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,

Petitioners/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 REPLY BRIEF

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

Honorable Eric J. Wildman, Presiding

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Rangen, Inc. ("Rangen") submits the following Reply Brief to address the arguments made by the North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (collectively, the "Districts" or "GWDs" or "Respondents").

I. ARGUMENT

The proposed water right that is at issue in this case serves no mitigation purpose. It is simply a legal fiction that the GWDs have advanced in order to avoid curtailment without the expense of actually mitigating for the depletive effect of their members' junior-priority groundwater pumping. This fact is at the heart of the Director's decision to deny the District's application. The Director is intimately familiar with the facts and circumstances surrounding this application and nature of the proposed "mitigation" use. The Director determined that:

> [T]he 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.

(A.R., Vol. 2, p. 364, ¶34)[1] (Emphasis added). These findings are not disputed by the GWDs. Not only has Rangen been using this water for more than fifty years, Rangen has a right to continue to use the water in the future under its own permit which the Districts stipulated to during the hearing on this case. (A.R., Vol. 2, p. 353, FN4). The water the Districts are seeking to appropriate will be used by Rangen regardless of whether this application is granted.

The Director's recognition of the Districts' mitigation shell game must inform any analysis of the Director's decision to deny this application. This is particularly true of the Director's findings that the application was filed in bad faith and is not in the local public interest. The

[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.

Districts' Response Brief does not address the issue of how this water right would provide any mitigation or benefit to Rangen.

A. The Director's interpretation of water appropriation rules and statutes is entitled to great deference.

The Districts have asserted that this Court should exercise "free review" of questions of law. *Districts' Response Brief*, p. 17. While this is true in many contexts, this appeal involves the Director of the Department of Water Resources' interpretation of various statutes and rules governing the appropriation of water. In this context, there is no such "free review."

The concept of "free review" of agency decisions involving the interpretation of statutes and regulations has been expressly rejected by this Court. *See, J.R. Simplot Co. Inc. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991). In that case, this Court took careful pause to reevaluate judicial review of issues involving questions of law. Guided by United States Supreme Court decisions, this Court rejected "free review" holding as follows:

> After reviewing our extensive case history, as well as the holdings of the U.S. Supreme Court and various other state courts, we hold that the rule of deference to agency statutory constructions retains continuing validity. We hold that a standard of "free review" is not applicable to agency determinations.

Id. at 862. *See also, Preston v. Idaho State Tax Commission*, 131 Idaho 502, 504, 960 P.2d 185, (1998), citing *J.R. Simplot Co. v. Idaho State Tax Comm'n*, supra.

The rule the *J.R. Simplot* Court upheld was as follows:

> However, the courts are not alone in their responsibility to interpret and apply the law. As the need for responsive government has increased, numerous executive agencies have been created to help administer the law. To carry out their responsibility, administrative agencies are generally "clothed with power to construe [the law] as a necessary precedent to administrative action." As a result, this Court has long followed the rule that the construction given to a statute by the executive and administrative officers of the State is entitled to great weight and will be followed by the courts unless there are cogent reasons for holding otherwise.

Id. at 854. (Citations omitted).

Having rejected "free review," this Court established a "four-prong" test to determine the level of deference that can be given to agency decisions. That test is as follows:

> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine 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. 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.

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

The District Court failed to give the proper deference to the Director's interpretation of the applicable statutes and rules as required by *J.R. Simplot* and *Duncan*.

B. The Director's finding of bad faith should be affirmed.

The GWDs argue that the Director: "[I]nterpreted 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." (*Districts' Response Brief,* p. 20). The Districts argue that this interpretation is "contrary to law and leads to absurd results." *Id.* at 21.

The District's argument is based upon two premises: (1) that the Court should exercise "free review" over the Director's interpretation of IDAPA 37.03.08.045.01.c; and (2) that the Director's interpretation and ruling can be narrowly construed as requiring new construction. Neither of these premises is correct. The Districts also contend that the Director's determination that the Districts' application does not propose a "project" is not supported by substantial competent evidence. *Districts' Response Brief,* p. 24. This is also incorrect.

