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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' REPLY TO IDWR AND RANGEN**
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 (the "Districts") submit this 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, in reply to the response briefs filed by Idaho Department of Water Resources ("IDWR") and Rangen Inc. ("Rangen") on June 23, 2015.

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REPLY

IDWR's response arguments are similar to arguments made by Rangen, but Rangen makes some additional arguments not made by IDWR. This reply first addresses arguments common to both IDWR and Rangen, then arguments unique to Rangen.

1. New construction is not a requirement for an appropriation to be made in good faith, but even if it were, the Application contemplates new construction.

The Director concluded that since part of the Districts' appropriation does not require new construction, the Application fails the good-faith requirement under Idaho Code § 42-203A(5). The Districts contend this conclusion was in error as a matter of law because new construction is not required for an appropriation to meet the good faith requirement under Idaho Code § 42-203A(5) and Rule 45.01.c of IDWR's Water Appropriation Rules[1] (the "Rules").[2]

In response, IDWR contends the plain language of Rule 45.01.c mandates new construction.[3] IDWR acknowledges that interpretation of an administrative rule should begin with the literal words of the rule and that such language should be construed in the context of the rule as a whole,[4] but argues that since "the words 'construct' and 'operate' are explicit in Rule 45.01.c.i." the rule makes new construction a requirement for any new water right. IDWR claims the Application does not meet the plain

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[1] IDAPA 37.03.08.45.01.c.

[2] Districts' Opening Br. at 16-17.

[3] IDWR Response Br. at 11.

[4] IDWR Response Br. at 11 (quoting *Mason v. Donnelly Club*, 135 Idaho 581, 586 (2001); *Rhodes v. Indus. Comm'n*, 125 Idaho 139, 142 (1993); *Thomas v. Worthington*, 132 Idaho 825, 829 (1999); *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011)).

language of this rule because it "proposes no construction or operation of a project for at least 8 cfs of the 12 cfs proposed for appropriation."[5] Rangen similarly contends that the Districts "do not propose to do anything."[6]

IDWR's and Rangen's arguments are unavailing. As explained below, the Districts' project includes new construction. Yet, even if it did not, Rule 45.01.c does not require new construction when read in context with the rest of the Rules. Further, construing the rule to require the appropriator to construct some new device or infrastructure would produce absurd results, and contradicts IDWR's practice of issuing water rights developed with existing infrastructure.

Finally, in the event this Court agrees that new construction is required to appropriate water, IDWR still erred by not approving the portion of the project using new construction and approving the remainder with a condition that requires new construction.

1.1 The Application proposes new construction.

The Application explicitly proposes the use of "Hydraulic pumps (size TBD)" as part of the diverting works.[7] These pumps are not in place; the Districts would need to build them.[8] Interestingly, Rangen discusses these proposed pumps while at the same time maintaining the Districts have proposed to do nothing.[9]

Since the Application contemplates construction of new pumps and related infrastructure, the position advanced by IDWR and Rangen must be that some new construction is not enough; rather, that every component

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[5] IDWR Response Br. at 11, 12.

[6] Rangen Response Br. at 6.

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

[8] Districts' Opening Br. at 18-19.

[9] Rangen Response Br. at 13.

of the project must utilize new construction. As explained below, the Rules when read as a whole do not mandate new construction at all, let alone that every component of the project utilize new construction.

1.2 When read as a whole, Rule 45.01.c does not require new construction for the appropriation to be made in good faith.

Rule 45.01.c is concerned with preventing people from applying for water rights "for delay or speculative purposes." It requires 1) "legal access to the property *necessary* to construct and operate the proposed project" or "the authority to exercise eminent domain authority to obtain such access," 2) that "[t]he applicant is in the process of obtaining other permits *needed* to construct and operate the project," and 3) that "[t]here are no obvious impediments that prevent the successful completion of the project."[10] The rule references construction, but does not explicitly state that new construction is mandatory.

Language from an administrative rule should be construed in the context of the rules "as a whole."[11] Here, the following "general provision" in the Rules is instructive:

> No person shall commence the construction of any project works *or* commence the diversion of the public water or trust water of the state of Idaho from any source . . . without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the Director . . . .[12]

Implicit in this is that an applicant may, upon the Director's approval, divert water without constructing new infrastructure.

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[10] IDAPA 37.03.08.045.01.c (emphasis added).

