

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 36-17011)	PRELIMINARY ORDER
IN THE NAME OF NORTH SNAKE)	ISSUING PERMIT
<u>GROUND WATER DISTRICT, ET AL.</u>)	

BACKGROUND

On February 28, 2014, North Snake Ground Water District ("GWD"), Aberdeen American Falls GWD, Bingham GWD, Bonneville Jefferson GWD, Jefferson Clark GWD, Madison GWD, Magic Valley GWD, and Southwest Irrigation District, represented by attorneys Randy Budge and T.J. Budge, filed Application for Permit No. 36-17011 with the Idaho Department of Water Resources ("Department"). The application was amended four times (March 4, 2014, March 10, 2014, March 12, 2014 and November 26, 2014). The fourth amendment revised the list of applicants to only include North Snake GWD, Magic Valley GWD and Southwest Irrigation District ("the Districts").

Application 36-17011 was advertised to the public beginning on April 3, 2014. A protest was filed by Rangen, Inc. ("Rangen"), represented by attorneys Robyn Brody, Justin May and Fritz Haemmerle. Protests were also filed by the U.S. Bureau of Land Management and North Side Canal Company ("NSCC"), but those protests have been withdrawn.

A pre-hearing conference was held on November 5, 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 February 5, 2015, 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. 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:

RANGEN'S STANDING TO FILE PROTEST

At the beginning of the hearing and in its post-hearing brief, the Districts argued that Rangen does not have standing to protest the pending application. The Districts argued that Rangen failed to provide any evidence that Rangen's water rights from the Curren Tunnel will be negatively impacted by the proposed application.

The doctrine of standing is a fundamental constitutional requirement in all contested matters and applies to contested cases before the Department. *See Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). To satisfy the standing requirement, a protestant "must allege or demonstrate an injury in fact and a substantial likelihood that the . . . relief requested will prevent or redress the claimed injury." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763

(1989). In a contested case arising from an application for permit, a protestant does not need to show that an injury in fact *has* occurred, but rather that an injury in fact *could* occur if the application were approved.

During the hearing, Rangen raised a viable argument that changing the relative amounts of water diverted at the Sandy Ponds for mitigation or recharge, as proposed in the application, could have a negative impact on flows from the Curren Tunnel.¹ Colvin Testimony, Tr. pages 154-157. As discussed within this order, Rangen's argument is not persuasive and is based on an incorrect characterization of incidental recharge. Standing, however, does not demand that a party ultimately prevail on its arguments, only that a party presents a viable injury argument. In this case, Rangen has made a sufficient showing to establish standing as a protestant.

FINDINGS OF FACT

1. Application for Permit 36-17011 was filed on February 28, 2014. Ex. 100A, page 27. The original application proposed diverting 32 cfs from a waste water source for irrigation and mitigation purposes. *Id.* The application was amended four times. Three of the amendments were filed prior to advertising.

2. The third amendment (filed on March 12, 2014) listed four additional waste water points of diversion and added the beneficial use of recharge in the amount of 50 cfs. Ex. 100A. The beneficial uses proposed in the third amended application were as follows:

<u>Beneficial Use</u>	<u>Rate</u>	<u>Period of Use</u>	<u>Place of Use</u>
Mitigation	32.00 cfs	1/1 to 12/31	Portions of 33 Sections
Recharge	50.00 cfs	1/1 to 12/31	Sandy Ponds
Irrigation	13.03 cfs	2/15 to 11/30	651.3 acres

3. The fourth amended application (filed on November 26, 2014) significantly reduced the proposed place of use for mitigation. Ex. 100. The remaining elements of the application did not change. The fourth amended application proposes the following:

Source: Wastewater

Points of Diversion: NESW, Sec. 5, T 08S, R14E (Sandy Pipeline)

NESW, SESW, NWSE, SWSE, Sec. 5, T08S, R14E (Sandy Ponds)

Proposed Uses:

Mitigation	32.00 cfs	1/1 to 12/31
Recharge	50.00 cfs	1/1 to 12/31
Irrigation	13.03 cfs	2/15 to 11/30

Total Diversion Rate: 50.00 cfs

¹ It should be noted, however, that Mr. Colvin's testimony contradicted the following statement made in his expert report: "It is unlikely that any water recharged through the Sandy Ponds significantly increases flow at the Curren Tunnel." Ex. 204, page 2 of 11. If one were to accept the statement from Mr. Colvin's expert report as fact, then any change in recharge under the proposed application would have no effect on the flow from the Curren Tunnel.

Places of Use:

Mitigation: SWNE, NESE, Sec. 31, T07S, R14E

Recharge: NESW, SESW, NWSE, SWSE, Sec. 5, T08S, R14E

Irrigation: 651.3 acres in Section 6, T08S, R14E; Sections 31 and 32, T07S, R14E; and Section 36, T07S, R13E

4. The fourth amended application included the following statement:

The Applicants will divert waste water from the Sandy Ponds for irrigation and mitigation purposes. Water will be delivered through the Sandy Pipe to (a) provide an alternate source of irrigation water for water rights from the Martin-Curren Tunnel to mitigate the Rangen curtailment order, (b) provide an alternate source of irrigation water for water rights from the Hoagland Tunnel, and ([c]) meet other mitigation obligations that may arise in the Hagerman Valley. In addition, water will be used to recharge the Eastern Snake Plain Aquifer via the Sandy Ponds.

Ex. 100, page 4.

5. The Sandy Ponds and Sandy Pipeline described in the pending application are already in existence. Ex. 110.

6. NSCC delivers water to some of its shareholders through a canal known as the W-26 Lateral. Prior to 1997, waste water in the W-26 Lateral that was not used by NSCC shareholders would continue to flow in the lateral and was ultimately discharged into the Snake River at a location between Milner Dam and Swan Falls Dam.

