



**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

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) **MEMORANDUM DECISION**  
) **AND ORDER**

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**I.**

**STATEMENT OF THE CASE**

**A. Nature of the Case.**

This case originated when Rangen, Inc. ("Rangen") filed a *Petition* 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 *Order Granting Rangen’s Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* issued on November 21, 2014 (“*Final Order*”). The *Final Order* grants a motion filed by Rangen to recalculate mitigation credit previously awarded to juniors and amends a curtailment order. Rangen asserts that the Director exceeded his authority in the *Final Order*, and requests that this Court set it aside and remand for further proceedings.

**B. Course of Proceedings and Statement of Facts.**

On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department. It alleged Rangen is short water under two senior rights due to junior ground water use. The Director subsequently issued a curtailment order concluding that Rangen’s senior rights are being materially injured by junior ground water pumpers.<sup>1</sup> *Supp. A.R. CM-DC-2011-001*, pp.1-104.<sup>2</sup> The curtailment order provided for the curtailment of certain junior ground water rights that divert from the Eastern Snake Plain Aquifer. *Id.* at p.42. The Director instructed, however, that affected juniors could avoid curtailment if they proposed and had approved a mitigation plan that provided Rangen with phased-in mitigation over a five-year period 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.* The time period associated with the first year was to begin April 1, 2014 and end March 31, 2015. 2935 R., p.296. Thereafter, the second year would commence April 1, 2015, and so on and so forth. *Id.*

The Idaho Ground Water Appropriators, Inc. (“IGWA”) submitted several mitigation plans on behalf of affected users. The first was on February 11, 2014. 2446 R., pp.1-13. It set forth nine proposals for juniors to meet their mitigation obligations. *Id.* The Director approved it in part, granting IGWA a total of 3.0 cfs of mitigation credit from April 1, 2014 to March 31, 2015. *Id.* at pp.484. Of that, 1.2 cfs was attributable to IGWA’s aquifer enhancement activities, including conversions from ground water to surface water irrigation, voluntary “dry-ups” of

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<sup>1</sup> The term “curtailment order” as used herein refers to the Director’s *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*, dated January 29, 2014. The Director’s curtailment order is not at issue in this proceeding, but was previously addressed by this Court on judicial review in Twin Falls County Case No. CV-2014-1338.

<sup>2</sup> There are multiple agency records made part of the record in this matter. The citation “4970, R., \_\_\_\_” refers to the agency record compiled for this judicial review proceeding. The citation “2935 R., \_\_\_\_” refers to the agency record compiled for Twin Falls County Case No. CV-2014-2935. The citation “1338 R., \_\_\_\_” refers to the agency record compiled for Twin Falls County Case No. CV-2014-1338, etc.

irrigated acreage, and ground water recharge. *Id.* at p.483. The remaining 1.8 cfs was attributable to the direct delivery of surface water to Rangen as a result of a water exchange agreement between the North Snake Ground Water District (“NSGWD”) and Butch Morris (“Morris”). *Id.* at p.484. This agreement will be referred to as the “Morris Exchange Agreement” or “Agreement.” Morris holds senior water rights that divert from the same source as Rangen, the Martin-Curren Tunnel. *Id.* at 471. Under the Morris Exchange Agreement, Morris authorized NSGWD to use his senior water rights as needed to provide direct delivery of mitigation water to Rangen. *Id.*

Although IGWA was originally granted 3.0 cfs of mitigation credit under its first mitigation plan (0.4 cfs short of its first year mitigation obligation), the Director subsequently recalculated the amount of credit granted to juniors for the Morris Exchange Agreement. *Supp. A.R. CM-DC-2011-001*, pp.368-369. As part of the recalculation, the Director determined that the Agreement would result in the delivery of an average rate of 2.2 cfs of mitigation water to Rangen for 293 days. *Id.* When added to the mitigation credit of 1.8 cfs granted for aquifer enhancement activities, the recalculation resulted in a total mitigation credit of 3.4 cfs from April 1, 2014 to January 18, 2015. *Id.* This recalculation changed the dynamic of the first mitigation plan. It resulted in IGWA being granted full mitigation credit of 3.4 cfs, but only for a portion of the first mitigation year. *Id.* This left a first year mitigation deficiency of 2.2 cfs from January 19, 2015 to March 31, 2015, due to the predicted exhaustion of the Morris Exchange Agreement mitigation source as of that date. To address the deficiency, the Director looked to other mitigation plans purposed by IGWA, which are not at issue in this proceeding. At any rate, it was solely pursuant to mitigation activities approved under IGWA’s first mitigation plan that the Director determined juniors had met their mitigation obligation from April 1, 2014 to January 18, 2015.