[11] *See Rhodes*, 125 Idaho at 142; *Verska*, 151 Idaho at 893.

[12] IDAPA 37.03.08.035.01.a (emphasis added).

A "plain, obvious and rational meaning"[13] of Rule 45.01.c when construed as a whole is that the appropriator must be able to obtain legal access and the permits required to perform any construction *necessary* to develop the water right, not that new construction is *always* necessary whether or not it is needed to divert water and apply it to beneficial use. The latter interpretation, which IDWR proposes, produces absurd results and contradicts IDWR's long history of approving water rights without new construction, as explained below.

1.3 Construing Rule 45.01.c to require new construction will produce absurd results.

If the Court finds ambiguity in the language of Rule 45.01.c, it should avoid the absurd results of an interpretation requiring new construction.[14]

The Idaho Constitution states: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied."[15] The gravamen are "divert" and "beneficial use." The mechanism for diverting water, as well as who owns the mechanism, are inconsequential as long as the appropriator has legal authority to use the diversion mechanism and to apply water to a beneficial use.

IDWR's proposed interpretation of Rule 45.01.c produces absurd results by requiring appropriators to build things even if it is entirely unnecessary to divert water and apply it to beneficial use.

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[13] *Mason*, 135 Idaho at 586.

[14] *See State v. Doe*, 155 Idaho 99, 102-03 (2013) ("Constructions of an ambiguous statute that would lead to an absurd result are disfavored.").

[15] Idaho Const., Art. 15, § 3.

1.4 IDWR and Rangen do not address the case law that allows new water rights to be appropriated using existing infrastructure.

The Districts' Opening Brief discussed two cases, *Portneuf Irrigating Co. v. Budge* and *Canyon View Irrigation v. Twin Falls Canal Co.*, wherein the Idaho Supreme Court held that an irrigation company could condemn the right to use another canal company's existing canal.[16] 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."[17] These cases require the Rules to be interpreted to allow water to be appropriated using existing structures, yet IDWR and Rangen are silent concerning these cases.

Other cases and statutes also support the Districts' ability to appropriate water without constructing new infrastructure. For example, Idaho courts have explained that when a landowner waters stock from a stream, he does not need to construct a new diversion structure beyond the existing flow of the stream.[18] And in *Bedke v. City of Oakley (In re SRBA)*, the Idaho Supreme Court held: "Because the Bedkes . . . have failed to show that they have gained a conveyance right in the City's pipeline, we conclude that the district court did not err when it adopted the special master's conclusion of law that the Bedkes' claimed water rights should be disallowed," indicating the Bedkes could have had a water right if they had the right to use the City's pipeline.[19]

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

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

[18] *Hulet*, 106 Idaho 37, 43-44 (Ct. App. 1983).

[19] *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 541 (2010).

By contrast, neither IDWR nor Rangen have cited a single case that suggests a water right cannot be appropriated unless it involves new construction.

1.5 Interpreting Rule 45.01.c to require new construction contradicts IDWR's historic practice.

IDWR has issued thousands of water rights where new construction was not involved. Most if not all "enlargement" water rights were appropriated using existing infrastructure; many irrigation rights were developed using existing headgates, canals, and ditches; and many municipal and industrial water rights were developed using existing infrastructure. Under IDWR's proposed interpretation of Rule 45.01.c, all of these water rights were developed in bad faith.

1.6 Even if new construction were required, IDWR should have approved the Application.

Idaho Code § 42-203A(5) instructs the Director to approve water right applications unless certain criteria are not met (sufficient water supply, etc.), in which case the Director may "reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions." Since IDWR admits that part of the Application proposes new construction, it was an abuse of discretion for the Director to not at least approve that part of the Application. Further, IDWR has offered no reason why it should not have approved the remainder of the Application with a condition that it utilize only new infrastructure.

2. The Director did not resolve a disputed factual matter concerning the Districts' intent to develop the permit, but rather ignored evidence that did not support his desired outcome.

