

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 36-16976)	PRELIMINARY ORDER
IN THE NAME OF NORTH SNAKE)	ISSUING PERMIT
<u>GROUND WATER DISTRICT, ET AL.</u>)	

On April 3, 2013, North Snake Ground Water District (GWD), Aberdeen American Falls GWD, Bingham GWD, Bonneville Jefferson GWD, Jefferson Clark GWD, Madison GWD, and Magic Valley GWD ("the Districts"), represented by attorney T.J. Budge of Racine Olson Nye Budge & Bailey, filed Application for Permit No. 36-16976 with the Idaho Department of Water Resources ("Department"). Protests against the application were filed by Blind Canyon Aquaranch Inc. ("Blind Canyon") and by Rangen Inc. ("Rangen"), represented by attorneys Robyn Brody, Justin May and Fritz Haemmerle.

A pre-hearing conference was held on May 13, 2014. The parties were unable to resolve the issues of protest at that time and requested that a hearing be held to decide the contested case. An administrative hearing was conducted on September 17, 2014, in Twin Falls, Idaho. Although the proposed points of diversion are located within Gooding County, the parties agreed to hold the hearing in Twin Falls County.

Blind Canyon did not participate in the hearing and, therefore, waived its right to offer evidence into the administrative record and cross examine witnesses. During the hearing, the Districts and Rangen offered testimonial and documentary evidence into the record. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 36-16976 was filed on April 3, 2013. The original application proposed diverting water from springs tributary to Billingsley Creek and from Billingsley Creek for "mitigation for irrigation" and "fish propagation." The proposed place of use was described as the SENE of Section 31 and the SWNW of Section 32, T07S, R14E. The application was amended on February 11, 2014, updating the proposed place of use to include the SWNE of Section 31, T07S, R14E, which contains the end section of Rangen's CTR raceways.
2. The application was advertised to the public beginning on February 20, 2014. The deadline for filing protests was set as March 10, 2014.
3. The application was amended a second time on May 27, 2014. The second amendment changed one of the proposed beneficial uses from "mitigation for irrigation" to "mitigation" and revised the answers to some of the application questions. The Department determined that the changes were minor and did not warrant re-advertisement of the application or advancement of the

priority date. The Districts assert that the beneficial use "mitigation" is non-consumptive because it will be used for fish propagation. (Testimony of Scott King)

4. Application 36-16976 proposes diverting a combined total of 12 cfs from springs tributary to Billingsley Creek and from Billingsley Creek for mitigation and fish propagation. The proposed place of use includes portions of the SWNE and SENE of Section 31, and the SWNW of Section 32, T07S, R14E. The proposed place of use covers the entire Rangen facility. Rangen owns the property at the proposed place of use and points of diversion.

5. Application 36-16976 lists two proposed points of diversion. The Districts' initial disclosures also describe two points of diversion: "Water will be delivered . . . either by gravity flow through an existing headgate on Billingsley Creek (known as the bridge diversion) . . . or by pumping water from Billingsley Creek to various fish rearing facilities at the Rangen hatchery." (Exhibit 1009, page 2; see also Exhibit 1059)

6. Even though they are located relatively close to one another, the bridge diversion and the proposed pump station represent two distinct points of diversion. The bridge diversion and pump station would be separately measured diversions and would supply water to different portions of the Rangen facility.

7. The two points of diversion described in the testimony and documents provided by the Districts are not consistent with the legal descriptions provided in the application. The application lists one point of diversion in the SESWNW of Section 32 and one point of diversion in the SWSWNW of Section 32. However, both proposed diversion structures (the bridge diversion and the proposed pump station) are located in the SWSWNW of Section 32. (Exhibit 1015, page 26; Exhibit 1041; Exhibit 1048)

8. Some of the evidence presented at the hearing suggests that the Districts intend to develop additional points of diversion from spring sources on the talus slope near the Rangen facility. (Testimony of Scott King) However, only two points of diversion are listed on the application and they are clearly identified in the District's initial disclosures as the bridge diversion and the proposed pump station. (Exhibit 1009, page 2)

9. Rangen owns and operates a fish propagation and research facility near the head of Billingsley Creek. Rangen diverts water to the facility from the Martin-Curren Tunnel ("Curren Tunnel") and from the head of Billingsley Creek, which is fed by various springs arising on a talus slope east of the facility and by overflow water from the Curren Tunnel diversion structures.

