

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

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 36-16976)	FINAL ORDER
IN THE NAME OF NORTH SNAKE)	DENYING APPLICATION
GROUND WATER DISTRICT, ET AL.)	
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BACKGROUND

On April 3, 2013, North Snake Ground Water District (“GWD”), Aberdeen American Falls GWD, Bingham GWD, Bonneville Jefferson GWD, Jefferson Clark GWD, Madison GWD, and Magic Valley GWD (“Districts”), represented by attorney T.J. Budge of Racine Olson Nye Budge & Bailey, filed Application for Permit No. 36-16976 (“Districts’ Application”) with the Idaho Department of Water Resources (“Department”). Protests against the Districts’ Application were filed by Rangen, Inc. (“Rangen”), represented by attorneys Robyn Brody, Justin May, and Fritz Haemmerle, and by Blind Canyon Aquaranch, Inc. (“Blind Canyon”).

A pre-hearing conference was held on May 13, 2014. An administrative hearing was conducted on September 17, 2014, in Twin Falls, Idaho. Blind Canyon did not participate in the hearing and, therefore, waived its right to offer evidence into the administrative record and cross examine witnesses. During the hearing, the Districts and Rangen offered testimony and documentary evidence into the record. Rangen and the Districts submitted post-hearing briefs. On November 18, 2014, the Department issued a *Preliminary Order Issuing Permit* (“Preliminary Order”) and Permit to Appropriate Water No. 36-16976 (“Permit”).

This matter is now before the Director of the Department as a result of *Exceptions to Preliminary Order* and *Rangen’s Brief in Support of Exceptions to Preliminary Order* (“Brief”) filed by Rangen on December 2, 2014. The Districts filed the *Ground Water Districts’ Response to Rangen’s Exceptions to Preliminary Order* on December 12, 2014. The Director finds, concludes, and orders as follows:

FINDINGS OF FACT

The Rangen Facility

1. Rangen owns and operates a fish propagation and research facility near the head of Billingsley Creek. Rangen currently diverts water to the facility from the Martin-Curren Tunnel (sometimes referred to as “Curren Tunnel”) and from the head of Billingsley Creek, which is fed by various springs arising on a talus slope east of the facility and by overflow water from the Curren Tunnel diversion structures.

2. The Rangen facility is comprised of a green house, hatch house, and small raceways which are all located south of the Billingsley Creek channel. The facility also includes a set of large raceways and structures known as the CTR raceways, which are both located north of the Billingsley Creek channel. The Rangen facility has existed for over fifty years.

3. Rangen diverts water to its facility from several points of diversion. Rangen first diverts water from a pipe placed in the mouth of the Curren Tunnel that conveys water to the hatch house and greenhouse. Tr. p. 123.

4. Water emanating from the Curren Tunnel flows into a concrete structure called the Farmers Box. Tr. p. 123. Two pipelines deliver water out of the Farmers Box toward a structure called the Rangen Box. *Id.* at 123-24. A single pipe runs out of the Rangen Box to the hatch house, greenhouse, and small raceways. *Id.* at 124.

5. All of the water from the talus slope and the overflow from the Farmers Box and Rangen box collects and forms the headwaters of Billingsley Creek. Rangen diverts water from a large diversion on Billingsley Creek (the "Bridge Diversion") which supplies water to the large raceways and CTR raceways. Ex. 1048; Ex. 1059. Water from the small raceways is piped across Billingsley Creek and added to the water flowing through the large raceways. Tr. p. 124.

6. Water used in the Rangen facility is returned to Billingsley Creek at the end of the CTR raceways. There are no water right points of diversion located between the Bridge Diversion and the return flow into Billingsley Creek at the end of the Rangen facility. Tr. p. 179-80.

7. Three water rights currently authorize diversion and use of Curren Tunnel water for fish propagation purposes at the Rangen facility. Water right 36-15501 bears a priority date of July 1, 1957, and authorizes the diversion of 1.46 cfs for fish propagation. Water right 36-2551 bears a priority date of July 13, 1962, and authorizes the diversion of 48.54 cfs for fish propagation and domestic use. Water right 36-7694 bears a priority date of April 12, 1977, and authorizes the diversion of 26.00 cfs for fish propagation.

8. Water rights 36-15501, 36-2551, and 36-7694 only identify a single water source, the Martin-Curren Tunnel. None of these three water rights list Billingsley Creek or springs tributary to Billingsley Creek as authorized sources. None of these three water rights identify the Bridge Diversion as an authorized point of diversion.

