IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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

Petitioners,

vs.

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

Respondents,

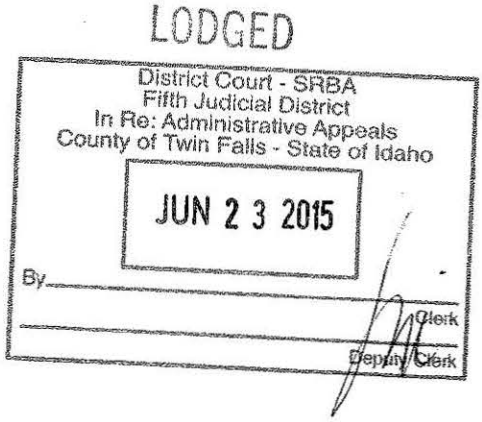
and

RANGEN, INC.,

Intervenor.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 36-16976 IN THE NAME OF NORTH SNAKE GROUND WATER DISTRICT, ET AL.

Case No. CV-2015-083



RANGEN, INC.'S RESPONSE BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF THE CASE

This Appeal involves the denial of an Application to appropriate water right 36-16976 filed by the North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (collectively, the "Districts" or "GWDs"). The GWDs' Application seeks to appropriate talus slope water that Rangen has been diverting and using to raise fish since 1962. The designated place of use (POU) and point of diversion (POD) are located wholly on Rangen's property. In fact, the GWDs seek to use Rangen's own Bridge Diversion and propose merely to assign the permit to Rangen for Rangen to perfect it by raising fish in Rangen's own facility. The purpose of the application is purportedly to mitigate for depletions caused by ground water pumping. Yet the Application provides no new water to Rangen or any other seniors on Billingsley Creek that continue to suffer shortages while at the same time allowing continued depletions and injury to continue. The Director of the Idaho Department of Water Resources ("IDWR") denied the Application because he concluded that (1) the permit Application was filed in bad faith; and (2) the Application is not in the Local Public Interest. The GWDs filed an appeal of that Decision. The Director's denial of the Application for these reasons stated by the Director. The denial should also be affirmed because denial was appropriate for several additional reasons that were erroneously rejected by the Director.

A. COURSE OF PROCEEDINGS BELOW

Rangen adopts the Procedural History as cited by the GWDs in the *Districts' Opening Brief.*

B. STATEMENT OF FACTS

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

2. The Application included two purposes of use: fish propagation and mitigation. (*Id.*). The stated intent of the GWDs when they applied for the permit was to obtain the permit and assign the permit to Rangen for Rangen to perfect the water right. (Tr. p. 75, l. 19-25; p. 76, l. 1-7).

3. The Application stated a place of use (POU) and point of diversion (POD) entirely located on Rangen's real property. The GWDs stipulated that "Rangen owns the property, place of use, and point of diversion." (Tr. 246, l. 13-14).

4. The GWDs did not have the consent or authority to perfect the water they sought to appropriate using Rangen's property. (Exh. 113-14). (Tr. p. 246, l. 21-25).

5. The GWDs proposed to use Rangen's existing diversion works, the same diversion works it had been using for fifty (50) years, to develop its permit. (Tr. 85, l. 1-21).

6. The GWDs have taken no steps or taken any "action" to gain possessory use of Rangen's property. The GWDs did file a Notice of Eminent Domain ("Notice"), but the Notice only refers to access and rights of way. The Notice does not indicate that the GWDs sought to obtain any fee title or occupancy use of Rangen's property, uses which were necessary to perfect the Application. (Exh. 1014). Even if the Notice had referred to an intent to obtain title to Rangen's Bridge Diversion or other portions of Rangen's facility, the GWDs do not have the authority to accomplish such a taking.

7. The GWDs' Application was executed by "Thomas J. Budge, Attorney." At the time the Application was filed, there was no Power of Attorney or corporate resolution giving Mr.

