IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 43564-2015

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.

Petitioners / Respondents,

v.

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

Respondents / Respondents,

v.

RANGEN, INC.,

Intervenor / Appellant.

Districts' Response Brief

Appeal from Gooding County Case No. CV-2015-83

Honorable Eric J. Wildman, District Judge, Presiding.

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STATEMENT OF THE CASE

1. Nature of the Case

This case presents for judicial review a decision by a district court acting in its appellate capacity, which vacated findings by the Idaho Department of Water Resources (the "Department" or "IDWR") and remanded an application for a water permit filed by the North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (collectively the "Districts").

2. Procedural History

On April 3, 2013, the Districts filed Application for Permit no. 36-16976 (the "Application") seeking a water right to divert up to 12 cfs from springs and/or Billingsley Creek for mitigation and fish propagation purposes.[1] Rangen, Inc. ("Rangen") filed a protest opposing the Application.[2]

A hearing on the Application was held September 17, 2014, at the IDWR Southern Region office in Twin Falls, Idaho, before IDWR Program Manager James Cefalo as the hearing officer.[3]

The hearing officer entered a *Preliminary Order Issuing Permit* (the "Preliminary Order") and the Director of IDWR issued a *Permit to Appropriate Water Right No. 36-16976* on November 18, 2014.[4]

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[1] Agency R., Vol. I, p. 1.

[2] Agency R., Vol. I, p. 44. Blind Canyon Aquaranch, Inc. ("Blind Canyon") also filed a protest. Agency R. Vol. I, p. 56.

[3] Tr., p. 7, LL. 1-25. Blind Canyon did not participate in the hearing and, therefore, waived its right to offer evidence into the administrative record and cross-examine witnesses. Tr., p. 8, LL. 11-16; Agency R. Vol. II, p. 263.

[4] Agency R., Vol. II, p. 263.

On December 2, 2015, Rangen filed *Exceptions to Preliminary Order* to the Director of IDWR (the "Director"), asking him to reverse the hearing officer's decision and deny the water right permit issued to the Districts.[5] Both Rangen and the Districts submitted briefing to the Director concerning Rangen's exceptions.[6]

The Director issued a *Final Order Denying Application* (the "Final Order") on February 6, 2015.[7] The Final Order ruled that the Application was complete and otherwise qualified for issuance of a permit, but was filed in bad faith and was not in the public interest.[8] On March 5, 2015, the Districts filed a *Petition for Judicial Review* of the Final Order to the district court, the Honorable Eric J. Wildman presiding (the "District Court").[9]

On August 7, 2015, the District Court issued a *Memorandum Decision and Order* (the "District Court Order") vacating the Director's findings regarding bad faith and the public interest, and remanding the Final Order to the Director for further proceedings as necessary.[10]

Rangen filed *Rangen Inc.'s Notice of Appeal* on September 15, 2015, appealing the District Court Order to this Court.[11]

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[5] Agency R., Vol. II, p. 283.
[6] Agency R., Vol. II, pp. 286, 313.
[7] Agency R., Vol. II, pp. 349, 365.
[8] Agency R., Vol. II, p. 362, 364.
[9] Agency R., Vol. II, p. 369.
[10] Clerk's R., Vol. I, pp. 187, 203.
[11] Clerk's R., Vol I, p. 205.

3. Statement of Facts

North Snake Ground Water District and Magic Valley Ground Water District are quasi-governmental entities formed under Chapter 52, Title 42, Idaho Code, to represent the common interests of their members, all of whom own groundwater rights that divert from the Eastern Snake Plain Aquifer (ESPA).[12] Southwest Irrigation District is similar, but was formed as an irrigation district under Title 43, Idaho Code.[13]

The Districts' primary objective is to protect their members' groundwater rights from curtailment in response to water calls filed by holders of water rights with older ("senior") priority dates. They do this by developing and implementing mitigation plans approved by the Department.

The Districts, along with several other ground water districts, are members of Idaho Ground Water Appropriators, Inc. ("IGWA"), through which they carry out most of their mitigation activities.[14]

The Districts and IGWA have recently formed various mitigation plans to deliver mitigation water to Rangen's fish hatchery near Hagerman, Idaho. These obligations stem from a water call filed by Rangen alleging that the use of water from the ESPA by groundwater users had diminished the amount of water flowing from the Martin-Curren Tunnel (commonly referred to as the "Curren Tunnel"), which supplies water to

[12] *See* Idaho Code § 42-5201 et seq.

[13] *See* Idaho Code § 43-101 et seq.

[14] IGWA members irrigate over one million acres of agricultural land, and its members include municipal water suppliers that provide water to over 100,000 businesses and households. *See* Ex. 1, pp. 49-102 (listed water rights curtailed after Rangen's 2003 delivery call).

Rangen's fish hatchery near Hagerman, Idaho.[15] The Director issued a curtailment order on January 19, 2015 (the "Curtailment Order"), ordering many of the Districts' members to either shut off their wells or provide mitigation water to Rangen.[16]

Rangen's hatchery is located adjacent to Billingsley Creek. It consists of a green house, hatch house, small raceways, and two sets of large raceways.[17] The Curren Tunnel supplies water to all these fish-rearing facilities.[18]

For many years, Rangen has also diverted water from Billingsley Creek through what is known as the "Bridge Diversion."[19] This diversion supplies water to the large raceways only.[20]

The water rights serving the Rangen hatchery list only the Curren Tunnel as the source of water; they do not list Billingsley Creek.[21]

When Rangen initiated its delivery call in 2011, it filed a motion for summary judgment arguing that its water rights include the right to divert water from all springs forming the headwaters of Billingsley Creek, even though Rangen's water rights list only the Curren Tunnel as the source of water and do not include a point of diversion from Billingsley Creek.[22] The Director, and subsequently the SRBA District Court, found that the *Partial Decrees*, as entered by the SRBA District Court in December 1997, are limited

[15] Ex. 1008, pp. 1, 42.
[16] Ex. 1008, pp. 42, 49-102.
[17] Agency R., Vol. I, p. 106; Agency R., Vol. II, p. 350.
[18] *See* Agency R., Vol. I, pp. 102, 106.
[19] *See* Agency R., Vol. I, p. 102; Agency R., Vol. II, p. 350.
[20] *See* Agency R., Vol. I, p. 94.
[21] Agency R., Vol. II, p. 350; *see also* Tr., p. 181, LL. 23-25.
[22] Ex. 1008 at 6-7.

to water coming from the Curren Tunnel.[23] They ruled that the plain language of the *Partial Decrees* does not permit Rangen to divert water from Billingsley Creek via the Bridge Diversion.[24]

When the Districts discovered that Rangen did not have a water right from Billingsley Creek, they filed the Application to use Billingsley Creek water for mitigation purposes "in the event the Director finds Rangen to be materially injured and orders junior groundwater users to provide mitigation [to Rangen] or be curtailed."[25] The Application has proven very valuable, as the Department subsequently issued a curtailment order that threatens to permanently shut off many of the Districts' members' water rights unless they provide mitigation to Rangen.[26]

The Application identifies two diversions: "Hydraulic pump(s) (size TBD); screw-operated headgate on Billingsley Creek."[27] The pumps—or "Pump System"—will be used to pump water from Billingsley Creek to the hatch house, green house, and small raceways, which can then flow by gravity to the large raceways.[28] Thus, the Pump System will be capable of delivering mitigation water to all of Rangen's fish rearing facilities.

