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

RANGEN, INC.,

Petitioner,

vs.

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

Respondent,

vs.

IDAHO GROUND WATER APPRO-
PRIATORS, INC.,

Intervenors.

Case No. CV-2014-4970

IGWA's Response Brief

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, through counsel, submits this brief in response to *Rangen, Inc's Opening Brief* filed March 27, 2015. This brief is submitted pursuant to Rule 84(p) of the Idaho Rules of Civil Procedure and this Court's *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* issued January 2, 2015.

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STATEMENT OF THE CASE

1. Nature of the Case

Rangen, Inc. (“Rangen”) again takes issue with efforts aimed at providing it water at its fish propagation facility, this time appealing the *Order Granting Rangen’s Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* (the “Order”) issued by the Director of the Idaho Department of Water Resources (IDWR) on November 21, 2014.¹ The Director had previously concluded that the Morris Exchange Agreement provided IGWA mitigation credit through January 19, 2015, and that on this date, IGWA’s Fourth Mitigation Plan, known as “the Magic Springs Project,” would be completed and delivering sufficient mitigation water to Rangen’s facilities.² However, the Order grants Rangen’s motion to recalculate the “Morris Exchange Credit,” and concludes they had already expired.³ Rangen complains that the Director did not, upon recalculating the Morris Exchange Credit, order immediate curtailment but instead ordered IGWA to provide an additional 3.3 of mitigation water via the Magic Springs Project to make up for this shortfall.⁴

2. Procedural History and Statement of Facts

Rangen, Inc.’s Opening Brief develops a large portion of the history leading up to this appeal, most of which is irrelevant for purposes of the instant appeal. The following history and facts are relevant.

Previous to granting the Motion, the Director had ordered IGWA to provide 2.2 cfs of mitigation water to Rangen by January 19, 2015, as part

¹ R. Vol. 1 at 99-149 (*Order Granting Rangen’s Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order*).

² See R. Vol. 1 at 101-02.

³ R. Vol. 1 at 101-02

⁴ R. Vol. 1 at 102.

of the approved Fourth Mitigation Plan.⁵ This mitigation obligation was based on the Director's conclusion that the Morris Exchange Agreement provided sufficient mitigation credit through January 19, 2015.⁶

On October 31, 2014, Rangen filed *Rangen, Inc.'s Motion to Determine Morris Exchange Water Credit and Enforce Curtailment*.⁷ Three weeks later, the Director issued the Order, which is the subject of the current appeal.⁸

As stated above, the Order grants Rangen's motion to recalculate the Morris Exchange Agreements credits and concludes they had already expired.⁹ Rather than order immediate curtailment, however, the Director recognized that "instantaneous curtailment will not immediately increase water supplies to Rangen."¹⁰ IGWA was in the midst of constructing the Magic Springs Project on an incredibly ambitious schedule that to meet the January 19, 2015 deadline. The Director ordered IGWA to provide an additional 3.3 of mitigation water via this pipeline project by the same deadline, exactly sixty days after the Order issued.¹¹ Thus, the Order increased IGWA's obligation to 5.5 cfs beginning January 19, 2015.¹²

On December 19, 2014, Rangen filed its *Petition for Judicial Review*.¹³

3. Standard on Review

The standard of review set forth in *Rangen, Inc.'s Opening Brief* is adequate.¹⁴

⁵ R. Vol. 1. at 102.

⁶ R. Vol. 1 at 101.

⁷ R. Vol. 1 at 1-10 (*Rangen, Inc.'s Motion to Determine Morris Exchange Water Credit and Enforce Curtailment*).

⁸ R. Vol. 1 at 99-149 (*Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order*).

⁹ R. Vol. 1 at 101-02

¹⁰ R. Vol. 1 at 102.

¹¹ R. Vol. 1 at 102.

¹² R. Vol. 1 at 102.

¹³ R. Vol. 1 at 150-59 (*Petition for Judicial Review*).