9. Rangen diverts water authorized by two other small water rights (36-134B and 36-135A) from the Curren Tunnel for domestic and irrigation use. Neither of these water rights list Billingsley Creek or springs tributary to Billingsley Creek as authorized sources. Neither of these water rights identifies the Bridge Diversion as an authorized point of diversion.

10. The flow in Billingsley Creek has, at times, exceeded 12 cfs at the Bridge Diversion over the last decade. Ex. 1021; Ex. 1022; Ex. 1040 at 1; Ex. 2017.

11. The Rangen facility was designed for flows of 76 cfs. Tr. p. 249. In recent years, some parts of the facility cannot be used because of a lack of flow from the Curren Tunnel and the headwaters of Billingsley Creek. Tr. p. 249. Currently, Rangen diverts almost all of the water arising upstream of the Bridge Diversion. *Id.*

12. Due to a decline in the flow from the Curren Tunnel and from the various springs at the head of Billingsley Creek, Rangen filed a Petition for Delivery Call (“Petition”) in December 2011. *See In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen, Inc.) (CM-DC-2011-004) (“Rangen Delivery Call”).* The Petition alleged that diversions of ground water authorized by junior-priority ground water rights are injuring Rangen’s water rights.

The Timing of the Application and Other Related Proceedings

13. On March 8, 2013, in advance of the initial hearing for the Rangen Delivery Call, Rangen filed with the Director a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* (“Source Motion”). *See Order Granting in Part and Denying in Part Rangen, Inc.’s Motion for Partial Summary Judgment Re: Source (CM-DC-2011-004) (“Source Order”)* at 1.

14. One of the issues raised in the Source Motion was whether Rangen’s Delivery Call is limited to the amount of water flowing through the Martin-Curren Tunnel. *Source Order* at 6. Prior to filing the Petition, Rangen had physically diverted water from the head waters of Billingsley Creek by means of the Bridge Diversion. Ex. 1008 at 32.¹ However, as discussed above, the Bridge Diversion was not included as an authorized point of diversion on Rangen’s water rights. *Id.* The Idaho Ground Water Appropriators, Inc. (“IGWA”),² argued the Director should deny summary judgment by ruling that Rangen has no legal right to call for the delivery of water to points of diversion that were not decreed for water right numbers 36-02551 and 36-07694 by the Snake River Basin Adjudication (“SRBA”) Court. *Source Order* at 2. On April 3, 2013, the parties orally argued the Source Motion before the Director.

15. Following oral argument on this issue, the Director expressed concern that the specific reference to Curren Tunnel as the source for Rangen’s water rights might prevent a delivery call for any water diverted by Rangen from both springs located below Curren Tunnel and from Billingsley Creek. Whether Rangen’s water rights authorize the diversion of water from Billingsley Creek became an issue of both fact and law in the Rangen Delivery Call. *See Source Order* at 6-7.

16. The Districts filed the Districts’ Application with the Department on April 3, 2013, the day of oral argument for the Source Motion before the Director. Ex. 1000. The Districts’ Application proposed diverting a combined total of 12 cfs from springs tributary to Billingsley Creek and from Billingsley Creek for “mitigation for irrigation” and “fish propagation.” *Id.* The proposed place of use was described as the SENE of Section 31 and the SWNW of Section 32,

¹ Exhibit 1008 is the January 29, 2014, *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 (CM-DC-2011-004)*.

² The Districts are members of IGWA. Tr. p. 26.

T07S, R14E. *Id.* The Districts' Application identified as a point of diversion the location of Rangen's existing Bridge Diversion from Billingsley Creek. *Id.*

17. On April 22, 2013, the Director issued the Source Order disposing of the Source Motion. The Director stated:

11. The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right) (emphasis added); 37.03.11.010.25 (defining "water right" to mean "[t]he legal right to divert and use ... the public waters of the state of Idaho where such right is evidenced by a decree ") (emphasis added).

12. While the SRBA partial decrees list Martin-Curren Tunnel as the source, the partial decrees do not expressly state that Rangen's water rights are limited only to diversion from the mouth of Martin-Curren Tunnel; likewise, the decrees do not state that sources other than Martin-Curren Tunnel are lawfully diverted within the ten-acre tract. Thus, there are genuine issues of material fact in dispute as to whether Rangen can divert from sources other than Martin-Curren Tunnel that are located within T07S R14E S32 SESWNW.

13. Because there are genuine issues of material fact concerning what source(s) of water-other than Martin-Curren Tunnel-Rangen may lawfully divert within T07S R14E S32 SESWNW, the Director cannot find, as a matter of law, that Rangen is entitled to summary judgment on that issue.

