Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
Racine Olson Nye Budge & Bailey, Chartered
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
tjb@racinelaw.net

Attorneys for IGWA

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

RANGEN, INC.,

Petitioner,

vs.

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

Respondent,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenors.

Case No. CV-2014-4633

IGWA's Response Brief

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, through counsel, submits this brief in response to *Rangen, Inc's Opening Brief* filed February 20, 2015. This brief is submitted pursuant to Rule 84(p) of the Idaho Rules of Civil Procedure and this Court's *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* issued December 5, 2015. This brief is supported by the *Affidavit of Thomas J. Budge* filed herewith.

TABLE OF CONTENTS

STATEMENT OF THE CASE

1. Nature of the Case.

This case was brought by Rangen in an effort to undo the *Order Approving IGWA's Fourth Mitigation Plan* (the "Order") issued by the Director of the Idaho Department of Water Resources (IDWR) on October 29, 2014.[1] The Order authorizes IGWA to pipe water to Rangen, Inc. ("Rangen") from Magic Springs to avoid water being shut off to 157,000 acres of farmland and dozens of cities, dairies, food processors, and other businesses in the Magic Valley. The pipe project was completed in early February and has since delivered 7.81 cfs of water to Rangen continuously, fully satisfying IGWA's mitigation obligation to Rangen.[2]

2. Procedural History.

Rangen, Inc.'s Opening Brief sets forth a procedural history that wanders far beyond the scope of the Order. Much of it is irrelevant, but is apparently included to help Rangen re-make its delivery call as having been motivated by concern for the aquifer.[3] Rangen at one time claimed it needed more water so it can raise more fish, but now that it is receiving more water it asks this Court to put an end to it on the basis that moving water from one spring to another does not help the aquifer.[4]

Whatever concern Rangen has for the aquifer, it is irrelevant to whether IGWA's Fourth Mitigation Plan mitigates injury to Rangen. Rangen's conjunctive management delivery call is not an aquifer management tool. The Legislature has enacted other mechanisms for that (Ground Water Management Areas and Critical Ground Water Areas).[5] Rangen's call is about

---

[1] R. Vol. 2 p. 178-200 (*Order Approving IGWA's Fourth Mitigation Plan*).

[2] *See Affidavit of Thomas J. Budge* (Mar. 20, 2015).

[3] *Rangen, Inc.'s Opening Brief* at 3-5.

[4] *Rangen, Inc.'s Opening Brief* at 5.

[5] Idaho Code §§ 42-233a and 42-233b.

one thing only: remediating injury to Rangen caused by junior-priority water use. And IGWA's Fourth Mitigation Plan is about one thing: preventing injury to Rangen.

Rangen correctly notes there has been outrage at Rangen's litigious curtailment strategy.[6] Indeed, if Rangen's objective was simply getting more water, it would not be appealing agency actions that give it more water and enable it to raise more fish.

Of course, Rangen's true motivations are not relevant to this Court's review of the Order. The only procedural history that merits consideration is that related directly to the Order. Rangen's discussions of the Thousand Springs Settlement Framework, Tucker Springs mitigation, and AquaLife mitigation plan have no bearing and should be ignored.[7]

3. Statement of Facts.

Rangen, Inc.'s Opening Brief does not contain a discrete statement of facts, though some facts are cited throughout the brief. A much more comprehensive recitation of relevant facts is found in the Findings of Fact set forth in the Order.[8] Additional facts and citations to testimony and exhibits are found in *IGWA's Post-Hearing Brief* filed with IDWR.[9]

While Rangen acknowledges "the Magic Springs pipeline has been constructed and is now delivering water to Rangen,"[10] it discusses the Fourth Mitigation Plan in terms of what it *will* accomplish when finished. A number of Rangen's arguments are based on fears that have been rendered moot by the successful completion of the Magic Spring project which is

---

[6] *Rangen, Inc.'s Opening Brief* at 4.

[7] *Rangen, Inc.'s Opening Brief* at 3-4.

[8] R. Vol. 2 p. 183-195.

[9] R. Vol. 1 p. 166-172.

[10] *Rangen, Inc.'s Opening Brief* at 23.

now operating to fully satisfy IGWA's mitigation obligation.[11] The *Affidavit of Thomas J. Budge* is submitted herewith for the purpose of demonstrating the mootness of many of Rangen's arguments.

4. Standard on Review.

The standard of review set forth in *Rangen, Inc.'s Opening Brief* is adequate.[12]

ARGUMENT

1. Whether the Director exceeded his authority by allowing out-of-priority ground water pumping is beyond the scope of this appeal.

Rangen contends the Director erred by "allow[ing] junior ground water pumping to continue for over a year without satisfaction of the juniors' mitigation obligation through a properly approved mitigation plan."[13] This argument is beyond the scope of this proceeding.

