IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 36-16979 IN THE NAME OF NORTH SNAKE GROUND WATER DISTRICT, ET AL.

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

Petitioner/Respondents,

vs.

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

Respondents/Respondents,

and

RANGEN, INC.,

Intervenor/Appellant.

SUPREME COURT DOCKET NO. 43564-2015

Gooding County Case No. CV-2015-83

APPELLANT RANGEN, INC.'S OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF CASE

A. NATURE OF CASE.

This Appeal involves an Application for Permit to obtain a new water right filed by multiple ground water districts (collectively, the "Districts" or "GWDs").

This Court recently took under advisement the issue of whether the source of Rangen's water rights includes the so-called "talus slope" spring water that Rangen has used to raise fish for more than fifty years. *Rangen, Inc. v. IDWR, Supr. Ct. Case No. 42772-2015.* The GWDs' Application seeks to appropriate 12 cfs of the talus slope water.

Even though they are applying for a new water right, the GWDs do not propose to actually do anything with the talus slope water. The water will flow down off the talus slope and pool in front of Rangen's Bridge Dam as it has for more than fifty years. The GWDs do not intend to put the water to beneficial use. Instead, they propose merely to assign the permit to Rangen to perfect the water right by having Rangen raise fish in its own facility using the water. The designated place of use (POU) and point of diversion (POD) are located wholly on Rangen's property. The Application provides no new water to Rangen, or any other senior water users on Billingsley Creek who continue to suffer shortages, while at the same time allowing continued depletions and injury to the Eastern Snake Plain Aquifer.

Director Spackman denied the Districts' Application, describing it as "the epitome of a mitigation shell game." (A.R., Vol. 2, p. 364)[1]. He concluded that the Application should be denied because it: (1) was filed in bad faith; and (2) was not in the local public interest. The GWDs filed an appeal of the Director's decision. The District Court reversed the Director's decision and remanded the Application back to the Director for further proceedings. Rangen contends that the Director's decision to deny the Application should be affirmed for the reasons discussed below.

B. COURSE OF PROCEEDINGS.

On April 3, 2013, seven different GWDs filed Application for Permit No. 36-16976 ("Application" or "Permit"). (A.R., Vol. 1, p. 1-4). The Application was amended several times. (A.R., Vol. 1, p. 14-17; 83-86).

On September 17, 2014, a Hearing Officer conducted a contested administrative hearing on the GWDs' Application. (A.R., Vol. 2, p. 263). Thereafter, on November 18, 2014, the Hearing Officer issued his *Preliminary Order Issuing Permit.* On December 2, 2014, Rangen filed *Exceptions to the Preliminary Order.* (A.R., Vol. 2, p. 284).

Director Spackman considered Rangen's *Exceptions*, and on February 6, 2015, the Director issued his *Final Order Denying Application* (*Final Order*). (A.R., Vol. 2, p. 349-365). On March 5, 2015, the GWDs filed a *Petition for Judicial Review* of the *Final Order.*

On July 20, 2015, a hearing on the GWDs' *Petition for Judicial Review* was held before the Honorable Eric Wildman. On August 7, 2015, the District Court issued a *Memorandum*

[1] The Clerk's Record on Appeal (R.) includes a disc of the agency record, exhibits, and hearing transcripts for the Judicial Review of the Districts' Permit Application, labeled AR_2015-83 (A.R.). These records shall be referred to in the citations herein by "R." and "A.R." accordingly.

Decision and Order reversing the Director's *Final Order*. On September 17, 2015, Rangen filed a *Notice of Appeal* seeking this Court's review.

C. STATEMENT OF FACTS.

On December 11, 2011, Rangen filed a *Petition for Delivery Call*. (A.R., Exh. 1008). The *Petition* involved two of Rangen's water rights: 36-02551 and 36-07694. These rights authorized the diversion of 74.54 cubic feet per second (cfs) of water. (*Id*). During the hearing on the delivery call, the Director noted that Rangen had reported flows which averaged 50.7 cfs in 1966. The flows declined 33 cfs between 1966 to 2012. (*Id*, p. 33). In 2012, flows for the Rangen's rights averaged just 14.6 cfs. (*Id*).

On January 29, 2014, after several years of litigation, the Director concluded that junior-priority groundwater pumping in the Eastern Snake Plain Aquifer ("ESPA") is causing material injury to Rangen's senior water rights. (*Id*, p. 36). The Director ordered the junior-priority users to provide Rangen with 9.1 cfs of water, but allowed them to phase-in the delivery over a period of five years. (*Id*., p. 42).

On April 3, 2013, seven different GWDs filed an Application for Permit No. 36-16976. (A.R., Vol. 1, p. 1-4). The Application was amended several times. (A.R., Vol. 1, p. 14-17; 83-86). The Application stated two purposes of use: fish propagation and mitigation. (*Id*.). The purposes of use were intended to cover any mitigation obligation owed to Rangen. The stated intent of the GWDs when they applied for the permit was to obtain the permit and assign the permit to Rangen for the company to perfect the water right. (A.R., Tr. p. 75, l. 19-25; p. 76, l. 1-7).

The GWDs' Application designated a place of use (POU) and point of diversion (POD) entirely located on Rangen's real property. The GWDs stipulated that "Rangen owns the property, place of use, and point of diversion." (A.R., Tr. 246, l. 13-14). The GWDs did not have the consent or authority to perfect the water they sought to appropriate using Rangen's property. (A.R., Exh. 113-14). (A.R., Tr. p. 246, l. 21-25).

