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 REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

IGWA claims the Fourth Mitigation Plan is about one thing: preventing injury to Rangen. *IGWA's Response Brief*, p. 4. The Fourth Mitigation Plan does not do that. It provides temporary compensation in the form of water without addressing the underlying problem of Rangen's declining spring flows. Rather than mitigating for the ground water withdrawals that are causing declining spring flows, it turns a non-consumptive water right into a consumptive right and allows the mining of the aquifer to continue. The Director refused to address these issues when he conditionally approved the Plan. Moreover, even though the pipeline is presently delivering water, Rangen continues to bear the risks associated with things like disagreements among ground water districts and mechanical failures. The Director should not have conditionally approved the Fourth Mitigation Plan, and Rangen respectfully requests that his decision be reversed.

II. ARGUMENT

A. Rangen Has Standing to Challenge All Issues Related to the Approval of the Fourth Mitigation Plan.

IGWA has asked the Court to rule that Rangen does not have standing to raise arguments related to the injury of water rights other than its own. *IGWA's Response Brief*, p. 7. IGWA contends that Rangen does not have a trust water right, and, therefore, Rangen should not be able to put on evidence or otherwise argue that the Fourth Mitigation Plan will injure those rights because the water diverted to the Research Hatchery will not return to the Snake River. *Id.* In making this argument, IGWA has misconstrued Idaho's standing laws and mischaracterized Rangen's injury argument.

Idaho Code § 67-5270(3) governs who has standing to bring a petition for judicial review under the Idaho Administrative Procedure Act. It states:

> A party aggrieved by a final order in a contested case decided by an agency other than the industrial commission or the public utilities commission is entitled to

> judicial review under this chapter if the person complies with the requirements of sections 67-2751 through 67-5279.

I.C. § 67-2570(3).

IGWA filed the Fourth Mitigation Plan in direct response to Rangen's December 2011 Delivery Call. Rangen filed a protest to the Plan and was a party to the proceeding. (A.R., 43-46). Rangen actively participated in discovery and in the hearing. (*See e.g.*, Deposition Notices (A.R., pp. 52, 58 and 63) and *see also* Hearing Transcript). Rangen has appealed from the *Order Approving IGWA's Fourth Mitigation Plan* because, among other things, the Director did not consider the injury done by the Plan and did not adequately protect Rangen's interests. (*See Petition for Judicial Review*, A.R. pp. 313-21).

There should be no doubt that Rangen has a substantial and material interest in the approval of the Fourth Mitigation Plan and its terms and conditions. The implementation of the Plan has a direct impact on Rangen's Research Hatchery. Rangen was "aggrieved" by the *Order Approving the Fourth Mitigation* Plan, and, as such, it has standing to bring this Petition for Judicial Review under I.C. § 67-2570(3).

IGWA wants the Court to carve out the injury issue and rule that Rangen does not have standing to raise this particular argument. The material injury analysis is one of the express factors the Director should have considered under CM Rules 43.03.i and j (IDAPA 37.03.11.043.03). How can it be that Rangen has standing to raise some of the Rule 43.03 factors, but not others? IGWA's position is not logical. Moreover, its position is not consistent with I.C. § 67-2570(3) or Idaho's standing laws.

The Idaho Supreme Court explained the doctrine of standing in *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989):

> ***The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.*** *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). While the doctrine is easily stated, it is imprecise and difficult in its application. *O'Hair v. White*, 675 F.2d 680 (Former 5th Cir.1982). However, the major aspect of standing has been explained:
>
> > ***The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions."*** As refined by subsequent reformation, this requirement of "personal stake" has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. (Citations omitted.)
>
> *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978).

Miles, 116 Idaho at 641, 778 P.2d at 763 (emphasis added). To be sure, Rangen has a personal stake in the outcome of the Fourth Mitigation Plan that assures the "concrete adversariness" necessary to adequately raise and address all issues.