ISSUES PRESENTED ON APPEAL

The Idaho Administrative Procedures Act (IDAPA) provides several grounds upon which parties can appeal agency action. *Rangen's Opening Brief* does not provide a list of the issues presented on appeal as required by rule 35(a)(4) of the Idaho Appellate Rules.¹⁵ Based on its brief, Rangen only appeals under two of these grounds: that the Order is: “(a) in violation of constitutional or statutory provisions” and “(b) in excess of the statutory authority of the agency.”¹⁶

Rangen does not argue that the Order was “(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.”¹⁷ Consequently, these bases should not be considered.

ARGUMENT

1. The Director did not exceed his statutory authority.

Rangen makes the bare allegation that, by allowing out-of-priority pumping, the Director exceeded his authority. Beyond this bare allegation, Rangen does not identify specific conduct “in excess of the statutory authority of the [Director].”¹⁸ “It is the burden of the party contesting the [agency’s] decision to show how the [agency] erred in a manner specified under Idaho Code § 67-5279”¹⁹

Rangen has failed to meet its burden on this issue. The agency action complained of in this appeal fits squarely within the Director’s statutory authority. Idaho Code § 42-602 states: “The director of the department of

¹⁴ *Rangen's Inc.'s Opening Br.* at 7.

¹⁵ See I.A.R. 35(a)(4).

¹⁶ I.C. § 67-5279(3).

¹⁷ *Id.*

¹⁸ I.C. § 67-5279(3)(b).

¹⁹ *Wheeler v. Idaho Dep't of Health & Welfare*, 147 Idaho 257, 260 (2009).

water resources shall have direction and control of the distribution of water from all natural water sources within a water district” By allowing out-of-priority pumping until January 19, 2015, the Director made a decision that “control[led] the distribution of water,” in fulfillment of his statutory duty. Although Rangen is displeased with the Director’s decision, it does not identify any conduct that falls outside the Director’s statutory authority. As a result, the Court should find that the Director acted within his authority.

2. The Director did not violate Idaho’s doctrine of prior appropriation.

Next, Rangen contends the Order violates Idaho law because, rather than immediately impose curtailment, it gave junior ground water users sixty days to plan for curtailment and/or provide mitigation water. Rangen suggests that the prior appropriation doctrine under Idaho law is a rigid rule that gives no thought to senior water users’ needs, junior water users’ circumstances, or the immediate results of curtailment.

Rangen’s view is simply not the law in Idaho. In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007), the Idaho Supreme Court explained that the prior appropriation doctrine requires the Director to use his discretion. It stated:

While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. . . . [T]he Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. *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.* This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly

developed record, this Court can determine whether that exercise of discretion is being properly carried out.²⁰

Similarly, the prior appropriation doctrine should not be rigidly applied so as to immediately curtail all ground water users within a zone of curtailment in all circumstances. Rather, when administering a curtailment order based on priority, the Director has a duty consider the unique circumstances of each curtailment, including the senior user's needs, the public's interest in Idaho water, and whether curtailment will result in waste or non-use of water that could otherwise be put to beneficial use.

In considering these factors, the Director cannot ignore priority, but he need not enforce it completely mechanically either. "While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception."²¹ Alongside priority is the doctrine of beneficial use: "The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use."²² This doctrine does not allow "water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use."²³ It requires the Director to consider "reasonableness of the senior water right diversion . . . and reasonableness of use."²⁴ These are discretionary decisions: "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."²⁵

²⁰ *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880 (2007) ("AFRD2") (emphasis added).

²¹ *Id.*

²² *A&B Irrigation v. Spackman*, 155 Idaho 640, 650 (Idaho 2013).

²³ *Id.*

²⁴ AFRD2, 143 Idaho at 869-870.

²⁵ AFRD2, 143 Idaho at 880; *see also A&B Irrigation*, 155 Idaho at 650.

Here, the Director applied the doctrine of priority when he ordered curtailment date of junior water rights. By assigning a curtailment date sixty days out, he simply exercised his discretionary powers under the doctrine of beneficial use. He understood it takes time for the effects of curtailment to be realized, and it takes time for fish farmers to plan for changes in water flow. Maintaining the January 19, 2015, deadline prevented the waste of water that would have occurred had curtailment been ordered for a few weeks until the Magic Springs Project was completed.

