

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

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 36-17011)	FINAL ORDER
IN THE NAME OF NORTH SNAKE)	DENYING EXCEPTIONS
<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.

Notice of Application 36-17011 was published beginning on April 3, 2014. Rangen, Inc. ("Rangen"), protested the application. Attorneys Robyn Brody, Justin May and Fritz Haemmerle represent Rangen. The U.S. Bureau of Land Management ("BLM") and North Side Canal Company ("NSCC") also protested the application. BLM and NSCC subsequently withdrew their protests.

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 a hearing to decide the contested case. An administrative hearing was conducted before Hearing Officer James Cefalo on February 5, 2015, in Twin Falls, Idaho.

On May 13, 2015, the Hearing Officer issued a *Preliminary Order Issuing Permit* ("Preliminary Order") approving Application 36-17011 and issuing Permit 36-17011. This matter is now before the Director of the Department ("Director") as a result of Rangen's May 27, 2015, filing of *Rangen's Exceptions to Preliminary Order Issuing Permit 36-17011* ("Exceptions").

The Director largely adopts the Hearing Officer's findings of fact, conclusions of law, and order, except for the Hearing Officer's determination that the waste water proposed to be appropriated is trust water. In this order, the Director determines the waste water sought to be appropriated is not trust water.

FINDINGS OF FACT

1. On February 28, 2014, North Snake GWD, Aberdeen American Falls GWD, Bingham GWD, Bonneville Jefferson GWD, Jefferson Clark GWD, Madison GWD, Magic Valley GWD, and Southwest Irrigation District filed Application for Permit 36-17011. 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 fourth amendment also reduced the applicants to North Snake GWD, Magic Valley GWD and Southwest Irrigation District ("the Districts"). The remaining elements of the application did not change. The fourth amended application proposes the following:

Source: Waste Water

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	

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, p. 4.

5. The Sandy Ponds and Sandy Pipeline described in Application 36-17011 already exist. Ex. 110.

6. NSCC delivers water to some of its shareholders through a canal known as the W-26 Lateral. The NSCC water rights that supply the W-26 Lateral are diverted from the Snake River above Milner Dam.¹ 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 ultimately discharge 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 W-26 Lateral. *Id.* Testimony established the Sandy Ponds were developed to be “sediment or water quality ponds” to capture the water before it flowed into the Snake River. King Testimony, Tr. p. 87; *see also* Colvin Testimony, Tr. p. 164. NSCC constructed and maintained the ponds. Ex. 112. The agreement recognized 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, p. 1. At the time of construction, NSCC did not hold 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. NSCC’s irrigation water rights likely authorized the retention of water in the Sandy Ponds.

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. There are no water rights separately and expressly 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, p. 27. Water passing over the NSCC Weir is no longer controlled by NSCC, but is considered waste water from the NSCC system. The NSCC waste water does not co-mingle with any other source of water prior to discharging into the Sandy Ponds. King Testimony, Tr. pp. 16, 89; Ex. 101, pp. 23, 39C-101. In recent years, the amount of waste water flowing past the NSCC Weir has, at times, exceeded 50 cfs. Ex. 134, p. 1.

12. Application 36-17011 describes four recharge ponds. Pond #3 is the first pond downstream of the NSCC Weir. Ex. 101, p. 12. Pond #3 has the largest surface area of the Sandy

¹ Water rights numbers 1-5, 1-16, 1-210, 1-212, 1-213, and 1-10509.

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, p. 12. A significant amount of water infiltrates into the ground from the Recharge Pond when compared to the other Sandy Ponds. Ex. 127, pp. 6-7. Water can be conveyed to the Recharge Pond by closing the outlet gate on Pond #3. A channel conveys water from Pond #3 to the Recharge Pond.

14. Pond #2 is the second pond downstream of the NSCC Weir. Ex. 101, p. 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, p. 12. Pond #1 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 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, pp. 30-34. The evaporation associated with the Sandy Ponds is a consumptive use of water.

17. Some water has always infiltrated or seeped into the ground from surface water flowing through the original W-26 Lateral between the NSCC Weir and the Snake River. King Testimony, Tr. pp. 95-99.

