

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

RANGEN, INC., an Idaho Corporation

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

NORTH SNAKE GROUND WATER DISTRICT,
MAGIC VALLEY GROUND WATER
DISTRICT, and SOUTHWEST IRRIGATION
DISTRICT,

Intervenors.

Case No. CV-2015-1130

RESPONDENTS' 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
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

*Deputy Attorneys General for Idaho
Department of Water Resources and
Gary Spackman*

ATTORNEYS FOR INTERVENORS

Randy C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE &
BAILEY, CHTD.
P.O. Box 1391
Pocatello, ID 83201
Telephone: (208) 232-6101
rcb@racinelaw.net
tjb@racinelaw.net

*Attorneys for the North Snake Ground
Water District, Magic Valley Ground
Water District and Southwest Irrigation
District*

ATTORNEYS FOR PETITIONER

J. Justin May
MAY, BROWNING & MAY, PLLC
1419 W. Washington
Boise, ID 83702
Telephone: (208) 429-0905
jmay@maybrowning.com

Robyn M. Brody
BRODY LAW OFFICE, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
robynbrody@hotmail.com

Fritz X. Haemmerle
HAEMMERLE & HAEMMERLE, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
fxh@haemlaw.com

Attorneys for Rangen, Inc.

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which Rangen, Inc. (“Rangen”), appeals a final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) approving Application for Transfer No. 79560 (“Transfer 79560”) filed by the Idaho Ground Water Appropriators, Inc. (“IGWA”), for North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (collectively referred to as “the Districts”). Transfer 79560 proposes to change the place of use of 10 cfs of water right no. 36-7072 from the SeaPac of Idaho, Inc. (“SeaPac”), fish hatchery at Magic Springs to the Rangen fish hatchery in order to deliver mitigation water to Rangen. Ex. 4000 at 2-4. The order appealed is the March 18, 2015, *Amended Final Order Approving Application for Transfer* (“Final Order”).

B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

Rangen owns and operates a fish propagation and research facility near the head of Billingsley Creek. CM-MP-2014-006 Ex. 1018 at 3.¹ On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department alleging that junior-priority ground water pumping from the Eastern Snake Plain Aquifer (“ESPA”) is materially injuring several of its water rights (“Rangen Delivery Call”). *Id.* at 1.

On January 29, 2014, the Director issued his *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*

¹ At the commencement of the hearing regarding Transfer 79560, the parties stipulated to admission of the record in the matter of IGWA’s Fourth Mitigation Plan (CM-MP-2014-006). References to documents from that record will be cited herein as CM-MP-2014-006 R. at (p. #) or CM-MP-2014-006 Ex. (#) at (p. #).

(“Curtailment Order”).² *Id.* at 42. The Director concluded Rangen is suffering material injury as a result of pumping by junior-priority ground water rights and ordered curtailment of certain ground water rights junior to July 13, 1962. *Id.* at 36, 42. The Curtailment Order recognized juniors could avoid curtailment if they participate in a mitigation plan that provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to Rangen.” *Id.* at 42. The Curtailment Order explained mitigation by direct flow to Rangen “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 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 August 27, 2014, IGWA filed its Fourth Mitigation Plan “to provide additional ways of satisfying the mitigation obligation imposed by the [Curtailment Order] and thereby prevent curtailment of junior-priority groundwater use.”³ CM-MP-2014-006 R. at 1. The Fourth Mitigation Plan consists of the “Magic Springs Project.” CM-MP-2014-006 Ex. 1000 at 3. A letter of intent executed by IGWA and SeaPac states that SeaPac will lease or sell to IGWA up to 10 cfs of “first use” water from its Magic Springs water rights (36-7072 and 36-8356) for mitigation

² 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, which affirmed the Director on a number of issues, but held the Director erred by applying a trim line to reduce the zone of curtailment. *Decision* at 28. The Decision has been appealed to the Idaho Supreme Court, Docket Nos. 42772-2015, 42775-2015 and 42836-2015.

³ To date, IGWA has submitted five mitigation plans to address mitigation obligations imposed by the Curtailment Order. On May 16, 2014, the Director approved some mitigation credit for certain components of IGWA’s first mitigation plan. *See Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (CM-MP-2014-001). While the Director approved IGWA’s second mitigation plan on June 20, 2014, in the *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* (CM-MP-2014-003), IGWA subsequently withdrew the plan. A status conference was held for IGWA’s third mitigation plan (CM-MP-2014-005) on March 17, 2015, at the Department’s state office in Boise, Idaho, wherein the parties requested the Director take no further action on the plan until after issuance of a decision regarding Application for Permit 36-17011. On December 18, 2014, IGWA filed *IGWA’s Fifth Mitigation Plan and Request for Hearing* (CM-MP-2014-008). The fifth mitigation plan proposes delivery of water to Rangen under water right no. 36-16976, that was the subject of a recent appeal before this Court in Case No. CV-2015-083, and is currently pending before the Department on remand.

purposes (“IGWA/SeaPac agreement”). CM-MP-2014-006 Ex. 1003 at 2. The IGWA/SeaPac agreement is contingent upon IGWA securing “an order from [the Department] approving the transfer of the point of diversion and place of use (as necessary) from SeaPac to Rangen” in order “to accomplish the delivery of Magic Springs water for mitigation purposes.” *Id.* at 2-3.