The Director ruled that "the Districts' intent at the time of filing the District's Application was to simply obtain the Permit and assign it to

Rangen to perfect by utilizing the water from the Rangen facility," and that it had no intent of perfecting the right itself.[20] The Districts have argued this finding is not supported by the record *as a whole,* as required by Idaho Code § 67-5279(3), because the Director ignored clear, undisputed evidence that the Districts intended from the outset to construct project works and develop the permit themselves in the absence of Rangen accepting an assignment of the permit.[21]

Rangen responds that the Director's finding is supported by substantial evidence in the record. IDWR similarly argues that the Director merely resolved a conflict in evidence, and "the existence of conflicting evidence is not grounds for overturning the Director's decision."[22] There is a difference, however, between resolving conflicting evidence and failing to base a decision on the record as a whole. The former involves resolving genuine disputes of fact, while the latter ignores undisputed fact.

In this case, the Director had undisputed evidence before him that the Districts would either (a) "do a mitigation plan where [the Districts] would develop these and supply the water," or (b) "just assign the permit to [Rangen] for mitigation."[23] There is no evidence in the record that genuinely disputes this. Lynn Carlquist's honest admission that the Districts hoped to assign the permit to Rangen does nothing to undermine his testimony that the Districts were committed to perfect the right themselves if necessary.

The Director on one hand acknowledged the Districts' intent to develop the permit themselves, making a finding of fact that the

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

[21] Districts' Opening Br. at 17.

[22] IDWR Response Br. at 13.

[23] Tr. 44:19-45:1.

Application contemplates a pump station and other diversions structures, yet in the section discussing the Districts' intent he does not consider any possibility other than assigning it to Rangen.[24] Such conduct is not a resolution of conflicting evidence but a failure to consider the record *as a whole* and, therefore, violates Idaho Code § 67-5279(3).

In fact, even if the Director had perceived a genuine conflict in evidence (which is impossible under the record), he still erred by failing to make factual findings reconciling the supposed conflict. For example, in *Cooper v. Board of Professional Discipline of the Idaho State Board of Medicine*, an agency heard conflicting testimony as to whether a doctor engaged in a sexually exploitive relationship.[25] The agency ultimately found that the doctor engaged in such a relationship, but it made no finding as to the credibility of testimony to the contrary.[26] Because it did not resolve the discrepancies in the testimonies but merely relied on the favorable testimony, the Court concluded that the agency's finding was "not supported by substantial evidence on the record *as a whole* as required by I.C. § 67-5279(3)."[27]

In light of *Cooper*, IDWR's response argument that the Director was merely resolving disputes of fact must additionally be rejected because the Final Order does not 1) acknowledge a conflict in the evidence or 2) resolve such a conflict through appropriate findings.

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[24] *See* Districts' Opening Br. at 17-20.

[25] *Cooper v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 134 Idaho 449, 451 (2000).

[26] *Id.* at 457 (emphasis added).

[27] *Id.*

3. In addressing the local public interest, the Director is confined to analyzing the effects of the proposed use on the water resource.

The Director found that the Application was not in the local public interest because it would form what he deemed unacceptable precedent. He also gave several reasons why it would be unfair to Rangen to approve the Application.[28] The Districts have argued that these considerations go beyond the statutory scope of the public interest analysis because they do not address "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," as defined in Idaho Code § 42-202B(3).[29]

Although the Districts rely upon the statutory definition of "local public interest," Rangen argues that the Districts "have urged a narrow definition," and that the Director has broad discretion to consider a wide array of factors as part of the "local public interest" analysis, citing *Shokal v. Dunn*, 109 Idaho 330, 339 (1985).[30] However, when *Shokal* was decided in 1985, the local public interest was broadly defined under Idaho Code § 42-403A(5) as "the affairs of the people in the area directly affected by the proposed use."[31] The *Shokal* decision recognized a variety of factors that could be related to the general "affairs of the people," such as the "economic effect" of the appropriation, the "loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation," the "effect [of the appropriation] upon access to navigable or public waters," or "the intent and ability of the applicant to complete the appropriation."[32] Given the wide variety of

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

[29] Districts' Opening Br. at 20-21 (quoting Idaho Code § 42-202B(3)).

[30] Rangen Response Br. at 10-11.

[31] *See* 1994 Idaho Sess. Laws 64.

[32] *Shokal v. Dunn*, 109 Idaho 330, 338 (1985).

potential factors to consider, the decision held that "[t]he determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion."[33]

This changed in 2003 when the Idaho Legislature amended the definition of "local public interest" to more narrowly define it 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*."[34] The Legislature deliberately removed from consideration the sweeping factors recognized in *Shokal*.