The GWDs proposed to use Rangen's existing diversion works, the same diversion works the company had been using for fifty years, to perfect the GWDs' permit. (A.R., Tr. 85, l. 1-21). The GWDs have taken no steps or taken any "action" to gain possessory use of Rangen's property. The GWDs did file a Notice of Eminent Domain ("Notice"), but the Notice only refers to access and rights of way. The Notice does not indicate that the GWDs seek to obtain any fee title or occupancy use of Rangen's property, uses which are necessary to perfect any water right allowed under the Application. (A.R., Exh. 1014). Even if the Notice had stated an intent to obtain title to Rangen's Bridge Dam or other portions of Rangen's facility, the GWDs do not have the authority to accomplish such a taking.

The GWDs' Application was executed by "Thomas J. Budge, Attorney." At the time the Application was filed, there was no Power of Attorney or corporate resolution giving Mr. Budge the authority to execute the Application on behalf of the GWDs. (*See*, A.R., Exh. 1000, 1004). The Application was also incomplete in that no addresses for the Applicant GWDs were listed as required. (*Id.*).

Ultimately, the Director denied the GWDs' Application, finding that it was filed in bad faith and was not in the local public interest. The Director explained the injury Rangen and

Billingsley Creek would suffer if the Application were granted to satisfy the junior-priority users' mitigation obligations:

> . . . 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 Curren Tunnel or headwaters of Billingsley Creek. It is not in the local public interest to approve such an Application.

(A.R., Vol. 2, p. 364) (Emphasis added). Thereafter, the Director denied the GWDs' Permit. (*Id*). Two of the Districts appealed the Director's determination. The District Court reversed the Director's determination and remanded the application back to the Director for further proceedings. Rangen timely filed an Appeal to this Court.

II. ISSUES PRESENTED ON APPEAL

1. Whether the Director's ruling that the Districts' Application was filed in bad faith is supported by substantial competent evidence.

2. Whether the Director's denial should be affirmed because the Districts' Application is speculative.

3. Whether the Director acted within the boundaries of his authority when he ruled that the Districts' Application was not in the "local public interest."

4. Whether the Director's denial should be affirmed because the application does not propose any defined beneficial use.

5. Whether the Director's denial should be affirmed because the Districts' Application is incomplete.

6. Whether the substantial rights of Rangen have been prejudiced by the granting of the GWDs' Application.

III. STANDARD OF REVIEW

In an appeal from a decision of the District Court acting in its appellate capacity under the IDAPA, this Court reviews the record created before the agency independently of the District Court's decision. *See, Chisholm v. Idaho Dept. of Water Resources,* 142 Idaho 159, 125 P.3d 515 (2005). In addition, "[T]he Court does not substitute its judgment as to the weight of evidence presented, Idaho Code § 67-5279(1), but instead defers to the agency's findings of fact unless they are clearly erroneous. When conflicting evidence is presented the agency's findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether [the court] might have reached a different conclusion." *Id.,* (citations omitted). "A strong presumption of validity favors an agency's actions." *Young Elec. Sign Co. v. State ex rel. Winder,* 135 Idaho 804, 807, 25 P.3d 117, 120 (2001).

Idaho Code § 67-5279 governs judicial review of agency decisions. The reviewing court shall affirm the agency decision:

> [U]nless it finds that the agency's findings, inferences, conclusions, or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion."

In the Distribution of Water to Various Water Rights, 155 Idaho 640, 647, 315 P.3d 828, 835 (2013) (quoting *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011)). "An action is capricious if it was done without a rational basis. It is arbitrary if it was

done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung Ass'n of Idaho/Nevada v. State, Department of Agriculture,* 142 Idaho 544, 130 P.3d 1062 (2006), citing *Enterprise, Inc. v. Nampa City,* 96 Idaho 734, 536 P.2d 729 (1975). The party challenging the agency action must first show that the agency erred in a manner specified in I.C. 67-5279(3) and then establish that a substantial right has been violated. *Barron v. Id. Dept. of Water Resources,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The "agency shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4).

IV. ARGUMENT

A. THE DIRECTOR'S RULING THAT THE DISTRICTS' APPLICATION WAS FILED IN BAD FAITH IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The statutory criteria for granting an Application to appropriate water is set forth in I.C. § 42-203A(5). One of the criteria is that an Application may be denied "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." I.C. § 42-203A(5)(c). This provision does not define "bad faith" or "good faith." Rule 45 of the Idaho Department of Water Resources' Appropriation Rules provides some guidance. It provides in relevant part:

> An Application will be found to have been made in good faith if:
>
> i. 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 . . . ; and
>
> ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

iii. There are no obvious impediments that prevent the successful completion of the project

IDAPA 37.03.08.045.01.c.

1. There is substantial competent evidence to support the Director's finding that there are threshold impediments to completion of a project.

The Director concluded that the GWDs' Application was filed in bad faith pursuant to IDAPA 37.03.08.0445.01.c.(iii). The District Court improperly reversed this determination. There is substantial competent evidence to support the Director's determination and it should be affirmed.

