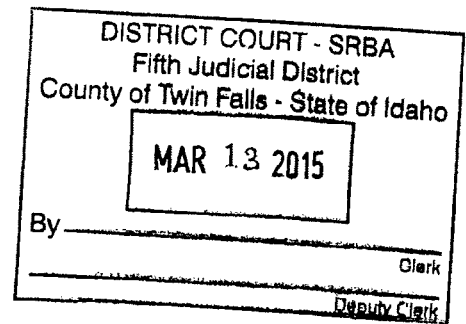


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ATTORNEYS FOR THE CITY OF POCATELLO

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

) Subcase No. 36-07694

) Subcase No. 36-02551

)

) **AFFIDAVIT OF MITRA M. PEMBERTON**

)

STATE OF COLORADO

)

) ss.

County of Denver

)

Mitra M. Pemberton, being first duly sworn upon oath, deposes and says:

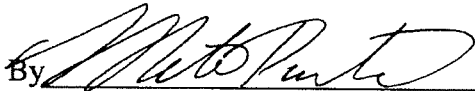
1. I am one of the attorneys of record for the City of Pocatello. I am over the age of 18 and state the following based upon my own personal knowledge.
2. Attached hereto as Exhibit 1 is a true and correct copy of an excerpt, Figure 2-3, of Spronk Water Engineers, Inc. Expert Supplemental Report, May 5, 2013, prepared for *In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen Inc.)*, CM-DC-2011-004.

3. Attached hereto as Exhibit 2 is a true and correct copy of *Notice of Claim to a Water Right*, A36-02551, Civil Case No. 39576, July 27, 1988.
4. Attached hereto as Exhibit 3 is a true and correct copy of *Notice of Claim to a Water Right*, A36-07694, Civil Case No. 39576, July 27, 1988.
5. Attached hereto as Exhibit 4 is a true and correct copy of the Director's recommendations for Rangen's claims nos. 36-02551 and 36-07694, received from the Idaho Department of Water Resources on March 12, 2015, excerpted from the Director's Report, Part I, Reporting Area 3 (Basin 36), Nov. 2, 1992.
6. Attached hereto as Exhibit 5 is a true and correct copy of *Order Granting In Part and Denying In Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source, Rangen's Delivery Call*, Apr. 22, 2013.
7. Attached hereto as Exhibit 6 is a true and correct copy of *Final Order Denying Application*, In the Matter of Application for Permit No. 36-16976 In the Name of North Snake Ground Water District, et al., Feb. 6, 2015.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 12th day of March, 2015.

WHITE & JANKOWSKI, LLP

By 
Mitra M. Pemberton

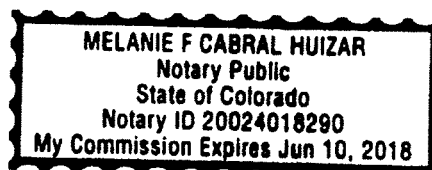
ATTORNEYS FOR CITY OF POCA TELLO

BEFORE ME, the undersigned, a Notary Public, in and for said County and State on this 12th day of March, 2015, personally appeared Mitra M. Pemberton who executed the above as her free and voluntary act.


Notary Public

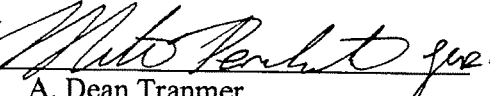
511 16th St Ste 500 Denver CO 80202

My Commission Expires: June 10, 2018



Dated this 12th day of March, 2015.

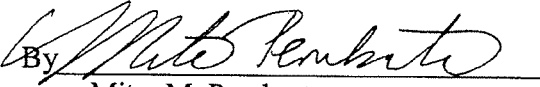
CITY OF POCA TELLO ATTORNEY'S OFFICE

By 
A. Dean Tranmer

WHITE & JANKOWSKI


By

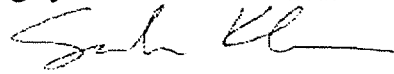
Sarah A. Klahn

By 
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCA TELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2015, I caused to be served a true and correct copy of the foregoing **AFFIDAVIT OF MITRA M. PEMBERTON Case No. 39576, Subcase No. 36-07694 and Subcase No. 36-02551** upon the following by the method indicated:



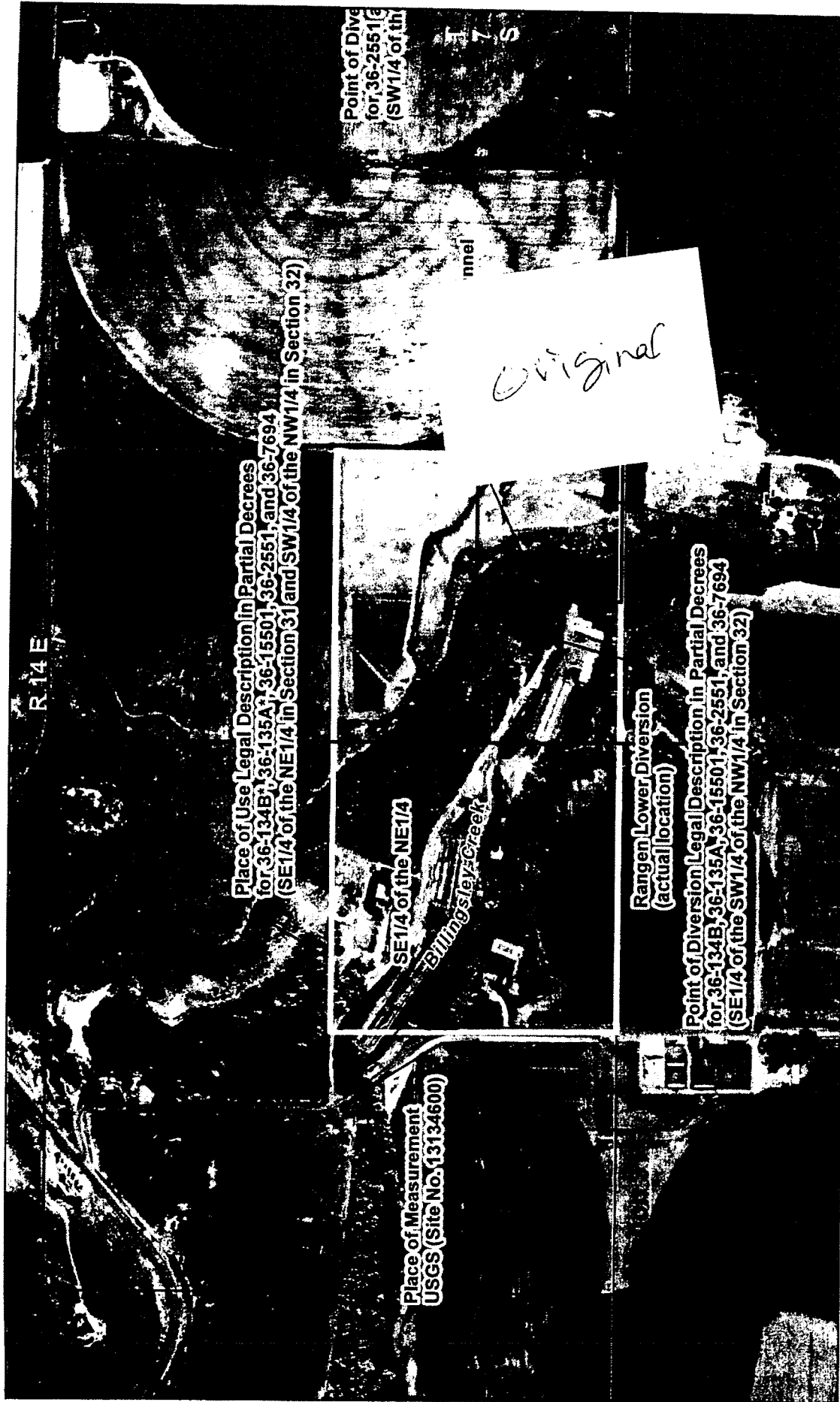
Sarah Klahn, White & Jankowski, LLP

Original to: SRBA District Court 253 3rd Ave North P.O. Box 2707 Twin Falls ID 83303-2707	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☒ Federal Express Overnight (Phone 208-736-3011) ☐ Facsimile 208-736-2121 ☐ Email
Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise ID 83720-0098 Deborah.gibson@idwr.idaho.gov	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☒ Email
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 83720 Boise ID 83720-0010	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☐ Email
U.S. Department of Justice Environment and Natural Resources Division 550 W Fort St MSC 033 Boise ID 83724	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☐ Email
IDWR Document Depository P.O. Box 83720 Boise ID 83720	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☐ Email
Garrick L. Baxter Emmi L. Blades Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov kimi.white@idwr.idaho.gov	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile 208-287-6700 ☒ Email

Randall C. Budge Thomas J. Budge Joseph G. Ballstaedt Racine Olson Nye Budge & Bailey 201 E Center St P.O. Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net jgb@racinelaw.net bjh@racinelaw.net	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile 208-232-6109 ☒ Email
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com jff@idahowaters.com	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile 208-735-2444 ☒ Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile 208-878-2548 ☒ Email
Jerry Rigby Hyrum Erickson Robert H. Wood Rigby Andrus & Rigby Law 25 North Second East Rexburg ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile 208-356-0768 ☒ Email
J. Justin May May Browning & May, PLLC 1419 W Washington Boise ID 83702 jmay@maybrowning.com	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile 208-342-7278 ☒ Email
Robyn M. Brody Brody Law Office, PLLC P.O. Box 554 Rupert ID 83350 robynbrody@hotmail.com	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile 208-434-2780 ☒ Email
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC P.O. Box 1800 Hailey ID 83333 fxh@haemlaw.com	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile 208-578-0564 ☒ Email

Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello ID 83201
dtranmer@pocatello.us

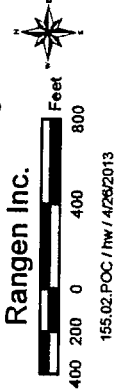
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☐ Federal Express Overnight
☐ Facsimile 208-234-6297
☒ Email



*The place of use for 36-134B and 36-135A in the partial decrees includes the SW 1/4 of the NE 1/4 in Section 31.
 Source:
 IDWR GIS files (w_r_pou and lthydro).
 Partial Decrees and Licenses for Rangen Inc.
 PLS GIS files for Gooding County, ID (BLM)
 2011 USDA NAIP aerial photo for Gooding County, ID
 USGS personal communications (March 2013).