Source Order at 6-7.

18. The Director conducted a hearing for the Rangen Delivery Call on May 1-16, 2013. *Ex. 1008* at 3.

19. On January 29, 2014, the Director issued his *Final Order Regarding Rangen Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (CM-DC-2011-004) ("Curtailment Order). The Director concluded that certain ground water users within the boundaries of the North Snake GWD and Magic Valley GWD were causing material injury to Rangen by reducing flows from the Curren Tunnel. *Ex. 1008* at 31-36. The Curtailment Order further stated that junior priority water rights within those districts would be curtailed if mitigation was not provided to Rangen. *Id.* at 42.³

³ Elements of the Director's Curtailment Order are currently being challenged and appealed in the Idaho courts. Mitigation plans offered by the Districts in response to the Rangen Delivery Call are also currently being challenged and appealed before the Department and within the Idaho courts.

20. In the Curtailment Order, the Director stated:

15. The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract: SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7S, R14E, Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E. A decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

Ex. 1008 at 32.

21. On February 3, 2014, Rangen filed application to appropriate water no. 36-17002. Application no. 36-17002 seeks a water right for 59 cfs. Application no. 36-17002 identifies the same point of diversion as the Districts' Application.⁴

22. The Districts' Application was amended on February 11, 2014, updating the proposed place of use to include the SWNE of Section 31, T07S, R14E, which contains the end section of Rangen's CTR raceways. Ex. 1001.

23. Following the Director's ruling limiting the point of diversion and source identified by Rangen's water rights to the Curren Tunnel, notice of the Districts' Application was published beginning on February 20, 2014. The deadline for filing protests was March 10, 2014.

24. The Districts' Application was amended a second time on May 27, 2014. Ex. 1004. The second amendment changed one of the proposed beneficial uses from "mitigation for irrigation" to "mitigation" and revised the answers to some of the application questions. *Id.* The Department determined the changes were minor and did not warrant re-advertisement of the application or advancement of the priority date. Ex. 1003. The Districts assert that the beneficial use "mitigation" is non-consumptive because it will be used for fish propagation. Tr. p. 178.

25. On October 24, 2014, the District Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* (CV-2014-1338) ("Memorandum Decision"). The Court determined that Rangen's water rights only authorize diversion of water from the Martin-Curren Tunnel. *Memorandum Decision* at 10-15.

⁴ On January 2, 2015, application for permit no. 36-17002 was approved for 28.1 cfs for fish propagation, with a priority date of February 3, 2014.

Description of the Districts' Application

26. As discussed above, the Districts' Application proposes diverting a combined total of 12 cfs from springs tributary to Billingsley Creek and from Billingsley Creek for "mitigation" and "fish propagation." Ex. 1004. The proposed place of use includes portions of the SWNE and SENE of Section 31, and the SWNW of Section 32, T07S, R14E. *Id.* The proposed place of use covers the entire Rangen facility. Tr. p. 87. Rangen owns the property at the proposed place of use and points of diversion. *Id.*

27. The Districts' Application lists two proposed points of diversion. Ex. 1004. The Districts' initial disclosures also describe two points of diversion: "Water will be delivered . . . either by gravity flow through an existing headgate (the "Bridge Diversion") on Billingsley Creek . . . or by pumping water from Billingsley Creek to various fish rearing facilities at the Rangen hatchery." Ex. 1009 at 2; see also Ex. 1059.

28. Even though they are located relatively close to one another, the Bridge Diversion and the proposed pump station represent two distinct points of diversion. The Bridge Diversion and pump station would be separately measured diversions and would supply water to different portions of the Rangen facility. Tr. p. 125-28.

29. The two points of diversion described in the testimony and documents provided by the Districts are inconsistent with the legal descriptions in the Districts' Application. The Districts' Application lists one point of diversion in the SESWNW of Section 32 and one point of diversion in the SWSWNW of Section 32. Ex. 1004. However, both proposed diversion structures (the Bridge Diversion and the proposed pump station) are located in the SWSWNW of Section 32. Ex. 1015 at 26; Ex. 1041; Ex. 1048.

30. As part of their Rule 40.05 disclosures (IDAPA 37.03.08), the Districts notified Gooding County, Idaho Department of Fish & Game, Idaho Department of Environmental Quality, and Big Bend Irrigation and Mining Company of the Districts' Application. The notice letters contained errors in the legal description for the proposed points of diversion. However, the errors were minor and did not affect the viability of the notice letters. None of the notified entities provided comment.