1. The Director's interpretation of Rule 45.01.c should be given great deference.

This court does not exercise "free review" of an agency's interpretation of a statute or rule. *Preston v. Idaho State Tax Commission,* 131 Idaho 502, 504, 960 P.2d 185, (1998), *citing J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). As set forth in section A above, courts reviewing an agency's interpretation of statutes and rules are required to perform a "four-pronged" test to determine what deference to give the agency. *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010). Despite acknowledging the appropriate "four-pronged" test, the Districts argue that "[w]hether Rule 45.01 requires new construction is a question of law over which courts exercise 'free review.'" The argument was expressly rejected by this Court in *J.R. Simplot Co., supra.* With the proper application of the four-pronged test, the Director's interpretation of Rule 45.01.c is entitled to great deference.

2. The Districts have misconstrued both Rangen's argument and the Director's ruling regarding the existence of a "project."

The Districts argue that the Director "[I]nterpreted 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." *Districts' Response Brief,* p. 20. The Districts claim, and the District Court agreed, that requiring "new construction" leads to absurd results because some water right applications involve the use of existing diversions rather than new construction. (R., p. 194). The Districts' argument does not fairly frame the Director's decision.

As Rangen argued in its opening brief, the Director's ruling can more fairly be read as requiring an identifiable project that can be completed in order to perfect the water right rather than imposing a specific requirement of "new construction." The Director found that the lack of

such an identifiable project is an impediment to completion of the project. This is a reasonable interpretation of Rule 45.01.c.

This is a unique case because the GWDs do not propose to use the water for which the application is filed. The GWDs propose that Rangen will use the water. Essentially, the GWDs seek to obtain a water right by doing nothing more than observing and identifying potentially unappropriated water.

In this case, the Rule on good faith allows the Director to examine the substantive actions or intent of the parties to construct or complete the project. "The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project." IDAPA 37.03.08.045.01.c. In this case, the Director did examine the intent of the GWDs in seeking the permit. Even though the Rules specifically contemplate a "project" and "construction" of the project, the Director concluded that the Application was filed in bad faith because the GWDs had no intent, at the time the Application was filed, to complete any project. The GWDs' intent was to simply obtain the Permit and assign it to Rangen. Lynn Carlquist, testifying on behalf of the GWDs, stated:

> 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).

Based on that testimony, and what the Rules require, the Director made a factual finding that the application was filed in bad faith:

> 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).

With regard to water flowing through the bridge diversion, the GWDs propose to simply identify unappropriated water in Billingsley Creek, utilize Rangen's existing bridge diversion, and without performing a single act, obtain a mitigation right to satisfy the mitigation obligation that the GWDs' members have towards Rangen. In this unique circumstance, the Director found that there was not an identifiable project that could be completed. The Director's interpretation of the Rule and his finding factual determination are entitled to great deference and should not have been reversed.

3. The Director's determination that the Districts do not intend to complete a project is supported by substantial competent evidence.

After filing the application, the GWDs amended their proposal to include a pump that would take 4 cfs of water from the bridge diversion and divert it to Rangen's hatch house, green

house and small raceways (collectively "hatch house"). (A.R., Vol. 1, p. 193-4). This water would no longer go through the bridge diversion to the large raceways. This involves actually building a pump station on Rangen's property above the bridge diversion. This also involves a reconfiguration of Rangen's research hatchery that is not beneficial for the use of the hatchery. It is very important for this Court to understand that Rangen has never diverted water from the bridge diversion to the hatch house. More importantly, Wayne Courtney, Rangen Executive Vice-President, testified at the Administrative Hearing that Rangen did not want water to be diverted from the bridge diversion to the hatch house. (A.R., Tr., 248, ll. 7-18). The GWDs themselves have indicated that they would only move water to the extent Rangen wanted water moved. (A.R., Tr. p. 89, l. 1-19).

The GWDs' proposal to build the pump station appears to have been made solely to give the GWDs an argument that they have a project that can be completed. They are proposing to use eminent domain powers to force the reconfiguration of Rangen's research facility even though Rangen does not want it. The pump that the GWDs have proposed serves no mitigation or other useful purpose to Rangen. The Director concluded that the GWDs do not intend to complete any project, and his finding is supported by substantial competent evidence. As such, it should not have been reversed.