Even if Idaho's standing laws were applied as IGWA contends, Rangen is suffering ongoing material injury because the Fourth Mitigation Plan enables junior-priority groundwater pumping to continue without addressing the mining of the aquifer and the continued decline of Martin-Curren Tunnel spring flows. IGWA argues that "Rangen's assertion that 'the aquifer is being mined at a rate of approximately 270,000 acre-feet per year' is blatantly false." The statement is 100% accurate and based directly on the Director's findings in the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call*. (A.R., P. at ¶¶ 73-75. The Director expressly found:

> 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.

(*Id.* at ¶ 75). IGWA cannot escape the fact that groundwater is being withdrawn from the aquifer at a rate that exceeds recharge. IGWA points out that one of the reasons that water is being withdrawn faster than it is being recharged is due to a reduction in recharge including a reduction in incidental recharge from irrigation. This argument simply highlights the point. Groundwater pumping has continued unabated without regard to the quantity of water available. Rangen's point is that the Fourth Mitigation Plan does not address the damage done by junior-priority groundwater pumping to Rangen's spring flows. Instead, the Plan merely provides temporary compensation while the damage continues. The result of curtailment of junior-priority ground water pumping would be both the stabilization of the aquifer and an increase in flow to Rangen's water rights, which the Director found to be 9.1 cfs. The Fourth Mitigation plan only temporarily addresses the relative increase of 9.1 cfs. Because the Fourth Mitigation plan does not "mitigate" for the withdrawal of ground water from the aquifer, the springs will continue to decline resulting in less than a 9.1 cfs net increase in water available to Rangen.

Even if Rangen's own rights were not injured, Director Spackman previously recognized that Rangen could put on evidence of others' injuries because he has an independent duty to consider the injury that may result from a mitigation plan. Director Spackman explained during the hearing on IGWA's Second Mitigation Plan (the Tucker Springs Plan) as follows:

> Now, I think in that particular motion there was also an argument that Rangen should not be able to present evidence on behalf of other individuals or entities that might be injured. You didn't talk about that particular subject, at least directly, although indirectly I think you did, TJ.
>
> ***And my response is that the Director's responsibility is much broader than in a court of law. The Director has a responsibility to review the issue of injury. And I can't just exclude those kinds of issues from an evidentiary presentation.***

> ***So, to the extent that Rangen wants to call witnesses who are water users and could be injured by the mitigation plan, I will allow it. I'll allow it into evidence.***

(Tucker Springs Hrg. Tr., p. 33, l. 13 – p. 34, l. 2) (emphasis added).

Rangen put on evidence of the injuries that were caused by the Fourth Mitigation Plan. The Director simply refused to consider the evidence, holding that the issue should be addressed in the context of a transfer application. Rangen had standing to submit the evidence and has standing to claim that the Director erred when he refused to consider it. There is no merit to IGWA's standing argument.

B. IDWR's Interpretation of CM Rule 43.03 is Inconsistent with the Plain Language of the Rule and the Director's Prior Ruling.

IDWR tries to justify the Director's failure to consider the injury issue by arguing that he determined that the "necessary" components of a mitigation plan are set forth in CM Rule 43.03(a)-(c). The Department contends that IGWA only had to present sufficient factual evidence to prove three factors:

> 1. the proposal is legal and would provide the quantity of water required by the Curtailment Order;
>
> 2. the Plan would be implemented timely to provide required mitigation water; and
>
> 3. The Plan was engineered and the necessary agreements or option contracts were executed or legal proceedings initiated.

IDWR Respondent's Brief, p. 12. The Department's interpretation of CM Rule 43.03 is inconsistent with the plain language of the Rule and the Director's prior ruling.

Conjunctive Management Rule 43.01.d requires that a mitigation plan contain the information necessary for the Director to evaluate the factors set forth in CM Rule 43.03. The Rule states: "A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: Such information as shall allow the Director to evaluate the

factors set forth in Rule Subsection 43.03." IDAPA 37.03.11.043.01.d. There is nothing in this requirement that expressly states, or even implicitly suggests, that the CM Rule 43.03 (a) – (c) factors are "necessary," but the other factors are not.

