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DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
GOODING COUNTY

NORTH SNAKE GROUND WATER DISTRICT, MAGIC VALLEY GROUND WATER DISTRICT and SOUTHWEST IRRIGATION DISTRICT, Petitioners, vs. IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN in his capacity as the Director of the Idaho Department of Water Resources, Respondents, and RANGEN, INC., Intervenor.	Case No. CV-2015-083 **DISTRICTS' OPENING BRIEF**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 36-16976 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 (collectively, the "Districts") submit this opening brief pursuant to Rule 84(p) of the Idaho Rules of Civil Procedure and the *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* entered by this Court on March 5, 2015.

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STATEMENT OF THE CASE

1. Nature of the Case

This case presents for judicial review an order issued by the Idaho Department of Water Resources (IDWR) that denies an application for a water right permit filed by 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") and Blind Canyon Aquaranch, Inc. ("Blind Canyon") filed protests.[2]

A hearing on the Application was held September 17, 2014, at the IDWR Southern Region office in Twin Falls, Idaho, before IDWR employee James Cefalo as the hearing officer.[3] Blind Canyon did not participate in the hearing and, therefore, waived its right to offer evidence into the administrative record and cross-examine witnesses.[4]

The hearing officer issued 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.[5]

On December 2, 2015, Rangen filed *Exceptions to Preliminary Order*.[6] Both Rangen and the Districts' submitted briefing concerning Rangen's exceptions.[7]

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

[2] R. Vol. 1, pp. 44, 56.

[3] Tr., p. 7, LL. 1-25.

[4] Tr., p. 8, LL. 11-16; R. Vol. 2, p. 263.

[5] R. Vol. 2, p. 263.

[6] R. Vol. 2, p. 283.

The Director issued a *Final Order Denying Application* (the "Final Order") on February 6, 2015.[8] The Districts filed a *Petition for Judicial Review* of the Final Order with this Court on March 5, 2015.[9]

3. Statement of Facts

Rangen owns and operates a fish hatchery near the head of Billingsley Creek.[10] The hatchery consists of a green house, hatch house, small raceways, and two sets of large raceways.[11]

For many years, Rangen has diverted water from the Martin-Curren Tunnel (commonly referred to as the "Curren Tunnel") for use in its fish hatchery.[12] This diversion supplies water to all fish rearing facilities at the Rangen hatchery.

Rangen has also diverted water from Billingsley Creek through what is known as the "Bridge Diversion."[13] This diversion supplies only the large raceways.[14]

The water rights serving the Rangen hatchery list only the Curren Tunnel as the source of water; they do not list Billingsley Creek.[15]

In response to a delivery call filed by Rangen in December of 2011, the Districts filed the Application which seeks to divert up to 12 cfs from springs and/or Billingsley Creek for mitigation and fish propagation purposes "in the event the Director finds Rangen to be materially injured and

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[7] R. Vol. 2, pp. 286, 313.
[8] R. Vol. 2, p. 349.
[9] R. Vol. 2, p. 369.
[10] R. Vol. 2, p. 349.
[11] R. Vol. 2, p. 350.
[12] R. Vol. 1, p. 102; R. Vol. 2, p. 349.
[13] R. Vol. 1, p. 102; R. Vol. 2, p. 350.
[14] *See* R. Vol. 1, p. 94.
[15] R. Vol. 2, p. 350; *see also* Tr., p. 181, LL. 23-25.

orders junior groundwater users to provide mitigation [to Rangen] or be curtailed."[16] IDWR subsequently issued a curtailment order that threatens to permanently shut off the Districts' members' water rights unless they provide mitigation to Rangen.[17]

The Application identifies two diversions: "Hydraulic pump(s) (size TBD); screw-operated headgate on Billingsley Creek."[18] The pumps will be used to pump water from Billingsley Creek into a pipe that will connect to Rangen's existing pipe that conveys water from the Curren Tunnel to the hatch house, green house, and small raceways.[19] The pumps will be capable of delivering mitigation water to all of Rangen's fish rearing facilities.

The screw-operated headgate will be a gravity-fed diversion from Billingsley Creek.[20] The Districts will either condemn an easement to use the existing Bridge Diversion or install a new diversion adjacent to the Bridge Diversion. This headgate will be used to deliver mitigation water to the large sets of raceways only.

