

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 36-17002)	FINAL ORDER
IN THE NAME OF RANGEN, INC.)	DENYING EXCEPTIONS
_____)	

On February 3, 2014, Rangen, Inc. (“Rangen”) filed Application for Permit No. 36-17002 (“Application”) with the Idaho Department of Water Resources (“Department”). The following filed protests against the Application: North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (“the Districts”), represented by attorney T.J. Budge; and by the City of Gooding (“Gooding”), represented by attorney Craig Hobdey. Rangen retained attorneys Fritz Haemmerle, Justin May, and Robyn Brody.

A pre-hearing conference was held on May 13, 2014. The parties were unable to resolve the issues of protest at that time and requested a hearing be held to decide the contested case. A hearing was scheduled for September 17 and 18, 2014, in Twin Falls, Idaho.

On September 17, 2014, prior to the hearing, the Districts and Rangen met and agreed that all of the Districts’ issues of protest were resolved except for one: the question of whether a subordination condition should be added to the proposed permit. Rangen and the Districts agreed to address that question through legal briefing before the Hearing Officer. Rangen and the Districts included their arguments in the closing briefs prepared for a companion contested case (Application for Permit 36-16976).

Rangen and Gooding decided to address Gooding’s protest through briefing before the Hearing Officer rather than conducting a hearing. Gooding filed an argument brief in opposition to granting the proposed permit on December 5, 2014. Rangen filed a response brief on December 12, 2014.

On January 2, 2015, the Department issued a *Preliminary Order Issuing Permit* (“Preliminary Order”) and Permit to Appropriate Water No. 36-17002 (“Permit 36-17002”). On January 16, 2015, Rangen filed *Rangen’s Exceptions to Preliminary Order* (“Exceptions”) and *Rangen’s Brief in Support of Exceptions to Preliminary Order* (“Brief”). Rangen argues:

1. The Hearing Officer lacked the authority to apply a subordination condition (Condition 7) to Permit 36-17002 and, in doing so, violated Rangen’s constitutional rights.
2. Condition 8 is not necessary or proper.

3. The Hearing Officer incorrectly determined the source and point of diversion of Rangen's other water rights, 36-15501, 36-2551 and 36-7694.

Exceptions at 2; Brief at 2-7.

Idaho Code § 42-203A(5) authorizes the Department to apply a subordination condition to Permit 36-17002.

Condition 7 of the Preliminary Order, referred to by Rangen as the subordination condition, states:

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.

Preliminary Order at 8.

Rangen argues the Hearing Officer lacked authority to issue Permit 36-17002 with the subordination condition. *Brief at 5.* Contrary to Rangen's argument, the Department has express statutory authority to apply the subordination condition to Permit 36-17002. Specifically, Idaho Code § 42-203A(5) states in relevant part:

[W]here the proposed use is such . . . (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code . . . 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.*"

Idaho Code § 42-203A(5)(emphasis added). Consistent with this statutory authority, Rule 50.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08) allows the Director to issue permits with conditions "to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code."

The Hearing Officer concluded that the question of whether Permit 36-17002 should include a condition subordinating the permit to future upstream consumptive uses falls within the local public interest criteria as defined in Idaho Code § 42-202B. *Preliminary Order at 5.* The Hearing Officer determined that, because the springs forming the headwaters of Billingsley Creek (the source of water for Permit 36-17002) are hydrologically connected to the Eastern Snake Plain Aquifer ("ESPA"), if Permit 36-17002 were issued without the proposed subordination condition, it could result in a permanent restriction on ground water development across a large portion of eastern Idaho. *Id.* at 6. The Hearing Officer concluded it is not in the public interest to allow a large

non-consumptive use of water to restrict future water development across a significant portion of the state and included a subordination condition on Permit 36-17002. *Id.*

Any application to appropriate water in Idaho is subject to the local public interest standard. *Hardy v. Higginson*, 123 Idaho 485, 489, 849 P.2d 946, 950 (1993). When the legislature enacted Idaho Code § 42-203A(5), “it clearly vested, in the [Department], considerable authority and discretion to determine and protect the ‘local public interest’ when issuing or rejecting water permits.” *Matter of Permit No. 47-7680*, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988). As emphasized above, Idaho Code § 42-203A(5) specifically grants the Department authority to “grant a permit upon conditions.” “The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department’s] sound discretion.” *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985).