7. In November 1997, NSCC entered into an agreement with John and Robin Sandy that authorized NSCC to construct sediment ponds on the Sandy property. Ex. 112. The ponds (known as the "Sandy Ponds") impound water near the end of the NSCC W-26 Lateral. *Id.* NSCC was responsible to construct and maintain the ponds. *Id.* The agreement recognized that NSCC had an existing easement to run waste water from the W-26 lateral across the Sandy property to the Snake River. *Id.*

8. The Sandy Ponds can store approximately 225 acre-feet of water. Ex. 110, page 1. At the time of construction, NSCC did not have a separate water right authorizing the storage of water in the Sandy Ponds. The Sandy Ponds were coincident with the operation of the NSCC delivery system. As such, they would have likely been covered under NSCC's irrigation water rights and would not have required a separate water right.

9. The Sandy Ponds and the underlying property were conveyed to North Snake GWD in 2003. Ex. 103. NSCC no longer has an ownership interest in the Sandy Ponds. Ex. 110.

10. Currently, there are no water rights authorizing the impoundment of water in the Sandy Ponds for recharge or for any other purpose. The Districts are not authorized to capture or store any water in the Sandy Ponds.

11. NSCC maintains a weir ("NSCC Weir") downstream of the last NSCC diversion from the W-26 Lateral. Ex. 101, page 27. Water passing over the weir is no longer controlled by NSCC and is considered waste water. The amount of waste water flowing past the NSCC Weir has, at times, exceeded 50 cfs in recent years. Ex. 134, page 1.

12. The pending application describes four recharge ponds. Pond #3 is the first pond downstream of the NSCC Weir. Ex. 101, page 12. Pond #3 has the largest surface area of the Sandy Ponds. *Id.* An outlet gate on the west side of Pond #3 controls water levels in the pond. *Id.* Water flows through the outlet gate and into Pond #2. *Id.*

13. There is a small pond to the north of Pond #3 identified as the "Recharge Pond." Ex. 101, page 12. A significant amount of water can be recharged through infiltration from the Recharge Pond when compared to the other Sandy Ponds. Ex. 127, pages 6-7. Water can be conveyed to the Recharge Pond by closing the outlet gate on Pond #3. There is a channel running from Pond #3 to the Recharge Pond.

14. Pond #2 is the second pond downstream of the NSCC Weir. Ex. 101, page 12. Water levels in Pond #2 are controlled by an outlet gate on the west side of the pond. *Id.* The inlet for the Sandy Pipeline draws water out of Pond #2 and is located just to the north of the outlet gate. *Id.*

15. Pond #1 is located farthest to the west. Ex. 101, page 12. It has a much smaller surface area than Pond #2 or Pond #3. *Id.* Water leaving Pond #1 flows into the original W-26 Lateral channel and continues on to the end of the channel where it is discharged into the Snake River. *Id.*

16. Evaporation from the Sandy Ponds exceeds the evaporation that would have occurred from the original W-26 Lateral channel. Based on the surface area of the Sandy Ponds and the evaporation data for the Hagerman area, the Districts estimate the instantaneous evaporation from the Sandy Ponds will be as much as 0.41 cfs during the summer. Ex. 101, pages 30-34. The evaporation associated with the Sandy Ponds constitutes a consumptive use of water that did not exist prior to construction of the ponds.

17. There has always been some amount of infiltration or seepage associated with water flowing through the original W-26 Lateral between the NSCC Weir and the Snake River. King Testimony, Tr. pages 95-99.

18. Seepage from the Sandy Ponds exceeds the seepage that would have occurred from the original W-26 Lateral channel. Colvin Testimony, Tr. Page 164. The distance between the NSCC Weir and the point where the W-26 Lateral discharges into the Snake River is approximately 7,000 feet. Ex. 101, page 12. The areal extent of the ponds far exceeds the areal extent of the original W-26 Lateral channel downstream of the NSCC Weir. Ex. 140, page 9.

19. The Sandy Pipeline, completed in May 2003, was constructed to convey water from the W-26 Lateral, downstream of the NSCC Weir, to certain water users from the Curren Tunnel and water users on the Curren Ditch. Ex. 110, page 1. In 2003, the project consisted of three cascading ponds (Sandy Ponds #1, #2 and #3) and the pipeline. *Id.* The Sandy Pipeline has delivered water to water users from the Curren Tunnel and to the Curren Ditch since 2004.

20. The inlet for the Sandy Pipeline is located on the north side of Pond #2. Ex. 101, page 23. The pipeline conveys water from the Sandy Ponds complex to a structure called the Sandy Pipe Vault. King Testimony, Tr. page 22-25. The capacity of this section of pipeline is 32 cfs. Ex. 110, page 1. In order to divert water into the Sandy Pipeline, Pond #2 must be full. *Id.*

21. The Sandy Pipe Vault is a large concrete vault which is configured to allow water to be pumped out of the vault to irrigate the places of use associated with certain irrigation rights from the Curren Tunnel (Candy, Morris, Musser). See Ex. 101, page 29, Ex. 116 and Ex. 133.

22. There is a pipeline running from the Curren Tunnel Farmer's Box to the Sandy Pipe Vault. Ex. 101, page 29 and Ex. 116. This Farmer's Box pipeline can be used to convey Curren Tunnel irrigation rights from the Curren Tunnel to the respective water users (Candy, Morris, Musser).

23. If water is not diverted out of the Sandy Pipe Vault for irrigation, it flows into another pipeline running to the head of the Curren Ditch. Ex. 116. There is no existing pipeline running from the Sandy Pipe Vault to a point of injection on Billingsley Creek. The Districts propose constructing a pipeline to Billingsley Creek, if needed, to supply mitigation water directly to Billingsley Creek, downstream of the Curren Ditch diversion.

24. In March 2004, the state of Idaho, North Snake GWD, Magic Valley GWD, and spring users in the Thousand Springs area entered into an agreement titled: "Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004." Ex. 109. The agreement was signed by Governor Kempthorne on behalf of the State of Idaho and was signed by J. Dee May on behalf of Rangen. *Id.*

25. The March 2004 agreement set forth certain obligations for each of the parties to the agreement. The ground water users committed to, among other things, convey operational spills from NSCC into the Sandy Pipeline. Ex. 109, page 5. The ground water users also committed to encourage and participate in initiatives for aquifer recharge. *Id.*

26. The proposed irrigation place of use includes ground that is currently irrigated under separate decreed water rights from the Curren Tunnel and the Hoagland Tunnel. These water rights from the Curren Tunnel and Hoagland Tunnel authorize a combined diversion rate of 13.03 cfs. Ex. 101, page 1.