Budge the authority to execute the Application on behalf of the GWDs. (*See*, Exh. 1000, 1004). No addresses for the Applicant GWDs were listed on the Application. (*Id.*)

8. The Water Master submitted a letter recommending denial of the GWDs Application. (Exh. 2042).

II. ADDITIONAL ISSUES ON APPEAL[1]

1. The GWDs' Application is speculative.

2. A water right cannot be perfected by mere delivery of water.

3. "Mitigation", by itself, without any identifying beneficial use does not describe a water right in a way that it can be evaluated or enforced.

4. The Application should have been denied on the additional basis that is was incomplete.

III. STANDARD OF REVIEW

Idaho Code § 67-5279 governs judicial review of agency decisions. The District Court shall affirm the agency:

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

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

[1] Rangen is not seeking a reversal of the Director's Decision on the GWDs Application. However, there are parts of the Director's Decision to which Rangen has issue. A party to an appeal may raise additional issues in its Response provided that party is not seeking any reversal of the agency decision. IAR 15(a).

done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung Ass'n of Idaho/Nevada v. State, Department of Agriculture,* 142 Idaho 544, 130 P.3d 1062 (2006), citing *Enterprise, Inc. v. Nampa City,* 96 Idaho 734, 536 P.2d 729 (1975).

The "agency shall be affirmed unless substantial rights of the appellant have been prejudiced." *I.C.* § 67-5279(4).

IV. ARGUMENT

A. The Director's conclusion that the application was filed in bad faith is supported by substantial evidence and his findings do not constitute an abuse of discretion.

The Director concluded that the Application was filed in bad faith. The Director found as follows:

> 26. The District's Application was filed in bad faith because, for a majority of the quantity of water sought to be appropriated, there is a threshold impediment to "completion of the project." To perfect a project for a water right, there inherently must be completion of works for beneficial use. The testimony of Lynn Carlquist quoted above demonstrates the Districts' intent at the time of filing the Districts' Application was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility the way Rangen has done for the last fifty years. The initial filing by the Districts did not contemplate any construction of works and completion of any project. Furthermore, even at this point, with respect to at least 8.0 cfs of the 12 cfs the Districts propose for appropriation, Rangen will continue to divert through its existing Bridge Diversion. There is no "project" and consequently cannot be a "completion of the project" for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use. The Districts' Application fails the bad faith test based on the threshold question of whether there will be a project, and whether there will be any construction of works for perfection of beneficial use.

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

The Director recognized the essential problem with the GWDs' Application. **The GWDs do not propose to do anything.** The GWDs do not propose to build diversion works or divert the water. Rangen will simply continue to divert the water at its Bridge Diversion as it has for over

50 years. The GWDs do not propose to convey the water anywhere. The water will continue to flow through Rangen's facility as it has for over 50 years. The GWDs do not propose to beneficially use the water. Rangen will continue to use the water to raise fish in its research hatchery as it has done for over 50 years.

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

> Q. And when I asked you last time [at your deposition], you told me that it was your intent it obtain the permit and then assign the permit to Rangen for us to perfect; correct?
>
> A. Well, that would be the easiest way for us to perfect it, if they would agree to that.
>
> Q. Okay. So you would be taking advantage of Rangen's existing fish facility that it built, correct, to do that?
>
> A. Yes.
>
> Q. You would be taking advantage of the diversion apparatus that Rangen has built and has had in place for 50 years to do that; correct?
>
> A. That's correct.
>
> (Tr. p. 75, l. 23-25; p. 76, l. 1-11).

The GWDs argue that there is nothing in the rules which requires actual "construction." *Districts' Opening Brief*, p. 16. This argument misses the point. There must be a proposed project to divert and beneficially use water that can be completed. The Application the GWDs filed did

not propose any such project. Essentially, the GWDs proposed to watch Rangen continue to divert and beneficially use the water. In this context, the conclusion that the GWDs did not have a "project" or that the Application did not contemplate a "completion of the project" is supported by the record.

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

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

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

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

> 15. Following oral argument on this issue, the Director expressed concern that the specific reference to Curren Tunnel as the source for Rangen's water rights might prevent a delivery call for any water diverted by Rangen from both springs located below Curren Tunnel and from Billingsley Creek. Whether Rangen's water rights authorize the diversion of water from Billingsley Creek became an issue of both fact and law in the Rangen Delivery Call. *See Source Order* at 6-7.

