IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

CITIES OF BLISS, BURLEY, CAREY, DECLO, DEITRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, AND WENDELL,

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents,

and

RANGEN, INC.,

Intervenor.

IN THE MATTER OF THE COALITION OF CITIES' SECOND MITIGATION PLAN FOR THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-15501, 36-02551, AND 36-07694 HELD BY RANGEN, INC.

Case No. CV-2015-172

IDWR RESPONDENT'S BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

The Coalition of Cities ("Cities") submitted their Second Mitigation Plan to the Director to mitigate for depletions to flows in the Curren Tunnel, from which Rangen, Inc. ("Rangen"), diverts water as authorized by its senior priority water rights. The Cities alleged that the mitigation plan, if implemented, would timely deliver to Rangen the full amount of mitigation water the Cities owed under the Director's orders, at the place and time ordered. R. Vol. 2 pp. 452-454; Tr. pp. 53-67.[1] Indeed, the Cities asserted the Second Mitigation Plan would provide more water to Rangen than was required under the Director's orders. *See* Tr. p. 62 (The mitigation plan "would provide benefits to Rangen over and above those that had been calculated by IDWR to satisfy the Rangen call"); *see also* Ex. 100 at i.

The Director concluded the Cities' Second Mitigation Plan did *not* actually deliver the required amount of mitigation water during the first year of phased-in curtailment. R. 467-68. As a result, the Director approved the mitigation plan, but with a condition limiting its application during the first year of the phase-in. R. 469.

In this appeal, the Cities argue the Second Mitigation Plan should have been unconditionally approved under CM Rules 43.03.c and 43.03.o,[2] which apply to plans for "other appropriate compensation" and stipulated plans "not otherwise fully in compliance with" the CM Rules. *Coalition of Cities' Opening Brief* ("Cities' Brief") at 12-15, 19-23. As discussed herein, the Cities' arguments are not well taken. The Cities' arguments would effectively nullify the

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[1] Volume 1 of the agency record includes pages bates numbered 1 through 258; Volume 2 includes bates numbers 259 through 496. Subsequent citations to the agency record in this brief will therefore consist of "R." followed by the bate numbers of the cited pages. Citations to the hearing transcript will consist of "Tr." followed by the cited page numbers.

[2] "CM Rules" refers to the "Rules for Conjunctive Management of Surface and Ground Water Resources." IDAPA 37.03.11.000 - .050.

Director's discretion under the plain language of CM Rule 43. Moreover, a mitigation plan that only covers some of the junior ground water users and that fails to provide mitigation within the time frame required by a curtailment order is contrary to the prior appropriation doctrine.

The Cities' alternative argument that the Second Mitigation Plan actually does fully satisfy the Cities' first year obligation by providing more than the full amount of water required by the Director's orders is contrary to the record and based on a flawed analysis, as even Rangen agrees. *Rangen, Inc.'s Intervenor Brief* ("Rangen Brief") at 3.

II. FACTS

The proceedings and general background relating to Rangen's delivery call and the Cities' Second Mitigation Plan are discussed in the briefing in this appeal and the Director's orders, R. 1-104, 195-258, 302-44, 357-67, 459-73, and need not be recited in detail here. Certain facts important to this appeal are discussed below.

Rangen filed a delivery call under the CM Rules, and the Director determined Rangen was being materially injured by diversions by holders of ground water rights junior in priority to Rangen's water rights. R. 459. The Director ordered curtailment to provide Rangen 9.1 cfs, to be phased-in over a period of five years: 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 by the fifth year. R. 459-60. The Director also ordered the first year of the phase in period would begin April 1, 2014 and end March 31, 2015. R. 460. The Cities were included in the curtailment list and received the curtailment notices. R. 170, 228-29, 312. The Cities did not appeal their inclusion on the curtailment lists nor did they appeal the Director's determination of the mitigation necessary to avoid curtailment.

Municipal water use is represented in the Enhanced Snake Plain Aquifer Model version 2.1 ("ESPAM 2.1") and was considered by the Director as part of his determination of material

injury in the curtailment order. R. 415. However, municipal water use was not included as part of the curtailment simulations using ESPAM 2.1 to quantify the specific mitigation obligation in the curtailment order because municipal use is a very small component of water use within the Eastern Snake Plain Aquifer ("ESPA"). *Id.* The ESPAM 2.1 simulations used to determine the mitigation obligation "masked" the Cities' diversions, R. 415-16, 459, but this "did not eliminate the true and actual depletive effect of the additional pumping by the Cities." R. 460. There is no dispute the Cities' junior diversions actually depleted the flows available to Rangen at the Curren Tunnel.

The Director issued an order for the Cities' Second Mitigation Plan on January 16, 2015, R. 357, and the Cities requested a hearing. R. 378. As the Director commented at the beginning of the hearing, "the timing of the recognition of mitigation" was the primary issue. Tr. 6.

The timing issue arose from a difference in the time periods the Department and the Cities used to calculate depletions during the first year of phased-in curtailment. The Department's analysis calculated depletions from the beginning of the first year under the Director's orders which was April 1, 2014. R. 417. The Cities' analysis calculated depletions starting with the end of actual or anticipated stays of curtailment—i.e., starting in January or February 2015. R. 452-54; Tr. 53-67, 70-71, 83-70. In short, the Department's mitigation analysis was based on depletions over the entire first year of the phased-in curtailment period, while the Cities' was based on the final two months of the first year. This is why the "the timing of the recognition of mitigation," Tr. 6, was the focus of the proceedings on the Cities' mitigation plan.

The Cities argued that under their analysis, the Second Mitigation Plan actually would deliver Rangen more than the full amount of first-year mitigation water the Cities owed under

the Director's orders. *See* Tr. p. 62 (The mitigation plan "would provide benefits to Rangen over and above those that had been calculated by IDWR to satisfy the Rangen call") *see also* Ex. 100 at i. The Director disagreed, concluding "the Cities' Second Mitigation Plan **does not** 'provide replacement water, at the time and place required... .'" R. 467-68 (emphasis in original).