10. The Rangen facility is comprised of a green house, hatch house and small raceways, which are all located south of the Billingsley Creek channel. The facility also includes a set of large raceways and structures known as the CTR raceways, which are both located north of the Billingsley Creek channel. The Rangen facility has been in existence for over 50 years.

11. Rangen has several diversions bringing water to its facility. There is a pipe placed in the mouth of the Curren Tunnel that conveys water to the hatch house and greenhouse.

12. Water emanating from the Curren Tunnel flows into a concrete structure called the Farmers Box. Two pipelines release water out of the Farmers Box toward the Rangen facility. One

pipeline is an overflow structure which spills water into the head of Billingsley Creek. The other pipeline conveys water down to a structure called the Rangen Box. A single pipe runs out of the Rangen Box to the hatch house, greenhouse, and small raceways.

13. All of the water from the talus slope and the overflow from the Farmers Box and Rangen box collects and forms the headwaters of Billingsley Creek. Rangen has a large diversion on Billingsley Creek (the bridge diversion) which supplies water to the large raceways and CTR raceways. (Exhibit 1048; Exhibit 1059) Water from the small raceways is piped across Billingsley Creek and added to the water flowing through the large raceways.

14. Water used in the Rangen facility is returned to Billingsley Creek at the end of the CTR raceways. There are no water right points of diversion located between the Rangen bridge diversion and the return flow into Billingsley Creek at the end of the Rangen facility. (Testimony of Scott King)

15. Three water rights are currently used for fish propagation purposes at the Rangen facility. Water right 36-15501 carries a priority date of July 1, 1957 and authorizes the diversion of 1.46 cfs for fish propagation. Water right 36-2551 carries a priority date of July 13, 1962 and authorizes the diversion of 48.54 cfs for fish propagation and domestic use. Water right 36-7694 carries a priority date of April 12, 1977 and authorizes the diversion of 26.00 cfs for fish propagation.

16. Water rights 36-15501, 36-2551 and 36-7694 only identify a single water source, the Curren Tunnel. None of these three water rights list Billingsley Creek or springs tributary to Billingsley Creek as authorized sources. None of these three water rights identify the Rangen bridge diversion as an authorized point of diversion.

17. Rangen diverts two other small water rights (36-134B and 36-135A) from the Curren Tunnel for domestic and irrigation use. Neither of these water rights list Billingsley Creek or springs tributary to Billingsley Creek as authorized sources. Neither of these water rights identifies the Rangen bridge diversion as an authorized point of diversion.

18. The pump station proposed by the Districts is designed to divert up to 4.0 cfs to supply water from Billingsley Creek to the hatch house, greenhouse and small raceways. (Exhibit 1015, page 22) The remaining 8.0 cfs described in the application would be diverted through the existing Rangen bridge diversion to supply the large raceways and CTR raceways. (Testimony of Robert Hardgrove)

19. The pump station would allow water to be diverted from Billingsley Creek to the facility structures on the south side of the creek (hatch house, greenhouse and small raceway). (Testimony of Robert Hardgrove) Currently, because of elevation differences, only the Curren Tunnel pipeline system can supply water to those structures. (Id.) A pump station would offer greater flexibility in the diversion and use of water from the head of Billingsley Creek at the Rangen facility.