16. The Districts filed the Districts' Application with the Department on April 3, 2013, the day of oral argument for the Source Motion before the Director. . . .

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

20. In the Curtailment Order, the Director stated:

15. The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract: SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7s, $14E, Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E. A decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract. Ex. 1008 at 32.

21. On February 3, 2014, Rangen filed application to appropriate water nos. 36-17002. Application no. 36-17002 seeks a water right for 59 cfs. Application no. 36-17002 identifies the same point of diversion as the Districts' Application.

(R., Vol. 2, p. 353). Rangen's application for permit no. 36-17002 was approved on January 2, 2015, for 28.1 cfs for fish propogation, with a priority date of February 3, 2014. (R., Vol. 2, p. 353, FN4).

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

34. Approval of the Districts' Application would establish an unacceptable precedent in other delivery call proceedings that are or may be pending. In the Rangen Delivery Call, the Director determined that certain ground water users were causing material injury to Rangen by reducing flows from the Curren Tunnel and that junior-priority water rights would be curtailed if mitigation was not provided to Rangen. The Districts' [sic] originally proposed assigning the Permit to Rangen as part of IGWA's first mitigation plan. *See Amended Final Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order.* The Director noted at that time "IGWA's water right application could be characterized as a preemptive strike

> against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application." *Id.* While a race to file an application to appropriate water does not itself establish that the Districts' Application is not in the local public interest, the Districts' Application attempts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has been using for fifty years. The Districts' Application is the epitome of a mitigation shell game. The Districts' Application brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek. It is not in the local public interest to approve such an application.

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

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

For all these reasons, the Director's conclusion that the Application was filed in bad faith should be affirmed.

B. The Director's conclusion that the application does not satisfy the local public interest is supported by substantial evidence in the record.

The Director held that the Application was not in the local public interest. The "local public interest" is defined as "the interest that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." I.C. §42-202B. "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Shokal v. Dunn*, 707 P.2d 441, 450, 109 Idaho 330, 339 (Idaho 1985). In this case, the GWDs have urged a narrow definition of "local public interest" that is not supported by the definition under Section 42-203B(2), and ignores the

fact that the term "local public interest" can be defined broadly by the Director as set forth in *Shokal*.

In this case, the Director's rationale that this Application does not satisfy any mitigation requirements requires almost no additional comment. The Director concluded that allowing the GWDs to use the talus slope water for mitigation, the same water Rangen had been using for fifty (50) years, would not be in the local public interest.

> 34. **Approval of the Districts' Application would establish an unacceptable precedent in other delivery call proceedings that are or may be pending.** . . The Director noted at that time "IGWA's water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application." *Id.* While a race to file an application to appropriate water does not itself establish that the Districts' Application is not in the local public interest, the Districts' Application attempts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has been using for fifty years. **The Districts' Application is the epitome of a mitigation shell game. The Districts' Application brings no new water to the already diminished flows of Curren Tunnel or headwaters of Billingsley Creek.** It is not in the local public interest to approve such an application.

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

To reverse the Director's conclusion would allow juniors to satisfy their mitigation obligations without providing a single molecule of new water; while at the same time, allowing juniors to continue pumping water unabated to the detriment of senior water users. It is not in the local public interest to approve a water right for mitigation based upon the further appropriation of the already depleted water resource.

C. The GWDs' Application is speculative.

The Director did not rule on Rangen's speculation arguments "because the Director concluded that the Districts' Application was filed in bad faith." (R, Vol. 2, p. 362). Nonetheless, the Application is also speculative and void under Department rules. Under IDAPA 37.03.08.045.01.b, **"[s]peculation for the purpose of this rule is an intention to obtain a permit**

to appropriate water without the intention of applying the water to beneficial use . . . " (Emphasis added). The general rule regarding speculative applications for permits is that an appropriator must be the actual appropriator or it must have some agency relationship with the party who is actually appropriating the water. *Colorado River Water Conservation District v. Vidler Tunnel Water Company*, 594 P.2d 566 (Colo. 1979); s*ee e.g., Bacher v. State Engineer of Nevada*, 146 P.3d 793, 799 (Nev. 2006). The doctrine "addresses the situation in which the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does." *Id.* at 799, *citing Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164, 173 n.11 (Colo. 1988). Here, the GWDs are not the appropriators, and they have no agency relationship with Rangen to perfect the water right on their behalf.