On September 12, 2014, IGWA, on behalf of the Districts, filed Transfer 79560. Ex. 4000. Transfer 79560 proposes to change the place of use of 10 cfs of water right no. 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen fish hatchery and to reflect “Fish Propagation/Mitig” as a nature of use in order to deliver mitigation water to Rangen. Ex. 4000 at 2-5. Water right no. 36-7072 bears a priority date of September 5, 1969, and authorizes diversion of 148.2 cfs of water from Thousand Springs for fish propagation purposes. CM-MP-2014-006 Ex. 1001 at 21-22. IGWA proposes that, if Transfer 79560 is approved, up to 10 cfs of water right no. 36-7072 “will be delivered from Magic Springs to the Rangen hatchery per engineering details submitted in the Fourth Mitigation Plan, CM-MP-2014-006.” Ex. 4002 at 4.⁴ In short, “spring water discharged from the ESPA at Magic Springs [will] be pumped via buried pipeline approximately 2.5 miles to Rangen’s place of use near the head of Billingsley Creek.” Ex. 4000 at 14. Water delivered to Rangen pursuant to Transfer 79560 will be discharged into Billingsley Creek after leaving the Rangen fish hatchery. Ex. 4002 at 5.

Rangen filed a *Notice of Protest by Rangen, Inc. to Water Right Transfer Application No. 79560*, in which Rangen argued, among other things, the transfer would injure other water rights. R. at 71-74. The *Response to Rangen’s Protest Against IGWA’s Water Right Application for Transfer No. 79560*, prepared for IGWA and the Districts by SPF Water Engineering, LLC, suggested injury could be addressed through mitigation and stated that “IGWA’s recharge,

⁴ These engineering details were admitted as Exhibit 1009 in CM-MP-2014-006.

conversion, and CREP add more than ten cfs to Billingsley Creek and other reaches of the Snake River upstream from Swan Falls and downstream from Milner Dam (see AMEC Table 2).” Ex. 4002 at 5.

The Director held a hearing for the Fourth Mitigation Plan on October 8, 2014. The Director issued the *Order Approving IGWA’s Fourth Mitigation Plan* on October 29, 2014.⁵ CM-MP-2014-006 R. at 178-240. Approval of Transfer 79560 is a condition of approval for IGWA’s Fourth Mitigation Plan. *Id.* at 197.

The Director held a hearing on Transfer 79560 on December 18, 2014. On January 27, 2015, the Director issued a *Notice of Taking Official Notice of Staff Memorandum* (“Notice”). R. at 340-42. The Notice explained that, after the hearing, the Director asked Department staff to review and analyze technical information contained in expert reports submitted in the matter, expert testimony offered at the hearing, and data and information in possession of the Department. *Id.* at 340-41. The Director also asked staff to prepare a memorandum regarding Transfer 79560. *Id.* at 341. In response to the request, Department staff prepared and submitted a memorandum.⁶ The Director informed the parties that official notice would be taken of facts and material contained in the staff memorandum and granted the parties two weeks to contest and rebut the facts or material officially noticed. *Id.* On February 10, 2015, Rangen submitted *Rangen, Inc.’s Expert Report in Response to Staff Memorandum* and *Rangen, Inc.’s Response to Staff Memorandum*. *Id.* at 346-59; *Id.* at 360-66.

⁵ The Fourth Mitigation Plan Order was appealed in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-4633. In its *Memorandum Decision and Order*, entered on May 13, 2015, this Court affirmed the Director’s approval of the Fourth Mitigation Plan. Rangen has appealed the decision to the Idaho Supreme Court, Docket No. 43370-2015.

⁶ The staff memorandum is attached to the Final Order as Attachment A. R. at 407-14.

On February 19, 2015, the Director issued the *Final Order Approving Application for Transfer*. *Id.* at 367-87. The Director required that, “as a condition of approval, IGWA and Southwest Irrigation District will continue into the future, aquifer enhancement activities sufficient to offset 10 cfs of depletion of flow in the Snake River between Kimberly and King Hill.” *Id.* at 375. The Director also required that “[p]rior to the start of each irrigation season, IGWA must provide documentation of aquifer enhancement activities from the previous year to establish that sufficient mitigation will be provided in the upcoming season.” *Id.* at 375-76.

