**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 THE Director of the Idaho Department of Water Resources,

Respondents,

and

RANGEN, INC.,

Intervenor.

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

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Case No. CV-2015-083

**MEMORANDUM DECISION AND ORDER**

## I.

## STATEMENT OF THE CASE

### A. Nature of the case.

This case originated when the North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District (collectively, "Districts") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The order under review is the Director's *Final Order Denying Application* entered on February 6, 2015 ("*Final Order*"). The *Final Order* denies an application for permit to appropriate water filed by the Districts. The Districts assert that the Director abused his discretion and exceeded his authority in the *Final Order*, and request that this Court set it aside and remand for further proceedings.

### B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water filed by the Districts. The application was filed on April 3, 2013. R., p.1. It seeks to appropriate 12 cfs of water from unnamed springs and Billingsley Creek for purposes of mitigation for irrigation and fish propagation. *Id.* The application was submitted in response to a delivery call filed by Rangen, Inc. ("Rangen") in December 2011. R., p.351; Ex.1008, p.1. In that call, Rangen alleged that it is short water under two senior rights due to junior ground water use, and sought the curtailment of various of the Districts' members. *Id.* The stated intent of the Districts is to use the appropriation as a potential source of mitigation for material injury resulting from the call:

> The . . . Districts [will use] this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain in the event that the Director finds Rangen to be materially injured and orders junior groundwater users to provide mitigation or be curtailed. Mitigation water will be delivered to Rangen for fish propagation purposes. The . . . 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.

R., p.2.

On January 19, 2014, the Director issued a curtailment order in the call proceeding.[1] Ex.1008. He concluded that Rangen's senior rights are being materially injured by junior

[1] The term "curtailment order" as used herein refers to the Director's *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*, dated January 29, 2014. Ex.1008. The

ground water pumpers. *Id.* The order provided for the curtailment of certain junior ground water rights that divert from the Eastern Snake Plain Aquifer, including rights held by various of the Districts' members. *Id.* at p.42. The Director instructed, however, that affected juniors could avoid curtailment if they proposed and had approved a mitigation plan that complied with certain specifications. *Id.* Following the issuance of the curtailment order, the Districts amended their application for permit. R., pp.14-17 & 83-86. Among other things, they amended the proposed "mitigation for irrigation" purpose of use to simply "mitigation." R., p.83. The Districts again informed the Director of their intent to use the appropriation as a potential mitigation source in response to the Rangen call. R., p.84.

Meanwhile, Rangen filed a competing application for permit with the Department on February 3, 2014.[2] Ex.2001. Rangen's application seeks the appropriation of 59 cfs of water from unnamed springs tributary to Billingsley Creek for fish propagation purposes. *Id.* Rangen's application is competing in nature as against the Districts' in that it seeks to appropriate from the same source of unappropriated water and from the same point of diversion. *Id.* Additionally, Rangen filed a protest to the Districts' application on March 7, 2014. R., pp.44-55. Rangen asserted that the application should be denied on the grounds, among others, that the proposed points of diversion and places of use are located on property owned by Rangen. *Id.* Rangen informed the Department that it has not granted the Districts permission to enter its property for purposes of perfecting the water right. *Id.* The protest also challenged the ability of the Districts to gain access to Rangen's property via use of eminent domain to perfect the right. *Id.*

A hearing on the Districts' application was held before the Department on September 17, 2014. Department employee James Cefalo acted as hearing officer. R., p.130. On November 18, 2014, the hearing officer issued his *Preliminary Order Issuing Permit* ("*Preliminary Order*"). R., pp.263-280. He found that the Districts' application was made in good faith, did not conflict with the local public interest, and satisfied all other pertinent statutory criteria. *Id.* He ordered that application be approved with certain conditions, and then issued Permit to

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Director's curtailment order is not at issue in this proceeding, but was previously addressed by this Court on judicial review in Twin Falls County Case No. CV-2014-1338.

[2] On January 2, 2015, Rangen's application for permit was approved for 28.1 cfs for fish propagation with a priority date of February 3, 2014. The Department's approval of Rangen's application for permit is not at issue in this proceeding.