IDWR does not dispute the current definition of "local public interest" but asserts the Director did consider the Application's effect on the public water resource.[35] The rationale cited by the Director, however, go well beyond the effects of the Application on Billingsley Creek.

The Director found a violation of the local public interest on the basis of 1) "unacceptable precedent [set by the Application] in other delivery call proceedings;" 2) the Districts acting "preemptive[ly]" to prevent Rangen from applying for the same water; 3) that the "Application attempts to establish a means to satisfy [a] required mitigation obligation to Rangen" with water Rangen was using without authorization; and 4) the District's use of "their eminent domain as a vehicle to obtain a water right for mitigation wholly located on land owned by Rangen."[36]

While these concerns apparently offend the Director's sense of fairness, they go well beyond "the effects of such use on the public water

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[33] *Id*. at 339.

[34] 2003 Idaho Sess. Laws 298 (emphasis added). Following this amendment, Idaho Code § 42-403A(5) now references Idaho Code § 42-202B for the definition of "local public interest."

[35] IDWR Response Br. at 15.

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

resource."[37] Specifically, 1) the Final Order does not explain how what precedent is purportedly unacceptable and how it will effect Billingsley Creek in other delivery call cases; 2) the Districts' having submitted its application to appropriate Billingsley Creek before Rangen submitted its own application is precisely what the prior appropriation doctrine encourages ("first in time is first in right"); 3) the fact that Rangen had been using Billingsley Creek without a valid water right is irrelevant, except to demonstrate that water is available to appropriate under the Application; and 4) the Director does not decide what an appropriate use of eminent domain is; judges do.

It is simply not appropriate for the Director to consider who will appropriate water later in time if an application is denied, and then play favorites by claiming the prior application is not in the public interest based on subjective notions of fairness. The unavoidable reality is that the Districts' use of Billingsley Creek under the Application will have no different effect on Billingsley Creek than Rangen's use of water under its later-priority application for permit.

The Director also erred by considering that by denying the Application he would force the Districts to add water to Billingsley Creek from another source. would be forced to do if he denied the Application. Whatever benefits there may be to adding water to Billingsley Creek, it is not a valid basis for finding the Application is not in the local public interest. Again, the Director's misguided legal analysis is based on a subjective sense of fairness, not the statutory scope of the local public interest under Idaho Code § 42-202B(3).

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[37] Idaho Code § 42-202B.

4. Rangen's speculation argument is without merit.

Under Idaho Code § 42-203A(5)(c), the Director can deny an application that "is not made in good faith, [or] is made for delay or speculative purposes." The Final Order does not conclude that the Application was speculative,[38] but Rangen now argues the Director's denial of the Application should be affirmed on the basis it is speculative.[39]

As explained below, this Court should reject Rangen's speculation argument because the Director did not make a finding as to speculation, and this Court should not engage in fact-finding. Even if the Court were to make a finding as to speculation, the Districts' Application is not speculative because (1) the Districts have a mitigation obligation to Rangen; (2) Idaho law does not require a current interest in the point of diversion or place of use; and (3) the Districts' condemnation powers are sufficient for the Application.

4.1 This Court should not entertain Rangen's request to make factual findings regarding speculation.

If a factual finding as to a disputed issue needs to be made, this is for the trier of fact, "not for an appellate court."[40] Here, it is the Director's role to determine whether the Districts had "an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial

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[38] Agency R., Vol. 2, p. 362.

[39] Rangen Response Br. at 15.

[40] *Ustick v. Ustick*, 104 Idaho 215, 223 (Ct. App. 1983) (declining to derive inferences from the evidence, since this is a role of finder of fact); *see also Grant v. Comm'r of Corr.*, 87 Conn. App. 814, 817, 867 A.2d 145, 148 (2005) ("It is well known that appellate courts do not make findings of fact . . . ." (quoting *State v. Pagan*, 75 Conn. App. 423, 431, 816 A.2d 635, 640 (2003)); *State v. Sykes*, 840 P.2d 825, 835-36 (Utah Ct. App. 1992) ("[I]t is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing and hearing the witnesses testify." (quoting *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)).

use with reasonable diligence."[41] Intent is a factual determination for the trier of fact.[42] In making this determination, the Rules require the fact-finder to judge "the substantive actions that encompass the proposed project."[43] The Court may remand factual issues to the agency for further fact-finding, but it would be improper for the Court to engage in fact-finding itself.[44] Thus, if the Court reverses the Director's findings regarding bad faith and the local public interest, a finding of speculation is not a viable alternate grounds for affirming the Final Order an appeal.