31. Some of the evidence presented at the hearing suggests the Districts intend to develop additional points of diversion from spring sources on the talus slope near the Rangen facility. Tr. p. 139. However, only two points of diversion are listed on the Districts' Application, Ex. 1004, and they are clearly identified in the District's initial disclosures as the Bridge Diversion and the proposed pump station. Ex. 1009 at 2.

32. The proposed pump station would allow up to 4.0 cfs of water to be diverted from Billingsley Creek to the facility structures on the south side of the creek (hatch house, greenhouse and small raceway). Tr. p. 156. Currently, because of elevation differences, only the Curren Tunnel pipeline system can supply water to those structures. Tr. p. 155. A pump station would offer greater flexibility, but more complexity, in the diversion and use of water from the head of

Billingsley Creek at the Rangen facility. *Id.* The remaining 8.0 cfs described in the Districts' Application would be diverted through the existing Rangen Bridge Diversion to supply the large raceways and CTR raceways. Ex. 1015 at 23.

33. The Districts were formed under Chapter 52, Title 42, Idaho Code, and represent the interests of ground water users within their respective district boundaries. Among other things, the Districts prepare plans to address mitigation obligations arising from various water calls. Tr. p. 16.

34. The Districts assess the water users within their district boundaries to fund the activities of the Districts, including the development and implementation of mitigation plans. Tr. p. 17-18. Other mitigation activities of the Districts have cost several million dollars. Tr. p. 60-61.

35. The Districts' Application includes the following statement:

The GW Districts will use this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain to mitigate for Rangen's apparent material injury and to provide mitigation for the curtailment of junior groundwater users as specified in the Director's Final Order dated 1/29/14 for Rangen's delivery call. Mitigation water will be provided to Rangen for its Curren Tunnel rights for fish propagation purposes. If unable to secure proper consent, the GWDs will use their power of eminent domain as set forth in I.C. Sec. 42-5224(13) to secure easements, as necessary.

Ex. 1004 at 2.

36. On August 25, 2014, North Snake GWD, Magic Valley GWD, and Southwest Irrigation District (which is not a party to this case) served Rangen with a "Notice of Intent to Exercise Eminent Domain and Summary of Rights of Property Owner" ("Eminent Domain Notice"). Ex. 1014.

37. The Eminent Domain Notice states that the two GWDs and Southwest Irrigation District intend to purchase "easements, rights-of-way, and other rights of access" over the Rangen property. Ex. 1014 at 1. Such easements, rights-of-way, and other rights of access would be used to "design, install, operate, and maintain pipes, pumps, and related facilities to deliver water to the Rangen fish hatchery" *Id.*

38. The Eminent Domain Notice refers to certain sections of Idaho Code which establish the Districts' eminent domain authority. Idaho Code § 42-5224(13) states that the Districts have the power to condemn private property for "easements, rights-of-way, and other rights of access" necessary to exercise their mitigation powers as defined in statute.

39. The Districts do not intend to operate the Rangen facility or to raise fish. Tr. p. 75. The Districts are not pursuing any permits associated with commercial fish production facilities. Tr. p. 76-77.

40. During cross examination by Rangen's attorney, Lynn Carlquist, chairman of the North Snake GWD, testified about the intent in filing the Districts' Application:

Q. Now I take it when you filed this in April of 2013 you had absolutely no intent to raise fish on Rangen's property?

A. That was not our intent at the time, no.

Q. And today you have no intent of raising fish on Rangen's property; correct?

A. That's correct.

Q. Now, Lynn, last time we spoke I asked you that if you get this permit, you understand that you have to perfect it somehow; correct?

A. That's right.

Q. And when I asked you that last time, you told me that it was your intent to obtain the permit and then assign the permit to Rangen for us to perfect; correct?

A. Well, that would be the easiest way for us to perfect it, if they would agree to that.

Q. Okay. So you would be taking advantage of Rangen's existing fish facility that it built, correct, to do that?

A. Yes.

Q. You would be taking advantage of the diversion apparatus that Rangen has built and has had in place for 50 years to do that; correct?

A. That's correct.

Tr. p. 75-76.

41. The Districts' Application was signed by T.J. Budge on behalf of the Districts. Lynn Carlquist testified that T.J. Budge had the authority to sign the Districts' Application at the time it was signed. Tr. p. 19, 26-37.