This proceeding is limited to the Fourth Mitigation Plan Order issued in IDWR Docket No. CM-DC-2014-006.[14] The Order was issued under Rule 43 of the Rules of Conjunctive Management of Surface and Ground Water Resources (CM Rules) which entitles IGWA to provide mitigation that will "prevent injury to senior rights."[15] The subject of this proceeding is strictly whether the Director properly determined that the Fourth Mitigation Plan will prevent injury to Rangen.

Many of Rangen's arguments pertain to the Director's decision in other proceedings to postpone curtailment until January 19, 2015. Specifically, Rangen cites to the *Order Granting IGWA's Petition to Stay Curtailment* in

---

[11] *See generally Aff. of Thomas J. Budge*.

[12] *Rangen's Opening Br*. at 7.

[13] *Rangen, Inc.'s Opening Brief* at 9.

[14] *Pet. for Judicial Review* ¶¶ 4, 8, Nov. 25, 2014.

[15] IDAPA 37.03.11.043.03.

CM-DC-2011-004,[16] *Order Granting IGWA's Second Petition to Stay Curtailment* in CM-DC-2011-004,[17] and *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* in CM-MP-2014-003 and CM-DC-2011-004.[18] None of these orders were issued in the Fourth Mitigation Plan case, CM-DC-2014-006; therefore, they cannot be challenged here.

Rangen also cites the *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* (the "Morris Credit Order") issued November 21, 2014, in CM-DC-2011-004, CM-MP-2014-001, and CM-MP-2014-006, which increased the amount of mitigation IGWA owes to Rangen.[19] Rangen contends that the Director should have also moved the curtailment date earlier than January 19, 2015, when he issued the Morris Credit Order. That argument, however, must be made in an appeal of the Morris Credit Order. It cannot be raised in the appeal of the Fourth Mitigation Plan Order which was issued a month prior.

Thus, whether the Director properly postponed curtailment to January 19th is not a proper issue on appeal in this proceeding. Further, the issue is moot since the deadline is past, the Fourth Mitigation Plan has been completed, and IGWA has for more than a month fully satisfied its mitigation obligation to Rangen.[20]

Therefore, IGWA respectfully asks this Court to decline to address Rangen's arguments concerning the January 19th curtailment date.

---

[16] CV-2014-2935, R. 103.

[17] CV-2014-2935, R. 180.

[18] CV-2014-2935, R. 537.

[19] *See Rangen Inc.'s Opening Brief* at 14-15.

[20] *See Koch v. Canyon County*, 145 Idaho 158, 163, 177 P.3d 372, 377 (2008) (declining to address issues on appeal that could not be resolved through "judicial decree of specific relief").

2. The Director acted within his discretion in addressing CM Rule 43.03.j.

Rangen contends the Director's approval of the Fourth Mitigation Plan violates the part of CM Rule 43.03.j that allows the Director to consider injury to other water rights.[21] Specifically, Rangen argues that approving the Plan subject to approval of IGWA's pending application to transfer water from Magic Springs to Rangen is impermissible.[22]

Rangen also contends the Fourth Mitigation Plan causes injury because, Rangen says, "the aquifer will continue to be used by junior users at a rate that exceeds recharge."[23] Both arguments are mistaken, as explained below. Moreover, Rangen does not have standing to challenge the Director's decision concerning injury to any water rights other than Rangen's own.

2.1 Rangen does not have standing to challenge the Director's decision concerning injury to other water users.

Under Idaho Code § 67-5270, only an "aggrieved party" has standing to contest agency decisions. Standing is a constitutional requirement.[24] It requires a "personal stake" in the outcome of the case.[25] To qualify, Rangen must demonstrate "substantial rights [that may be] prejudiced."[26] Standing cannot be based upon a speculative injury.[27]

CM Rule 43.03 deals with "injury to senior rights."[28] Rangen certainly has standing to challenge the Director's decision concerning injury to its own rights, but not to other senior rights.

---

[21] *Id*.

[22] *Rangen, Inc.'s Opening Brief* at 15-19; *cf*. R. Vol. 2 p. 196 ¶ 12.

[23] *Id*. at 16.

[24] *Evans v. Teton County*, 139 Idaho 71, 75 (2003).

[25] *Miles v. Idaho Power Co*. 116 Idaho 635, 641 (1989).

[26] I.C. § 67-5279(4); *see also Sandpoint Indep. Highway Dist. v. Bd. of County Comm'rs*, 138 Idaho 887, 892-893 (2003).

[27] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 (U.S. 1992).

[28] IDAPA 37.03.11.043.03.