The Director therefore approved the Cities' Second Mitigation Plan, but with a condition. The condition stated that mitigation would be recognized for the first year of "phase-in" only when the modeled benefits of mitigation to the Curren Tunnel during the first year equaled the modeled depletions caused by the Cities' junior diversions during that same year. R. 469.

III. ARGUMENT

I. Standard of Review

Judicial review of a final decision of the Director of the Department of Water Resources is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code (IDAPA). Idaho Code § 42-1701A(4). Under IDAPA, a court reviews an appeal from an agency decision based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The reviewing court does not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The reviewing court affirms the agency decision unless the court determines 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; *Castaneda*, 130 Idaho at, 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code § 67-5279 and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the record is conflicting, the reviewing court does not overturn an agency's decision that is based on substantial evidence in the record supporting the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 552, 976 P.2d 477 (1999).

II. The Director Correctly Concluded the Cities' Second Mitigation Plan Would Not Provide Mitigation During the "First Year" of "Phased-In Curtailment."

The Cities presented their Second Mitigation Plan to the Director as a proposal that would deliver Rangen more mitigation water during the first year of phase-in than was required under the Director's orders. This argument incorrectly assumed that the "first year" of the phased in curtailment began in February of 2015. R. 437, 452-54; Ex. 141, 142; Tr. 53-67, 70-71, 83-70.

The Director's *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (May 16, 2014) established that the "first year" was a twelve month period that began on April 1, 2014 and ended on March 31, 2015. R. 460. The Department's staff analysis of the Cities' Second Mitigation Plan also defined the "first year" as the full twelve month period from April 2014 to March 2015. R. 417-20. The staff analysis concluded that the recharge project proposed by the Cities' Second Mitigation Plan "does not offset the Cities' predicted impact to discharge at Curren Tunnel during the first year." R. 418.

The Director found that the recharge under the Cities' plan, which had not yet occurred, "did not deliver mitigation water to Rangen by January 19, 2015", the curtailment date if additional mitigation activities were not approved and completed. R. 463. The Director found

that "[a]t best the mitigation water will only be delivered to the recharge site for approximately one month of the first year in which mitigation is required." *Id.* The Director thus concluded that "[d]uring the first year when mitigation is required (April 1, 2014 through March 31, 2015), the Cities Second Mitigation Plan **does not** 'provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal... .'" R. 467-68 (emphasis in original). The Director further concluded that if the delivery of recharge water to the Gooding site occurred, as proposed, "during late February and March 2015, the mitigation plan **will** provide replacement water at the time and place required for the April 1, 2015 through March 31, 2016 'phase-in' year." R. 468. These findings and conclusions are supported by substantial evidence in the record. R. 414-20; Tr. Tr. 53-67, 70-71, 83-70. Rangen agrees with these findings and conclusions. *Rangen's Brief* at 1-3.

The Cities argued before the Director, and continue to argue in this appeal, that calculating the Cities' mitigation requirement on the basis of a twelve month "first year" starting on April 1, 2014 was incorrect. The Cities argued to the Director that "the legally operative starting date for examining the benefits of curtailment to Rangen in the first year" is February 7, 2015, R. 454, and argue to this Court that "Rangen was fully mitigated until January 18, 2015." *Cities' Brief* at 18. These arguments are contrary to the record.

February 7, 2015 was not the "operative starting date" the Director identified for the first-year of phased-in curtailment. The Cities' reliance on February 7, 2015 is not based on the Director's definition of the "phase-in" years, but rather on assertions that until February 7, 2015 the Cities were protected from curtailment by actual or de facto stays approved by the Director or this Court. *Cities' Brief* at 17-18; R. 452-55; Tr. 53-67, 70-71, 83-70. For this reason, the Cities

calculated their first year mitigation obligation based only on the last two months of the first year of phased-in curtailment. *Id.*

The Cities' analysis and arguments are contrary to the Director's orders, which required full curtailment or delivery of mitigation water over five years, with separate mitigation obligations for each year. R. 460. This means the first year mitigation obligation must be satisfied with water delivered during the first year; the second year obligation must be satisfied with water delivered during the second year; and so on. Even if the amount of mitigation delivered under the Second Mitigation Plan during the second year exceeds the total amount of mitigation the Director ordered during both the first and second years, the first year obligation still was not satisfied. Delivering extra mitigation water during the second year does not change that fact.

Further, the Director rejected the Cities' argument that a stay of curtailment also reduces their mitigation obligations. *See* R. 467 ("Judge Wildman's Order Granting Stay did not change the Cities' obligation for mitigation."). The Director's conclusion was correct. Mitigation owed to Rangen is determined by modeling curtailment of ground water diversions by holders of junior ground water rights. In contrast, curtailment is the physical act of prohibiting diversion of ground water by the holders of junior priority ground water right holders. A stay of curtailment may allow juniors to continue pumping while they try to arrange for mitigation, but it does not offset the depletive effects of junior diversions or reduce the amount of mitigation owed for out-of-priority pumping.

The Cities' contention that Rangen "was fully mitigated" until January 18, 2015, *Cities' Brief* at 18, is also contrary to the record. This contention incorrectly assumes Rangen had been "fully mitigated" simply because in 2014 the Director approved various IGWA mitigation plans.

Cities' Brief at 18 (citing R. 460). Rangen, however, had "appealed orders approving the first, second, and fourth mitigation plans. Rangen has consistently argued . . . the Director's orders have not supplied mitigation water . . . in time of need." R. 461. This Court agreed with some of Rangen's arguments and remanded parts of the Director's curtailment or mitigation orders for further proceedings. *See, e.g., Memorandum Decision and Order on Petition for Judicial Review, Rangen, Inc. v. IDWR*, Case No. CV- 2014-2446 (Idaho 5th Jud. Dist.) (Dec. 3, 2014) (concluding the Director erred in how he calculated the Morris Exchange credit); *Memorandum Decision and Order, Rangen, Inc. v. IDWR*, Case No. CV 2014-4970 (Idaho 5th Jud. Dist.) (Jun. 1, 2015) (concluding the Director erred in not immediately curtailing once he determined the Morris Exchange credit only extended through October 1, 2014).[3] The record is clear that Rangen was not "fully mitigated" at least from October 2, 2014 until early February of 2015, when the Magic Springs pipeline began delivering water to Rangen pursuant to IGWA's Fourth Mitigation Plan. The Cities, through the Second Mitigation Plan, were in effect "seek[ing] immediate recognition of mitigation for delayed recharge activities." R. 387. Further, while Rangen stipulated to the Cities' Second Mitigation Plan, Rangen did not agree that it had been "fully mitigated" at the time of the hearing, and still does not. *Rangen Brief* at 1-3. The record does not support the Cities' contention that Rangen was "fully mitigated" until January 18, 2015.

