed the Curtailment Order until it issued a decision on the mitigation plan.[8]

On April 11, 2014, IDWR approved IGWA's mitigation plan in part, granting mitigation credit of 3.0 cfs for mitigation activities that IGWA had

[3] *Id.* at 28.

[4] *Id.*; see also *Id.* at 42.

[5] *Id.* at 28.

[6] *Id.* at 32-33.

[7] Ex. C to Budge Aff.

[8] Exs. D & E to Budge Aff.

already in place, such as groundwater recharge and conversions of farmland from groundwater to surface water irrigation.[9] Because IDWR granted only 3.0 cfs in immediate mitigation credit, IGWA still needed to mitigate an additional 0.4 cfs.

On April 17, 2014, IGWA filed a *Second Petition to Stay Curtailment, and Expedite Decision* with IDWR, asking the Director of IDWR to stay implementation of the Curtailment Order, and the Director granted the motion on April 28, 2014.[10] On June 20, 2014 the Director issued an *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order,* which lifted the stay.[11] This order also adjusted the mitigation credit from the Morris Exchange Agreement, part of the first mitigation plan, in order to mitigate the full 3.4 cfs through January 18, 2015, at which time IGWA would be required to have other mitigation in place.[12]

On October 29, 2014, IDWR approved IGWA's Fourth Mitigation Plan, known as the Magic Springs Project.[13] This project proposed to pump up to 10 cfs from Magic Springs a distance of roughly two miles to the Rangen fish hatchery. Completing the project required a lease or purchase of 10.0 cfs of water right nos. 36-7072 and 36-8356 owned by SeaPac of Idaho (SeaPac); long-term lease or purchase from the Idaho Water Resource Board (IWRB) of water right nos. 36-40114, 36-2734, 36-15476, 36-2414, and 36-2338 to make available to SeaPac; design, construction, operation, and maintenance of the water intake and collection facilities, pump station, and pipeline to transport water from SeaPac's Magic Springs fish hatchery to the head of the Rangen hatchery on Billingsley Creek; acquisition of easements

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[9] Ex. F to Budge Aff.

[10] See *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* p. 1 (Ex. G to Budge Aff.).

[11] *Id.*

[12] *Id.* at 17-18.

[13] Ex. H to Budge Aff.

for the water intake and collection facilities, pump station, pipeline, construction access, and other necessary components; and approval of a transfer application to change the place of use from SeaPac to Rangen.[14]

To successfully meet the January 19, 2015 curtailment deadline, the Magic Spring Project required extraordinary efforts. Robert Hardgrove, the lead engineer, explained that these efforts included "additional staffing, hiring multiple contractors to construct different parts of the project, paying premiums to expedite materials and construction, financial incentives in contracts completion by January 19, 2015, and working holidays, weekends, and extended hours."[15] In sum, this project has been constructed as fast as possible, at significant expense.

The most difficult component of the project involves installing a steel pipe used to transport water from the pump station at Magic Springs to the top of a cliff adjacent to Magic Springs. Photographs of this remarkable component are attached to the Affidavit of Robert Hardgrove. This is the only component that could not be completed by the January 19th deadline. It is expected to be finished on or before February 7, 2015.[16]

As a temporary solution, the engineers fused together an HDPE pipe to transport water to the top of the cliff until the permanent steel pipe is complete. On January 16, 2015, with the temporary pipe nearly completed and ready to pump water, the Magic Springs Project was on track to finish on time. However, it was discovered that the supplier of the pipe provided used pipe while the IDWR required new pipe so as to avoid contaminating the Rangen fish hatchery. This same day, IGWA filed a motion to allow it to use the used pipe, or, alternatively, to temporarily stay curtailment.[17] IGWA explained that the old pipe was equivalent to new pipe since it had been used

[14] *Id.* at 3-4.

[15] Hardgrove Aff. ¶ 5.

[16] *Id.* ¶ 13.

