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IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 36-16976 IN THE NAME
OF NORTH SNAKE GROUND WATER
DISTRICT ET AL., AND APPLICATION
FOR PERMIT NO. 36-17002 IN THE
NAME OF RANGEN, INC.

Ground Water Districts' Post-Hearing Brief

North Snake Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, and Clark Jefferson Ground Water District (collectively, the “Districts”) submit this post-hearing brief pursuant to verbal instructions given by the hearing officer at the close of the hearing in this matter on September 17, 2014.

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SUMMARY

IDWR should approve the Districts' Application because it meets the requirements of Idaho Code §§ 42-202 and 42-203A. If Rangen's Application is approved, it should include a condition subordinating it to future development of consumptive water uses from the Eastern Snake Plain Aquifer.

PROCEDURAL BACKGROUND

1. Districts' Application for Permit 36-16976.

On April 3, 2013, the Districts filed Application for Permit 36-16976 (the "Districts' Application") seeking 12 cfs from Springs and Billingsley Creek for mitigation and fish propagation purposes.¹ The application was amended February 11, 2014, and again May 27, 2014, on condition the priority date is not advanced.² Protests were filed by Rangen, Inc. ("Rangen") and Blind Canyon Aquaranch, Inc. ("Blind Canyon").

2. Rangen Application for Permit 36-17002.

On February 3, 2014, Rangen filed Application for Permit 36-17002 ("Rangen Application") seeking 59 cfs from Springs for fish propagation.³ Protests were filed by the City of Gooding ("Gooding") and the Districts.

3. Parallel Proceedings.

On May 13, 2014, IDWR issued a notice of prehearing conference with the caption listing both the Districts' Application and the Rangen Application. Though not formally consolidated, the matters proceeded on a parallel track, with parties making pre-hearing submissions in both cases jointly.

4. Hearing.

A hearing on the Districts' Application was held September 17, 2014, at the IDWR Southern Region office in Twin Falls, Idaho, before James Cefalo as the hearing officer. A hearing on the Rangen Application was scheduled to follow immediately after; however, Rangen and the Districts entered into a stipulation to avoid the need for presentation of evidence at the hearing. The terms of the stipulation are:

¹ Ex. 1000.

² Exs. 1001 and 1004.

³ Ex. 2001.

- a) The Districts withdrew their protest against the Rangen Application, with the exception of their assertion that it should contain a subordination condition as asserted in the SPF Water Engineering report of Scott King, exhibit 1016.
- b) Rangen agreed to admit into the administrative record concerning the Rangen Application exhibit 1016 and the testimony of Scott King given in the hearing on the Districts' Application.

DISTRICTS' APPLICATION 36-16976

The Districts' Application should be approved because it contains the information required by Idaho Code § 42-202, and meets the criteria for approval set forth in Idaho Code § 42-203A.

1. The Districts' Application contains the information required by Idaho Code § 42-202.

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

- Name and post-office address of the applicant.⁴
- Source of water supply.⁵
- Nature of proposed use.⁶
- Period of use.⁷
- Point of diversion and description of diversion works.⁸
- Amount of water to be diverted and used.⁹
- Time required to develop the permit.¹⁰
- Map of diversion works and place of use.¹¹

Each of these requirements is satisfied, as explained below.

1.A Applicant's name and address.

The Districts' Application was submitted on behalf of seven Ground Water Districts, in care of their attorneys, whose names and address is

⁴ Idaho Code § 42-202(1)(a).

⁵ Idaho Code § 42-202(1)(b).

⁶ Idaho Code § 42-202(1)(c).

⁷ *Id.*

⁸ Idaho Code § 42-202(1)(d).

⁹ *Id.*

¹⁰ Idaho Code § 42-202(1)(e).

¹¹ Idaho Code § 42-202(4).

listed.¹² Thus, it meets the requirement of Idaho Code §42-202(1)(a) that the application list the “name and post-office address of the applicant.”

Rangen’s counsel argued at the hearing the Districts’ Application cannot be approved because it did not have attached to it a written “power of attorney” authorizing the Districts’ attorneys to sign it. Rangen presumably relies on IDWR Water Appropriation Rule 35.03.b.xii which states that applications “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,”¹³ along with Rule 35.03.b.xiv which states applications “may be signed by a person having a current ‘power of attorney’ authorized by the applicant,” in which case a “copy of the ‘power of attorney’ shall be included with the application.”¹⁴

Rangen’s argument is misplaced. As explained below, (a) Water Appropriation Rule 35.03.b.xiv does not require licensed attorneys to have a written power of attorney when acting on behalf of their clients, (b) IDWR had ample evidence the Racine law firm represents the Districts, (c) evidence presented at the hearing confirms the Racine law firm was authorized to sign the Districts’ Application, and (d) IDWR accepted and processed the Application, and it would be utterly unjust to reverse that action now.

1.A.i Water Appropriation Rule 35.03.b.xiv does not require licensed attorneys to have a written “power of attorney” when acting on behalf of their clients.