42. On September 16, 2014, Magic Valley GWD and North Snake GWD adopted resolutions confirming that T.J. Budge, through his law firm Racine, Olson, Nye, Budge & Bailey Chartered, had the authority to file the Districts' Application on behalf of Magic Valley GWD and North Snake GWD, respectively. *See* Exs. 1076 and 1077.

CONCLUSIONS OF LAW

1. Idaho Code § 42-202(1) requires applications for permit to contain the following information:

- (a) The name and post-office address of the applicant.
- (b) The source of the water supply.
- (c) The nature of the proposed use or uses and the period of the year during which water is to be used for such use or uses.
- (d) The location of the point of diversion and description of the proposed ditch, channel, well or other work and the amount of water to be diverted and used.
- (e) The time required for the completion of construction of such works and application of the water to the proposed use.

The application must also “be accompanied by a plan and map of the proposed works for the diversion and application of the water to a beneficial use . . . and the area and location of the lands proposed to be irrigated, or location of place of other use.” Idaho Code § 42-202(4).

2. Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

3. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5).

4. Rule 45.01.c of the Department’s Water Appropriation Rules sets forth the criteria for determining whether an application is made in good faith and not for delay or speculative purposes.

5. Rule 45.01.c further requires: “The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way.” IDAPA 37.03.08.45.01.c.i.

6. The applicant must also demonstrate that it is “in the process of obtaining other permits needed to construct and operate the project” and that there are “no obvious impediments that prevent successful completion of the project.” IDAPA 37.03.08.45.01.c.i – iii.

7. Rangen argues the Hearing Officer committed five errors in issuing the Preliminary Order. *Brief* at 5. Specifically, Rangen asserts the Hearing Officer erred by: 1) deciding that mitigation is a recognized purpose of use for a water right, 2) finding that the place of use is located where water is injected into Rangen’s infrastructure, 3) concluding the Districts’ Application is complete; 4) subordinating the Permit; and 5) concluding the Districts’ Application was not speculative. *Id.* Each argument will be addressed below.

Mitigation is a Viable Beneficial Use

8. Rangen argues the Hearing Officer erred by concluding that “mitigation” is a viable beneficial use. *Brief* at 6. Rangen asserts the Hearing Officer’s analysis on this point includes no “citation to any authority or historic use” and is not “based upon any evidence in the record,” and the Hearing Officer’s “definition of ‘mitigation’ was derived on an *ad hoc* basis to achieve the purpose of approving [the Districts’] Application.” *Id.*

9. As the Hearing Officer correctly noted, the Department has recognized the beneficial use of “mitigation” in other water rights, but the Department’s Water Appropriation Rules and Idaho Code do not contain a definition for the beneficial use of “mitigation.” *See Preliminary Order* at 8-9.

10. Contrary to Rangen’s argument, in defining the term “mitigation” and determining the mitigation beneficial use proposed by the Districts constitutes a viable beneficial use which should be recognized by the Department, the Hearing Officer cited to authority and evidence contained in the record. Specifically, the Hearing Officer pointed to the Department’s Conjunctive Management Rules (IDAPA 37.03.11) (“CM Rules”) that provide a definition for “mitigation plan.” *See Preliminary Order* at 8. The Hearing Officer took official notice of the CM Rules at the commencement of the hearing in this matter. *Tr.* p. 11. The Hearing Officer also cited to Idaho Code § 42-5201 which includes a similar definition for “mitigation plan.” *Preliminary Order* at 8. From these definitions, the Hearing Officer reasonably concluded that, “[i]n order for the proposed mitigation use to be viable, it must prevent material injury to senior water rights or compensate senior water right holders for material injury.” *Id.* Because the mitigation beneficial use described in the Districts’ Application proposes to compensate Rangen for diminishment of the source listed on Rangen’s water rights (the Curren Tunnel) by delivering water from a separate source (Billingsley Creek) directly into the Rangen system, the Hearing Officer correctly concluded the mitigation beneficial use described in the Districts’ Application falls within the definition of mitigation.⁵

⁵ While Rangen “adamantly disputes that water coming from the martin Curren Tunnel and water forming the headwaters to Billingsley Creek constitute separate sources of water,” *Brief* at 6, the District Court rejected this argument in its Memorandum Decision. This decision is on appeal to the Idaho Supreme Court.