In reviewing the *Preliminary Order* entered by the Hearing Officer, the Director recognized the inherent problem with the GWDs' Application. **The GWDs do not propose to do anything with the water they seek to appropriate.** The GWDs do not intend to build diversion works or divert the water.[2] Rangen will simply continue to divert the water at its Bridge Dam as it has for over fifty years. The GWDs do not intend to convey the water anywhere. The water will continue to flow through Rangen's facility as it has for over fifty years. The GWDs do not propose to beneficially use the water. Rangen will continue to use the water to raise fish in its Research Hatchery as it has done for over fifty years. While Rangen has sought a determination from this Court that its water rights encompass the talus slope water,[3] Rangen has recently been granted a

[2] After the Application was filed, the GWDs added a proposal to pump a portion of the water from Billingsley Creek to Rangen's Hatch House and research facilities. Rangen does not want the water moved from where it pools in front of the Bridge Dam. (A.R., Tr. p. 248, l. 7-15). The GWDs have indicated that they would only move water to the extent Rangen wanted water moved. (A.R., Tr. p. 89, l. 1-19). The simple fact is the pump was added to the Application solely because the GWDs aren't proposing to do anything but observe Rangen using the water. The GWDs didn't actually intend to pump any water.

[3] *Rangen, Inc. v. IDWR, Supr. Ct. Case No. 42772-2015.*

separate water right authorizing the use of water from the talus slope at the Bridge Dam. The GWDs intend to simply watch Rangen continue to use water that would be legally available to Rangen with or without the GWDs' Application and be given mitigation credit for it. The GWDs want the new right for "mitigation" for the damage they are doing, but the GWDs do not propose to bring in any new water to augment the flows of Billingsley Creek.

The Director ruled that the GWDs' Application was made in "bad faith" because there is a threshold impediment to "completion of the project." (A.R., Vol. 2, p. 362). Based on the evidence presented at the hearing, the Director concluded that when the Districts filed their Application they had no intent to do anything with the water other than to assign the Permit to Rangen so that it could perfect the water right using its facility. (*See id.*). The Director reasoned that: "[t]o perfect a project for a water right, there inherently must be completion of works for beneficial use." (*See id.*). The Director's decision is supported by substantial competent evidence and should be affirmed.

The Director's actual finding was as follows:

> 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.

(A.R, Vol. 2, p. 362).

The GWDs' only proposed contribution is the filing of the Application itself. Lynn Carlquist, a director of the North Snake GWD, candidly admitted that once the Application was filed the GWDs intended to simply assign it to Rangen to perfect. Testifying on behalf of the GWDs, Carlquist stated that the GWDs did not propose any "project" of their own to perfect the Application. Rather, it was the intent of the GWDs at filing to simply take and use Rangen's existing facilities to force Rangen to perfect a water right on behalf the GWDs. The GWDs' proposal at filing was simply to assign the permit to Rangen for it to perfect the Application on the GWDs' behalf:

> Q. And when I asked you last time [at your deposition], you told me that it was your intent it 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.

(A.R., Tr. p. 75, l. 23-25; p. 76, l. 1-11).

The GWDs argued to the District Court that there is nothing in the rules which requires actual "construction." (R., p. 60). The District Court determined that the Director's conclusion of bad faith was not supported by substantial evidence by inferring that the Director was imposing a requirement of new construction. (R., p. 193).

The District Courts' conclusion constitutes too narrow of an interpretation of the Director's *Final Order* and fails to recognize the broader problem with the GWDs' Application. In order to issue a new water right permit, there must be a proposed project to divert and beneficially use water that can actually be completed. While it is true, as Judge Wildman noted, that the proposed project can utilize existing physical structures, there still must be some identifiable project by which the applicant intends to beneficially use the water. As the Director recognized, the Application the GWDs filed did not propose any such project. Essentially, the GWDs proposed to watch Rangen continue to divert and beneficially use the water in the same way it has for more than fifty years. In this context, the conclusion that the GWDs did not have a "project" or that the Application did not contemplate a "completion of the project" is amply supported by the record and is entitled to deference.

The Appropriation Rules contemplate that an Applicant have a "project" of some kind to complete in order to perfect a water right. *See*, IDAPA 37.03.08.45.c. The GWDs' Application does not involve an instream water use. Accordingly, a "project" is necessary to divert water. The term "project" is used throughout the Appropriation Rules. The definition of "project works" contemplates the creation of construction of some apparatus to divert water.

> **14. Project Works**. A general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works.

IDAPA 37.03.08.010.14. In this case, when the GWDs filed their application, there was no such "project" contemplated.

The Director is intimately familiar with the unique situation that led to the filing of the GWDs' Application. The GWDs' Application was filed in an attempt to take advantage of a dispute that arose during Rangen's 2011 delivery call regarding whether the source of Rangen's existing water rights included the talus slope and head of Billingsley Creek that is at issue with the GWDs' Application in the present action. On April 3, 2013, the Director heard oral argument on a motion for summary judgment regarding this issue.

> 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. . . .

(A.R., Vol. 2, p. 351).

> 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, $14E, 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 nos. 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.

(A. R., Vol. 2, p. 353). Rangen's Application for Permit No. 36-17002 was approved on January 2, 2015, for 28.1 cfs for fish propagation, with a priority date of February 3, 2014. (A. R., Vol. 2, p. 353, FN4). Regardless of the outcome of Rangen's appeal concerning the source of its water rights, Rangen has a water right to use all of the water that the GWDs seek to appropriate with this Application. This means that no one will use any of the water that the GWDs seek to appropriate. Rangen will continue to use all of the water available at the Bridge Dam pursuant to its own water rights, including the new right that was recently issued.