IGWA filed a *Petition for Reconsideration* on February 25, 2015, requesting the Director modify the February 19, 2015, final order but stating “IGWA and Southwest Irrigation District (SWID) anticipate maintaining acquifer [sic] enhancement activities sufficient to offset 10 cfs of depletion to the Snake River below Milner Dam indefinitely.” *Id.* at 388-91. The Director issued an *Order on Reconsideration* and the Final Order at issue in this appeal on March 18, 2015.

II. ISSUES ON APPEAL

The issues presented by Rangen are as follows:

- 1) Did the Director exceed his statutory authority by approving a transfer application that injures other water rights and results in an enlargement of the original water right?
- 2) Did the Director err by relying upon mitigation to approve this transfer application?
- 3) Did the Director err or exceed his statutory authority by approving a transfer application that is speculative?

Respondents' formulation of the issues presented is as follows:

- 1) Whether the Director's approval of Transfer 79560 was based upon analyses consistent with Idaho Code and supported by substantial evidence in the record.
- 2) Whether Rangen's substantial rights have been prejudiced.

III. 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).

IV. ARGUMENT

A. THE DIRECTOR'S APPROVAL OF TRANSFER 79560 IS CONSISTENT WITH IDAHO CODE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

The Director's approval of Transfer 79560 is based upon analyses consistent with Idaho Code § 42-222 and supported by substantial evidence in the record. Section 42-222 sets forth criteria to evaluate transfer applications. It states the Director "shall examine all the evidence and available information and shall approve the [transfer] in whole, or in part, or upon conditions, provided":

1. no other water rights are injured thereby;
2. the change does not constitute an enlargement in use of the original right;
3. the change is consistent with the conservation of water resources within the state of Idaho;
4. the change is in the local public interest as defined in Idaho Code § 42-202B;
5. the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; and
6. the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222.

Upon review of evidence in the record, the Director concluded: "The proposed transfer will not result in injury to other water rights or an enlargement in use of the original right, is consistent with the conservation of water resources within the state of Idaho, is in the local public interest as defined in Idaho Code § 42-202B, and will not adversely affect the local economy." R. at 404. The Director also concluded it is appropriate to describe the nature of use associated with Transfer 79560 as "mitigation." *Id.* at 402. The Director's conclusions are consistent with applicable statutory provisions; within the Director's statutory authority; made upon lawful procedure;

supported by substantial evidence on the record as a whole; and not arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3).

On appeal, Rangen challenges the Director's determinations that Transfer 79560 does not injure other water rights or constitute an enlargement in use of the original right. Rangen also challenges the Director's determination that the nature of use associated with Transfer 79560 is appropriately described as "mitigation." Those challenges are addressed below.

1. Transfer 79560 Will Not Injure Other Water Rights

In accordance with Idaho Code § 42-222, the Director analyzed whether Transfer 79560 will injure other water rights. R. at 401-02. At the hearing, evidence and testimony regarding injury focused primarily on return flows to the Snake River. Currently, the "water diverted under water right no. 36-7072 flows from the SeaPac fish hatchery to the Snake River over a distance of less than one mile." Ex. 4002 at 5. Thus, the majority of water SeaPac diverts at Magic Springs returns to the Snake River. The District's expert acknowledged there could be a reduction of return flows to the Snake River because Magic Springs' "[w]ater delivered to the Rangen facility pursuant to [Transfer 70560] could, after leaving the Rangen facility, be consumptively used by other Billingsley Creek water users or evaporate from Billingsley Creek." Ex. 4002 at 5.⁷ R. at 399. The District's expert also acknowledged "[i]f this occurred at a time when minimum stream flows at the Murphy Gage are violated, it could contribute to enforcement of the Swan Falls Agreement, which may include curtailment of other water rights." *Id.*

The Director found there was no evidence in the record quantifying what percentage of the Magic Springs' water would be lost to consumptive use once it left the Rangen fish hatchery. *Id.*

⁷ The Districts' expert reports estimate that, if 10 cfs of water from Magic Springs is conveyed to the Snake River via Billingsley Creek, approximately 0.039 cfs will be lost to evaporation prior to reaching the Snake River. Ex. 4002 at 11; Ex. 4003 at 15.