Importantly, Rangen has not asked this Court to rule that the Director abused his discretion. Rangen has only argued that the Director exceeded his authority. In other words, Rangen contends the Director does not have any discretion at all to maintain the January 19, 2015 curtailment date—that strict priority is the law. This argument has been rejected time and again by Idaho courts.

Therefore, the Court should deny Rangen’s argument that the Director exceeded his authority by exercising his discretion in applying the companion doctrines of priority and beneficial use.

3. The Director did not abuse his discretion by delaying curtailment for sixty days.

IGWA does not believe Rangen properly raised an issue as to whether the Director abused his discretion, and IGWA adamantly opposes any attempt by Rangen to reframe its case in its reply brief as an abuse of discretion case. However, IGWA will briefly address the issue in case this Court interprets Rangen’s brief to include an abuse of discretion issue.

To determine 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.”²⁶

The Director correctly perceived that he could apply some discretion in imposing a curtailment date under the doctrine of prior appropriation. He had earlier found that Rangen’s rights were being materially injured, and he did not ignore the fact that Rangen held pre-eminent rights to junior users’ rights. At the same time, he recognized his duty to consider the public’s interest in the Eastern Snake Plain Aquifer (ESPA) and the effects of immediate, yet temporary, curtailment both on Rangen and junior users. In balancing Rangen’s and the Districts’ interests to arrive at an appropriate curtailment date, he explained: “[I]nstantaneous curtailment will not immediately increase water supplies to Rangen.”²⁷ In other words, he recognized that curtailment would not provide water for Rangen’s beneficial use. The Director implicitly acknowledged, as the Idaho Supreme Court has stated, that often times there is “tension between the first in time and beneficial use aspects of the prior appropriation doctrine.”²⁸

As already stated, prior appropriation “is not an absolute rule without exception,”²⁹ but often requires discretionary allocation of water. Correctly perceiving the tension between junior users’ ability to beneficially use water from the ESPA and Rangen’s right to that same water, which would accumulate at Rangen’s fish hatchery in the following years and decades, the Director appropriately made discretionary decisions as to proper allocation of water.

²⁶ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 813 (2011) (quoting *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54 (2006)).

²⁷ *Order Granting Rangen’s Mot. to Determine Morris Exchange Water Credit; Second Am. Curtailment Order* at 4 [hereinafter *Order*].

²⁸ *A&B Irrigation*, 155 Idaho at 650 (discussing Article XV, section 3 of the Idaho Const.).

²⁹ *AFRD2*, 143 Idaho at 880.

After making a finding of material injury, Rule 40.01 of the Conjunctive Management of Surface & Ground Water Resources (CM Rules) allows the Director two options.

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use *where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment*; or
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been *approved* by the Director.³⁰

Both options allow for delayed curtailment. The first explicitly allows for curtailment to be “phased-in over . . . a five-year (5) period” when injury is long range, as is the case here. Applying a phase-in period requires the Director to use his discretion. Similarly, the second option states out-of-priority diversions are appropriate pursuant to a properly approved plan. Significantly, it does not require mitigation water to be immediately delivered but only that a proper mitigation plan be *approved*. Implicit in this option is the understanding that time often passes between approval of a plan and delivery of water via the plan. The Director must use some discretion to determine how much time junior water users should be afforded to deliver water pursuant to an approved mitigation plan. Thus, the Director’s decision to delay curtailment does not exceed applicable legal standards.

Next, the Director acted within the outer limits of his discretion by maintaining the January 19, 2015 curtailment date. The outer limits of his discretion are defined by the doctrine of prior appropriation, which, again, “is not an absolute rule without exception.”³¹ Rangen suggests that the Di-

³⁰ IDAPA 37.03.11.040.01.

³¹ *Am. Falls*, 143 Idaho at 880, 154 P.3d at 451.

rector ignored its rights under this doctrine; however, the Director enforced the water rights serving Rangen's rather small fish hatchery at the expense of hundreds of rights serving various dairies, stockyards, farmers, and other industries, all of which pump water from the ESPA. It firmly ordered that these junior water users "shall curtail/refrain from diversion and use of ground water" from the ESPA on January 19, 2015, sixty days after the date the Order issued, unless they provided additional mitigation to make up for the shortfall in the Morris Exchange Agreement credit.³² This was not a hollow obligation, as junior groundwater users did in fact complete the Magic Springs Project, admittedly a few days late, which has been delivering mitigation water to Rangen since early February. Rangen has not shown how this rather short delay was unreasonable under the unique circumstances.

