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-2014-4970

IDAHO DEPARTMENT OF WATER RESOURCES' BRIEF IN RESPONSE TO RANGEN, INC.'S OPENING BRIEF

Judicial Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, District Judge, Presiding

ATTORNEYS FOR RESPONDENTS

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Deputy Attorneys General for Gary Spackman, Director, and the Idaho Department of Water Resources

ATTORNEYS FOR PETITIONER

J. JUSTIN MAY
MAY BROWNING
1419 W. Washington
Boise, Idaho 83702
jmay@maybrowning.com

ROBYN BRODY
BRODY LAW OFFICE
P.O. Box 554
Rupert, Idaho 83350
robynbrody@hotmail.com

FRITZ HAEMMERLE
HAEMMERLE & HAEMMERLE
P.O. Box 1800
Hailey, Idaho 83333
fxh@haemlaw.com

Attorneys for Rangen, Inc.

ATTORNEYS FOR INTERVENORS

RANDALL C. BUDGE
THOMAS J. BUDGE
RACINE OLSON NYE BUDGE &
BAILEY, CHTD.
P.O. Box 1391
Pocatello, Idaho 83204
rcb@racinelaw.com
tjb@racinelaw.com

Attorneys for Idaho Ground Water Appropriators, Inc.

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STATEMENT OF CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which Rangen, Inc. ("Rangen"), appeals an order issued by the Director ("Director") of the Idaho Department of Water Resources ("Department") in response to *Rangen, Inc's Motion to Determine Morris Exchange Water Credit and Enforce Curtailment* ("Morris Exchange Motion"). The order appealed is the *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* ("Morris Exchange Order").

B. PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

Issues raised in this appeal stem from the *Petition for Delivery Call* filed by Rangen with the Department on December 13, 2011, alleging Rangen is not receiving all of the water it is entitled to pursuant to water right nos. 36-2551 and 36-7694, and is being materially injured by junior-priority ground water pumping. In the delivery call proceeding, the Director issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order").[1] The Director ordered curtailment of junior-priority ground water rights, but that curtailment could be avoided if the junior ground water users participated in a mitigation plan that would provide "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Supp. A.R. CM-DC-2011-004* at 42.[2] The Curtailment Order explained that mitigation provided to Rangen "may be phased-in

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[1] The Curtailment Order was appealed in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-1338. This Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* ("Decision") on October 24, 2014. The Decision has been appealed to the Idaho Supreme Court, Docket Nos. 42772-2015, 42775-2015, and 42863-2015.

[2] The record in this case includes several documents filed with the Department in CM-DC-2011-004. These documents are located on the CD submitted to the Court in the sub-file entitled CM-DC-2011-004 Supp AR. Citations to these documents will be noted as particular pages of *Supp. A.R. CM-DC-2011-004.*

over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first 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." *Id.*

On February 11, 2014, Idaho Ground Water Appropriators, Inc. ("IGWA"), filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("First Mitigation Plan") which set forth nine proposals to avoid curtailment imposed by the Curtailment Order. *Supp. A.R. CM-DC-2011-004* at 105-06. On May 16, 2014, the Director issued the *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("First Mitigation Plan Order"). *Id.* at 309-32. The Director approved partial mitigation credit for only two proposals: (1) IGWA's past and ongoing aquifer enhancement activities; and (2) exchange of irrigation water diverted from the Martin-Curren Tunnel by Howard (Butch) and Rhonda Morris with operational spill water from the North Side Canal Company ("Morris exchange agreement"). *Id.* at 328. Rangen challenged the Director's determination of mitigation credit for the Morris exchange agreement in its June 13, 2014, petition for judicial review of the First Mitigation Plan Order. *A.R. CV-2014-2446* at 644.[3]

On March 10, 2014, during the pendency of First Mitigation Plan proceedings, IGWA filed with the Department *IGWA's Second Mitigation Plan and Request for Hearing* ("Second Mitigation Plan"). *Supp. A.R. CM-DC-2011-004* at 353. The Second Mitigation Plan proposed delivery of up to 9.1 cfs of water from Tucker Springs through a 1.3 mile pipeline to the fish research and propagation facility owned by Rangen ("Rangen Facility"). *Id.* On June 20, 2014, the Director issued the *Order Approving IGWA's Second Mitigation Plan, Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* ("Second Mitigation Plan Order").