Appropriate Water No. 36-16976 in the name of the Districts. R., pp.276, 281-282. The Permit authorized the Districts to develop 12 cfs of water from Billingsley Creek for mitigation purposes under an April 3, 2013, priority date, subject to conditions. R., pp.281-282. For instance, the Permit required that "[u]se of water under this right shall be non-consumptive," and that the "right shall be junior and subordinate to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses . . . ." *Id.* Under the Permit, the Districts had until December 1, 2019, in which to submit their proof of application of water to beneficial use to the Department. R., p.281.

Rangen filed exceptions to the hearing officer's *Preliminary Order*. R., pp.283-285. On February 6, 2015, following briefing by the parties, the Director issued his *Final Order*. R.,pp.349-368. He overturned the decision of the hearing officer and ordered that the Districts' application be denied. *Id.* The Director based the denial on two grounds – that the application was filed in bad faith, and that the application was not in the local public interest. R., pp.362-364. On March 5, 2015, the Districts filed the instant *Petition for Judicial Review*, asserting that the Director abused his discretion and exceeded his authority in his denial of their application. The case was reassigned by the clerk of the court to this Court on that same date.[3] On March 27, 2015, the Court entered an *Order* permitting Rangen to appear as an intervenor. The parties subsequently briefed the issues raised on judicial review. A hearing on the *Petition* was held before this Court on July 20, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or July 21, 2015.

## II.
## STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds

[3] The case was reassigned to this Court pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

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. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

## III.

## ANALYSIS

An analysis of the nature presented here must begin with the simple guarantee that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const., Art. XV § 3. It is against this long-standing constitutional tenet that the Director's *Final Order* is evaluated. While the Director has the discretion to deny an otherwise complete application to appropriate unappropriated water, his discretion is not unbridled. It is limited to those instances where the proposed use is such:

> (a) that it will reduce the quantity of water under existing water rights, or
> (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or
> (c) 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, or
> (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or
> (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or
> (f) that it is contrary to conservation of water resources within the state of Idaho, or
> (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.

I.C. § 42-203A(5). In this case, the Director denied the Districts' application on the grounds that it is not made in good faith and is not in the local public interest. The Districts argue that the Director abused his discretion and/or exceeded his authority on both grounds. For the reasons set forth below, this Court agrees.

**A. The Director's determination that the Districts' application is made in bad faith is set aside and remanded for further proceedings as necessary.**

An application for permit may be denied "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." I.C. § 42-203A(5)(c). The statute does not define the term "good faith." However, the Department's administrative rules provide criteria for evaluating good faith. They instruct that "[t]he criteria requiring that the Director evaluate whether an application is made in good faith . . . requires an analysis of the intentions of the applicant *with respect to the filing and diligent pursuit of application requirements*." IDAPA 37.03.08.045.01.c. (emphasis added). The term "application requirements" means those requirements set forth in IDAPA 37.03.08.035. The rules instruct further that "[t]he judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project." *Id.* They then state that 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, has the authority to exercise eminent domain authority to obtain such access, or in the in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. . . .; and
>
> 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.

IDAPA 37.03.08.045.01.c.

Under Idaho law, statutory interpretation "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). If the statutory language is unambiguous, "the clearly expressed intent of

the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *St. Luke's Reg. Med. Ctr. v. Bd. of Comm'rs of Ada County*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009). Administrative rules are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011).

The plain language of IDAPA 37.03.08.045.01.c. requires the Director to engage in an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The criteria set forth under parentheses (i), (ii) and (iii) of the rule are intended to assist the Director in that analysis. Namely, an applicant must establish that there is no obvious impediment (i.e., lack of legal access, lack of necessary permits, etc.) that would unduly hinder him in the diligent pursuit of the perfection of the application for permit. If such impediment exists, then the intentions of the applicant may lack the good faith contemplated by the rule. The Director may then, in his discretion, deny the application, and in so doing avoid tying up unappropriated water under a permit that cannot be perfected due to some obvious impediment.