[17] Ex. I to Budge Aff.

to transport groundwater from wells to water trucks, and that curtailment of dairies and cities until the Magic Springs project is complete will not increase the supply of water Rangen receives from the Curren Tunnel by any measurable amount by the time the project is complete. Nonetheless, on January 17, 2015, IDWR denied the motion, ordering curtailment to occur for two to three weeks until the project is finished.[18]

It should be noted that while the used temporary pipe could be replaced with a new temporary pipe in roughly one week's time, IGWA does not believe this a reasonably safe or prudent solution. When the temporary pipe was initially proposed, IGWA anticipated it would need to transport only 0.5 cfs. By the time IDWR approved IGWA's Fourth Mitigation Plan, IDWR increased the mitigation obligation from January 15th through March 31st to 2.2 cfs. Then, on November 21, 2014, when the Magic Springs Project was well under way, IDWR issued the Second Amended Curtailment Order which increased the obligation to 5.5 cfs. This required larger temporary pipe, significantly increasing the weight of water in the pipe, and adding stress to its connection to the permanent pipe at the top of the cliff. IGWA reluctantly accepted this risk in an effort to meet the January 19th deadline.

Now, because IGWA has not been allowed to use the temporary pipe that is presently installed, IGWA will be required to pump even more than 5.5 cfs through the pipe to make up for the shortfall. The amount is expected to increase further still because of this Court's elimination of the Great Rift trim line. For the reasons explained in the Affidavit of Robert Hardgrove, IGWA is no longer comfortable with temporary and less reliable pipe because of the increased risk of damage to the piping system and to workers on site. Consequently, IGWA has concluded it must press forward with the permanent pipe, with an anticipated date of completion of February 7, 2015.

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[18] Ex. J. to Budge Aff.

LEGAL STANDARD

The Idaho Administrative Act provides that upon the filing of a petition for judicial review, the "reviewing court may order[ ] a stay [of the enforcement of the agency action] upon appropriate terms."[19] Idaho Rule of Civil Procedure 84(m) also provides that the "reviewing court may order[ ] a stay upon appropriate terms."

Neither the statute nor the rule provides guidance on what terms are appropriate for the granting of a stay, and there is no reported Idaho case that defines "appropriate terms." However, in *Haley v. Clinton* the Idaho Court of Appeals held that a stay is appropriate "when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending."[20] In *McHan v. McHan*, the Idaho Supreme Court explained that "where it appears necessary to preserve the *status quo* to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers."[21] The *McHan* decision further elaborated that a stay is appropriate when "[i]t is entirely possible that the refusal to grant a stay would injuriously affect appellant and it likewise is apparent that granting such a stay will not be seriously injurious to respondent."[22]

Other factors that are often considered in determining whether to grant a motion to stay are the following:

> (1) the likelihood the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others

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[19] Idaho Code § 67-5274.

[20] 123 Idaho 707, 709 (Ct. App. 1993).

[21] 59 Idaho 41, 46 (1938).

[22] *Id.*

will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[23]

ARGUMENT

As explained below, the Court should stay implementation of the Second Amended Curtailment Order because (1) curtailed groundwater users will be severely and irreparably harmed absent a stay; (2) Rangen will not be harmed by, but will actually benefit from, a stay; and (3) granting a stay is in the public interest.

1. Curtailment will cause severe and irreparable harm.

People's livelihoods, cows, and many businesses are dependent upon water. Curtailment will devastate not only the holders of the curtailed water rights but also numerous other Magic Valley businesses who depend upon dairy production for their survival. The harm will be devastating and irreparable.

2. Rangen will not be harmed by a stay.

Granting a temporary stay will maintain the status quo. Curtailment is not expected to provide a measureable increase in water to Rangen before the pipe is completed. Thus, a stay will not harm Rangen.

On the other hand, IGWA can make up for the stay by delivering more water to Rangen once the pipe is completed. Thus, a stay benefits Rangen.

It is also significant that Rangen has been permitted to use 10-12 cfs from Billingsley Creek for nearly a year without a water right. The Curtail-

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[23] *Michigan Coalition of radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n*, 107 Idaho 47, 50 (1984) (Stay justified when there is irreparable loss to moving party); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435-1436 (9th Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); 5 Am.Jur.2d *Appellate Review* § 470 ("Standards for granting stay").

ment Order imposed two curtailments, yet only one of them has been enforced. While IGWA has labored to identify, develop, and implement mitigation plans to avoid curtailment, facing opposition from Rangen at every turn, Rangen has had uninhibited use of two to three times more water than IGWA owes in mitigation. This greatly adds to the equity of allowing IGWA three weeks to complete the Magic Springs project.