[3] The record in this case includes documents filed in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-2446. Citations to these documents will be noted as particular pages of *A.R. CV-2014-2446.*

Id. at 352-75. The Director recalculated the period of time the Morris exchange agreement was recognized as mitigation. *Id.* at 357-58. The Director determined that mitigation credit from the Morris exchange agreement (2.2 cfs), in combination with mitigation credit from aquifer enhancement activities (1.2 cfs), would provide full mitigation to Rangen during the first year of phased-in mitigation (3.4 cfs for April 1, 2014, through March 31, 2015) until January 19, 2015. *Id.* at 357-58, 369. The Director ordered that failure to provide 2.2 cfs of water to Rangen by January 19, 2015, would result in curtailment of water rights junior or equal to August 12, 1973, unless another mitigation plan was approved and providing the water to Rangen. *Id.* at 369.

On August 27, 2014, IGWA filed *IGWA's Fourth Mitigation Plan and Request for Expedited Hearing* ("Fourth Mitigation Plan").[4] *A.R. CV-2014-4633* at 1-24.[5] The Fourth Mitigation Plan consists of the "Magic Springs Project." *Id.* at 2-3. The Magic Springs Project called for IGWA to lease or purchase 10.0 cfs of water right no. 36-7072 owned by SeaPac of Idaho ("SeaPac") and then pipe the water approximately 1.8 miles from SeaPac's Magic Springs facility to the head of Billingsley Creek directly up gradient from the Rangen Facility. *Id.* at 2, 11. On October 29, 2014, the Director issued the *Order Approving IGWA's Fourth Mitigation Plan* ("Fourth Mitigation Plan Order"). *Id.* at 178-240. The Director approved the Fourth Mitigation Plan upon several conditions and with contingencies to protect Rangen. *Id.* at 197-98. The Director reiterated that IGWA must provide 2.2 cfs mitigation to Rangen when credit for the Morris exchange agreement expired on January 19, 2015, or junior-priority ground water pumpers would be curtailed to satisfy the mitigation deficiency. *Id.* at 197.

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[4] On June 10, 2014, IGWA filed with the Department *IGWA's Amended Third Mitigation Plan and Request for Hearing*. Several protests were filed. A status conference was held on March 17, 2015, wherein the parties requested the Director take no further action on the Amended Third Mitigation Plan until after issuance of a decision regarding Application for Permit 36-17011.

[5] The record in this case includes documents filed in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-4633. Citations to these documents will be noted as particular pages of *A.R. CV-2014-4633*.

On October 31, 2015, Rangen filed the Morris Exchange Motion with the Department. *A.R. CV 2014-4970* at 1-10. Rangen also filed the *Affidavit of J. Justin May in Support of Rangen, Inc.'s Motion to Determine Morris Exchange Water Credit and Enforce Curtailment* which included Martin-Curren Tunnel measurements for April 15, 2014, through October 15, 2014. *Id.* at 6. These measurements demonstrated the Morris exchange agreement provided full mitigation to Rangen only through October 1, 2014. *Id.* at 7. Rangen requested the Director re-calculate mitigation credit for the Morris exchange agreement utilizing the measurement data supplied by Rangen and curtail out-of-priority ground water pumping. *Id.* at 8.

On November 21, 2014, the Director issued the Morris Exchange Order. *Id.* at 99-149. The Director concurred with Rangen that Martin-Curren Tunnel measurements for April 15, 2014, through October 15, 2014, demonstrated the Morris exchange agreement provided full mitigation to Rangen only through October 1, 2014, and that the Director must order curtailment to address the shortfall. *Id.* at 100-02. The Director adopted the January 19, 2015, curtailment date from prior orders discussed above. *Id.* at 102. The Director also ordered an increase in the amount of water that must be delivered on January 19, 2015. *Id.* Specifically, the Director ordered that, due to the shortfall in the Morris exchange agreement credit, to forestall curtailment on January 19, 2015, junior ground water users must deliver direct flow mitigation equal to 5.5 cfs beginning January 19, 2015, and continuing through March 31, 2015. *Id.* at 101-02. This appeal challenges the Morris Exchange Order.