The Department was required to apply its statutory authority set forth in Idaho Code § 42-203A(5) in deciding this fact-specific case. The Hearing Officer concluded that, if Permit 36-17002 were issued without the challenged subordination condition, it could result in a permanent restriction on ground water development across a large portion of eastern Idaho. In an exercise of discretion to determine and protect the public interest, the Director agrees it is not in the public interest to allow a large non-consumptive use of water to restrict future water development across a significant portion of the state. The Hearing Officer appropriately issued Permit 36-17002 with the challenged subordination condition.

Inclusion of the subordination condition on Permit 36-17002 does not violate Rangen’s constitutional rights.

Rangen argues that issuance of Permit 36-17002 with the challenged subordination condition “deprives Rangen of the full opportunity to appropriate water” as allowed by section 3 of article 15 of the Idaho Constitution. *Brief* at 2-3. Rangen overlooks that the Idaho Supreme Court and Legislature construe sections 1 and 3 of article 15 of the Idaho Constitution “as reserving to the state the right to regulate and control the manner and means of appropriating the unappropriated waters of the state.” *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365, 367 (1909). Specifically, “title to the public waters of the state is vested in the state for the use and benefit of all citizens of the state under such rules and regulations as may be prescribed from time to time by the lawmaking power of the state.” *Walbridge v. Robinson*, 22 Idaho 236, 125 P. 812, 814 (1912). The state’s interest is not one “in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.” *Id.* In “harmony with article 15” of the Idaho Constitution, *Short v. Praisewater*, 35 Idaho 691, 208 P. 844, 847 (1922), Idaho Code § 42-101 states “[a]ll the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state.” The Court has explained “[t]he Legislature has full authority to provide the method and procedure of appropriating such waters to a beneficial use by all persons.” *Idaho Power & Transp. Co. v. Stephenson*, 16 Idaho 418, 101 P. 821, 824 (1909).

In accordance with this authority, Idaho Code § 42-103 states: “The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.” Idaho Code § 42-203A(5) gives the Department power to grant a permit to appropriate waters of this state upon conditions if a proposed use conflicts with the local public interest. Therefore, issuance of Permit 36-17002 with a subordination condition to protect the public interest does not violate Rangen’s rights under the Idaho Constitution.

Rangen also argues that, by including the subordination condition on Permit 36-17002, the Hearing Officer created “two separate classes of water users” in violation of “Rangen’s right to Equal Protection under the Idaho and Federal Constitutions.” *Brief* at 5. The Hearing Officer did not create separate classes of water users by including the subordination condition on Permit 36-17002, but rather applied the local public interest standard as authorized by Idaho Code § 42-203A(5) to the specific facts of this case. In a proper exercise of discretion to determine and protect the public interest, the Hearing Officer concluded it is not in the public interest to allow a large non-consumptive use of water to restrict future water development across a significant portion of the state and appropriately issued Permit 36-17002 with the challenged subordination condition.¹

Assuming for the sake of discussion that the Hearing Officer’s actions created separate classes of water users, inclusion of the subordination condition on Permit 36-17002 does not violate Rangen’s right to equal protection. The Idaho Supreme Court explained in *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 814, 135 P.3d 756, 760 (2006) that, after identifying the classification at issue, the second step in an equal protection analysis is to articulate the standard under which the classification will be tested. Rangen asserts that “the Hearing Officer’s creation of favored classe[s] would likely be evaluated under a strict scrutiny test, as opposed to a rational basis test.” *Brief* at 5, n.1. However, strict scrutiny would be inappropriate in this case because there is no allegation that inclusion of the subordination condition on Permit 36-17002 categorizes on the basis of an inherently suspect characteristic and there is no infringement upon a fundamental right. *See Tarbox v. Tax Comm’n*, 107 Idaho 957, 959-60, 695 P.2d 342, 344-45 (1984). The Idaho Supreme Court has defined the type of right a water permittee has as follows:

By application for permit ... the permittee secures an inchoate right which will ripen into a legal and complete appropriation by compliance with the statutory steps. Such right is merely a contingent right, which may ripen into a

¹ Rangen cites to section 3 of article 15 of the Idaho Constitution to support the argument that, with the exception of domestic and power water rights, “all purposes are treated equal.” *Brief* at 5, n.1. Section 3 of article 15 does not support Rangen’s argument. The language in section 3 of article 15 defining preferences of water for particular purposes simply lays out a preference of water rights for condemnation purposes. *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522, 523 (1917). In addition, as discussed above, the Idaho Supreme Court has determined that, in harmony with article 15 of the Idaho Constitution, the Legislature has full authority to provide the method and procedure of appropriating all the waters of this state to a beneficial use by all persons. The Legislature has utilized this authority to mandate that the right to use unappropriated waters within Idaho shall only be acquired as provided in title 42, Idaho Code. *See* Idaho Code § 42-103. Idaho Code § 42-203A(5) gives the Department power to grant a permit to appropriate waters of this state upon conditions if a proposed use conflicts with the local public interest.

complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property. It is merely a consent given by the state to construct and acquire real property.

Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45, 52 (1927). Because Permit 36-17002 only gives Rangen an inchoate or contingent right to put water to a beneficial use, inclusion of the subordination condition on Permit 36-17002 does not infringe upon a fundamental right. Even if a fundamental right were at issue, the subordination condition included on Permit 36-17002 pursuant to the Department's statutory authority in Idaho Code § 42-203A(5) simply defines an element of Permit 36-17002. The fact that Rangen must adhere to such a defining element in exercising Permit 36-17002 does not mean Rangen's exercise of the permit is infringed. Therefore, equal protection requires only that the "classification is rationally related to a legitimate governmental purpose." *Meisner v. Potlatch Corp.*, 131 Idaho 258, 262, 954 P.2d 676, 680 (1998). Inclusion of the challenged subordination condition on Permit 36-17002 is rationally related to a legitimate governmental purpose because it insures compliance with the local public interest doctrine. The subordination condition on Permit 36-17002 does not violate Rangen's right to equal protection.

Condition 8 is necessary and proper.

Condition 8 on Permit 36-17002 states: "This right is for the use of trust water and is subject to review 5 years after the issuance of the permit to determine availability of water and to re-evaluate the public interest." Rangen challenges the public interest aspect of the condition. Specifically, Rangen asserts that Idaho Code § 42-203C(1) contains the following two-part test: "whether (1) the proposed use 'would significantly reduce the amount of trust water available to the holder of the water right used for power production'; **and if so** (2) 'whether the proposed reduction is in the public interest.'" *Brief* at 6 (emphasis in original). Rangen concludes that, because there is no evidence Permit 36-17002 would reduce any power production right, "no 'public interest' analysis was appropriate when [Permit 36-17002] was issued" and "there is no need, and it would be inappropriate to reevaluate the 'public interest' at any time after [Permit 36-17002] is issued or perfected." *Id.* at 6-7.

Rangen's conclusion misses that the first step in the analysis under Idaho Code § 42-203C(1) requires the Director to consider "the criteria established in section 42-203A, Idaho Code." Those criteria include an evaluation of whether the proposed use will conflict with the local public interest as defined in Idaho Code § 42-202B. *See* Idaho Code § 42-203A(5). The public interest analysis is applicable to Permit 36-17002. Condition 8 is necessary and proper.

The Hearing Officer correctly determined the source and point of diversion of Rangen's other water rights 36-15501, 36-2551, and 36-7694.

Rangen disputes the inclusion of Findings of Fact 6 and 10 in the Preliminary Order. Finding of Fact 6 states:

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 Rangen Bridge Diversion or the Rangen Box as authorized points of diversion.

Preliminary Order at 2. Finding of Fact 10 states:

Rangen’s water rights associated with the Curren Tunnel are sufficient to cover its diversion from that water source. Evidence suggests that some spring flow (above and beyond the water coming from the Curren Tunnel) enters the Rangen Box and is diverted for use at the Rangen facility. There are no water rights associated with this diversion of spring water. Further, there are no water rights associated with the Bridge Diversion from Billingsley Creek.