C. The Court Should Affirm the Director's Denial of the Application Because the Districts' Application is Speculative.

In Section 2 of their response brief, the GWDs state: "Rangen now contends that the District Court erred by addressing its argument concerning speculation." *Districts' Response Brief,* p. 29. It is important to clarify Rangen's position. When the GWDs appealed the Director's decision to the District Court, Rangen argued an alternative basis for affirming the Director's decision. Rangen argued that the decision could be affirmed because the permit was "speculative."

The District Court ruled that the permit was not speculative, but also expressly declined to "prejudge" the issue of whether the GWDs actually have the eminent domain powers to perfect their application. (R., p. 202-03). In light of this ruling, Rangen's position is that rather than make a legal determination that the permit was not speculative, the District Court should have sent the case back to the Director to determine whether the Districts have the authority to actually perfect their application and whether that authority was properly exercised when the application was filed.

There are two critical issues of fact which are uncontested. Those facts are that the GWDs do not own the place of use (POU) or point of diversion (POD) designated by the Application. 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). (Emphasis added); s*ee 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).

There are two ways for a party to perfect a water right when that party who is applying for a permit does not own the POU or POD. The first way is for the party to have an agency relationship with the owner of the property where the water right is sought. *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). In this case, the uncontested fact is that the GWDs do not have any agency relationship with Rangen.

The second way to perfect a water right for a party who does not own the POU or POD is to properly exercise eminent domain authority. *Lemon v. Hardy, supra.* This raises two separate

inquiries: (1) whether the GWDs have the legal authority to seek eminent domain; and (2) even if they have the right of eminent domain, whether the GWDs properly exercised this authority when they filed the application. Rangen addressed both of these issues in its Opening Brief, but it is important to clarify the following points.

The first inquiry is whether the GWDs have the legal authority to seek eminent domain for the purposes of this permit. Exercising eminent domain in this case would require not only the authority to condemn Rangen's bridge diversion, but also the authority to install a pump and reconfigure how water flows through the Rangen facility over Rangen's objection. On this issue, both the Director and the District Court declined to address whether the GWDs had the legal authority necessary to gain access to Rangen's property. On the issue of whether the GWDs had actual authority to exercise eminent domain, the trial court stated:

> 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 prejudge the issues, will not address these arguments. The fact that the Districts have the express statutory authority to exercise the power of eminent domain for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of their mitigation powers is sufficient for the purposes of a speculation analysis.

(R., p. 203).

Second, regardless of whether the GWDs have the legal authority to exercise eminent domain, an important issue for this appeal is whether the GWDs actually considered and voted to exercise their eminent domain powers in connection with the filing of their application. [2] The GWDs are political subdivisions. Under their statutory powers, the GWDs have the authority to:

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[2] The Districts contend that Rangen does not have standing to challenge the validity of the GWDs' actions. See *Districts' Response Brief*, p. 45. Rangen has standing to contest the exercise of the GWDs' authority since the POU and POD for the water right under the application are wholly located on Rangen's property. Rangen has asserted the necessary "distinct palpable injury" necessary to have standing. *See Young v. Ketchum,* 137 Idaho 102, 44 P.3d 1157 (2002); *Martin v. Camas County*, 150 Idaho 508, 248 P.3d 1243 (2011).

(1) file applications for water rights, I.C. § 42-5224(8); and (2) exercise eminent domain for rights of way, I.C. § 42-5224(13). Under I.C. § 42-5223(3), the statute that immediately precedes the statutory powers of the Board, the only way for the GWDs to exercise their statutory powers is for a majority of the Board to act at a meeting where a quorum exists:

> The board of directors **shall hold a regular monthly meeting** in the district's office on the first Tuesday in every month or such date each month as it shall fix by resolution, and such special meetings **as may be required for the proper transaction of business**. Special meetings may be held on seventy-two (72) hours' notice of the chairman or a majority of the members. **A majority shall constitute a quorum for the transaction of business and the concurrence of a majority of the members shall be necessary to constitute the action of the board.** All meetings of the board shall be public and all records of the board shall be open to the inspection of any member water user, or representative thereof during business hours.