With this context, the Director examined the GWDs' intent and motivation for filing this Application when discussing the local public interest:

> 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' [sic] 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.

(A. R., Vol. 2, p.364.)

Based on the evidence in the record and the unique situation presented by this Application, the Director's legal and factual conclusions that the Application was filed in bad faith are supported by substantial and competent evidence in the record. Therefore, the Director's conclusions are binding on the Court. *Wilkinson v. St*ate, 151 Idaho 784, 264 P.3d 680 (Ct.App. 2011). Furthermore, the Court cannot substitute its judgment for that of the agency on questions of fact involving the weight of particular evidence. *Woodfield v. Board of Professional Discipline*, 127 Idaho 738, 905 P.2d 1047 (Ct.App 1995). As such, the Director's decision to deny the Application should be affirmed.

2. The District Court improperly made determinations on issues upon which the Director did not make any findings.

It is important to note that the Director did not make any finding of facts on either subsection (i) or subsection (ii) of Rule 45 of the Appropriation Rules (IDAPA 37.03.08.045.01.c). These provisions require an examination of whether the GWDs have the eminent domain authority necessary to gain possession of Rangen's property. When the District Court reviewed this matter, it found that:

> With respect to the criteria set forth in IDAPA 37.03.08.045.01.c.(i), (ii) and (iii), the record establishes that the Districts have "the authority to exercise eminent

> domain authority to obtain such access" necessary to construct and operate the proposed project. The applicants are ground water districts formed under Chapter 52, Title 42, Idaho Code. R., p. 355; Tr., pp. 15-18. Idaho Code grants them "the power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of the mitigation power herein granted. . . ." The record does not establish that any other permits are necessary to construct and operate the project proposed by the application, and the Director's Final Order does not find that the Districts have failed to pursue any necessary permits. . . .".

(R., p.195).

It was improper for the District Court to make findings regarding issues that were not decided by the Director. To the extent that the Director did not make any findings under Subsections c.i and ii, the trial court substituted its own findings for that of the agency. In this regard, the trial court erred. If there are no findings or findings are not adequate, the trial court must remand for the agency to make findings.

> Under Idaho's Administrative Procedures Act, I.C. § 67-5201 et seq., ... when an appeal is brought to a district court and the findings of fact to be reviewed are missing or inadequate the district court should remand the case to the [agency]. *See Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982), (stating that failure to hold otherwise would be to authorize the district court to substitute its judgment for that of the agency despite the express provision prohibiting such action in subsection (g) of I.C. § 67-5215).

Idaho County Nursing Home v. Idaho Department of Health and Welfare, 124 Idaho 116, 117-18, 856 P.2d 1283 (1993).

In the event this Court were to reverse the Director's finding of bad faith under IDAPA 37.03.08.045.01.c.(iii), the Court should remand this matter to the Director for further consideration of subsections ii and iii of IDAPA 37.03.08.045.01.c. To the extent the Court

determines it is necessary to actually examine the issues, the Court should consider the arguments addressed below.

a) The GWDs do not have legal access to Rangen's property and do not have the authority to exercise eminent domain authority to obtain such access (IDAPA 37.03.08.045.01.c.i).

Under subsection (i) of Rule 45 of the Appropriation Rules, "[t]he applicant shall have the legal access to the property necessary to construct and operate the proposed project, [and] has the authority to exercise eminent domain authority to obtain such access." (IDAPA 37.03.08.045.01.c.i). The Director did not address this requirement because he found bad faith under subsection (iii) of Rule 45. When the District Court reviewed the GWDs' Application, it actually made two inconsistent rulings. First, the District Court held that the GWDs had the statutory "power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of mitigation power herein granted." (R., p. 199) (citing I.C. § 42-5224(13)). Based on this authority, the District Court held that the GWDs had satisfied the necessary elements of subsection ii or Rule 45 of the Appropriation Rules, finding that it was possible for the GWDs to obtain legal access to Rangen's property.

Rangen argued before the District Court that the GWDs did not, as a matter of law, have the actual legal authority to condemn and take Rangen's property to complete the Application. The ability to condemn property is outlined under Idaho's condemnation statutes. Those statutes specify the three distinct property interests that may be obtained by eminent domain. These three interests are as follows:

> 7-702. ESTATES SUBJECT TO TAKING. The following is a classification of the estates and rights in lands subject to be taken for public use:
>
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.
>
> 2. An easement, when taken for any other use.
>
> 3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

I.C. § 7-702.

The GWDs' condemnation authority is not so broadly defined to include the three "bundles" of property rights, which are subject to eminent domain proceedings under Section 7-702. Rather, the GWDs can only:

> . . . exercise the power of eminent domain in the manner provided by law for the condemnation of private property for ***easements, rights of way, and other rights of access*** of to property necessary to the exercise of the mitigation powers herein granted, both within and without the district.

I.C. § 42-5224(13). (Emphasis added). Section 42-5224(13) expressly and unequivocally limits the GWDs' eminent domain powers to situations where they are obtaining "easements, rights of way or other rights of **access**." It does not grant the Districts the power to condemn and take fee title possession of property (i.e., take Rangen's Bridge Dam or to occupy its property to construct a pump station). The GWDs' limited condemnation authority was recognized in this very case. The Hearing Officer held that GWDs did not have the ability to gain any fee title interest to Rangen's property, or to otherwise occupy its property. (A.R., Vol. 2, p. 269). This finding was not appealed by the GWDs. (A.R., Vol. 2, p. 313-319).