4.2 The Application is not speculative because the Districts reasonably anticipated a mitigation obligation to Rangen.

If this Court deems it proper to engage the fact-finding process concerning speculation, Rangen's arguments still must be denied.

Rangen cites a Colorado case, *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*, 197 Colo. 413, 418 (1979), for the proposition that an applicant must have an agency or contractual relationship with the party who actually beneficially uses the water. However, in addition to this case being non-binding, the facts here are clearly distinguishable.

In that case, a water right application was denied on the basis that "water rights are sought here on the assumption that growing population will produce a general need for more water in the future. But [the applicant] has no contract or agency relationship justifying its claim to represent

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[41] IDAPA 37.03.08.045.01.c.

[42] *See Krepcik v. Tippett*, 109 Idaho 696, 699 (Ct. App. 1985); *Barrett v. Barrett*, 149 Idaho 21, 24 (2010).

[43] IDAPA 37.03.08.045.01.c.

[44] *See* Idaho Code § 67-5276(1)(a).

those whose future needs are asserted."[45] By contrast, at the time the Districts' Application was filed they were in the midst of a delivery call case, facing a potential mitigation obligation.

This Court's recent *Memorandum Decision and Order* in *Rangen v. IDWR*, Twin Falls County Case No. CV-2014-4970 (June 1, 2015), requires junior groundwater users must have mitigation plans approved and implemented *before* the Director makes a finding of material injury in a delivery call case. This requires juniors to appropriate water rights for mitigation in anticipation of future mitigation obligations.

Accordingly, the hearing officer properly concluded:

> Rangen filed its pending delivery call against the Districts in December 2011. Therefore, at the time Application 36-16976 was filed, there was a pending water call against the Districts. The Districts should have recognized that some amount of material injury was occurring at the Rangen facility due to upstream ground water pumping, regardless of whether the Department had made a formal finding of material injury. The Districts' future mitigation obligation was reasonably foreseeable. Therefore, the Districts could pursue measure to mitigate the apparent injury which was already occurring at the Rangen facility at the time the application was filed.[46]

Based on the circumstances at the time the Application was filed, Rangen's speculation argument must be denied.

4.3 *Lemmon* supports the Districts' mitigation to Rangen.

Rangen next argues that mitigation water rights cannot be acquired unless the appropriator has a possessory interest in the land on which the

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[45] Conversely, the "anti-speculation" rule did not apply in *Bacher v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1120 (2006), where the applicant acted as an agent for the party who would apply the water to beneficial use.

[46] R. Vol. 2, p. 274.

mitigation will be applied to use by the senior.[47] Rangen cites *Lemmon v. Hardy*, 95 Idaho 778, 780, 781 (1974), which states that "a water right initiated by trespass on private property is invalid" and that "[l]ack of a possessory interest in the property designated as the place of use is speculation."[48]

Lemmon is clearly distinguishable. There, the applicants sought to appropriate water for fish propagation, but were exploring options as to where they would lease land to rear fish.[49] Here, the Application specified the place of use, and the Districts have legal authority to condemn easements for mitigation purposes. The *Lemmon* decision explicitly acknowledges a possessory interest is not necessary if it can be acquired through condemnation, as held in *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144 (1912), and *Bassett v. Swenson*, 51 Idaho 256 (1931).

4.4 The Districts' condemnation powers enable them to accomplish the proposed projects under the Application.

As part of its speculation arguments, Rangen directs several attacks on the Districts' condemnation powers and the proposed uses thereunder.

It first claims the Districts never had a plan to install their own diversion since their Rule 40.05 Disclosures indicated they intended to use the Bridge Diversion.[50] This argument is without merit since Idaho law allows the use of eminent domain to condemn the use of existing infrastructure.[51]

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[47] Rangen Response Br. at 12.

[48] *Id.*

[49] *Lemmon*, 95 Idaho at 778.

[50] Rangen Response Br. at 13.

[51] The Districts' do have the power to build a separate diversion structure next to the Bridge Diversion; however, building such a structure is unnecessary in light of the ability to condemn an easement to use the Bridge Diversion.