20. The flow in Billingsley Creek has, at times, exceeded 12 cfs at the bridge diversion over the last decade. (Exhibit 1021; Exhibit 1022; Exhibit 1040, page 1; Exhibit 2017)

21. The Rangen facility was designed to handle 76 cfs of flow. In recent years, some parts of the facility cannot be used because of a lack of flow from the Curren Tunnel and the headwaters of Billingsley Creek. Currently, Rangen diverts almost all of the water arising upstream of the bridge diversion. (Testimony of Wayne Courtney)

22. Due to a decline in the flow from the Curren Tunnel and from the various springs at the head of Billingsley Creek, Rangen filed a Petition for Delivery Call in December 2011. The Petition alleged that Rangen's water rights were being injured by the diversion of ground water by junior water users located upgradient from the facility.

23. On January 29, 2014, the Director of the Department issued a final order addressing the Rangen delivery call, concluding that certain ground water users within the boundaries of the North Snake GWD and Magic Valley GWD were causing material injury to Rangen by reducing flows from the Curren Tunnel. The order further stated that certain water rights within those districts would be curtailed if mitigation was not provided to Rangen.

24. Certain elements of the Department's final order for the Rangen delivery call are currently being challenged and appealed in the Idaho courts. Mitigation plans offered by the Districts in response to the Rangen call are also currently being challenged and appealed before the Department and within the Idaho courts.

25. Application 36-16976 (second amendment) includes the following statement:

The GW Districts 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 Final Order dated 1/29/14 for Rangen's delivery call. Mitigation water will be provided to Rangen for its Curren Tunnel rights for fish propagation purposes. If unable to secure proper consent, the GWDs will use their power of eminent domain as set for the in I.C. Sec. 42-5224(13) to secure easements, as necessary.

26. As part of their Rule 40.05 disclosures (IDAPA 37.03.08), the Districts notified Gooding County, Idaho Department of Fish & Game, Idaho Department of Environmental Quality, and Big Bend Irrigation and Mining Company of the pending application. The notice letters contained errors in the legal description for the proposed points of diversion. However, the errors were minor and did not affect the viability of the notice letters. None of the notified entities provided comment.

27. The Districts were formed under Chapter 52, Title 42, Idaho Code, and represent the interests of ground water users within their respective district boundaries. Among other things, the Districts prepare plans to address mitigation obligations arising from various water calls. (Testimony of Lynn Carlquist)

28. The Districts assess the water users within their district boundaries to fund the activities of the Districts, including the development and implementation of mitigation plans. (Testimony of Lynn Carlquist) Other mitigation activities of the Districts have cost several million dollars. (Id.)

29. Application for Permit 36-16976 was signed by T.J. Budge on behalf of the Districts. Lynn Carlquist testified that T.J. Budge had the authority to sign Application 36-16976 at the time the application was signed. In processing the application, the Department never requested additional evidence relating to T.J. Budge's authority to sign the application.

30. On September 16, 2014, Magic Valley GWD and North Snake GWD adopted resolutions confirming that T.J. Budge, through his law firm Racine, Olson, Nye, Budge & Bailey Chartered, had the authority to file Application for Permit 36-16976 on behalf of Magic Valley GWD and North Snake GWD, respectively. (See Exhibits 1076 and 1077)

31. The Districts do not intend to operate the Rangen facility or to raise fish. (Testimony of Lynn Carlquist) The Districts are not pursuing any permits associated with commercial fish production facilities. (Id.)

32. On August 25, 2014, North Snake GWD, Magic Valley GWD, and Southwest Irrigation District (who is not a party to this case) served Rangen with a "Notice of Intent to Exercise Eminent Domain and Summary of Rights of Property Owner" ("Eminent Domain Notice"). (Exhibit 1014)

33. The Eminent Domain Notice stated that the two GWDs and Southwest Irrigation District intended to purchase "easements, rights-of-way, and other rights of access" over the Rangen property. (Id. at page 1) Such easements, rights-of-way and other rights of access would be used to "design, install, operate, and maintain pipes, pumps, and related facilities to deliver water to the Rangen fish hatchery . . ." (Id.)