Id. 2-3. Rangen objects to these findings “[t]o preserve Rangen’s arguments” in an appeal to the Idaho Supreme Court challenging a determination made by the Director and affirmed by the District Court that Rangen’s Martin-Curren Tunnel water rights are limited to only water discharging from the Martin-Curren Tunnel. *Brief* at 7. Rangen requests elimination of Findings of Fact 6 and 10, claiming they are “unnecessary to the issuance” of Permit 36-17002. *Id.*

Findings of Fact 6 and 10 will not be removed from Permit 36-17002.² Inclusion of these Findings of Fact has no bearing on Rangen’s appeal to the Idaho Supreme Court. In addition, as Finding of Fact 9 explains, Rangen claimed in its initial disclosures that Permit 36-17002 is intended to authorize diversion from the existing points of diversion at the Rangen facility, which would include the Curren Tunnel, Rangen Box, and Bridge Diversion. However, the Application only lists two points of diversion (the SWSWNW and the SESWNW of Section 32, T07S, R14E), and does not designate discrete locations for the two points of diversion. Findings of Fact 6 and 10 are therefore necessary to issuance of Permit 36-17002 because the findings explain that Rangen’s existing water rights only authorize diversion from the Martin Curren Tunnel and establish that the appropriate points of diversion for Permit 36-17002 are the Rangen Box and Bridge Diversion.

Except as modified or supplemented herein, the Director adopts the Findings of Fact and Conclusions of Law of the Hearing Officer. The Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Rangen owns and operates a fish propagation and research facility near the head of Billingsley Creek. Rangen diverts water to the facility from the Martin-Curren Tunnel (sometimes referred to as “Curren Tunnel”).

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 been in existence for over fifty years.

² For clarification purposes, the Director will modify the first sentence of Finding of Fact 10.

3. Water from the Curren Tunnel is piped to a concrete box, known as the Rangen Box, which collects water into a pipeline running from the Rangen box to the Rangen facility. Some spring water is captured by the Rangen box.

4. All of the spring water from the talus slope and the overflow from the Curren Tunnel diversion system form the headwaters of Billingsley Creek. Rangen has a large diversion on Billingsley Creek (the "Bridge Diversion") which supplies water to the large raceways and CTR raceways. Water used in the Rangen facility is returned to Billingsley Creek at the end of the CTR raceways.

5. Three water rights authorize diversion and beneficial use of 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.

6. 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 identify Billingsley Creek or springs tributary to Billingsley Creek as authorized sources. None of these three water rights identify the Rangen Bridge Diversion or the Rangen Box as authorized points of diversion.

7. The Application proposes diverting water from Springs tributary to Billingsley Creek for Fish Propagation. The Application identifies two points of diversion (the SWSWNW and the SESWNW of Section 32, T07S, R14E), but does not designate discrete locations for the two points of diversion. The Application included three different maps. However, none of the maps identify the exact location of the proposed points of diversion.

8. The Application included the following statement: "The purpose of this application is to secure points of diversion for water emanating from springs, seeps, talus slopes, and from [t]he Martin-Curren Tunnel. All of these sources emanate from basalt in the spring complex and enter the headwaters of Billingsley Creek from which they have historically entered the pipeline to the large raceways."

9. Rangen's initial disclosures (filed pursuant to IDAPA 37.03.08.40.05) state that all of the proposed points of diversion have been previously constructed and that Rangen will not have any additional infrastructure costs before diverting water under the proposed permit. This statement confirms that Rangen intended to identify only existing diversion facilities in the Application.

10. Rangen's diversions from the Curren Tunnel do not exceed the diversion rate authorized pursuant to its existing water rights. Evidence suggests that some spring flow (above and beyond the water discharging from the Curren Tunnel) enters the Rangen Box and is diverted for use at the Rangen facility. There are no water rights associated with this diversion of spring water. Further, there are no water rights associated with the Bridge Diversion from Billingsley Creek.