3. A stay is in the public's interest.

The magnitude of the pending curtailment rises to the level of a public crisis. Given Idaho's heavily agriculture-dependent economy, the effects of curtailment will undoubtedly ripple throughout Idaho's economy.

Staying the Second Amended Curtailment Order for a mere two to three weeks will provide IGWA the time needed to finish the Magic Springs Project, which will definitely resolve Rangen's water needs by providing the mechanism to meet the full mitigation obligation imposed by the Curtailment Order.

While curtailment can be avoided long-term by staying the curtailment for a mere three weeks, the damage of a short-term curtailment will have already been done. Thus, the public interest weighs overwhelmingly against short-term curtailment, particularly since it would provide less water to Rangen than would a stay of the Curtailment Order.

CONCLUSION

In sum, the Curtailment Order should be stayed for a short period until the Magic Springs project is complete because curtailing cities and dairies during this time will provide no benefit to Rangen, yet will cause substantial and irreversible harm to the curtailed water users. Therefore, IGWA respectfully asks this Court to stay the curtailment until the Magic Springs mitigation project is operational, which is expected to be on or before February 7, 2015, at which time IGWA will deliver Rangen 5.5 cfs of water and whatever additional amount necessary to compensate for this three-week delay.

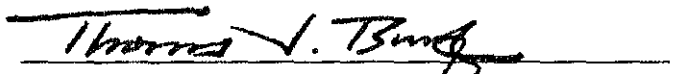
DATED January 20, 2015.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: _____
Randall C. Budge
Thomas J. Budge

CERTIFICATE OF MAILING

I certify that on this 20th day of January, 2015, the foregoing document was served on the following persons in the manner indicated.



Signature of person serving document

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

RANGEN, INC., an Idaho Corporation, **Petitioner,** **vs.** **IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources,** **Respondent.**	**Case No. CV-2014-4970** **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY OF CURTAILMENT ORDER**

Rangen, Inc., through its attorneys, submits the following Memorandum in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order.

I. BACKGROUND

On January 20, 2015, Idaho Ground Water Appropriators, Inc. ("IGWA") filed a Petition seeking judicial review of Director Gary Spackman's Order Denying Petition to Amend and Request for Stay entered on January 17, 2014 in connection with Rangen's December 2011 Petition for Delivery Call (CM-DC-2011-004) and IGWA's Fourth Mitigation Plan (CM-MP-2014-006) (hereinafter referred to as the "Magic Springs" Mitigation Plan). At the same time, IGWA filed a Motion for Stay of Curtailment Order and a Motion to Shorten Time in this case and in Twin Falls County Case No. CV-2014-4970 (petition for judicial review of the Director's recalculation of the Morris Exchange credit). The Court held a hearing that same day at 4:00 p.m. and granted the Motion to Shorten Time. The Court then scheduled a hearing on the merits of IGWA's Motions for Stay of Curtailment Order for January 22, 2015 at 1:30 p.m.

The Court conducted a hearing on IGWA's Motions for Stay of Curtailment Order as scheduled and granted the Motion from the bench. During the hearing the Court asked counsel for IGWA what impediments – besides the steel pipe -- existed:

> THE COURT: Well, Mr. Budge, let me ask you this: What other impediments are there towards completing the pipeline? I mean, you talked about getting the 400-foot section of steel pipe in there, but are there other impediments that are existing out there?

Tr., p. 35, lines 20-25 (attached as Exhibit 1 to *May Affidavit*).[1] IGWA explained that a thrust block had to be completed and the steel pipe had to be installed. Tr., p. 36. Counsel for IGWA asserted: "***So it's ready to go once the steel pipe is in place***." Tr., p. 36, lines 13-14 (emphasis added). The Court then asked about insurance. IGWA stated it was a "nonissue." Tr., p. 37, lines

[1] All exhibits referenced herein are attached to the *Affidavit of J. Dee May in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order*.

19-21. IGWA also told the Court that IGWA did a water supply bank transfer as a "safeguard" because the transfer application for the Magic Springs water has not been approved, but that "the authority to pump water is there." Tr., p. 31, line 23 – p. 32, line 5. IGWA did not disclose to the Court, however, that the rental that has been approved from the water supply bank is for 5.5 cfs – not the 7.81 cfs which IGWA indicated it was prepared to deliver to make up for the shortfall caused by the delay.