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[23] Exs. 1065, 1067; Ex. 1008, p. 32-33; *Memorandum Decision and Order,* Twin Falls County Case No. CV-2014-1338, pp. 10-19 (Oct. 24, 2014).

[24] Ex. 1008, p. 32-33; *Memorandum Decision and Order,* Twin Falls County Case No. CV-2014-1338, pp. 10-19 (Oct. 24, 2014).

[25] Agency R., Vol. I, pp. 1, 2.

[26] Ex. 1008, p. 42.

[27] Agency R., Vol. I, p. 83.

[28] *See* Agency R., Vol. I, p. 102; *see also* Agency R., Vol I, p. 105-106.

The screw-operated headgate will be a gravity-fed diversion from Billingsley Creek.[29] The Districts will either condemn an easement to use the existing Bridge Diversion or install a new diversion adjacent to the Bridge Diversion.[30] This headgate will be used to deliver mitigation water to the large raceways only.[31]

The Application allows up to 12 cfs to be diverted from either diversion.[32] The Pump System is presently designed to divert up to 4 cfs, leaving the remaining 8 cfs to be diverted by the headgate, but the Pump System could be upsized to divert the full 12 cfs if needed.[33]

At the hearing on the Application, Lynn Carlquist, chairman of North Snake Ground Water District, explained the Districts could utilize the Application in one of two ways:

> Well, we would try to work with Rangen. Our intent would be that we could provide now mitigation water to them for the [curtailment] order that's in place. We could do it one of two ways: We could do a mitigation plan where we would develop these and supply the water, or we could just -- if they would agree, I think we could just assign the permit to them for our mitigation.[34]

This is why the Application lists two beneficial uses: fish propagation and mitigation. Perfecting the fish propagation beneficial use would require the rearing of fish in Rangen's raceways, necessitating an agreement with Rangen to use its raceways or an assignment of the permit to Rangen. By contrast, the Districts can perfect the

[29] *See* Agency R., Vol. II, p. 350.

[30] *See* Tr., p. 44, L. 19 – p. 45, L. 1.

[31] *See* Agency R., Vol. I, p. 105.

[32] Agency R., Vol. I, p. 83.

[33] *See* Agency R., Vol. I, p. 106.

[34] Tr., p. 44, L. 19 – p. 45, L. 1.

mitigation beneficial use on their own by utilizing their own diversion structures and delivering water to Rangen as mitigation, at which point Rangen will take control of the water and make use of it in its raceways.

From the outset, the Districts understood that if Rangen declined to accept an assignment of the permit the Districts would need to develop it on their own, which is why the initial Application states: "The Ground Water Districts, if unable to secure Rangen's consent, will use their power of eminent domain as set forth in Idaho Code section 42-5224(13) to secure necessary easements for mitigation facilities."[35]

As it turned out, Rangen declined to cooperate, and on August 25, 2014, the Districts served Rangen with a *Notice of Intent to Exercise Eminent Domain and Summary of Rights of Property Ownership*.[36] The Districts have since filed an action to exercise their power of eminent domain.[37]

The hearing officer approved the mitigation beneficial use component of the Application, but denied the fish propagation beneficial use since Rangen had not agreed to cooperate in developing that use.[38]

In response to Rangen's *Exceptions to Preliminary Order*, the Director denied the mitigation beneficial use as well.[39] Despite the Districts' plan to utilize a pump, headgate, pipes, and related facilities to divert and deliver mitigation water to Rangen, the Director concluded that the Application does not contemplate completion of a "project," and was

[35] Agency R., Vol. II, p. 2.

[36] Agency R., Vol. II, p. 355.

[37] *North Snake Ground Water District et. al. v. Rangen, Inc.*, Gooding County case no. CV-2015-123.

[38] Agency R., Vol. II, pp. 269-74.

[39] Agency R., Vol. II, p. 364.

therefore filed in bad faith.[40] He also concluded that the Application was not in the public interest because it seeks to appropriate water that Rangen has been using for many years, albeit without a water right to do so.[41]

The Districts appealed the Director's decision to the District Court, and the District Court ruled in their favor, vacating the Director's finding that the Application was filed in bad faith.[42] The District Court concluded that this finding was not supported by substantial evidence in the record as a whole because both the Pump System and the Bridge Diversion constituted project works under the Department's rules governing applications for water right permits (the "Appropriation Rules").[43] It also vacated the Director's finding that the Application was filed in bad faith because the Director relied on factors and considerations that were irrelevant to the local public interest.[44] The District Court remanded the Final Order for further proceedings as necessary.[45]

Rangen's petition for judicial review challenges the District Court Order.[46] It asks this Court to affirm the Director's Final Order denying the Districts' water right.[47]

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[40] Agency R., Vol. II, p. 362.

[41] Agency R., Vol. II, p. 364.

[42] Agency R., Vol. II, p. 364.

[43] Agency R., Vol. II, p. 369; Clerk's R., Vol. I, p. 192. The Appropriation Rules are located in IDAPA 37.03.08.

[44] Clerk's R., Vol. I, pp. 192-93.

[45] Ckerk's R., Vol. I, pp. 6, 9.

[46] Clerk's R., Vol. I, p. 205.

[47] *See* Clerk's R., Vol. I, pp. 206-08.

4. Standard of Review

The Final Order is subject to review under the Idaho Administrative Procedure Act.[48] "On appeal from a district court's review of agency action, this Court reviews the district court's decision to determine whether the issues were correctly decided."[49] "Although the parties may have raised many issues during the administrative proceedings, this Court will only consider those issues raised before the district court."[50]

The Final Order must be affirmed unless the Court determines the findings, inferences, conclusions, or decisions of the Final Order 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.[51]

Issues of fact must be confined to the record created before the agency,[52] and a reviewing court must not substitute its judgment for that of the agency as to the weight of the evidence on issues of fact.[53] However, agency findings of fact must be "supported by substantial evidence on the record as a whole," not just portions of the record in isolation.[54]

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[48] Idaho Code § 42-1701A(4).

[49] *A& B Irrigation v. Spackman (In re A& B Irrigation Dist.)*, 155 Idaho 640, 648, 315 P.3d 828, 836 (2013).

[50] *Id.*

[51] Idaho Code § 67-5279(3).

[52] Idaho Code § 67-5277.

[53] Idaho Code § 67-5279(1).

[54] Idaho Code § 67-5279(3)(d); *see also Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

By contrast, courts exercise free review of questions of law.[55] Also, "[u]nless a mixed question of fact and law is primarily factual, [the Court] review[s] mixed questions *de novo*."[56]

Discretionary decisions should be affirmed if the agency "perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason."[57] A discretionary decision is improper if it is "arbitrary, capricious or unreasonable."[58] A decision is arbitrary "if it was done in disregard of the facts and circumstances presented or without adequate determining principles."[59] It is capricious if "done without a rational basis."[60] Thus, discretionary decisions must be rational, reasonable, consistent with applicable legal standards, and based on facts in the record and adequate determining principles.