On the issue of whether the GWDs had the actual eminent domain authority to take Rangen's property to perfect their water right, the trial court declined to make any finding. Rather, the trial court held:

> Rangen also raises several arguments regarding the ability of the Districts to exercise their eminent domain powers to perfect their application for permit. Since issues of that nature are more appropriately addressed in the context of a challenge to a condemnation proceeding, the Court, so as to not prejudice the issues, will not address these arguments.

(R., p. 203).

On one hand, the trial court made a finding that the GWDs had possible legal access to Rangen's property, citing the GWDs' authority under Section 42-5224(13). On the other hand, the District court expressly declined to rule whether the GWDs had the actual type of eminent domain authority to perfect their Application for permit.

On the issue of actual legal access, the GWDs did not submit as evidence any agreements to divert water on Rangen's property, nor did they show any court order granting them authority to enter Rangen's property. The only evidence produced by the GWDs was a Notice of Intent to Exercise the Power of Eminent Domain. (A.R., Exh. 1014). There is nothing in that Notice indicating that the GWDs intended to condemn property to build a pump station or to condemn Rangen's pre-existing Bridge Dam at the head of Billingsley Creek to divert water that Rangen has been using since 1962.

To summarize, given the trial court's two inconsistent rulings, and the fact that the GWDs failed to show they had any legal access, there has been no showing that "[t]he 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" as required under IDAPA 37.03.08.045.c(i). (Emphasis added). Accordingly, the District Court's finding that the GWDs' have the power of eminent domain under Subsection c.i of Rule 45 is erroneous.

b) The Director did not make any findings regarding what permits might be necessary to complete the project (IDAPA 37.03.08.045.c(ii)).

The Director also did not make any finding of facts regarding subsection (ii) of Rule 45 of the Appropriation Rules (IDAPA 37.03.08.045.01.c). When the District Court reviewed the issue, it found:

> The record does not establish that any other permits are necessary to construct and operate the project proposed by the application, and the Director's Final Order does not find that the Districts have failed to pursue any necessary permits.

(R., p. 195). The District Court's finding was erroneous.

The Director did not address this issue because he found bad faith pursuant to subsection (iii) of Rule 45. The Director's ruling did not contain any findings on whether there were any permits were required for the project. The only "finding" made by the Director was the following statement of law:

> 6. The Applicant must also demonstrate that 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.ci-iii.

(A.R., Vol. 2, p. 358). Other than this statement of law, the Director made no findings. Accordingly, in the event this Court were to reverse the Director's decision to deny the Application, this case should be remanded to the Director to determine what permits, if any, are required and whether such permits have been obtained.

B. THE DIRECTOR'S DENIAL SHOULD BE AFFIRMED BECAUSE THE DISTRICTS' APPLICATION IS SPECULATIVE.

As previously indicated, one of the statutory criteria for granting an application to appropriate is that the application is not "speculative." I.C. § 42-203A(5). The Director did not rule on Rangen's speculation arguments "because the Director concluded that the Districts' Application was filed in bad faith." (A.R., Vol. 2, p. 362). Nonetheless, the District Court ruled that the application was not speculative. The District Court's ruling was erroneous since the Director did not rule on the issue. The District Court should have remanded the matter back to the Director for further findings on this issue. *Idaho County Nursing Home v. Idaho Department of Health and Welfare*, *supra.*

Under IDAPA 37.03.08.045.01.b, "[s]peculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use . . . " (Emphasis added). The well-established general rule throughout western prior appropriation states regarding speculative applications for permits is that an appropriator must be the actual appropriator or it must have some agency relationship with the party who is actually appropriating the water. *Colorado River Water Conservation District v. Vidler Tunnel Water Company*, 594 P.2d 566 (Colo. 1979); s*ee e.g., Bacher v. State Engineer of Nevada*, 146 P.3d 793, 799 (Nev. 2006). The doctrine "addresses the situation in which the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does." *Id.* at 799, *citing Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164, 173 n.11 (Colo.

1988). Here, the GWDs are not the appropriators, and they have no agency relationship with Rangen to perfect the water right on their behalf.

The GWDs' Application designates a POU and POD that are wholly located on Rangen's property. Because the GWDs do not own the POU or POD designated in their Application, their Application is void on its face. The long-standing rule in Idaho and most every other jurisdiction with respect to perfecting a water right on property not owned by the water user is as follows:

> It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.

Lemmon v. Hardy, 95 Idaho 778, 780, 519 P.2d 1168 (1974), *citing Bassett v. Swenson,* 51 Idaho 256, 5 P.2d 722 (1931). *See also*, *Joyce Livestock v. U.S.A.*, 144 Idaho 1, 18, 156 P.3d 502, (2007); *Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348 (1984).

Under this rule, the Court in *Lemmon* held that the "[l]ack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place for use thereof." *Id.* at 781. (Emphasis added). To the extent an application is filed without a possessory right in the place of use, the application is void. Furthermore, as previously argued in Section IV.A.2(a), *infra*, the GWDs have no way of obtaining the type of possessory interest to take Rangen's Bridge Dam or to place a pump station on Rangen's property, under their limited eminent domain authority under I.C. § 42-5224(13).