The Application allows up to 12 cfs to be diverted from either diversion. 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 pumps could be upsized to divert the full amount if needed.

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

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[16] R. Vol. 1, pp. 1, 2.

[17] R. Vol. 2, p. 352.

[18] R. Vol. 1, p. 83.

[19] R. Vol. 1, p. 102.

[20] R. Vol. 1, p. 92.

> 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.[21]

Since the fish propagation beneficial use would require operation of Rangen's raceways, perfecting this use would require an agreement with Rangen to use its raceways or an assignment of the permit to Rangen. The Districts can perfect the mitigation beneficial use on their own by condemning easements necessary to divert and deliver mitigation water to Rangen, at which point Rangen will make use of the water 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."[22]

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*.[23] The Districts have since filed an action to exercise their power of eminent domain.[24]

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.[25]

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[21] Tr. p. 44, L. 19 – p. 45, L. 1.

[22] R. Vol. 2, p. 2.

[23] R. Vol. 2, p. 355.

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

[25] R. Vol. 2, p. 263 et. seq.

In response to Rangen's *Exceptions to Preliminary Order*, the Director denied the mitigation beneficial use as well. 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 therefore filed in bad faith.[26] He also concluded that the Application is not in the local public interest because it seeks to appropriate water that Rangen has been using for many years, even though Rangen did not have a water right for it at the time the Application was filed.[27]

This petition for judicial review challenges the Director's denial of the mitigation beneficial use component of the Application.

4. Standard of Review

The Final Order is subject to review under the Idaho Administrative Procedure Act.[28] It must be affirmed unless the Court determines the findings, inferences, conclusions, or decisions of the 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.[29]

Issues of fact must be confined to the record created before the agency,[30] and the court must not substitute its judgment for that of the agency as to the weight of the evidence on issues of fact.[31] However, agency findings

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[26] R. Vol. 2, p. 362.
[27] R. Vol. 2, p. 364.
[28] Idaho Code § 42-1701A(4).
[29] Idaho Code § 67-5279(3).
[30] Idaho Code § 67-5277.
[31] Idaho Code § 67-5279(1).

of fact must be "supported by substantial evidence on the record as a whole," not just portions of the record in isolation.[32]

In contrast to questions of fact, courts exercise free review of questions of law.[33]

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."[34] A discretionary decision is improper if it is "arbitrary, capricious, or unreasonable."[35] A decision is arbitrary "if it was done in disregard of the facts and circumstances presented or without adequate determining principles."[36] It is capricious if "done without a rational basis."[37] 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.[38] It should not be set aside unless substantial rights have been prejudiced.[39]

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[32] Idaho Code § 67-5279(3)(d); *see also Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 417 (2001); *Cooper v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 134 Idaho 449 (2000) (citing Idaho Code § 67-5279(3)).

[33] *Vickers v. Lowe*, 150 Idaho 439, 442 (2011).

[34] *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 54 (2006).

[35] *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91 (2007).

[36] *In re Delivery Call of A&B Irrigation Dist.*, 153 Idaho 500, 511 (2011) (citing *Am. Lung Ass'n of Idaho/Nevada v. State, Dept. of Agric.*, 142 Idaho 544, 547 (2006)).

[37] *Id.*

[38] Idaho Code § 67-5279(3).

[39] Idaho Code § 67-5279(4).

ISSUES PRESENTED

1. The Application contemplates using a pump station, screw-operated headgate, pipes and related facilities to deliver mitigation water to Rangen. Is the Director's conclusion that the Application does not contemplate a "project"—and was filed in bad faith—supported by substantial evidence in the record as a whole, contrary to law, or an abuse of discretion?

2. Under Idaho Code the "local public interest" means "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." Did the Director violate Idaho Code or abuse his discretion by concluding that the Application was not in the local public interest based on concerns over precedent and fairness rather than the effects on the public water resource?

SUMMARY OF THE ARGUMENT

The Final Order stretches beyond applicable legal standards to find a way to deny the Application.