18. Seepage from the Sandy Ponds exceeds the seepage from the original W-26 Lateral channel. Colvin Testimony, Tr. p. 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, p. 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, p. 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 water users diverting water from the Curren Tunnel and water users receiving water from the Curren Ditch. Ex. 110, p. 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, p. 23. The pipeline conveys water from the Sandy Ponds complex to a structure called the Sandy Pipe Vault. King Testimony, Tr. pp. 22-25. The capacity of this section of pipeline is 32 cfs. Ex. 110, p. 1. To divert water into the Sandy Pipeline, Pond #2 must be full. *Id.*

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

22. An existing pipeline can deliver water from the Sandy Pipe Vault to the Curren Tunnel Farmers' Box. Ex. 101, p. 29 and Ex. 116. This Farmers' 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 and delivered to the Curren Tunnel Farmer's Box for irrigation, the water from Sandy Ponds flows into another pipeline discharging to the head of the Curren Ditch. Ex. 116. There is no existing pipeline delivering water 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 deliver 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 established 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, p. 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 currently identified as a place of use by separate decreed water rights. These decreed water rights authorize irrigation with water 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, p. 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 authorizing diversion from the same waste water source described in Application 36-17011 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 executed 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 offer 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 present 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. pp. 22-23. First, data would be collected from the existing NSCC Weir to determine how much water is entering the Sandy Ponds. Ex. 101, pp. 13-14. NSCC has agreed to provide 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, p. 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 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 infiltrating through the Sandy Ponds. Ex. 101, pp. 13-15.

40. The Districts propose installing measuring devices in the Sandy Vault to measure 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, pp. 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, p. 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 delivering 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, Tr., pp. 36-38.

43. Twelve water rights are associated with the Curren Ditch. These rights, in combination, authorize a total diversion rate of 35 cfs. Fifteen cfs of the total diversion rate is associated with water rights bearing priority dates of September 10, 1884. Twenty 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. Tr., p. 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 to Rangen or curtailment of junior priority ground water uses. *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). Tr., p. 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. The Districts and Buckeye Farms (a water user on Billingsley Creek with senior water rights in the Curren Ditch) executed a confidential memorandum agreement, in which the Districts agreed to deliver water from the Sandy Pipe to the Curren Ditch. Tr., p. 50.

49. The Districts are in the process of negotiating a “global settlement” with water users in the Billingsley Creek drainage. Tr., pp. 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 commented.

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 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 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. Idaho Code § 42-203B(2) states:

Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; *provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.*

(emphasis added).

9. The Department's Water Appropriation Rules describe the location and nature of trust water as follows:

a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach.

b. *Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water.* After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only.

c. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement.

IDAPA 37.03.08.030.01.a-c (emphasis added).

10. The Department's Water Appropriation Rules also state that "[f]lows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach" are sources of public water that are *not* trust water. IDAPA 37.03.08.030.03.e.

11. 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.

12. 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 AND CONCLUSIONS OF LAW

A. Analysis of Application 36-17011 Under Idaho Code § 42-203A(5)

Reduction to Existing Water Rights

1) **Reduction to Water Right 36-8723 (Morris)**

Diversion proposed by Application 36-17011 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 agreed to irrigate with water from the Sandy Pipeline in exchange for not diverting water as authorized by his Curren Tunnel water rights. Ex. 111. Depletions of Curren Tunnel flows that would have satisfied 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. Therefore, the project proposed by Application 36-17011 will not reduce the quantity of water under water right 36-8723.

2) Reduction to Curren Tunnel Rights

The project proposed by Application 36-17011 will not reduce the flow available to any water rights in the Curren Tunnel, including Rangen's water rights. The recharge from the Sandy Ponds is much greater than the original recharge from the original W-26 Lateral channel. Colvin Testimony, Tr. pp. 162-164. With authorized recharge through the Sandy Ponds, the flow from the Curren Tunnel may actually increase. *Id.* at 151-152.² If the pending application was denied and the Sandy Ponds and Sandy Pipeline removed, the corresponding reduction in ground water recharge would adversely impact Rangen. *Id.* at 159.