Finally, the Director decided to delay curtailment through an exercise of reason. As explained above, tension existed between Rangen's water rights and those of ground water users who pumped water from the ESPA. In light of this tension, the Director explained:

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 uses such as commercial and industrial water uses should also be afforded time to plan for elimination of what may be their sole source of water. This delay [of sixty days] in curtailment is reasonable because instantaneous curtailment will not immediately increase water supplies to Rangen. The flow from the Martin-Curren Tunnel has

³² *Order* at 4.

been gradually declining over a number of years. Curtailment will not quickly restore the tunnel flows.³³

Thus, the Director considered the harsh consequences of immediate curtailment and the consequences of delayed curtailment. It made a decision that balanced Rangen's water rights and its interest in its fish propagation against the reality that short-term curtailment would not enable Rangen to raise more fish, while considering the interests of hundreds of dairies, stockyards, farmers, and other industries. The Director did not act arbitrarily; he arrived at his decision through the exercise of reason. Rangen has not argued otherwise.

4. Maintaining the January 19, 2015 curtailment date did not prejudice Rangen's substantial rights.

This Court must affirm the Order unless Rangen shows it prejudiced Rangen's substantial rights.³⁴ Rangen claims that the Order prejudiced its rights because it "diminishes" its water rights.³⁵ This is simply not true. Driven by the priority of Rangen's water rights, the Order affirmed that curtailment would occur if mitigation was not provided. Curtailment the small amount of pumping that occurs during the winter for sixty days would not have provided Rangen with enough water, if any at all, to make a difference in its fish operation. Thus, while Rangen has a substantial right to receive water, the delay in curtailment did not prejudice that right.

Rangen also argues its substantial rights were prejudiced "by the failure of the Director to deliver the amount of water necessary to address Rangen's injury caused by junior-priority groundwater pumping."³⁶

³³ *Id.*

³⁴ I.C. § 67-5279(4). The Idaho Supreme Court "has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67-5279(4)." *Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 5 (2013) (quoting *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 232 (2011)).

³⁵ *Rangen Inc.'s Opening Br.* at 9.

³⁶ *Rangen Inc.'s Opening Br.* at 9.

Rangen appears to suggest the Director had the power to immediately deliver water but failed to do so. It seems to the Order itself caused its water shortage. In reality, the Director found Rangen in its injured state and used what authority it had to help Rangen. The Director only had power to facilitate delivery of water in one of two ways: 1) curtail junior water users and wait for the unused water to trickle down to Rangen over the course of years and decades or 2) allow junior water users to deliver Rangen mitigation water in the near future.³⁷

Under the circumstances and given the Director's options, the Order did not prejudice Rangen's water rights but rather resolved its injury. If the Director had relied solely on curtailment, Rangen would be worse off than it is now. By requiring junior groundwater users to deliver mitigation water while at the same time providing them a feasible—although incredibly demanding—timeline, the Order ensured the quickest possible solution to Rangen's water shortage.

CONCLUSION

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

1. Find the Director's Order did not exceed his statutory authority since it merely controlled the distribution of Idaho water.
2. Find the Order did not violate the Idaho Constitution or Idaho statutes and regulations because the prior appropriation doctrine allows the Director to exercise discretion, which he did.
3. Rule that Rangen did not properly raise an issue as to whether the Director abused his discretion by maintaining the January 19, 2015 curtailment date; or, alternatively, find that the Director did not abuse his discretion.
4. Find the Order did not prejudice Rangen's substantial rights.

³⁷ See IDAPA 37.03.11.040.01.

RESPECTFULLY SUBMITTED this 24th day of April, 2015.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



Randall C. Budge
Thomas J. Budge

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2015, a true and correct copy of the foregoing document was served on the persons listed below by the method(s) indicated.



Randall C. Budge

Thomas J. Budge

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