Similarly, there is nothing in CM Rule 43.03 itself that indicates that (a)-(c) are the "necessary" criteria. The rule simply states:

> 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.
>
> * * *
>
> i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.
>
> 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).

The fact is, the Director allowed Rangen to present evidence regarding injury caused by the Fourth Mitigation Plan. He simply chose to ignore it, and instead conditioned the approval of the Plan on the approval of the transfer application or a lease/rental agreement from the Idaho Water Resource Board. This is inconsistent with the Director's prior ruling.

During the hearing on IGWA's Second Mitigation Plan (the Tucker Springs proposal), IGWA argued that the Director should not consider injury issues in the mitigation plan hearing. The Director rejected IGWA's position, stating:

> 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.***

(Tucker Springs Hrg. Tr., P. 32 L.15 – P. 33 L. 12) (emphasis added). ***IGWA and IDWR do not address the Director's decision to depart from this ruling.*** Frankly, there is no justification for the departure.

After the Director deferred the injury analysis in the Fourth Mitigation Plan, the IWRB then issued a rental agreement for the Magic Springs water. IDWR contends that a material injury

analysis was done in connection with the rental agreement. *See IDWR Respondent's Brief*, p. 14. This argument is not well taken.

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 Blades Affidavit*, Appendix A, Exhibit 2, p. 18).[1] The other addressed the rental application with IGWA and IWRB. (*See Blades Affidavit*, Appendix A, Exhibit 3).

Mr. Remington's Memorandum on the lease agreement expressly states that the lease/rental applications were submitted because Rangen protested the Magic Springs water transfer. (*See Blades Affidavit*, Appendix A, Exhibit 2, p. 18). It states: "This lease rental application is being submitted due to the protesting of the transfer application." (*Id.*). The Memorandum also acknowledges that the IWRB usually does not consider rental applications where transfer proceedings have been initiated or 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.

(*See id.*).

Even though Director Spackman had already conducted a hearing on the injury issue and had the matter under advisement, Mr. Remington superficially addressed the issue. He found that

[1] The parties' Stipulation to Augment the Record was obtained shortly before *IDWR's Response Brief* was due. As a result, there are no page numbers on the attachments to the *Blades Affidavit*. The numbers cited herein were derived by physically counting pages.

the rental agreement could injure trust water rights, but basically concluded that the IWRB was aware of the rental and that the rental agreement could be canceled if injury was proven:

> INJURY TO OTHER WATER RIGHTS: Water right 36-7072 non-consumptively utilizes water that emergences from the ESPA at Magic Springs before it flows into the Snake River. The use of rental water from Magic Springs for the purposes of fish propagation at Rangen should be non-consumptive; water will exit Rangen's facility and flow into Billingsely Creek, a tributary to the Snake River. Though water from this rental should ultimately flow back to the Snake River, water delivered to Billingsley Creek could be diverted and/or consumptively used by other water users on Billingsley Creek before returning to the Snake River. The IWRB minimum stream flow water rights 2-201, 2-223 and 2-224 safeguard flows in the Snake River of 3,900 cfs from April 1 through Oct 31 and 5,600 cfs from Nov. 1 through Mar 31. Injury to the MSF water rights is possible, however the IWRB is aware of this rental and the rental can be approved with standard conditioning that it is subject to reduction or cancelation of injury is proven.

(*See Blades Affidavit*, Appendix A, Exhibit 3, p. 12). This is the exact opposite of the injury analysis required in connection with mitigation plans and transfer applications. Mitigation plans and transfer applications are supposed to be evaluated for injury before they are approved. They are not approved subject to disapproval if someone later proves an injury.

It was certainly no surprise when the Director issued a *Final Order Approving Application for Transfer* for the Magic Springs water on February 19, 2015. (*See Blades Affidavit*, Appendix C, Attachment A-11). By that time, more than four months had elapsed since the October 4th hearing on the Fourth Mitigation Plan and several millions of dollars borrowed from the IWRB had been expended to build the Magic Springs pipeline. The pipeline was complete and already delivering water to Rangen. Under these circumstances, the issuance of the permit was a foregone conclusion. The Director's failure to address the injury issue as part of the Fourth Mitigation Plan deprived Rangen of its right to a full and fair hearing, and, violated CM Rule 43.03. As such, the decision should be reversed.

