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Attorneys for Respondents

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

SOUTH VALLEY GROUND WATER
DISTRICT,

Petitioner,

vs.

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

Respondents.

Case No. CV07-21-00243

**SECOND DECLARATION OF
MICHAEL C. ORR**

I, MICHAEL C. ORR, certify and declare under penalty of perjury pursuant to the laws
of the State of Idaho, that the following is true and correct:

1. I am over the age of eighteen (18) and am an attorney of record for Respondents the Idaho Department of Water Resources (“Department”) and its Director Gary Spackman, in his official capacity as Director of the Department, in the above-captioned matter. I make this declaration pursuant to Idaho Code Section 9-1406, and based on my own personal knowledge.
2. Attached hereto as “**Exhibit C**” is a true and correct copy of the *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* issued on May 4, 2021, in the contested case before the Department under Docket No. AA-WRA-2021-001;
3. Attached hereto as “**Exhibit D**” is a true and correct copy of a staff memorandum prepared by Sean Vincent for the contested case before the Department under Docket No. AA-WRA-2021-001;
4. Attached hereto as “**Exhibit E**” is a true and correct copy of the *Final Order Denying Mitigation Plan* issued on June 29, 2021, the contested case before the Department under Docket No. AA-WRA-2021-001;
5. Attached hereto as “**Exhibit F**” is a true and correct copy of the *Final Order Denying Petition to Stay Curtailment/Granting Request for Expedited Decision/Granting Request for Hearing* issued on June 29, 2021, the contested case before the Department under Docket No. AA-WRA-2021-001;
6. Attached hereto as “**Exhibit G**” is a true and correct copy of the *Memorandum Decision and Order on Petition for Judicial Review* issued in Twin Falls County Case No. CV 2014-2446 on December 3, 2014.

DATED this 30th day of June, 2021.

///

/s/ MICHAEL C. ORR
MICHAEL C. ORR
Deputy Attorney General
Idaho Department of Natural Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2021, I caused to be served a true and correct copy of the foregoing document by ICourts e-filing delivery to each party listed as following:

Albert P. Barker Travis L. Thompson Michael A. Short BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson St., Ste. 102 P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com tlr@idahowaters.com mas@idahowaters.com	James R. Laski Heather E. O'Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com
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/s/ MICHAEL C. ORR
MICHAEL C. ORR
Deputy Attorney General
Idaho Department of Water Resources

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**NOTICE OF ADMINISTRATIVE
PROCEEDING, PRE-HEARING
CONFERENCE, AND HEARING**

A drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 ("Model") show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. Pursuant to Idaho Code § 42-237a.g., "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect...the present or future use of any prior surface or ground water right." Based on the information from the Model, the Director of the Idaho Department of Water Resources ("Department") believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

NOTICE OF ADMINISTRATIVE PROCEEDING

NOTICE IS HEREBY GIVEN that pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding ground water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. Additional information and maps will be posted on the Department's website at: <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.

If you wish to participate in the administrative proceeding, **please send written notice to the Department by May 19, 2021, to P.O. Box 83720, Boise, Idaho 83720-0098 stating your intent to participate in AA-WRA-2021-001. If you do not participate, you may still be legally bound by the results of the proceedings.**

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that the Department will hold a prehearing conference to discuss the Administrative Proceeding on May 24, 2021, at 9:00 a.m. (MDT), in Conference Rooms 602C and 602D of the Department's State Office, located at 322 E. Front Street, 6th Floor, Boise, Idaho. Parties may appear in person or via Zoom teleconference. However, due to gathering restrictions, in-person

attendance is limited. Contact Kimberle English to reserve an in-person spot at: Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

All parties must be present at the prehearing conference in person, by telephone or by video conference. Parties will be provided with login information for the video conference a few days before the conference.

Parties should come to the prehearing conference prepared to discuss the following:

- Procedure at Hearing
- Remote Participation at the Hearing
- Discovery
- Witnesses
- Burdens

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure. IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The prehearing conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department no later than five (5) days prior to the conference. Inquiries for special accommodations should be directed to Kimberle English, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Department will hold a hearing in the matter on June 7-11, 2021, at 10:00 a.m. (MDT), in Conference Rooms 602A, 602B, 602C, and 602D of the Department's State Office, located at 322 E. Front Street, 6th Floor, Boise, Idaho. All parties must be present at the hearing. The possibility of remote participation will be discussed at the pre-hearing conference.