Direct delivery of mitigation water to the senior irrigators from the Curren Tunnel (Morris, Musser, and Candy) provides a greater benefit to Rangen than incidental recharge through the original W-26 Lateral. Colvin Testimony, Tr. pp. 153-155. Only a small percentage of seepage from the W-26 Lateral would result in increased flow at the Curren Tunnel. Furthermore, delivery of mitigation water 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 Application 36-17011 is approved.

3) Reduction to Trust Water Flows

The water proposed for appropriation by Application 36-17011 is not trust water. While the Hearing Officer's determination to the contrary was consistent with prior decisions of the Department for similarly situated applications for permit, this is a matter of first impression before the Director on exceptions.

Application 36-17011 proposes to divert waste water from the Sandy Ponds. Ex. 100, p. 4. The waste water in the Sandy Ponds is derived from water passing over the NSCC Weir downstream of the last NSCC diversion from the W-26 Lateral that carries water sourced from the NSCC system Ex. 101, pp. 11, 13, 27; Tr. p. 95. The NSCC water rights that supply the NSCC system divert from the Snake River above Milner Dam. Therefore, pursuant to the plain language of Idaho Code § 42-203B(2) and the Department's Water Appropriation Rules 30.01.b & 030.03.e, the original source of the water passing over the NSCC Weir is not trust water. The water passing over the NSCC Weir is no longer controlled by NSCC and is considered waste water. "Third parties may appropriate the waste water after it leaves the control of the original appropriator." *Order on Challenge*, SRBA Subcase Nos. 36-02080, et al, p. 16 (Apr. 25, 2003), *affirmed in A&B Irrigation District v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 188 P.3d 78 (2005). Water passing over the NSCC Weir retains its "original characteristic" as non-trust water until the water commingles with a natural stream or aquifer and becomes tributary to the Snake River below Milner Dam. *See Order on Motions for Summary Judgment, Aberdeen-Springfield Canal Company v. IDWR*, Case No. CV-2014-165, p. 9 (Apr. 8, 2015) ("Where the

² It should be noted, however, that Mr. Colvin stated in his expert report: "It is unlikely that any water recharged through the Sandy Ponds significantly increases flow at the Curren Tunnel." Ex. 204, p. 2.

original appropriator relinquishes control of the seepage water and it returns to, and is commingled with, a natural stream or aquifer, the *water loses its original characteristic.*” (emphasis added.). Water passing over the NSCC Weir does not co-mingle with a natural stream or aquifer prior to reaching the Sandy Ponds. Ex. 101, p. 39C-101. Therefore, the NSCC waste water at issue is not trust water and may be appropriated by third parties as non-trust water. Because the waste water proposed for appropriation by Application 36-17011 is not trust water, the criteria set forth in Idaho Code § 42-203C are inapplicable.³

Sufficiency of Water Supply

The Districts 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 Application 36-17011 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. There are no obvious impediments that prevent successful completion of the proposed project. Water has been diverted for recharge and mitigation purposes as described in Application 36-17011 since 2004.

Rangen argues Application 36-17011 violates the anti-speculation doctrine. *Exceptions* at 13-16. 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 agreed with Morris to deliver irrigation water to his property through the Sandy Pipeline. The Districts did not present 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 the irrigation element of Application 36-17011 may not be needed if the other elements of the application are approved. King Testimony, Tr. pp. 55-58; Districts’ Post-hearing Brief, pp. 7-8. For the lands irrigated from the Curren Tunnel and the

³ The arguments set forth in the *Exceptions* alleging the Hearing Officer erred in his analysis under Idaho Code § 42-203C are moot. See *Exceptions* at 4-6.

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 Application 36-17011 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 Application 36-17011, the Districts propose to compensate senior water right holders for injury caused by the diversion of water under junior water rights. The Districts will compensate senior water right holders 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 already constructed the irrigation system and planted crops 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 senior priority 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)*, p. 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 an anticipated mitigation demand. The Districts' mitigation obligation to water users on the Curren Ditch is highly anticipated. 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 Director finding material injury, is not speculative.

c) Developing or Perfecting a Permit for Mitigation Purposes

Rangen argues that a mitigation water right can only be perfected if it is linked to some other beneficial use. *Exceptions* at 13- 16. 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)*, p. 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. The benefit 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)*, pp.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. *See Exs. 106 – 108, 116.*

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 Permit 36-17011.