ISSUES PRESENTED ON APPEAL

Respondents' formulation of the issues presented on appeal is as follows:

1) Whether Rangen has demonstrated prejudice to a substantial right.

2) Whether the Director abused his discretion by adopting the January 19, 2015, curtailment date in the Morris Exchange Order.

3) Whether Rangen can use this proceeding to challenge prior orders issued by the Director.

STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 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 affirm the agency decision unless it finds 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); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

ARGUMENT

A. <u>THE MORRIS EXCHANGE ORDER SHOULD BE AFFIRMED BECAUSE RANGEN'S SUBSTANTIAL RIGHTS HAVE NOT BEEN PREJUDICED.</u>

It is well established that the party challenging an agency decision must demonstrate the agency erred in a manner specified in I.C. § 67–5279(3) and that a substantial right of that party has been prejudiced. *Wheeler v. Idaho Dep't of Health & Welfare,* 147 Idaho 257, 260, 207 P.3d 988, 991 (2009). However, an agency's decision may be affirmed solely on the grounds that the petitioner has not shown prejudice to a substantial right. *Hawkins v. Bonneville Cnty. Bd. of Comm'rs,* 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). In other words, the courts may forego analyzing whether an agency erred in a manner specified by I.C. § 67–5279(3) if the petitioner does not show that a substantial right has been prejudiced. *Id.*

Here, Rangen asserts its "substantial rights have been prejudiced" by the Morris Exchange Order because it "diminished Water Right Nos. 36-02551 and 36-07694, as those rights were decreed by the Snake River Basin Water Adjudication and permitted and licensed by the Department." *Opening Brief* at 9. Rangen asserts its "substantial rights have been prejudiced by the failure of the Director and Department to deliver the amount of water necessary to address Rangen's injury caused by junior-groundwater pumping." *Id.*

Rangen has not demonstrated prejudice to a substantial right. The Morris Exchange Order granted Rangen's request to require that IGWA deliver additional water to Rangen in order to make up for the shortfall in the Morris exchange agreement credit. The Morris Exchange Order required delivery of an amount of water necessary to address material injury to water right nos. 36-2551 and 36-7694 as identified in the Curtailment Order by January 19, 2015. In addition, on January 20, 2015, IGWA filed a *Motion to Stay Curtailment Order* in this matter, requesting the Court stay curtailment of junior ground water rights identified in the Morris

Exchange Order "until February 7, 2015, so that it may complete construction of its Magic Springs mitigation project." *Order Granting Motion to Stay Curtailment Order* at 1, Case No. CV-2014-4970 (Fifth Jud. Dist. Ct. Jan. 22, 2015) ("Order Granting Stay"). The Court granted IGWA's request and "ordered that IGWA complete the Magic Springs project per the Director's specifications on or before February 7, 2015, and that IGWA deliver 7.81 cfs as mitigation to Rangen to make up for the delay on or before February 7, 2015." *Id.* at 2. Measurements for the Magic Springs pipeline taken in February and March 2015 demonstrate that Rangen received at least 7.81 cfs of water in accordance with the Court's Order Granting Stay. *See Stipulation to Augment the Record* ("Stipulation") at Attachment A-12, Case No. CV-2014-4633.[6] Rangen cannot demonstrate prejudice to a substantial right because IGWA has delivered to Rangen the amount of water necessary to address material injury to water right nos. 36-2551 and 36-7694 as identified in the Curtailment Order and required by this Court in its Order Granting Stay. In other words, Rangen has failed to demonstrate prejudice to a substantial right as material injury to water right nos. 36-2551 and 36-7694 has been mitigated for by IGWA's delivery of water to Rangen. Therefore, the Court should affirm the Morris Exchange Order on grounds that Rangen has not shown prejudice to a substantial right.