11. Rangen also argues that “[t]he word ‘mitigation’ does not describe how a water right will be used in any manner that would allow the evaluation of the Idaho Code Section 42-203A(g) factors” and suggests the Districts’ Application needed to identify a particular use, i.e. “mitigation for irrigation,” or “mitigation for fish propagation.” *Brief* at 7. The Department has previously recognized the beneficial use of “mitigation” without another identified use. *See e.g.* Ex. 1026 (Permit issued for water right no. 51-13067 designating the beneficial use as “mitigation from storage.”). The Hearing Officer did not err by concluding “mitigation” can be designated as a valid beneficial use.⁶

The Place of Use is Appropriately Described as Where Water is Delivered into Rangen’s Infrastructure

12. The Hearing Officer noted “a significant amount of time was spent trying to define where the beneficial use of mitigation actually takes place.” *Preliminary Order* at 10. The Hearing Officer explained that testimony presented at the hearing established that “the beneficial use of mitigation would occur throughout the raceways at the Rangen facility and that the mitigation beneficial use ends where the water is returned to Billingsley Creek.” *Id.* The Hearing Officer also explained that, “[i]n their post-hearing brief, the Districts argue that the mitigation use takes place at the point where water is delivered to Rangen.” *Id.*

13. The Hearing Officer correctly determined that, when, as here, a proposed mitigation use “involves diverting water from a separate source to deliver the water directly to a senior water right holder on a diminished source . . . mitigation occurs when water is injected into the infrastructure of the senior water right holder.” *Preliminary Order* at 11. As the Hearing Officer explained, the mitigation use proposed by the Districts will “accomplish mitigation by delivering water to Rangen at the Bridge Diversion and at the pipeline coming from the Rangen Box to the facilities on the south side of Billingsley Creek.” *Id.* The appropriate place of use for the Districts’ proposed mitigation is where water is delivered into the Rangen infrastructure. Those areas of delivery are included within the proposed place of use described in the Districts’ Application.

14. Rangen asserts “[t]he only evidence in the record is that the [Districts’ proposed] beneficial use occurs in the raceways.” *Brief* at 9. Rangen argues the Hearing Officer erred by “relying on the [Districts’ post-hearing brief]” in determining the place of use for the proposed mitigation occurs at the point where water is delivered into Rangen’s infrastructure in violation of the Department’s Rule of Procedure 712. *Id.* Rule 712 provides that “[f]indings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” IDAPA 37.01.01.712.01.

15. The Hearing Officer’s conclusion that the place of use for the proposed mitigation occurs at the point where water is delivered into the Rangen infrastructure is a conclusion of law,

⁶ As described by the Hearing Officer, mitigation has been recognized by the Department in three basic forms. *Preliminary Order* at 8-9. The Districts’ Application involves providing water directly to senior water users owning water rights on a source that has been diminished by junior water users. While not necessary in this order, it may be necessary for the Department in the future to provide additional guidance on how the different types of mitigation shall be described in the Department’s records.

not a finding of fact. Rangen's assertion that the Hearing Officer erred by considering arguments raised in the Districts' post-hearing brief in reaching that conclusion of law is misplaced. Arguments must be raised before the Department to be considered. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). Because the Districts raised the argument that the proposed mitigation place of use takes place at the point where water is delivered to Rangen, it was appropriate for the Hearing Officer to consider and analyze the argument. The Hearing Officer did not err by reaching the legal conclusion that the place of use for the proposed mitigation occurs at the point where water is delivered into Rangen's infrastructure.

16. Rangen argues that, "[e]ven if the Hearing Officer could conclude, as a matter of law, that the mitigation use occurs at the point where water is injected into Rangen's facility, such ruling ignores fundamental principles of Idaho water law." *Brief* at 9. Specifically, Rangen argues that "[w]ithout both delivery and use of water, a beneficial use never occurs" and, as such, "without proof that the water is actually applied to fish propagation, the mitigation water right can never be perfected." *Id.* at 10.

17. Rangen's argument misses the point that the beneficial use of mitigation would occur pursuant to the Permit once water is injected into Rangen's infrastructure. There is no need for proof the water is applied to fish propagation within the Rangen facility. All that is required in order for perfection of the mitigation water right at issue here is legally accomplished delivery of the water and injection into the Rangen facility.

The Districts' Application is Complete

18. Rangen argues the Districts' Application is incomplete "because there was no evidence that the Application was executed properly" pursuant to IDAPA 37.03.08.035.01.d. *Brief* at 18. Rangen asserts the Districts' Application lacked "a duly authorized signature" as required by IDAPA. *Id.* at 19. Rangen emphasizes IDAPA 37.03.08.035.03.b.xii which states "[t]he application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application."⁷ *Id.* The Districts' Application was signed by "Thomas J Budge, Attorney." Ex. 1004 at 2. Rangen asserts "no authority has been filed" demonstrating Mr. Budge's authority to sign the Districts' Application on behalf of all the Districts. *Brief* at 20. Rangen further complains that "none of the addresses of the Applicants are included." *Id.* Thus, Rangen concludes the Districts' Application is incomplete and no permit can be granted.