The Director also found the “Watermaster for Water District 36A, testified regarding the complexity of water distribution in Water District 36A and explained that, given the complexity along with insufficient measuring devices and gauging stations and the possibility of diversions by downstream irrigators, it would ‘be a very difficult task to actually track that water.’” *Id.*

To mitigate injury to the Swan Falls minimum flows, the Districts looked to IGWA’s ongoing aquifer enhancement activities. The District’s expert concluded “ongoing IGWA mitigation activities substantially exceed the potential consumption of water added to Billingsley Creek from [Transfer 79560]. Ex. 4003 at 14.”⁸ *Id.* The District’s expert also concluded “it would be reasonable to include in the approval of [Transfer 79560] a condition that requires mitigation be provided sufficient to offset depletion of water right 36-7072 in the event of a violation of the Swan Falls minimums. Ex. 4003 at 5.” *Id.*

After the hearing, the Director asked Department staff to review and analyze technical information contained in expert reports submitted in the matter, expert testimony offered at the hearing, and data and information in possession of the Department. R. at 340-41. Similar to the District’s expert, Department staff “compiled results of the ESPAM2.1 model runs of IGWA and Southwest Irrigation District’s aquifer enhancement activities. *See Attachment A.*” *Id.* at 399. However, given this Court’s *Memorandum Decision and Order on Petition for Judicial Review* in Case No. CV-2014-2446, the memorandum prepared by staff evaluated the aquifer enhancement activities of IGWA and Southwest Irrigation District “without assuming a continuation of 2013

⁸ The Districts’ expert compiled results from ESPAM2.1 model runs performed by the Department in support of the order approving IGWA’s first mitigation plan. Ex. 4003 at 13-17. Those model runs simulated aquifer enhancement activities (conversions, voluntary “dry-ups” through the Conservation Reserve Enhanced Program (“CREP”), voluntary curtailment, and recharge) performed by IGWA and Southwest Irrigation District between 2005 and 2013, with the assumption that 2013 conversions, CREP, and voluntary curtailment were continued in future years. Ex. 1020 at 8. The Districts’ expert presented the total model-predicted benefit of the mitigation accruing to springs tributary to the Snake River between Kimberly and King Hill. Ex. 4003 at 17. The Districts’ expert reported an average benefit of 48.6 cfs between April 2014 and March 2015, and an average benefit of 58.1 cfs between April 2018 and March 2019. *Id.*

aquifer enhancement activities into 2014.”⁹ *Id.* at 400. This evaluation established “[t]he model-predicted benefit [from past IGWA and Southwest Irrigation District aquifer enhancement activities] to springs tributary to the Snake River between Kimberly and King Hill is 40.6 cfs between April 2014 and March 2015.” *Id.* Department staff also evaluated whether at least 10 cfs of the model-predicted benefits from IGWA and Southwest Irrigation District’s past aquifer enhancement activities would actually reach the Snake River. *Id.* Staff focused on 10 cfs because that is the maximum impact to the Snake River return flows as a result of Transfer 79560. As stated in the Department’s staff memorandum, “A very conservative approach would be to assume a maximum impact of 10 cfs.” *Id.* at 409. This evaluation established “[t]he average model-predicted benefit [of documented past aquifer enhancement activities] to the Box Canyon reach, the Devil’s Washbowl and Devil’s Corral spring cells, and the baseflow represented by general head boundaries is 11.1 cfs between April 2014 and March 2015.” *Attachment A* at 4.” *Id.* at 400. Accordingly, the Director found that, even without “benefits from 2014 and future activities, the benefits of IGWA and Southwest Irrigation District’s past aquifer enhancement activities to the Snake River between Kimberly and King Hill are predicted to exceed the potential impact of the proposed transfer on flow in the Snake River between April 2014 and March 2015.” *Id.* at 401.

Based upon the above-described expert reports, testimony, and staff memorandum, the Director determined it was necessary to condition approval of Transfer 79560 upon continuation and documentation into the future of IGWA and Southwest Irrigation District’s aquifer enhancement activities sufficient to offset any depletion of flow in the Snake River due to the transfer. *Id.* at 401-02. Because this mitigation requirement mandates complete offset of potential impact to Snake River flows, it ensures Transfer 79560 will not result in injury to other water rights.

⁹ Documentation of 2014 IGWA and Southwest Irrigation District aquifer enhancement activities was not available as of the date of the Final Order. *R.* at 400, n.9.

By including the ongoing mitigation requirement, the Director approved Transfer 79560 “upon conditions” as expressly provided by Idaho Code § 42-222.

Rangen argues “[t]he principal problem with this transfer is that it causes a 10 cfs reduction in the return flow to the Snake River below the point where the Sea Pac Magic Spring facility discharges into the Snake River.” *Rangen Inc.’s Opening Brief* at 9. Rangen repeats “[t]he effect of this transfer would be to eliminate approximately 10 cfs of return flow that has historically flowed into the Snake River from Magic Springs” and “[t]he result is that the transfer reduces the quantity of water available in the Snake River below Magic Springs by 10 cfs.” *Id.* at 10 & 11. Rangen even asserts “[t]he Director erred by ignoring the fact that the transferred water will be fully consumed in Billingsley Creek and will not return to the Snake River.” *Id.* at 17-18. Rangen asks the Court to “[set] aside for the moment the issue of mitigation” and conclude Transfer 79560 “causes injury to other water users.” *Id.* at 13.