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

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

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

Under this rule, the Court in *Lemmon* held that the "[l]ack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place for use thereof." Id. at 781. (Emphasis added). To the extent an application is filed without a possessory right in the place of use, the application is void.

Furthermore, as previously argued, the GWDs have no way of obtaining the type of possessory interest to take Rangen's bridge diversion or to place a pump station on Rangen's property, under their limited eminent domain authority under I.C. § 42-5224(13).

The GWDs argue that they have the ability to condemn an easement to use the existing Bridge Diversion or to condemn an easement to install its own head gate adjacent to the Bridge Diversion. *Districts' Opening Brief*, p. 15. There are several problems with this argument. First, the Districts never had a plan to install their own bridge diversion. Their Rule 40.05 Disclosures indicates that they intended to use the "existing head gate (the "bridge diversion") on Billingsley Creek." (R, Vol. 1, p. 92).

Second, as to delivering water using a pump from the bridge diversion pond, Wayne Courtney, testifying on behalf of Rangen at the hearing on the Application, stated that Rangen never had a pump station to the small raceways and never desired such a pump station. (Tr. p. 248, l. 7-18). Essentially, the GWDs seek to force Rangen to use a pump station it never had or never desired.

Finally, the GWDs' proposal that they can condemn either the existing bridge diversion or property to build a pump station ignores the GWDs limited eminent domain powers. The ability to condemn property is outlined under Idaho's condemnation statutes. Those statutes specify the three distinct property interests which may be obtained by eminent domain. These three interests are as follows:

> 7-702. ESTATES SUBJECT TO TAKING. The following is a classification of the estates and rights in lands subject to be taken for public use:
>
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.
>
> 2. An easement, when taken for any other use.

3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

I.C. § 7-702.

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

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

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

Finally, even if the GWDs had authority to take or occupy property, which they do not have, there was no showing in the record that the GWDs had taken the necessary steps to perfect a fee title or possessory interest in Rangen's property. IDAPA 37.03.08.040.05.e reads as follows:

> i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary **for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest.** Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.

> ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.

IDAPA 37.03.08.040.05.e. (Emphasis added).

Again, the POD and POU for the Application are located on Rangen's property. The GWDs did submit a Notice of Intent to Exercise the Power of Eminent Domain. (Exh. 1014). There is nothing in the Notice indicating that the GWDs intended to condemn property to build a pump station or to condemn Rangen's pre-existing bridge diversion at the head of Billingsley Creek to divert water it is been using since 1962.

For all these reasons, the Director's determination that the GWDs' Application was filed in bad faith should be affirmed for the additional reason that the Application was speculative.

D. A water right cannot be perfected by mere delivery of water.

The Director erred in finding that a water right can be perfected by the mere delivery of water. The Director found that that the POU for the GWDs' Application is where the "water is injected into Rangen's infrastructure."

> 13. The Hearing Officer correctly determined that, when, as here, a proposed mitigation use "involves diverting water from a separate source to deliver the water directly to a senior water right holder on a diminished source... mitigation occurs when water is injected into the infrastructure of the senior water right holder." *Preliminary Order* at 11. As the Hearing Officer explained, the mitigation use proposed by the districts will "accomplish mitigation by delivering water to Rangen at the Bridge Diversion and at the pipeline coming from the Rangen Box to the facilities on the south side of Billingsley Creek." *Id.* The appropriate place of use for the Districts' proposed mitigation is where water is delivered into the Rangen infrastructure. Those areas of delivery are included within the proposed place of use described in the Districts' Application.

(R, Vol. 2, p. 359).