Rangen asks IDWR to interpret Rule 35.03.b.xiv in a manner that goes beyond its plain language. The Rule states applications “*maybe* signed by a person having a current ‘power of attorney.’”¹⁵ It does not mention licensed attorneys, let alone state licensed attorneys *must* have a written “power of attorney” to act on behalf of their clients.

Rangen’s argument fails to distinguish between licensed attorneys, who as a matter of law are authorized to sign legal documents on behalf of their clients, and non-attorneys, who as a matter of law cannot act as another’s agent without a written “power of attorney” document.

The Idaho Supreme Court explained in *Storey v. United States Fidelity and Guaranty Co.* that “an attorney has authority, by virtue of his employ-

¹² Exs. 1000, 1001, 1004.

¹³ IDAPA 37.03.08.035.03.xii.

¹⁴ IDAPA 37.03.08.035.03.xiv.

¹⁵ *Id.* (emphasis added).

ment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, but has no power to compromise or release the cause of action itself.”¹⁶ The Court later explained this is part of the implied authority of licensed attorneys:

The relationship between an attorney and client is one of agency. The answer to whether an attorney can bind his client by a stipulation rests in whether the subject of the stipulation falls within the scope of the attorney’s implied authority, and if it is outside the attorney’s implied authority, whether the client has actually authorized or later ratified his actions. It is generally recognized that an attorney has “. . . the general implied or apparent authority to enter into or make such agreements or stipulations, with respect to procedural or remedial matters, as appear, in the progress of the cause, to be necessary or expedient for the advancement of his client’s interest or to accomplishment of the purpose for which the attorney is employed.” Yet it is well settled that “. . . The implied authority of an attorney ordinarily does not extend to the doing of acts which will result in the surrender or giving up any substantial right of the client.”¹⁷

Simply put, a licensed attorney can, as a matter of law, bind his client, so long as he is not giving up his client’s substantial rights.¹⁸

In contrast, non-attorneys have no right to bind another person unless they have a signed “power of attorney” authorizing the non-attorney to act as the person’s agent. This type of authority derives from the Uniform Power of Attorney Act, Title 15, Chapter 12, Idaho Code, and is entirely separate from the authority of licensed attorneys acting on behalf of their clients.

When Water Appropriation Rule 35.03.b.xiv uses the term “power of attorney,” it is referring to the type of authority granted under the Uniform Power of Attorney Act. It requires non-attorneys who sign applications on behalf of others to submit a written “power of attorney” evidencing their authority, as required by the Act. As the IDWR does not control the practice of law, Rule 35.03.b.xiv cannot be construed as a limitation on the inherent legal authority of licensed attorneys to act on behalf of their clients.

¹⁶ *Storey v. United States Fidelity & Guar. Co.*, 32 Idaho 388, 392 (1919).

¹⁷ *Muncey v. Children’s Home Finding & Aid Soc’y*, 84 Idaho 147, 151-152 (1962) (quoting 7 C.J.S. Attorney and Client § 100, p. 917).

¹⁸ *See, e.g., Evans v. Power County*, 50 Idaho 690, 706 (1931) (upholding attorney agreement on behalf of client concerning distribution of proceeds from execution of a judgment)

1.A.ii IDWR had ample evidence of the authority of the Districts’ attorneys to sign the Application.

When dealing with licensed attorneys, IDWR simply needs evidence “to show that the signator has authority to sign the application,” as required by Water Appropriation Rule 35.03.b.xii.¹⁹ In this case, the Racine law firm, and Randy Budge and T.J. Budge in particular, have a long and well-known history of representing IGWA and the Districts in proceedings before IDWR and the Idaho judiciary. IDWR was well aware of this at the time the Districts’ Application was submitted, as the Budges were in the midst of representing the Districts in the Rangen delivery call and other proceedings then pending before IDWR, as well as various matters before the Idaho judiciary. IDWR’s first-hand knowledge the Racine firm represents the Districts was sufficient to accept the Districts’ Application at the time it was filed.

1.A.iii The authority of the Districts’ attorneys to sign and file the Districts’ Application is undisputed.

Lynn Carlquist testified at the hearing the Racine firm has represented the Districts since 2007, that he and the other Districts were consulted before their Application was filed, and that the Districts authorized the Racine firm to file the Application. Lest there be any doubt, Mr. Carlquist also provided resolutions of Magic Valley Ground Water District (MVGWD) and North Snake Ground Water District (NSGWD) explicitly ratifying the authority of the Racine firm to file the Districts’ Application.²⁰ Rangen failed to produce any evidence that the Racine firm was not authorized to sign the Districts’ Application.

1.A.iv IDWR accepted the Districts’ Application.

Finally, IDWR already deemed the Districts’ Application to be in compliance with Water Appropriation Rule 35.03. Water Appropriation Rule 35.01.d states applications for permit that are “not complete as described in Subsection 35.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application.”²¹

¹⁹ IDAPA 37.03.08.035.03.b.xii.

²⁰ Exs. 1076 and 1077.

²¹ IDAPA 37.03.08.035.01.d.

In contrast, applications that are complete “will be accepted for filing and will be endorsed by the department as to the time and date received.”²²

IDWR accepted the Districts’ Application, processed it, advertised it, and set it for hearing. Had the Application been incomplete due to concern over the authority of the Districts’ attorneys to sign it, additional evidence could have been provided well in advance of the filing of Rangen’s Application which was not made until February 2014—ten months after the Districts filed their Application.