First, it erroneously concludes the Districts filed the Application in bad faith, asserting that the Districts never actually contemplated constructing new works, and, therefore, did not intend to perfect the water right. This conclusion is in error because it (i) disregards the good faith requirements found in IDWR's Water Appropriation Rules (which the Application satisfies); (ii) imposes a requirement of new construction for which there is no legal basis; and (iii) is not supported by substantial evidence in the record.

Second, the Director also evaded applicable legal standards in concluding the Application is not in the local public interest. Under Idaho Code, this analysis is limited to "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."[40] The Final Order disregards this standard, instead concluding that considerations of fairness, legal precedent, and the Districts' use of eminent domain cause the Application to violate the local public interest. The Director's local public interest analysis exceeds his authority, violates Idaho Code, and is an abuse of discretion.

While the Director has significant authority and discretion when scrutinizing water right applications, he does not have power to ignore or alter the legal standards set forth in the Idaho Code and accompanying regulations in order to achieve a desired outcome.

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[40] Idaho Code § 42-202B(3).

ARGUMENT

The Final Order denies the Application by concluding it was filed in bad faith and is not in the local public interest. As explained below, the bad faith ruling is inconsistent with IDWR's Water Appropriation Rules, is not supported by substantial evidence in the record as a whole, and is an abuse of discretion. The ruling that the Application is not in the local public interest violates applicable statutory provisions, exceeds the Director's authority, and is also an abuse of discretion.

1. The ruling that the Application does not contemplate a project—and was therefore filed in bad faith—is not supported by the record as a whole and is contrary to law and an abuse of discretion.

The Director has authority under Idaho Code § 42-203A(5)(c) to reject a water right application "where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes."[41] The Director did not find that the Districts filed the Application for delay or speculative purposes, but he did conclude they filed it in bad faith, stating: "The Application fails the bad faith test 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."[42]

This conclusion is in error for three reasons. First, the Application clearly meets the good faith criteria outlined in IDWR's Water Appropriation Rules. Second, Idaho law does not require new construction in order to get a water right. Third, the finding that the Districts did not intend to perfect the water right is not supported by the record as a whole.

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[41] Idaho Code § 42-203A(5)(c).

[42] Final Order at 14 (R. Vol. 2, p. 362).

1.1 The Application clearly meets the good faith criteria outlined in IDWR's Water Appropriation Rules.

IDWR's Water Appropriation Rules state:

> An application *will* be found to have been made in good faith if:
>
> i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, [or] has the authority to exercise eminent domain authority to obtain such access, . . .
>
> ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
>
> iii. There are no obvious impediments that prevent the successful completion of the project.[43]

The Application clearly meets this standard.

Because the Districts have eminent domain powers, the Application meets the first requirement. The Idaho Legislature has vested ground water districts with the power to "develop, maintain, operate and implement mitigation plans" as well as the "power of eminent domain . . . for the condemnation of private property . . . necessary to the exercise of [its] mitigation powers . . . , both within and without the district."[44] It has similarly vested irrigation districts with the right to condemn property for their water projects.[45] The Final Order acknowledges this.[46]

It should be noted that the Idaho Supreme Court has on more than one occasion allowed an irrigation entity to use eminent domain to condemn the use of existing water works. In *Portneuf Irrigating Co. v. Budge* and again in *Canyon View Irrigation v. Twin Falls Canal Co.* the Court held that an irrigation company could condemn the right to enlarge and use another

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[43] IDAPA 37.03.08.045.01.c.iii. (emphasis added).

[44] Idaho Code § 42-5224(11), (13).

[45] Idaho Code § 43-304.

[46] Final Order at 355, ¶¶ 36-38 (R. Vol. 2, p. 355).

canal company's existing canal.[47] Further, the Court specifically held in *Canyon View* "that an individual may acquire the right to enlarge *or to use* an existing canal in common with the owners thereof, upon payment of proper compensation."[48] Thus, the Districts' plan to condemn an easement to use the existing Bridge Diversion is within the purview of Idaho's eminent domain authority. And, even if it weren't, the Districts could condemn an easement to install its own headgate adjacent to the Bridge Diversion.

As to the second good-faith requirement, no other permits are required and the Final Order does not find that the Districts have failed to pursue necessary permits. Thus, the Application meets the second requirement.