After the hearing, the Court entered a written order confirming the stay it had granted from the bench. The Court ordered that IGWA has until February 7, 2015, to complete construction of the Magic Springs pipeline in accordance with the terms and conditions of the Fourth Mitigation Plan and that IGWA must deliver 7.81 cfs of water to Rangen beginning on that date.

Rangen learned about a Magic Springs water lease for the first time when counsel for IGWA told the Court about it during the January 22nd hearing. Neither IGWA nor the Department had ever informed Rangen that IGWA had applied for such a lease nor that it had been approved on January 15, 2015. *See Rangen's Objection to Stay*, p. 7. Immediately after the hearing, Rangen requested a copy of all documentation pertaining to the lease from IGWA and IDWR. The information was provided on the morning of January 23, 2015. *See* Exhibit 2 for a copy of the IDWR documents related to the lease of water from SeaPac to the IWRB and Exhibit 3 for a copy of the IDWR documents related to the rental of the same water from the IWRB to IGWA.

Rangen has now had the opportunity to review the lease and rental documents. Based on that review, Rangen respectfully requests that the Court vacate the stay that was granted because: (1) contrary to IGWA's representation IGWA does not have the right to pump 7.81 cfs of water as ordered; and (2) the issuance of the rental agreement circumvented the issues of whether the Magic

Springs Mitigation Plan will constitute an enlargement of the underlying water right or otherwise cause material injury to other users.

II. ARGUMENT

A. IGWA Cannot Comply with the Court's Delivery Order Because Its Rental Agreement with the IWRB is Limited to 5.5 CFS of Water.

While construction of the Magic Springs pipeline is critical to IGWA's Fourth Mitigation Plan, equally important is having the legal right to deliver the water to Rangen for use at its Research Hatchery. The North Snake Groundwater District, Magic Valley Groundwater District, and Southwest Irrigation District have applied for a permit to transfer 10 cfs of water from Magic Springs to the Rangen Research Hatchery. A hearing was held by Director Spackman on December 19, 2014, but, to date, the transfer has not been approved.

On December 15, 2014, just four days before the transfer hearing, IGWA went to the IWRB to facilitate a lease of 5.5 cfs of water for use at Rangen's facility. IGWA submitted paperwork to lease 5.5 cfs of Magic Springs water to the IWRB (*see* Exhibit 2, p. 17) and then rent that same 5.5 cfs (*see* Exhibit 3, p. 5). The rental agreement between IGWA and the IWRB is unequivocal – it is for 5.5 cfs. *See* Exhibit 3, p. 1. This means that at the present time IGWA does not have the legal means to deliver the water that the Court has ordered that it deliver on February 7th.

To be sure, IGWA's inability to deliver 7.81 cfs of water to Rangen on February 7, 2015, is a huge impediment. This impediment was acknowledged when IDWR supplied Rangen with the lease/rental documents on January 23, 2015, and also notified Rangen in an email that ". . . new documents are being prepared by IGWA due to the need to provide additional flow to Rangen." *See* Exhibit 4. This impediment should have been disclosed to Rangen and the Court

and is a factor that should have been taken into consideration by the Court when ruling on IGWA's Motion for Stay of Curtailment Order.

B. The Stay Should be Vacated Because the Issuance of the Rental Agreement Circumvented the Issues of Enlargement and Material Injury.

Rangen opposed the Magic Springs Mitigation Plan and the proposed transfer of SeaPac's underlying water right from Magic Springs because, among other things, it would enlarge SeaPac's water right and injure many other water rights. SeaPac's water right is a non-consumptive fish propagation right. The water comes from Magic Springs, flows through SeaPac's facility which is located next to the Snake River, and then immediately flows to the river. The Magic Springs Mitigation Plan does NOT protect this return flow to the Snake River. After the Magic Springs water goes through the Rangen facility it will flow down Billingsley Creek where it will be fully consumed. The water will not return to the Snake River which means that SeaPac's non-consumptive water right will be turned into a fully consumptive right. *See Rangen's Closing Brief in Opposition to Fourth Mitigation Plan* (Exhibit 5) and *Rangen's Closing Brief* submitted in the transfer proceeding (Exhibit 6).