Figure 2-3
 Points of Diversion and Place of Use
 1962 and 1977 Water Rights
 Rangen Inc.



NW 1/4	NE 1/4	NW 1/4	NE 1/4
31 SW 1/4	SE 1/4	SW 1/4	SE 1/4
			32

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A36-02551
Date Received: 7/27/1988
Receipt No: 5001134
Received By: SCC

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: RANGEN INC. 208-543-6421
Address: P.O. BOX 706
BUHL, ID 83316

2. Date of Priority: JUL 31, 1962

3. Source: CURRAN TUNNEL Trib. to: BILLINGSLEY CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
07S	14E	32	SW		NW		GOODING

5. Description of diverting works:
CONCRETE DAM WITH STEEL PIPELINES

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
FISH PROPAGATION	01/01	12/31	50.000		
DOMESTIC	01/01	12/31	0.100		

7. Total Quantity Appropriated is:
50.000 C.F.S. (and/or) A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:
D/ 3 HOUSES, 2 OFFICES, H/ 62 PONDS

10. Place of Use:

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
07S	14E	31	SE	NE		FISH	
			SE	NE		DOMEST	

A36-02551

Page 1

Date: 07/27/88

REPROFILMED
JAN 28 1993

10. Place of Use: Continued

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
07S	14E	32	SW	NW		FISH	
			SW	NW		DOMEST	

11. Place of use in counties: GOODING

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A36-00134B, A36-00135A, A36-07694

14. Remarks:
FISH PONDS ARE THRE BASIC SIZES; 3-1/2'X 100'X 3-1/2',
8'X 100'X 4', 16'X 180'X 4'.

15. Basis of Claim: LICENSE
Water Right Number: 30654

RECORDED
JAN 28 1993

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do do not wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 0

For Organizations:

I do solemnly swear or affirm that I am Vice President of Rough Inc., that I have signed the foregoing document in the space below as Vice President of Rough Inc. and that the statements contained in the foregoing document are true and correct.

Christopher Rough
Signature of Authorized Agent

Vice President Rough Inc.
Title and Organization

July 27, 1988
Date

State of Idaho)
County of Twin Falls) SS.

Subscribed and sworn (or affirmed) before me this 27 day
of July 19 88

Allen B. Piers
Notary Public

Seal

Residing at Twin Falls

My Commission Expires 2/20/93

RECORDED
JAN 28 1993

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A36-07694
Date Received: 7/27/1988
Receipt No: 5001134
Received By: SCC

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: RANGEN, INC. 208-543-6421
Address: P.O. BOX 706
BUHL, ID 83316

2. Date of Priority: APR 12, 1977

3. Source: CURRAN TUNNEL Trib. to: BILLINGSLEY CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
07S	14E	32	SW	NW			GOODING

5. Description of diverting works:
CONCRETE DAM WITH STEEL PIPELINES.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
FISH PROPAGATION	01/01	12/31	26.000		

7. Total Quantity Appropriated is:
26.000 C.F.S. (and/or) A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
07S	14E	31	SE	NE		FISH	
		32	SW	NW		FISH	

11. Place of use in counties: GOODING

A36-07694

Page 1

Date: 07/27/88

FILED
FEB 04 1993

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A36-00134B, A36-00135A, A36-02551

14. Remarks:
FACILITY VOLUME = 287,640 CUBIC FEET. SOURCE KNOWN LOCALLY
AS CURRAN TUNNEL. THIS RT. WHEN COMBINED WITH RT. 36-2551
SHALL NOT EXCEED 76.0 CFS. A MEASURING DEVICE OF A TYPE
APPROVED BY THIS DEPT. SHALL BE MAINTAINED ON THE OUTLET
WORKS.

15. Basis of Claim: LICENSE

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 0

For Organizations:

I do solemnly swear or affirm that I am Vice President of
 Ranger, Inc. , that I have signed the foregoing
document in the space below as Vice President of
 Ranger, Inc. and that the statements contained in the
foregoing document are true and correct.

 Christina Ranger
Signature of Authorized Agent

 Vice President Ranger
Title and Organization

 July 27, 1988
Date

RECORDED
FEB 04 1993

State of Idaho)
County of Twin Falls) SS.

Subscribed and sworn (or affirmed) before me this 27 day
of July 19 88

Allen B. Perea
Notary Public

Seal

Residing at Twin Falls
My Commission Expires 2/20/93

RECORDED
FEB 04 1993

AJ5856NP

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAWDATE: NOV-2-1992
PAGE: A-3727

RIGHT NUMBER	NAME & ADDRESS	PRIORITY DATE	PURPOSE OF USE	PERIOD OF USE FROM TO	MAXIMUM QUANTITY	BASIS OF CLAIM
SOURCE: MARTIN-CURREN TUNNEL		TRIBUTARY: BILLINGSLEY CREEK				
36-02551	RANGEN INC PO BOX 706 BUHL ID 83316	07/13/1962	FISH PROPAGATION DOMESTIC	01-01 12-31 01-01 12-31	50.00 .1	CFS CFS
TOTAL QUANTITY:					50.00	CFS
NON-IRRIGATION-USES:						
DOMESTIC, 3 HOMES, 2 OFFICES; FISH, 62 PONDS						
POINT OF DIVERSION:						
T07S R14E S32 SESWNW						
PLACE OF USE: FISH PROPAGATION						
T07S R14E S31 SENE						
S32 SWNW						
PLACE OF USE: DOMESTIC						
T07S R14E S31 SENE						
S32 SWNW						
REMARKS: FACILITY VOLUME 123,272 CU. FT..						
THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF						
DIVERSION DESCRIBED ABOVE: 36-00102, 36-00134A, 36-00134B,						
36-00134C, 36-00135A, 36-00135B, 36-00135C, 36-07694, 36-10140						
& 36-10142.						
36-07694	RANGEN INC PO BOX 706 BUHL ID 83316	04/12/1977	FISH PROPAGATION	01-01 12-31	26.00	CFS
TOTAL QUANTITY:					26.00	CFS
POINT OF DIVERSION:						
T07S R14E S32 SESWNW						
PLACE OF USE: FISH PROPAGATION						
T07S R14E S31 SENE						
S32 SWNW						
REMARKS: FACILITY VOLUME=287,640 CU. FT.						
THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF						
DIVERSION DESCRIBED ABOVE: 36-00102, 36-00134A, 36-00134B,						
36-00134C, 36-00135A, 36-00135B, 36-00135C, 36-10140, 36-10142						
& 36-02551.						

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

**IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551
AND 36-07694**

(RANGEN, INC.)

)
) **CM-DC-2011-004**
)
) **ORDER GRANTING IN PART**
) **AND DENYING IN PART**
) **RANGEN, INC.'S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **RE: SOURCE**
)

FINDINGS OF FACT

1. On March 8, 2013, Rangen, Inc. ("Rangen") filed a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* ("Source Brief"). In its Source Brief, Rangen seeks a ruling on two points: (1) the source for its Martin-Curren Tunnel water rights (36-2551, 36-7694, and 36-15501) is surface water, not ground water; and (2) its delivery call "is not limited only to water from the mouth of the Martin-Curren Tunnel itself." *Source Brief* at 2.

2. Regarding the issue of whether the legal source of its Martin-Curren Tunnel water rights is ground water or surface water, Rangen points to its SRBA decrees and prior licenses, as well as the supporting documents. Rangen also relies on the Department's adjudication rules for the proposition that if its Martin-Curren Tunnel water rights were ground water, the adjudication rules required the claims to be made for "ground water." IDAPA 37.03.01.060.02.c ("AJ Rule 60"). "Rangen's Partial Decrees also specify that the Martin-Curren Tunnel is tributary to Billingsley Creek. The identification of a tributary is unique to surface water sources." *Source Brief* at 15. Rangen argues that any attempt to change its decreed source from surface water to ground water would constitute an impermissible collateral attack on its decrees.

3. The second issue raised by Rangen is whether its "demand for water is limited to the amount of water that would flow through the mouth of the Martin-Curren Tunnel itself and not the springs complex that supplies the Research Hatchery." *Id.* at 17. While the source of its rights is described as Martin-Curren Tunnel, Rangen argues that Martin-Curren Tunnel is a part of a greater springs complex that supplies its facilities. "Because Rangen's historical appropriations, point of diversion and use of water includes water from the entire spring complex at the head of its Research Hatchery," Rangen argues it should be entitled to judgment as a

**ORDER GRANTING IN PART AND DENYING IN PART
RANGEN, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SOURCE**

1

EXHIBIT 5

matter of law that its delivery call is not limited to water that flows only through the mouth of the Martin-Curren Tunnel. *Id.* at 19.

4. On March 22, 2013, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Response to Rangen's Motion for Partial Summary Judgment Re: Source* ("IGWA Response"). In its Response, IGWA agrees with Rangen that the decreed source of its Martin-Curren Tunnel water rights is surface water, and that the Director "does not have the authority to change the decreed elements of Rangen's water right." *Response* at 3. However, IGWA argues the Director is not precluded "from administering water based on hydro-geology reality." *Id.* "The issue of whether the Martin-Curren Tunnel should be administered as a surface or ground water source was not adjudicated in the SRBA, but is a matter within the Director's discretion when responding to a delivery call." *Id.* IGWA argues the Martin-Curren Tunnel should be administered as a ground water source because it meets the statutory definition of a well contained in Idaho Code § 42-230(b) (defining well as "an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained."). IGWA argues that to the extent AJ Rule 60 is inconsistent with Idaho Code, the statute must control. IGWA claims the Martin-Curren Tunnel "extends at least 70 feet below land surface"¹ and is therefore ground water. *Id.* at 4. IGWA also argues that the Idaho Supreme Court has already held that water flowing from a tunnel is ground water. *In re General Determination of Rights to Use of Surface and Ground Waters of Payette River Drainage Basin*, 107 Idaho 221, 687 P.2d 1352 (1984) (hereinafter referred to as "*Miracle Mine*").² There, the Court held that water emanating from a mine portal was ground water. IGWA states "[w]ater emanating from the Martin-Curren Tunnel is no different." *IGWA Response* at 5.