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 “the water use is incidental to the use of water obtained from the original diversion and use of water from other water rights.” *Exceptions* at 2. Rangen asserts that, because Idaho Code § 42-234(5) would have barred NSCC from obtaining a recharge right for recharge occurring in the Sandy Ponds, “the Districts should not be able to claim a recharge purpose from these waste water rights.” *Id.* at 3-4.

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 to North Snake GWD in 2003. Ex. 103. The Sandy Ponds constitute an impoundment and diversion of water (Colvin Testimony, Tr. pp. 213-214) and 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 surface water stored in the Sandy Ponds has recharged the ground water over the last fifteen years, Application 36-17011’s 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, but are now owned by North Snake GWD. The Districts are not barred from pursuing a permit to authorize the beneficial use of recharge in the Sandy Ponds.

b) Necessary Permits

Rangen asserts the Districts have “failed to provide all necessary permits associated with Application 36-17011.” *Exceptions* at 16. The only argument Rangen sets forth in support of this assertion is that “the [Districts] do not own the property where any beneficial use of this water will occur.” But the Sandy Ponds and the underlying property were conveyed to North Snake GWD in 2003. Ex. 103. The Districts have demonstrated legal access to the proposed mitigation places of use. See Exs. 106 – 108, 116.

Rangen raised arguments related to necessary permits in its post hearing brief. Rangen specifically referred 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.

Local Public Interest

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).

In concluding Application 36-17011 is in the local public interest as defined by Idaho Code § 42-202B(3), the Hearing Officer cited the Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004 as "some evidence of the local public interest relating to the Sandy Pipeline. Ex. 109." *Preliminary Order* at 18. The Hearing Officer stated:

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.

Preliminary Order at 18.

Rangen argues the Hearing Officer erred by relying on the 2004 agreement in the local public interest analysis because the agreement was only a one-year agreement. *Exceptions* at 8. Expiration of the 2004 agreement does not negate the Hearing Officer's determination that Application 36-17011 is in the local public interest because the proposed uses would "alleviate water shortage pressures in the Thousand Springs area and within the Billingsley Creek drainage." In other words, Application 36-17011 will help alleviate water shortages and thereby benefit the public water resource at issue and the people in the area directly affected by the proposed project. Application 36-17011 is in the local public interest.

Conservation of Water Resources

Application 36-17011 seeks to preserve existing water uses in the state of Idaho and to help recharge the Eastern Snake Plain Aquifer. Application 36-17011 is not contrary to the conservation of water resources of the state of Idaho.

B. Analysis of Application 36-17011 Under the 1993 Moratorium

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, p. 1 (emphasis added). This statement is not correct. The beneficial uses proposed in Application 36-17011 (mitigation and recharge) are consumptive because they will deplete the waste water source listed on the application. 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 1993 Moratorium prohibits the processing and approval of the application. However, the Director may review and approve Application 36-17011 if it falls within one of two recognized exceptions. In this case, the application falls within both exceptions.

First, approval of Application 36-17011 promotes "[p]rotection 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 Application 36-17011 will have no effect on prior surface or ground water rights because of its location and because it will not appropriate trust water. The only downstream water right for the waste water source at issue is 36-8723, which authorizes irrigation of the same acres that will be supplied mitigation water under Permit 36-17011.

C. 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). Application 36-17011 falls within recognized exceptions to the 1993 Moratorium. Therefore, Application 36-17011 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. 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 5th day of August 2015.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August 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, postage prepaid and properly addressed, to the following:

Documents Served: Final Order Denying Exceptions and Explanatory Information to Accompany a Final Order

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

Fritz Haemmerle
Haemmerle & Haemmerle, PLLC
PO Box 1800
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Robyn M Brody
Brody Law Office
PO Box 554
Rupert ID 83350

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



Deborah Gibson
Admin. Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department 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 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.