If the Final Order is not affirmed, it must be set aside in whole or in part, and remanded for further proceedings as necessary.[61] It should not be set aside unless substantial rights have been prejudiced.[62]

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[55] *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).

[56] *Thornock v. Boise Indep. Sch. Dist.*, 115 Idaho 466, 470, 767 P.2d 1241, 1245 (1988) (quoting *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987)); *see also Highlands, Inc. v. Hosac*, 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1997) ("Because mixed questions of fact and law are primarily questions of law, we review them de novo.").

[57] *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006).

[58] *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007).

[59] *A& B Irrigation*, 153 Idaho at 511, 284 P.3d at 236.

[60] *Id.*

[61] Idaho Code § 67-5279(3).

[62] Idaho Code § 67-5279(4).

SUMMARY OF THE ARGUMENT

First, the District Court properly vacated the Director's finding of bad faith. The Director imposed a requirement of new construction that is contrary to the Idaho Constitution. Moreover, even if this were a valid requirement the Director ignored uncontroverted facts showing the Application proposes new construction and two separate project works.

Second, the District Court did not err by recognizing the Application was not speculative. Rangen argues this was inappropriate on the basis it constitutes a factual finding the District Court is not permitted to make, but the Court was simply recognizing the undisputed fact that the Districts' were facing a mitigation obligation to Rangen at the time the Application was filed.

Third, the District Court did not err by recognizing that the Districts have the power of eminent domain, that there is no evidence that the Application requires other permits, and that there is no evidence of obvious impediments to the completion of the water right permit issued under the Application. Rangen contends these were inappropriate factual determinations; however, the District Court merely recognized the Districts' statutory authority along with clear and obvious facts that Rangen does not dispute.

Fourth, the District Court properly determined that the Director exceeded his authority by going beyond the statutory definition of "local public interest." Rangen claims the Director has wide discretion to consider any factor he believes bears on the local public interest, but the District Court properly held that the Legislature confined the Director's discretion when it amended Idaho Code § 42-202(B)(3) in 2003 to

narrowly define "local public interest" to be "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."

Fifth, the District Court properly affirmed the Director's determination that mitigation is a viable beneficial use.

Sixth, the District Court properly concluded that the Director did not abuse his discretion by accepting the signature of the Districts' attorney on the Application, without requiring the submission of a separate power of attorney document. Rangen claims the Director erred in this regard, even though Rangen admits that the attorney did in fact represent the Districts and was authorized to sign the Application on their behalf. The Director did not abuse his discretion in this regard. Moreover, the signing of the Application by the Districts' attorney does not prejudice Rangen's substantial rights.

For these reasons, the District Court properly vacated the Director's Final Order and remanded it to the Director for further proceedings as necessary.

ARGUMENT

1. The District Court properly set aside the Director's finding of bad faith.

An application for a water right permit should be denied under Idaho Code § 42-203A(5) if it "is not made in good faith." Appropriation Rule 45.01.c elaborates on this by providing that an application is made in good faith if (1) "[t]he applicant shall have legal access to the property necessary to construct and operate the proposed project, [or] has the authority to exercise eminent domain authority to obtain such access; (2) "[t]he applicant is in the process of obtaining other permits needed to construct and operate the

project; and (3) "[t]here are no obvious impediments that prevent the successful completion of the project."[63]

The Director ruled that 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."[64] In other words, he interpreted Adjudication Rule 45.01.c to require construction of infrastructure, then found that the Application did not propose new construction, and denied it on that basis.

The District Court set aside the Director's ruling concerning Rule 45.01.c, finding that it is "contrary to law," "leads to absurd results," and "is not supported by the record."[65]

Rangen asks this Court to reverse the District Court decision, arguing that Rule 45.01.c.iii should require "the creation of construction of some apparatus to divert water."[66] Rangen also contends the District Court "improperly made determinations on issues upon which the Director did not make any finding," referring to the Court's acknowledgement of the Districts' statutory right of eminent domain and the lack of any evidence in the record that the Districts need other permits.[67]

As explained below, the District Court's rulings on these matters are sound and should not be reversed.

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[63] IDAPA 37.03.08.045.01.c.

[64] Agency R., Vol. II, p. 362.

[65] Clerk's R., Vol. I, p. 193-94.

[66] *Rangen Inc.'s Opening Br.* at 14.

[67] *Id.* at 17.

1.1 The District Court properly set aside the Director's requirement of new construction because it is contrary to law and leads to absurd results.

Rangen asks this Court to accept the Director's ruling that Rule 45.01.c.iii requires "the creation of construction of some apparatus to divert water."[68] The District Court properly set aside this interpretation because is contrary to law and leads to absurd results.[69] Further, even if it were a valid requirement, the Director's finding that the Application does not propose construction of a project is not supported by the record.

A. The District Court properly found that the Director's requirement of new construction is contrary to law.

When a reviewing court considers an agency interpretation of a rule, it applies a four-pronged test to determine whether deference to an agency interpretation is appropriate.[70] These factors, as stated in *Duncan v. State Board of Accountancy*, are "whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present."[71] No deference is afforded to an agency interpretation that fails any of these four prongs.[72] This Court has held that an agency interpretation is unreasonable if

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[68] *Id.* at 14.

[69] Clerk's R., Vol. I, p. 194.

[70] *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

[71] *Id.*

[72] *See J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991) (applying the four prongs of deference to an agency interpretation of a statute); *see also Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 314, 208 P.3d 289, 296 (2009) (giving no deference where the second and third factors were not met); *Farrell v. Whiteman*, 146 Idaho 604, 611 n.2, 200 P.3d 1153, 1160 (2009) (explaining that an agency construction "must be reasonable").

"the agency relied on erroneous facts or law in its determination."[73] Such findings are generally arbitrary and capricious.[74]

The District Court found the Director's requirement of new construction to be contrary to law, explaining:

> The Director's interpretation of the good faith requirement as necessitating construction in order to perfect a water right is contrary to law. The perfection of a water right requires the diversion and application of water to beneficial use. *See e.g., U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P .3d 600, 604 (2007). If such diversion and application to beneficial use can be accomplished using pre-existing diversion works, there is simply no further requirement that *new* or *additional* diversion works be constructed. As long as water can be diverted and put to beneficial use, the question of whether it will be diverted and applied via the use of pre-existing diversion works, or diversion works to be newly constructed is inconsequential. Interpreting IDAPA 37.03.08.045.01.c. to contain a new construction or project requirement in order to perfect a water right is contrary to Idaho water law, and conflicts with the constitutional guarantee that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const., Art. XV § 3.[75]

Rangen does not dispute this analysis, but nonetheless argues that the Director's requirement of new construction is "entitled to deference."[76] Rangen's position ignores the standard of review. Whether Rule 45.01 requires new construction is a question of law over which courts exercise "free review."[77]

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[73] *Duncan*, 149 Idaho at 3, 232 P.3d at 324.