The hearing will be held in accordance with the provisions of Chapter 17, Title 42 and Chapter 542, Title 67, Idaho Code, and the Department's Rules of Procedure. IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department no later than five (5) days prior to the hearing. Inquiries for special accommodations should be directed to Kimberle English, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.


DATED this 4th day of May, 2021.



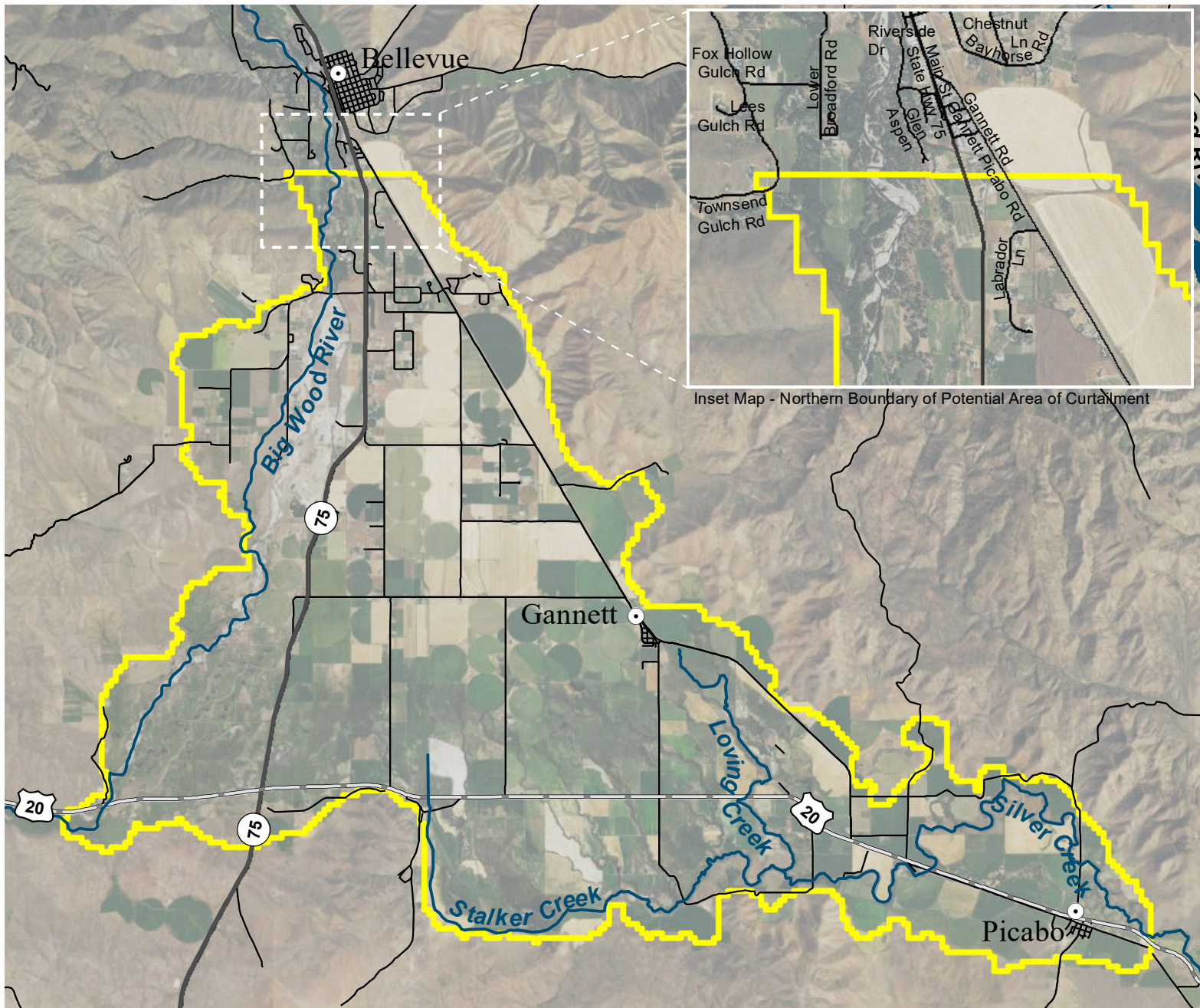
GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 4 day of May, 2021, the above and foregoing **NOTICE OF ADMINISTRATIVE PROCEEDING, PRE-HEARING CONFERENCE, AND HEARING** was mailed through United States Postal Service to the service list posted on the Department's website: <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.