[6] A copy of Attachment A-12 to the *Stipulation* is attached hereto as Appendix A. Respondents move the Court to take judicial notice of Attachment A-12 to the *Stipulation* pursuant to IRE 201(d). 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) emphasis added. "Judicial notice may be taken at any stage of the proceeding." IRE 201(f).

B. THE DIRECTOR'S ADOPTION OF THE JANUARY 19, 2015, CURTAILMENT DATE IN THE MORRIS EXCHANGE ORDER WAS REACHED THROUGH A PROPER EXERCISE OF DISCRETION.

Even if the Court considers whether the Director erred in a manner specified in I.C. § 67–5279(3), the Director's adoption of the January 19, 2015, curtailment date in the Morris Exchange Order was reached through a proper exercise of discretion. Again, in granting the Morris Exchange Motion, the Director concurred with Rangen's analysis that Martin-Curren Tunnel measurements for April 15, 2014, through October 15, 2014, demonstrated the Morris exchange agreement provided full mitigation to Rangen only through October 1, 2014, and that the Director must order curtailment to address the shortfall. *A.R. CV 2014-4970* at 100-02. However, the Director did not order immediate curtailment, but ordered that junior ground water users would be curtailed in approximately sixty days unless they provided additional mitigation to make up the shortfall in the Morris exchange agreement credit. The Director stated:

> 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.

Id. at 102. The Director concluded that sixty days was "a reasonable timeframe for junior ground water users to plan for curtailment," and, because "[j]unior ground water users should have already been planning for the contingency that curtailment could occur on January 19, 2015," the Director adopted January 19, 2015, as the curtailment date. *Id.*

Rangen challenges the Director's decision not to immediately order curtailment of the junior ground water users. Rangen argues the CM Rules[7] and the prior appropriation doctrine mandate immediate curtailment upon a determination of material injury unless a mitigation plan is in place. *Opening Brief* at 7. Rangen also argues the Director "exceeded his authority and violated Idaho law" by not immediately curtailing junior ground water pumping. *Id.* at 8.

Contrary to Rangen's argument, the Director is not required to immediately order curtailment of water users and may, in an exercise of discretion, delay the time for curtailment for a reasonable period to account for practical considerations such as the need to find alternative water supplies for cattle. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) ("Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director."); *see also* IDAPA 37.03.11.040.01.a (Upon a finding by the Director that material injury is occurring, the Director shall "[r]egulate 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, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may . . . be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment."). The fact that the Director has discretion under Idaho law to stay enforcement of any order issued by the Director further supports that the Director may allow a reasonable delay in time for curtailment to take effect. *See Order Denying Application for Alterative Writ of Mandate*, Case No. CV-2014-272 (Fifth

[7] 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.

Jud. Dist. Ct. May 23, 2014); IDAPA 37.01.01.780; I.C. § 67-5274 and I.R.C.P. 84(m); *see also Bank of Idaho v. Nesseth,* 104 Idaho 842, 846, 664 P.2d 270, 274 (1983). In determining whether an agency abused its discretion, the Court "must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 813, 252 P.3d 71, 94 (2011).

Here, the Director adopted the January 19, 2015, curtailment date in the Morris Exchange Order in recognition that the CM Rules and Idaho law allow the Director, in an exercise of discretion, to delay the time for curtailment to take effect. The Director adopted the January 19, 2015, curtailment date upon an analysis of the potential injurious affect of immediate curtailment to junior ground water users and to Rangen. Specifically, the Director determined that immediate curtailment would not quickly increase water supplies to Rangen or restore Martin-Curren Tunnel flows that have been declining over a number of years, but would cause unreasonable injury to others including immediate elimination of the likely sole source of drinking water for livestock. It was within the Director's discretion to delay, or in effect stay, immediate enforcement of curtailment pursuant to that analysis. *See McHan v. McHan*, 59 Idaho 41, 80 P.2d 29, 31 (1938) (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."). In sum, consistent with the CM Rules and Idaho law, the Director perceived the issue of whether to immediately curtail junior-priority ground water users as discretionary. The Director's analysis of the potential injurious affect of immediate curtailment to junior ground water users and to Rangen was within the limits of the

Director's discretion and consistent with applicable legal standards. The Director's decision to adopt the January 19, 2015, curtailment date was reached through an exercise of reason. The Director did not err by adopting the January 19, 2015, curtailment date in the Morris Exchange Order.