[74] *See Stafford v. Idaho Dep't of Health & Welfare (In re Stafford)*, 145 Idaho 530, 539, 181 P.3d 456, 465 (2008) (W. Jones, J. dissenting) (arguing that an agency acted in a manner that was arbitrary and capricious when it erroneously interpreted its regulations).[75] Clerk's R., Vol. I, p. 194.

[75] Clerk's R., Vol. I, p. 194.

[76] *Rangen Inc.'s Opening Br.* at 14.

[77] *Vickers*, 150 Idaho at 442, 247 P.3d at 669.

The District Court provided a sound explanation of why the Director's interpretation of Rule 45.01.c is contrary to law. This decision should not be reversed.

B. The District Court properly found that the Director's requirement of new construction leads to absurd results.

The District Court additionally concluded that the Director's interpretation of Rule 45.01.c.iii "leads to absurd results,"[78] noting that "[t]here are many instances in which a prospective water user is able to divert water and apply it to a beneficial use using pre-existing project works."[79] To illustrate, the Court explained:

> A new homeowner purchases a piece of property serviced by a preexisting well and irrigation system. The homeowner subsequently learns that his predecessors never applied for or received a water right authorizing the use of water from the well. Further, that a water right is necessary given the lot's size. Therefore, the homeowner submits an application for permit to appropriate water via the existing well and irrigation system. Under the Director's interpretation, the application will be found to have been filed in bad faith since it does not propose the development of any new project works. This is an absurd result. There is simply no legal prohibition impeding the homeowner from using the existing well and irrigation system to divert water and apply it to beneficial use, thereby perfecting the water right.

The absurd nature of the Director's reasoning is further apparent when considering Rangen's own application for a water right from Billingsley Creek. Rangen filed its application after the Districts had filed theirs (making Rangen's water right junior to the Districts' right).[80] Rangen's application proposed to use existing infrastructure without any new construction. Consequently, Rangen's application must be denied under the

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[78] Clerk's R., Vol. I, p. 194 (citing *Jasso v. Camas County,* 151 Idaho 790, 798, 264 P.3d 897, 905 (2011) (explaining that "[c]onstructions that lead to absurd or unreasonably harsh results are disfavored").

[79] Clerk's R., Vol. I, p. 194.

[80] *Rangen Inc.'s Opening Br.* at 16.

Director's interpretation of Rule 45.01.c. Yet, the Director went ahead and approved Rangen's application without requiring new construction, demonstrating the arbitrary and capricious nature of the Director's denial of the Districts' Application.[81]

Rangen does not challenge the District Court's conclusion that the Director's requirement of new construction leads to absurd results. Therefore, this Court should uphold the District Court's decision to set aside the Director's interpretation of Appropriation Rule 45.01.c to require of new construction.

C. The Director's finding that the Application does not propose a project is not supported by substantial evidence in the record as a whole.

Even if the Director's requirement of a project were correct, the District Court correctly found that the Director's finding that the Application does not propose a project "is not supported by the record."[82]

Rangen contends "there is substantial and competent evidence to support the Director's finding that there are threshold impediments to completion of a project," arguing that "[t]he GWD's do not intend to build diversion works or divert the water."[83] This assertion blatantly ignores, as did the Director, undisputed evidence in the record that the Application does in fact propose project works.

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[81] A decision is arbitrary "if it was done . . . without adequate determining principles." *A& B Irrigation,* 153 Idaho at 511, 284 P.3d at 236. It is capricious if "done without a rational basis." *Id.*

[82] Clerk's R., Vol. I, p. 193.

[83] *Rangen Inc.'s Opening Br.* at 11.

Under the Appropriation Rules, project works include "diversion works . . . which may be used to apply the water to the intended use."[84] As the District Court correctly recognized, "[t]he Districts' application proposes to divert water from two separate points of diversions via two separate project works."[85] The first is a Pump System that will be constructed to pump water from Billingsley Creek into a pipe that will connect to Rangen's existing pipe, which conveys water to the hatch house, green house, and small raceways.[86] The District Court properly acknowledged: "It is undisputed that the first diversion contemplates the construction of project works."[87]

The second diversion "is proposed to be diverted through an existing diversion work . . . known as the Bridge Diversion."[88] As with the first diversion, the District Court correctly concluded that the Bridge Diversion constitutes project works since it is a diversion works that applies water to the intended use.[89]

Since uncontroverted facts show the Application proposes two distinct diversion works, which both constitute project works under the Appropriation Rules, the District Court properly concluded that the Director's finding that Application proposed no project was not supported by substantial evidence in the record as a whole.[90]

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[84] Clerk's R., Vol. I, p. 194 at 8 (citing IDAPA 37.03.08.010.14).

[85] Clerk's R., Vol. I, p. 193. IDAPA 37.03.08.010.14 defines project works as "[a] general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use."

[86] *See* Agency R., Vol. I, p. 102.

[87] Clerk's R., Vol. I, p. 193.

[88] Clerk's R., Vol. I, p. 194

[89] Clerk's R., Vol. I, p. 194 (citing IDAPA 37.03.08.010.14).

[90] Clerk's R., Vol. I, p. 193.

1.2 The District Court did not err by acknowledging the Districts' statutory power of eminent domain.

Appropriation Rule 45.01.c.i explains that for an application to be made in good faith "[t]he applicant shall have legal access to the property necessary to construct and operate the proposed project, [or] the authority to exercise eminent domain authority to obtain such access."[91]

The District Court acknowledged the Districts' have authority to obtain access by eminent domain, noting that "Idaho Code § 42-5224(13) grants [the Districts] '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 powers herein granted . . . .'"[92] These powers expressly include the powers to "appropriate, develop, store, and transport water within the state,"[93] and to "develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district."[94]

Rangen contends the District Court erred, arguing that Idaho Code § 42-5224(13) does not give the Districts authority to obtain fee title to Rangen's property, and that the Districts cannot develop their mitigation water right without fee title to Rangen's property.[95] Rangen cites Idaho Code § 7-702 for the proposition that fee title is required,

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[91] IDAPA 37.03.08.045.01.c.i.

[92] Clerk's R., Vol. I, p. 195.

[93] Idaho Code § 42-5224(8).

[94] Idaho Code § 42-5224(11).

[95] *Rangen Inc.'s Opening Br.* at 20.

but that statute only requires fee title 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." By contrast, the statute provides that an easement is adequate "for any other use."[96]

As explained above in the statement of facts, the Application requires the use of pumps and pipes, neither of which require fee simple under Idaho Code § 7-702. Consequently, the Districts' authority to condemn "easements, rights-of-way, and other rights of access" is sufficient. A review of decisions by this Court demonstrate that an easement is sufficient to construct or condemn a wide range of infrastructure such as sewers,[97] power lines,[98] roads,[99] ditches,[100] canals,[101] and—especially relevant here—diversion works, pumping plants, transformer stations, and pumping houses.[102] Indeed, the Districts' condemnation power would be worthless if they could not use it to divert and convey water for mitigation purposes.