5. Responding to Rangen's request that the source of its Martin-Curren Tunnel water rights is made up of the Tunnel and surrounding springs, IGWA argues that Rangen's decrees are unambiguous: "Had Rangen claimed an entitlement to water from Billingsley Creek or springs in the Rangen area, it had a duty to claim points of diversion on those sources." *Id.* at 8. The only point of diversion decreed to Rangen in the SRBA is located in a ten-acre tract: SESWNW, Sec. 32, Township 7 S., Range 14 E. IGWA cites to the *Third Affidavit of Charles M. Brendecke* (March 22, 2013) to show the location of the Martin-Curren Tunnel and the ten-acre tract. *IGWA Response* at 10. Exhibit F to the *Third Affidavit of Charles M. Brendecke* depicts the Martin-Curren Tunnel and the ten-acre tract. "Rangen has no right to call for the delivery of water to points of diversion that the SRBA court did not include in Rangen's partial decree." *Id.* at 11.

6. On March 22, 2013, the City of Pocatello ("Pocatello") filed a *Response to Rangen's Motion for Partial Summary Judgment Re: Source* ("Pocatello Response"). While agreeing with IGWA that Rangen's Martin-Curren Tunnel water rights should be administered as

¹ To support this factual statement, IGWA cites to a December 20, 2012 report of its expert witness, Bern S. Hinckley. *Rangen Groundwater Discharge and ESPAM 2.1 Hydrogeologic Investigation*, Hinckley, Bern. S. (December 20, 2012). In that report, Hinckley states, "The tunnel opening is approximately 75 ft. west of the rim and approximately 70 ft. below the rim elevation." *Id.* at 20. Hinckley goes on to say, "The Curren Tunnel is a horizontal, flowing well." *Id.* 21. Idaho Code § 42-230(b) defines a "well" as "vertical" not horizontal.

² IGWA refers to this case interchangeably as *Birthday Mine* or *Miracle Mine*.

ground water rights, Pocatello believes the SRBA decrees are ambiguous: “the decrees themselves do not identify the Martin-Curren Tunnel water supply as either ground water or surface water.” *Pocatello Response* at 2. Because of the ambiguity, and citing Idaho Code § 42-230, Pocatello asks the Director to “resolve any alleged ambiguity in the decreed sources of the Curren Tunnel Rights by applying hydrogeologic facts—which support the administration of the Curren Tunnel Rights as ground water.” *Id.* at 4.

7. Responding to Rangen’s request that the source of its Martin-Curren Tunnel water rights is made up of the Tunnel and surrounding springs, Pocatello states, “the partial decrees do not identify a source of supply beyond the Curren Tunnel. Further, there are no terms to suggest that the spring located on the lower talus is a source of water to be served by Rangen’s water rights.” *Id.* at 5. Pocatello argues the only basis Rangen has to include additional spring sources/points of diversion in its delivery call is “the fact that it measures its diversions below the fish hatchery; if Rangen measured its water at the point of diversion (e.g. the Curren Tunnel) as required by Idaho law, the issue of whether springs emanating from the talus slope lower down are properly encompassed in its adjudicated rights would not even arise.” *Id.* If the Director decides that Rangen may “call for water from the lower talus slope . . . the Director should also examine the reasonableness of Rangen’s demands in light of its *per se* unreasonable means of diversion.” *Id.*

8. On March 29, 2013, Rangen filed a *Reply Brief in Support of Motion for Summary Judgment Re: Source* (“Reply”). Rangen states, contrary to Pocatello, that the source of its Martin-Curren Tunnel water rights is unambiguously surface water and must be administered as surface water. Rangen notes that in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), IGWA, appearing as *amicus curiae*, agreed that the source of Martin-Curren Tunnel was surface water. Rangen also distinguishes IGWA’s use of the *Miracle Mine* case: “The water coming from [Miracle] Mine existed only because of the mine; the mining brought it to the surface. In contrast, the Martin-Curren Tunnel only enhances existing, natural spring flows.” *Reply* at 6 (emphasis in original). Because of IGWA’s prior position in *Musser*, Rangen states that IGWA must be estopped from arguing that that source of Martin-Curren Tunnel is ground water. Concerning whether Rangen is entitled to call for delivery of water from the Martin-Curren Tunnel only, or other surrounding springs, Rangen simply states: “Rangen’s delivery call is not limited to water that would flow from the mouth of the Martin-Curren Tunnel itself.” *Reply* at 8.

9. Oral argument was held on April 3, 2013. On April 22, 2013, during the pre-hearing conference, the location of the ten-acre tract was discussed. The Director stated the Department could provide a map showing the location of the Martin-Curren Tunnel and the ten-acre tract that was partially decreed by the SRBA district court as Rangen’s point of diversion. The parties agreed that the Department should provide this map.

CONCLUSIONS OF LAW

1. Rangen presents the Director with two issues on summary judgment. “Summary judgment must be granted ‘if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ I.R.C.P. 56(c).” *Ida-Therm, LLC v. Bedrock*

Geothermal, LLC, 293 P.3d 630, 632 (2012). The Director must “construe all disputed facts and make all reasonable inferences in favor of the nonmoving party.” *Pioneer Irr. Dist. v. City of Caldwell*, 288 P.3d 810, 813 (2012).

Martin-Curren Tunnel Is A Surface Water Source And Should Be Administered As Surface Water

2. As to the first issue, Rangen seeks a ruling from the Director that the source of its Martin-Curren Tunnel water rights is surface water. Water right nos. 36-2551, 36-7694, and 36-15501 were decreed in the SRBA with the following Source element: Martin-Curren Tunnel, tributary to Billingsley Creek. *See Third Affidavit of Charles M. Brendecke*, Exhibits D & E (March 22, 2013). The fact that the source and tributary are named demonstrate that the rights were decreed from a surface water source. *See* AJ Rule 60 (“For surface water sources, the source of water shall be identified The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as ‘ground water.’”). Consistent with AJ Rule 60, listing a source and tributary for surface water rights, and only “ground water” for ground water rights, was the custom and practice in the SRBA. In 1997, Rangen’s Martin-Curren Tunnel water rights were partially decreed. The partial decrees were entered pursuant to Idaho Rule of Civil Procedure 54(b). No appeal has ever been taken. The plain language of Rangen’s partial decrees from the SRBA show that Martin-Curren Tunnel is unambiguously surface water.

3. The conclusion that the source of Rangen’s water rights is surface water is supported by three Idaho Supreme Court decisions. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Court reviewed the Director’s defense of inaction in a delivery call filed by holders of a Martin-Curren Tunnel water right against junior-priority ground water users. The Court stated the source of Mussers’ water right as follows: “The springs which supply the Mussers’ water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer).” *Musser* at 394, 871 P.2d at 811 (emphasis added). The fact that Musser was an appropriator of a surface water right was reconfirmed by the Court in *A&B*. 153 Idaho at 234, 284 P.3d at _____. In *Clear Springs*, the Court examined separate conjunctive management delivery calls initiated by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (“Spring Users”). The Spring Users, like Rangen, “have water rights in certain springs emanating from the canyon wall along a section of the Snake River below Milner Dam in south central Idaho.” *Clear Springs* at 794, 252 P.3d at 75. In *Clear Springs*, IGWA argued that the Spring Users should be administered as ground water users, consistent with Idaho Code § 42-226: “the Spring Users’ priority rights should be protected only in the maintenance of a reasonable aquifer level.” *Clear Springs* at 804, 252 P.3d at 85. The Court rejected this argument: “By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs.” *Id.* (emphasis added). These cases clearly demonstrate that Martin-Curren Tunnel is a surface water source.

4. IGWA argues that even though the source of Martin-Curren Tunnel is unambiguously surface water, the Director should administer the rights as ground water. To

support this argument, IGWA attempts to create a conflict between AJ Rule 60 and Idaho Code § 42-230. For IGWA, a conflict exists between AJ Rule 60 and Idaho Code § 42-230 because of its belief that Martin-Curren Tunnel is a “well” as defined by Idaho Code § 42-230(b): “‘Well’ is an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained.” Emphasis added. IGWA’s argument is misplaced, because, as stated above, Rangen’s water rights are unambiguously surface water. Because Rangen’s Martin-Curren Tunnel water rights are from surface water, there can be no conflict between AJ Rule 60 and Idaho Code § 42-230. Furthermore, AJ Rule 60 applied in the SRBA and has no applicability in administration: “These rules implement statutes governing the filing of notices of claims to water rights acquired under state law . . . in general adjudications . . .” IDAPA 37.03.01.001. To the extent IGWA believed Martin-Curren Tunnel was a ground water right, it should have raised the issue in the SRBA.

5. IGWA cites the Idaho Supreme Court’s decision in *Miracle Mine* to bolster its position that Rangen’s Martin-Curren Tunnel rights should be administered as ground water. The *Miracle Mine* case stemmed from the Payette River Basin Adjudication (“PRBA”). In the PRBA, claims were filed by the Bransons and Miracles for water emanating from a mine portal. “The water in question was developed as a result of and emanated from the Bransons’ mining tunnel on their ‘Birthday # 24’ mining claim.” *Miracle Mine* at 223, 687 P.2d at 1350. On May 20, 1982, the district court issued orders, decreeing the source of the Branson and Miracle rights as ground water. Appeal of the district court’s orders was taken, with the Idaho Supreme Court holding: “the water flow emanating from the mine portal is public ground water subject to appropriation.” *Id.* at 225, 687 P.2d at 1352.

6. While the PRBA was commenced in 1969, “a final unified decree was never entered. Due to unresolved objections to certain rights at the time of the commencement of the SRBA, the Payette Adjudication was consolidated with the SRBA on February 8, 2001.” *Order Denying Late Notice of Claim*, SRBA Subcase No. 65-2794 (Dec. 1, 2010). Because of this, water right holders from the PRBA filed claims in the SRBA for their PRBA water rights. In the SRBA, the Branson and Miracle PRBA water rights were claimed and partially decreed as ground water.³ Because *Miracle Mine* was decided in 1984—prior to the 1987 commencement of the SRBA—any party to the adjudication could have filed objections to Rangen’s water rights and litigated whether the Source element was properly described as surface water. Moreover, because the Branson and Miracle claims were made in the SRBA, water users in the SRBA were on notice of how water emanating from a mine portal could be claimed.

7. While IGWA argues that Rangen’s Martin-Curren Tunnel surface water rights should be administered as ground water rights, IGWA does not state what difference in administration would occur. If the Director were to administer Rangen’s senior-priority surface water rights as senior-priority ground water rights, he would be required to examine Idaho Code § 42-226 and its principles of full economic development and reasonable pumping levels. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). As recently explained by the Idaho Supreme Court in *Clear Springs*, full economic development and reasonable pumping levels do not apply in calls between senior-priority surface water rights and junior-priority ground water

³ The SRBA partial decrees are 65-10737 and 65-10839.

rights: "By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs." *Clear Springs* at 804, 252 P.3d at 85. The Director cannot administer Rangen's senior-priority surface water rights as ground water rights because, to do so, would run counter to *Clear Springs*.