34. The Eminent Domain Notice refers to certain sections of the Idaho Code which establish the Districts' eminent domain authority. Idaho Code § 42-5224(13) states that the Districts have the power to condemn private property for "easements, rights-of-way, and other rights of access" necessary to exercise their mitigation powers as defined in statute.

APPLICABLE STATUTES AND RULES

1. Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, 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 . . . the director of the department of water resources 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.

2. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5).

3. Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is made in good faith and not for delay or speculative purposes. "Speculation 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 with reasonable diligence." (IDAPA 37.03.08.45.01.c)

4. Rule 45.01.c further requires: "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 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." (IDAPA 37.03.08.45.01.c.i)

5. The applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are "no obvious impediments that prevent successful completion of the project." (IDAPA 37.03.08.45.01.c.i - ii)

ANALYSIS

Reduction to Existing Water Rights

There is no evidence in the record suggesting that the amount of water available to satisfy other water rights will be reduced or diminished by the proposed water use. The Districts and Rangen both asserted that the beneficial use of fish propagation should be considered non-consumptive. (See Exhibits 1016 and 1047) Fish propagation rights are generally described as non-consumptive by the Department. The mitigation use proposed in the application will provide water to the Rangen facility for fish propagation and would also be considered non-consumptive. There are no other water rights between the proposed points of diversion and the point of return flow from the Rangen facility into Billingsley Creek. The Districts have satisfied their burden of proof regarding no injury to other water rights.

Sufficiency of Water Supply

The Districts have satisfied their burden of proof regarding the sufficiency of the water supply. Evidence in the record shows that the flow in Billingsley Creek at the Rangen facility has, at times, exceeded 12 cfs in recent years. (Exhibit 1021; Exhibit 1022; Exhibit 1040, page 1; Exhibit 2017)

Good Faith / Speculative Purposes

For this section, the two proposed beneficial uses (fish propagation and mitigation) will be discussed separately.

1) Fish Propagation

The Districts' proposal to divert water for fish propagation is speculative. Mr. Carlquist testified that the Districts do not intend to operate the Rangen facility or to raise fish. The Districts are not actively pursuing local and state permits which would be needed to raise fish for commercial purposes. (Exhibits 2019 and 2020 provide examples of additional permits needed to operate an aquaculture facility) In his post-hearing brief, Mr. Budge confirmed that the Districts do not intend to operate the Rangen facility. Rather, the Districts plan on immediately assigning Permit 36-16976 to Rangen and allowing Rangen to develop the fish propagation element of the permit.

Obtaining a permit, hoping to immediately assign the permit to another party, without the intent of developing the water right (putting water to beneficial use), is speculative. (See IDAPA 37.03.08.045.01.c) A permit holder cannot rely on another person to perfect his water right. The requirement to develop and beneficially use water within the time frame set forth under a permit rests entirely on the permit holder. By their own admission, the Districts will not accomplish the beneficial use of fish propagation.

A water right cannot be established through trespass onto another's property. *Lemmon v. Hardy*, 519 P.2d 1168 (Idaho 1974). The Districts do not currently have legal access to the Rangen facility necessary to accomplish the beneficial use of fish propagation. Lynn Carlquist testified that the Districts would use eminent domain, if needed, to perfect the proposed water right. He also testified that the Districts would acquire only as much of the Rangen facility as would be needed to develop the permit.

Idaho Code § 7-711 describes the three types of estates or property interests that can be acquired through eminent domain proceedings: fee simple, easements, or rights of occupation. Pursuant to Idaho Code § 42-5224(13), the District's eminent domain authority appears to be limited to easements (including rights-of-way and other rights of access). In order to accomplish the proposed beneficial use of fish propagation, the Districts would need to condemn a fee simple interest in the Rangen facility or, at a minimum, a right of occupation for the entire facility, which exceeds the eminent domain authority described in Section 42-5224.