Thus, the District Court did not err by acknowledging the Districts' statutory power of eminent domain satisfies Appropriation Rule 45.01.c.i.

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[96] Idaho Code §7-702.

[97] *E.g., Payette Lakes Water & Sewer Dist. v. Hays,* 103 Idaho 717, 719, 653 P.2d 438, 440 (1982).

[98] *E.g., Sutton v. Hunziker*, 75 Idaho 395, 403, 272 P.2d 1012, 1016 (1954).

[99] *E.g., Kolouch v. Kramer*, 120 Idaho 65, 66, 813 P.2d 876, 877 (1991).

[100] *E.g., Aguirre v. Hamlin,* 80 Idaho 176, 181, 327 P.2d 349, 352 (1958).

[101] *E.g.*, *Canyon View Irrigation v. Twin Falls Canal Co.*, 101 Idaho 604, 608, 619 P.2d 122, 126 (1980).

[102] *E.g., Quinn v. Stone*, 75 Idaho 243, 244, 270 P.2d 825, 825 (1954).

1.3 The District Court did not err by acknowledging there is no evidence in the record of additional permits needed by the Districts.

Appropriation Rule 45.01.c.ii explains that for an application to be made in good faith the applicant must be "in the process of obtaining other permits needed to construct and operate the project."[103]

Rangen contends the District Court erred by acknowledging there is no evidence in the record that the Districts need other permits.[104] However, the District Court merely recognized an undisputed fact. The Districts put on evidence that the Districts needed no other permits, and Rangen submitted no evidence of other permits it claims are necessary.[105] The District Court's acknowledgement of an undisputed fact is not improper and should not be disturbed.

2. The District Court did not err by rejecting Rangen's argument that the Application is speculative under Idaho Code § 42-203A(5)(c).

A water right application can be denied under Idaho Code § 42-203A(5)(c) if it is made for speculative purposes.[106] The Director declined to address speculation because he concluded the Application was filed in bad faith.[107] Notwithstanding, Rangen argued on appeal to the District Court that the Application should be denied on the basis that it

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[103] IDAPA 37.03.08.045.01.c.ii.

[104] *Rangen Inc.'s Opening Br.* at 22.

[105] Rangen inferred at the hearing the Districts would need NPDES, CAFO, and other fish-rearing permits. Tr., p 76, L. 16 – p. 79, L. 11. However, this argument is predicated on the Rangen's mistaken assumption the Districts will take control of and operate Rangen's hatchery. Since Rangen will continue to raise fish with the mitigation water delivered to it by the Districts, there is no need for the Districts to obtain NPDES or other fish-rearing permits.

[106] Idaho Code § 42-203A(5)(c).

[107] Agency R., Vol. II, p. 362.

was filed for speculative purposes.[108] The District Court rejected Rangen's argument, finding that the Application was not speculative.[109] Rangen now contends that the District Court erred by addressing its argument concerning speculation.[110]

Aside from the inequity of Rangen attacking a conclusion that it asked the District Court to make, the District Court 's did not make a factual finding but rather a legal conclusion based on clear and undisputed facts from the record. Appropriation Rule 45.01.c explains the basis for a conclusion of speculation:

> [W]hether [an application] is made for . . . speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation 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 with reasonable diligence.[111]

This analysis first considers questions of fact—the "substantive actions" of the application. Based on these facts, a decision is made as to whether an application is, as a matter of law, speculative. Thus, the issue of speculation is a mixed question of fact and law, and the District Court, especially when confronted with only the legal aspect of this issue, exercises free review.[112]

Here, the record is clear regarding the underlying facts concerning the Districts' intention in filing the application. As the District Court noted:

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[108] Clerk's R., Vol. I, p. 94.

[109] Clerk's R., Vol. I, p. 202.

[110] *Rangen Inc.'s Opening Br.* at 23.

[111] IDAPA 37.03.08.045.01.c.

[112] "Unless a mixed question of fact and law is primarily factual, [the Court] review[s] mixed questions *de novo*." *Thornock*, 115 Idaho at 470, 767 P.2d at 1245 (quoting *Gregory*, 811 F.2d at 1310.

> There is no evidence in the record establishing a lack of intent on behalf of the Districts to apply the water identified in their application to beneficial use with reasonable diligence. To the contrary, the record establishes that at the time the application was filed, Rangen's delivery call seeking the curtailment of various of the Districts' members had been filed. Ex. 1008, p.1. By its express terms, the Districts' application was filed in response to the pending call. R.,pp.2 & 84. By the time the Department conducted its hearing on the application, the Director had issued his curtailment order finding material injury to Rangen's senior rights, resulting in a mitigation obligation on behalf of the Districts to Rangen. Ex. 1008, p.42. These undisputed facts corroborate the stated intent of the Districts that they will "use this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain to mitigate for Rangen's apparent material injury and to provide mitigation for the curtailment of junior groundwater users as specified in the Director's [curtailment order]." R., p.84.[113]

Rangen does not dispute the fact that the Districts legitimately need the Application to provide mitigation and have, from the outset, intended to so use the water for mitigation. Instead, Rangen cites to foreign cases for the proposition that an application is speculative if the applicant does not have an agency or contract relationship with the party appropriating the water.[114] This argument, however, is relevant only to the fish propagation beneficial use, which the Department denied since it requires the rearing of fish and the Districts were unable to procure an agreement allowing them to utilize Rangen's raceways for that purpose. It is inapplicable to the mitigation beneficial use because the Districts have the ability to appropriate water for mitigation on their own, without a contractual relationship with Rangen.

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[113] Clerk's R., Vol. I, p. 202-03.

[114] *Rangen Inc.'s Opening Br.* at 23 (citing *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P.2d 566 (1979); *Bacher v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 146 P.3d 793 (2006)).

Rangen also argues that the Application is speculative because it "designates a [place of use] and a [point of diversion] wholly located on Rangen's property.[115] It quotes *Lemmon v. Hardy*, which states that "a water right initiated by trespass is void" and that "[l]ack of a possessory interest in the property designated as the place of use is speculation."[116]

Lemmon is easily distinguishable. There, the applicants sought to appropriate water for fish propagation on land that would be "leased from the Idaho Power Company and/or Magic Springs," but they had not yet obtained a possessory interest in this proposed place of use, nor they did not have the power of eminent domain to acquire this place of use.[117] The *Lemmon* decision explicitly acknowledges a possessory interest is not necessary if it can be acquired through condemnation, as held in *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912), and *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931).[118]

As explained above, the Districts have statutory authority to condemn easements for mitigation purposes to deliver water to the place of use specified in their Application.

Thus, the only issue before the District Court was the legal determination of whether—in light of the undisputed fact that the Districts legitimately need the Application to provide mitigation to Rangen, and that they filed the Application for this

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[115] *Rangen Inc.'s Opening Br.* at 24.

[116] *Id.* (quoting *Lemmon v. Hardy*, 95 Idaho 778, 780, 781, 519 P.2d 1168, 1170, 1171 (1974) (quoting *Bassett v. Swenson*, 51 Idaho 256, 259, 5 P.2d 722, 723 (1931)).