C. ASSIGNMENTS OF ERROR REGARDING ORDERS ISSUED BY THE DIRECTOR PRIOR TO THE MORRIS EXCHANGE ORDER SHOULD NOT BE CONSIDERED IN THIS APPEAL.

While this appeal is from the Morris Exchange Order, Rangen appears to challenge multiple decisions of the Director since issuance of the Curtailment Order. Specifically, Rangen implies the Director erred by granting stays on February 21, 2014, and April 28, 2014, and appears to challenge the Director's approval of IGWA's Second and Fourth Mitigation Plans. As discussed below, such challenges are not appropriate for the Court to consider in this proceeding.

1. Orders Granting Requests for Stay

Rangen mentions that, on February 21, 2014, the Director issued an *Order Granting IGWA's Petition to Stay Curtailment. Opening Brief* at 4. Rangen also mentions the Director's decision to issue the April 28, 2014, *Order Granting IGWA's Second Petition to Stay Curtailment. Id.* at 4-5. To the extent Rangen seeks to challenge the Director's issuance of these stays in this proceeding, those challenges are barred by claim preclusion. Specifically, claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (quotations and citations omitted). Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the

present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action. *Ticor Title Co. v. Stanion,* 144 Idaho 119, 125–27, 157 P.3d 613, 618–20 (2007).

Here, Rangen could have challenged the Director's decisions to issue the February 21, 2014, and April 28, 2014, stays in its petition for judicial review of the First Mitigation Plan Order in Case No. CV-2014-2446 dated June 13, 2014. Case No. CV-2014-2446 ended in a final judgment on the merits when the Court entered its *Memorandum Decision and Order on Petition for Judicial Review* ("2446 Decision")[8] and *Judgment* on December 3, 2014, and its *Remittitur* on January 26, 2015. Rangen's challenges to the above-described stays arise out of the same series of transactions as Rangen's appeal of the First Mitigation Plan Order. Accordingly, Rangen's failure to raise challenges to the Director's issuance of the February 21, 2014, and April 28, 2014, stays in its appeal of the First Mitigation Plan Order means claim preclusion prevents Rangen from raising those challenges here.

2. Orders Approving IGWA's Second and Fourth Mitigation Plans

Rangen appears to challenge decisions made by the Director in approving IGWA's Second and Fourth Mitigation Plans related to calculation of mitigation credit for the Morris exchange agreement. *Opening Brief* at 5-6. As stated above, this Court entered its 2446 Decision with respect to Rangen's appeal of the First Mitigation Plan Order on December 3, 2014. The Court concluded the Director's approval of mitigation credit for the Morris exchange agreement did not violate the prior appropriation doctrine, but reversed and remanded the Director's use of flow data associated with an average year and use of an annual time period to

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[8] A copy of the 2446 Decision is attached hereto as Appendix B. Respondents move the Court to take judicial notice of the 2446 Decision pursuant to IRE 201(d).

calculate the mitigation credit for further proceedings as necessary. *2446 Decision* at 10-15. Because the Court reversed and remanded the issue of calculation of the Morris exchange agreement credit, the issue is currently before the Department on remand and, therefore, moot in this proceeding.

D. RANGEN IS NOT ENTITLED TO ATTORNEY FEES.

In order for attorney fees to be awarded, authority and argument establishing a right to attorney fees must be presented in the first brief filed by a party on appeal. *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009). While Rangen demanded attorney fees pursuant to Idaho Code § 12-117 and Idaho Rule of Civil Procedure 54 in its *Petition for Judicial Review* filed on December 19, 2014, Rangen presents no argument in support of this demand in its opening brief on appeal. Even if the Court considers Rangen's request for attorney fees, the Director's factual findings are supported by substantial and competent evidence and his determinations of legal issues are not clearly erroneous. Rangen is not entitled to an award of attorney fees in this matter.