Because the Districts, by their own admission, do not intend to develop the beneficial use of fish propagation and because the Districts have not sufficiently demonstrated that they will be able to obtain legal access to the Rangen property necessary to complete the proposed beneficial use of fish propagation, the fish propagation element of the application is speculative under Idaho Code § 42-203A(5) and should be denied.

2) Mitigation

The question of whether the mitigation use proposed by the Districts is not made in good faith or is for delay or speculative purposes under Idaho Code § 42-203A(5) can be split into two inquiries. First, the Department must determine whether the mitigation use described by the Districts should be recognized as a beneficial use. Second, the Department must determine whether the Districts will be able to develop (perfect) the proposed mitigation use. These two inquiries are discussed separately below.

a) Mitigation Use Described by the Districts

The Department has recognized the beneficial use of mitigation in other water rights. The beneficial use of "mitigation" is fairly new when compared with the other recognized beneficial uses in the state. (Testimony of Scott King) As such, the understanding of how, when and where mitigation rights can be used will continue to develop over time.

The Department's Water Appropriation Rules (IDAPA 37.03.08) do not contain a definition for the beneficial use "mitigation." The Department's Conjunctive Management Rules (IDAPA 37.03.11) provide a definition for "mitigation plan," which is helpful for understanding the nature of mitigation. "Mitigation plan" is defined as

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director . . . that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (IDAPA 37.03.11.010.15)

Idaho Code § 42-5201 includes a similar definition for "mitigation plan": "[A] plan to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior priority ground water rights who are participants in the mitigation plan."

Using the definitions for "mitigation plan" referenced above as a guide, "mitigation" could be defined as any action taken to prevent injury to senior water right holders or to compensate senior water right holders for injury caused by the diversion and use of water by junior water right holders.

The key terms in the definitions listed above are "prevent" and "compensate." In order for a proposed mitigation use to be viable, it must prevent material injury to senior water rights or compensate senior water right holders for material injury.

Prevention of injury is accomplished by incorporating water efficiency measures that minimize the impact of junior diversions on senior appropriators. The pending application does not propose any methods to prevent or reduce the depletionary effects of ground water diversions by junior water right holders.

Compensation mitigation has been recognized by the Department in three basic forms. 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.

The second type of compensation mitigation involves diverting water from a separate source and injecting water into the diminished water source to compensate senior water users on the

diminished source. Water is added to the diminished source above and beyond that which would otherwise be available to the senior water right holders from that source.

The third type of compensation mitigation involves holding a senior water right (which would otherwise divert from the diminished source) unused. (See Idaho Code § 42-223(10))

The second and third types of compensation mitigation described above do not apply to the pending application. The Districts do not propose injecting water from Billingsley Creek into the diminished water source (the Curren Tunnel). Nor do the Districts propose holding a senior water right unused.

In the pending application, the Districts propose the first type of compensation mitigation, whereby water from Billingsley Creek would be delivered directly to Rangen (injected into the Rangen infrastructure). Evidence in the record shows that the source listed on Rangen's water rights (the Curren Tunnel) has been diminished by diversion under junior water rights. The Districts propose to mitigate for the reduced flows in the Curren Tunnel by diverting water from a separate source (Billingsley Creek) and delivering the mitigation water directly into Rangen's water system.

Rangen may argue that the beneficial use proposed by the Districts does not constitute mitigation because it does not result in any additional water above the Rangen bridge diversion. Evidence suggests that Rangen has diverted water from Billingsley Creek at the bridge diversion since the time the facility was built. At the time of this order, Rangen's water rights do not authorize any diversion from Billingsley Creek at the bridge diversion. If Rangen had an existing water right from Billingsley Creek, then the beneficial use proposed by the District might not qualify as mitigation. However, Rangen does not have a water right or authorized point of diversion for Billingsley Creek. Therefore, the Districts may pursue a water right from Billingsley Creek to deliver to Rangen to compensate for the diminishment of flows from the Curren Tunnel (the source listed on the Rangen's water rights).