The Director was required to evaluate injury to other water rights when considering the Magic Springs Mitigation Plan. Rule 43.03.j of the Conjunctive Management Rules 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:
>
> j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.43.03.j. The Director has acknowledged this important duty. During the hearing on IGWA's Tucker Springs mitigation plan, the Director stated:

> And I will tell you that with respect to the issue of injury that – an, TJ, you stated this yourself, that the Director had in the past ruled and referred to the conjunctive management rules that require that the Director consider injury in its review of – or in his review of the mitigation plan.
>
> Now, the distinction, I guess, I draw is that the issue of injury and the presentation of evidence doesn't – in a mitigation hearing does not need to rise to the level of proof that would be required in a transfer proceeding. And I don't want to mischaracterize the standard, other than to say that the issue, in my opinion, should be is there a reasonable possibility that – or is there a way in which the mitigation plan can be implemented so that it does cause injury to other water users or IGWA in general.
>
> So when I started my narrative here, I said that I would not rule on the issues. ***But at least with respect to injury, the Director has a responsibility to consider injury as part of the mitigation hearing, and I will consider injury and take evidence related to that subject.***

Tr., p. 32, line 15 – p. 33, l. 12 (emphasis added) (Exhibit 7).

Despite the prior acknowledgement of his duty to consider injury issues in the mitigation plan hearing, Director Spackman's conditional approval of the Fourth Mitigation Plan expressly deferred the enlargement/material injury issues to the pending transfer proceeding. The Order stated:

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

See Order Approving IGWA's Fourth Mitigation Plan, p. 19 (Exhibit 8) (emphasis added).

IGWA filed an application for transfer to change the SeaPac water rights to allow use at Rangen's Research Hatchery on September 10, 2014. Such a transfer can only be approved by the Department if the transfer will not enlarge the water right or injure other water rights. *See* I.C. § 42-222(1). Rangen protested the transfer application. *See* Exhibit 9.

IGWA's transfer application was originally assigned to James Cefalo, an IDWR hearing officer. *See* Exhibit 10. After conditional approval of the Fourth Mitigation Plan, Director Spackman reassigned the transfer proceeding to himself and issued a Notice of Hearing and Scheduling Order. *See* Exhibit 11. Director Spackman conducted a hearing on the matter on December 19, 2014. The hearing took almost an entire day and consisted of the testimony of multiple water engineers and water rights experts and Frank Erwin, the water master of Water District 36A where the Rangen Research Hatchery and Billingsley Creek are located. *See* Exhibit 12 for a copy of the transcript of the hearing. At the end of the hearing, Director Spackman identified serious and complex legal issues associated with the transfer application and requested that the parties address them in their post hearing briefing:

> THE HEARING OFFICER: Okay. Two weeks. I want to talk to you just briefly about some concerns I have that may not have been voiced or identified, and I'll talk to you about three of them, if I can, just quickly.
>
> And so if I turn to 42-222, which is the statute that describes the filing of applications for transfer, how the Department should review them. And there is one particular provision -- I'm looking in the code, but this is -- sorry, everybody else probably doesn't have their volumes with them. But this is subsection (1), last sentence in subsection (1). It's a long subsection.
>
> MR. BUDGE: In 222?
>
> THE HEARING OFFICER: In 222. And it says, the last sentence, "Provided, however, minimum stream flow water rights may not be established under the local public interest criterion and may only be established pursuant to Chapter 15, Title 42, Idaho code."

And I just want to ask the question whether asking a watermaster to shepherd 10 cfs from Rangen to the mouth of Billingsley Creek establishes a de facto minimum stream flow and perhaps is prohibited by 42-222? I don't know the answer. I just ask the question.

This question has come up in a couple of other contested case hearings that I've held. And at least in one of them that I think factually was farther away from characterization of a minimum stream flow where we required a bypass flow. There were those in the legal community and the water community who pointed to this and wondered whether I had established a minimum stream flow. That particular approval did not propose to shepherd water through an entire reach. This one does.

There's another provision, and we've talked about the enlargement of use. And I just -- I look at the criterion, and so I just want to read it.

MR. HAEMMERLE: I'm sorry, Director. What section are you on?

THE HEARING OFFICER: This is the same subsection (1). It's very long.