C. This is the Proper Case for Rangen to Challenge the Director's Decision to Reaverage the Morris Exchange Water Credits in Order to Allow Continued Out-of-Priority Pumping.

IDWR argues that the Court should not address Rangen's assertion that the Director exceeded his authority by allowing out-of-priority pumping to continue under the Fourth Mitigation Plan. IDWR contends that the February and April 2014 stays should have been challenged as part of the First Mitigation Plan and that the Morris Exchange Water credits should be challenged in another separate proceeding. It is important to clarify Rangen's position.

Rangen is challenging the Director's *Order Approving IGWA's Fourth Mitigation Plan* – not the stays that were issued in February and April 2014. Rangen's point in discussing the stays is that the Director, through a series of connected decisions, including the stays, allowed out-of priority pumping to continue for more than a year after his January 29, 2014 decision on Rangen's Delivery Call without ever enforcing curtailment. The Director perpetuated the error when he issued the October 29, 2014 *Order Approving IGWA's Fourth Mitigation Plan*. It is important to note, however, that allowing pumping to continue under the Fourth Mitigation Plan was error independent of the previous stays.

The Director ruled in the *Order Approving IGWA's Fourth Mitigation Plan* that he would not modify the mitigation obligations set forth in connection with the Tucker Springs Plan:

> This approval does not modify the deadline established in the Director's approval of the Second Mitigation Plan. IGWA must provide the full 2.2 cfs mitigation required when credit for the Morris exchange agreement expires on January 19, 2015, or junior-priority ground water pumpers will face curtailment to satisfy the mitigation deficiency unless another mitigation plan has been approved and is providing water to Rangen at its time of need.

(A.R., p. 197 at ¶ 17). As part of this conclusion, the Director Ordered:

> IT IS FURTHER ORDERED that failure to provide water by January 19, 2015, to Rangen to satisfy the 2.2 cfs mitigation deficiency will result in curtailment of junior water rights, unless another mitigation plan has been approved and is providing water to Rangen at its time of need. If IGWA fails to satisfy this

> obligation, at 12:01 a.m. on or before January 19, 2015, users of ground water holding consumptive water rights bearing priority dates junior to August 12, 1973, listed in Attachment A to this order . . . shall curtail/refrain from diversion and use of ground water . . . .

(A.R., p. 198).

This Court has already ruled that the *Order Approving Fourth Mitigation Plan* is what gives effect to the Director's re-averaging of the Morris Exchange Water credits and that this is the proper forum to challenge the decision to re-average for the purpose of avoiding the enforcement of curtailment. After the Director issued the *Order Approving Fourth Mitigation Plan*, IGWA withdrew the Tucker Springs Mitigation Plan as Rangen predicted. IDWR then moved to dismiss Rangen's appeal on mootness grounds. Rangen objected, arguing that the re-averaging was not moot because it was incorporated into the *Order Approving IGWA's Fourth Mitigation Plan*. The Court rejected Rangen's position and expressly held that this is the proper forum to challenge the Director's re-averaging:

> Second, Rangen raises issues related to the Director's decision to re-average the 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.***

(*Rangen's Opening Brief, Appendix 3, p. 4*) (emphasis added).

Despite the Court's clear ruling that this is the proper forum, IDWR again seeks to derail Rangen's challenge. First, IDWR argues that the re-averaging is moot because of the Court's *Memorandum Decision and Order on Petition for Judicial Review* issued in IGWA's First

Mitigation Plan (Twin Falls County Case No. CV 2014-2446) on December 3, 2014 (*See* Exhibit D to *IDWR's Respondent's Brief*). *IDWR's Respondent's Brief*, p. 16. The Court's decision does not make Rangen's challenge moot. Rather, the Court's *Memorandum Decision* establishes precedent that the re-averaging was erroneous. The Court made it clear in the First Mitigation Plan that averaging the Morris Exchange Water credits on an annual basis is improper and so is the use of historical average flows. Instead of arguing that Rangen's challenge is moot, IDWR should acknowledge that the Director's re-averaging decision in the Fourth Mitigation Plan Order was erroneous.