Finally, the Application meets the third good-faith requirement because there is no evidence in the record of impediments that prevent completion of the project, and the Final Order does not identify any such impediments.

Since the Application meets the good faith requirements set forth in IDWR's Water Appropriation Rules, the Director has a duty to find the Application was made in good faith.

Notwithstanding, the Director concluded the Application was filed in bad faith, asserting: "The initial filing by the Districts did not contemplate any construction of works and completion of any project."[49] This ruling mistakenly imposes a "construction of works" requirement that is not found in the Idaho Code or IDWR's Water Appropriation Rules. Moreover, the assertion that the Districts did not intend to perfect the water right is not supported by the record as a whole.

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[47] *Portneuf Irrigation Co., Ltd. v. Budge*, 16 Idaho 116 (1909); *Canyon View Irr. v. Twin Falls Canal Co.*, 101 Idaho 604 (1980).

[48] *Canyon View Irr.*, 101 Idaho at 609 (emphasis added).

[49] Final Order, p. 14, ¶ 26 (R. Vol. 2, p. 362).

1.2 A water right application is not filed in bad faith simply because it does not contemplate new construction.

While Idaho law requires the diversion and beneficial use of water to develop a water right, it does not mandate the construction of new works. Water rights are most often developed using existing diversion structures, by the applicant either using its own diversion structure, making an agreement to use a diversion structure owned by someone else, or in some cases condemning the ability to use a structure owned by someone else.

The word "construct" is used in two places in the Water Appropriation Rules related to good faith: (a) in the requirement that the applicant have "legal access . . . to construct and operate the proposed project;" and (b) in the requirement that the applicant be "in the process of obtaining other permits needed to construct and operate the project." These require access and permits *if* the project requires new construction. It would be absurd to read these provisions as imposing a standalone requirement of new construction. Were this intended, the Rules would need to explicitly state that an application must involve new construction to satisfy the good faith requirement.

For example, North Snake Ground Water District recently applied for a natural flow water right from the Snake River to use for conversions. Water under this right will be diverted through existing canals and delivered to existing headgates on those canals to service lands of North Snake Ground Water District members. It would be absurd to say this application has been filed in bad faith simply because the District intends to use existing infrastructure to put the water to beneficial use.

To the extent the Final Order requires physical construction of new infrastructure to show good faith, it is inconsistent with Idaho law.[50]

1.3 The finding that the Districts did not intend to perfect the water right is not supported by the record as a whole.

The Director ultimately ruled that the Districts pursued the Application in bad faith based on his assertion that "the Districts' intent at the time of filing the Application was to simply obtain a Permit and assign it to Rangen . . . . The initial filing by the Districts did not contemplate any construction of works and completion of any project."[51] In other words, the Director concluded that the Districts have no intent of perfecting the water right. To support this conclusion the Final Order quotes the following testimony of Lynn Carlquist given on cross-examination:

> Q. Now, Lynn, last time we spoke I asked you that if you get this permit, you understand that you have to perfect it somehow; correct?
>
> A. That's right.
>
> Q. And when I asked you that last time, you told me that it was your intent to obtain the permit and then assign the permit to Rangen for us to perfect;
>
> 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.

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[50] An agency properly exercised its discretion if it "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." *Haw*, 143 Idaho at 54 (emphasis added).

[51] R. Vol. 2, p. 362.

> 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.[52]

In isolation, this testimony could potentially be construed to support the conclusion that the Districts had no intent but to assign the permit to Rangen. But not when considering the record as a whole.

The above quote is one isolated part of Mr. Carlquist's testimony, and it must be read in conjunction with the rest of his testimony. On direct examination, he testified that assigning the permit to Rangen was only *one* potential method for developing the permit: "We could [provide mitigation water to Rangen] *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."[53]

The permit can of course be legally assigned to Rangen by agreement; hence, Mr. Carlquist's testimony that assigning the permit "would be the easiest way for us to perfect it, *if they would agree to that*."[54] But the record also unequivocally demonstrates that the Districts intended to complete the project themselves if needed.

In analyzing the Districts' intent, the Water Appropriation Rules require the Director to judge it by "the substantive actions that encompass the proposed project."