MR. HAEMMERLE: Okay.

THE HEARING OFFICER: And it sets out the criteria or the factors that the Director must consider. And one of them, of course, is the enlargement of use criterion. And it says, "The change does not constitute an enlargement in use of the original right." I'm not sure I know what that means, "in use of the original right." And so the issue has really been set up well here. And I understand the differences. But it really is in the interpretation of, I think, what an enlargement in use of the original right means. What does that mean? I don't know, in the context in looking at these facts.

And -- but I recognize -- and it troubles me a little, frankly, that we could propose approving an application for transfer that would -- that would not result in an enlargement use -- enlargement of use if we look myopically at a portion of the total use that would result but ignore the rest of it. But again, I just -- I look at it, and I don't know what that term means.

The last question that I want to ask is -- and it hinges, I guess, on this interpretation of what an enlargement of use is. But either way, we interpret the enlargement of use, at least from the testimony, without some careful regulation and very difficult regulation on Billingsley Creek. There will be an increase of consumptive use. And from my perspective, that increase in consumptive use will be very difficult or almost impossible to avoid.

And so then my next question is, is the water that will be consumed, is it trust water? Is it actually trust water, water that's been placed in trust and held by the State of Idaho? And would that increased consumption invoke the other provisions of trust water? Now, I know it refers to it in 202 -- 42-202, and I think it's (c), and talks about the appropriation of water. But is it trust water?
And those are, I guess, questions or issues we didn't talk about today, but ones that I think I need to look at in the evaluation of the application.

And I just wanted to throw them out to everybody because I think I have an obligation.

MR. HAEMMERLE: I will say, Director, in 120 years of jurisprudence in the state of Idaho, it's an honor to be involved in these issues, because I think they are probably first-time issues.

THE HEARING OFFICER: Okay. There you go. So I don't have anything else. Do the parties have anything?

MR. HAEMMERLE: Thanks for the direction, Director.

THE HEARING OFFICER: Yeah. I don't want to write a decision that surprises the parties somehow. I want you to know that I'll look at those matters and issues that I at least detailed for you.

(Tr., p. 261, l. 15 – 264, l. 14) (emphasis added).

The transfer application has never been approved. Director Spackman has not issued a decision on the transfer application or any analysis of the enlargement/injury that would result from the transfer. It now appears that the transfer proceeding was merely a ruse. Four days before the hearing on the transfer proceeding began, IGWA applied for a lease and rental from the water bank. *See* Exhibits 2 and 3. Neither IGWA nor the Director disclosed or mentioned this application during the hearing on the transfer application. *See* Exhibit 12.

The IDWR staff memos that were generated in connection with the lease/rental documents affirmatively show that Department policies and procedures were circumvented to issue these agreements without the knowledge and input of Rangen and to avoid the issues raised in the

protested transfer application. On January 2, 2015 – the day that Rangen and IGWA submitted their post-hearing briefing in the transfer proceeding – Remington Buyer, an IDWR employee, issued two memoranda. One addressed the lease application with SeaPac and IWRB. *See* Exhibit 2, p. 22. The other addressed the rental application with IGWA and IWRB. *See* Exhibit 3, p. 12.

Mr. Remington's Memorandum on the lease agreement expressly states that the lease/rental applications were submitted because Rangen protested the transfer. *See* Exhibit 2, p. 22. It states: "This lease rental application is being submitted due to the protesting of the transfer application." The Memorandum acknowledges that the IWRB usually does not consider rental applications where transfer proceedings have been initiated. The Memorandum also acknowledges that the IWRB avoids reviewing those applications where there is a protest. Nonetheless, these policies were expressly circumvented:

> As a matter of avoiding duplicative work, the Water Supply Bank tends not to consider lease and rental applications where transfer proceedings are pending, and the Bank avoids considering a lease/rental if an associated transfer is protested. This lease/rental transaction however is being proposed to accomplish mitigation activities approved by an order of the Director of IDWR (IGWA's Fourth Mitigation Plan) and the mitigation activities are sanctioned by the IWRB, thus the bank will consider this transaction.

Exhibit 2, p. 21.