27. The Districts own the property on which the Sandy Ponds are located. Ex. 103. The Districts own easements for the existing Sandy Pipeline. Exs. 106 - 108.

28. The only existing water right diverted from the same waste water source described in the pending application and located downstream of the proposed points of diversion is water right 36-8723, currently owned by Howard (Butch) Morris ("Morris").

29. Water right 36-8723 bears a priority date of April 11, 1994, and authorizes the diversion of 2.40 cfs for the irrigation of 125 acres. Water right 36-8723 is fully overlapped by water rights 36-134D, 36-135D and 36-10141A which are owned by Morris and diverted from the Curren Tunnel.

30. Water right 36-134D bears a priority date of October 9, 1884, and authorizes the diversion of 1.58 cfs. Water right 36-135D bears a priority date of April 1, 1908, and authorizes the diversion of 1.58 cfs. Water right 36-10141A bears a priority date of December 1, 1908, and authorizes the diversion of 0.82 cfs.

31. Water rights 36-134D, 36-135D and 36-10141A when combined are limited to 3.98 cfs and the irrigation of 143 acres. This equates to 0.028 cfs per acre, which constitutes a full supply of water for the 143 acres.

32. Water right 36-8723 includes the following condition: "The rate of diversion of water for irrigation under this right and all other water rights on the same land shall not exceed 0.02 cubic feet per second for each acre of land." If water rights 36-134D, 36-135D and 36-10141A are fully delivered, then no water may be diverted under water right 36-8723.

33. On February 11, 2014, North Snake GWD and Morris entered into a Memorandum Agreement regarding the Sandy Pipeline. Ex. 111. North Snake GWD agreed to continue to deliver water through the Sandy Pipeline to Morris to mitigate for the use of Morris's water rights from the Curren Tunnel. *Id.* In exchange, Morris agreed to allow North Snake GWD to use his water from the Curren Tunnel to deliver to Rangen as mitigation. *Id.*

34. The Memorandum Agreement specifically includes water rights 36-134D, 36-135D and 36-10141A. *Id.* The agreement is for five years. *Id.* If water is delivered to Morris through the Sandy Pipeline pursuant to the 2014 Agreement and water rights 36-134D, 36-135D and 36-10141 are fully satisfied, then no water could be legally diverted by Morris under water right 36-8723.

35. No evidence was presented relating to the Hoagland Tunnel or any of the water rights from the Hoagland Tunnel. The Districts did not provide any documents granting the Districts legal access to the properties currently irrigated with water rights from the Hoagland Tunnel. Although Morris owns property irrigated from the Hoagland Tunnel, the 2014 Memorandum Agreement between Morris and the Districts only pertains to Morris's Curren Tunnel water rights.

36. Currently, Morris operates the Musser and Candy properties in addition to his own. Ex. 127, page 3. The Districts do not own any of the proposed irrigation places of use. King Testimony, Tr. page 106. The Districts did not provide any evidence of legal access to the proposed irrigation place of use which would allow the Districts to develop irrigation water rights on those properties.

37. The Districts propose to use three measuring devices to track the amount of water delivered for recharge. King Testimony, Tr. pages 22-23. First, data would be collected from the existing NSCC Weir to determine how much water is entering the Sandy Ponds. Ex. 101, pages 13-14. NSCC has agreed to provide access to the data collected at the NSCC Weir. *Id.*

38. The second measuring device will be installed in the Sandy Pipeline upstream of the irrigation vault. Ex. 101, page 16. A third measuring device will be installed on the outflow channel from Pond #1, where water is released into the original W-26 Lateral channel. *Id.*

39. Measuring the amount of water entering the Sandy Ponds, the amount of water diverted from the Sandy Ponds in the Sandy Pipeline, the amount of water released from Pond #1 to the end

SCANNED

of the W-26 Lateral channel, and estimating the amount of water lost to evaporation will allow the Districts to calculate the amount of water being infiltrated through the Sandy Ponds. Ex. 101, pages 13-15.

40. The Districts propose installing measuring devices in the Sandy Vault to determine the amount of water diverted by the irrigators from the vault, the amount of water entering the vault from the Curren Tunnel, and the amount of water being conveyed to the Curren Ditch. Ex. 101, pages 15-16.

41. The fourth amended application identifies three places of use for mitigation purposes: The Sandy Pipe Vault, the head of the Curren Ditch, and a point on Billingsley Creek, just downstream of the Curren Ditch diversion. Ex. 100, page 6.

42. The Curren Ditch is a diversion from Billingsley Creek located less than ¼ mile downstream of the end of the Rangen facility. Ex. 133. The Districts believe that providing water at the head of Curren Ditch could free up water in Billingsley Creek to bypass the Curren Ditch diversion and continue downstream to satisfy other senior water right holders on Billingsley Creek who may be impacted by upstream junior ground water diversions. King Testimony.

43. Currently, there are twelve water rights associated with the Curren Ditch. These rights, in combination, authorize a total diversion rate of 35 cfs. 15 cfs of the total diversion rate is associated with water rights bearing priority dates of September 10, 1884. 20 cfs of the total diversion rate is associated with water rights bearing priority dates of April 1, 1917.

44. The Districts intend to use the Curren Ditch and Billingsley Creek mitigation places of use to mitigate injury to any water right in the Billingsley Creek drainage, known or unknown at this time. Transcript, page 51.

45. On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department alleging that it was not receiving the water it was entitled to under water rights 36-2551 and 36-7694. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call* at 1, Docket No. CM-DC-2011-004 (January 29, 2014). Water right 36-2551 bears a priority date of July 13, 1962. *Id.* at 5. Water right 36-7694 bears a priority date of April 12, 1977. *Id.* at 5. The Director determined that diversions by junior ground water users had materially injured Rangen and required mitigation be provided to Rangen or curtailment of certain ground water users. *Id.* at 36, 42.