The Districts first substantive action was submitting the Application, which from the outset listed "Hydraulic pumps (size TBD)" as part of the diverting works.[55] These pumps are not in place; the Districts would need

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[52] Tr., p. 75, L. 19 – p. 76, L. 11; R. Vol. 2, p. 356.

[53] Tr., p. 44, L. 19 – p. 45, L. 1 (emphasis added).

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

[55] R. Vol. 1, p. 1.

to build them. This demonstrates intent from the outset to construct works to perfect the right.

The initial Application also states that if Rangen refused to cooperate, the Districts would exercise eminent domain to secure necessary easements for mitigation facilities.[56] This further demonstrates the Districts' intent from the outset to perfect the right.

By contrast, nothing in the initial Application states or even suggests it would be assigned to Rangen. The only possible inference concerning the Districts' intent at the time of filing is that they intended to construct pumps and use eminent domain if needed to deliver mitigation water to Rangen. The Director's finding that "the Districts' intent at the time of filing the Application was to simply obtain a Permit and assign it to Rangen" has no evidentiary support.

Subsequent substantive actions by the Districts further demonstrate their intent to perfect the permit. After filing the Application, the Districts went forward with engineering work,[57] commenced the condemnation process,[58] and proceeded with the hearing to have the Application approved. These actions further demonstrate that the Districts intend to perfect the right themselves despite Rangen's refusal to enter into a cooperative mitigation agreement.

The hearing officer got it right. He recognized that Rangen does not have a prior right to divert water from Billingsley Creek, that the Application will augment the supply of water Rangen receives from the Curren

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[56] R. Vol. 1, p. 2. (emphasis added).

[57] R. Vol. 1, pp. 96-126.

[58] R. Vol. 2, p. 355; *North Snake Ground Water District et. al. v. Rangen, Inc.*, Gooding County case no. CV-2015-123.

Tunnel, that the Districts have the means to perfect the right, and that the Districts have taken substantive actions to perfect the right.[59]

The Director reversed these findings, yet without citing a single substantive action of the Districts that demonstrates they do not intend to perfect the right.

While the Director has discretion to resolve issues of disputed fact, he is not free to ignore undisputed fact.[60] He is not free to rely on a snippet of Lynn Carlquist's testimony and ignore the rest.[61] The content of the Application, the testimony of Lynn Carlquist, the engineering work, and the condemnation action support only one finding: that the Districts have intended and do intend to develop the permit.

Therefore, the Districts respectfully ask this Court to reverse the Director's finding that the Districts do not intend to perfect the permit—and that they filed the Application in bad faith—because it is inconsistent with IDWR's Water Appropriation Rules, is not supported by substantial evidence in the record as a whole, and is an abuse of discretion.

2. The Director violated statutory provisions when he concluded that the Application was not in the local public interest.

Under Idaho Code § 42-203A(5)(e), the Director is required to make a finding as to whether the Application "will conflict with the local public in-

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[59] R. Vol. 2, pp. 271, 273.

[60] *See Cooper*, 134 Idaho at 457 (concluding that the Idaho State Board of Medicine's finding were not supported by the record as whole where it did not make findings to reconcile conflicting testimony); *see also Wilkinson v. State*, 151 Idaho 784, 786 (Ct. App. 2011) ("[T]he agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record.").

[61] Idaho Code § 67-5279(3)(d). Similarly, other jurisdictions do not permit agencies to ignore unfavorable evidence. *See, e.g., O'Connor v. Shalala*, 873 F. Supp. 1482, 1491 (D. Kan. 1995) (holding that an agency decision was not support by substantial evidence where it "impermissibly ignored the evidence as a whole choosing instead to abstract selectively pieces of evidence favorable to [its] position").

terest." Idaho Code § 42-202B(3) defines "local public interest" as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource."[62] It is a two-part analysis. The Director must determine the effects of the proposed use on the public water resource, then consider the impact of those effects on the interests of people in the area.

The Final Order does not discuss the effects of the proposed use on the public water resource, but nonetheless determined that the Application was not in the local public interest. The Director's primary rationale was that approving the Application "would establish an unacceptable precedent in other delivery call proceedings."[63] The "unacceptable precedent" it refers to is that "the District's 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 Application brings no new water to the already diminishing flows of the Curren Tunnel or headwaters of Billingsley Creek."[64] In other words, the Director concluded that the Application is not in the public interest because it will *not* affect the public water supply.