In this case, the Director found the Districts' application to be made in bad faith. R., p. 362. The legal impediment relied upon by him is his finding is that the application "did not contemplate any constructions of works and completion of any project." *Id.* He reasoned that an application for permit lacking a proposal for the construction of project works cannot legally be perfected on the grounds that "[t]o perfect a project for a water right, there inherently must be completion of works for beneficial use." *Id.* The Director thus found that Districts' application cannot be legally perfected because there are no proposed project works through which water may be diverted and put to beneficial use. *Id.* The term "project works" is defined as "[a] general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use." IDAPA 37.03.08.010.14.

The Court finds that the Director's finding is not supported by the record. The Districts' application proposes to divert water from two separate points of diversion via two separate project works. R., p.354. Of the 12 cfs applied for, the application proposes diverting 4.0 cfs from Billingsley Creek via the construction and implementation of a pump station. R., pp.354-355.[4] The pump station would pump the water into a pipe connecting to an already existing pipe

[4] The Director's good faith analysis does not appear to apply to this point of diversion, as it clearly contemplates the construction of new diversion works to implement the proposed pump station.

that conveys water from Rangen's authorized source to its fish propagation facilities. *Id.* It is undisputed that this first diversion contemplates the construction of project works, as the Districts would need to develop the pump station and pipeline to apply the water to its intended use. *Id.* The remaining 8.0 cfs is proposed to be diverted through an existing diversion work already located on Billingsley Creek known as the Bridge Diversion. *Id.*; R., p.350. The record establishes that the Bridge Diversion already has the ability to supply water from Billingsley Creek to Rangen's fish propagation facilities. *Id.* Both the proposed pump station and the Bridge Diversion are clearly "project works," as the term is defined by the Department's administrative rules. They are both "diversion works . . . which may be used to apply the water to the intended use." IDAPA 37.03.08.010.14. Therefore, the Director's finding that the application contains no project works through which water can be diverted and applied to beneficial use is not supported by the record.

It appears that the Director's real problem with the application, at least as it applies to the 8.0 cfs, is that the Districts did not propose the construction and development of new project works. Rather, they simply proposed using the pre-existing Bridge Diversion. The Director's interpretation of the good faith requirement as necessitating such construction in order to perfect a water right is contrary to law. The perfection of a water right requires the diversion and application of water to beneficial use. *See e.g., U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106,110, 157 P.3d 600, 604 (2007). If such diversion and application to beneficial use can be accomplished using pre-existing diversion works, there is simply no further requirement that *new* or *additional* diversion works be constructed. As long as water can be diverted an put to beneficial use, the question of whether it will be diverted and applied via the use of pre-existing diversion works, or diversion works to be newly constructed is inconsequential. Interpreting IDAPA 37.03.08.045.01.c. to contain a new construction or project requirement in order to perfect a water right is contrary to Idaho water law, and conflicts with the constitutional guarantee that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const., Art. XV § 3.

The Director's interpretation also leads to absurd results. *See.e.g., Jasso v. Camas County*, 151 Idaho 790, 798, 264 P.3d 897, 905 (2011) ("[c]onstructions that lead to absurd or unreasonably harsh results are disfavored"). There are many instances in which a prospective water user is able to divert water and apply it to a beneficial use using pre-existing project works.

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

With respect to the criteria set forth in IDAPA 37.03.08.045.01.c.(i), (ii) and (iii), the record establishes that the Districts have "the authority to exercise eminent domain authority to obtain such access" necessary to construct and operate the proposed project. The applicants are ground water districts formed under Chapter 52, Title 42, Idaho Code. R., p.355; Tr., pp.15-18. Idaho Code § 42-5224(13) grants them "the power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of the mitigation power herein granted. . . ." The record does not establish that any other permits are necessary to construct and operate the project proposed by the application, and the Director's *Final Order* does not find that the Districts have failed to pursue any necessary permits. Last, aside from the lack of a proposal for the construction of new project works, which this court addressed, the Director did not find any other obvious impediment that will prevent the successful completion of the project. Therefore, the Director's determination that the Districts' application is made in bad faith is set aside and remanded for further proceedings as necessary.