To summarize, the beneficial use "mitigation" is not defined in statute or rule. This order sets forth a logical definition for the beneficial use of mitigation. The mitigation beneficial use described in the pending application falls within the definition of mitigation because it proposes to compensate Rangen for diminishment of the source listed on Rangen's water rights (the Curren Tunnel) by delivering water from a separate source (Billingsley Creek) directly into the Rangen system. The mitigation beneficial use proposed by the Districts constitutes a viable beneficial use which should be recognized by the Department.

b) Developing or Perfecting a Mitigation Beneficial Use

The second inquiry under the Department's speculation analysis is determining whether the Districts currently have or can obtain legal access to the proposed points of diversion and place of use necessary to construct and operate the proposed project. (IDAPA 37.03.08.45.01.c.i) The Districts' access to the proposed place of use and points of diversion are discussed separately.

i. **Place of Use**

During the hearing, a significant amount of time was spent trying to define where the beneficial use of mitigation actually takes place. The parties also provided arguments on this topic in their post-hearing briefs. The question of where mitigation occurs is critical in the context of an application for permit because the Department's Water Appropriation Rules (IDAPA 37.03.08) require an applicant to demonstrate legal access to the proposed place of use.

The testimony offered by the Districts' water right expert, Scott King, provides an example of the difficulty of defining a place of use for mitigation water rights. In response to questions posed by the hearing officer, Mr. King stated that the beneficial use of mitigation would occur throughout the raceways at the Rangen facility and that the mitigation beneficial use ends where the water is returned to Billingsley Creek. (Testimony of Scott King, Transcript pages 219-220) This would require the Districts to obtain legal access to the entire Rangen facility in order to develop the mitigation use. In their post-hearing brief, however, the Districts argue that the mitigation use takes place at the point where water is delivered to Rangen. (Districts Post-hearing Brief, page 18).

Unlike other beneficial uses, the place of use for a mitigation water right is not readily apparent. For example, the place of use for an irrigation water right is easily identified. It is the area where water is applied to plants. The place of use for an industrial water right is the location where an industrial process requires water. Mitigation water rights are not as straight-forward. As described above, there are a number of circumstances where mitigation has been recognized within the state of Idaho. Each one of these types of mitigation will have a unique way to describe the place of use.

For water rights where mitigation is accomplished by "preventing" injury to senior water rights (where efficiency measures are incorporated to reduce the impact of junior-priority diversions), the mitigation place of use would cover the same area as the other beneficial uses listed on the junior water right. Mitigation occurs instantaneously as efficiency/preventative measures are used. This scenario does not apply to the pending application because the Districts are not proposing to accomplish mitigation by preventing injury.

Similarly, for the scenario where a senior water right is held unused, mitigation occurs at the location where the water right is not used. Therefore, the mitigation element of the water right should have a place of use that covers the same area as the other beneficial uses listed on the unused senior water right. The Department does not require water users who mitigate by holding senior water rights unused to file transfers to formally change the beneficial use of the unused rights to mitigation. Therefore, in such cases, there is no need or opportunity to define a mitigation place of use. This scenario does not apply to the pending application because the Districts do not propose to hold a senior water right unused.

Some mitigation uses involve diverting water from one source to augment the flow in another source. In this scenario, mitigation occurs at the point of delivery to the augmented source. The place of use would properly be described as the location where water is added to the diminished

source. In other words, once the water is injected into the diminished source, mitigation is accomplished.

Finally, some mitigation uses involve 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. Water may be injected into a pipeline or ditch. In either instance, the mitigation place of use would be properly described as the point of delivery.

In this case, the Districts propose to 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. The mitigation use would take place at the point of delivery. The place of use for this type of mitigation use would be properly described as the area where water is delivered into the Rangen infrastructure. The areas of delivery into the Rangen infrastructure are included within the proposed place of use described in the application for permit.