For all these reasons, the District Court's determination that the GWDs' Application was not speculative is erroneous. At the very least, because the District Court did not rule on the

speculation issue, the District Court should have remanded the case back to the Director for further findings. *Idaho County Nursing Home v. Idaho Department of Health and Welfare, supra.*

C. THE DIRECTOR ACTED WITHIN HIS AUTHORITY WHEN DENYING THE DISTRICTS' APPLICATION ON THE BASIS THAT IT WAS NOT IN THE LOCAL PUBLIC INTEREST.

The Director held that the GWDs' Application was not in the local public interest. The "local public interest" is defined as "the interest 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." I.C. § 42-202B. The Director's interpretation of the "local public interest" under this Application should have been given "great weight." As stated in another case where the Department was interpreting whether partial forfeiture was allowed under I.C. § 42-222, this Court held:

> This four prong test states that an agency's construction of a statute will be given great weight if: (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present. . . There is no question that IDWR is entrusted with the responsibility to administer water resources in the state. I.C. §§ 42-1701--1778; §§ 42-1801--1806.

State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400, (1997). Here, the District Court did not give the Director's analysis of the "local public interest" any weight, let alone "great weight," as required by Idaho law. "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Matter of Permit No. 47-7680*, 114 Idaho 600, 759 P.2d 891 (1988), citing 1 R. Clark, WATERS AND WATER RIGHTS § 29.3, 170 (1967).

As the District Court stated, I.C. § 42-202B was amended in 2003. However, that amendment was not intended to limit the discretion of the Director to reject a water right that the Director has determined to be "the epitome of a mitigation shell game" and which "brings no new water to the already diminished flows of Current Tunnel or headwaters of Billingsley Creek." The Statement of Purpose for the Amendment indicates:

> This legislation clarifies the scope of the "local public interest" review in water right applications, transfers and water supply bank transactions. This legislation is intended to ensure that the Department of Water Resources has adequate authority to require that diversions, transfers and other actions affecting water resources do not frustrate the public's interest in the effective utilization of its water resources. The "local public interest" should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the E P H A. As noted by the Idaho Supreme Court in Shokal v. Dunn, 109 Idaho 330 85), "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors that role is vested" in other agencies.
>
> Water Resources [sic] role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. **This legislation contemplates that "[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests." "The determination of what elements of the**

> **public interest are impacted, and what the public interest requires, is committee [sic] to Water Resources' sound discretion."**

House Bill No. 284 – Statement of Purpose RS 13046. (Emphasis added).

This Statement of Purpose makes it clear that the term "local public interest" was not narrowed in the way that the District Court interpreted it.

In this case, the Director's rationale that this Application does not satisfy any mitigation requirements requires almost no additional comment. The Director concluded that allowing the GWDs to use the talus slope water for mitigation, the same water Rangen had been using for fifty years, would not be in the local public interest.

> 34. **Approval of the Districts' Application would establish an unacceptable precedent in other delivery call proceedings that are or may be pending. . .** 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 Curren Tunnel or headwaters of Billingsley Creek.** It is not in the local public interest to approve such an application.

(A.R., Vol. 2, p. 364). (Emphasis added).

The local "public water resource" is Billingsley Creek, and all the springs that feed Billingsley Creek. As evidenced by Rangen's successful water call, the record is not in dispute that junior-priority groundwater pumping by the GWDs' members has negatively impacted the Billingsley Creek drainage. (A.R., Vol. 2, p. 352). With this Application, the GWDs are applying for water flowing within Billingsley Creek, the very same source of water which is being depleted

by their groundwater pumping. The Director concluded that it was not in the local public interest for the GWDs to satisfy their mitigation obligation by providing no new water, and providing only that water which Rangen had been previously using for the past fifty years. The Director concluded that the so-called mitigation does not, in fact, provide any "new water" to the depleted resource and allows the GWDs to continue to deplete the aquifer, without actually mitigating for the injury caused by their members' water use.

The Director's decision that the GWDs' legal tactic is not in the "local public interest" should have been given "great weight." *State v. Hagerman Water Right Owners, Inc.*, supra. The Director should have substantial discretion in deciding whether proposed "mitigation" water is, in fact, mitigation water. He should have discretion is deciding how senior users on any given public waterways, who are suffering injury, are mitigated. Allowing "shell games" in lieu of actual mitigation should not be tolerated, sanctioned or condoned by any single branch of Idaho State government.[4]

D. HE DIRECTOR'S DENIAL SHOULD BE AFFIRMED BECAUSE THE APPLICATION DOES NOT PROPOSE TO APPLY TO WATER TO ANY DEFINED BENEFICIAL USE.

The hearing officer approved this Application with a beneficial use described simply as "mitigation." Mitigation does not adequately describe a beneficial use. Mitigation is a motivation. The word mitigation describes a beneficial use in the same way that "making money" or

[4] The District Court indicated that the Director will have the opportunity to consider the issue of mitigation when a mitigation plan is filed to obtain mitigation credit related to the GWDs' Application. (R., p. 199 f/n 8). Having ruled that there is no such mitigation, the Director should deny any such mitigation plan. However, the fact that further proceedings on this issue may occur should not limit the Director's discretion to deny the Application. It merely highlights the lack of any beneficial use.

"improving aesthetics" could be used to describe an irrigation water right. Mitigation describes why a water right is being sought, but does not provide any insight into how the water is being used. To the extent that "mitigation" is allowed to be used as a description for a beneficial use, it must be defined. If not, the Department has no way to evaluate or administer the proposed water right as illustrated by this case. There must also be an evaluation as to whether there is any beneficial use actually occurring.