46. Water rights 36-2551 and 36-7694 are diverted from the Curren Tunnel, which, in addition to other seeps and springs in the immediate area, form the headwaters of Billingsley Creek. Ex. 133.

47. At the time of the hearing, the Districts did not have any pending mitigation obligations to water users in the Billingsley Creek drainage (except for Rangen). Transcript, page 50. There were four delivery calls filed in 2014 by water users in the Billingsley Creek drainage (Ark Fisheries, Aquarius Aquaculture, LynClif Farms and Dan & Dadhri Lee). *Id.* These delivery calls have all been settled. *See Final Order Approving Mitigation Plan and Dismissing Delivery Call* for each call (Aquarius Aquaculture, Docket No. CM-DC-2014-001 (November 24, 2014); Lee, Docket No. CM-DC-2014-003 (November 24, 2014); Ark Fisheries, Docket No. CM-DC-2014-002 (February 26, 2015); LynClif Farms, Docket No. CM-DC-2003-001 (February 26, 2015)).

48. There is a confidential memorandum agreement between the Districts and Buckeye Farms (a water user on Billingsley Creek with senior water rights in the Curren Ditch), where the Districts have agreed to deliver water from the Sandy Pipe to the Curren Ditch. Transcript, page 50.

49. The Districts are in the process of negotiating a “global settlement” with water users in the Billingsley Creek drainage. Transcript, pages 50-51. This agreement has not been finalized. *Id.*

50. Pursuant to IDAPA 37.03.08.040.05.g, the Districts requested comment about the proposed application from Gooding County, Idaho Department of Fish & Game, Idaho Department of Environmental Quality, and Big Bend Irrigation and Mining Company. None of those entities provided comments.

APPLICABLE STATUTES, RULES AND ORDERS

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). IDAPA 37.03.08.040.04.

3. Rule 45.01.a of the Department’s Water Appropriation Rules sets forth the criteria used to determine whether a proposed use will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.45.01.a.i.

4. 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.

5. Rule 45.01.c also states 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 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.

6. 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.ii - iii.

7. “Trust Water” is defined as “[t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code.” IDAPA 37.03.08.010.17.

8. The flows in the Snake River between Milner Dam and Swan Falls Dam and all surface and ground water sources tributary to that reach of the Snake River are “trust water”. IDAPA 37.03.08.030.01.a. This area of trust water was designated by agreement as described in Idaho Code § 42-203B(5).

9. Rule 25.02 of the Department’s Water Appropriation Rules states:

Applications to appropriate water from sources on which the state holds water in trust, pursuant to Section 203B(5), Idaho Code, will be processed in a three-step analysis. Evaluation will consider the purposes of “trust water” established in Section 42- 203B, Idaho Code.

- a. First, the proposed use must be evaluated using the procedures and criteria of Section 42-203A, Idaho Code. If all criteria of Section 42-203A(5), Idaho Code, are satisfied, the application may be approved for unappropriated water. If the application does not satisfy the criteria of Section 42-203A(5) b, c, d, and e, Idaho Code, or is found to reduce the water to existing water rights other than those held in trust by the state, the application will be denied. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except Section 42-203A(5)a, Idaho Code, but is found to reduce water held in trust by the state, the application will be reviewed under criteria of Section 42-203C, Idaho Code.

b. Second, Section 42-203C, Idaho Code, requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of Section 42-203B, Idaho Code (hereinafter termed "significant reduction"). If a significant reduction will not occur, the application may be approved without an evaluation of the public interest criteria of Section 42-203C(2), Idaho Code.

c. Third, based upon a finding of significant reduction, the proposed use will be evaluated in terms of the public interest criteria of Section 42-203C(2), Idaho Code.

IDAPA 37.03.08.025.02.a-c.

10. Idaho Code § 42-203C states in pertinent part:

(1) If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.

(2)(a) The director in making such public interest determinations for purposes of this section shall consider:

- (i) The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;
- (ii) The economic impact the proposed use would have upon electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact;
- (iii) The promotion of the family farming tradition;
- (iv) The promotion of full economic and multiple use development of the water resources of the state of Idaho;
- (v) In the Snake River Basin above the Murphy gauge whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under the provisions of this section shall be on the protestant.

SCANNED
MAY 13 2015

11. The protestant bears the initial burden of coming forward with evidence for the evaluation of the public interest criteria set forth in Idaho Code § 42-203C(2). The protestant also bears the ultimate burden of persuasion for the criteria of Section 203C(2). IDAPA 37.03.08.040.04.

12. Idaho Code § 42-234 states in pertinent part:

(1) . . . The legislature finds that the use of water to recharge ground water basins in accordance with Idaho law and the state water plan may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

(2) The legislature hereby declares that the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water. The director of the department of water resources is authorized to issue permits and licenses for the purpose of ground water recharge, pursuant to the provisions of this chapter and in compliance with other applicable Idaho law and the state water plan.

. . .

(5) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right.

13. On April 30, 1993, the Department issued an Amended Moratorium Order (“1993 Moratorium”) restricting “the processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake Plain Area and all tributaries thereto” *1993 Moratorium* at 4. The 1993 Moratorium applies to all applications proposing a consumptive use of water and includes the following provision:

9. The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if

- a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
- b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location insignificant consumption of water or mitigation provided by the applicant to offset injury to other water rights.

Id. at 5.

ANALYSIS

Reduction to Existing Water Rights

1) Consumptive Nature of the Proposed Permit

The Districts' Rule 40.05 disclosures include the following assertion: "[A]ll water diverted under [this] Application will be used to supply mitigation water to existing water rights. There will be no new consumptive water use as a result of this Application." Ex. 101, page 1 (emphasis added). This statement is not correct. The Districts acknowledge that there will be as much as 0.41 cfs of evaporation occurring instantaneously from the Sandy Ponds during the summer months. *Id.* at 30-34.