Under the plain language of "local public interest" as defined by Idaho Code §42-203B(3), the Director cannot find that an application will not affect the public water resource, and at the same time conclude it will be detrimental to the local public interest. By so doing, the Final Order violates the statute.

The Director attempted to further justify his public interest ruling by arguing "it is inconsistent with local public interest and inappropriate for

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[62] Idaho Code § 42-202B(3).

[63] R. Vol. 2, p. 364.

[64] R. Vol. 2, p. 364.

the Districts to exercise their power of eminent domain as a vehicle to obtain a water right for mitigation wholly located on land owned by Rangen."[65] Again, however, the Director's concern about mitigation rights being located wholly on the senior's property goes beyond the definition of local public interest set forth in Idaho Code § 42-202B(3) since the issue has no effect on the public water resource. Moreover, the Director does not have legal authority to determine what is an appropriate use of eminent domain; thus, this ruling is "in excess of the statutory authority of the agency" in violation of Idaho Code § 67-5279(3)(b).

The Final Order additionally states that the Districts should not be able to "dictate how mitigation water is delivered wholly within Rangen's facility."[66] There is no evidence in the record, however, to support this finding. The Districts have no intention of dictating how Rangen uses mitigation water. Their intent is simply to deliver water to Rangen to use in its fish hatchery it as it sees fit.

The Application will in reality have only a positive effect on the local community. Because it proposes a non-consumptive use, it will not diminish the Billingsley Creek water supply, yet will provide Rangen with a more reliably supply of water, thus enhancing its ability to raise fish, and will protect groundwater rights in the area from curtailment.

It seems the real reason the Director denied the Application is because he thinks it unfair to allow the Districts to appropriate water that Rangen has been using without a water right due to its mistake or miscalculated strategy in the Snake River Basin Adjudication. The Director would have preferred that Rangen file its application to appropriate Billingsley Creek before the Districts filed their Application, and by denying the Application

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[65] R. Vol. 2, p. 364.

[66] R. Vol. 2, p. 264.

can accomplish the same result. But the Director's preference as to who files for unappropriated waters and his sense of fairness are not statutory considerations. By attempting to fit these or other irrelevant considerations into the definition of local public interest, as defined in Idaho Code § 42-203A(5)(e), the Director acted "in violation of . . . statutory provisions."[67]

The Districts are all too familiar with the harsh realities of the priority system, and the harsh consequences of a failure to properly protect their interests when non-consumptive, spring-fed fish propagation rights like Rangen's were adjudicated the SRBA. Yet, the priority system, and the binding nature of judicial decrees, cut both ways.

The Application meets the public interest standards imposed by Idaho Code. Therefore, the Final Order should be reversed on this point.

3. The Final Order violates the Districts' substantial rights.

In Idaho, permit applicants have a substantial right in having the governing entity properly adjudicate their applications by applying correct legal standards.[68] By ignoring abundant evidence in the record, misapplying legal standards when exercising his discretion, and violating statutory provisions, the Director did not properly adjudicate the Application. This conduct violated the Districts' substantial rights in having their Application properly adjudicated. It also violated their substantial rights in future property interests.

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[67] Idaho Code § 67-5279(3)(a).

[68] *Hawkins v. Bonneville Cnty. Bd. of Comm'rs,* 151 Idaho 228, 233 (2011).

CONCLUSION

For the foregoing reasons, the Districts respectfully ask this Court to set aside the Final Order because (i) its conclusion that the Application was filed in bad faith is inconsistent with Idaho law, not supported by substantial evidence in the record as a whole, and/or an abuse of discretion; and (ii) its conclusion that the Application is not in the local public interest violates applicable statutory provisions, exceeds the Director's authority, and/or is an abuse of discretion.

DATED this 18th day of May, 2018.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

Randall C. Budge
T.J. Budge

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2015, I served a true and correct copy of the foregoing was served by the method indicated below, and addressed as stated:

Randall C. Budge
T. J. Budge

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