[3] If a party moves the Court to "take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all the parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information." IRE 201(d) (emphasis added). "Judicial notice may be taken at any stage of the proceeding." IRE 201(f). Pursuant to IRE 201(d), the Department requests the Court take judicial notice of the *Memorandum Decision and Order on Petition for Judicial Review, Rangen, Inc. v. IDWR*, Case No. CV- 2014-2446 and *Memorandum Decision and Order, Rangen, Inc. v. IDWR*, Case No. CV 2014-4970 which are attached hereto as Appendix A and Appendix B.

The Cities' argument that the Second Mitigation Plan must be approved because the Director "increased" the mitigation obligation, *Cities' Brief* at 18, is based on faulty logic and must also be rejected. The Cities argue that if the Cities' municipal diversions were not included when calculating the mitigation obligation, the Director must approve the mitigation plan. While the mitigation obligation calculated by the original ESPAM 2.1 curtailment simulations did not include the Cities' municipal diversions, R. 459, it does not logically follow that the Cities' mitigation plan must be approved by the Director. The Cities' municipal diversions were not included in the first instance because municipal use is a very small component of water use within the ESPA. R. 415. It is only because the Cities were seeking individual protection through a mitigation plan did it become necessary to independently determine their specific impact. The Department separately evaluated the depletionary effects of the Cities' junior diversions, and the Cities' separate mitigation obligations, in analyzing the Cities' Second Mitigation Plan. R 414-20.[4] There is no dispute the Cities' junior diversions actually depleted the flows available to Rangen at the Curren Tunnel. The Director must ensure the proposed mitigation plan "will prevent injury" to the senior water right holder, CM Rule 43.03, and cannot approve any mitigation plan that does not meet the standards of CM Rule 43. If the Cities' argument is to be accepted, the Director would be required to approve a mitigation plan that is contrary to CM Rule 43. In this circumstance, the Director correctly concluded, "[t]he Cities cannot argue that because the precision of the model run did not include their increment of real depletion, they should receive special treatment or be excluded from curtailment." R. 387.

[4] Rangen agrees that the Cities' argument is based on a mischaracterization of the Department's analysis, and also agrees the Second Mitigation Plan did not provide Rangen with the full amount of first year mitigation water required by the Director's orders. *Rangen Brief* at 1-3.

III. Conditional Approval of the Second Mitigation Plan was an Appropriate Exercise of the Director's Discretion Under the CM Rules.

During the administrative proceeding, the Cities' principally argued, as discussed above, that the Second Mitigation Plan should have been unconditionally approved because it actually delivered Rangen more water during the first year than the amount required under the Director's orders. The Cities also alternatively argued that CM Rule 43.03.c and 43.03.o require approval of the mitigation plan. *See* R. 448 (citing CM Rules 43.03.c and 43.03.o "as an alternative basis to approve the Cities' Second Mitigation Plan"). The Cities now offer this argument as the centerpiece of their case in this appellate proceeding.

The Cities, Rangen and the *amici curiae* essentially argue the Director had no choice but to approve the Second Mitigation Plan under CM Rule 43 because "Rangen agree[d] the Mitigation Plan shall be deemed to mitigate the Cities' out-of-priority ground water pumping." R. 261. *Cities Brief* at 12-16, 19-22; s*ee Rangen's Brief* at 4 ("Rangen's decision to agree to the Cities' Second Mitigation Plan was Rangen's decision to make. The Director should not have second-guessed that decision."). In short, the Cities and Rangen argue the Director was required to approve the Second Mitigation Plan because the Cities and Rangen had reached "an agreement on an acceptable mitigation plan," CM Rule 43.03.o, and because the plan was for "other appropriate compensation," CM Rule 43.03.c.

CM Rule 43.03 provides a non-exhaustive list of "[f]actors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior water rights." One of the factors is whether the proposed mitigation plan provides "other appropriate compensation," CM Rule 43.03.c, and another is whether the parties have agreed to a mitigation plan "even though such plan may not otherwise be fully in compliance with these provisions." CM Rule 43.03.o. The language of CM Rule 43.03 is discretionary; it lists factors "that may be

considered." (emphasis added). Arguments that the Director must approve a stipulated mitigation plan are contrary to the plain language of CM Rule 43.03. Such an interpretation nullifies the discretion expressly provided to the Director in the CM Rules. The language of CM Rule 43 is clear and this Court must reject any argument that is contrary to the plain language of the rule. *See Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006) (Only where the language of a rule is ambiguous "will [a] Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.").

The Director determined that Rangen had "'stipulate[d] to the Mitigation Plan with the Cities, agreeing that the Plan shall be deemed to mitigate the Cities' out-of-priority ground water pumping.'" R. 463-64 (citation omitted); *id.* 467 ("Rangen and the Cities agreed to the Cities' Second Mitigation Plan as mitigation for depletions to Rangen's water supply from Curren Tunnel."). The Director recognized the language of CM Rule 43.03 rule is discretionary, concluding that CM Rule 43 "establishes multiple factors that **may** be considered." R. 465 (emphasis in original); *id.* 467 ("The Director is not bound to accept an agreement").

The Director determined that the Cities' Second Mitigation Plan should not be approved as a stipulated plan for "other appropriate compensation" under CM Rule 43.03 because it did not address "the entire mitigation obligation of the ground water users" but rather "carv[ed] out special consideration for one group of junior users." R. 467. A stipulated mitigation plan that does not actually provide full mitigation in the form of the prescribed amount water delivered at the place and time of need warrants careful consideration. It is important to ensure that a stipulation not result in a situation where some juniors are curtailed but one is not, even though none of the juniors are actually providing timely mitigation in fact. R. 468. This concern is even more important in the context of a conjunctive management delivery call, which is far more

complex than a surface water-only call. *See Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007) (referring to "the complexity of the factual determinations that must be made" in a conjunctive management delivery call).