As the first mitigation year got underway, Rangen realized it was not receiving the full amount of mitigation water the Director determined it would receive. As a result, Rangen submitted a *Motion to Determine Morris Exchange Water Credit and Enforce Curtailment* to the Director on October 31, 2014. 4970 R., pp.1-10. The *Motion* asked the Director to recalculate the mitigation credit awarded to juniors under the Morris Exchange Agreement. *Id.* at pp.1-2. The Director’s calculation of that credit was based on anticipated flows in the Martin-Curren Tunnel during the first mitigation year. *Supp. A.R. CM-DC-2011-001*, pp.368-369. Rangen

asserted that the Director overestimated those flows to its detriment, resulting in a mitigation deficiency. 4970 R., pp.1-10. Rangen supported its argument with flow data acquired for 2014, which established that actual Martin-Curren Tunnel flows had been, and continued to be, less than anticipated by the Director. *Id.* Rangen argued that the mitigation deficiency resulted in unmitigated material injury to its senior rights. It moved the Director to curtail junior users to address that injury. *Id.* at p.8.

Rangen's *Motion* was unopposed. 4970 R., p.99. The uncontroverted evidence established that the Morris Exchange Agreement in actuality only provided mitigation water for 184 days – not 293. *Id.* at p.101. The mitigation source was exhausted by October 2, 2014. *Id.* This resulted in a mitigation deficiency of 2.2 cfs from that date to January 18, 2015. *Id.* The Director acknowledged the Agreement mitigation source had been exhausted:

The Director previously concluded that the Morris Exchange Agreement provided mitigation credit to IGWA through January 19, 2015, based on predicted Martin-Curren Tunnel flows. Because the 2014 Martin-Curren Tunnel flow data establishes that actual flows were less than predicted, the mitigation credit from the Morris Exchange Agreement must be reconsidered and adjusted. The Director concurs with Rangen's calculations that the Morris Exchange Agreement credit has expired *and that the Director must order curtailment to address the shortfall.*

*Id.* at pp.101-102 (emphasis added). However, the Director did not proceed to curtail offending junior users. *Id.* at p.102. He ruled that under the circumstance, “[s]ufficient time must be granted to junior ground water users to prepare for curtailment.” *Id.* The Director gave juniors until January 19, 2015, an additional sixty days, to prepare for curtailment or provide an alternative source of mitigation. *Id.*

The January 19th date is significant. At the time the Director issued his *Final Order*, he had already conditionally approved IGWA's fourth proposed mitigation plan. 4663 R., pp.178-240. The fourth plan consisted generally of a pump and pipeline project to provide for direct delivery of up to 10 cfs of water to Rangen from another spring user in the Hagerman area. *Id.* at pp.180-181. In conditionally approving the plan, the Director ordered that if IGWA failed to complete the project and provide the requisite amount of mitigation water to Rangen by January 19, 2015, junior users would be curtailed. *Id.* at p.198. Thus, in his *Final Order*, the Director noted that junior users should already be planning for the possibility that curtailment could occur come January 19th. 4970 R., p.102.

On December 19, 2014, Rangen filed the instant *Petition for Judicial Review*. It asserts that the Director exceeded his authority by failing to curtail once he determined a mitigation deficiency exists. The case was reassigned by the clerk of the court to this Court on December 23, 2014.<sup>3</sup> On January 27, 2015, the Court entered an *Order* permitting IGWA to appear as an intervenor. The parties subsequently briefed the issues raised on judicial review. A hearing on the *Petition* was held before this Court on May 20, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or May 21, 2015.

## II.

### STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner 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).

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<sup>3</sup> 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*.