[117] *Id.* at 778, 519 P.2d at 1168.

[118] *Id.* at 780, 519 P.2d at 1170.

specific purpose—the Application was speculative. The District Court did not err in concluding that it was not.

Lastly, even if the Director decided questions of fact in concluding the Application is not speculative, doing so was not improper. Under Idaho law, "[w]hen the record on appeal does not yield an obvious answer to the relevant factual question, the appellate court may not properly make those findings of fact."[119] However, when the record is clear and yields "an obvious answer to the factual question," an appellate court can supply this clear and obvious finding on appeal.[120] As explained above, there is no dispute that the intent of the application is to supply mitigation water to Rangen.

The District Court did not err by acknowledging clear and obvious facts in the record and concluding that the Application is not speculative. Therefore, its decision on this point should not be disturbed.

3. The District Court properly concluded the Director exceeded his authority when he ruled that the Application was not in the local public interest.

An application for a water right permit can be denied under Idaho Code § 42-203A(5) "if it will conflict with the local public interest as defined in section 42-202B."

The Director denied the Application on the basis that it conflicts with the local public interest. The District Court set aside this decision because it strays well beyond the definition in section 42-202B, and, therefore, exceeded the Director's authority. Rangen asks this Court to reverse the District Court and defer to the Director's analysis,

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[119] *Sherry v. Sherry*, 111 Idaho 185, 186, 722 P.2d 494, 495 (Ct. App. 1986).

[120] *See id.*; *see also Perry Plumbing Co. v. Schuler*, 96 Idaho 494, 497, 531 P.2d 584, 587 (1975) (explaining that when the record is clear; "[t]he absence of findings may be disregarded by the appellate court").

even though Rangen does not dispute that the Director went outside the bounds set by section 42-202B.[121]

The Director gave three rationales for finding that the Application is not in the local public interest: the appropriation 1) is not fair, 2) adds no new water to Billingsley Creek, and 3) employs an inappropriate use of eminent domain. The District Court properly explained that all three rationales exceed the Director's authority.

3.1 The District Court properly concluded the Director cannot deny the Application based on his perception of fairness.

In addressing the local public interest, the Director first attacked the fairness of the Application, arguing that it (a) "could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective date borne by a Rangen application," (b) "attempts to . . . divert[] water to Rangen that Rangen has been using for fifty years," and (c) "would establish an unacceptable precedent in other delivery call proceedings."[122]

The District Court properly conclude that these fairness rationales exceed the Directors authority under Idaho Code § 42-202B(3),[123] which defines the "local public interest" as "the interests that the people in the area directly affected by the proposed water use have *in the effects of such use on the public water resources.*"[124] The District Court recognized "the [Idaho] Legislature intended the definition of 'local public interest' to be

[121] *Rangen Inc.'s Opening Br.* at 25.

[122] Agency R., Vol. II, p. 364.

[123] Clerk's R., Vol. I, p. 197.

[124] Clerk's R., Vol. I, p. 197 (quoting Idaho Code § 42-202B(3) (emphasis added by District Court).

narrowly defined and construed" through a 2003 amendment.[125] Before this amendment, the local public interest was "broadly defined . . . as 'the affairs of the people in the area directly affected by the proposed use,'"[126] but the 2003 amendment "narrowed the definition of the local public interest considerably."[127]

Recognizing the narrow definition of local public interest, the District Court properly concluded that the Director's fairness rationales exceed statutory authority.[128] First, the Court found that the Director's determination that it was unfair that the Districts applied for the unappropriated water before Rangen "is contrary to law" because it "penalize[s] the Districts for being first in time," in conflict with the long-standing principle of appropriation that "first in time is first in right."[129]

Second, regarding the Director's consideration of Rangen's prior use of Billingsley Creek without a water right the District Court stated: "The fact that Rangen has allegedly used the subject water historically is irrelevant, except to show that there is unappropriated water available to appropriate."[130]

Third, regarding the Director's concern for an alleged unfair precedent, the District Court noted that "[t]he Director does not explain how such a precedent would negatively

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[125] Clerk's R., Vol. I, p. 197.

[126] Clerk's R., Vol. I, p. 197 (quoting 1978 Idaho Sess. Laws 306).

[127] *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 164 n.3, 125 P.3d 515, 520 (2005).

[128] Clerk's R., Vol. I, p. 197.

[129] Clerk's R., Vol. I, p. 198.

[130] Clerk's R., Vol. I, p. 198.

or otherwise affect the interests that the people in the area directly affected by the proposed use have in the effects of such use on the public water resource."[131]

Rangen takes issues with the Director's analysis, but it ignores the 2003 amendment of the definition of local public interest, and instead quotes a 1988 case that states: "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion."[132] Neither Rangen nor the Director can disregard current legislation that supplants prior law and more narrowly defines and limits the local public interest to factors affecting the public water resources.

Rangen also quotes from the Statement of Purpose for the 2003 amendment, which states: "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."[133] Yet, that same Statement of Purpose also provides that the Director should, "*within the confines of this legislation*, . . . consider all locally important factors *affecting the public water resources*."[134] Thus, the Statement of Purpose, when read as a whole, likewise fails to support Rangen's position.

Because the Director's perceptions of fairness go beyond "the interests that the people in the area directly affected by the proposed water use have *in the effects of such*

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[131] Clerk's R., Vol. I, p. 198.

[132] *In re Application for Permit No. 47-7680*, 114 Idaho 600, 607, 759 P.2d 891, 898 (1988) (quoting *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985)).

[133] *Rangen Inc.'s Opening Br.* at 26-27 (quoting House Bill No. 284 – Statement of Purpose RS 13046, which amended Idaho Code § 42-202B in 2003).

[134] *Id.* at 26 (quoting House Bill No. 284 – Statement of Purpose RS 13046) (emphasis added).

use on the public water resources," the District Court properly found the Director exceeded his authority under section 42-202B(3).

3.2 The District Court properly concluded the Director exceeded his authority by requiring the Application to bring new water to the Curren Tunnel and Billingsley Creek.

The Director also denied the Application on the basis that it "brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek."[135] The District Court deemed this consideration irrelevant and beyond the Director's authority because "[a]n application to appropriate water, by its very definition, does not bring new water to a water system—it seeks to appropriate unappropriated water."[136] Indeed, if the Director were permitted to deny a water right application on the basis that it does not add water to the source from which it diverts, the Director would have unrestricted authority to deny any and all applications, even if they completely complied with all other statutory and regulatory requirements.

The District Court further highlighted the arbitrary nature of the Director's reasoning, noting that "[the Director] approved Rangen's competing application (though it was filed later in to time) to appropriate the same unappropriated water from the same source and point of diversion proposed by the Districts," yet without requiring Rangen to add water to Billingsley Creek.[137] The District Court properly found this rationale to exceed the Director's authority.

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[135] Agency R., Vol. II, p. 364; *see Rangen Inc.'s Opening Br.* at 25-28.

[136] Clerk's R., Vol. I, p. 199.