The “issue of mitigation” cannot be “[set] aside for the moment” for purposes of analyzing injury to other water users as Rangen suggests. The Director’s analysis of injury to other water users and of the sufficiency of IGWA and Southwest Irrigation District’s past aquifer enhancement activities to offset depletion of flows to the Snake River due to Transfer 79560 are inextricably tied. The Director recognized Transfer 79560 could injure other water users and, therefore, approved the transfer conditioned upon continuation and documentation into the future of IGWA and Southwest Irrigation District’s aquifer enhancement activities sufficient to offset depletion of flow due to the transfer. *R.* at 405. Specifically, the Director ordered:

[A]s a condition of approval, IGWA and Southwest Irrigation District will continue into the future aquifer enhancement activities equal to the rate of flow to be diverted from Magic Springs due to the transfer. Prior to the start of each irrigation season, IGWA must submit documentation to the State Office of the Department stating: (a) the rate of flow to be diverted from Magic Springs for the upcoming year (April 1 through March 31), and (b) past aquifer enhancement activities to sufficiently

mitigate for water diverted from Magic Springs the upcoming year. For example, if 8 cfs will be diverted from Magic Springs pursuant to the transfer, IGWA and Southwest Irrigation District must submit documentation establishing mitigation from aquifer enhancement activities of 8 cfs to the Snake River between Kimberly and King Hill. If IGWA fails to document sufficient mitigation through aquifer enhancement activities as required, diversions from Magic Springs will not be authorized pursuant to this transfer for the year in which documentation is lacking.

Id.. The Director's conditional approval ensured Transfer 79560 will not injure other water rights.

Rangen argues the Director's determination that benefits of IGWA and Southwest Irrigation District's past aquifer enhancement activities are predicted to exceed the potential impact of the proposed transfer "is not supported by substantial evidence." *Rangen Inc.'s Opening Brief* at 20. Contrary to Rangen's argument, there is substantial evidence in the record to support the Director's determination. Ex. 4002 at 5; Ex. 4003 at 5; R. at 407-12; Tr. pp. 76-77, 240.

"Substantial evidence 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 . . . was proper." *Memorandum Decision and Order on Petition for Judicial Review* at 4, Case No. CV-2014-2446 (Fifth Jud. Dist. Ct. Dec. 3, 2014).

Rangen also asserts "[t]he Director made no findings with regard to activities, if any, that may have been conducted by the [ground water districts] that are the applicants in this matter. This error is compounded by the condition that IGWA, a third party, mitigate for the injury caused by this transfer." *Rangen's Opening Brief* at 20. Rangen's argument ignores the well documented interrelationship between IGWA and the Districts. The Districts are all members of IGWA. CM-MP-2014-006 R. at 172. IGWA serves as an umbrella organization that has participated in the Rangen Delivery Call to represent the interests of junior-priority ground water users. IGWA has also filed multiple mitigation plans in the Rangen Delivery Call on behalf of junior-priority ground water users. IGWA's Fourth Mitigation Plan was filed "to provide additional ways of satisfying

the mitigation obligation imposed by the [Curtailment Order], and thereby prevent curtailment of junior-priority groundwater use.” *Id.* at 1. Approval of Transfer 79560 is a condition of approval for IGWA’s Fourth Mitigation Plan. *Id.* at 197. The application form submitted in this transfer proceeding further highlights the interrelationship between IGWA and the Districts. In the “name of applicant(s)” section of the application form for Transfer 79560, it states “IGWA for North Snake GWD, Magic Valley GWD, Southwest ID.” R. at 2. Approval of Transfer 79560 prevents curtailment of junior-priority water use of all of IGWA’s members implicated in the Rangen Delivery Call, not just the Districts. Given the clear interrelationship of IGWA and the Districts, it is appropriate for the Director to condition approval of Transfer 79560 upon ongoing mitigation activities of IGWA and Southwest Irrigation District.

In addition, in its *Petition for Reconsideration*, IGWA did not challenge its inclusion on Transfer 79560, but affirmatively stated: “IGWA and Southwest Irrigation District (SWID) anticipate maintaining aquifer [sic] enhancement activities sufficient to offset 10 cfs of depletion to the Snake River below Milner Dam indefinitely.” R. at 388-91. This statement adds support to the Director’s conditioning approval of Transfer 79560 upon continuation and documentation into the future of IGWA and Southwest Irrigation District’s aquifer enhancement activities sufficient to offset depletion of flow due to the transfer.