Kensie Thorneycroft

Basin 37 Administrative Proceeding



Inset Map - Northern Boundary of Potential Area of Curtailment

Legend

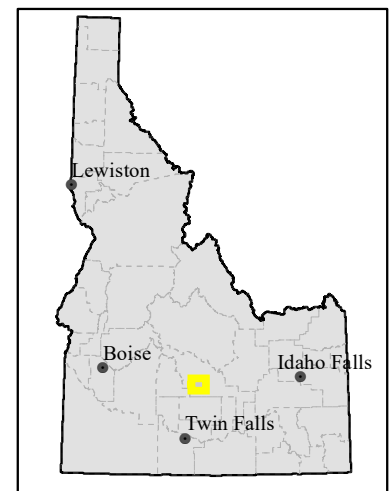
- Selected Rivers and Creeks
- Cities
- Potential Area of Curtailment

Imagery is 2019 (NAIP/FSA source)

0 1 2 4 Miles



April 29th, 2021



Location Map

MEMO

State of Idaho

Department of Water Resources

322 E Front Street, PO Box 83720, Boise, Idaho 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700

Date: May 17, 2021

To: Gary Spackman, Director

From: Sean Vincent, Hydrology Section Manager

Subject: Surface Water Supply Forecasts for the Wood River Basins

This memorandum has been prepared in response to the Director's request for staff memoranda dated May 11, 2021. This memorandum addresses item 2 in the request:

- 2. *Describe methods of predicting surface water supplies for the Wood River Basins. Based on IDWR expertise, recommend a method for predicting the water supply for the upcoming 2021 irrigation season and identify potential analog years.***

Description of Methods

Three methods for predicting surface water supplies for the upcoming irrigation season were considered:

1. **SWSI**

The Surface Water Supply Index (SWSI) is a predictive indicator of surface water availability in a basin compared to historic supply. The Natural Resources Conservation Service (NRCS) computes the SWSI by summing the two major sources of surface water supply for irrigation: streamflow runoff and reservoir carryover. According to the NRCS website, "*SWSI uses non-exceedance probabilities to normalize the magnitude of annual water supply variability between basins. The non-exceedance values are then rescaled to range from +4.1 (extremely wet) to -4.1 (extremely dry). A SWSI value of 0.0 indicates a median water supply as compared to historic occurrences.*" SWSIs are computed for many of the irrigated basins in the western United States including the Big Wood River basin below Magic Reservoir and the Big Wood River above Hailey.

At the beginning of each month (excluding November and December), the NRCS publishes a table with 10-, 30-, 50-, 70-, and 90-percent exceedance forecasts for the coming season along with measured total annual water supply volumes for the previous 30 years and an estimate of the adequate water supply volume for irrigation.

2. **WRWC Model**

The predictive model developed by Dr. Kendra Kaiser for the Wood River Water Collaborative (WRWC) provides forecasts for irrigation season streamflow, total volume, and runoff timing for

gages on the Big Wood (Hailey, Stanton Crossing), Silver Creek, and Camas Creek. The WRWC model also estimates annual diversions and curtailment dates for three water right priorities on each reach (Big wood above Stanton, Big Wood below Magic Reservoir, and Silver Creek). The WRWC model, like those used for NRCS water supply forecasts, is a suite of statistical models based on linear regressions between streamflow and predictive variables such as Snow Water Equivalent, precipitation, antecedent streamflow, and climate teleconnection index.

IDWR staff downloaded and ran the WRWC model and then compared WRWC model output with NRCS forecasts for runoff volume at the Big Wood at Hailey gage (no other gage sites are included in both forecast models). IDWR also contacted Dr. Kaiser and learned that the WRWC model is still in development and that modifications to the code are being made based on input from the WRWC.

3. NWRFC ESP

The Northwest River Forecast Center (NWRFC) currently uses an ensemble streamflow prediction (ESP) technique to make water supply forecasts for the Columbia River Basin; the coastal streams of Washington and Oregon; and the Great Basin of Oregon. The ESP streamflow volume forecast has two components: (1) a 10-day streamflow forecast based on the current 10-day weather forecast and information relative snow water content, snow cover, soil moisture, and reservoir levels (found at: <https://www.nwrfc.noaa.gov/rfc/>), and (2) an ensemble of 40 streamflow forecasts based on historic temperature and precipitation datasets from the period 1981 to present. Each of the historic forecasts is appended to the end of the 10-day forecast and the resulting ensemble of 40 forecasts are described using exceedance probabilities. The ESP forecasts are revised daily.