I.C. § 42-5223(3) (Emphasis added).

In this case, the uncontested fact is that the GWDs never held any meeting to authorize the filing of the application and submitted no evidence establishing their Boards' decision to authorize the exercise of their eminent domain authority. The only evidence in the record from the GWDs is the testimony of Lynn Carlquist, a Director of the North Snake Ground Water District, who testified that no meeting was ever held to consider and vote on the filing of the application:

Q. (Haemmerle); **That's my question, whether there was an official board meeting on behalf of your groundwater district to take action to filed the permit.**

A. (Carlquist) **Not for this specific permit, no.** But there were – there were the conference discussion over the phone to say "Yes, we approve. Let's go after it and get this permit filed for it."

Q. But there was no official convening of the board to take that kind of action?

A. Not in person.

Q. And you don't really recall what any of the other districts did or didn't do, do you?

A. No, I don't. I do know that there were phone conversations with the other districts.

(A.R., Tr., p. 69, ll. 19-25; p. 70, ll. 1-8). (Emphasis added).

Resolutions from the North Snake Groundwater District (A.R., Exh. 1076) and Magic Valley Groundwater District (A.R., Exh. 1077) (collectively "Resolutions") were produced at the administrative hearing on the application. The Southwest Irrigation District never produced a Resolution. The Resolutions were dated September 16, 2014, or a single day before the administrative hearing on the Application. According to Lynn Carlquist, the Resolutions were executed at a Special Meeting just prior to the administrative hearing held on September 17, 2014. There were no Resolutions authorizing the law firm of Racine, Olson, Nye, Budge & Bailey, Chartered ("Racine") to execute the Application for the permit prior to September 16, 2014.

Q. So there were no corporate resolutions at the time any of the permits were filed?

A. That's correct.

(A.R., Tr., 31, ll. 22-24).

Furthermore, the Resolutions only authorized the filing of the application. The Resolutions did not authorize the initiation of any eminent domain proceeding against Rangen. The Resolutions, in pertinent part, stated:

> RESOLVED, the Board confirms the authority of Racine to file application for water right permit no. 36-16976 on behalf of the District, and to represent the District in all other current and future proceedings before the IDWR to which the District is a party; and
>
> Further RESOLVED, the Board reaffims the Special Power of Attorney for Water Rights executed by the District on May 2, 2014, confirming the authority of Racine to represent the District in all current and future proceeding before the IDWR to which the District is a party.

(*See e.g.*, A.R., Exh. 1076 and 1077).

Political subdivisions, in this case the groundwater districts, only have authority to act in duly noticed and constituted meetings. I.C. § 42-5223. If the government body does not properly exercise its authority, the government body's lawyers cannot act on their own and validate an

illegally exercised authority of the political subdivision. Attorneys for political subdivisions are not authorized to take action for the political body, without the political body holding an authorized meeting to transact business.

To summarize, *Lemmon v. Hardy* is controlling. The GWDs do not own the POD or POU for the water right described in the application. The Department's Rules require that a permit 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." IDAPA 37.03.08.45.c.i In this case, there are no findings that the GWDs, in fact or law, have the authority to seek eminent domain to take Rangen's property to perfect this application. Even if they do, the GWDs failed to present any evidence that those powers were exercised in an open meeting. For these reasons, the application should have been denied, or the case remanded to the Director for further findings.

D. Attorneys are Not Exempt from the Requirement to Submit Evidence of Authority When Signing an Application for Permit on Behalf of a Client.

The Districts contend that Rangen is asking IDWR to interpret IDAPA 37.03.08.035.03.b.xiv in a manner that goes beyond its plain language. *Districts' Response Brief*, p. 40. The Districts argue: "The Rule states applications 'may be signed by a person having a current power of attorney.' 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." *See id.* The Districts' have misconstrued Rangen's position.