The storage of water in the Sandy Ponds and evaporation from the ponds is not associated with any existing water rights. In the absence of a water right supporting the Sandy Ponds, they would be considered an unauthorized diversion and should not be used. Therefore, the evaporation from the Sandy Ponds must be included in an injury analysis under the proposed permit.

The small amount of evaporation occurring from the Sandy Ponds is inconsequential, however, because all of the elements of the proposed water right are consumptive when viewed in the context of immediate impact to the flows in the Snake River. Water infiltrated through or evaporated from the Sandy Ponds, water delivered for use by Curren Tunnel water rights, and water delivered as mitigation to water users in the Billingsley Creek drainage all result in an immediate impact to the Snake River. Although water from all of these uses may eventually return to the Snake River and offset some of the long-term impacts, the Districts did not provide any evidence to show how and when these return flows may arrive at the Snake River.

2) Reduction to Water Right 36-8723 (Morris)

Diversion under the proposed permit has the potential to reduce the quantity of water under water right 36-8723. Pursuant to the terms of the 2014 Memorandum Agreement between Morris and North Snake GWD, Morris has agreed to use water from the Sandy Pipeline in exchange for not diverting his Curren Tunnel water rights. Ex. 111. Morris's senior water rights will be mitigated for with water from the Sandy Pipeline. According to the conditions on water right 36-8723, if Morris's Curren Tunnel water rights are fully satisfied, he may not divert any water under water right 36-8723.

At the present time, given the delivery of water to Morris through the Sandy Pipeline, water right 36-8723 cannot be diverted. If delivery of water right 36-8723 is ever required in the future, the measuring device proposed by the Districts, to be located immediately downstream of the Sandy Ponds, will be sufficient to ensure that 2.40 cfs is released past the Sandy Ponds to satisfy water right 36-8723.

3) Reduction to Curren Tunnel Rights

Rangen argues that, if the Districts deliver more water through the Sandy Pipeline for mitigation purposes, the amount of recharge occurring at the Sandy Ponds might be reduced, which may impact spring flows in the area, including flow from the Curren Tunnel. Colvin Testimony, Tr. pages 156-157.² This argument is not persuasive.

Rangen assumes that the Sandy Ponds would continue to exist and be used in the absence of a water right. This assumption is incorrect. If the pending application is not approved, the Department could require that the Sandy Ponds be removed and the W-26 Lateral channel be restored to convey waste water from the NSCC system directly to the Snake River. Injury to other water rights resulting from the proposed permit should be evaluated using the original W-26 Lateral channel (without any diversions or impoundments) as the baseline.

The proposed project will not reduce the flow available to any water rights in the Curren Tunnel, including Rangen's water rights. The recharge occurring from the Sandy Ponds is much greater than would have occurred from the original W-26 Lateral channel. Colvin Testimony, Tr. pages 162-164. With authorized recharge occurring through the Sandy Ponds, the flow from the Curren Tunnel may actually increase. *Id.* at 151-152. If the pending application was denied and the Sandy Ponds and Sandy Pipeline removed, it would have an adverse impact on Rangen. *Id.* at 159.

Direct delivery of mitigation water to the senior irrigators from the Curren Tunnel (Morris, Musser, Candy) provides a greater benefit to Rangen than incidental recharge through the original W-26 Lateral. Colvin Testimony, Tr. pages 153-155. Only a small percentage of seepage from the W-26 Lateral would be realized as increased flow at the Curren Tunnel. Whereas, mitigation water provided to Morris, Musser and Candy results in less demand on the Curren Tunnel and more water being available to Rangen. The evidence in the record does not support Rangen's argument that Curren Tunnel water rights will be reduced if the proposed permit is approved.

4) Reduction to Snake River Flows

Diversion under the proposed permit will "significantly reduce the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to [Idaho Code § 42-203B(5)]". Idaho Code § 42-203C. The Snake River between Milner Dam and Swan Falls Dam is designated by statute as an area of trust water. Diversion under the proposed permit could reduce instantaneous flows in the Snake River by as much as 50 cfs during the irrigation season.

A reduction in trust water does not mean that the proposed permit must be denied. Pursuant to Idaho Code § 42-203C, the Department must determine whether the expected reduction in trust water is in the public interest.

² See footnote 1.

Public Interest Review under Idaho Code § 42-203C

The protestant bears the burdens of production and persuasion for the public interest criteria set forth in Idaho Code § 42-203C(2). These 42-203C public interest criteria are primarily focused on the economic impacts of the proposal. Rangen provided no evidence addressing these review criteria. In fact, the expert report, rebuttal report and post-hearing brief submitted by Rangen do not even refer to Idaho Code § 42-203C or any of the review criteria listed in that section.

Scott King, the expert witness for the Districts, provided a short analysis of the 203C criteria within his expert report. Ex. 140, pages 4-6. The evidence in the record indicates that diversion of water under the proposed permit will help the Districts avoid curtailment of their members' water rights. This will maintain the economic benefit to the state derived from those existing water uses. Further, if the permit is approved, it will benefit farmers and aquaculture facilities throughout southern Idaho. In this case, it is in the public interest to allow a reduction to the trust water available between Milner Dam and Swan Falls Dam.

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 waste water flows in the NSCC W-26 Lateral have, at times, exceeded 50 cfs in the last ten years. Ex. 134.

Good Faith / Speculative Purposes

The mitigation and recharge elements of the pending application are not speculative or filed in bad faith. The proposed diversion works and delivery system are already constructed and the Districts will install additional measuring devices to track the amount of water delivered for recharge and mitigation. Water has been diverted for recharge and mitigation purposes, as described in the pending application, since 2004.

In its post-hearing brief, Rangen argues that the entire application fails because it violates the anti-speculation doctrine. The fact that the Districts have already constructed the delivery system and have been using water from the Sandy Ponds for mitigation and recharge purposes for more than a decade, albeit without a valid water right, reduces any concerns of speculation. Rangen's speculation arguments are based on a mischaracterization of recharge and mitigation water rights. Because speculation and the perfection of the proposed water right are some of the primary issues of protest, they warrant additional discussion in this order. Each of the proposed beneficial uses (irrigation, mitigation, and recharge) are discussed separately.