Method Selection

IDWR chose the SWSI for predicting surface water supplies for the 2021 irrigation season for the following reasons:

1. The SWSI and NWRFC ESP are both good methods for predicting agricultural water supplies in reservoir-regulated basins, like the Big Wood River basin below Magic Reservoir, because they consider reservoir storage in addition to natural flow.
2. The SWSI is normalized, making it easy to compare the forecast supply with historical water supplies in the same basin and in other basins.
3. SWSI tables include exceedance forecasts for the coming season along with historical water supply volumes for previous years. For this reason, SWSI tables are especially useful for choosing analog water years.
4. SWSI tables also include an estimate of the adequate water supply volume, which can be used to determine if the current year will have a shortage or surplus of irrigation water.
5. The WRWC model is still in development.

SWSI Selection

Because it includes a reservoir storage component, the SWSI for the Big Wood River basin below Magic Reservoir is the obvious choice for forecasting surface water availability for irrigators with access to storage water in Magic Reservoir. On the other hand, the SWSI for the Big Wood River above Hailey is a better choice for predicting the available supply for surface water users in the Wood River Valley as well as downstream users that don't have access to Magic Reservoir but instead divert from Silver Creek and/or the Little Wood River.

Forecast supplies for the 2021 irrigation season

The April 2021 Big Wood River below Magic Reservoir SWSI for the most probable case (50% exceedance) was -2.7 with a total projected water supply of 116 thousand acre-feet (KAF), which is the sum of the end of March reservoir storage (32 KAF) plus the projected April through September natural flow (84 KAF). The projected total irrigation season water supply is less than one-half of the adequate water supply volume of 275 KAF.

The April SWSI for the Big Wood River above Hailey (used as an indicator for the Wood River Valley) was also -2.7 with a predicted April through September runoff volume of 127 KAF. The projected total water supply for the Big Wood River above Hailey is only slightly less than the adequate water supply volume of 135 KAF.

Potential analog years for the Big Wood River Basin below Magic Reservoir

For the period 1991 to 2020, the years with the most similar total supplies to the April 50% exceedance forecast for 2021 are 1994 (SWSI = -2.6) and 2004 (SWSI = -2.8). In both years, Magic Reservoir failed to fill, the shutoff date occurred in early July, and the reservoir was essentially empty on the shutoff date.

Potential analog years for the Wood River Valley

For the period 1991 to 2020, the years with the most similar total supplies to the 50% exceedance forecast for 2021 are 2004 (SWSI = -2.6) and 2020 (SWSI = -2.8). Despite being a poor water supply year, the water supply volume in 2004 (136 KAF) just exceeded the 135 KAF adequate water supply.

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**FINAL ORDER DENYING
MITIGATION PLAN**

BACKGROUND

This proceeding was initiated by the Director of the Idaho Department of Water Resources,¹ pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, to determine whether water is available to fill the ground water rights within an area of the Wood River Valley south of Bellevue known as the “Bellevue Triangle.” *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (May 4, 2021) (“*Notice*”). The *Notice* stated “[i]f the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation seasons.” *Id.* The *Notice* scheduled a hearing for June 7-11, 2021. The hearing was extended by one day, and concluded on June 12, 2021. Post-hearing briefs were filed on June 21, 2021.

On June 23, 2021, South Valley Ground Water District and Galena Ground Water District (“Ground Water Districts”) submitted *South Valley Ground Water District and Galena Ground Water District’s Proposed Mitigation Plan* (“*Proposed Plan*”). The *Proposed Plan* was submitted pursuant to Rule 43 of the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.011.000—.051 (“CM Rules”), “in response to the delivery call and demands for conjunctive administration of surface and ground water use . . . asserted by certain surface water users.” *Proposed Plan* at 1-2. The Ground Water District submitted the *Proposed Plan* in advance of an order of curtailment, anticipating a curtailment order may be forthcoming. *Id.* at 3. The Big Wood & Little Wood Water Users Association (“BWLWWUA”) and the Big Wood Canal Company (“BWCC”) submitted a *Response to SVGWD and GGWD’s Proposed Mitigation Plan* on June 25, 2021 (“*Response*”).