Second, IDWR contends that Rangen did not raise the argument that the Director should use actual tunnel flows in proceedings related to the Fourth Mitigation Plan. IDWR misses the point. The Fourth Mitigation Plan was about the Magic Springs pipeline – not the Morris Exchange Water credit. The Morris Exchange Water credit was decided in the First Mitigation Plan. The Director, *sua sponte*, re-calculated the credit in the Tucker Springs Plan and then he perpetuated the error when he adopted that same reasoning in the Fourth Mitigation Plan. This was not the place for the Director to re-calculate credits, but he did. Rangen argued that it was error in the Tucker Springs appeal and Rangen is arguing that it is error now. It was error to make the decision, it was wrong to use the average historical flows, and it was wrong to grant the credits on an annual basis rather than during the permitted season of use. The decision was made for one reason – to allow junior-priority groundwater pumpers to continue to pump through the 2014 irrigation season even though they had not satisfied the mitigation obligation.

Rangen had to file a motion to get the Director to calculate the Morris Exchange Water credit based on actual flow data. (A.R., p. 262). The Department maintains the Martin-Curren Tunnel flow data, and the Director should have used it when determining credits. The Department

claims that it did not have the "white pipe" data from Rangen until the motion was filed. *IDWR Respondent's Brief*, p. 17. There is a small white pipe that takes water from inside the Martin-Curren Tunnel to the hatch house that Rangen uses occasionally when they are raising eggs and fry. This water is de minimus, but even so, the data was available during the time that the Director could have amended the Order Approving IGWA's Fourth Mitigation Plan. Rangen was outside the time for filing a Motion for Reconsideration, but the Director could and should have amended the Order himself. Instead, he recognized that the junior-priority groundwater pumpers were out of credit in October, but continued to allow them to pump out of priority. This was error.

D. Rangen Bears the Risks with Conditional Approvals.

IGWA and IDWR summarily dismiss Rangen's concerns about the risks associated with the conditional approval of the Fourth Mitigation Plan. IGWA contends that Rangen's questions about the details of the Plan are "moot, trivial, ignorant, or none of Rangen's business." *IGWA's Response Brief*, p. 11. IDWR contends that Rangen's questions are either irrelevant or addressed by the Fourth Mitigation Plan Order or in the documents submitted by IGWA in January 2015. *IDWR Respondent's Brief*, p. 21, fn 12. Rangen's concerns should not be so easily dismissed.

There is one inescapable fact – the *Order Approving IGWA's Fourth Mitigation Plan* allowed out-of-priority pumping to continue without full mitigation. From the time the Plan was approved until the pipeline started delivering water in February 2015, Rangen, the senior user, shouldered the risk that the project would be delayed or not completed at all. There was no back-up plan that would provide Rangen with water if the project failed. Mitigation plans have to have contingency provisions to protect senior users in the event the water becomes unavailable. *See* IDAPA 37.03.11.43.03.c and *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 315 P.3d 828 (2013). This Court invalidated the Director's Methodology Order in the Surface Water Coalition's delivery call because it did not have a contingency plan to protect the

seniors' 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 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 Fourth Mitigation Plan did not have contingency provisions and the fact that the pipeline is now operational does not make the conditional approval of the plan without any contingencies proper.