Rangen next states it "never had a pump station to the small raceways and never desired such a pump station."[52] If anything, this argument casts doubt on Rangen's claimed shortage of water to the small raceways. Regardless, injury has been found, IGWA's members have been ordered to deliver mitigation water to the small raceways, and the pump station contemplated by the Application will do just that.[53]

Next, Rangen argues that the Districts' limited condemnation powers prevent it from pursuing the Application.[54] It suggests a narrow view of easements that requires the Districts to obtain a fee simple interest; however, under Idaho law an easement allows a party to build and operate infrastructure,[55] including things like "diversion works, pumping plant, transformer station and pumping house."[56]

Finally, Rangen argues that even if the Districts have the necessary condemnation authority, the Districts' Notice of Intent to Exercise the Power of Eminent Domain (the "Notice") is legally deficient.[57] However, even if the Notice were deficient (which it is not), it would not be a basis to deny the Application because such Notice is legally required only when "acquir[ing] a parcel of real property *in fee simple*,"[58] not the easements the Districts seek. The Rules require only that the Districts take "appropriate action," which the Districts have done by filing a condemnation action.[59]

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[52] Rangen Response Br. at 13.

[53] *See* R. Vol. 1, pp. 94, 102; R. Vol. 2, p. 349.

[54] Rangen Response Br. at 13-15.

[55] *See, e.g., Canyon View Irr.*, 101 Idaho at 606.

[56] *Quinn v. Stone*, 75 Idaho 243, 244 (1954).

[57] Rangen's Response Br. at 14-15.

[58] *See* Idaho Code § 7-707 (Emphasis added).

[59] IDAPA 37.03.080.05.e.1; Pursuant to Idaho Rule of Evidence 201(d), the Districts respectfully ask that the Court take judicial notice of the documents filed in Gooding

Rangen's arguments attacking the Districts' condemnation powers do not address speculation, are without merit, and do not serve as an alternate basis for affirming the Director's Final Order.

5. The Director properly concluded that mitigation is accomplished by delivering water to the senior user.

Rangen makes an interesting argument regarding how mitigation water is put to beneficial use. It claims the Director erred by concluding mitigation occurs by delivering water into Rangen's infrastructure because evidence in the record suggested that beneficial use occurred in Rangen's raceways, not upon delivery.[60] Rangen claims this determination violated IDAPA 37.01.01.712.01, which states: "Findings of fact must be based exclusively on the evidence in the record . . . ." It contends the Hearing Officer erred in considering the Districts' argument that the place of use is where the Districts deliver Rangen the water.[61]

Since Rangen has not appealed the Final Order, there is no basis for it to raise this as an issue in its response brief. Nonetheless, suffice it to say that the question of whether a mitigation beneficial use is accomplished by delivering water to the senior to use is a legal question, and the Hearing Officer (and the Director) was well within his authority to consider IGWA's legal arguments concerning the same.[62]

Rangen next argues that even if this is a law issue, the Director's conclusion ignores "[t]he most fundamental law [] that water must be used for a beneficial use, and a water right is not obtained unless there is a

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County Case No. CV-2015-123, including: 1) the Verified Complaint filed on March 23, 2015; 2) the Motion for Possession and Memorandum

[60] Rangen Response Br. at 15.

[61] Rangen Response Br. at 16.

[62] *See* R. Vol. 2, p. 359-60 (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011)).

diversion and application of water to a beneficial use."[63] It further contends: "Without both delivery and use of water, a beneficial use never occurs."[64] The Districts' post-hearing brief contains an adequate response to this argument, and the Districts incorporate that analysis here by reference.[65] The Districts also concur with the Hearing Officer's and the Director's analyses of this issue.[66]

6. The Application provided sufficient information to evaluate and enforce a water permit.

Rangen similarly argues that the Application should be denied since it does not add words to "mitigation" to describe how it will be used, which Rangen contends makes the right impossible to evaluate or enforce.[67] Specifically, Rangen argues "there is no way to tell if a water right application has been perfected without knowing how it will be used," and "there is no way to tell from the description of mitigation whether the water right will be consumptive or not."[68]

Of course, the same argument could be made with respect to a water right appropriated for industrial or commercial purposes. But such rights do not list the beneficial use as, for example, "industrial use for potato processing plant" or "industrial use for fabrication;" it is simply "industrial." In each instance, interested parties must review the rest of the application, and may even need to participate in the proceeding, if they want to know the specifics of how water will be used under the application.