19. Lynn Carlquist, as a representative of all the applicant Districts, testified that the Racine firm has represented the Districts since 2007, that the Districts were consulted prior to the filing of the Districts' Application, and that T.J. Budge had authority to file the Districts' Application on

⁷ Rangen also emphasizes IDAPA 37.03.08.035.03.b.xiv which states "[a]pplications may be signed by a person having a current 'power of attorney' authorized by the applicant. A copy of the 'power of attorney' shall be included with the application." To the extent Rangen asserts counsel for the Districts had to submit a copy of a power of attorney with the Districts' Application, such assertion is misplaced. The term "power of attorney" refers to "[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor." *Black's Law Dictionary* (9th ed. 2009). Licensed attorneys do not need a written power of attorney to act on behalf of clients. *See Storey v. Unite States Fidelity & Guar. Co.*, 32 Idaho 388, 392 (1919).

behalf of the Districts in April 2013. Tr. p. 15, 26-37.⁸ Mr. Carlquist's testimony is sufficient evidence to satisfy the question of Mr. Budge's authority to file the Districts' Application. The address of the law firm of T.J. Budge was included on the Districts' Application. Ex. 1004 at 1. Rangen has not demonstrated the Hearing Officer erred by concluding the Districts' Application was complete.

The Hearing Officer did not err by Subordinating the Permit

20. "Rangen contests the subordination clause placed on the Permit." *Brief* at 21.⁹ The subordination clause states:

7. This right shall be junior and subordinate to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho that are initiated later in time than the priority date of this right and shall not give rise to any claim against any future rights for the use of water, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho initiated later in time than the priority date of this right.

Permit at 2.

21. Rangen asserts the Department has no "lawful authority" to include such a subordination condition on the Permit. *Brief* at 22. Idaho Code § 42-203A(5) states the Director "may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, *or may grant a permit upon conditions.*" (emphasis added). In addition, in support of the subordination condition, the Hearing Officer determined "[i]t is not in the local public interest to allow large non-consumptive water rights to tie up a significant amount of water in a basin, thereby restricting future development within the basin." *Preliminary Order* at 13. This public interest criterion is set forth in Idaho Code § 42-203A(5)(e). The Hearing Officer also cited to Exhibits 1024 and 1025, which are existing fish propagation water rights in Basin 36 that have similar subordination conditions.

22. Rangen also argues the subordination condition "removes the only protection Rangen might have if the water under the Permit becomes unavailable, which is to file a water call on the replacement water." *Brief* at 22. Rangen cites to CM Rule 43.03.c which requires a mitigation plan "include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." As this Rule demonstrates, the analysis of adequate contingency provisions is relevant to whether a mitigation plan may be approved, not whether an application for permit may be approved. After issuance of the Preliminary Order and Permit, IGWA filed *IGWA's Fifth Mitigation Plan and Request for Hearing*, Docket No. CM-MP-2014-008, seeking approval to deliver mitigation water to Rangen under the Permit. Those proceedings

⁸ To the extent Rangen argues the Districts did not properly authorize T.J. Budge to file the Districts' Application, this challenge should be raised in the context of a private civil dispute between Mr. Budge and his clients. That is a matter outside of the Department's jurisdiction.

⁹ The Districts agree that the subordination condition is appropriate. *Preliminary Order* at 13.

would be the appropriate venue for Rangen to challenge the sufficiency of contingency provisions to assure protection of its senior-priority rights in the event the mitigation water source becomes unavailable.

The Districts' Application was Filed in Bad Faith

23. Rangen tenders several arguments to support its assertion that the Districts' Application is speculative, and therefore void. *Brief* at 10-18. As stated above, Idaho Code § 42-203A(5)(c) states the Director may reject the Districts' Application if "it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes." Rangen's speculation arguments need not be addressed because the Director concludes the Districts' Application was filed in bad faith.

24. The Department's Water Appropriation Rules state:

The criteria requiring the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the application with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project.

IDAPA 37.03.08.045.01.c.