### III. ANALYSIS

#### A. **The Director exceeded his authority under the CM Rules by failing to timely implement the mitigation plan's contingency.**

When the Director makes a determination that material injury exists in the context of a call, he must engage in one of two actions. He may regulate and curtail the diversions causing injury, or he may approve a mitigation plan that permits offending out-of-priority diversions to continue. IDAPA 37.03.11.040.01.a,b. The Director took the latter action in this case. He approved two sources of mitigation under IGWA's first mitigation plan, and allowed continued out-of-priority water use. One of the approved mitigation sources – the direct delivery of water under the Morris Exchange Agreement – is at the center of this proceeding. However, the propriety of the Director's award of mitigation credit resulting from the Agreement is not at issue. That was addressed in Twin Falls County Case No. CV-2014-2446, wherein the Court reversed and remanded the award. *Respondents' Br.*, Appx. B.<sup>4</sup> At issue in this proceeding is the premature exhaustion of the Agreement mitigation source, and the Director's ensuing response.

The Court notes initially that the mitigation source exhausted prematurely due to the Director's failure to adequately protect Rangen's rights when granting mitigation credit. The Court will not repeat the entirety of its previous analysis on this issue; however, a brief summary is necessary to set the stage. To determine the amount of mitigation credit to grant juniors as a result of the Agreement, the Director had to first predict how much water would emanate from the Martin-Curren Tunnel during the first mitigation year. He relied upon historical flow data associated with average Martin-Curren Tunnel flows to accomplish this task. The Director's credit award thus rested on the assumption that average flows would emanate from the Martin-Curren Tunnel throughout the first mitigation year. On judicial review, the Court determined that the Director's use of average flow data did not adequately protect Rangen's senior rights:

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 . . . that "equality in sharing the risk will not adequately protect the senior priority surface water

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<sup>4</sup> A copy of this Court's *Memorandum Decision and Order* entered in Twin Falls County Case No. CV-2014-2446 on December 3, 2014, is attached as Appendix B to the Respondents' Brief.

right holder from injury,” and that “predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder.”

*Respondents’ Br.*, Appx. B, pp.13-14. On those grounds, the Court reversed and remanded the Director’s award.<sup>5</sup> *Id.*

When the Court addressed the credit award previously, actual Martin-Curren Tunnel flow data for the first mitigation year was not before it. Now that it is, the data supports the concerns set forth by the Court in its remand order. 4970 R., pp.28-39. It establishes that the Director’s assumption was erroneous. *Id.* Historically average flows did not emanate from the Martin-Curren Tunnel during the first mitigation year; less than average flows did. *Id.* As a result, the Agreement mitigation source exhausted prematurely on October 2, 2014, resulting in material injury to Rangen’s rights. 4970 R., p.101. It was therefore the Director’s failure to adequately protect Rangen’s senior rights from the outset that set the stage for the current predicament.

It is with this background in mind the Court turns to the present issue – whether the Director’s response to the premature exhaustion of the mitigation source adequately protected Rangen’s senior rights. The Court holds it did not. When the Director considers a proposed mitigation plan, he may approve the plan only if it includes “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. It is undisputed that the Agreement mitigation source became unavailable as of October 2, 2014. 4970 R., pp.28-39 &101. Once that determination was made, the Director was required to effectuate the plan’s contingency to assure protection of Rangen’s senior rights. IDAPA 37.03.11.043.03.c. IGWA’s first mitigation plan did not provide for an alternative source of mitigation water as the contingency. The only contingency under the plan was curtailment.

While the Director recognized that “he must order curtailment to address the shortfall,” he in fact did not proceed to curtail. 4970 R., p.102. Rather, he ruled that “[s]ufficient time must be granted to junior ground water users to prepare for curtailment,” and granted juniors an additional sixty days to continue their out-of-priority diversions. *Id.* Curtailment fashioned in this manner is not an “adequate contingency” as contemplated by the CM Rules. It fails “to assure protection of the senior-priority right in the event the mitigation water source becomes

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<sup>5</sup> The Court entered its judgement in Twin Falls County Case No. CV-2014-2446 on December 3, 2014. No appeal has been taken by any party and the time for an appeal has expired.