Rangen's position is that the plain language of Rule 35.03.b requires an attorney to submit evidence of authority to sign an application for permit when it is filed with the Department. Evidence of that authority *may* be in the form of a power of attorney or it may be in another form

like a motion or a resolution. Rangen's point is that attorneys are not exempt from the requirement to submit evidence of the express authorization of their client. Rule 35.03.b states in relevant part:

> b. The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department.
>
> * * *
>
> 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).

The Districts contend that attorneys are exempt from this rule by virtue of the attorney-client relationship. Their position is that everyone knows that Thomas J. Budge and Randy Budge represent the Districts and it would be "utterly unjust" to enforce the requirement of submitting evidence of express authorization. They claim that this is a mere "technicality" and a "trap for the unwary." *Districts' Response Brief,* p. 45. The Districts' arguments miss the mark for several reasons.

To begin with, the Districts' reliance on *Storey v. United States Fidelity and Guaranty Co.*, 32 Idaho 388, 183 P. 990 (1919) is misplaced. The Districts quoted the following language from *Storey* to support their position:

> 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 surrender or giving up any substantial right of the client.

Districts' Response Brief, p. 41, quoting *Storey,* 32 Idaho 388 at 392, 183 P. 990 at 991. This language does not support the Districts' position, but rather, undermines it.

The *Storey* decision makes it clear that an attorney is the agent of the client. While an attorney has implied authority to handle *procedural or remedial* matters that come up while a case is pending, the attorney cannot do anything that affects the client's substantive rights without express authority. The *Storey* Court held: "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.'" *Id.,* 32 Idaho 388 at 392, 183 P. 990 at 991 (Emphasis added). The signing and filing of an application for permit to appropriate the waters of this state is not a procedural or remedial matter.

The appropriation of water creates a real property interest, and as discussed above, will require the Districts to exercise their eminent domain powers against Rangen since the POU and POD are located on Rangen's property. *See Nettleton v. Higginson,* 98 Idaho 87, 558 P.2d 1048 (1977); *Neilson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); I.C. § 55-101. The decision to file the application for permit is a serious undertaking that can only be authorized by the Districts'

Boards of Directors. The signing and filing of the Districts' application was not part of the attorney's implied authority.

While the Districts seem to balk at the assertion that an attorney must submit written evidence of authority to sign an application for permit, this Court has made it clear that attorneys are not exempt from this type of requirement. In *Ogden v. Griffith,* 149 Idaho 489, 494, 236 P.3d 1249, 1254 (2010), this Court held that the written power of attorney requirement set forth in I.C. § 9-503, the statutory codification of the statute of frauds for real estate transactions, applies to attorneys. Section 9-503 states:

> No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, ***or by his lawful agent thereunto authorized by writing.***

I.C. § 9-503 (emphasis added).

The failure to submit evidence of Thomas J. Budge's authority to sign with the application means that the Districts' application was incomplete under Rule 35.01.d and no priority was established:

> All applications for permit to appropriate public water or trust water of the state of Idaho shall be on the form provided by the department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" and shall include all necessary information as described in Subsection 035.03. An application for permit that is not complete as described in 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.*** Applications meeting the requirements of Subsection 035.03. will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the Director.

IDAPA 37.03.08.035.01.d (emphasis added); *see also* IDAPA 37.03.08.035.02.b ("The priority of an application . . . is established as of the time and date the application is received in complete

form . . . .)" While Rangen contends there are serious issues as to whether the Districts ever lawfully authorized the filing of the application (*see* Section C above), the earliest priority date that could possibly be given to the Districts' application for permit is the date of the hearing when the Districts submitted the resolutions authorizing the Racine firm to sign on behalf of the Districts (*see* A.R., Exh. 1076 and 1077) and Lynn Carlquist testified.

The Districts' final argument is that it would be "utterly unjust" to enforce the requirement that an attorney submit evidence of authority when signing and filing an application for permit. What would be unjust in this case is the granting of a permit for what the Director expressly found was nothing but a "mitigation shell game."