8. Based on the law and the facts, the Director finds that Rangen is entitled to judgment as a matter of law that the source of its Martin-Curren Tunnel water rights is surface water and its rights should be administered as surface water.

The SRBA Partial Decrees For Rangen's Martin-Curren Tunnel Water Rights Authorize Diversion Within A Ten-Acre Tract

9. Rangen's second issue on summary judgment is its position that the point of diversion of its water rights is not limited to the mouth of the Martin-Curren Tunnel, but should also include the greater springs complex that supplies its facilities. Rangen's partial decrees unambiguously state that the point of diversion element is located as follows: "T07S R14E S32 SESWNW within Gooding County." *Third Affidavit of Charles M. Brendecke*, Exhibits D & E (March 22, 2013). Rangen's partial decrees also unambiguously state that the only source for its water rights is Martin-Curren Tunnel, tributary to Billingsley Creek. *Id.* The partial decrees do not list "Spring(s)" and/or "Unnamed Stream(s)" as additional sources.

10. The ten-acre tract is visually depicted in Exhibit F to the *Third Affidavit of Charles M. Brendecke* (March 22, 2013). See also *Spronk Water Engineers, Inc. Expert Report to IDWR Staff Memorandum Dated April 5, 2013, Prepared for the City of Pocatello* at 31 (April 4, 2013) (depicting location of Martin-Curren Tunnel and the ten-acre tract). At the April 22, 2013 pre-hearing conference, the Director agreed to provide a map to the parties depicting the location of the Martin-Curren Tunnel and the ten-acre tract point of diversion that was partially decreed by the SRBA district court to Rangen. Attached to this order is this map.

11. The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right) (emphasis added); 37.03.11.010.25 (defining "water right" to mean "[t]he legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree . . .") (emphasis added).

12. While the SRBA partial decrees list Martin-Curren Tunnel as the source, the partial decrees do not expressly state that Rangen's water rights are limited only to diversion from the mouth of Martin-Curren Tunnel; likewise, the decrees do not state that sources other than Martin-Curren Tunnel are lawfully diverted within the ten-acre tract. Thus, there are

genuine issues of material fact in dispute as to whether Rangen can divert from sources other than Martin-Curren Tunnel that are located within T07S R14E S32 SESWNW.

13. Because there are genuine issues of material fact concerning what source(s) of water—other than Martin-Curren Tunnel—Rangen may lawfully divert within T07S R14E S32 SESWNW, the Director cannot find, as a matter of law, that Rangen is entitled to summary judgment on that issue.

ORDER

Based upon the foregoing, the Director GRANTS IN PART and DENIES IN PART Rangen's *Motion for Partial Summary Judgment Re: Source*. Rangen is entitled to judgment as a matter of law on the issue of the source of its water rights and the fact that its water rights shall be administered as surface water rights. Genuine issues of material fact exist as to what source(s) of water—other than Martin-Curren Tunnel—Rangen may divert within T07S R14E S32 SESWNW; therefore, Rangen is not entitled to judgment as a matter of law on that issue.

Dated this 22nd day of April, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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NWNE

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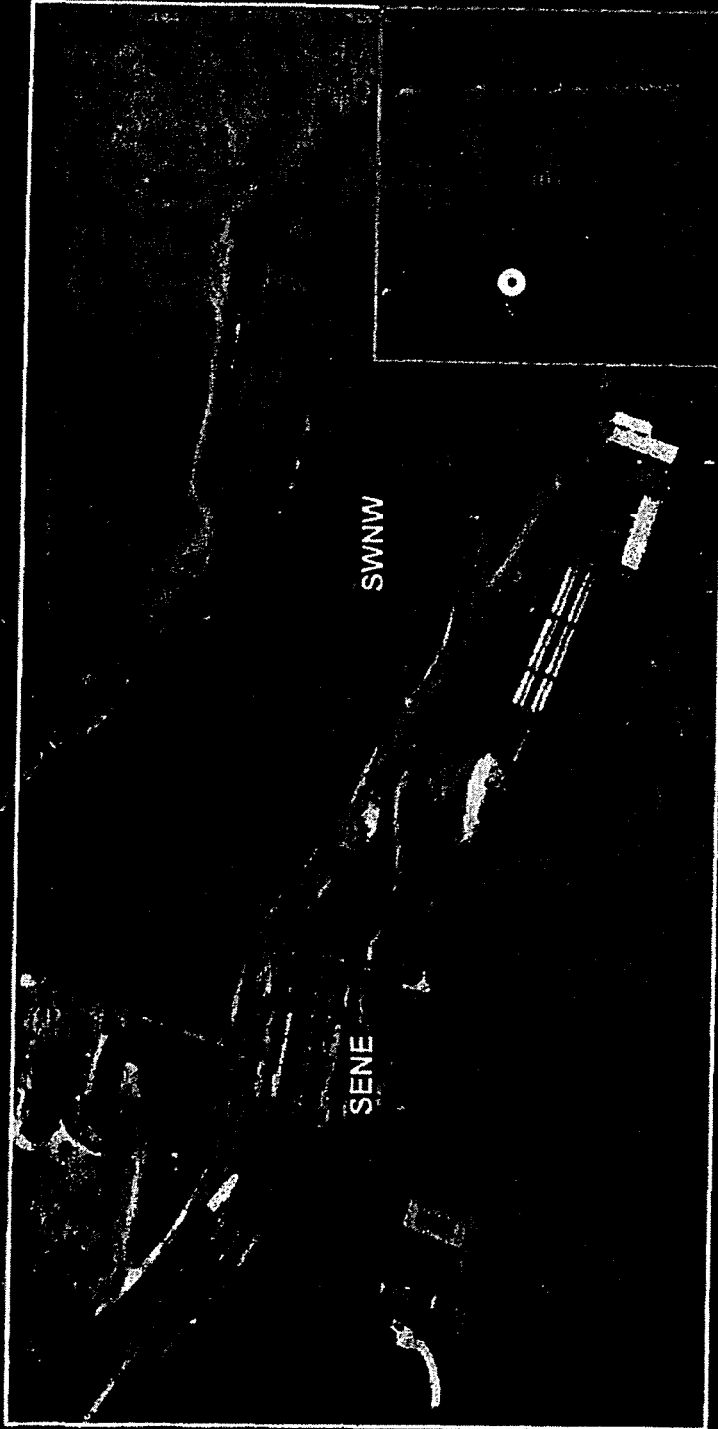
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- Current Tunnel outlet
- Lower Collection Box
- ▲ Diversion to Lower Raceways
- POU for 36-2551
- Township/Range
- Sections
- QQ



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Feet

Aerial photography from 2011
National Agriculture Imagery Program
Prepared April 22, 2013
by Jennifer Sukow, IDWR

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

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

BACKGROUND

On April 3, 2013, North Snake Ground Water District ("GWD"), Aberdeen American Falls GWD, Bingham GWD, Bonneville Jefferson GWD, Jefferson Clark GWD, Madison GWD, and Magic Valley GWD ("Districts"), represented by attorney T.J. Budge of Racine Olson Nye Budge & Bailey, filed Application for Permit No. 36-16976 ("Districts' Application") with the Idaho Department of Water Resources ("Department"). Protests against the Districts' Application were filed by Rangen, Inc. ("Rangen"), represented by attorneys Robyn Brody, Justin May, and Fritz Haemmerle, and by Blind Canyon Aquaranch, Inc. ("Blind Canyon").

A pre-hearing conference was held on May 13, 2014. An administrative hearing was conducted on September 17, 2014, in Twin Falls, Idaho. Blind Canyon did not participate in the hearing and, therefore, waived its right to offer evidence into the administrative record and cross examine witnesses. During the hearing, the Districts and Rangen offered testimony and documentary evidence into the record. Rangen and the Districts submitted post-hearing briefs. On November 18, 2014, the Department issued a *Preliminary Order Issuing Permit* ("Preliminary Order") and Permit to Appropriate Water No. 36-16976 ("Permit").

This matter is now before the Director of the Department as a result of *Exceptions to Preliminary Order* and *Rangen's Brief in Support of Exceptions to Preliminary Order* ("Brief") filed by Rangen on December 2, 2014. The Districts filed the *Ground Water Districts' Response to Rangen's Exceptions to Preliminary Order* on December 12, 2014. The Director finds, concludes, and orders as follows:

FINDINGS OF FACT

The Rangen Facility

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

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

3. Rangen diverts water to its facility from several points of diversion. Rangen first diverts water from a pipe placed in the mouth of the Curren Tunnel that conveys water to the hatch house and greenhouse. Tr. p. 123.

4. Water emanating from the Curren Tunnel flows into a concrete structure called the Farmers Box. Tr. p. 123. Two pipelines deliver water out of the Farmers Box toward a structure called the Rangen Box. *Id.* at 123-24. A single pipe runs out of the Rangen Box to the hatch house, greenhouse, and small raceways. *Id.* at 124.

5. All of the water from the talus slope and the overflow from the Farmers Box and Rangen box collects and forms the headwaters of Billingsley Creek. Rangen diverts water from a large diversion on Billingsley Creek (the "Bridge Diversion") which supplies water to the large raceways and CTR raceways. Ex. 1048; Ex. 1059. Water from the small raceways is piped across Billingsley Creek and added to the water flowing through the large raceways. Tr. p. 124.

6. Water used in the Rangen facility is returned to Billingsley Creek at the end of the CTR raceways. There are no water right points of diversion located between the Bridge Diversion and the return flow into Billingsley Creek at the end of the Rangen facility. Tr. p. 179-80.

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

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

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

10. The flow in Billingsley Creek has, at times, exceeded 12 cfs at the Bridge Diversion over the last decade. Ex. 1021; Ex. 1022; Ex. 1040 at 1; Ex. 2017.

11. The Rangen facility was designed for flows of 76 cfs. Tr. p. 249. In recent years, some parts of the facility cannot be used because of a lack of flow from the Curren Tunnel and the headwaters of Billingsley Creek. Tr. p. 249. Currently, Rangen diverts almost all of the water arising upstream of the Bridge Diversion. *Id.*

12. Due to a decline in the flow from the Curren Tunnel and from the various springs at the head of Billingsley Creek, Rangen filed a Petition for Delivery Call ("Petition") in December 2011. *See In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen, Inc.) (CM-DC-2011-004) ("Rangen Delivery Call")*. The Petition alleged that diversions of ground water authorized by junior-priority ground water rights are injuring Rangen's water rights.