unavailable.” IDAPA 37.03.11.043.03.c. To the contrary, Rangen’s senior rights were prejudiced and subjected to unmitigated material injury while junior users were permitted to continue out-of-priority diversions. Such a result is not contemplated by the CM Rules. The Director’s rationale for his decision centered on the state of junior users. He reasoned that “[m]any of the junior ground water users diverting water this time of year are dairies and stockyards,” and opined that “[i]t is not reasonable to order curtailment that would immediately eliminate what is likely the sole source of drinking water for livestock.” 4970 R., p.102. Further, that “[o]ther [junior] water users 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.” *Id.* Should not the same considerations weigh equally, if not more so, in favor of the senior right holder under a prior appropriation system? Yet, under the Director’s rationale, the senior user’s water use and operations should be disrupted so as to not unduly disrupt the juniors’. This is contrary to the CM Rules and Idaho’s prior appropriation doctrine. When the Director approves a mitigation plan, there should be certainty that the senior user’s material injury will be mitigated throughout the duration of the plan’s implementation. This is the price of allowing junior users to continue their offending out-of-priority water use. It is for this very reason the Rules require mitigation plans to have “contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.” If an approved mitigation source fails, the resulting material injury cannot go unaddressed to the detriment of the senior. The contingency should be implemented to address the injury.

If junior users wish to avoid curtailment by proposing a mitigation plan, the risk of that plan’s failure has to rest with junior users. Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director must address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment. Curtailment is an adequate contingency if timely effectuated. In this same vein, if curtailment is to be used to satisfy the contingency requirement, junior users are on notice of this risk and should be conducting their operations so as to not lose sight of the possibility of curtailment. A senior user can expect no more under the prior appropriation doctrine than for offending junior



user's to be curtailed to address material injury. However, given the circumstances presented here, there are simply no grounds under the CM Rules for the Director to permit juniors to continue their out-of-priority diversions for sixty days in the face of existing material injury to Rangen's senior rights. The Court therefore holds that the Director exceeded his authority under the CM Rules by failing to timely implement the plan's contingency (i.e., curtailment) once he determined the Agreement mitigation source had become unavailable. The Court further finds that Director's exceedance resulted in prejudice to Rangen's substantial rights in the form of unmitigated material injury to its senior water rights.

**B. The Director's conditional approval of the fourth mitigation plan does not alter the analysis.**

At the time the Director issued his *Final Order*, he had already conditionally approved IGWA's fourth proposed mitigation plan. 4663 R., pp.178-240. However, the Director's conditional approval did not authorize the out-of-priority diversions permitted under the *Final Order*. The conditions of approval were not met at the time the Director issued his *Final Order*, nor was the pump and pipeline project contemplated under the fourth plan constructed or operational. This Court has already held that while the Director may conditionally approve a mitigation plan consistent under the CM Rules, he may not permit out-of-priority water use to occur under that plan prior to the conditions of approval being satisfied. *Memorandum Decision*, Twin Falls County Case No. CV-2014-4633, pp.7-8 (May 13, 2015). Therefore, the fact that the Director has conditionally approved IGWA's fourth mitigation plan at the time he issued his *Final Order* does not alter or affect the Court's preceding analysis.

**C. The Director did not make a finding of futile call.**

Futile call may be a defense to curtailment under Idaho law. The junior bears the burden of proving the defense. *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). Such burden must be carried by clear and convincing evidence in the record. *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irr. Dist.*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013). In his *Final Order*, the Director stated that his "delay in curtailment is reasonable because instantaneous curtailment will not immediately increase water supplies to Rangen." 4970 R., p.102. It is unclear whether

the Director intended this statement to justify his failure to timely curtail on the grounds that such curtailment would be futile. Aside from this conclusory statement, the Director did not engage in a futile call analysis in his *Final Order*. There certainly is not clear and convincing evidence in the record supporting a futile call determination. Therefore, if the Director intended the above-quoted statement to be a futile call determination, the Court reverses and remands the same on the grounds that it is not supported by clear and convincing evidence in the record.

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

In its *Petition*, 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 Court does not find the arguments of the Department to be frivolous or unreasonable. Therefore an award of attorney fees under Idaho Code § 12-117 is not warranted.


**IV.**

**ORDER**

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

IT IS SO ORDERED.

Dated June 1, 2015

  
ERIC J. WILDMAN  
District Judge

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on June 01, 2015, with sufficient first-class postage to the following:

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ORDER

Page 1 6/01/15

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