In short, if a senior surface water right holder calls for delivery of water against holders of junior ground water rights, and the juniors water right holders will not provide mitigation to the senior water right holder by the deadlines established by the Director, then the senior water right holder may not designate which non-mitigating junior water right holders will or will not be curtailed. Water rights are curtailed based on priority, not preference. Idaho Const. art. XV, § 3 ("Priority of appropriations shall give the better right as between those using the water... ."). Allowing a senior water right holder to favor certain junior water right holders over others when none are actually mitigating is contrary to priority administration. This also opens the door to favoritism in conjunctive management delivery calls. In this case, the Director correctly refused to grant immediate recognition to the Cities for delayed recharge activities. When mitigation is not provided to the senior water right holder in the time frame established by the Director but instead may be provided at some indeterminate time in the future, it is appropriate to do as the Director did in this case and condition approval upon the benefits of mitigation accruing to the senior water user.

Further, while the Cities relied on a 2009 Department order regarding a mitigation plan for "other appropriate compensation," R. 467, that order is distinguishable. In that order, the Director accepted a mitigation plan based on an agreement between Clear Springs Foods and IGWA that called for monetary compensation instead of water. In that case, the mitigation plan addressed the entire mitigation obligation of the ground water users. In contrast, in this instance, Rangen and the Cites are carving out special consideration for one group of juniors and not the

other junior users. As the Director suggested, "The disparity could be reconciled if the Cities were timely mitigating. They are not." R. 467.

Under the facts of this case, the Director therefore determined it would be "ironic and inconsistent" to unconditionally approve the Second Mitigation Plan. R. 468. Unconditional approval would have meant that some junior water users—the Cities—would be entirely relieved from curtailment during the first year even though their plan did not provide mitigation when required, while "[a]t the same time other junior ground water users might have been curtailed despite efforts to provide mitigation." R. 468 (emphasis added). The Director thus concluded "[t]he agreement by Rangen to accept the Cities' Second Mitigation Plan is not grounds to justify the mitigation plan's non-delivery of replacement water during the first 'phase-in' year," R. 468, and approved the plan with a condition limiting its application during the first year of the phase-in. R. 468-69.

The Cities' arguments that the Director abused his discretion under the standards of several previous judicial review decisions of this Court, *Cities Brief* at 13, lack merit. In those decisions, this Court determined the Director abused his discretion by approving mitigation plans that failed to adequately mitigate for the senior's actual material injury. It was for this same reason—failure to adequately mitigate the senior's material injury during the first year of phase-in—that the Director conditioned the Cities' Second Mitigation Plan. In short, the decisions cited by the Cities support the Director's decision to conditionally approve the Cities' Second Mitigation Plan. The Director did not abuse his discretion in conditionally approving the Second Mitigation Plan. *See Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95 (2011) (holding Director did not abuse his discretion where "he perceived the issue . . . as discretionary,

acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason").

Arguments that the Director's decision to conditionally approve the Second Mitigation Plan will "chill" future negotiations and provide "no incentive to enter into mitigation plans" are hyperbole. *Cities' Brief* at 4 n.4, 16. The Director approved the Second Mitigation Plan, and his decision to impose a condition was rooted in the particulars of the complex and involved mitigation proceedings of this case. Going forward, it is within the power and ability of the junior and senior water users to enter into a mitigation plan that avoids the necessity of a conditional approval. The Director's order establishes sideboards consistent with the prior appropriation doctrine for future stipulated mitigation plans, where the stipulated plan protects some juniors but not others, delivers no first year mitigation, and yet seeks immediate recognition of future mitigation. Junior ground water right holders can avoid the Director conditionally approving a future plan by providing mitigation by the deadlines established by the Director.

IV. CONCLUSION

The Cities' argument that the Director must approve the Second Mitigation Plan is contrary to the plain language of CM Rule 43 and would effectively nullify the discretion afforded the Director. Furthermore, conditionally approving a plan like the one proposed by the Cities is necessary to ensure that the mitigation plan is consistent with the prior appropriation doctrine. The Cities' argument that the Second Mitigation Plan fully satisfies the Cities' first year obligation is contrary to the record and based on a flawed analysis. The Department respectfully requests that this Court affirm and uphold the Director's orders.

RESPECTFULLY SUBMITTED this 15TH day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15TH day of July 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:

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APPENDIX A

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

DEC - 3 2014

By _____ Clerk

_____ Deputy Clerk

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

RANGEN, INC. Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, Respondents, and IDAHO GROUND WATER APPROPRIATORS, INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY Intervenors.	Case No. CV 2014-2446 **MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case originated when Rangen, Inc. ("Rangen") filed a *Petition* in the above-captioned matter seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The order under review is the Director's *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014;Amended Curtailment Order* ("*Amended Final Order*") issued on May 16, 2014, in IDWR Docket Nos. CM-MP-2014-001 and CM-DC-2011-004. The *Amended Final Order* approves in part a mitigation plan submitted by the Idaho Ground Water Appropriators, Inc. ("IGWA") in response to a delivery call made by Rangen. Rangen asserts that the *Amended Final Order* is contrary to law in several respects and requests that this Court set it aside and remand for further proceedings.