E. The Director correctly held that granting the application was not in the local public interest.

The Districts filed this application seeking to appropriate water for "mitigation." Such a purpose of use presumes that the manner in which the water is used will mitigate for depletions due to the applicant's use of other water rights. As Rangen has argued in this matter, the simple description "mitigation" does not describe how the use of the water will actually mitigate. The Districts have steadfastly refused to explain how this water right would benefit anyone that is suffering injury due to depletions caused by groundwater pumping. The Director determined that there was no benefit from granting this permit and that it is not in the local public interest.

The Director is required pursuant to I.C. § 42-203A(5) to deny a water right "if it will conflict with the local public interest as defined in I.C. § 42-202B." The local public interest is defined 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 resource." I.C. § 42-202B. The Director is well aware of water shortages suffered not only by Rangen, but also other water users in the local area and downstream on Billingsley Creek. Approval of this application has the potential to affect the

public water resources dramatically. Ultimately, the Districts intend to use this water right as part of a mitigation plan that would allow widespread continued depletion of the ESPA. Of course, the Director will be able to deny that mitigation plan and will almost certainly be required to do so given that this is merely a "mitigation shell game."[3] However, there is no reason to require the Director to delay consideration of these issues for a mitigation plan proceeding.

The Director found that:

> The District's 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.

(A.R., Vol. 2, p. 364, ¶34). The approval of a "mitigation" water right that provides no mitigation benefit has a direct effect upon the public water resource because it allows continued depletion of the aquifer without mitigation. Consequently, the Director did not exceed his authority by denying the Districts' application. The District Court erred by failing to give the appropriate deference to the Director's interpretation and application of I.C. § 42-202B. *See J.R. Simplot Co. Inc. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991).

F. The Director erred when he allowed "mitigation" as a permitted purpose of use.

Rangen stands on the arguments it made in its Opening Brief concerning why "mitigation" as a proposed purpose of use should not be allowed. *See, Rangen, Inc.'s Opening Brief*, p. 28. One issue, however, needs further elaboration.

Both the District Court and Director relied on the definition of "mitigation plan" under I.C. § 42-5201(13) to support their respective conclusions that the GWDs' application for "mitigation"

[3] Regarding the Director's finding that the GWDs' application brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek, the District Court noted that "[I]ndeed, this consideration may have relevance in any proceeding seeking the approval of any mitigation plan for which the appropriation is intended." (R., p. 199).

water should be allowed. I.C. § 42-5201(13) defines "mitigation plan" as a "plan to prevent or compensate for material injury to holders of senior water right caused by the diversion and uses of water holders of junior priority groundwater rights who are participants in a mitigation plan."

The Director, incorporating the decision of the Hearing Officer, and using the definition of "mitigation plan" under Section 42-5201, concluded: "In Order for the proposed senior use to be viable, it must prevent material injury to senior water rights or compensate senior water right holders for material injury." (A.R.. p. 358). Applying this definition, the Director concluded that the GWDs' application "proposes to compensate Rangen for diminishment of the source." (A.R., p. 358). There were no findings that the GWDs' application would "prevent material injury."

The GWDs' application does not "compensate" Rangen for any material injury. Both the GWDs' application and Rangen's permit propose using the very same non-consumptive water. (Exh. 2001). (A.R., p. 189). Regardless of whether the GWDs' application is granted, Rangen will be diverting the very same water under its own right and applying it to its own beneficial use. Even if the Districts' permit is granted, they will not be providing anything that Rangen does not already have the right to use.

The proposed use also does not prevent material injury. The GWDs' members are obligated to compensate for the injury they are causing to the Eastern Snake Plain Aquifer. The proposed use does not stop the depletion of the aquifer in any way, shape or form and it does not add new water.[4] Most fundamentally, regardless of whether the permit is granted, Rangen already has the right to use this water under its own permit. As such, the application should have been denied.

[4] The District Court concluded that the fact that the GWDs did not being "new water" might have "relevance in any proceeding seeking the approval of any mitigation plan for which the appropriation is intended." (R., p. 199).

II. CONCLUSION

For the reasons set forth in Rangen's Opening Brief and those set forth above, Rangen respectfully requests that the Court affirm the Director's decision to deny the Districts' application for permit.

DATED this 4th day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 4th day of March, 2016 he caused a true and correct copy of the foregoing document to be served upon the following by email:

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