The Timing of the Application and Other Related Proceedings

13. On March 8, 2013, in advance of the initial hearing for the Rangen Delivery Call, Rangen filed with the Director a *Motion and Brief in Support of Motion for Partial Summary Judgment Re: Source* ("Source Motion"). *See Order Granting in Part and Denying in Part Rangen, Inc.'s Motion for Partial Summary Judgment Re: Source (CM-DC-2011-004) ("Source Order")* at 1.

14. One of the issues raised in the Source Motion was whether Rangen's Delivery Call is limited to the amount of water flowing through the Martin-Curren Tunnel. *Source Order* at 6. Prior to filing the Petition, Rangen had physically diverted water from the head waters of Billingsley Creek by means of the Bridge Diversion. Ex. 1008 at 32.¹ However, as discussed above, the Bridge Diversion was not included as an authorized point of diversion on Rangen's water rights. *Id.* The Idaho Ground Water Appropriators, Inc. ("IGWA"),² argued the Director should deny summary judgment by ruling that Rangen has no legal right to call for the delivery of water to points of diversion that were not decreed for water right numbers 36-02551 and 36-07694 by the Snake River Basin Adjudication ("SRBA") Court. *Source Order* at 2. On April 3, 2013, the parties orally argued the Source Motion before the Director.

15. Following oral argument on this issue, the Director expressed concern that the specific reference to Curren Tunnel as the source for Rangen's water rights might prevent a delivery call for any water diverted by Rangen from both springs located below Curren Tunnel and from Billingsley Creek. Whether Rangen's water rights authorize the diversion of water from Billingsley Creek became an issue of both fact and law in the Rangen Delivery Call. *See Source Order* at 6-7.

16. The Districts filed the Districts' Application with the Department on April 3, 2013, the day of oral argument for the Source Motion before the Director. Ex. 1000. The Districts' Application proposed diverting a combined total of 12 cfs from springs tributary to Billingsley Creek and from Billingsley Creek for "mitigation for irrigation" and "fish propagation." *Id.* The proposed place of use was described as the SENE of Section 31 and the SWNW of Section 32,

¹ Exhibit 1008 is the January 29, 2014, *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 (CM-DC-2011-004)*.

² The Districts are members of IGWA. Tr. p. 26.

T07S, R14E. *Id.* The Districts' Application identified as a point of diversion the location of Rangen's existing Bridge Diversion from Billingsley Creek. *Id.*

17. On April 22, 2013, the Director issued the Source Order disposing of the Source Motion. The Director stated:

11. The point of diversion element decreed by the SRBA district court unambiguously limits diversion to T07S R14E S32 SESWNW. Therefore, by the unambiguous terms of its SRBA partial decrees, Rangen is not authorized to divert water from sources outside T07S R14E S32 SESWNW. Without a water right that authorizes diversion outside T07S R14E S32 SESWNW, Rangen cannot call for delivery of water from sources located outside its decreed point of diversion. IDAPA 37.03.11.001 ("rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right") (emphasis added); 37.03.11.010.25 (defining "water right" to mean "[t]he legal right to divert and use ... the public waters of the state of Idaho where such right is evidenced by a decree") (emphasis added).

12. While the SRBA partial decrees list Martin-Curren Tunnel as the source, the partial decrees do not expressly state that Rangen's water rights are limited only to diversion from the mouth of Martin-Curren Tunnel; likewise, the decrees do not state that sources other than Martin-Curren Tunnel are lawfully diverted within the ten-acre tract. Thus, there are genuine issues of material fact in dispute as to whether Rangen can divert from sources other than Martin-Curren Tunnel that are located within T07S R14E S32 SESWNW.

13. Because there are genuine issues of material fact concerning what source(s) of water-other than Martin-Curren Tunnel-Rangen may lawfully divert within T07S R14E S32 SESWNW, the Director cannot find, as a matter of law, that Rangen is entitled to summary judgment on that issue.

Source Order at 6-7.

18. The Director conducted a hearing for the Rangen Delivery Call on May 1-16, 2013. Ex. 1008 at 3.

19. On January 29, 2014, the Director issued his *Final Order Regarding Rangen Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (CM-DC-2011-004) ("Curtailment Order"). The Director concluded that certain ground water users within the boundaries of the North Snake GWD and Magic Valley GWD were causing material injury to Rangen by reducing flows from the Curren Tunnel. Ex. 1008 at 31-36. The Curtailment Order further stated that junior priority water rights within those districts would be curtailed if mitigation was not provided to Rangen. *Id.* at 42.³

³ Elements of the Director's Curtailment Order are currently being challenged and appealed in the Idaho courts. Mitigation plans offered by the Districts in response to the Rangen Delivery Call are also currently being challenged and appealed before the Department and within the Idaho courts.

20. In the Curtailment Order, the Director stated:

15. The source for water right nos. 36-02551 and 36-07694 is the Curren Tunnel. The point of diversion for both water rights is described to the 10 acre tract: SESWNW Sec. 32, T7S, R14E. While Rangen has historically diverted water from Billingsley Creek at the Bridge Diversion located in the SWSWNW Sec. 32, T7S, R14E, Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E. A decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

Ex. 1008 at 32.

21. On February 3, 2014, Rangen filed application to appropriate water no. 36-17002. Application no. 36-17002 seeks a water right for 59 cfs. Application no. 36-17002 identifies the same point of diversion as the Districts' Application.⁴

22. The Districts' Application was amended on February 11, 2014, updating the proposed place of use to include the SWNE of Section 31, T07S, R14E, which contains the end section of Rangen's CTR raceways. Ex. 1001.

23. Following the Director's ruling limiting the point of diversion and source identified by Rangen's water rights to the Curren Tunnel, notice of the Districts' Application was published beginning on February 20, 2014. The deadline for filing protests was March 10, 2014.

24. The Districts' Application was amended a second time on May 27, 2014. Ex. 1004. The second amendment changed one of the proposed beneficial uses from "mitigation for irrigation" to "mitigation" and revised the answers to some of the application questions. *Id.* The Department determined the changes were minor and did not warrant re-advertisement of the application or advancement of the priority date. Ex. 1003. The Districts assert that the beneficial use "mitigation" is non-consumptive because it will be used for fish propagation. Tr. p. 178.

25. On October 24, 2014, the District Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* (CV-2014-1338) ("Memorandum Decision"). The Court determined that Rangen's water rights only authorize diversion of water from the Martin-Curren Tunnel. *Memorandum Decision* at 10-15.

⁴ On January 2, 2015, application for permit no. 36-17002 was approved for 28.1 cfs for fish propagation, with a priority date of February 3, 2014.

Description of the Districts' Application

26. As discussed above, the Districts' Application proposes diverting a combined total of 12 cfs from springs tributary to Billingsley Creek and from Billingsley Creek for "mitigation" and "fish propagation." Ex. 1004. The proposed place of use includes portions of the SWNE and SENE of Section 31, and the SWNW of Section 32, T07S, R14E. *Id.* The proposed place of use covers the entire Rangen facility. Tr. p. 87. Rangen owns the property at the proposed place of use and points of diversion. *Id.*

27. The Districts' Application lists two proposed points of diversion. Ex. 1004. The Districts' initial disclosures also describe two points of diversion: "Water will be delivered . . . either by gravity flow through an existing headgate (the "Bridge Diversion") on Billingsley Creek . . . or by pumping water from Billingsley Creek to various fish rearing facilities at the Rangen hatchery." Ex. 1009 at 2; see also Ex. 1059.

28. Even though they are located relatively close to one another, the Bridge Diversion and the proposed pump station represent two distinct points of diversion. The Bridge Diversion and pump station would be separately measured diversions and would supply water to different portions of the Rangen facility. Tr. p. 125-28.

29. The two points of diversion described in the testimony and documents provided by the Districts are inconsistent with the legal descriptions in the Districts' Application. The Districts' Application lists one point of diversion in the SESWNW of Section 32 and one point of diversion in the SWSWNW of Section 32. Ex. 1004. However, both proposed diversion structures (the Bridge Diversion and the proposed pump station) are located in the SWSWNW of Section 32. Ex. 1015 at 26; Ex. 1041; Ex. 1048.

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

31. Some of the evidence presented at the hearing suggests the Districts intend to develop additional points of diversion from spring sources on the talus slope near the Rangen facility. Tr. p. 139. However, only two points of diversion are listed on the Districts' Application, Ex. 1004, and they are clearly identified in the District's initial disclosures as the Bridge Diversion and the proposed pump station. Ex. 1009 at 2.

32. The proposed pump station would allow up to 4.0 cfs of water to be diverted from Billingsley Creek to the facility structures on the south side of the creek (hatch house, greenhouse and small raceway). Tr. p. 156. Currently, because of elevation differences, only the Curren Tunnel pipeline system can supply water to those structures. Tr. p. 155. A pump station would offer greater flexibility, but more complexity, in the diversion and use of water from the head of

Billingsley Creek at the Rangen facility. *Id.* The remaining 8.0 cfs described in the Districts' Application would be diverted through the existing Rangen Bridge Diversion to supply the large raceways and CTR raceways. Ex. 1015 at 23.

33. The Districts were formed under Chapter 52, Title 42, Idaho Code, and represent the interests of ground water users within their respective district boundaries. Among other things, the Districts prepare plans to address mitigation obligations arising from various water calls. Tr. p. 16.

34. The Districts assess the water users within their district boundaries to fund the activities of the Districts, including the development and implementation of mitigation plans. Tr. p. 17-18. Other mitigation activities of the Districts have cost several million dollars. Tr. p. 60-61.

35. The Districts' Application includes the following statement:

The GW Districts will use this water for mitigation purposes to protect groundwater use on the Eastern Snake Plain to mitigate for Rangen's apparent material injury and to provide mitigation for the curtailment of junior groundwater users as specified in the Director's Final Order dated 1/29/14 for Rangen's delivery call. Mitigation water will be provided to Rangen for its Current Tunnel rights for fish propagation purposes. If unable to secure proper consent, the GWDs will use their power of eminent domain as set forth in I.C. Sec. 42-5224(13) to secure easements, as necessary.

Ex. 1004 at 2.