B. Course of Proceedings and Statement of Facts.

The underlying administrative proceeding in this matter concerns a delivery call. The call commenced in 2011, when Rangen filed a petition with the Department requesting curtailment of certain hydraulically connected junior ground water rights. On January 29, 2014, the Director issued his *Curtailment Order* in response to the call.[1] Ex.2042. The Director concluded that Rangen's senior water right numbers 36-2551 and 36-7694 are being materially injured by junior users. He ordered that certain junior ground water rights bearing priority dates junior to July 13, 1962, be curtailed as a result on or before March 14, 2014. Ex.2042, p.42. However, the Director instructed that the affected junior users could avoid curtailment if they proposed and had approved a mitigation plan that provided "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Id.* He further directed that if mitigation is provided by direct flow to Rangen, the mitigation plan "may be phased-in over not more than a five-year period pursuant to Rule 40 of the CM Rules as follows: 3.4 cfs the first

[1] The Director issued his *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("*Curtailment Order*") on January 29, 2014, in IDWR Docket No. 2011-004. It is included in the agency record as Exhibit 2042. The Director's *Curtailment Order* is not at issue in this proceeding. However, it was subject to judicial review by this Court in Twin Falls County Case No. CV-2014-1338. This Court entered its *Memorandum Decision and Order* and *Judgment* in that case on October 24, 2014.

year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year."[2] *Id.*

IGWA filed a proposed mitigation plan with the Director on February 11, 2014. R., pp.1-13. The plan set forth various proposals for junior users to meet their mitigation obligations to Rangen. *Id.* Following hearing, the Director issued his *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("*Final Order*"), wherein he approved IGWA's mitigation plan in part. R., pp.464-489. In so approving, the Director granted IGWA a total mitigation credit of 3.0 cfs. R., p.484. The Director then noted that "the total mitigation credit is 0.4 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015." *Id.* To address the mitigation deficiency, the *Final Order* included a revised curtailment order providing that certain junior ground water rights bearing priority dates junior to July 1, 1983, would be curtailed on or before May 5, 2014. *Id.* Following the filing of motions for reconsideration, the Director issued his *Final Order on Reconsideration* as well as his *Amended Final Order*. The *Amended Final Order* superseded the Director's *Final Order*, but did not materially change the substantive findings of fact or conclusions of law at issue here.

On June 13, 2014, Rangen filed the instant *Petition for Judicial Review*, asserting that the Director's *Amended Final Order* is contrary to law in several respects and should be set aside and remanded for further proceedings. The case was reassigned by the clerk of the court to this Court on June 16, 2014.[3] On August 6, 2014, the Court entered an *Order* permitting IGWA, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company to appear as intervenors in this proceeding. Rangen and the Department subsequently briefed the issues contained in the *Petition*. The Intervenors did not submit any briefing with respect to the *Petition*. A hearing on the *Petition* was held before this Court on November 13, 2014. The parties did not request the opportunity to submit additional briefing

[2] The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

[3] The case was reassigned to this Court pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

and the Court does not require any in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or December 14, 2010.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[4] *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

[4] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

III.

ANALYSIS

The Director's *Curtailment Order* allows for phased-in mitigation. Ex.2042, p.42. It contemplates a first year mitigation obligation of 3.4 cfs from junior users for the annual period commencing April 1, 2014, and ending March 31, 2015 ("2014 Period"). *Id.* Thereafter, it contemplates incremental increases in the mitigation obligation of junior users for each of the following four years. *Id.* To determine the mitigation obligation for each year of the five year phase-in, the Director ran ESPAM 2.1 to establish the benefits that would accrue to Rangen if curtailment was implemented under the *Curtailment Order*. Ex.2043, p.5. The exercise revealed that if curtailment was implemented, the predicted benefit to the Martin-Curren Tunnel during each of the first four years would be 3.4 cfs, 5.2 cfs, 6.0 cfs and 6.6 cfs respectively. *Id.* Those numbers thus represent the respective mitigation obligations of junior users during the first four years of phased-in mitigation. *Id.* With respect to the fifth year, ESPAM 2.1 predicted a curtailment benefit to the Martin-Curren Tunnel of 7.1 cfs. Ex.2043, pp.5-6. However, the Director held that the full obligation of 9.1 cfs would nonetheless be required the fifth year because "the Director can only phase in curtailment over five years per Conjunctive Management Rule 20.04." Ex.2043, p.6.

The mitigation plan proposed by IGWA in this case set forth nine proposals for junior users to meet their mitigation obligations to Rangen. In his *Amended Final Order*, the Director approved IGWA's plan in part. He approved IGWA's first proposal to engage in aquifer enhancement activities, including: (a) conversions from ground water irrigation to surface water irrigation, (b) voluntary "dry-ups" of acreage irrigated with ground water through the Conservation Reserve Enhanced Program or other cessation of irrigation with ground water, and (c) ground water recharge. R., p.616. These activities augment the ground water supply in the ESPA, which in turn increases ESPA discharge to springs in the Hagerman area. He also approved IGWA's second proposal to provide direct delivery of surface water from the Martin-Curren Tunnel to Rangen as a result of an exchange agreement between one of its members, the North Snake Ground Water District ("NSGWD"), and Howard Morris ("Morris Water Exchange Agreement"). *Id.* Morris holds water rights senior to Rangen's that authorize the diversion of water from the Martin-Curren Tunnel. With respect to the remaining seven proposals, the

Director rejected those on the grounds that IGWA failed to carry its evidentiary burden. R., pp. 600 & 617.

In full, the Director granted IGWA a total of 3.0 cfs of transient mitigation credit for the 2014 Period in his *Amended Final Order*. R., p.614. Of that total, 1.2 cfs is attributable to aquifer enhancement activities. *Id.* The remaining 1.8 cfs is attributable to the Morris Water Exchange Agreement. *Id.* On judicial review, Rangen raises issues concerning the legality of the Director's approval of both mitigation proposals.

A. The *Amended Final Order's* approval of IGWA's mitigation proposal based on future aquifer enhancement activities is reversed and remanded for further proceedings as necessary.

Rangen seeks judicial review of the Director's approval of IGWA's mitigation proposal to engage in aquifer enhancement activities. Rangen does not take issue with the Director's approval of mitigation credit attributable to past aquifer enhancement activities (i.e., 2005-2013). However, it argues that under the facts and circumstances present here, the Director's approval of mitigation credit for future aquifer enhancement activities is contrary to law and an abuse of discretion. Rangen contends that the Director's approval places an unlawful risk on it as the senior appropriator that the future enhancement activities will not occur. It asserts "there are no provisions in the Director's *Amended Final Order* to ensure that these future activities will occur," and "there are similarly no contingency provisions if the future activities do not or cannot occur." Rangen *Opening Br.*, p.9. This Court agrees.