CONCLUSION

The Morris Exchange Order should be affirmed because Rangen has not demonstrated prejudice to a substantial right. In addition, the Director's decision to adopt the January 19, 2015, curtailment date in the Morris Exchange Order was reached through a proper exercise of discretion. Claim preclusion prevents Rangen from challenging stays issued by the Director on February 21, 2014, and April 28, 2014. Challenges related to calculation of the Morris exchange agreement credit are moot in this proceeding. Rangen is not entitled to attorney fees on appeal. Rangen has not demonstrated the Director's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; unsupported by substantial evidence in the record; or arbitrary, capricious, or an abuse of discretion. The Court should affirm the Morris Exchange Order.

DATED this 24th day of April 2015.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

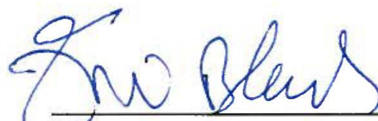
CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

Garrick L. Baxter
Emmi L. Blades
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April 2015, I caused to be served a true and correct copy of the foregoing document by the method indicated, to the following:

Original to: SRBA District Court 253 3RD AVENUE NORTH PO BOX 2707 TWIN FALLS ID 83303-2707 Facsimile: (208) 736-2121	( ) U.S. Mail, Postage Prepaid (x) Hand Delivery ( ) Facsimile ( ) E-mail
J JUSTIN MAY MAY BROWNING 1419 W WASHINGTON BOISE ID 83702 jmay@maybrowning.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) E-mail
ROBYN BRODY BRODY LAW OFFICE PO BOX 554 RUPERT ID 83350 robynbrody@hotmail.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) E-mail
FRITZ HAEMMERLE HAEMMERLE & HAEMMERLE PO BOX 1800 HAILEY ID 83333 fxh@haemlaw.com	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) E-mail
RANDALL C BUDGE TJ BUDGE RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Facsimile (x) E-mail



EMMI L. BLADES
Deputy Attorney General

APPENDIX A

ATTACHMENT A-12

White, Kimi

Subject: FW: Measurements for Magic Springs Pipeline

From: Baxter, Garrick
Sent: Tuesday, March 17, 2015 9:28 PM
To: Robyn Brody
Cc: Tessa Sparrow; Justin May; Randy Budge; fxh@haemlaw.com; Blades, Emmi; TJ Budge
Subject: RE: Measurements for Magic Springs Pipeline