On June 28, 2021, the Director issued a *Final Order* that orders curtailment of certain junior priority ground water rights within the Bellevue Triangle during the 2021 irrigation season, starting July 1, 2021.

DISCUSSION

¹ In this order, “Department” refers to the Idaho Department of Water Resources, and “Director” refers to the Director of the Department.

The *Proposed Plan* characterizes this contested case as a response to delivery calls made by the holders of certain senior surface water rights and the CM Rules. This contested case, however, does not address or involve delivery calls, and is not a proceeding under the CM Rules. It is a proceeding initiated by the Director pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104.

As BWLWWUA and BWCC point out, Idaho Code § 42-237a.g. does not expressly authorize “mitigation” in lieu of curtailment. *Response* at 2. The Director’s authority to prohibit or limit ground water use under Idaho Code § 42-237a.g. is expressly “discretionary,” however, and also “broad.” *Stevenson v. Steele*, 93 Idaho 4, 11-12, 453 P.2d 819, 826-27 (1969). The Director agrees that providing mitigation to address the adverse effects of ground water pumping in the Bellevue Triangle on the present or future use of senior surface water rights diverting from Silver Creek and the Little Wood River can be an alternative to curtailment pursuant to Idaho Code § 42-237a.g. The Director will therefore consider the *Proposed Plan*.

The *Proposed Plan* assumes that the mitigation obligation of the junior water right holders is limited to protecting three senior surface water rights bearing 1883 priority dates. *Proposed Plan* at 3. This assumption is based on the Ground Water Districts’ interpretation of testimony presented at the contested case hearing conducted on June 7-12, 2021. The Ground Water Districts have combined an analysis by Tim Luke, an IDWR employee, and Kevin Lakey, Watermaster for Water District 37, to narrowly limit the mitigation obligation.

The record shows that the ground water rights in the Bellevue Triangle are junior in priority to virtually all of the surface water rights for Silver Creek and the Little Wood River. The *Final Order* did not determine that the only surface water rights on Silver Creek and the Little Wood River that must be protected are those bearing priority dates equal to or earlier than 1883. The *Final Order* determined that consumptive ground water pumping in the Bellevue Triangle should be curtailed as soon as possible in order to protect all senior surface water rights diverting from Silver Creek and the Little Wood River.

There are many surface water rights on Silver Creek and the Little Wood River junior in priority to 1883 but senior to ground water pumping in the Bellevue Triangle. Many of these water rights have been curtailed but will be entitled to divert, within the limits of their priorities, any additional water provided by curtailment of ground water pumping in the Bellevue Triangle. Tr. 898. The *Proposed Plan* does not take this into account, and appears to provide considerably less water than would result from curtailment. *See, e.g., Response* at 2-3. The *Proposed Plan* also would allow all ground water pumping to continue until August 15, and would allow pumping for approximately 4,000 acres of pasture and potatoes to continue after August 15. *Proposed Plan* at 6. Thus, even assuming that the *Proposed Plan* provides sufficient detail and assurances to conclude that the proposed mitigation will actually materialize—which it does not, as discussed below—the *Proposed Plan* is not sufficient to offset depletions resulting from ground water pumping in the Bellevue Triangle, and is not equivalent to the “the best-case scenario” for senior surface water users. *Proposed Plan* at 3.

In addition, the *Proposed Plan* does not provide sufficient detail and assurances to support a conclusion that the mitigation proposed will actually be provided:

- there is no evidence that the Ground Water Districts have, or will be able to, secure storage water from Water District 1;

- there is no written verification from American Falls Reservoir District No. 2 that the mitigation storage water can be delivered through the Milner-Gooding Canal in time of need;
- the proposal to rely upon new ground water pumping to mitigate for the depletion effects of existing ground water pumping appears circular, and raises the question of whether mitigation can be achieved by pumping ground water that is hydraulically connected to the source for the surface water rights to be protected;
- the proposal to rely upon new ground water pumping to mitigate for the depletion effects of existing ground water pumping depends on so many interdependent assumptions and components that it is difficult to understand or predict the actual effect that the proposal will have on flows in Silver Creek and the Little Wood River;
- the Temporary Change Applications were not accompanied by the required filing fees;
- the materials submitted in connection with the proposed Temporary Change Applications lack sufficient detail and information to process;² and
- the *Proposed Plan* does not include any contingency provisions that would protect senior surface water users on Silver Creek and the Little Wood River in the event that the proposed mitigation is not or cannot be provided at the seniors' points of diversion when needed, in the quantities needed.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that *South Valley Ground Water District and Galena Ground Water District's Proposed Mitigation Plan* is DENIED.