[137] Clerk's R., Vol. I, p. 199.

3.3 The District Court properly concluded the Director exceeded his authority in finding it inappropriate for the Districts to use their eminent domain powers to perfect the Application.

The Director's last basis for concluding the Application is not in the local public interest was that the Districts' proposed use of eminent domain to obtain the easements needed to construct the project on Rangen's property, which the Director ruled "is inconsistent with the local public interest and inappropriate."[138] The District Court responded:

> The Legislature has expressly granted ground water districts "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...." I.C. § 42-5224(13). It is an exceedance of the Director's authority to determine when the use of such power is appropriate.[139]

The District Court further noted that "the Director does not explain how this consideration is pertinent to evaluating the effects of the Districts' application on the public water resource."[140]

In sum, the District Court properly vacated the Director's finding that the Application is not in the local public interest because it was based on factors and rationales that exceed the scope of the public interest inquiry defined by Idaho Code §

[138] Agency R., Vol. II, p. 364.

[139] Clerk's R., Vol. I, p. 199.

[140] Agency R., Vol. II, pp. 363-64.

42-202B(3). The Districts also contend that the Director's public interest ruling is arbitrary, capricious, and an abuse of discretion.[141]

4. The Director and the District Court properly held that the Application appropriately describes mitigation as a beneficial use.

Rangen argues that the Application must be denied on the basis that "[m]itigation does not adequately describe a beneficial use."[142] This argument challenges the Director and the District Court, both of whom concluded mitigation is a viable beneficial use.[143] The District Court explained:

> Idaho's statutory and administrative rule scheme recognize the use of water in conjunction with a mitigation plan. Idaho Code § 42-5201(13) defines "mitigation plan" as a "plan to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by holders of junior priority groundwater rights who are participants in a mitigation plan." Idaho Code § 42-5224 grants the board of directors of a ground water district the power to "develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district." Rule 43 of the Conjunctive Management Rules (CMR) specifically recognizes the use of water to mitigate for injury to a senior right. IDAPA 37.03.11.043.01.c., 03.a., b. and c. Indeed, the inability to beneficially use water in order to mitigate for injury to a senior right would not only run contrary to the express language of the CMR but would also undermine significant provisions of the CMR.
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> In this case, both the hearing officer and the Director found mitigation to be a viable beneficial use. In so holding, the Department acknowledged that it has previously recognized the beneficial use of "mitigation" in the issuance of other water rights. R., pp.358-359. Likewise, the SRBA District Court has also recognized the beneficial use of "mitigation," and has issued numerous partial decrees that were litigated with a "mitigation"

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[141] *See* Idaho Code § 67-5279(3)(a), (e); *Haw*, 143 Idaho at 54, 137 P.3d at 441; *see also A&B Irrigation*, 153 Idaho at 511, 284 P.3d at 236 (stating agency action "is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles").

[142] *Rangen Inc.'s Opening Br.* at 28.

[143] Clerk's R., Vol. I, p. 201.

> purpose of use. *See e.g., Partial Decree,* SRBA Subcase No. 22-13247 (June 12, 2008); *Partial Decrees,* SRBA Subcase No. 37-22631, 37-22632, 37-22633 (June 29, 2012); *Partial Decree,* SRBA Subcase No. 63-33511 (March 3, 2014); *Partial Decree,* SRBA Subcase No. 37-1 1811 (September 24, 2010). The Districts' application identifies the rights that the appropriation seeks to mitigate as well as the purpose of use of those rights receiving the mitigation. R., p.2.[144]

In summary, the District Court explained that Rangen's opposition to mitigation as a viable beneficial use attempts to undermine (a) Idaho statutes and regulations enabling mitigation plans, (b) mitigation plans and water rights accomplishing mitigation, and (c) administrative and judicial decisions approving of mitigation. The District Court properly affirmed the Director's determination that mitigation is a viable beneficial use.

5. The District Court properly concluded that the Director did not abuse his discretion by accepting the signature of the Districts' attorney.

Rangen argues the Director erred by accepting the Application, arguing that it was incomplete on the basis that "no authority has been filed for all the Applicant GWDs" and "[i]t is essential that agents working on behalf of their principals have express authority to act."[145]

Rangen relies on Appropriation Rule 35.03.b.xii, which states applications "shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application,"[146] along with Rule 35.03.b.xiv, which states applications "may be signed by a person having a current 'power of

[144] Clerk's R., Vol. I, pp. 201-02.

[145] *Rangen Inc.'s Opening Br.* at 34, 35.

[146] *Id.* at 33 (quoting IDAPA 37.03.08.035.03.b.xii).

attorney' authorized by the applicant," in which case a "copy of the 'power of attorney' shall be included with the application."[147]

Rangen's argument is misplaced. As explained below, (a) Appropriation Rule 35.03.b.xiv does not require licensed attorneys to have a written power of attorney when acting on behalf of their clients, (b) evidence in the record shows that the Districts' attorney was in fact authorized to sign the Application on behalf of the Districts, (c) IDWR accepted and processed the Application, and it would be utterly unjust to reverse that action now, and (d) even if the Application were not properly signed, this technicality does not prejudice Rangen's substantial rights. Accordingly, the District Court correctly concluded that the Director did not abuse his discretion by accepting the Application as complete.

5.1 Appropriation Rule 35.03.b.xiv does not require licensed attorneys to have a written "power of attorney" when acting on behalf of their clients.

Rangen asks IDWR to interpret Rule 35.03.b.xiv in a manner that goes beyond its plain language. The Rule states applications "*may* be signed by a person having a current 'power of attorney.'"[148] It does not mention licensed attorneys, let alone require licensed attorneys to provide a written "power of attorney" before acting on behalf of their clients.

Rangen's argument fails to distinguish between licensed attorneys, who as a matter of law are authorized to sign legal documents on behalf of their clients, and non-attorneys, who as a matter of law cannot act as another's agent without a written "power of attorney" document.

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[147] *Id.* at 34 (quoting IDAPA 37.03.08.035.03.b.xiv).

[148] *Id.* (emphasis added).

The Idaho Supreme Court explained in *Storey v. United States Fidelity and Guaranty Co.* that "an attorney has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, but has no power to compromise or release the cause of action itself."[149] The Court later explained this is part of the implied authority of licensed attorneys:

> The relationship between an attorney and client is one of agency. The answer to whether an attorney can bind his client by a stipulation rests in whether the subject of the stipulation falls within the scope of the attorney's implied authority, and if it is outside the attorney's implied authority, whether the client has actually authorized or later ratified his actions. It is generally recognized that an attorney has "... the general implied or apparent authority to enter into or make such agreements or stipulations, with respect to procedural or remedial matters, as appear, in the progress of the cause, to be necessary or expedient for the advancement of his client's interest or to accomplishment of the purpose for which the attorney is employed." Yet it is well settled that "... The implied authority of an attorney ordinarily does not extend to the doing of acts which will result in the surrender or giving up any substantial right of the client."[150]

Thus, a licensed attorney can, as a matter of law, bind his client, so long as he is not giving up his client's substantial rights.[151]

In contrast, non-attorneys have no right to bind another person unless they have a signed "power of attorney" authorizing the non-attorney to act as the person's agent. This type of authority derives from the Uniform Power of Attorney Act, Title 15, Chapter

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[149] *Storey v. United States Fid. & Guar. Co.*, 32 Idaho 388, 392, 183 P. 990, 991 (1919).