When material injury to a senior water right is found to exist, the CM Rules permit the Director to allow out-of-priority water use to occur pursuant to an approved mitigation plan. IDAPA 37.03.11.040.01. In this case, the Director's *Amended Final Order* permits out-of-priority water use in part because of anticipated future aquifer enhancement activities that the Director assumes will occur:

> Using the data entered into evidence at the hearing, the Department input data into the model for each year of private party aquifer enhancement activities from 2005 through 2014. The 2005 through 2013 data were compiled from previously documented activities. IDWR Ex. 3001; IGWA Ex. 1025. *For 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero.* The Department determined the average annual benefit from aquifer enhancement activities predicted to accrue to the Curren Tunnel between April 2014 and March

2015 is 871 acre feet, which is equivalent to an average rate of 1.2 cfs for 365 days.

R., p.604 (emphasis added). While the Director has discretion to approve a mitigation plan based on future mitigation activities, such a mitigation plan "must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." IDAPA 37.03.11.043.03.c.

This Court finds that the Director's *Amended Final Order* lacks a contingency provision adequate to protect Rangen's senior rights in the event the assumed future aquifer enhancement activities do not occur. The future activities contemplated by the plan consist primarily of conversions by junior users from ground water use to surface water use. Ex. 1025. The record establishes that most of the juniors that have converted to a surface water source also maintain their ground water connections as a safety net. Tr., pp.153-154. If for any reason those junior converters are unable to meet their water needs from their surface source, they assert the right to switch back to using ground water at any time.

That such is the case is evidenced by the testimony of Richard Lynn Carlquist ("Carlquist"). Carlquist is the chairman of the NSGWD. Tr., p.74. The NSGWD is an IGWA member. Tr., p.77. Carlquist also sits as a member of IGWA's executive committee. Tr., p.78. At the hearing before the Director, Carlquist testified that the conversions by junior users are voluntary. Further, that if junior converters do not receive all the water they need from their surface water source, they can and should revert back to using ground water:

Q. [Haemmerle] Now, I want to understand how the conversions might work. You characterized almost all conversions as soft; correct?

A. [Carlquist] Yes.

Q. [Haemmerle] And you described it in such a way that if the people who do those conversions, they have the ability to turn on their pumps if they're not obtaining surface water; correct?

A. [Carlquist] That's correct.

Q. [Haemmerle] Would you say that's a routine practice?

A. [Carlquist] It hasn't happened much, but we have told them that they need to maintain that as an option because we cannot guarantee that we can lease water every year, year in and year out.

Q. [Haemmerle] Okay. Have you leased water in the last several years?

A. [Carlquist] Yes.

Q. [Haemmerle] Have you been able to deliver that leased water through the entire irrigation season routinely?

A. [Carlquist] For the most – most of the years we have been able to do that, yes.

Q. [Haemmerle] Okay. Are there years where you're unable to do that?

A. [Carlquist] There have been where we haven't been able to get as much as has been requested by the converters.

. . .

Q. [Haemmerle] And you in fact expressly tell them that if they're not getting their surface water they need to be able to turn their pumps back on; correct?

A. [Carlquist] Yes, that's what we've told them. If we can't get the water, that's why they need to maintain that connection.

Q. [Haemmerle] All right. And so most everyone maintains a connection to their groundwater pumps; correct?

A. [Carlquist] Yes.

Q. [Haemmerle] And you agree that they -- you, sitting here today, you agree that they should be able to turn their pumps back on when they need water?

A. [Carlquist] Yes.

Tr., pp.152-154.

Following the above-quoted exchange, counsel for Rangen further inquired of Carlquist concerning IGWA's understanding of its proposed mitigation plan:

Q. [Haemmerle] All right. Now, you understand that IGWA is seeking what's called a steady-state credit for these conversions. Do you know what that means?

A. [Carlquist] Basically, yes, I do. We're asking for credit for the amount of converted water that we have been able to put to use.

Q. [Haemmerle] And the steady state concept that I'm talking to you about envisions that water remains off for a long period of time where over a period of time water will appear at the Martin-Curren Tunnel. Do you understand that?

A. [Carlquist] Yes. How the model tells them it will happen.

Q. [Haemmerle] Okay. And that contemplates that water remains unused for a period of time, more than one year. Do you understand that?

A. [Carlquist] Yes.

Q. [Haemmerle] Okay. So it seems to me, Mr. Carlquist, that in order to get credit for the conversions it seems fair that those people who convert cease using their groundwater pumping. Do you agree or disagree?

A. [Carlquist] I disagree.

Q. [Haemmerle] Okay. So if in need, people on groundwater pumping can simply resume?

A. [Carlquist] Yes.

Tr., pp.154-155.

While the Director is assuming that mitigation conversions will continue and be maintained into the future, the testimony of Carlquist establishes that such an assumption is shaky at best. The conversions are voluntary, not compelled. Absent from the Director's *Amended Final Order* is any directive requiring that junior convertors refrain from reverting to ground water use during the implementation of the mitigation plan. As a result, neither the Director nor Rangen has any mechanism to compel compliance with the Director's assumption that mitigation conversions will occur into the future. To the contrary, junior users admit that the conversions will be maintained only so long as IGWA acquires enough surface water to meet their demands. Tr., pp.152-155. IGWA has not always been able to do so. The record establishes that there have indeed been years when IGWA has been unable to secure enough surface water to meet the demands of the convertors. Tr., p.153. When such a scenario arises, IGWA has instructed junior convertors to revert to ground water use to satisfy their water needs. Tr., 153. These instructions persist notwithstanding IGWA's submittal of its mitigation plan. Tr., pp.152-155.

Although the Director has assumed that mitigation conversions will continue into the future, the record establishes there is certainly no guarantee that such will actually be the case. Therefore, the CM Rules require that the mitigation plan include a contingency provision to assure the protection of the Rangen's rights in the event that source of mitigation water (i.e., water accrued to Rangen from ground to surface conversions) becomes unavailable. The Department argues that the *Amended Final Order* contains such a mitigation provision. It provides:

> If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency.

R., p.602.