**B. The Director's determination that the Districts' application is not in the local public interest is set aside and remanded for further proceedings as necessary.**

An application for permit may be denied where the proposed use is such "that it will conflict with the local public interest as defined in section 42-202B, Idaho Code." I.C. § 42-203A(5)(e). The term "local public interest" is defined 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." I.C. § 42-202B(3).

**i. Historical context.**

A bit of historical context is necessary to understand the Director's analysis on this issue. In December 1997, the SRBA District Court entered *Partial Decrees* for water right numbers 36-2551 and 36-7694 in favor of Rangen. Ex.1065 & 1067. In December 2011, Rangen filed a delivery call under those rights, alleging it is short water due to junior ground water use. Ex.1008, p.1. In that proceeding, an issue arose as to the proper scope and extent of the call. Ex.1008, pp.6-7. Namely, whether Rangen's call was limited to that water which emanates from the Martin-Curren Tunnel itself, or whether Rangen could more broadly call for that amount of water that emanates from the greater spring complex forming the headwaters of Billingsley Creek. *Id.* Resolution of the issue required an interpretation of Rangen's *Partial Decrees* to determine from which sources and points of diversion Rangen is lawfully permitted to divert.

The Director, and subsequently this Court, found that the plain language of Rangen's *Partial Decrees* limited it to diverting water from the Martin-Curren Tunnel within a specific ten-acre tract. Ex.1008, p.32; *Memorandum Decision and Order*, Twin Falls County Case No. CV-2014-1338, pp.10-19 (Oct. 24, 2014). The plain language does not permit Rangen to divert water from other springs comprising the greater springs complex. *Id.* Nor does it permit Rangen to divert water from Billingsley Creek via the Bridge Diversion. *Id.* As such, the scope of Rangen's call was found to be limited to the amount of water that emanates from the Martin-Curren Tunnel itself. *Id.* Rangen complained that it has diverted and used water from Billingsley Creek via the Bridge Diversion for over fifty years, and that its *Partial Decrees* do not accurately reflect its historic use in this respect. In various legal proceedings, this Court and the SRBA District Court rejected those arguments, finding among things that Rangen failed to timely raise the issue in the Snake River Basin Adjudication.[5]

The determination that Rangen is not lawfully permitted to divert water from Billingsley Creek via the Bridge Diversion created what the Director refers to as "a race to file an application to appropriate water." R., p.364. Since Rangen did not have the right to divert water

[5] *Memorandum Decision and Order*, Twin Falls County Case No. CV-2014-1338, pp.10-19 (Oct. 24, 2014); *Order Denying Motion to Set Aside*, Twin Falls County Case No. 39576 (In Re SRBA), Subcase Nos. 36-2551 and 36-7694 (May 4, 2015); *Order Denying Motion to File Late Claim*, Twin Falls County Case No. 39576 (In Re SRBA), Subcase No. 36-16977 (Oct. 2, 2013). Links to electronic copies of these decisions can be found respectively at: (1) http://164.165.134.61/A0080025XX.HTM; (2) http://164.165.134.61/S3602551XX.HTM; and (3) http://164.165.134.61/S3616977XX.HTM.

via the Bridge Diversion, that water was unappropriated, and the race to appropriate it commenced.[6] The Districts filed the instant application on April 3, 2013, thereby winning the race. R., p.1. Rangen came in second, filing its competing application on February 3, 2014. Ex.2001.