[150] *Muncey v. Children's Home Finding & Aid Soc'y*, 84 Idaho 147, 150-51, 369 P.2d 586, 588 (1962) (quoting 7 C.J.S. Attorney and Client § 100, p. 917).

[151] *See, e.g., Evans v. Power County*, 50 Idaho 690, 706, 1 P.2d 614, 620 (1931) (upholding attorney agreement on behalf of client concerning distribution of proceeds from execution of a judgment).

12, Idaho Code, and is entirely separate from the authority of licensed attorneys acting on behalf of their clients.[152]

When Appropriation Rule 35.03.b.xiv uses the term "power of attorney," it must be read harmoniously with both the Uniform Power of Attorney Act and Idaho law governing attorneys, so as to require non-attorneys who sign applications on behalf of others to submit a written "power of attorney" evidencing their authority, while allowing licensed attorneys to sign on behalf of their clients. As the IDWR does not control the practice of law, Rule 35.03.b.xiv cannot be construed as a limitation on the inherent legal authority of licensed attorneys to act on behalf of their clients.

Moreover, the Director's acceptance of the Application without requiring an additional Power of Attorney document falls within his purview to interpret the Department's administrative rules and is entitled to deference. If "(1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present," that interpretation is entitled to deference.[153]

The Director is responsible for administration of the Appropriation Rules,[154] his interpretation of Appropriation Rule 35.03.b.xiv is reasonable, the language of the rule does not expressly address licensed attorneys, and the Director's interpretation is supported by the underlying rationale of agency deference that it is a practical

[152] Idaho Code § 15-12-101 et seq.

[153] *Duncan*, 149 Idaho at 3, 232 P.3d at 324.

[154] Idaho Code § 42-1805(8).

interpretation.[155] Accordingly, the District Court properly declined to set aside the Director's interpretation of Rule 35.03.b.xiv.

5.2 Ample evidence in the record supports the Director's decision to accept the application as complete.

When dealing with licensed attorneys, IDWR simply needs evidence "to show that the signator has authority to sign the application," as required by Appropriation Rule 35.03.b.xii.[156] The District Court recognized this evidence:

> The Districts' application and subsequent amended applications for permit were signed by Thomas J. Budge, the Districts' attorney of record ("Budge"). R., pp.2, 15 & 84. Lynn Carlquist, as representative of the Districts, testified that Budge has represented the Districts since 2007, that the Districts were consulted prior to the filing of the application, and that Budge had authority to file the application on behalf of the Districts. Tr., pp.26-36. The applications also contain the Districts' mailing address as "c/o Randall C. Budge, 201 E. Center Street; P.O. Box 1391, Pocatello, Idaho 83204." R., pp.2, 15 & 84.[157]

In addition to his testimony, Mr. Carlquist provided resolutions from two of the Districts, Magic Valley Ground Water District (MVGWD) and North Snake Ground Water District (NSGWD), that explicitly ratify the authority of the Racine firm to file the Application.[158] The record is void of—and Rangen failed to produce any—evidence showing the Racine firm was not authorized to sign the Application.

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[155] "There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation." *Id.*

[156] IDAPA 37.03.08.035.03.b.xii.

[157] Clerk's R., Vol. I, p. 200.

[158] Exs. 1076, 1077.

Moreover, the Racine law firm, and Randy Budge and T.J. Budge in particular, have a long and well-known history of representing IGWA and the Districts in proceedings before IDWR and the Idaho judiciary. IDWR was well aware of this at the time the Application was submitted, since the Budges were in the midst of representing the Districts in the Rangen delivery call and other proceedings then pending before IDWR.[159] IDWR's first-hand knowledge the Racine firm represents the Districts was sufficient to accept the Application at the time it was filed.

For these reasons, the Director did not abuse his discretion in accepting that Mr. Budge was authorized to sign the Application on behalf of the Districts.

5.3 The District Court properly affirmed the Director's acceptance of the Application since denying it would be unjust.

Appropriation Rule 35.01.d explains that applications for permit that are "not complete as described in Subsection 35.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application."[160] Thus, IDWR has a duty, within a reasonable time, to officially reject an incomplete application. In contrast, applications that are complete "will be accepted for filing and will be endorsed by the department as to the time and date received."[161]

IDWR accepted the Districts' Application, processed it, advertised it, and set it for hearing.[162] The Districts relied upon these actions. Had the Application been incomplete due to concern over the authority of the Districts' attorneys to sign it, additional evidence

[159] *See, e.g.*, Ex. 1008 (listing Mr. Budge as on the certificate of service in the Curtailment Order).
[160] IDAPA 37.03.08.035.01.d.
[161] *Id.*
[162] *See* Agency R., Vol. II, p. 263.

could have easily been provided well in advance of the filing of Rangen's Application, which was not filed until February of 2014—ten months after the Districts filed their Application.[163] To deny the Districts their Application and priority date now, years after the fact, would be utterly unjust.

5.4 Even if the Application were not properly signed, this technicality does not prejudice Rangen's substantial rights.

Even if IDWR technically erred by deeming the Application incomplete without first instructing the Districts to submit a separate Power of Attorney document to verify Mr. Budge's authority, the omission does not prejudice Rangen's substantial rights.

The obvious purpose of Appropriation Rule 35.03.b's signature requirements is to ensure the applicant is indeed the party seeking the proposed permit. It is not to create a trap for attorneys who customarily sign pleadings on their clients' behalf, and it has no bearing on the legal standards applicable to water permit applications found in Idaho Code § 42-203A or the substantive legal inquiries in the Appropriation Rules.

Rangen does not dispute that Mr. Budge was in fact authorized to sign for the Districts, and evidence was presented at the hearing confirming that, thereby curing any technical deficiency. While Rangen may have a right to challenge the Application's compliance with the standards set forth in Idaho Code § 42-203A(5), it is not a member of the Districts, has no interest in their internal affairs, and does not have standing to challenge Mr. Budge's authority to sign the Application on behalf of the Districts.

[163] Ex. 2001.

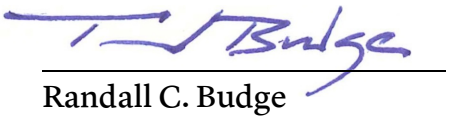
For these reasons, the District Court properly concluded that the District did not abuse his discretion in accepting the Application as complete.

CONCLUSION

Based on the foregoing, the Districts asks this Court to affirm the District Court Order.

RESPECTFULLY SUBMITTED this 10th day of February, 2016.

RACINE OLSON NYE BUDGE & BAILEY, chartered



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CERTIFICATE OF SERVICE

I CERTIFY that on this 10th day of February, 2016, the above document was served on the following persons in the manner indicated:

THOMAS J. BUDGE

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