The injury Rangen complains of is to the Snake River, but Rangen owns no water rights from the Snake River. While a breach of the Swan Falls minimum flows could result in curtailment of so-called "trust water rights," this presents no risk to Rangen because none of its water rights qualify as trust water rights (all of Rangen's water rights predate 1985). Moreover, even if Rangen's rights were subject to the Swan Falls minimum flows they would not be exposed to curtailment because they are for a non-consumptive use (fish propagation).

Ironically, Rangen's injury argument is aimed not at *preventing* injury to its water rights, but at *maintaining* injury to its water rights by blocking IGWA from delivering mitigation water from Magic Springs.

Regardless, Rangen has failed to demonstrate substantial rights that may be prejudiced; therefore, IGWA respectfully asks this Court to rule that Rangen does not have standing to challenge the Director's analysis under CM Rule 43.03 concerning injury to senior rights other than Rangen's.

2.2 The Director did not abuse his discretion by approving the Plan subject to approval of the transfer application.

Rangen contends the Director's decision to approve IGWA's Fourth Mitigation Plan subject to approval of IGWA's corresponding transfer application or a water supply bank rental violates CM Rule 43.03, which lists various factors that "may" be considered to prevent injury to other rights.[29] In other words, Rangen claims that making the Fourth Mitigation Plan conditional upon the transfer being approved *does not* prevent injury to other rights. There is no factual basis to support this argument.

In this case, the only risk of injury to senior rights would be as a result of the transfer of water from Magic Springs to Rangen. IDWR is required by

---

[29] *Rangen, Inc.'s Opening Brief* at 15-19; *cf.* R. Vol. 2 p. 196 ¶ 12; *see* IDAPA 37.03.11.043.03.

statute to address injury to other rights in the transfer proceeding as well as a water bank rental.[30] By conditioning the Fourth Mitigation Plan upon approval of the transfer or water bank rental, the Director ensured the Plan would prevent injury to other rights. It would certainly have been duplicative for IDWR to go through the analysis twice.

Moreover, since the transfer has now been approved by IDWR, Rangen's arguments concerning injury are moot.[31]

Therefore, IGWA respectfully asks this Court to reject Rangen's argument that the Director abused discretion by approving the Fourth Mitigation Plan subject to approval of the corresponding water right transfer.

2.3 Rangen's argument concerning groundwater recharge is misplaced.

Rangen cites the part of CM Rule 43.03.j that allows the Director to consider whether a mitigation plan "would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge" to argue that IGWA's Fourth Mitigation Plan causes groundwater withdrawals to exceed recharge.[32]

This argument is misplaced because IGWA's Fourth Mitigation Plan does not involve the withdrawal of groundwater; only the delivery of surface water from Magic Springs.

As mentioned above, mitigation plans are not a substitute for Ground Water Management Areas and Critical Ground Water Areas. Thus, the recharge language in CM Rule 43.03.j is not intended to force all mitigation plans to address global aquifer management issues; rather, it is there to ensure that mitigation plans that utilize groundwater do not cause groundwater withdrawals to exceed recharge.

---

[30] Idaho Code §42-203A(5)(a); IDAPA 37.02.03.025.01.

[31] *Affidavit of Thomas J. Budge* (Mar. 20, 2015) at Ex. B.

[32] *Rangen, Inc.'s Opening Brief* at 16.

Moreover, Rangen's assertion that "the aquifer is being mined at a rate of approximately 270,000 acre-feet per year" is blatantly false. The order Rangen cites actually says that water discharges from the aquifer three ways: spring flows, evapotranspiration from wetlands, and groundwater withdrawals—and that the *total* annual discharge has exceeded recharge by 270,000 acre-feet on average since 2008.[33] This is not because groundwater withdrawals exceed recharge (groundwater withdrawals are less than one-third of annual recharge);[34] it is because of the residual effects of surface water irrigation efficiencies (conversions from flood to sprinkler irrigation, etc.) that have not fully been realized.

Therefore, IGWA respectfully asks this Court to reject Rangen's argument that the Fourth Mitigation Plan violates CM Rule 43.03.j.

3. The Director's Fourth Mitigation Plan Order should not be construed as a taking.

Rangen claims the Order is a taken of Rangen's property rights because it requires Rangen to notify IGWA of whether it will allow construction on its property, which Rangen says "effectively" granted IGWA an easement over its property.[35] This statement should not be construed as a taking, but as an acknowledgement that if Rangen were to refuse to accept water from Magic Springs then it would be wasteful to require IGWA to physically construct the Magic Springs project. Further, that if Rangen is willing to accept water from Magic Springs yet refuses to allow construction on its property IGWA would be forced to use its power of eminent domain under Idaho Code § 42-5224(13), which would delay the delivery of mitigation water.