Rangen also argues the Department’s staff memorandum and the District’s expert “failed to calculate the net effect of continued groundwater pumping.” *Rangen’s Opening Brief* at 21. Rangen suggests that, as part of the transfer proceeding, IGWA and the Districts must mitigate for all the impact of ground water pumping junior to July 13, 1962, on flows in Billingsley Creek. *Id.* at 22; *see* Ex. 5019 at 7-8; *see* Tr. p. 213-215. Rangen’s argument fails because the impact of junior ground water pumping on flows in Billingsley Creek is irrelevant. The impact

at issue in Transfer 79560 is the impact on flows in the Snake River resulting from the transfer of 10 cfs of water from Magic Springs to Rangen, not the impact of all ground water pumping on flows in Billingsley Creek. The evidence shows that impact to Snake River flows resulting from Transfer 79560 is offset by ongoing mitigation activities of IGWA and Southwest Irrigation District. Ex. 4002 at 5; Ex. 4003 at 5; R. at 407-12; Tr. pp. 76-77, 240. Transfer 79560 relates to the Rangen Delivery Call and is an integral part of IGWA's Fourth Mitigation Plan to mitigate the effects of junior ground water pumping on the Martin-Curren Tunnel (the source of Rangen's water rights), not the entirety of Billingsley Creek. By arguing IGWA and the Districts must mitigate for all impact on flows in Billingsley Creek due to ground water pumping, Rangen seeks to improperly broaden the purpose of this proceeding and increase the mitigation requirements of junior ground water users. Rangen's argument must be rejected as the effects of junior ground water pumping on Billingsley Creek are not at issue in Transfer 79560.

Rangen cites a number of Idaho and Colorado cases for the general proposition that a transfer cannot be approved if it injures junior appropriators. *Rangen's Opening Brief* at 14-15. Rangen then suggests the cases stand for a proposition that they do not stand for. Specifically, Rangen asserts the cases establish that, if a transfer would result in a change in return flows to another stream, the transfer must be rejected. *Id.* at 15-16. What Rangen's misses is that a transfer involving a change in return flows can be approved if mitigation offsets injury to other water rights. "[A] water right is real property and may be sold or transferred separate and apart from the land on which it is used and may be made appurtenant to other lands *so long as* such transfer does not injure other appropriators." *In re Robinson*, 61 Idaho 462, 469, 103 P.2d 693, 696 (1940) (emphasis added). "One of the incidents of such ownership is the right to transfer or

change the place of use of the water if no other water user is thereby injured.” *Id.* Thus, if potential injury is mitigated, a transfer may be approved by the Director.

Idaho Code § 42-222 expressly authorizes the Director to impose conditions as part of any transfer approval. The ability of the Director to require mitigation as a condition of approval is reflected in Idaho Code § 42-223: “No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the [Director] including as a condition of approval for ... a water right transfer approved pursuant to section 42-222” The Department requires mitigation as part of a transfer approval if the change would injure other water rights. *See* Ex. 5017 at 13 (“Increased depletions [to the Snake River] greater than 10 percent for any reach are presumed to cause injury and must be fully mitigated...”).

It is common place in Idaho and in other states for injury concerns to be addressed with conditions of approval intended to mitigate injury: “[E]ven though an injury may likely occur if a proposed reallocation is approved, the application will rarely be denied. Rather, a water court or an administrative agency will likely impose conditions designed to mitigate or prevent injury or other adverse effects of the reallocation.” 1 *Waters and Water Rights* § 14.04.(c)(2) (Amy K. Kelley, ed., 3rd ed. 2015) (citations omitted). Thus, Rangen’s argument that any change in return flows is per-se grounds for rejecting a transfer application is contrary to law. So long as injury to other water rights can be addressed through mitigation, the transfer can be approved.

Furthermore, if Rangen’s argument were adopted, this would bring to a halt nearly all water right transfers on the Eastern Snake Plain. Almost every ground water right transfer application filed with the Department involving the ESPA changes the return flows to the Snake River. This is why the Department requires that all applicants run the Department’s ESPA

ground water model, or other equivalent and acceptable analysis, to calculate depletions to the Snake River and then mitigate for impact to the Snake River. Ex. 5017 at 12-13. It is axiomatic that most, if not all, surface water transfers on the Eastern Snake Plain result in some change to the quantity, location, or timing of return flows of the Snake River. Under Rangen's interpretation of law, no transfer involving the ESPA could be approved, even if the applicant proposes mitigation. Not even the Colorado cases cited by Rangen support this argument: "Where it appears that the change sought to be made will result...in injury to junior appropriators...[the change] should be denied only in such instances as where it is impossible to impose reasonable conditions to effectuate this purpose." *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 586, 272 P.2d 629, 635 (1954). Rangen's interpretation is contrary to Idaho law as it would prevent Idaho water right holders from freely buying, selling and transferring their water rights even if they are able to fully mitigate any injury. *In re Robinson*, 61 Idaho at 469, 103 P.2d at 696.