The sole evidence at the hearing was that the beneficial use takes place in the raceways of Rangen's facility. The GWDs identified the raceways as the POU in its Application. As

previously indicated, the GWDs' own expert, Scott King, also testified that the POU takes place in the raceways. The Hearing Officer found that Mr. King testified "that the beneficial use of mitigation would occur throughout the raceways at the Rangen facility and that the mitigation beneficial use would end where water is returned to Billingsley Creek." (R, Vol. 2, p. 272).

Despite the evidence adduced during the hearing, the Hearing Officer relied on IGWA's post-trial briefing wherein IGWA argued that the mitigation takes place "at the point where water is delivered to Rangen." *Id.* In relying on IGWA's briefing, rather than the record, the Hearing Officer violated the Department's own procedural rules. Contested hearings on Applications are governed by the Department's Procedural Rules. "Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." IDAPA 37.01.01.712.01. Briefs are not evidence. *See*, IDAPA 37.01.01.600 – 606. The only evidence in the record is that the beneficial use occurs in the raceways.

Even if the Hearing Officer could conclude, as a matter of law, that the mitigation use occurs at the point where water is injected into Rangen's facility, such a ruling ignores fundamental principles of Idaho water law. The most fundamental law is that water must be used for a beneficial use, and that a water right is not obtained unless there is a diversion and application of water to a beneficial use. The Idaho Supreme Court in *United States v. Pioneer Irrigation Water District*, 144 Idaho 106, 113, 157 P.3d 600 (2007), stated:

> A common theme throughout [Idaho water law] is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger,* 36 Idaho at 598, 211 P. at 1086-87; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code.
>
> * * *

> Further, I.C. § 42-104 states, "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-201(1) provides in part: "All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise.... Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title." As previously noted, in order to obtain a licensed water right in Idaho one must prove that the water has been applied to a beneficial use. I.C. § 42-217. The districts act on behalf of the landowners within the districts to put the water to beneficial use. It is that beneficial use that determines water right ownership.

Id. at 144 Idaho 113.

In this case, under all well-established rules of appropriation, the mere delivery of water can never constitute a "beneficial use" of water. Whether or not "mitigation" can be considered a beneficial use, the mere delivery of water to a place of use is not a beneficial use of water. Idaho water law always speaks in terms of "delivery and use" of water. Without both delivery and use of water, a beneficial use never occurs. *Id.*; IDAHO CONS., Art. XV, Section 3; *Nielsen v. Parker*, 19 Idaho 727, 115 P. 488(1911); *Furey v. Taylor*, 22 Idaho 605, 127 P. 676 (1912); *Cantlin v. Carter*, 85 Idaho 179, 397 P.2d 761 (1964).

Finally, even if a water right could be perfected without any application to a beneficial use, the Director erred in concluding that the proposed mitigation is lawful. The Hearing Officer concluded that there were three types of "compensation mitigation." Again, without citation to any authority, it is anyone's guess how these three "compensation mitigation" uses were authorized or created. At any rate, the Hearing Officer concluded that the "compensation mitigation" proposed by the GWDs is the "first type" of compensation mitigation.

> The first type of compensation mitigation involves providing water directly to a senior water user owning water rights on a source that has been diminished by junior water users. Mitigation water is diverted from a separate source and delivered directly into the senior water user's system.

(R, Vol. 2, p. 271).

The water coming from the Martin Current Tunnel (MCT) and the water forming the headwaters to Billingsley Creek do not constitute separate sources of water. The water coming from the MCT, along with other springs located on the talus slope, ultimately form the headwaters of Billingsley Creek which is then diverted at Rangen's pre-existing bridge diversion. (Exh. 1016, page 5). This being the case, the water coming from the MCT and Billingsley Creek are not different sources of water. (R, Vol. 1, p. 102). Billingsley Creek is a single source of water, which is fed by spring sources located on the talus slope, one of which is the MCT. It is an impossible stretch to conclude that the water coming from Billingsley Creek, which is the source for this Application, is a "different source" of water than the MCT.

The GWDs propose to mitigate with water from the same diminished spring source of water (i.e. water coming from the talus slope, whether it be from the MCT or individual spring sources on the slope). Any finding that these are "separate sources" is not supported by any competent evidence.