Mr. Remington superficially addressed material injury/enlargement issues in his Memorandum on the rental agreement. Exhibit 3, p. 12. Again, his analysis was done on the same day that IGWA and Rangen submitted their final briefing in the transfer proceeding, yet Mr. Remington does not address the legal issues or concerns that Director Spackman asked the parties to address. It does not appear that Mr. Remington considered any of the evidence that the Department had on the enlargement/material injury issues during the transfer proceeding.

There is also no evidence that *Director Spackman* considered the lease/rental applications. Section 42-1763 requires the Director to do the same enlargement/material injury analysis in connection with the lease/rental applications that he was required to do in connection with the Magic Springs Mitigation Plan and the transfer proceeding. It states:

> 42-1763. Rentals from bank -- Approval by director. The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources. ***The director of the department of water resources may reject and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.*** The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code.

I.C. § 42-1763 (emphasis added).

The Director did not do this analysis even though he had just conducted a full day hearing on the matter and had extensive testimony from experts and legal briefings from the parties. In fact, it appears that the Department staff who reviewed the lease and rental applications ignored all of the evidence and legal briefing that the Director had just received.

In addition, IGWA's rental agreement for the 5.5 cfs was not approved by the Director. The agreement was signed by Cheri Palmer for Brian Patton, the Acting Administrator for the IWRB. *See* Exhibit 3, p. 2. Ms. Palmer certified on behalf of Mr. Patton as follows:

> Having determined that this agreement satisfied the provisions of Idaho Code § 42-1763 and IDAPA 37.02.03.030 (Water Supply Bank Rule 30), for the rental and

> use of water under the terms and conditions herein provided, and none other, I hereby execute this Rental Agreement on behalf of the Idaho Water Resource Board.

See id. Even if one assumes that Ms. Palmer has the authority to make the certifications on behalf of Mr. Patton, the problem with this certification is that the legal responsibility to review rental agreements rests with Director Spackman – not the IWRB.

The Idaho legislature put the responsibility for reviewing and approving rental agreements squarely on the shoulders of the Director – not the IWRB:

> 42-1763. Rentals from bank -- Approval by director. ***The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources.*** The director of the department of water resources may reject and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code.

I.C. § 42-1763 (emphasis added).

The certification that the rental agreement meets the criteria of I.C. § 41-1763 was given by the IWRB – not the Director. This does not comply with Idaho law and renders the rental agreement a nullity. Without the Director's approval of the rental agreement, IGWA does not have the ability to comply with the Court's February 7th Order, and, as such, Rangen requests that the stay be vacated.

It is unconscionable for the Magic Springs Mitigation Plan to be implemented without an analysis of whether the plan results in an enlargement of SeaPac's water rights or causes material injury to Snake River water users because the water will not return to the Snake River once it enters Billingsley Creek. The Director refused to address this issue in the mitigation plan hearing and said he would address it in the transfer proceeding. The Department and IWRB ignored their standard operating policies and procedures to consider the lease/rental applications even though a transfer proceeding had been commenced and there was a protest. Rangen was not notified of the applications and was deprived of the opportunity to participate. The Department and IWRB ignored the evidence and legal briefing that they had in their possession and they accomplished indirectly what they could not do directly – the approval of the use of water without a full injury analysis. The Director did not approve the lease/rental applications and he did not do the injury/enlargement analysis. In fact, the Director has not yet addressed in any forum or proceeding whether the Magic Springs Mitigation Plan causes material injury to others or results in an enlargement of SeaPac's water rights. As such, the Court should not allow pumping to commence through the Magic Springs pipeline until IGWA, the Department and the IWRB comply with Idaho law. Respectfully, Rangen requests that the stay be vacated.

III. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that Rangen's Motion for Reconsideration be granted and that the stay be vacated.

DATED this 26th day of January, 2015.

MAY, BROWNING & MAY, PLLC

By: _____
J. Dee May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 26th day of January, 2015 he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Original: State of Idaho 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	☑ ☐ ☐ ☐ ☑
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery U.S. Mail Facsimile Federal Express E-Mail	☐ ☐ ☐ ☐ ☑
Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 201 E. Center Street P.O. Box 1391 Pocatello, ID 83204 rcb@racinelaw.net tjb@racinelaw.net	Hand Delivery U.S. Mail Facsimile Federal Express E-Mail	☐ ☐ ☐ ☐ ☑

J. Dee May