The Idaho Supreme Court has previously held that the Director abused his discretion in approving a mitigation plan that does not provide an adequate contingency provision. *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013). Such is the case here. If junior convertors choose to revert back to ground water use during a given year, the above provision establishes that the Director will take no action with respect to that reversion, and the resulting mitigation deficiency, during that year. It provides only that the Director will address the deficiency at the beginning of the following irrigation season. And, that the Director will then curtail junior water right holders at that time to cure the deficiency. The Court holds such actions do not ensure the protection of Rangen's senior water rights as required by the CM Rules, and as such prejudice and diminish Rangen's substantial rights. They do not address the mitigation deficiency in the year in which it occurs; that is, the year Rangen's senior water rights will suffer injury. Curtailing ground water rights the following irrigation season is too late. The injury to Rangen's rights, and corresponding out-of-priority water use, will have already occurred. Since the Director's *Amended Final Order* does not contain a contingency provision adequate to assure protection of Rangen's senior-priority water rights, it must be set aside and remanded for further proceedings as necessary.

B. The *Amended Final Order's* approval of IGWA's mitigation proposal concerning the Morris Water Exchange Agreement is reversed and remanded in part for further proceedings as necessary.

Rangen next seeks judicial review of the Director's approval of IGWA's second mitigation proposal concerning the Morris Water Exchange Agreement. It argues that the Director's approval of the Agreement as a source of mitigation is contrary to law in several respects and must be reversed and remanded. Rangen sets forth three primary arguments in support of its position. Each will be addressed in turn.

i. The *Amended Final Order* does not violate the prior appropriation doctrine in approving the Morris Water Exchange Agreement as providing a source of mitigation water to Rangen.

Rangen first argues that the Director's approval of the Morris Water Exchange Agreement runs contrary of the doctrine of prior appropriation and its basic principle of priority administration. Rangen initiated the instant delivery call on the grounds that it is not receiving all the water it is entitled to under water right numbers 36-2551 and 36-7694. Those rights authorize Rangen to divert water from the Martin-Curren Tunnel under a July13, 1962, and April 12, 1977, priority respectively. Morris holds decreed water rights to divert water from the Martin-Curren Tunnel that are senior to those rights. Ex.1049. In February 2014, Morris entered into the Morris Water Exchange Agreement with the NSGWD. Ex.2032. Under the Agreement, Morris authorizes NSGWD to use his Martin-Curren Tunnel water rights "as needed to provide mitigation water to Rangen . . . ." *Id.* In exchange, NSGWD agreed to deliver Morris an equivalent quantity of water via an alternative surface water source referred to as the Sandy Pipeline. *Id.* In his *Amended Final Order*, the Director approved the Morris Water Exchange Agreement as providing a source of mitigation water to Rangen, and granted IGWA 1.8 cfs of mitigation credit for the 2014 Period for the direct delivery of that water to Rangen. R., p.617.

Rangen argues that the Director's approval of the Morris Water Exchange Agreement as mitigation is contrary to the prior appropriation doctrine. It contends that since Morris is not exercising his senior water rights out of the Martin-Curren Tunnel, the prior appropriation doctrine requires that the unused water go to the next user in priority on that source. This Court disagrees. Rangen's argument appears to confuse the concept of one's right as a water right holder to contract with others for the sale or use of water under that right with concepts of forfeiture, abandonment and nonuse. When one forfeits or abandons a water right, the priority of the original appropriator may be lost and junior users on the source may move up the ladder of

priority. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). However, such is not the case here. In his *Amended Final Order*, the Director did not find that Morris' senior rights had been forfeited or abandoned due to nonuse. To the contrary, the Director found that Morris' senior rights are in fact being used in priority, albeit not by Morris. Pursuant to the plain language of the Morris Water Exchange Agreement, those rights are being used in priority by NSGWD to provide direct delivery of mitigation water to Rangen. Such agreements are commonplace in Idaho, and are often utilized by junior users in delivery calls to provide a source of mitigation water in lieu of curtailment. Therefore, the Court finds Rangen's arguments on this issue are unavailing, and the *Amended Final Order* is affirmed in this respect.

ii. The Director's use of flow data associated with an average year to determine the mitigation credits of junior users is reversed and remanded for further proceedings as necessary.

In determining the amount of mitigation credit to grant IGWA as a result of the Morris Water Exchange Agreement, the Director had to first predict how much water will emanate from the Martin-Curren Tunnel throughout the implementation of the mitigation plan. To do this, the Director relied upon historical flow data associated with average Martin-Curren Tunnel discharge for the years 2002 through 2013. R., pp.605-606. He noted that "[f]rom 2002 through 2013, the average irrigation season flow has varied between 2.3 cfs and 5.7 cfs." R., p.605. He then determined that "[t]he average of the average irrigation season values for each year from 2002 through 2013 is 3.7 cfs." *Id.* The Director thus awarded mitigation credit to IGWA resulting from the Morris Water Exchange Agreement on the assumption that 3.7 cfs will emanate from the Martin-Curren Tunnel each year the mitigation plan is implemented. Rangen argues that the Director's use of flow data associated with an average year fails to protect its senior rights.

The Idaho Supreme Court has held that the Director may utilize a predictive baseline methodology when responding to a delivery call. *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho at 65o, 315 P.3d at 838 (2013) (holding "[t]he Director may, consistent with Idaho law, employ a baseline methodology for management of water resources and as a starting point in administration

proceedings"). Therefore, the Director's use of a predictive baseline methodology in this context is not inconsistent with Idaho law. However, the Court finds the Director's application of a baseline that utilizes flow data associated with an average year to be problematic.

This Court recently addressed a similar issue in its *Memorandum Decision and Order* ("*Memo Decision*") issued in Gooding County Case No. CV-2010-382 on September 26, 2014. That case, like this one, involved a delivery call. In responding to the call, the Director employed a baseline for purposes of his initial reasonable in-season demand determination. *Memo Decision*, p.33. In so employing, the Director did not use data associated with an average year. *Id.* To the contrary, to determine the water demand of the senior users in that case, the Director intentionally used historic data associated years of above average temperatures and evapotranspiration and below average precipitation. *Id.* To determine water supply, the Director intentionally underestimated supply. *Id.* at 35. When responding to the allegations that he should have used demand and supply data associated with an average year, the Director responded that "equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury." *Id.* at 33. Further, that "the incurrence of actual demand shortfalls by a senior surface water right holder resulting from . . . predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder." *Id.* When juniors users argued on judicial review that the Director was required to use demand and supply data associated with an average year, this Court disagreed. *Id.* at pp.33-35. The Court ultimately upheld the Director's rationale that the use of data associated with an average year would not adequately protect the seniors' rights in that case. *Memo Decision*, pp.33-35.