### ii. The Director exceeded his authority under Idaho Code §§ 42-203A(5)(e) and 42-202B(3).

The Director appears to have found the race, or at least the Districts' participation in it, objectionable. It is the primary reason he finds the Districts' application conflicts with the local public interest. He states that the Districts' "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." R., p. 364. And, that "[w]hile 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 diverting water to Rangen that Rangen has been using for fifty years." *Id.* He concludes that it is not in the local public interest to approve such an application as it "would establish an unacceptable precedent in other delivery call proceedings that are or may be pending." *Id.*

The Director's ability to evaluate a proposed water use against the local public interest is statutorily limited. He may only evaluate "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*." I.C. § 42-202B(3) (emphasis added). That the Legislature intended the definition of "local public interest" to be narrowly defined and construed is established by its amendment of the term in 2003. 2003 Idaho Sess. Laws 298. Prior to that, the term "local public interest" was broadly defined in Idaho Code § 42-203A(5)(e) as "the affairs of the people in the area directly affected by the proposed use." 1978 Idaho Sess. Laws 306. The 2003 amendment "narrowed the definition of local public interest considerably." *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 164 fn.3 125 P.3d 515, 520 fn.3 (2005).

[6] Indeed, the Director found that "[t]he flow in Billingsley Creek has, at times, exceeded 12 cfs at the Bridge Diversion over the last decade." R., p. 350.

In this case, the Director's holding essentially amounts to a determination that granting the Districts' application would be unfair, given: (1) Rangen's prior, albeit legally unauthorized, alleged historical use, and (2) the history surrounding Rangen's call. Considerations of these natures go beyond the scope of what the statute authorizes. The fact that Rangen has allegedly used the subject water historically is irrelevant, except to show that there is unappropriated water available to appropriate. Both the Department and this Court have held that Rangen has no legal right to divert and use water from Billingsley Creek via the Bridge Diversion. Ex.1008, p.32; *Memorandum Decision and Order*, Twin Falls County Case No. CV-2014-1338, pp.10-19 (Oct. 24, 2014). The Court likewise fails to see the relevance in the finding that approval would "establish an unacceptable precedent in other delivery call proceedings." The Director does not explain how such a precedent would negatively or otherwise affect the interests that the people in the area directly affected by the proposed use have in the effects of such use on the public water resource. In basing his decision on these considerations, the Court finds that the Director exceeded his authority under Idaho Code §§ 42-203A(5)(e) and 42-202B(3).

In finding that the Districts' application "could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective date borne by a Rangen application," the Director appears to penalize the Districts for being first in time.[7] Implicit in the statement is a preference that Rangen should have the better right to appropriate the subject water, even though its completing application was filed well after the Districts'. Such analysis is contrary to Idaho law. Where, as here, water is unappropriated, first in time is first in right. *See e.g.*, Idaho Const., Art. XV § 3 ("priority of appropriation shall give the better right as between those using the water"); IDAPA 37.03.08.035.02. (providing, "the priority of an application for unappropriated . . . water is established as of the time and date of the application is received in complete form"). The Director cannot, consistent with Idaho law, utilize the local public interest standard to sidestep this long standing constitutional principle under the circumstances present here. There is simply no reason under the prior appropriation doctrine, alleged historical use notwithstanding, why preference should be given to Rangen's application, which was filed later in time, and thus later in right, than the Districts'.

[7] Indeed, after denying the Districts' application, the Director proceeded to grant Rangen's competing application, even though it was filed later in time and thus later in right, and proposed to divert the same water from the same source and point of diversion. R., p.353 fn.4.

The Director also makes the finding that the Districts' application "brings no new water to the already diminished flows of the Current Tunnel or headwaters of Billingsley Creek." R., p.364. The Court fails to see how this consideration is relevant to a local public interest analysis under the circumstances present here.[8] An application to appropriate water, by its very definition, does not bring new water to a water system – it seeks to appropriate unappropriated water. In this case, the Director found that there is unappropriated water available in Billingsley Creek. R., p.350. Indeed, he approved Rangen's competing application (though it was filed later in time) to appropriate that same unappropriated water from the same source and point of diversion proposed by the Districts. R., p.353 fn.4. The Director did not find, and the record does not support the finding, that the Districts' proposed use would injure or prevent any senior user on Billingsley Creek from receiving his or her established water rights. Indeed, the Districts' proposed use is (1) non-consumptive, and (2) was to be subordinated to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses. R., pp.281-282. While the Director insinuates that Rangen's senior rights in the Martin-Curren Tunnel may be further injured, such insinuation is misplaced. The Districts' propose to divert unappropriated water from Billingsley Creek – a different source altogether than the Martin-Curren Tunnel. *See Supra* fn.5.