In summary, the Director appropriately determined IGWA and Southwest Irrigation District's ongoing aquifer enhancement activities are predicted to exceed impact on flows in the Snake River due to Transfer 79560. The Director properly conditioned approval of Transfer 79560 upon continuation and documentation into the future of IGWA and Southwest Irrigation District's aquifer enhancement activities sufficient to offset any depletion of flows due to the transfer.

2. Transfer 79560 Will Not Result in Enlargement in Use of the Original Right

In accordance with Idaho Code § 42-222, the Director analyzed whether Transfer 79560 will result in enlargement in use of the original right. R. at 402-03. Transfer 79560 proposes to change the place of use of 10 cfs of water right no. 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen fish hatchery and to reflect "Fish Propagation/Mitig" as a nature of use. Ex. 4000 at

2-5. In analyzing whether Transfer 79560 will result in enlargement in use of water right no. 36-7072, the Director stated that, “[b]ecause the reason for the proposed transfer is to mitigate material injury to Rangen, the nature of use will be described in the transfer documents as ‘Mitigation.’” R. at 402. The Director concluded the change in nature of use from “Fish Propagation” to “Mitigation” does not constitute enlargement in use prohibited by Idaho Code § 42-222 because the change “does not alter that water right 36-7072 will be used for non-consumptive fish propagation purposes, but only reflects that water delivered to Rangen pursuant to the transfer will help satisfy mitigation obligations imposed by the Curtailment Order.” *Id.* at 402-03. The Director also concluded the condition of approval requiring continuation and documentation into the future of IGWA and Southwest Irrigation District’s aquifer enhancement activities sufficient to offset depletion of flow due to the transfer establishes that Transfer 79560 will not result in an expansion of historical consumptive use of water right no. 36-7072. *Id.*

Rangen argues Transfer 79560 results in enlargement in use of water right no. 36-7072 because the original water right was “wholly non-consumptive” and, under Transfer 79560, “the water will be consumed by other users in the Billingsley Creek system.” *Rangen Inc’s Opening Brief* at 18. Rangen continues to overlook the Director’s condition of approval requiring continuation and documentation into the future of IGWA and Southwest Irrigation District’s aquifer enhancement activities sufficient to offset depletion of flow due to the transfer. This condition of approval establishes that Transfer 79560 will not result in an expansion of historical consumptive use of water right no. 36-7072. The Director properly concluded that Transfer 79560 will not result in enlargement in use of water right no. 36-7072.

3. The Nature of Use Proposed by Transfer 79560 is Appropriately Described as “Mitigation”

Rangen argues “[t]he Director exceeded his authority in this case by approving a transfer changing the use from ‘fish propagation’ to ‘fish propagation/mitigation.’” *Rangen’s Opening Brief* at 22. Rangen argues the “[t]erm “mitigation” . . . does not describe the use to which the water will be put in any way that allows evaluation of the impact of the proposed use or administration of the water right.” *Id.* at 24.

As an initial point of clarification, the Director determined the nature of use will be described in Transfer 79560 documents as “mitigation,” not “fish propagation/mitigation.” R. at 402. Further, the term “mitigation” can be properly designated as a valid beneficial use. *Memorandum Decision and Order, in the Matter of Application for Permit No. 36-16976 in the Name of North Snake Ground Water District, et al.* at 15-16, Case No. CV-2015-083 (Fifth Jud. Dist. Ct. 2015) (“Order Re: IGWA Application for Permit”). The Department's Conjunctive Management Rules (“CM”) Rules (IDAPA 37.03.11.010.15) define “mitigation plan” as:

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

CM Rule 43 recognizes the use of water to mitigate for injury to senior rights. IDAPA 37.03.11.043.01.c, 03.a., b., and c. In addition, Idaho Code § 42-5201(13) defines “mitigation plan” as “a plan to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior priority ground water rights who are participants in the mitigation plan.” As this Court recently recognized, “mitigation” is a

viable beneficial use if it prevents material injury to senior water rights or compensates senior water right holders for material injury. *See Order Re: IGWA Application for Permit* at 15-16.

The nature of use proposed by Transfer 79560 is appropriately described as “mitigation.” The transfer proposes that up to 10 cfs of water right no. 36-7072 “will be delivered from Magic Springs to the Rangen hatchery per engineering details submitted in the Fourth Mitigation Plan, CM-MP-2014-006.” Ex. 4002 at 4; *see* Ex. 4000 at 4. The description of the proposal set forth in Transfer 79560 and the accompanying documents allowed for substantial evaluation of the impact of the proposed use and administration of the water right. Approval of Transfer 79560 enabled the Districts to implement the Fourth Mitigation Plan to compensate Rangen for material injury to Rangen’s water rights. The Director appropriately described the nature of use of Transfer 79560 as “mitigation.”