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[63] Rangen Response Br. at 16.

[64] Rangen Response Br. at 17.

[65] R. Vol. 2, pp. 228-30.

[66] R. Vol. 2, pp. 272-73, 359-60.

[67] Rangen Response Br. at 18.

[68] Rangen Response Br. at 18.

Here, the Application explains that "[m]itigation water will be delivered to Rangen for fish propagation purposes," and it identifies Rangen's water rights: "36-2551 and 36-7694."[69] It is no mystery to Rangen or to the world that water will be delivered to Rangen for use in its fish hatchery.

7. Rangen has not appealed the Hearing Officer's determination that Martin-Curren Tunnel and Billingsley Creek are separate sources of water.

As part of its mitigation analysis, Rangen argues the Hearing Officer erred when it found that the Martin-Curren Tunnel and Billingsley Creek were separate sources of water.[70] Again, Rangen has not appealed this ruling. Further, the issue has already been decided by this Court in other proceedings.

8. The Application was complete.

Rangen argues that the Application was incomplete because it was not signed by the Districts but rather their attorney.[71] Once again, Rangen has not appealed this issue. Notwithstanding, the Districts addressed this argument in their post-hearing brief and incorporate here by reference the analysis found therein.[72] The Districts also concur with the Hearing Officers' and Directors' analysis on this issue.[73]

9. Rangen does not have standing to challenge the Districts' approval of the Application, nor is this the proper forum.

Within its argument that the application was incomplete, Rangen also contends that Districts did not properly approve the Application because,

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[69] R. Vol. 1, p. 2.

[70] Rangen Response Br. at 18.

[71] Rangen Reponse Br. at 20.

[72] R. Vol 2, pp. 221-25.

[73] R. Vol. 2, pp. 275-76, 360-61.

under Idaho Code § 42-5223(3), boards of directors in ground water districts "can only act through regular monthly meetings or special meetings" and that if they do not, such acts are null and void pursuant to Idaho Code § 67-2347(6), part of Idaho's Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347.[74] This argument should also be ignored since Rangen did not appeal this issue. Moreover, there is no evidence in the record to support it, and Rangen does not have standing to challenge the resolutions passed by the Districts approving the Application. Under Idaho's Open Meeting Law, only a person "affected by" a failure to comply with the law has standing to challenge it.[75] "[T]he plaintiff must show that a harm or peril personal to the plaintiff is caused by the agency's actions."[76] "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing."[77]

Further, even if Rangen did have standing, it would need to challenge the conduct via "a civil action in the magistrate division of district court," as required under Idaho's Open Meeting Law.[78] Raising this issue for the first time on appeal is not appropriate.[79]

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[74] Rangen Response Br. at 22-23. These specific provisions of Idaho's Open Meeting Law were repealed effective July 1, 2015, but they were in force at all relevant times.

[75] Idaho Code § 67-2347(6); *see also Arnold v. City of Stanley*, 158 Idaho 218, __ (2015) (recognizing that Idaho Code § 67-2347(6) "expressly provides standing only to those affected by the violation of the open meeting law").

[76] *Rural Kootenai Org. v. Bd. of Comm'rs*, 133 Idaho 833, 841 (1999), *overruled on other grounds in Smith v. Wash. Cnty.*, 150 Idaho 388, 390, 247 P.3d 615, 617 (2010).

[77] *Student Loan Fund v. Payette Cnty.*, 125 Idaho 824, 828 (Ct. App. 1994).

[78] Idaho Code § 67-2347(6).

[79] *Id.* And even if Rangen now wished to declare the Districts' conduct null and void, it had to do so "within thirty (30) days of the time of the decision or action that results . . . from a meeting that failed to comply with [Idaho's Open Meeting Law]." This time has well passed. Without compliance with these provisions, Rangen cannot seek to declare the Districts' conduct null and void. "If actions in violation of the open meeting laws were void without a challenge, the provisions of I.C. Section 67-2347(4) would be meaningless." *Petersen v. Franklin Cnty.*, 130 Idaho 176, 181 (1997).

CONCLUSION

Based on the foregoing, the Districts respectfully urge this Court to grant the relief requested in the Districts' Opening Brief.

DATED this 13th day of July, 2015.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

Randall C. Budge
T.J. Budge

CERTIFICATE OF SERVICE

I hereby certify that on this 13TH day of July, 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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