1) Irrigation

The Districts propose to divert 13.03 cfs for the irrigation of 651.3 acres. These irrigated acres are owned by various individuals (Musser, Candy, Morris, and other water users who divert from the Hoagland Tunnel). The Districts provided an agreement with Morris to deliver irrigation water to his property through the Sandy Pipeline. The Districts did not provide any agreements

demonstrating legal access to the any of the irrigated properties allowing the Districts to develop a new irrigation permit on those properties.

The Districts acknowledge that the irrigation element of the pending application may not be needed if the other elements of the application are approved. King Testimony, Tr. pages 55-58; Districts' Post-hearing Brief, pages 7-8. For the lands irrigated from the Curren Tunnel and the Hoagland Tunnel, the irrigation element of the application is duplicative of the mitigation element. Water can be delivered to the Candy, Morris, Musser properties and the Hoagland Tunnel properties under the "mitigation" element of the right.

Because the Districts do not intend to develop the beneficial use of irrigation and because the Districts have not sufficiently demonstrated legal access to the proposed irrigation place of use to engage in irrigation activities, the irrigation component of the application should not be included on the permit. See Idaho Code § 42-203A(5)(c); IDAPA 37.03.08.45.01.c.i.

2) Mitigation

a) Mitigation as a Beneficial Use

"Mitigation" has been recognized as an authorized beneficial use in many circumstances in the state of Idaho. The Department's Water Appropriation Rules (IDAPA 37.03.08) do not contain a definition for the beneficial use "mitigation." In a previous order, the Department determined that the beneficial use of mitigation includes "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." *Preliminary Order Issuing Permit (36-16976)* (Nov. 18, 2014) (relying on Idaho Code § 42-5201 and IDAPA 37.03.11.010.15 to describe the beneficial use "mitigation").

In the pending application, the Districts propose to compensate senior water right holders for injury caused by the diversion of water under junior water rights. Compensation will occur by delivering waste water into the Sandy Pipe Vault or the Curren Ditch or delivering water into Billingsley Creek to augment the water supply for senior water users. The activities proposed by the Districts fall within the above-stated definition of "mitigation." The mitigation proposed by the Districts constitutes a viable beneficial use of water which can be recognized in a permit issued by the Department.

b) Formal Mitigation Requirements or Delivery Call Proceedings

The fact that an applicant does not have a pre-existing demand for water does not, by itself, make an application for permit speculative. For example, an applicant seeking an irrigation water right is not required to have the irrigation system already constructed and crops planted at the time an application is filed. Stated differently, a farmer is not expected to have potatoes in the ground prior to filing an application for permit for an irrigation use. Similarly, the Districts are not required to have a formal mitigation obligation prior to pursuing an application for permit for mitigation purposes.

Further, there is nothing in statute or rule that restricts the beneficial use “mitigation” to the realm of delivery calls. If the Districts determine their activities have reduced the water supply to certain water users, the Districts may seek mitigation water rights to address those impacts, even without a formal finding of material injury by the Director. *See Final Order Denying Exception (Transfer 78255)*, page 4, (“[M]itigation plans may be processed and approved prior to a delivery call and determination that the calling party is being materially injured.”).

The Districts may pursue a water right for a mitigation demand that is reasonably foreseeable. The Districts’ mitigation obligation to water users on the Curren Ditch is not only reasonably foreseeable, it is highly likely. The Curren Ditch water rights (which bear priority dates senior to the water rights forming the basis of Rangen’s 2011 Delivery Call) authorize 35 cfs of diversion from Billingsley Creek. Pursuing a permit to provide mitigation water to water users on the Curren Ditch, prior to the issuance of an order from the Department finding material injury, is not speculative.

c) Developing or Perfecting a Permit for Mitigation Purposes

Rangen focused much of its post-hearing brief on the argument that a mitigation water right can only be perfected if it is linked to some other beneficial use. Rangen would argue, for example, that if mitigation is delivered to an irrigator, the beneficial use of mitigation occurs at the time the water is used for irrigation. This is an incorrect understanding of mitigation.

The beneficial use of mitigation is accomplished when a right holder derives a benefit from the diversion of water. This occurs at the time the water is delivered to the senior water right holder as mitigation. *Final Order Denying Application (36-16976)*, page 12, ¶ 17 (“All that is required in order for perfection of the mitigation water right at issue here is legally accomplished delivery of the water and injection into the Rangen facility.”); *See also id.* at 11, ¶ 13 (“mitigation occurs when water is injected into the infrastructure of the senior water right holder”).

The benefit derived from diverting water under proposed Permit 36-17011 is not raising fish or growing crops. Rather, the benefit derived is that the water users within the Districts avoid possible curtailment of their junior water rights. This occurs at the moment mitigation water is delivered. A mitigation water right can be perfected by delivering the water to a senior water user who is impacted by diversions under junior water rights or delivering water to a diminished source.

d) Mitigation Place of Use

Pursuant to a previous order of the Department, the place of use for a mitigation right proposing to inject water into a diminished source is the location where the water is injected into the diminished source. Similarly, the place of use for a mitigation right proposing to supply water directly to an impacted senior water right holder is the location where water is delivered to the senior’s infrastructure. *Final Order Denying Application (36-16976)*, pages 11-12. In this case, the places of use identified in the fourth amended application are consistent with previous orders of the Department. The Districts have demonstrated legal access to the proposed mitigation places of use.

3) Recharge

Prior to the hearing, the parties agreed to not address the extent to which recharge occurring in the Sandy Ponds increases flow from the Curren Tunnel or from other springs in the area. The issuance of a recharge permit does not determine the extent of mitigation credit or guarantee that mitigation credit will be recognized for recharge activities occurring under the permit.

a) Incidental Recharge

Rangen argues that the Department is barred by Idaho Code § 42-234(5) from issuing a recharge right for the Sandy Ponds because “incidental recharge” has been occurring at the ponds since they were created. Rangen assumes that the Sandy Ponds “will continue to exist whether this application is approved or not.” Ex. 203, page 2. This assumption is incorrect.