DATED this 29th day of June, 2021.



GARY SPACKMAN
Director

² Pursuant to Idaho Code § 42-222A(3), the Director must determine that a proposed temporary change “can be properly administered and there is no information that the change will injure any other water right.” As drafted the proposed temporary changes lack the information necessary for the Director to determine whether they meet the statutory requirements. The additional information needed includes, but may not be limited to, the following: the locations where water will be injected into Silver Creek and rediverted from the Little Wood River, the locations where the water will be used for irrigation purposes, the location of the lands that will be idled, the consent of the water rights owners to the proposed temporary changes, the appropriate beneficial use (other than irrigation) for the proposal to inject water into Silver Creek to augment the water supply of the Little Wood River in general, and the historic consumptive use of the water rights proposed to be changed to a new beneficial use.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 29th day of June, 2021, the above and foregoing FINAL ORDER DENYING MITIGATION PLAN was served by the method indicated below, and address to the following:

James R. Laski Heather E. O'Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 Ketchum, ID 83340 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Matthew A. Johnson Brian T. O'Bannon White, Peterson, Gigray & Nichols, P.A. 5700 East Franklin Road, Suite 200 Nampa, Idaho 83687-7901 mjohnson@whitepeterson.com bobannon@whitepeterson.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Laird B. Stone Stephan, Kvanvig, Stone, & Trainor P.O. Box 83 Twin Falls, Idaho 83303-0083 skst@idaho-law.com cynthia@idaho-law.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Jerry R. Rigby Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Joseph F. James James Law Office, PLLC 125 5th Ave. West Gooding, ID 83330 joe@jamesmvlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Robert L. Harris Holden, Kidwell, Hahn & Crapo, P.L.L.C. P.O. Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405 rharris@holdenlegal.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Rusty Kramer, Secretary PO Box 507 Fairfield, ID 83327 waterdistrict37b@outlook.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Brendan L. Ash James Law Office, PLLC 125 5th Ave. West Gooding, ID 83330 efile@jamesmvlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Richard T. Roats Lincoln County Prosecuting Attorney P.O. Box 860 Shoshone, ID 83352 rtr@roatslaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Paul Bennett 114 Calypso Lane Bellevue, ID 83313 info@swiftsureranch.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
J. Evan Robertson Robertson & Slette, PLLC P.O. Box 1906 Twin Falls, Idaho 83303-1906 erobertson@rsidaholaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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James P. Speck Speck & Aanestad P.O. Box 987 Ketchum, ID 83340 jim@speckandaanestad.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
John K. Simpson Barker Rosholt & Simpson LLP 1010 Jefferson St., Ste. 102 P.O. Box 2139 Boise Idaho 83701-2139 jks@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Lawrence Schoen Napuisunaih 18351 U.S. Highway 20 Bellevue, ID 83313 lschoen@naramail.net	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, postage prepaid Hand Delivery Overnight Mail Facsimile Email
Idaho Ranch Hands Property Management 218 Meadowbrook Hailey, ID 83333 idahoranchhands@gmail.com	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, postage prepaid Hand Delivery Overnight Mail Facsimile Email
Southern Comfort Homeowner's Association P.O. Box 2739 Ketchum, ID 83340	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. Mail, postage prepaid Hand Delivery Overnight Mail Facsimile Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, Idaho 83318 wkf@pmt.org	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, postage prepaid Hand Delivery Overnight Mail Facsimile Email
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GARY D. SLETTE ROBERTSON & SLETTE PLLC PO Box 1906 Twin Falls, Idaho 83303 gslette@rsidaholaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Megan Jenkins
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**FINAL ORDER DENYING PETITION
TO STAY
CURTAILMENT/GRANTING
REQUEST FOR EXPEDITED
DECISION/ GRANTING REQUEST
FOR HEARING**

BACKGROUND

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). The *Notice* stated that a drought is predicted for 2021 irrigation season, and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. *Id.* at 1. The *Notice* stated the Director was initiating an administrative proceeding, pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, to determine whether water is available to fill the ground water rights within the Wood River Valley south of Bellevue. *Id.* After a six day hearing, On June 28, 2021, the Director issued a *Final Order* curtailing ground water rights within the area known as the Bellevue Triangle, starting July 1, 2021 at 12:01 a.m.