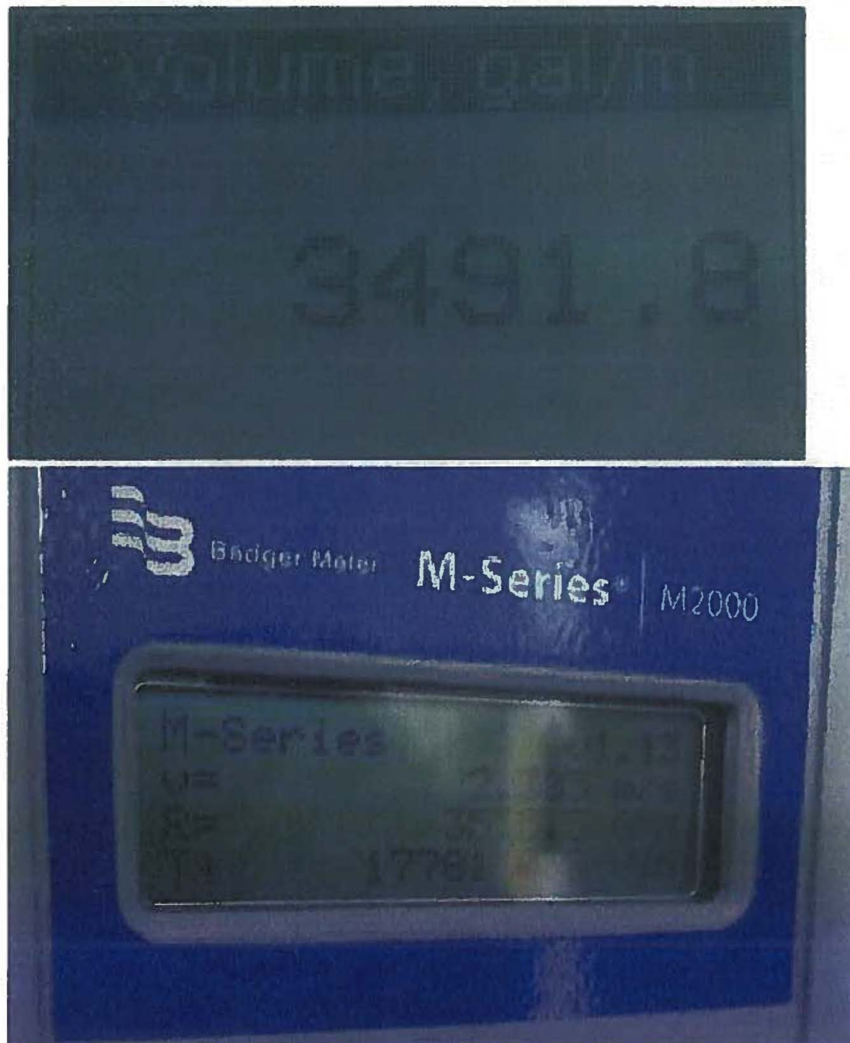
Robyn,
Tim Luke provided me the following chart with updated measurement information:

Date	Time	Instantaneous Flow Rate (gpm)	Instantaneous Flow Rate (cfs)	Totalized Volume (gallons)	Entity Reporting Measurement	Comments
2/6/2015	16:58	3511.3	7.82	12,545,173	SPF/IGWA	Start of flow being delivered t
2/9/2015	11:25	3515	7.83	26,464,663	WD130/IDWR	WD130/IDWR calibration mea cfs
2/19/2015	14:00	3518.8	7.84	77,581,028	SPF/IGWA	
2/27/2015	13:05	3530	7.86	117,103,182	WD130/IDWR	
3/4/2015	10:20	3507.5	7.81	141,807,034	SPF/IGWA	
3/11/2015	11:43	3507.2	7.81	177,275,120	SPF/IGWA	SPF meas 7.78 cfs on 16" pipe discharge at Bridge diversion

Tim also provided the following email regarding flow measurements:

> **From:** Peter Cooper [mailto:PCooper@spfwater.com]
> **Sent:** Thursday, March 12, 2015 12:38 PM
> **To:** Luke, Tim
> **Cc:** Yenter, Cindy; charles.e.brockway@brockwayeng.com; Bob Hardgrove
> **Subject:** Rangen Flow Measurement
>
> Tim-
>
> Bob and I were down at Magic Springs yesterday. At our IDWR meeting last week, Chuck requested that we measure lengths of the 16" pipe that discharges to Rangen's bridge diversion box. We took some measurements yesterday and I've attached a pdf showing what we found out. Like we discussed at the meeting, this portion was field fit and so it is difficult to tell the exact length of the pipe coming up at a 45 degree angle because most of it is underground, but it is roughly 5' in length, with approximately 2' sticking out of the ground. I was focused on the angled pipe in the field, and did not think about getting a length on the horizontal pipe until this morning. Looking at our survey data, the horizontal portion is approximately 12' long from the elbow to the beginning of the discharge opening.
>
> While we were there, we took a flow measurement on the 16" pipe with our GE Panametrics ultrasonic flow meter. We found that we were able to take a decent measurement on the horizontal pipe. We stayed on the upstream portion of the straight pipe (approx. 2.5' downstream of the elbow) to help ensure the pipe was full and did not try measuring further downstream. Here is a screenshot of the flow meter screen showing a flow rate of 3,492 gpm. The flow rate at the Magic Springs flow meter was 3,515 gpm an hour or so before taking the

reading at Rangen. As Chuck stated in our call, the piping configuration is not ideal for obtaining a 100% accurate measurement, i.e. the upstream bend, pipe potentially not 100% full, etc. Even with these potential inaccuracies, this should help validate the water that is being pumped from Magic Springs is making it to Rangen. Note to Cindy: They promise to get the flow meter parameters changed this Friday.