It is also noteworthy that if Rangen were willing to accept the water yet refuse construction on its property, the Director could exercise his equita-

---

[33] Tucker Springs R. p. 16, ¶¶ 74-75.

[34] *Id*.

[35] R. 198.

ble authority to stay the curtailment date until the necessary easements were acquired by eminent domain.

Finally, Rangen's argument is moot because it has provided IGWA a written license to construct the Magic Springs pipe on its property.[36]

4. The Director imposed reasonable and adequate contingencies under CM Rule 43.03.c.

Rangen complains that the Fourth Mitigation Plan does not contain adequate contingencies under CM Rule 43.03.c, raising a long list of questions that are either trivial, moot, ignorant, or none of Rangen's business. While IGWA could easily dispose of each question individually, it is sufficient to point out that IGWA submitted 100% engineering drawings with no objection from Rangen, IGWA obtained all required easements, and the pipe is complete and has been delivering water to Rangen for more than a month without problem. With respect to contingencies specifically, the Order requires a backup pump and a backup diesel generator, and insurance to protect Rangen in the very unlikely event of a complete system failure—all of which has been done.[37] This is more than adequate to protect Rangen.

Therefore, IGWA respectfully asks this Court to deny Rangen's argument that the Order does not contain adequate contingency provisions.

5. Rangen's substantial rights are not prejudiced by the Fourth Mitigation Plan Order.

Lastly, Rangen contends its substantial rights have been prejudiced because of "no backup on contingency provisions."[38] As explained above, this argument is unfounded. The only other prejudice Rangen claims is "the damage to Rangen's spring water flows and the mining of the aquifer to

---

[36] *Affidavit of Thomas J. Budge* (Mar. 20, 2015), at Ex. C.

[37] *See Affidavit of Thomas J. Budge* (Mar. 20, 2015).

[38] *Rangen, Inc.'s Opening Brief* at 24.

continue."[39] However, as to spring flows, the Fourth Mitigation Plan replaces the impacts of pumping with essentially identical spring water. With respect to mining the aquifer, Rangen has no basis to complain since its water rights are surface rights.

IGWA argued above that Rangen does not have standing to challenge the Director's decision concerning injury under CM Rule 43.03 with respect to any rights other than Rangen's own. Because Rangen has not demonstrated prejudice to substantial rights at all, IGWA respectfully asks the Court to dismiss Rangen's petition for judicial review entirely for failure to comply with Idaho Code § 67-5279(4).

CONCLUSION

Based on the foregoing, IGWA respectfully asks this Court to:

1. Decline to address Rangen's arguments concerning the January 19th curtailment date because it is beyond the scope of this appeal.
2. Find Rangen does not have standing to challenge the Director's decision concerning injury under CM Rule 43.03 to any water users other than Rangen.
3. Find the Director did not abuse his discretion in approving the Fourth Mitigation Plan *subject to* approval of IGWA's corresponding water right transfer application.
4. Find that the recharge language of CM Rule 43.03.j does not apply to this proceeding because the Fourth Mitigation Plan does not utilize groundwater; or, alternatively, find that the Director's application of CM Rule 43.03.j is supported by substantial evidence and is not an abuse of discretion.
5. Decline to construe the Order as a taking; or, alternatively, find the issue is moot since IGWA has a license for the portion of the Magic Springs pipe on Rangen's property.

---

[39] *Id.*

6. Find the Director did not abuse his discretion by imposing contingencies to protect Rangen under CM Rule 43.03.c.

7. Dismiss Rangen's petition for judicial review for failure to demonstrate prejudice to substantial rights as required by Idaho Code § 67-5279(4).

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

Randall C. Budge
Thomas J. Budge

March 20, 2014
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2015, a true and correct copy of the foregoing document was served on the persons listed below by the method(s) indicated.

Randall C. Budge
Thomas J. Budge

Clerk of the Court Snake River Basin Adjudication 427 Shoshone Street N Twin Falls, ID 83303	☒ ☐ ☐ ☐ ☐	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Idaho Dept. of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov deborah.gibson@idwr.idaho.gov kimi.white@idwr.idaho.gov	☐ ☐ ☐ ☐ ☒	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Robyn M. Brody Brody Law Office, PLLC P.O. Box 554 Rupert, ID 83350 robynbrody@hotmail.com	☐ ☐ ☐ ☐ ☒	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC P.O. Box 1800 Hailey, ID 83333 fxh@haemlaw.com	☐ ☐ ☐ ☐ ☒	U.S. Mail Facsimile Overnight Mail Hand Delivery Email
J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, ID 83702 jmay@maybrowning.com	☐ ☐ ☐ ☐ ☒	U.S. Mail Facsimile Overnight Mail Hand Delivery Email