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

37. The Eminent Domain Notice states that the two GWDs and Southwest Irrigation District intend to purchase "easements, rights-of-way, and other rights of access" over the Rangen property. Ex. 1014 at 1. Such easements, rights-of-way, and other rights of access would be used to "design, install, operate, and maintain pipes, pumps, and related facilities to deliver water to the Rangen fish hatchery" *Id.*

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

39. The Districts do not intend to operate the Rangen facility or to raise fish. Tr. p. 75. The Districts are not pursuing any permits associated with commercial fish production facilities. Tr. p. 76-77.

40. During cross examination by Rangen's attorney, Lynn Carlquist, chairman of the North Snake GWD, testified about the intent in filing the Districts' Application:

Q. Now I take it when you filed this in April of 2013 you had absolutely no intent to raise fish on Rangen's property?

A. That was not our intent at the time, no.

Q. And today you have no intent of raising fish on Rangen's property; correct?

A. That's correct.

Q. Now, Lynn, last time we spoke I asked you that if you get this permit, you understand that you have to perfect it somehow; correct?

A. That's right.

Q. And when I asked you that last time, you told me that it was your intent to obtain the permit and then assign the permit to Rangen for us to perfect; correct?

A. Well, that would be the easiest way for us to perfect it, if they would agree to that.

Q. Okay. So you would be taking advantage of Rangen's existing fish facility that it built, correct, to do that?

A. Yes.

Q. You would be taking advantage of the diversion apparatus that Rangen has built and has had in place for 50 years to do that; correct?

A. That's correct.

Tr. p. 75-76.

41. The Districts' Application was signed by T.J. Budge on behalf of the Districts. Lynn Carlquist testified that T.J. Budge had the authority to sign the Districts' Application at the time it was signed. Tr. p. 19, 26-37.

42. On September 16, 2014, Magic Valley GWD and North Snake GWD adopted resolutions confirming that T.J. Budge, through his law firm Racine, Olson, Nye, Budge & Bailey Chartered, had the authority to file the Districts' Application on behalf of Magic Valley GWD and North Snake GWD, respectively. *See* Exs. 1076 and 1077.

CONCLUSIONS OF LAW

1. Idaho Code § 42-202(1) requires applications for permit to contain the following information:

- (a) The name and post-office address of the applicant.
- (b) The source of the water supply.
- (c) The nature of the proposed use or uses and the period of the year during which water is to be used for such use or uses.
- (d) The location of the point of diversion and description of the proposed ditch, channel, well or other work and the amount of water to be diverted and used.
- (e) The time required for the completion of construction of such works and application of the water to the proposed use.

The application must also “be accompanied by a plan and map of the proposed works for the diversion and application of the water to a beneficial use . . . and the area and location of the lands proposed to be irrigated, or location of place of other use.” Idaho Code § 42-202(4).

2. 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.

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

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.

5. Rule 45.01.c further requires: “The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way.” IDAPA 37.03.08.45.01.c.i.

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.i – iii.

7. Rangen argues the Hearing Officer committed five errors in issuing the Preliminary Order. *Brief* at 5. Specifically, Rangen asserts the Hearing Officer erred by: 1) deciding that mitigation is a recognized purpose of use for a water right, 2) finding that the place of use is located where water is injected into Rangen’s infrastructure, 3) concluding the Districts’ Application is complete; 4) subordinating the Permit; and 5) concluding the Districts’ Application was not speculative. *Id.* Each argument will be addressed below.

Mitigation is a Viable Beneficial Use

8. Rangen argues the Hearing Officer erred by concluding that “mitigation” is a viable beneficial use. *Brief* at 6. Rangen asserts the Hearing Officer’s analysis on this point includes no “citation to any authority or historic use” and is not “based upon any evidence in the record,” and the Hearing Officer’s “definition of ‘mitigation’ was derived on an *ad hoc* basis to achieve the purpose of approving [the Districts’] Application.” *Id.*

9. As the Hearing Officer correctly noted, the Department has recognized the beneficial use of “mitigation” in other water rights, but the Department’s Water Appropriation Rules and Idaho Code do not contain a definition for the beneficial use of “mitigation.” *See Preliminary Order* at 8-9.

10. Contrary to Rangen’s argument, in defining the term “mitigation” and determining the mitigation beneficial use proposed by the Districts constitutes a viable beneficial use which should be recognized by the Department, the Hearing Officer cited to authority and evidence contained in the record. Specifically, the Hearing Officer pointed to the Department’s Conjunctive Management Rules (IDAPA 37.03.11) (“CM Rules”) that provide a definition for “mitigation plan.” *See Preliminary Order* at 8. The Hearing Officer took official notice of the CM Rules at the commencement of the hearing in this matter. *Tr.* p. 11. The Hearing Officer also cited to Idaho Code § 42-5201 which includes a similar definition for “mitigation plan.” *Preliminary Order* at 8. From these definitions, the Hearing Officer reasonably concluded that, “[i]n order for the proposed mitigation use to be viable, it must prevent material injury to senior water rights or compensate senior water right holders for material injury.” *Id.* Because the mitigation beneficial use described in the Districts’ Application proposes to compensate Rangen for diminishment of the source listed on Rangen’s water rights (the Curren Tunnel) by delivering water from a separate source (Billingsley Creek) directly into the Rangen system, the Hearing Officer correctly concluded the mitigation beneficial use described in the Districts’ Application falls within the definition of mitigation.⁵

⁵ While Rangen “adamantly disputes that water coming from the martin Curren Tunnel and water forming the headwaters to Billingsley Creek constitute separate sources of water,” *Brief* at 6, the District Court rejected this argument in its Memorandum Decision. This decision is on appeal to the Idaho Supreme Court.

11. Rangen also argues that “[t]he word ‘mitigation’ does not describe how a water right will be used in any manner that would allow the evaluation of the Idaho Code Section 42-203A(g) factors” and suggests the Districts’ Application needed to identify a particular use, i.e. “mitigation for irrigation,” or “mitigation for fish propagation.” *Brief* at 7. The Department has previously recognized the beneficial use of “mitigation” without another identified use. *See e.g.* Ex. 1026 (Permit issued for water right no. 51-13067 designating the beneficial use as “mitigation from storage.”). The Hearing Officer did not err by concluding “mitigation” can be designated as a valid beneficial use.⁶

The Place of Use is Appropriately Described as Where Water is Delivered into Rangen’s Infrastructure

12. The Hearing Officer noted “a significant amount of time was spent trying to define where the beneficial use of mitigation actually takes place.” *Preliminary Order* at 10. The Hearing Officer explained that testimony presented at the hearing established that “the beneficial use of mitigation would occur throughout the raceways at the Rangen facility and that the mitigation beneficial use ends where the water is returned to Billingsley Creek.” *Id.* The Hearing Officer also explained that, “[i]n their post-hearing brief, the Districts argue that the mitigation use takes place at the point where water is delivered to Rangen.” *Id.*

13. The Hearing Officer correctly determined that, when, as here, a proposed mitigation use “involves diverting water from a separate source to deliver the water directly to a senior water right holder on a diminished source . . . mitigation occurs when water is injected into the infrastructure of the senior water right holder.” *Preliminary Order* at 11. As the Hearing Officer explained, the mitigation use proposed by the Districts will “accomplish mitigation by delivering water to Rangen at the Bridge Diversion and at the pipeline coming from the Rangen Box to the facilities on the south side of Billingsley Creek.” *Id.* The appropriate place of use for the Districts’ proposed mitigation is where water is delivered into the Rangen infrastructure. Those areas of delivery are included within the proposed place of use described in the Districts’ Application.

14. Rangen asserts “[t]he only evidence in the record is that the [Districts’ proposed] beneficial use occurs in the raceways.” *Brief* at 9. Rangen argues the Hearing Officer erred by “relying on the [Districts’ post-hearing brief]” in determining the place of use for the proposed mitigation occurs at the point where water is delivered into Rangen’s infrastructure in violation of the Department’s Rule of Procedure 712. *Id.* Rule 712 provides that “[f]indings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” IDAPA 37.01.01.712.01.

15. The Hearing Officer’s conclusion that the place of use for the proposed mitigation occurs at the point where water is delivered into the Rangen infrastructure is a conclusion of law,

⁶ As described by the Hearing Officer, mitigation has been recognized by the Department in three basic forms. *Preliminary Order* at 8-9. The Districts’ Application involves providing water directly to senior water users owning water rights on a source that has been diminished by junior water users. While not necessary in this order, it may be necessary for the Department in the future to provide additional guidance on how the different types of mitigation shall be described in the Department’s records.

not a finding of fact. Rangen's assertion that the Hearing Officer erred by considering arguments raised in the Districts' post-hearing brief in reaching that conclusion of law is misplaced. Arguments must be raised before the Department to be considered. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). Because the Districts raised the argument that the proposed mitigation place of use takes place at the point where water is delivered to Rangen, it was appropriate for the Hearing Officer to consider and analyze the argument. The Hearing Officer did not err by reaching the legal conclusion that the place of use for the proposed mitigation occurs at the point where water is delivered into Rangen's infrastructure.

16. Rangen argues that, "[e]ven if the Hearing Officer could conclude, as a matter of law, that the mitigation use occurs at the point where water is injected into Rangen's facility, such ruling ignores fundamental principles of Idaho water law." *Brief* at 9. Specifically, Rangen argues that "[w]ithout both delivery and use of water, a beneficial use never occurs" and, as such, "without proof that the water is actually applied to fish propagation, the mitigation water right can never be perfected." *Id.* at 10.

17. Rangen's argument misses the point that the beneficial use of mitigation would occur pursuant to the Permit once water is injected into Rangen's infrastructure. There is no need for proof the water is applied to fish propagation within the Rangen facility. 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.

The Districts' Application is Complete

18. Rangen argues the Districts' Application is incomplete "because there was no evidence that the Application was executed properly" pursuant to IDAPA 37.03.08.035.01.d. *Brief* at 18. Rangen asserts the Districts' Application lacked "a duly authorized signature" as required by IDAPA. *Id.* at 19. Rangen emphasizes IDAPA 37.03.08.035.03.b.xii which states "[t]he application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application."⁷ *Id.* The Districts' Application was signed by "Thomas J Budge, Attorney." Ex. 1004 at 2. Rangen asserts "no authority has been filed" demonstrating Mr. Budge's authority to sign the Districts' Application on behalf of all the Districts. *Brief* at 20. Rangen further complains that "none of the addresses of the Applicants are included." *Id.* Thus, Rangen concludes the Districts' Application is incomplete and no permit can be granted.