Such is also the case here. The Director's use of flow data associated with an average year to award mitigation credit to IGWA does not adequately protect Rangen's senior rights. The mitigation credit is awarded on the assumption that 3.7 cfs will emanate from the Martin-Curren Tunnel during each year the mitigation plan is implemented. That assumption is determined based on historic data associated with an average year. Using data associated with an average year by its very definition will result in an over-prediction of Martin-Curren Tunnel flows half of the time. When that occurs, Rangen's senior rights will not be protected, resulting in prejudice and the diminishment of Rangen's substantial rights. This Court agrees with the Director's prior proclamation in Gooding County Case No. CV-2010-382 that "equality in sharing the risk will not adequately protect the senior priority surface water right holder from

injury." and that "predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder." Therefore, the Director's *Amended Final Order* must be set aside in this respect and remanded for further proceedings as necessary.

iii. The Director's use of an annual time period to evaluate the mitigation benefits of the Morris Water Exchange Agreement is reversed and remanded for further proceedings as necessary.

The mitigation obligations set forth by the Director in his *Curtailment Order* are year-round, 365 days a year, mitigation obligations. The obligations are year-round because water right numbers 36-2551 and 36-7694 authorize Rangen to divert water from the Martin-Curren Tunnel year-round. However, the Morris water rights for which the Director granted IGWA mitigation credit do not authorize year-round use. They only authorize Morris, and thus NSGWD via the Agreement, to divert water from the Martin-Curren Tunnel during the irrigation season.[5] Indeed, the Director found that "[t]he contribution of water to Rangen by leaving water in the Curren Tunnel that normally would have been diverted by Morris only benefits Rangen during the irrigation season." *Id.* Notwithstanding, the Director granted IGWA 365 days' worth of mitigation credit in the amount of 1.8 cfs for delivery of water under the Morris rights. On judicial review, Rangen challenges the Director's decision in this respect.

Despite the fact that Morris' senior water rights provide no water to Rangen during the non-irrigation season, the Director's *Amended Final Order* grants IGWA a year-round mitigation credit for delivery of water under those rights. The Director reasoned that "[a]veraging IGWA's mitigation activities over a period of one year will establish consistent time periods for combining delivery of the Morris water for mitigation and the average annual benefit provided by aquifer enhancement activities, and for direct comparison to the annual mitigation requirement." R., p.602. It is reasonable to run ESPAM 2.1 to determine the benefits of aquifer enhancements activities on an annual time period. Conversions from ground water irrigation to surface water irrigation, voluntary "dry-ups," and ground water recharge all augment the ground water supply in the ESPA. The benefits of those activities accrue to Rangen on an annual time period, and so it reasonable to grant IGWA year-round mitigation credit for those activities.

[5] The irrigation season is defined under water right numbers 36-134D, 36-134E and 36-135D as "02-15 to 11-30."

The direct delivery of wet water as mitigation is another story. It is a fiction to conclude that water delivered to Rangen under the Morris Water Exchange Agreement provides mitigation to Rangen on a year-round basis. Since that water is only available to Morris during the irrigation season, it is only available to NSGWD for delivery to Rangen during the irrigation season. In reality, it provides no mitigation water to Rangen during the non-irrigation season. Put differently, during the non-irrigation season, Rangen's rights are senior in priority to receive the water that would otherwise be available to satisfy the Morris Water Exchange Agreement rights during the irrigation season. Therefore, the "foregone diversion" of Morris water during the irrigation season provides no mitigation water to Rangen during the non-irrigation season. Furthermore, Rangen's rights rely on direct flow from the Martin-Curren Tunnel. This is not a situation involving a storage component where the volume of mitigation water delivered during the irrigation season can be mathematically and physically apportioned for use by Rangen over a 365-day period. Absent such a situation, water credited for mitigation during the non-irrigation season is available on paper only. Therefore, the Court holds that the Director abused his discretion in granting IGWA year-round mitigation credit resulting from the Morris Water Exchange Agreement. The Director's decision in this respect prejudices and diminishes Rangen's senior rights and must be reversed and remanded for further proceedings as necessary.

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

In its *Petition for Judicial Review*, Rangen seeks an award of attorney fees under Idaho Code § 12-117. While Rangen seeks an award in its *Petition*, it has not supported that request with any argument or authority in its briefing. On that ground, Rangen is not entitled to an award of attorney fees on judicial review, and its request must be denied. *See e.g., Bailey v. Bailey* 153 Idaho 526, 532, 284 P.3d 970, 976 (2012) (providing "the party seeking fees must support the claim with argument as well as authority"). Additionally, the Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the issues presented to this Court are largely issues of first impression under the CM Rules. The Court holds that the Department has presented legitimate questions for this Court to address, and Rangen's request for attorney fees is alternatively denied on those grounds.

IV.

CONCLUSION AND ORDER OF REMAND

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

IT IS SO ORDERED.

Dated December 3, 2014

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

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

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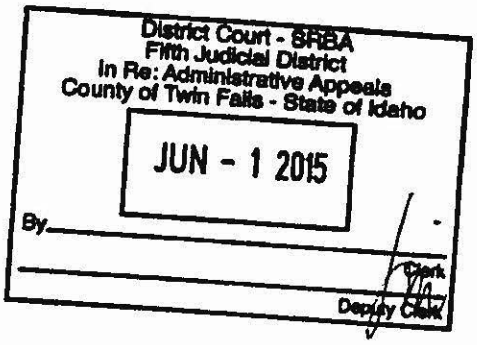
APPENDIX B



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 **MEMORANDUM DECISION AND ORDER**

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.[1] *Supp. A.R. CM-DC-2011-001*, pp.1-104.[2] 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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[1] 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.

[2] 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.[3] 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).

[3] The case was reassigned to this Court pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

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.[4] 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

[4] 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.[5] *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

[5] 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 uses 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

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