The areas of delivery into the Rangen facility (the mitigation places of use) are located on property owned by Rangen. Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) requires the Districts to demonstrate legal access to the proposed place of use. The Districts provided evidence of the authority and intent to exercise eminent domain to obtain an easement for the construction of the pump station and an easement for use of the bridge diversion. The Districts eminent domain authority would allow the Districts to acquire an easement for the places where water would be delivered into the Rangen facility. Therefore, the Districts have sufficiently demonstrated access to the proposed place of use.

ii. Point of Diversion

During the hearing and in the post-hearing briefs, there was some discussion as to whether a mitigation water right could be developed or perfected without a physical diversion of water. The idea that a water right can be developed or perfected without a diversion is not consistent with Idaho water law. The Idaho Supreme Court has confirmed that a diversion is almost always required to establish a valid water right:

Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right. Only two exceptions to the diversion requirement exist. No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering. In addition, State entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens. *State v. United States*, 996 P.2d 806, 811 (Idaho 2000), citations omitted.

Neither of the exceptions to the diversion requirement set forth in *State v. United States* pertain to the pending application. The application is not for instream stockwater. The application was not filed by the state of Idaho for the benefit of the citizens of the state. (See Chapter 15, Title 42, Idaho Code) Therefore, the Districts must identify point where the Districts (not Rangen) intend to divert water under the proposed permit.

The application states that water will be diverted by the Districts at the pump station or at the Rangen bridge diversion. Both of these proposed points of diversion are located entirely on property owned by Rangen. Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) requires the Districts to demonstrate legal access to the two proposed points of diversion. The Districts provided evidence of the authority and intent to exercise eminent domain to obtain an easement for the construction of the pump station and an easement for use of the bridge diversion. The Districts eminent domain authority would allow the Districts to acquire an easement for the proposed points of diversion. Therefore, the Districts have sufficiently demonstrated access to the proposed points of diversion.

3) Other Speculation Arguments Raised by Rangen

Rangen argues that the application should also be considered speculative because the Districts did not have a formal mitigation obligation to Rangen at the time the application was filed. This is not a convincing argument. The fact that the Districts were not yet under a formal mitigation order in April 2013, by itself, does not make the application speculative.

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 measures to mitigate the apparent injury which was already occurring at the Rangen facility at the time the application was filed.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) states: "A governmental entity will be determined to have satisfied [the financial resources] requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule."

Ground water districts are governmental entities established by Chapter 52, Title 42, Idaho Code. The Districts met their burden of proof for this element because they have the ability to assess their water users to cover any costs associated with development of the proposed permit. Lynn Carlquist testified that the Districts, individually and collectively, have assessed their water users to pay for multi-million dollar projects in the past.

Conservation of Water Resources

No evidence was presented suggesting that the proposed development is contrary to the conservation of water resources of the state of Idaho.

Local Public Interest

No evidence was presented suggesting that the proposed development is contrary to the local public interest. The Department should condition the permit to be subordinate to future upstream development except for other non-consumptive uses. In their post-hearing brief, the Districts agree that such a condition is appropriate. It is not in the local public interest to allow large non-consumptive water rights to tie up a significant amount of water in a basin, thereby restricting future development within the basin. (See Exhibits 1024 and 1025)

Sufficiency of the Original Application

Rangen argued that the application, as filed, was deficient on its face and should have been rejected by the Department. First, Rangen argues that T.J. Budge did not have the legal authority to act on behalf of the Districts at the time the application was filed. Lynn Carlquist, as a representative of the Districts, testified that T.J. Budge did have the authority to file the application on behalf of the Districts in April 2013. Mr. Carlquist's testimony is sufficient evidence to satisfy the question of Mr. Budge's authority to file.

Rule 35.03 of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the requirements for applications for permit to be considered complete and acceptable for filing. "The application form 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) When it was originally filed, the application did not include any evidence that T.J. Budge had the authority to sign the application on behalf of the Districts.