Prior to the issuance of the *Final Order*, on June 24, 2021, South Valley Ground Water District (“South Valley”) and Galena Ground Water District (“Galena”) filed *South Valley Ground Water District and Galena Ground Water District’s Proposed Mitigation Plan* (“Mitigation Plan”).

After the Director issued the *Final Order*, on June 28, 2021, South Valley and Galena filed *South Valley Ground Water District’s and Galena Ground Water District’s Petition to Stay Curtailment/Request for Expedited Decision/Request for Hearing on Proposed Mitigation Plan* (“Petition”).¹

ANALYSIS

The *Petition* requests three interrelated actions of the Director: 1) Stay the curtailment called for in the *Final Order* until the Director makes a decision on the *Mitigation Plan*; 2) Hold a hearing on the *Mitigation Plan*; and 3) Expedite the decision on the *Petition*.

¹ According to the Certificate of Service, South Valley and Galena emailed the Director a copy of the *Petition* and mailed the official filing on June 28, 2021. As of the issuance of this Order, the Department has not received the mailed copy.

The first and third requests can be addressed summarily. Concurrent with this Order the Director is issuing an order denying the *Mitigation Plan*. As such, the need to stay the curtailment, called for in the *Final Order*, as requested in the *Petition*, is moot and denied. In issuing this Order the Director grants the *Petition*'s request to expedite the decision.

The request for a hearing on the *Mitigation Plan* is granted. However, the legal authority for holding a hearing needs to be clarified. In the *Petition*, South Valley and Galena argue the Director is required to hold a hearing on the *Mitigation Plan* pursuant to the Conjunctive Management Rules, IDAPA 37.03.11 ("CM Rules"). *Petition* at 3-4, 9. As discussed in the *Final Order*, this proceeding is not governed by the CM Rules. *Final Order* at 30-32. The Director will treat South Valley's and Galena's request for a hearing as a request under Idaho Code § 42-1701A(3) in regards to the Director's denial of the *Mitigation Plan* and denial of the request for stay in the *Petition*. The Department will work with the parties in this administrative proceeding to expeditiously schedule the hearing.

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that South Valley's and Galena's petition to stay curtailment is DENIED.

IT IS FURTHER ORDERED that South Valley's and Galena's petition for hearing is GRANTED.

IT IS FURTHER ORDERED that South Valley's and Galena's petition to expedite the Director's decision on the *Petition* is GRANTED.

DATED this 29th day of June, 2021.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 29th day of June, 2021, the above and foregoing FINAL ORDER DENYING PETITION TO STAY CURTAILMENT/GRANTING REQUEST FOR EXPEDITED DECISION/ GRANTING REQUEST FOR HEARING was served by the method indicated below, and address to the following:

James R. Laski Heather E. O'Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 Ketchum, ID 83340 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Matthew A. Johnson Brian T. O'Bannon White, Peterson, Gigray & Nichols, P.A. 5700 East Franklin Road, Suite 200 Nampa, Idaho 83687-7901 mjohnson@whitepeterson.com bobannon@whitepeterson.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Robert L. Harris Holden, Kidwell, Hahn & Crapo, P.L.L.C. P.O. Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405 rharris@holdenlegal.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

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John K. Simpson Barker Rosholt & Simpson LLP 1010 Jefferson St., Ste. 102 P.O. Box 2139 Boise Idaho 83701-2139 jks@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Lawrence Schoen Napuisunaih 18351 U.S. Highway 20 Bellevue, ID 83313 lschoen@naramail.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Idaho Ranch Hands Property Management 218 Meadowbrook Hailey, ID 83333 idahoranchhands@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Megan Jenkins
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

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- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
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(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

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

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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 July 13, 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 650, 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.

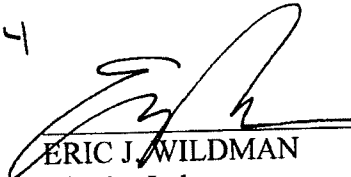
IV.

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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