### iii. The Director exceeded his authority in determining that it is inappropriate for the Districts to propose using their eminent domain powers to perfect their application for permit.

In addition to the factors set forth above, the Director found that it is inconsistent with the local public interest for the Districts to propose exercising their power of eminent domain to perfect their application. R., p. 364. The Legislature has expressly granted ground water districts "the power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of the mitigation power herein granted. . . ." I.C. § 42-5224(13). It is an exceedance of the Director's authority to determine when the use of such power is appropriate. Such considerations will be taken up and considered at the appropriate time in an eminent domain proceeding. Furthermore, the Director does not explain how this consideration is pertinent to

[8] Indeed, this consideration may have relevance in any proceedings seeking the approval of any mitigation plan for which the appropriation is intended. *See* IDAPA 37.03.11.043.

evaluating the effects of the Districts' application on the public water resource. Therefore, the Court finds the Director exceeded his authority in determining that it is inappropriate for the Districts to propose using their eminent domain power to perfect their application for permit.

### C. The Director did not abuse his discretion in determining that the Districts' application is complete.

Rangen asserts that the Districts' application should have been denied on the additional basis that it is incomplete. The Districts' argue that this issue is not properly before the Court. Idaho Appellate Rules 11(g) and 15(a) both provide that if no affirmative relief is sought by way of reversal, vacation or modification of the order, "an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal." Such is the case here. Although Rangen did not file a cross-petition in this proceeding, Rangen properly raised this additional issue in its response brief as it does not seek affirmative relief by way of reversal, vacation or modification of the *Final Order*. I.R.C.P. 84(r); I.A.R. 11(g) and 15(a). Therefore, the issue is properly before the Court.

Rangen argues that the application was not complete because there was no evidence that it was properly executed. The Department's administrative rules direct that an application for permit "shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application." IDAPA 37.03.08..035.03.b.xii. Further, that the "name and post office address of the applicant shall be listed." IDAPA 37.03.08..035.03.b.i. Both the hearing officer and the Director found, in an exercise of their discretion, that the Districts' application was properly executed and otherwise complete. R., pp.275-276 & 360-361. Contrary to Rangen's assertion, the Court finds ample evidence in the record supporting the Director's decision in this respect.

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

Director did not abuse his discretion in making the determination that the Districts' application was properly executed, and further finds that his decision in this respect is supported by substantial evidence in the record.

**D. The Director did not err in determining that mitigation is a viable beneficial use.**

Rangen asserts that the Districts' application should have been denied on the additional basis that mitigation is not a beneficial use. The Districts' argue that this issue is not properly before the Court, however the Court finds it has been properly raised for the same reasons set forth in the preceding section. The Idaho Supreme Court has held that the term "beneficial use" has never been judicially or statutorily defined. *State, Dept. of Parks. v. Idaho Dept. of Water Administration*, 96 Idaho 440, 444, 530 P.2d 924, 928 (1974). The SRBA Court has also held that the beneficial purposes of use enumerated in Article 15 § 3 of the Idaho Constitution are not exhaustive and that absent a statutory provision or rule of law to the contrary, additional purposes of use could be recognized as viable beneficial uses. *See In Re: SRBA Case No. 39576, Amended Consent Decree Re: Aesthetic, Recreation and Wildlife (ARW)*, Basin-Wide Issue No. 00-91014 (Feb 25, 2009), pp.7-8[9] (recognizing Aesthetic, Recreation and Wildlife as viable beneficial uses of water); *See In Re: SRBA Case No. 39576, Memorandum Order and Decision on Challenge*, Subcase Nos. 01-23B, 01-297, 35-2543 and 35-4246 (Aberdeen-Springfield Canal Co.) (April 4, 2011)[10] (recognizing ground water recharge as a viable beneficial use prior to 1978 legislative act declaring ground water recharge as a beneficial use).