Please let me know if you have any further questions.

Thanks-

Peter Cooper, P.E. | Project Engineer
SPF Water Engineering, LLC
300 E Mallard Drive, Suite 350 | Boise, ID 83706
p. 208.383.4140 | f. 208.383.4156 | c. 208.921.7799
e. pcooper@spfwater.com | w. www.spfwater.com

Let me know if you have questions.
Thanks,
Garrick

From: Baxter, Garrick
Sent: Wednesday, March 04, 2015 9:00 AM

To: 'TJ Budge'; Robyn Brody
Cc: Tessa Sparrow; Justin May; Randy Budge; fxh@haemlaw.com
Subject: RE: Measurements for Magic Springs Pipeline

Robyn,
I forwarded your request to Cindy. Here is what she said:

> I have checked the flow twice. Both times it was 7.8 cfs.

Is this sufficient or would you like me to ask Cindy if there is written documentation related to her visit?
Garrick

From: TJ Budge [mailto:tjb@racinelaw.net]
Sent: Tuesday, March 03, 2015 5:10 PM
To: Robyn Brody
Cc: Baxter, Garrick; Tessa Sparrow; Justin May; Randy Budge; fxh@haemlaw.com
Subject: Re: Measurements for Magic Springs Pipeline

Robyn,

It's set at 7.81 cfs per Judge Wildman order granting stay. Garrick can confirm.

TJ

On Mar 3, 2015 4:41 PM, Robyn Brody <robynbrody@hotmail.com> wrote:
Dear Garrick,

Can you please provide us with the water measurements for the water going in to the Magic Springs pipeline as soon as possible?

Thank you.

Robyn

Robyn M. Brody
Brody Law Office, PLLC
PO Box 554
614 Fremont
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780

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APPENDIX B

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

DEC - 3 2014

By________________ Clerk
________________ Deputy Clerk

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.

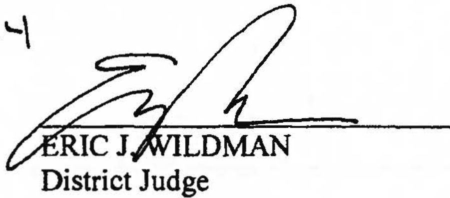
IV.

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

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW was mailed on December 04, 2014, with sufficient first-class postage to the following:

MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS, ID 83301-3029
Phone: 208-733-0700

RANGEN, INC
Represented by:
FRITZ X HAEMMERLE
PO BOX 1800
HAILEY, ID 83333
Phone: 208-578-0520

IDAHO DEPARTMENT OF WATER
Represented by:
GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

RANGEN, INC
Represented by:
J JUSTIN MAY
1419 W WASHINGTON
BOISE, ID 83702
Phone: 208-429-0905

RANGEN, INC
Represented by:
ROBYN M BRODY
BRODY LAW OFFICE, PLLC
PO BOX 554
RUPERT, ID 83350
Phone: 208-434-2778

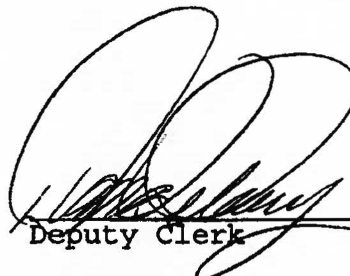
IDAHO GROUND WATER
Represented by:
THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391

Phone: 208-232-6101

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
Represented by:
TRAVIS L THOMPSON
195 RIVER VISTA PL STE 204
TWIN FALLS, ID 83301-3029
Phone: 208-733-0700

AMERICAN FALLS RESERVOIR
MINIDOKA IRRIGATION DISTRICT
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318-0248
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098



 Deputy Clerk