If, the beneficial use of a water right is described as "mitigation" there must be some evaluation of what that means. Although the Director ultimately rejected the GWDs' Application because it was made in bad faith and was not in the local public interest, he determined that "mitigation" can be the stated beneficial use of water. This was erroneous.

The Director purported to define the term "mitigation" based upon the definition of "mitigation plan" found in the Conjunctive Management Rules. The problem in this case is that he allowed "mitigation" as a stated beneficial use even though he specifically found that the GWDs' proposed use was just a "mitigation shell game" that provides no real benefit to Rangen or any other Billingsley Creek water user. The District Court saw no relevance in whether the proposed beneficial use actually provided mitigation, yet acknowledged this could be a factor to be considered in whether to approve a mitigation plan.[5] (*See* R., p. 199 f/n 8). The District Court's reasoning is flawed – if the proposed beneficial use is "mitigation" then whether the water right

[5] It is certainly true that no mitigation plan could be approved based upon this water right because there is no benefit to Rangen from this water right. This fact should be fatal to both a mitigation plan and to any application seeking a water right for mitigation. Yet, the District Court seems to be saying that the Director has no authority when reviewing a water right proposed for "mitigation" to determine whether or not the proposed use actually mitigates.

actually is going to provide mitigation is a relevant inquiry and is not an issue the Director should wait to decide until the mitigation plan hearing.

One of the most fundamental principles of Idaho water law is that water must be put to a beneficial use, and that a water right is not obtained unless there is a diversion and application of water to a beneficial use. The Idaho Supreme Court in *United States v. Pioneer Irrigation Water District*, 144 Idaho 106, 113, 157 P.3d 600 (2007), stated:

> A common theme throughout [Idaho water law] is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger,* 36 Idaho at 598, 211 P. at 1086-87; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code.
>
> * * *
>
> Further, I.C. § 42-104 states, "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-201(1) provides in part: "All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise.... Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title." As previously noted, in order to obtain a licensed water right in Idaho one must prove that the water has been applied to a beneficial use. I.C. § 42-217. The districts act on behalf of the landowners within the districts to put the water to beneficial use. It is that beneficial use that determines water right ownership.

Id. at 144 Idaho 113.

Under all well-established rules of appropriation, the mere observation that water may be unappropriated can never constitute a "beneficial use" of water. Idaho water law always speaks in terms of "delivery and use" of water. Without both delivery and use of water, a beneficial use

never occurs. *Id.*; IDAHO CONS., Art. XV, Section 3; *Nielsen v. Parker*, 19 Idaho 727, 115 P. 488(1911); *Furey v. Taylor*, 22 Idaho 605, 127 P. 676 (1912); *Cantlin v. Carter*, 85 Idaho 179, 397 P.2d 761 (1964).

As this case illustrates, the failure to identify an actual use makes it impossible to evaluate an application for a permit under the I.C. § 42-203A(5) factors. In order to evaluate the Application, more information is necessary. For instance, there is no way to tell from a description of "mitigation" whether the use of the water will be consumptive. Similarly, there is no way to tell when and if a water right application has been perfected without knowing how it will be used. The additional information that is needed is how the right would actually be used.

In order to evaluate the GWDs' Application, another use, "fish propagation," had to be assumed with, and added to, the "mitigation" use. The entire evaluation by the GWDs' experts assumed the "mitigation" use was, in fact, for "fish propagation." Scott King, the GWDs' expert, admitted this fact:

> Q. Okay. Is it your opinion, then, all's they have to do is obtain unappropriated water under a permit and do nothing else and it's perfected?
>
> A. No.
>
> Q. Then how is this water right perfected
>
> A. The water right's perfected by using it for beneficial use within the facility.
>
> Q. Okay. And you understand -- that's clear that's your testimony, that's how this water right gets perfected?
>
> A. That's my understanding of how this water right would be perfected, yes.

Q. All right. So someone's got to file a proof of beneficial use that says the water right is in fact used within the facility for a beneficial purpose, which is, I take it, fish propagation?

A. Correct.

(A.R., Tr. p. 233-34).

The hearing officer's analysis of this Application illustrates the potential absurdity of allowing the beneficial use of a water right to be described as simply "mitigation." The GWDs' Application stated proposed beneficial uses of "fish propagation" and "mitigation." The hearing officer analyzed both of these beneficial uses utilizing the factors set forth in I.C. § 42-203A. The Hearing Officer's analyses for both "mitigation" and "fish propagation" assumed that the water would actually be used for fish propagation in Rangen's facility. Yet, despite the fact that the manner in which the water would be used was identical, the hearing officer granted the water right for "mitigation," but denied the water right for "fish propagation." (R., p. 276.) The Director's *Final Order* in this case would have allowed this absurd result to stand in the absence of his finding with regard to bad faith and the local public interest.

E. THE DIRECTOR'S DENIAL SHOULD BE AFFIRMED ON THE ADDITIONAL BASIS THAT THE DISTRICTS' APPLICATION IS INCOMPLETE.

The Districts' Application should not have been accepted because it was incomplete. The District Court did not address any of Rangen's substantive arguments on this point. Rather, the court merely stated that the agency exercised its discretion and that there was "ample evidence in the record supporting the Director's decision in this respect." (R., p. 200). The Application was

not complete because there was no evidence that the Application was executed properly. IDAPA 37.03.08.035.01 d provides that all applications for a water right:

> shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. **No priority will be established by an incomplete application.**

IDAPA 37.03.08.035.01.d (Emphasis added). Along with being returned, an incomplete application is not entitled to a priority date. A priority date is only established when an application "is received in complete form." IDAPA 37.03.08.035.02.b.; *Lemmon v. Hardy, supra,* at p. 781.