19. Lynn Carlquist, as a representative of all the applicant Districts, testified that the Racine firm has represented the Districts since 2007, that the Districts were consulted prior to the filing of the Districts' Application, and that T.J. Budge had authority to file the Districts' Application on

⁷ Rangen also emphasizes IDAPA 37.03.08.035.03.b.xiv which states "[a]pplications may be signed by a person having a current 'power of attorney' authorized by the applicant. A copy of the 'power of attorney' shall be included with the application." To the extent Rangen asserts counsel for the Districts had to submit a copy of a power of attorney with the Districts' Application, such assertion is misplaced. The term "power of attorney" refers to "[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor." *Black's Law Dictionary* (9th ed. 2009). Licensed attorneys do not need a written power of attorney to act on behalf of clients. *See Storey v. Unite States Fidelity & Guar. Co.*, 32 Idaho 388, 392 (1919).

behalf of the Districts in April 2013. Tr. p. 15, 26-37.⁸ Mr. Carlquist's testimony is sufficient evidence to satisfy the question of Mr. Budge's authority to file the Districts' Application. The address of the law firm of T.J. Budge was included on the Districts' Application. Ex. 1004 at 1. Rangen has not demonstrated the Hearing Officer erred by concluding the Districts' Application was complete.

The Hearing Officer did not err by Subordinating the Permit

20. "Rangen contests the subordination clause placed on the Permit." *Brief* at 21.⁹ The subordination clause states:

7. This right shall be junior and subordinate to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho that are initiated later in time than the priority date of this right and shall not give rise to any claim against any future rights for the use of water, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho initiated later in time than the priority date of this right.

Permit at 2.

21. Rangen asserts the Department has no "lawful authority" to include such a subordination condition on the Permit. *Brief* at 22. Idaho Code § 42-203A(5) states the Director "may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, *or may grant a permit upon conditions.*" (emphasis added). In addition, in support of the subordination condition, the Hearing Officer determined "[i]t is not in the local public interest to allow large non-consumptive water rights to tie up a significant amount of water in a basin, thereby restricting future development within the basin." *Preliminary Order* at 13. This public interest criterion is set forth in Idaho Code § 42-203A(5)(e). The Hearing Officer also cited to Exhibits 1024 and 1025, which are existing fish propagation water rights in Basin 36 that have similar subordination conditions.

22. Rangen also argues the subordination condition "removes the only protection Rangen might have if the water under the Permit becomes unavailable, which is to file a water call on the replacement water." *Brief* at 22. Rangen cites to CM Rule 43.03.c which requires a mitigation plan "include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." As this Rule demonstrates, the analysis of adequate contingency provisions is relevant to whether a mitigation plan may be approved, not whether an application for permit may be approved. After issuance of the Preliminary Order and Permit, IGWA filed *IGWA's Fifth Mitigation Plan and Request for Hearing*, Docket No. CM-MP-2014-008, seeking approval to deliver mitigation water to Rangen under the Permit. Those proceedings

⁸ To the extent Rangen argues the Districts did not properly authorize T.J. Budge to file the Districts' Application, this challenge should be raised in the context of a private civil dispute between Mr. Budge and his clients. That is a matter outside of the Department's jurisdiction.

⁹ The Districts agree that the subordination condition is appropriate. *Preliminary Order* at 13.

would be the appropriate venue for Rangen to challenge the sufficiency of contingency provisions to assure protection of its senior-priority rights in the event the mitigation water source becomes unavailable.

The Districts' Application was Filed in Bad Faith

23. Rangen tenders several arguments to support its assertion that the Districts' Application is speculative, and therefore void. *Brief* at 10-18. As stated above, Idaho Code § 42-203A(5)(c) states the Director may reject the Districts' Application if "it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes." Rangen's speculation arguments need not be addressed because the Director concludes the Districts' Application was filed in bad faith.

24. The Department's Water Appropriation Rules state:

The criteria requiring the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the application with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project.

IDAPA 37.03.08.045.01.c.

25. The Department's Water Appropriation Rules also state that an application will be found to have been made in good faith if "[t]here are no obvious impediments that prevent the successful completion of the project." IDAPA 37.03.08.045.01.c.iii

26. The District's Application was filed in bad faith because, for a majority of the quantity of water sought to be appropriated, there is a threshold impediment to "completion of the project." To perfect a project for a water right, there inherently must be completion of works for beneficial use. The testimony of Lynn Carlquist quoted above demonstrates the Districts' intent at the time of filing the Districts' Application was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility the way Rangen has done for the last fifty years. The initial filing by the Districts did not contemplate any construction of works and completion of any project. Furthermore, even at this point, with respect to at least 8.0 cfs of the 12 cfs the Districts propose for appropriation, Rangen will continue to divert through its existing Bridge Diversion. There is no "project" and consequently cannot be a "completion of the project" for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use. The Districts' Application fails the bad faith test based on the threshold question of whether there will be a project, and whether there will be any construction of works for perfection of beneficial use.

Consideration of Other Statutory Criteria

27. The discussion above addressed arguments raised in Rangen's Brief. The Director must also consider other criteria outlined in Idaho Code § 42-203A(5). The Director will address

below whether the Districts' Application will reduce the quantity of water under existing water rights, the sufficiency of the water supply, the sufficiency of financial resources, whether the Districts' Application is contrary to conservation of water resources within the state of Idaho, and whether the Districts' Application will conflict with the local public interest as defined in Idaho Code § 42-202B.

Reduction to Existing Water Rights

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

Sufficiency of Water Supply

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

Sufficiency of Financial Resources

30. 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."

31. Ground water districts are governmental entities established by Chapter 52, Title 42, Idaho Code. The Districts satisfied their burden of proof for this element because they have the ability to assess their water users to cover any costs associated with development of the proposed permit. Lynn Carlquist testified that the Districts, individually and collectively, have assessed their water users to pay for multi-million dollar projects in the past. Tr. p. 59-61.

Conservation of Water Resources

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

The Districts' Application is not in the Local Public Interest

33. 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.

34. Approval of the Districts' Application would establish an unacceptable precedent in other delivery call proceedings that are or may be pending. In the Rangen Delivery Call, the Director determined that certain ground water users were causing material injury to Rangen by reducing flows from the Curren Tunnel and that junior-priority water rights would be curtailed if mitigation was not provided to Rangen. The Districts' originally proposed assigning the Permit to Rangen as part of IGWA's first mitigation plan. *See Amended Final Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order.* The Director noted at that time "IGWA's water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application." *Id.* While a race to file an application to appropriate water does not itself establish that the Districts' Application is not in the local public interest, the Districts' Application attempts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has been using for fifty years. The Districts' Application is the epitome of a mitigation shell game. The Districts' Application brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek. It is not in the local public interest to approve such an application.

35. In addition, in this instance, it is inconsistent with the local public interest and inappropriate for the Districts to exercise their power of eminent domain as a vehicle to obtain a water right for mitigation wholly located on land owned by Rangen and to dictate how mitigation water is delivered wholly within Rangen's facility.

ORDER

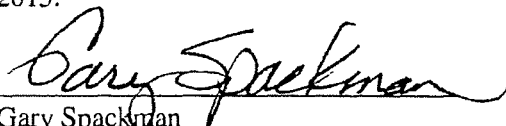
Based on and consistent with the foregoing, IT IS HEREBY ORDERED that Application to Appropriate Water no. 36-16976 is **DENIED**.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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) 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 Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 6th day of February, 2015.


Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February 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, and by email to the following:

Document(s) Served: Final Order Denying Application and Explanatory Information to Accompany a Final Order

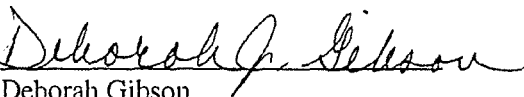
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(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.

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 36-17002	)	PRELIMINARY ORDER
<u>IN THE NAME OF RANGEN, INC.</u>	)	ISSUING PERMIT

On February 3, 2014, Rangen, Inc. ("Rangen") filed Application for Permit No. 36-17002 with the Idaho Department of Water Resources ("Department"). Protests against the application were filed by North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District ("the Districts"), represented by attorney T.J. Budge, and by the City of Gooding ("Gooding"), represented by attorney Craig Hobdey. Rangen retained attorneys Fritz Haemmerle, Justin May and Robyn Brody to represent the company in this contested case.

A pre-hearing conference was held on May 13, 2014. The parties were unable to resolve the issues of protest at that time and requested that a hearing be held to decide the contested case. A hearing was scheduled for September 17 and 18, 2014, in Twin Falls, Idaho.

On September 17, 2014, prior to the hearing, the Districts and Rangen met and agreed that all of the Districts' issues of protest were resolved except for one: the question of whether a subordination condition should be added to the proposed permit. Rangen and the Districts agreed to address that question through legal briefing before the Hearing Officer. Rangen and the Districts included their arguments in the closing briefs prepared for a companion contested case (Application for Permit 36-16976).

Mr. Hobdey (representing Gooding) was not present during the settlement discussions between Rangen and the Districts. Based on the partial settlement of the Districts' protest, the Hearing Officer decided to vacate the hearing scheduled for Application 36-17002. The Department failed to notify Mr. Hobdey of the hearing cancellation until after Mr. Hobdey had arrived at the location of the hearing.

As a result of informal discussions, Rangen and Gooding decided to address Gooding's protest through briefing before the Hearing Officer rather than conducting a hearing. Gooding filed an argument brief in opposition to granting the proposed permit on December 5, 2014. Rangen filed a response brief on December 12, 2014. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

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

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

3. Water from the Curren Tunnel is piped to a concrete box, known as the Rangen Box, which collects water into a pipeline running from the Rangen box to the Rangen facility. Some spring water is captured by the Rangen box.

4. All of the spring water from the talus slope and the overflow from the Curren Tunnel diversion system form the headwaters of Billingsley Creek. Rangen has a large diversion on Billingsley Creek (the bridge diversion) which supplies water to the large raceways and CTR raceways. Water used in the Rangen facility is returned to Billingsley Creek at the end of the CTR raceways.

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

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

7. Application 36-17002 proposes diverting water from Springs tributary to Billingsley Creek for Fish Propagation. The application lists two points of diversion (the SWSWNW and the SESWNW of Section 32, T07S, R14E), but does not designate discrete locations for the two points of diversion. The application included three different maps. However, none of the maps identify the exact location of the proposed points of diversion.

8. Application 36-17002 included the following statement: "The purpose of this application is to secure points of diversion for water emanating from springs, seeps, talus slopes, and from [t]he Martin-Curren Tunnel. All of these sources emanate from basalt in the spring complex and enter the headwaters of Billingsley Creek from which they have historically entered the pipeline to the large raceways."