11. The evidence in the administrative record establishes that the two points of diversion proposed in the Application are the Rangen Box and the Bridge Diversion. Both of these structures capture the spring water emanating from the talus slope near the Rangen facility.

12. Although Rangen identifies the source of water for the Bridge Diversion as “Springs,” the correct source designation should be “Billingsley Creek” because the springs join together into a single, identifiable creek channel upstream of the Bridge Diversion.

13. The points of diversion and sources for the Application should be identified as follows:

<u>Legal Description</u>	<u>Source</u>	<u>Diversion Name</u>
SWSWNW, Sec. 32, T07S, R14E	Billingsley Creek	Rangen Bridge Diversion
SESWNW, Sec. 32, T07S, R14E	Springs	Rangen Box

14. The place of use described in the Application covers the SWNE and SENE of Section 31, T07S, R14E. This area includes the large raceways and CTR raceways, but does not include any of the facilities on the south side of Billingsley Creek. Water diverted from the Bridge Diversion and the Rangen Box can be used in the large raceways and CTR raceways.

15. The Application seeks approval of a diversion rate of 59.00 cfs. During pre-hearing negotiations, Rangen agreed to reduce the proposed diversion rate to 21.80 cfs. In the last twenty years, the total flow of water through the Rangen facility, including water from the Curren Tunnel, has, at times, exceeded 40 cfs. *See* Exs. 2017 and 1016. The Curren Tunnel only represents a small portion of the total water diverted to the Rangen facility.

CONCLUSIONS OF LAW

1. 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.

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

Reduction to Existing Water Rights

3. 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 Department generally describes fish propagation rights as 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.

4. Rangen satisfied its burden of proof regarding no injury to other water rights.

Sufficiency of Water Supply

5. Rangen satisfied its burden of proof regarding the sufficiency of the water supply. Evidence in the record shows that the total flow through the Rangen facility, including water diverted from the Curren Tunnel, exceeded 40 cfs in recent years. Exs. 2017 and 1016.

Good Faith/Speculative Purposes

6. Rangen satisfied its burden of proof regarding good faith/speculation. Rangen owns the property at the proposed points of diversion and place of use. Further, Rangen has already obtained all other permits needed to operate a fish propagation facility.

Sufficient Financial Resources

7. Rangen satisfied its burden of proof regarding sufficient financial resources to complete the proposed project. According to its disclosures, Rangen intends to divert water through its existing diversion under Permit 36-17002. Therefore, there will be little or no cost to develop Permit 36-17002.

Conservation of Water Resources

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

Local Public Interest

9. The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). 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(3).

10. Gooding argued that the proposed permit is not in the local public interest because it would allow Rangen to divert water from Billingsley Creek under Permit 36-17002 while still pursuing a delivery call (against junior ground water users) under its existing senior water rights (from the Curren Tunnel). Gooding’s argument is not persuasive. Rangen’s delivery call is presently limited to the Martin-Curren Tunnel, the source listed on Rangen’s senior water rights. Any water available in the Curren Tunnel will be first used to satisfy the senior rights from that

source. The Application is for sources not listed on Rangen's existing water rights. Therefore, Rangen's pending delivery call has no bearing on the outcome of this contested case.

11. Rangen and the Districts submitted written arguments on the question of whether Permit 36-17002 should include a condition subordinating the permit to future upstream consumptive uses. This question falls within the local public interest criteria. The Districts argued that a subordination condition is appropriate because, without such a condition, the permit could block all future upstream development. Rangen argued the Department does not have the authority to subordinate non-consumptive permits to future consumptive uses.