At the time the Sandy Ponds were constructed by NSCC, the ponds were a component of the NSCC delivery system and would have likely been considered coincident to NSCC’s delivery of irrigation water to its shareholders. Once the Sandy Ponds passed out of the ownership and control of NSCC, they were no longer used as a management tool in the delivery and operation of NSCC, and, therefore, were no longer covered by the NSCC irrigation water rights.

The Sandy Ponds have been unauthorized since the time NSCC conveyed ownership of the ponds. The Sandy Ponds constitute an impoundment and diversion of water (Colvin Testimony, Tr. page 213-214) and, as such, require a recorded water right. *See* Idaho Code §§ 42-103, 42-201 and 42-351. Without a water right authorizing a beneficial use associated with the Sandy Ponds, water cannot be impounded in the ponds.

Although ground water recharge has occurred over the last fifteen years because of the existence of the Sandy Ponds, the proposed beneficial use of recharge is not “incidental” to the ponds because the ponds do not currently represent an authorized beneficial use of water. The Sandy Ponds are no longer incidental to NSCC’s water rights. The only reason the Sandy Ponds still exist today is for recharge purposes. The Districts are not barred from pursuing a recharge permit to legitimize the existence of the Sandy Ponds and the recharge that has occurred at the ponds since they were acquired from NSCC.

b) Necessary Permits

In its post hearing brief, Rangen asserts that the Districts have not pursued all of the permits needed to complete the proposed recharge project. Rangen specifically refers to a ground water protection permit from the Department of Environmental Quality as required under IDAPA 58.01.01 (Rules for the Control of Air Pollution in Idaho). The administrative rules cited by Rangen do not mention “recharge” and do not appear to be applicable to this contested case. Rangen likely intended to refer to IDAPA 58.01.11 (Ground Water Quality Rules). However, these rules do not describe any ground water quality permit that would be required by the Idaho Department of Environmental Quality relating to the proposed recharge project. *See* IDAPA 58.01.11.001.02.

Sufficient Financial Resources

Prior to the hearing, the parties stipulated that the question of whether the Districts have sufficient financial resources to complete the proposed project is not at issue in this contested case. 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.

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

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). 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." Idaho Code § 42-202B(3).

The Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004 provides some evidence of the local public interest relating to the Sandy Pipeline. Ex. 109. At the time of the agreement, the Sandy Pipeline, which had already been constructed, was considered an important component in the plan to address the water shortages in the Thousand Springs area. As evidenced by the 2011 Delivery Call filed by Rangen, the water shortages in the area have not yet been fully resolved.

The 2004 agreement also recognized that one of the ways to address the water shortages in the Thousand Springs area would be to supply non-spring dependent water users (such as Morris, Musser and Candy) with alternative surface water supplies (such as the W-26 Lateral waste water) to free up spring flows for spring dependent water users (such as Rangen). See Ex.109, page 3 (Paragraph 1.D).

The pending application seeks to obtain an official water right for diversions that have taken place since 2004. The proposed uses are meant to alleviate water shortage pressures in the Thousand Springs area and within the Billingsley Creek drainage. Use of the Sandy Ponds and the initial use of the Sandy Pipeline were authorized through agreement by the Governor of the state of Idaho and the state legislature. For these reasons, the pending application is in the local public interest.

Moratorium

The beneficial uses proposed in the application (mitigation and recharge) are consumptive uses because they deplete the source of water listed on the application. As such, the 1993 Moratorium prohibits the processing and approval of the application. However, the Department may review and approve certain applications on a case-by-case basis if they fall within one of two recognized exceptions. In this case, the application falls within both exceptions.

First, approval of the application promotes “the protection and furtherance of the public interest” because diversion of water under the proposed permit could resolve a portion of delivery calls which, if not addressed, could result in the curtailment of hundreds of thousands of irrigated acres in the state.

Second, diversion of waste water under the proposed application will have no effect on prior surface or ground water rights because of its location. The only downstream water right for the waste water source listed on the right is 36-8723 which authorizes the irrigation of the same acres that will be provided water under the pending application.

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) and Idaho Code § 42-203C. Therefore, the pending application should be approved and a permit issued with limiting conditions. The “irrigation” element of the water right should not be included on the permit because it is speculative and is duplicative of the “mitigation” element.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 36-17011 in the name of North Snake GWD et al. is APPROVED and Permit 36-17011 is ISSUED with the following elements and conditions:

Priority Date: March 12, 2014

Source: Waste Water Tributary to: Snake River

Beneficial Use: Recharge Period of Use: 1/1 – 12/31 Diversion Rate: 50.00 cfs

Beneficial Use: Mitigation Period of Use: 1/1 – 12/31 Diversion Rate: 32.00 cfs

Combined Diversion Rate: 50.00 cfs

Points of Diversion: NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T08S, R14E, B.M. (Sandy Ponds)
 SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T08S, R14E, B.M. (Sandy Ponds)
 NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T08S, R14E, B.M. (Sandy Ponds)
 SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T08S, R14E, B.M. (Sandy Ponds)
 NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T08S, R14E, B.M. (Sandy Pipeline)

Recharge Place of Use: NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T08S, R14E, B.M.
SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T08S, R14E, B.M.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T08S, R14E, B.M.
SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T08S, R14E, B.M.

Mitigation Place of Use: SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31, T07S, R14E, B.M.
NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, T07S, R14E, B.M.