One of the requirements for a complete application is a duly authorized signature on the Application. In pertinent part, IDAPA 37.03.08.035.03.b requires:

> i. **The name and post office address of the applicant shall be listed.** If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any.
>
> * * *
>
> xii. **The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signatory has authority to sign the application.** An application in more than one (1) name shall be signed by each applicant unless the names are joined by "or" or "and/or."
>
> xiii. **Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application.** The signatory's title shall be shown with the signature.
>
> * * *

> xiv. Applications 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.**

IDAPA 37.03.08.035.03.b (Emphasis added).

Here, the Application was signed by "Thomas J Budge, Attorney." There is no indication from the face of the Application as to whom Mr. Budge represented. He does not indicate specifically which, if any, of the Districts he was signing for. Furthermore, none of the addresses of the Applicants are included. At the time of filing, there was no "evidence" of any authority. To date, no evidence of authority at the time of the filing of the Application has been submitted to the Department.

During the hearing, the Districts admitted Corporate Resolutions for the North Snake and Magic Valley Ground Water Districts, but no Corporate Resolutions were admitted showing authority for the other five Ground Water Districts. The Resolutions were dated September, 2014 – more than a year after the Application was submitted. (A.R., Exh. 1076, 1077). Likewise, the Districts submitted Powers of Attorney for the Magic Valley and North Snake Ground Water Districts, but no Powers of Attorney were admitted from the other five Ground Water Districts. The Powers of attorney were dated in May, 2014 – more than a year after the Application was submitted. (A.R., Exh. 1073, 1074).

Because no authority has been filed for all the Applicant GWDs, the Application is not complete and no permit can be granted and no priority date can be established. Again, if an application is not complete, the application may not be accepted and must be returned to the applicant. *Lemmon v. Hardy, supra*, at p. 781; IDAPA 37.03.08.035.01.d and 03.b. If the

Department does not return the Application, the Applicants still cannot receive any priority date because the Application is not complete even at this late date.

Evidence of Mr. Budge's authority to file the Application is not a mere formality. It is essential that agents working on behalf of their principals have express authority to act. This is particularly true with respect to public entities. In this case, Mr. Carlquist's testimony, on behalf of the North Snake Ground Water District, was anything but clear when it came to whether the Board of Directors ever authorized Mr. Budge to file the Application at issue prior to its filing. At best, Mr. Carlquist's testimony establishes that he had telephone "conferences" with fellow board members where they discussed filing the application and that they said yes to get the Application filed. (A.R., Tr., p. 61, ll. 14-23). Mr. Carlquist admitted that a meeting of the Board was never convened to consider the filing of the Application. (*Id*).

A Ground Water District can only act through its Board of Directors. One of the specific powers of the Board of Directors is to "appropriate. . . water within the state." I.C. § 42-5224(8). The Board of Directors can only act through regular monthly meetings or special meetings. *See* I.C. § 42-5223(3). The Board has to give 72-hour advance notice of special meetings and all meetings are public. *Id.* Public agencies, like the GWDs, cannot make decisions during private telephone calls with each other. Public agencies can only make decisions in public during regularly convened monthly meetings or special meetings after proper notice and publication of an agenda. "If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with [Idaho's Open Meeting Law] such action shall be null and void." I.C. § 67-2347.

Instead of following all the procedures, the Department essentially excused the GWDs' lack of compliance on the basis that the Application was accepted by the Department when it was filed. The fact that the Department accepted the Application is not dispositive as to whether the Application was complete when it was filed. For these reasons, the Director's conclusion that the Application was complete should be reversed.

F. RANGEN'S SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED BY THE REVERSAL OF THE DIRECTOR'S DECISION.

Rangen's substantial rights are prejudiced by the reversal of the Director's ruling on the GWDs' talus slope Application. There is no dispute that junior-priority groundwater pumping in the ESPA is causing material injury to Rangen's senior water rights. Junior-priority users have been ordered to deliver 9.1 cfs of mitigation water phased in over a five-year period or face curtailment. The GWDs seek to satisfy that obligation merely by delivering Rangen an Application for Permit that does not add any new water to Billingsley Creek or the Martin-Curren Tunnel and allows the damage to the Eastern Snake Plain aquifer to continue. Director Spackman called the GWDs' plan "the epitome of a mitigation shell game." If the Application is approved, Rangen will be in the exact same position as before it filed its Delivery Call, injured and impacted without any meaningful mitigation. This results in Rangen's substantial rights being affected by the outcome of this case. [6]

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[6] Even the District Court acknowledged that if Rangen is not being provided any "new water to the already diminished flows of the Current [sic] Tunnel or headwaters of Billingsley Creek," the fact that no new water is being provided to the depleted source may be relevant "in any proceeding seeking approval of any mitigation plan which the appropriation is intended." (R., p. 199 f/n 8).

V. CONCLUSION

For all these reasons, the Director's decision to deny the GWDs' permit should be affirmed.

DATED this 12th day of January, 2016.

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J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 12th day of January, 2016 he caused a true and correct copy of the foregoing document to be served upon the following by email:

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J. Justin May