25. The Department's Water Appropriation Rules also state that an application will be found to have been made in good faith if "[t]here are no obvious impediments that prevent the successful completion of the project." IDAPA 37.03.08.045.01.c.iii

26. The District's Application was filed in bad faith because, for a majority of the quantity of water sought to be appropriated, there is a threshold impediment to "completion of the project." To perfect a project for a water right, there inherently must be completion of works for beneficial use. The testimony of Lynn Carlquist quoted above demonstrates the Districts' intent at the time of filing the Districts' Application was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility the way Rangen has done for the last fifty years. The initial filing by the Districts did not contemplate any construction of works and completion of any project. Furthermore, even at this point, with respect to at least 8.0 cfs of the 12 cfs the Districts propose for appropriation, Rangen will continue to divert through its existing Bridge Diversion. There is no "project" and consequently cannot be a "completion of the project" for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use. The Districts' Application fails the bad faith test based on the threshold question of whether there will be a project, and whether there will be any construction of works for perfection of beneficial use.

Consideration of Other Statutory Criteria

27. The discussion above addressed arguments raised in Rangen's Brief. The Director must also consider other criteria outlined in Idaho Code § 42-203A(5). The Director will address

below whether the Districts' Application will reduce the quantity of water under existing water rights, the sufficiency of the water supply, the sufficiency of financial resources, whether the Districts' Application is contrary to conservation of water resources within the state of Idaho, and whether the Districts' Application will conflict with the local public interest as defined in Idaho Code § 42-202B.

Reduction to Existing Water Rights

28. There is no evidence in the record suggesting that the amount of water available to satisfy other water rights will be reduced or diminished by the proposed water use. The Districts and Rangen both asserted that the beneficial use of fish propagation should be considered non-consumptive. (See Exhibits 1016 and 1047). Fish propagation rights are generally described as non-consumptive by the Department. The mitigation use proposed in the Districts' Application will provide water to the Rangen facility for fish propagation and would also be considered non-consumptive. There are no other water rights between the proposed points of diversion and the point of return flow from the Rangen facility into Billingsley Creek. The Districts satisfied their burden of proof regarding no injury to other water rights.

Sufficiency of Water Supply

29. The Districts satisfied their burden of proof regarding the sufficiency of the water supply. Evidence in the record shows that the flow in Billingsley Creek at the Rangen facility has, at times, exceeded 12 cfs in recent years. (Exhibit 1021; Exhibit 1022; Exhibit 1040, page 1; Exhibit 2017).

Sufficiency of Financial Resources

30. Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) states: "A governmental entity will be determined to have satisfied [the financial resources] requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule."

31. Ground water districts are governmental entities established by Chapter 52, Title 42, Idaho Code. The Districts satisfied their burden of proof for this element because they have the ability to assess their water users to cover any costs associated with development of the proposed permit. Lynn Carlquist testified that the Districts, individually and collectively, have assessed their water users to pay for multi-million dollar projects in the past. Tr. p. 59-61.

Conservation of Water Resources

32. No evidence was presented suggesting that the proposed development is contrary to the conservation of water resources of the state of Idaho.

The Districts' Application is not in the Local Public Interest

33. Local public interest “is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B.

34. Approval of the Districts' Application would establish an unacceptable precedent in other delivery call proceedings that are or may be pending. In the Rangen Delivery Call, the Director determined that certain ground water users were causing material injury to Rangen by reducing flows from the Curren Tunnel and that junior-priority water rights would be curtailed if mitigation was not provided to Rangen. The Districts' originally proposed assigning the Permit to Rangen as part of IGWA's first mitigation plan. *See Amended Final Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order.* The Director noted at that time “IGWA's water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application.” *Id.* While a race to file an application to appropriate water does not itself establish that the Districts' Application is not in the local public interest, the Districts' Application attempts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has been using for fifty years. The Districts' Application is the epitome of a mitigation shell game. The Districts' Application brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek. It is not in the local public interest to approve such an application.

35. In addition, in this instance, it is inconsistent with the local public interest and inappropriate for the Districts to exercise their power of eminent domain as a vehicle to obtain a water right for mitigation wholly located on land owned by Rangen and to dictate how mitigation water is delivered wholly within Rangen's facility.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that Application to Appropriate Water no. 36-16976 is **DENIED**.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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) 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 Idaho Code § 67-5273.* The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 6th day of February, 2015.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February 2015, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, and by email to the following:

Document(s) Served: Final Order Denying Application and Explanatory Information to Accompany a Final Order

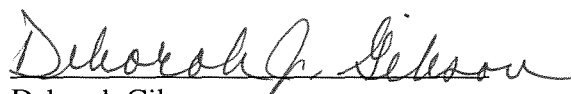
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Deborah Gibson
Administrative Assistant

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.