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **June 01, 2020**.
2. Subject to all prior water rights.
3. The waste water diverted under this right is subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place of use or manner of wasting it, or to recapture it.
4. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
5. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
6. Approval of this permit does not constitute approval by the Idaho Water Resource Board as may be required pursuant to Section 42-1737, Idaho Code.
7. The right holder shall record the daily quantity of water diverted for ground water recharge and shall report the diversion data for the prior calendar year to the Department by February 1 each year. Reporting shall occur in the manner specified by the Department, consistent with Section 42-701, Idaho Code. To facilitate this reporting requirement, the right holder shall install and maintain totalizing measuring devices approved by the Department in the Sandy Pipeline and immediately downstream of the Sandy Ponds.
8. This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Section 42-1416B, or any other proposal to utilize credit for the recharge effort.
9. Recharge occurring under this right does not include seepage occurring between the banks of the W-26 Lateral channel as it existed prior to construction of the Sandy Ponds.
10. 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.
11. Prior to diversion of water under this right, the right holder shall install and maintain department approved measuring devices at the following locations: 1) in the existing waste water

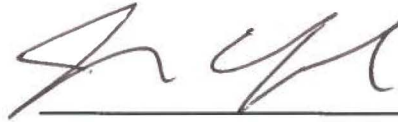
channel immediately downstream of the Sandy Ponds, 2) in the Sandy Pipeline upstream of the Sandy Pipe Vault, 3) on all diversions from the Sandy Pipe Vault, 4) on the pipeline conveying water from the Sandy Pipe Vault to the Curren Ditch, and 5) on the pipeline conveying water from the Sandy Pipe Vault to Billingsley Creek (if one is constructed).

12. This right does not grant any right-of-way or easement across the land of another.

13. 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.

14. 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.

Dated this 13th day of May 2015.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May 2015, 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



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.

State of Idaho
Department of Water Resources
Permit to Appropriate Water

NO. 36-17011

Priority: March 12, 2014

Maximum Diversion Rate: 50.00 CFS

This is to certify, that MAGIC VALLEY GROUND WATER DISTRICT
NORTH SNAKE GROUND WATER DISTRICT
SOUTHWEST IRRIGATION DISTRICT
C/O RANDALL C BUDGE
PO BOX 1391
POCATELLO ID 83204-1391

has applied for a permit to appropriate water from:

Source: WASTE WATER**Tributary:** SNAKE RIVER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
MITIGATION	01/01 to 12/31	32.00 CFS
GROUND WATER RECHARGE	01/01 to 12/31	50.00 CFS

LOCATION OF POINT(S) OF DIVERSION:

WASTE WATER	NE $\frac{1}{4}$ SW $\frac{1}{4}$	Sec. 5	Twp 08S	Rge 14E, B.M.	GOODING County
WASTE WATER	SE $\frac{1}{4}$ SW $\frac{1}{4}$	Sec. 5	Twp 08S	Rge 14E, B.M.	GOODING County
WASTE WATER	NE $\frac{1}{4}$ SW $\frac{1}{4}$	Sec. 5	Twp 08S	Rge 14E, B.M.	GOODING County
WASTE WATER	NW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec. 5	Twp 08S	Rge 14E, B.M.	GOODING County
WASTE WATER	SW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec. 5	Twp 08S	Rge 14E, B.M.	GOODING County

PLACE OF USE: MITIGATION

Twp	Rge	Sec	NE	NW	SW	SE	Totals
07S	14E	31	X				

PLACE OF USE: GROUND WATER RECHARGE

Twp	Rge	Sec	NE	NW	SW	SE	Totals
08S	14E	5			X		

SCANNED
MAY 13 2015

State of Idaho
Department of Water Resources
Permit to Appropriate Water
NO. 36-17011

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **June 01, 2020**.
2. Subject to all prior water rights.
3. The waste water diverted under this right is subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place of use or manner of wasting it, or to recapture it.
4. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
5. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
6. Approval of this permit does not constitute approval by the Idaho Water Resource Board as may be required pursuant to Section 42-1737, Idaho Code.
7. The right holder shall record the daily quantity of water diverted for ground water recharge and shall report the diversion data for the prior calendar year to the Department by February 1 each year. Reporting shall occur in the manner specified by the Department, consistent with Section 42-701, Idaho Code. To facilitate this reporting requirement, the right holder shall install and maintain totalizing measuring devices approved by the Department in the Sandy Pipeline and immediately downstream of the Sandy Ponds.
8. This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Section 42-1416B, or any other proposal to utilize credit for the recharge effort.
9. Recharge occurring under this right does not include seepage occurring between the banks of the W-26 Lateral channel as it existed prior to construction of the Sandy Ponds.
10. 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.
11. Prior to diversion of water under this right, the right holder shall install and maintain department approved measuring devices at the following locations: 1) in the existing waste water channel immediately downstream of the Sandy Ponds, 2) in the Sandy Pipeline upstream of the Sandy Pipe Vault, 3) on all diversions from the Sandy Pipe Vault, 4) on the pipeline conveying water from the Sandy Pipe Vault to the Curren Ditch, and 5) on the pipeline conveying water from the Sandy Pipe Vault to Billingsley Creek (if one is constructed).
12. This right does not grant any right-of-way or easement across the land of another.
13. 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.

SCANNED

MAY 13 2015

State of Idaho
Department of Water Resources
Permit to Appropriate Water

NO. 36-17011

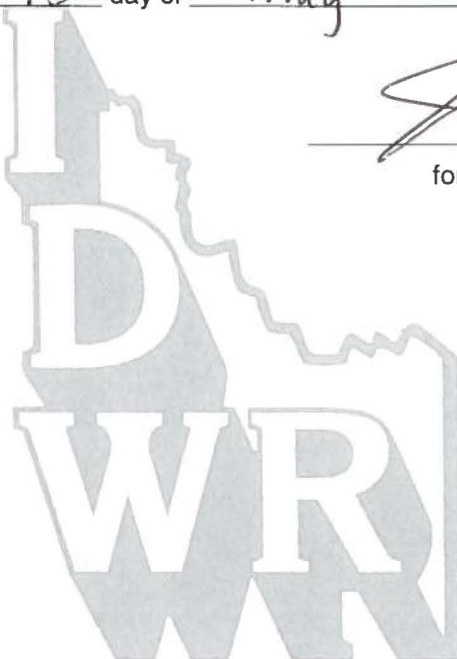
CONDITIONS OF APPROVAL

14. 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.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this 13th day of May, 20 15.



for GARY SPACKMAN
Director



SCANNED

MAY 13 2015