9. Rangen's initial disclosures (filed pursuant to IDAPA 37.03.08.40.05) state that all of the proposed points of diversion have been previously constructed and that Rangen will not have any additional infrastructure costs before diverting water under the proposed permit. This statement confirms that Rangen intended to identify only existing diversion facilities under its Application.

10. Rangen's water rights associated with the Curren Tunnel are sufficient to cover its diversion from that water source. Evidence suggests that some spring flow (above and beyond the water coming from the Curren Tunnel) enters the Rangen Box and is diverted for use at the Rangen

facility. There are no water rights associated with this diversion of spring water. Further, there are no water rights associated with the Rangen bridge diversion from Billingsley Creek.

11. The evidence in the administrative record strongly suggests that the two points of diversion proposed in Application 36-17002 are the Rangen Box and the Rangen bridge diversion. Both of these structures capture the spring water emanating from the talus slope near the Rangen facility.

12. Although Rangen identifies the source of water for the bridge diversion as “Springs”, the correct source designation should be “Billingsley” Creek because the springs join together into a single, identifiable creek channel upstream of the bridge diversion.

13. The points of diversion and sources for Application 36-17002 should be identified as follows:

<u>Legal Description</u>	<u>Source</u>	<u>Diversion Name</u>
SWSWNW, Sec. 32, T07S, R14E	Billingsley Creek	Rangen Bridge Diversion
SESWNW, Sec. 32, T07S, R14E	Springs	Rangen Box

14. The place of use described in Application 36-17002 covers the SWNE and SENE of Section 31, T07S, R14E. This area includes the large raceways and CTR raceways, but does not include any of the facilities on the south side of Billingsley Creek. Water diverted from the bridge diversion and the Rangen Box can be used in the large raceways and CTR raceways.

15. Application 36-17002 lists a diversion rate of 59.00 cfs. During pre-hearing negotiations, Rangen agreed to reduce the proposed diversion rate to 21.80 cfs. In the last twenty years, the total flow of water through the Rangen facility, including water from the Curren Tunnel, has, at times, exceeded 40 cfs. (See Exhibits 2017 and 1016) The Curren Tunnel only represents a small portion of the total water diverted to the Rangen facility.

CONCLUSIONS OF LAW / ANALYSIS

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.

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

Reduction to Existing Water Rights

There is no evidence in the record suggesting that the amount of water available to satisfy other water rights will be reduced or diminished by the proposed water use. Fish propagation rights are generally described as non-consumptive by the Department. Except for Permit 36-16976, there are no other water rights between the proposed points of diversion and the point of return flow from the Rangen facility into Billingsley Creek.

Permit 36-16976 (with a priority date of April 3, 2013) was issued by the Department on November 18, 2014 and authorizes the permit holder to divert water from Billingsley Creek at and just upstream of the Rangen bridge diversion to deliver water to Rangen for mitigation purposes. The permit is currently being challenged by Rangen before the director of the Department. If, after the appeals process is complete, Permit 36-16976 is still recognized as a valid water right, Permit 36-16976 would be senior to Permit 36-17002. Administration of water rights by the local watermaster (Water District 36A) and the installation of measuring devices should be sufficient to prevent injury to Permit 36-16976.

Rangen has satisfied its burden of proof regarding no injury to other water rights.

Sufficiency of Water Supply

Rangen has satisfied its burden of proof regarding the sufficiency of the water supply. Evidence in the record shows that the total flow through the Rangen facility, including water diverted from the Curren Tunnel, has exceeded 40 cfs in recent years. (Exhibits 2017 and 1016)

Good Faith / Speculative Purposes

Rangen has satisfied its burden of proof regarding good faith / speculation. Rangen owns the property at the proposed points of diversion and place of use. Further, Rangen has already obtained all other permits needed to operate a fish propagation facility.

Sufficient Financial Resources

Rangen has satisfied its burden of proof regarding sufficient financial resources to complete the proposed project. According to its disclosures, Rangen intends to use its existing diversion infrastructure to divert water under the proposed permit. Therefore, there will be little or no cost to develop 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))

Gooding argues that the proposed permit is not in the local public interest because it would allow Rangen to divert water from Billingsley Creek under the permit while still pursuing a delivery call (against junior ground water users) under its existing senior water rights (from the Curren Tunnel). Gooding’s argument is not persuasive. Rangen’s delivery call is presently limited to the Curren Tunnel, the source listed on Rangen’s senior water rights. Any water available in the Curren Tunnel will be first used to satisfy the senior rights from that source. The pending permit application is for sources not listed on Rangen’s existing water rights. Therefore, Rangen’s pending delivery call should have no bearing on the outcome of this contested case.

Rangen and the Districts provided written arguments on the question of whether the proposed permit should include a condition subordinating the permit to future upstream consumptive uses. This question falls within the local public interest criteria. The Districts argue that a subordination condition is appropriate because, without such a condition, the permit could block all future upstream development. The Districts asked for a subordination condition to be placed on their Permit 36-16976, which is also diverted at the Rangen facility. Rangen, on the other hand, argues that the Department does not have the authority to subordinate non-consumptive permits to future consumptive uses.

Idaho Code § 42-203A(5) authorizes the director of the Department to include conditions on permits. The authority to condition water rights has been recognized by the Idaho Supreme Court. *See Hardy v. Higginson*, 849 P.2d 946 (Idaho 1993). Rule 50.01 of the Department’s Water Appropriation Rules (IDAPA 37.03.08) states:

The director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

For a number of years, the Department has recognized that it is not in the public interest to allow large non-consumptive water rights to restrict upstream development within a basin. For

example, since the mid-1980s, the Department has added the following condition to hydropower permits:

The rights for the use of water acquired under this right shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.

The condition proposed for inclusion on Permit 36-17002 has very similar language to the hydropower condition and has been included on nine permits recently issued for non-consumptive uses such as fish propagation or recreation. Two of these permits are located within Administrative Basin 36. The proposed condition states:

This right shall be junior and subordinate to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho that are initiated later in time than the priority date of this right and shall not give rise to any claim against any future rights for the use of water, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho initiated later in time than the priority date of this right.

Because the springs forming the headwaters of Billingsley Creek (the source of water for the proposed permit) have been found to be hydrologically connected to the Eastern Snake Plain Aquifer, if Permit 36-17002 were issued without the proposed subordination condition, it could result in a permanent restriction on ground water development across a large portion of eastern Idaho. It is not in the public interest to allow a large non-consumptive use of water to restrict future water development across a significant portion of the state.

If the subordination condition is included on the permit, Rangen has satisfied its burden of proof regarding the local public interest.

Additional Issues Raised by Gooding

In its brief in opposition to the proposed permit, Gooding raises two additional issues that should be discussed in this order. Gooding asserts that Application 36-17002 does not clearly identify the location and source of the proposed points of diversion. Gooding is correct. Application 36-17002 is very ambiguous about proposed points of diversion, describing many different sources and methods of diversion. If anything, the application overstates the diversion that will actually occur under the proposed permit.

In its initial disclosures, Rangen explained that the permit is intended to cover the existing points of diversion at the Rangen facility. This would include the diversion from the Curren Tunnel, the Rangen Box (which captures some spring inflow) and the bridge diversion. Rangen's

initial disclosures provide sufficient clarification about the proposed points of diversion to allow the application to be processed. Because Rangen's existing water rights are sufficient to cover its diversion from the Curren Tunnel and because Rangen only identified two points of diversion on Application 36-17002, the Curren Tunnel diversion will not be included on the permit.

Gooding also asserts that the proper source designation for the bridge diversion should be Billingsley Creek rather than Springs tributary to Billingsley Creek. Evidence in the administrative record, including maps of the area, show that the bridge diversion exists at a location where springs emanating from the talus slope join together to form a creek channel. The bridge diversion sits within 500 feet of the top of the talus slope. (See Exhibit 2021) It is understandable why Rangen would identify the source of its bridge diversion as "Springs".

Rule 35.03.b.ii of the Department's Water Appropriation Rules (IDAPA 37.03.08) requires the source of water to be listed on an application for permit. "For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in the local common usage." (IDAPA 37.03.08.35.03.b.ii) The USGS Quadrangle map does not clearly delineate where Billingsley Creek begins.

Rule 35.04.b of the Department's Water Appropriation Rules allows applications to be amended to "clarify the name of the source of water". Because the diversion infrastructure (Rangen Box and bridge diversion) are already in place, the actual sources of the water being diverted by Rangen are fixed. The Department retains the authority to determine what name should be assigned to a given source and to issue a permit with the correct source name. In this case, the correct name for the source supplying water to the bridge diversion is "Billingsley Creek".

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 36-17002 in the name of Rangen, Inc. is APPROVED and Permit 36-17002 is ISSUED with the following elements and conditions:

Priority Date: February 3, 2014

Source: Billingsley Creek Tributary to: Snake River
 Springs Tributary to: Billingsley Creek

Period of Use: 1/1 – 12/31

Beneficial Use: Fish Propagation

Diversion Rate: 21.80 cfs

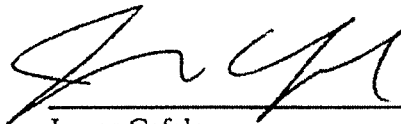
Points of Diversion: SW¼ SW¼ NW¼ of Sec 32, T07S, R14E, B.M. (Billingsley Creek)
 SE¼ SW¼ NW¼ of Sec 32, T07S, R14E, B.M. (Springs)

Place of Use: SW¼ NE¼ of Sec 31, T07S, R14E, B.M.
 SE¼ NE¼ of Sec 31, T07S, R14E, B.M.

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **February 1, 2020**.
2. Subject to all prior water rights.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 36A.
4. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
5. The right holder shall not divert water at a rate exceeding what is reasonably necessary for the beneficial use authorized by this right.
6. Use of water under this right shall be non-consumptive.
7. This right shall be junior and subordinate to all future water rights, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho that are initiated later in time than the priority date of this right and shall not give rise to any claim against any future rights for the use of water, other than those for fish propagation, wildlife, recreation, aesthetic, or hydropower uses, within the state of Idaho initiated later in time than the priority date of this right.
8. This right is for the use of trust water and is subject to review 5 years after the issuance of the permit to determine availability of water and to re-evaluate the public interest.
9. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
10. This right does not grant any right-of-way or easement across the land of another.

Dated this 2nd day of January, 2015.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January 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

Craig Hobdey for
City of Gooding
PO Box 176
Gooding, ID 83330



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.