12. Idaho Code § 42-203A(5) authorizes the director of the Department to include conditions on permits. The authority to condition water rights has been recognized by the Idaho Supreme Court. *See Hardy*, 123 Idaho at 491, 849 P.2d at 952. Rule 50.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08) states:

The director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

13. Any application to appropriate water in Idaho is subject to the local public interest standard. *See Hardy*, 123 Idaho at 489, 849 P.2d at 950. When the legislature enacted Idaho Code § 42-203A(5), "it clearly vested, in the [Department], considerable authority and discretion to determine and protect the 'local public interest' when issuing or rejecting water permits." *Matter of Permit No. 47-7680*, 114 Idaho at 606, 759 P.2d at 897. As emphasized above, Idaho Code § 42-203A(5) specifically gives the Department authority to "grant a permit upon conditions." "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department's] sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

14. Because the springs forming the headwaters of Billingsley Creek (the source of water for the proposed permit) are hydrologically connected to the ESPA, if Permit 36-17002 were issued without the proposed subordination condition, the unsubordinated Permit and subsequent water right could permanently restrict ground water development across a large portion of eastern Idaho. It is not in the public interest to allow a large non-consumptive use of water to restrict future water development across a significant portion of the state.

15. The Department is required to apply its statutory authority set forth in Idaho Code § 42-203A(5) in deciding this fact-specific case. In an exercise of discretion to determine and protect the public interest, the Director concludes it is not in the public interest to allow a large non-consumptive use of water to restrict future water development across a significant portion of the state. The following subordination condition must be included on Permit 36-17002:

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.

16. If the subordination condition is included on Permit 36-17002, Rangen has satisfied its burden of proof regarding the local public interest.

Additional Issues Raised by Gooding

17. In its brief in opposition to the proposed permit, Gooding raised two additional issues that should be discussed in this order. Gooding asserted the Application does not clearly identify the location and source of the proposed points of diversion. Gooding is correct. The Application is very ambiguous about proposed points of diversion, describing many different sources and methods of diversion. If anything, the Application overstates the diversion that will actually occur under Permit 36-17002.

18. In its initial disclosures, Rangen explained Permit 36-17002 seeks authorization to divert and use water from the existing points of diversion at the Rangen facility. These points of diversion would include the diversion from the Curren Tunnel, the Rangen Box (which captures some spring inflow) and the Bridge Diversion. Rangen's initial disclosures sufficiently clarify the proposed points of diversion to allow the application to be processed. Because Rangen's diversions from the Curren Tunnel do not exceed the diversion rate authorized pursuant to its existing water rights and because Rangen only identified two points of diversion on the Application, the Curren Tunnel diversion will not be included on Permit 36-17002.

19. Gooding also asserted the proper source designation for the Bridge Diversion should be Billingsley Creek rather than Springs tributary to Billingsley Creek. Evidence in the administrative record establishes that the Bridge Diversion exists at a location where springs emanating from the talus slope join together to form a creek channel. The Bridge Diversion sits within 500 feet of the top of the talus slope. *See* Ex. 2021. It is understandable why Rangen would identify the source of its Bridge Diversion as "Springs".


20. Rule 35.03.b.ii of the Department's Water Appropriation Rules (IDAPA 37.03.08) requires the source of water to be listed on an application for permit. "For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in the local common usage." IDAPA 37.03.08.35.03.b.ii. The USGS Quadrangle map does not clearly delineate where Billingsley Creek begins.

21. Rule 35.04.b of the Department's Water Appropriation Rules allows applications to be amended to "clarify the name of the source of water." Because the diversion infrastructure (Rangen Box and Bridge Diversion) are already in place, the actual sources of the water being diverted by Rangen are fixed. The Department retains authority to determine what name should be assigned to a given source and to issue a permit with the correct source name. Here, the correct name for the source supplying water to the Bridge Diversion is "Billingsley Creek".

the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

10. This right does not grant any right-of-way or easement across the land of another.

Dated this 13th day of March 2015.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March 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, to the following:

Document Served: Final Order Denying Exceptions and Explanatory Information to Accompany a Final Order

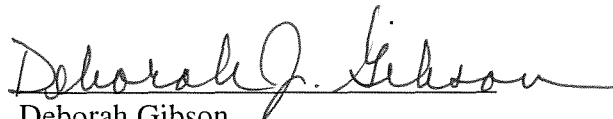
T.J. Budge
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391

Fritz Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333

Robyn M Brody
Brody Law Office
PO Box 554
Rupert ID 83350

J. Justin May
May Browning & May
1418 W Washington
Boise ID 83702

Craig Hobdey for
City of Gooding
PO Box 176
Gooding, ID 83330



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.