The fact that the pipeline is now operational also does not eliminate the ongoing risks that Rangen has to shoulder. For example, the *Order Approving the Fourth Mitigation Plan* required *IGWA* to finalize to an agreement with SeaPac for 10 cfs of Magic Springs water in exchange for a long-term lease of the Aqua Life facility from the IWRB. (A.R., pp. 197-98). *IGWA* does not have a lease for the facility. Rather, the North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District obtained the lease. (*See Blades Affidavit*, Appendix C, Attachment A-1). More importantly, the lease they provided states expressly that it cannot be assigned without the written consent of the IWRB: "Tenant may not assign this Lease or sublet all or a part of the Premises unless Tenant first obtains the prior written consent of Landlord, which consent shall not be unreasonably conditioned, withheld or delayed." (*See id.* at p. 7). IGWA and the groundwater districts have not submitted anything to demonstrate that the IWRB has consented to the assignment of the lease to SeaPac.

The Department points out that *IGWA* has been ordered to pay for all costs of building, operating, maintaining and monitoring the pipeline. *IDWR Respondent's Brief*, p. 20. There was no evidence of *IGWA's* ability to pay these ongoing costs. One has to assume that the three impacted ground water districts will actually pay the costs. There was no evidence of their

agreement to pay the costs or how they would be financed or how they would be shared among the three districts. Contrary to IGWA's claim, knowing who has agreed to pay the bills, how they will be financed and who is responsible for the physical work is Rangen's business. It is Rangen's business because Joy Kinyon, the General Manager of Rangen's aquaculture division, testified about the significant expenditures that Rangen is going to make to put the water to use. *See Rangen's Opening Brief*, p. 23. Before Rangen makes significant capital investments and hires additional personnel, it is reasonable to expect transparency from IGWA and the districts to ensure that there is a reasonable framework in place to pay bills and provide ongoing maintenance and repairs. Telling Rangen that these details are none of their business is not reasonable.

IGWA was also ordered to obtain an insurance policy for Rangen's benefit. (A.R., p. 198). The Order fails to specify what type of policy other than it should be for the benefit of Rangen to cover any losses attributable to the failure of the pipeline. *IGWA* did not obtain such an insurance policy. Rather, *North Snake Ground Water District* obtained a policy. It is not a policy that insures Rangen. Rather, it is a commercial liability policy that insures North Snake Ground Water District against *fault-based claims* made by Rangen. (*See Blades Affidavit*, Exhibit 2, Attachment A-10) which means that it may not pay in the event of a power outage. The policy is also a *claims made* policy which means that it has to be in place at the time of a loss or else there is no coverage. (*See id.*).

The pipeline is a mechanical system dependent upon electricity. It is a given that it will fail at some point in time. The question is when and under what circumstances. There may or may not be fault for the failure (which means that there may or may not be insurance) and three of the potentially responsible parties (IGWA, Magic Valley Ground Water District and Southwest Irrigation District) are not even insured under the policy. While both IDWR and IGWA point

repeatedly to the insurance policy as a safeguard for Rangen, the policy does not provide adequate protection. The Fourth Mitigation Plan was approved without adequate contingencies and back-up plans. As such, the Director's decision should be reversed.

E. Rangen's Substantial Rights Have Been Impacted by the Approval and Implementation of the Fourth Mitigation Plan.

Rangen's substantial rights have been impacted by the approval and implementation of the Fourth Mitigation Plan. The Fourth Mitigation Plan sanctions continued pumping and declining spring flow, which affect the water available to Rangen's water rights. The *Order Approving IGWA's Fourth Mitigation Plan* allowed out-of-priority pumping without the delivery of the required mitigation water. Rangen had to bear the risk that the project would not be completed and it still bears the risk of system failures going forward. IGWA's deliberate lack of transparency concerning who is actually paying for ongoing maintenance and monitoring costs and who is responsible for doing the work is unreasonable. Rangen has a legitimate interest in having the information so that it can be assured that its financial investments in the facility will be protected. While IGWA and IDWR quickly point to the insurance policy to protect Rangen, the reality is that the fault-based, claims made liability insurance policy protects North Snake Ground Water District in the event of a negligence suit, but it does not insure Rangen's interests.

III. 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 10th day of April, 2015.

BRODY LAW OFFICE, PLLC

By _____
Robyn M. Brody

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By _____
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By _____
Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 10th day of April, 2015 he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

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for J. Justin May