The Water Appropriation Rules also include the following provision:

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 date will be established by an incomplete application. Applications meeting the requirements of Rule Subsection 035.03 will be accepted for filing and will be endorsed by the department as to the time and date received. (IDAPA 37.03.08.035.d)

In this case, the Department considered Application for Permit 36-16976 complete at the time it was filed and prepared the application for public advertising. The Department could have requested evidence of authority to file, but did not, likely due to T.J. Budge's representation of the Districts in other water right proceedings.

If T.J. Budge acted outside of his authority in pursuit of the application for permit, such action may give rise to a private civil dispute between Mr. Budge and his clients. However, that is a matter outside of the Department's jurisdiction. The Department need only obtain basic evidence of an authority to file. Such evidence was provided at the hearing through Lynn Carlquist's testimony.

Rangen also argues that the address listed on the application (the address for the law firm of Racine, Olson, Nye, Budge & Bailey Chartered) does not satisfy the filing requirements. Because

the Department has determined that Application for Permit 36-16976 was properly filed by T.J. Budge on behalf of the Districts, the address for the Budge law firm, as a common mailing address for all of the Districts, is also acceptable.

Conclusion

Based on the evidence in the administrative record, the Districts satisfied their burden of proof for all of the review criteria set forth in Idaho Code § 42-203A(5). Therefore, the pending application should be approved and a permit issued with certain limits. First, because the Districts' initial disclosures and witnesses only identified points of diversion from Billingsley Creek, the permit should only list Billingsley Creek as an authorized source. Second, because the points of diversion are from Billingsley Creek, they only need to be described to the 40-acre tract (SWNW of Section 32, T07S, R14E). Third, "fish propagation" must be excluded from the permit because it is found to be speculative. Fourth, the place of use for mitigation should be limited to the area where water will be delivered into the Rangen infrastructure (SWNW of Section 32, T07S, R14E). Finally, the permit should include a condition stating that the water right is subordinate to future upstream uses (except for other non-consumptive uses).

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 36-16976 in the name of North Snake GWD et al. is APPROVED and Permit 36-16976 is ISSUED with the following elements and conditions:

Priority Date: April 3, 2013

Source: Billingsley Creek Tributary to: Snake River

Period of Use: 1/1 – 12/31

Beneficial Use: Mitigation

Diversion Rate: 12.00 cfs

Points of Diversion: SW¼ NW¼ of Section 32, T07S, R14E, B.M.

SW¼ NW¼ of Section 32, T07S, R14E, B.M.

Place of Use: SW¼ NW¼ of Section 32, T07S, R14E, B.M.

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **December 01, 2019**.
2. Subject to all prior water rights.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 36A.
4. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
5. The right holder shall not divert water at a rate exceeding what is reasonably necessary for the beneficial use authorized by this right.

6. Use of water under this right shall be non-consumptive.
7. This right shall be junior and subordinate to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho that are initiated later in time than the priority date of this right and shall not give rise to any claim against any future rights for the use of water, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho initiated later in time than the priority date of this right.
8. This right is for the use of trust water and is subject to review 5 years after the issuance of the permit to determine availability of water and to re-evaluate the public interest.
9. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
10. This right does not grant any right-of-way or easement across the land of another.

Dated this 18th day of November, 2014.


James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2014, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Issuing Permit

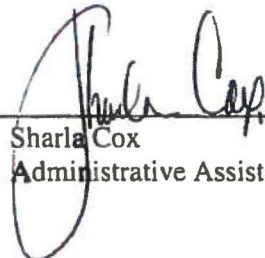
**T.J. Budge
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391**

**Fritz Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
Hailey, ID 83333**

**Robyn M Brody
Brody Law Office
PO Box 554
Rupert ID 83350**

**J. Justin May
May Browning & May
1418 W Washington
Boise ID 83702**

**Blind Canyon Aquaranch Inc
Gary Lemmon
2757 S 1050 East
Hagerman ID 83332**



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a Preliminary Order issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.