E. "Mitigation", by itself, without any identifying beneficial use does not describe a water right in a way that it can be evaluated or enforced.

There must be a diversion and application of water to a beneficial use to perfect a water right. "Mitigation" does not describe a beneficial use. Rather it describes the motivation of the applicant for a water right. The word "mitigation" does not describe how a water right will be used in any manner. The failure to identify an actual use makes it impossible to evaluate an application for a permit under the Idaho Code Section 42-203A(5) factors. In order to evaluate the Application, more information is necessary. For instance, there is no way to tell from a description of mitigation whether the use of the water will be consumptive or not. Similarly, there is no way to tell when and if a water right application has been perfected without knowing how it will be used. The additional information that is needed is how the right would actually be used.

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

Q. Okay. Is it your opinion, then, all's they have to do is obtain unappropriated water under a permit and do nothing else and it's perfected?

A. No.

Q. Then how is this water right perfected?

A. The water right's perfected by using it for beneficial use within the facility.

Q. Okay. And you understand -- that's clear that's your testimony, that's how this water right gets perfected?

A. That's my understanding of how this water right would be perfected, yes.

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

A. Correct.

(Tr. p. 233-34).

The hearing officer's analysis of this Application illustrates the potential absurdity of allowing the beneficial use of a water right to be described as "mitigation." Although this Application was ultimately denied by the Director due to bad faith and the local public interest, the Application was initially granted by the hearing officer, but only for "mitigation." The Application stated proposed beneficial uses of "fish propagation" and "mitigation." The hearing officer analyzed both purported beneficial uses utilizing the factors in I.C. § 42-203A. The Hearing Officer's analyses for both "mitigation" and "fish propagation" assumed that the water would actually be used for fish propagation. Yet despite the fact that the manner in which the water would be used was identical, the hearing officer granted the water right for "mitigation," but denied

the water right for "fish propagation." (R., Vol. 2, p. 276.) The Director's *Final Order* in this case would have allowed this absurd result to stand in the absence of his finding with regard to bad faith and the local public interest.

The Director's findings regarding bad faith and the local public interest were correct and should be affirmed. Those findings, however, should have been unnecessary. Even if this Court were to reverse the District Court on both of those issues, the Director's denial of the Application should be affirmed on the alternative ground that "mitigation," by itself, is not a recognized purpose of use, and, such a right cannot be perfected. A water right where the motivation of the applicant is to mitigate must be evaluated and perfected in the same manner and under the same criteria as any other application to appropriate water for the actual beneficial use to which the water will be put.

F. The Application should have been denied on the additional basis that is was incomplete.

The Director concluded that the Application was complete. (R, Vol. 2, p. 360). The Districts' Application should not have been accepted because it was incomplete. The Application was not complete because there was no evidence that the Application was executed properly. IDAPA 37.03.08.035.01.d provides that all applications for a water right:

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

IDAPA 37.03.08.035.01.d (Emphasis added).

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

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

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

IDAPA 37.03.08.035.03.b (Emphasis added).

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

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

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

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

A GWD can only act through its Board of Directors. One of the specific powers of the Board of Directors is to "appropriate. . . water within the state. I.C. § 42-5224(8). The Board of

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

Instead of following all the procedures, the Department essentially excused the GWDs' lack of compliance on the basis that the Application was accepted by the Department when it was filed. The fact that the Department accepted the Application is not dispositive as to whether the Application was complete when it was filed.

For all these reasons, the Director's conclusion that the Application was complete must be reversed.

V. CONCLUSION

The Court should affirm the Decision of the Director in DENYING the GWDs' Application.

DATED this 23rd day of June, 2015.

BRODY LAW OFFICE, PLLC

By _____
Robyn M. Brody

HAEMMERLE LAW, PLLC

By _____
Fritz X. Haemmerle

MAY, BROWNING & MAY, PLLC

By _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 23rd day of June, 2015 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

Original to: SRBA District Court 253 3rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121	Hand Delivery ☒ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☐
Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.gibson@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Federal Express ☐ E-Mail ☒
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Federal Express ☐ E-Mail ☒
Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Federal Express ☐ E-Mail ☒

for J. Justin May