Citing a 2005 Colorado case, Rangen also argues the “anti-speculation doctrine,” that is generally applied to applications seeking new water rights under Idaho Code § 42-203A(5), is equally applicable to Transfer 79560. *Rangen’s Opening Brief* at 23. Rangen asserts “[i]t is not clear whether the [Districts] intend that the ‘mitigation’ right may be used in other places to satisfy other users in Billingsley Creek for future mitigation responsibilities, this right as claimed is too speculative to allow.”¹⁰ *Id* at 24.

The anti-speculation doctrine is not one of the statutory criteria considered in an application for transfer. It only applies to new applications for permit. *Compare* Idaho Code § 42-222, *with* Idaho Code § 42-203A(5). Even if the anti-speculation doctrine were applicable to

¹⁰ Rangen also argues the Districts “have not shown sufficient rights to the place where the water is to be transferred to, namely, the Rangen facility.” *Rangen’s Opening Brief* at 24. “Rangen contends that the [Districts] lack the legal authority to condemn under I.C. §42-5224(13)...” *Id*. This Court declined to address similar arguments in its *Order Re: IGWA Application for Permit*, holding that “issues of that nature are more appropriately addressed in the context of a challenge to a condemnation proceeding ...” *Order Re: IGWA Application for Permit* at 17. The Court should equally decline to address issues of condemnation in this case.

applications for transfer, the beneficial use of “mitigation” authorized by Transfer 79560 is not speculative. Rule 45.01.c of the Department’s Water Appropriation Rules states: “Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence.” IDAPA 37.03.08.045.01.c. Evidence in the record establishes the Districts’ intent in filing Transfer 79560 was to obtain a means “to provide additional ways of satisfying the mitigation obligation imposed by the [Curtailment Order]” by delivering water “from Magic Springs to the Rangen hatchery per engineering details submitted in the Fourth Mitigation Plan, CM-MP-2014-006.” CM-MP-2014-006 R. at 1; Ex. 4002 at 4. Transfer 79560 specifically proposes to change the place of use of 10 cfs of water right no. 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen fish hatchery. Ex. 4000 at 2-4. The Director acted within his authority by approving Transfer 79560.

B. RANGEN’S SUBSTANTIAL RIGHTS HAVE NOT BEEN PREJUDICED

The Curtailment Order explained junior ground water right holders could avoid curtailment in the Rangen Delivery Call if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.” CM-MP-2014-006 Ex. 1018 at 42. Transfer 79560 proposes to change the place of use of 10 cfs of water right no. 36-7072 from the SeaPac fish hatchery at Magic Springs to the Rangen fish hatchery to deliver mitigation water to Rangen. Ex. 4000 at 2-4. Yet Rangen argues the Director’s Final Order approving Transfer 79560 diminishes Rangen’s senior water rights. *Rangen’s Opening Brief* at 25. The Final Order does not diminish Rangen’s senior water rights. Rather, as Rangen admits, approval of Transfer 79560 allows delivery of mitigation water to Rangen’s facility that provides undeniable and immediate benefit to Rangen. *Id.*

Rangen also argues its “substantial rights have been prejudiced by the failure of the Director and Department to follow consistent and appropriate procedure when evaluating water rights issues that are related to Rangen’s Call and the critical water shortages in the Hagerman Valley.” *Rangen’s Opening Brief* at 25. In support of this argument, Rangen quotes the statement in *Hawkins v. Bonneville Cnty. Bd. of Comm’rs*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011) that applicants for permit “have a substantial right in having the governing board properly adjudicate *their applications* by applying the correct legal standards.” (emphasis added). The Director’s Final Order addresses an *application for transfer filed by the Districts*, not an application for permit filed by Rangen. Further, Rangen’s attempts to expand the scope of this proceeding beyond Transfer 79560 to analysis of “critical water shortages in the Hagerman Valley” are inappropriate. The Director analyzed Transfer 79560 consistent with Idaho law and applied the correct procedural and legal standards. Rangen’s substantial rights have not been prejudiced.

CONCLUSION

The Director's conditional approval of Transfer 79560 is consistent with applicable statutory provisions; within the Director's statutory authority; made upon lawful procedure; supported by substantial evidence on the record as a whole; and is not arbitrary, capricious, or an abuse of discretion. Rangen's substantial rights have not been prejudiced. The Court should affirm the Director's Final Order approving Transfer 79560.

RESPECTFULLY SUBMITTED this 20th day of August 2015.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



GARRICK L. BAXTER
EMMI L. BLADES
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:

DISTRICT COURT
253 3RD AVENUE NORTH
P.O. 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

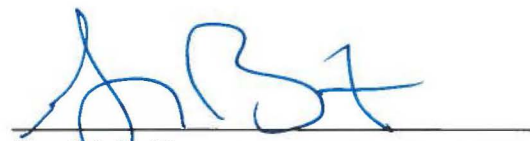
(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

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
T.J. BUDGE
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail



Garrick L. Baxter
Deputy Attorney General