In regards to mitigation as a beneficial use, Idaho's statutory and administrative rule scheme recognize the use of water in conjunction with a mitigation plan. Idaho Code § 42-5201(13) defines "mitigation plan" as a "plan to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by holders of junior priority groundwater rights who are participants in a mitigation plan." Idaho Code § 42-5224 grants the board of directors of a ground water district the power to "develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district." Rule 43 of the Conjunctive Management Rules (CMR) specifically recognizes the use of water to mitigate for

[9] A link leading to an electronic copy of this decision can be found at: http://164.165.134.61/S0091014XX.HTM.
[10] A link leading to an electronic copy of this decision can be found at: http://164.165.134.61/S0100023BX.HTM

injury to a senior right. IDAPA 37.03.11.043.01.c., 03.a., b. and c. Indeed, the inability to beneficially use water in order to mitigate for injury to a senior right would not only run contrary to the express language of the CMR but would also undermine significant provisions of the CMR.

In this case, both the hearing officer and the Director found mitigation to be a viable beneficial use. In so holding, the Department acknowledged that it has previously recognized the beneficial use of "mitigation" in the issuance of other water rights. R., pp.358-359. Likewise, the SRBA District Court has also recognized the beneficial use of "mitigation," and has issued numerous partial decrees that were litigated with a "mitigation" purpose of use. *See e.g.*, *Partial Decree*, SRBA Subcase No. 22-13247 (June 12, 2008; *Partial Decrees*, SRBA Subcase No. 37-22631, 37-22632, 37-22633 (June 29, 2012); *Partial Decree*, SRBA Subcase No. 63-33511 (March 3, 2014); *Partial Decree*, SRBA Subcase No. 37-11811 (September 24, 2010). The Districts' application identifies the rights that the appropriation seeks to mitigate as well as the purpose of use of those rights receiving the mitigation. R.,p.2.

**E. The Districts' application is not made for speculative purposes.**

Rangen asserts that the Districts' application should be denied under Idaho Code § 42-203A(5)(c) on the additional basis that it is made for speculative purposes. Speculation is defined as "an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence." IDAPA 37.03.08.045.01.c. The Court finds that the Districts' application is not speculative. There is no evidence in the record establishing a lack of intent on behalf of the Districts to apply the water identified in their application to beneficial use with reasonable diligence. To the contrary, the record establishes that at the time the application was filed, Rangen's delivery call seeking the curtailment of various of the Districts' members had been filed. Ex.1008, p.1. By its express terms, the Districts' application was filed in response to the pending call. R.,pp.2 & 84. By the time the Department conducted its hearing on the application, the Director had issued his curtailment order finding material injury to Rangen's senior rights, resulting in a mitigation obligation on behalf of the Districts to Rangen. Ex.1008, p.42. These undisputed facts corroborate the stated intent of the Districts that they will "use this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain to mitigate for Rangen's apparent material injury

and to provide mitigation for the curtailment of junior groundwater users as specified in the Director's [curtailment order]." R., p.84.

Rangen also raises several arguments regarding the ability of the Districts to exercise their eminent domain powers to perfect their application for permit. Since issues of that nature are more appropriately addressed in the context of a challenge to a condemnation proceeding, the Court, so as to not prejudge the issues, will not address these arguments. The fact that the Districts have the express statutory authority to exercise the power of eminent domain for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of their mitigation powers is sufficient for the purposes of a speculation analysis.

### F. The Director's *Final Order* prejudices the Districts' substantial rights.

The Director's *Final Order* prejudices the Districts' substantial right relating to the ability to pursue the appropriation of unappropriated water. It further prejudices the Districts' substantial rights in their application for permit. *See e.g.*, IDAPA 37.03.08.035.02.d. (providing "[a]n applicant's interest in an application for permit to appropriate water is personal property").

## IV.

## ORDER

For the reasons set forth above, the Director's *Final Order* is set aside and remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated August 7, 2015

ERIC J. WILDMAN
District Judge

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on August 07, 2015, with sufficient first-class postage to the following:

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