The testimony of Lynn Carlquist and the resolutions of MVGWD and NSGWD simply validate IDWR’s correct determination the Racine firm was authorized to sign the Districts’ Application on behalf of the Districts. Therefore, IDWR should find the Districts’ Application complies with Idaho Code § 42-202(1)(a) and Water Appropriation Rule 35.03.

If IDWR finds the resolutions of NSGWD and MVGWD to be a linchpin in its analysis, the Districts have no objection to their permit being issued in the names of NSGWD and MVGWD only.

1.B Source of water supply.

In considering whether an application for permit properly identifies the “source of the water supply” as required by Idaho Code §42-202(1)(b), Water Appropriation Rule 35.03.b.ii explains: “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 local common usage.”²³ In making this determination, IDWR must identify the proposed point of diversion. Snake River Basin Adjudication (SRBA) Judge Barry Wood held the name of the source depends on the location of the point of diversion, explaining that an appropriator’s “subjective intent as to which particular spring it was diverting from does not establish the source. The point of diversion establishes the source.”²⁴

As explained below, the Districts anticipate diverting from Billingsley Creek and potentially from springs on the talas slope above the Rangen fish hatchery. Scott King testified that Billingsley Creek is listed on the USGS Quadrangle map; thus, the Districts’ Application properly identifies “Billingsley Creek” as a source. Mr. King also explained that IDWR com-

²² *Id.*

²³ IDAPA 37.03.08.035.03.b.ii.

²⁴ Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge, SRBA Subcase Nos. 36-2708 & 36-7218 (Fifth Jud. Dist., Twin Falls County) (August 15, 2000).

monly identifies spring sources by the generic name “springs;” thus, the Districts’ Application properly identifies “Springs” as the source of water that may be diverted from springs on the talas slope.

1.C Nature of use.

In evaluating whether an application lists the proper “nature of proposed use or uses” under Idaho Code §42-202(1)(c), Water Appropriation Rule 35.03.b.vii requests “a description sufficient to identify the proposed use or uses of water.”²⁵

The Districts’ Application lists “mitigation” and “fish propagation” as natures of use.²⁶ The original Application included this description:

The Ground Water Districts (sic) water for mitigation purposes to protect groundwater use on the Eastern Snake Plain in the event that the Director finds Rangen to be materially injured and orders junior groundwater users to provide mitigation or be curtailed. Mitigation water will be delivered to Rangen for fish propagation purposes. The Ground Water Districts, if unable to secure Rangen’s consent, will use their power of eminent domain as set forth in Idaho Code section 42-5224(13) to secure necessary easements for mitigation facilities.²⁷

Following entry of the curtailment order in the Rangen delivery call case, the description was updated as follows:

The GW Districts will use this water for mitigation purposes to protect groundwater use on the Easter Snake Plain to mitigation 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 Curren Tunnel rights for fish propagation purposes. If unable to secure proper consent, the GWD’s will use their power of eminent domain as set forth in I.C. Sec. 42-5224(13) to secure easements, as necessary.²⁸

Lynn Carlquist testified that both descriptions are accurate today, with the updated version simply being more descriptive. He explained the Districts will develop the permit either by assigning it to Rangen to develop as

²⁵ IDAPA 37.03.08.035.03.b.vii.

²⁶ Ex. 1004.

²⁷ Ex. 1000.

²⁸ Exs. 1001 and 1004.

any other fish propagation water right, or by delivering water to Rangen for mitigation purposes in accordance with a mitigation plan approved by the Director of IDWR.

Mitigation and fish propagation are well-recognized beneficial uses of water in Idaho, evident by the hundreds of water right licenses and decrees for such uses. With respect to mitigation specifically, the Districts have statutory authority to “acquire . . . water rights . . . designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district.”²⁹

Thus, the Application complies with Idaho Code § 42-202(1)(c) and Water Appropriation Rule 35.03.b.vii by identifying valid beneficial uses.

1.D Season of use.

The Districts’ Application identifies a year-round season of use for both fish propagation and mitigation, thereby complying with the requirement of Idaho Code § 42-202(1)(c) that applications list the “period of the year during which water is to be used.”

1.E Points of diversion / diverting works.

Idaho Code § 42-202(1)(d) requires applications to list 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.” Water Appropriation Rule 35³⁰ also requires a description of the diverting works.

The Districts’ Application includes legal descriptions encompassing the anticipated diversion structures from Billingsley Creek and Springs, a map depicting the diversion area, and a description of the diverting works as: “Hydraulic pump(s) (size TBD); screw-operated headgate on Billingsley Creek.”³¹ Lynn Carlquist explained the pump will be used to divert water from Billingsley Creek to Rangen’s hatch house, greenhouse, and Small Raceways; that either the existing headgate or a new headgate on Billingsley Creek will be used to divert water to Rangen’s large raceways; that Districts may also divert water from the springs on the talas slope above the Rangen fish hatchery; and that actual construction will depend on which facilities are approved by the Director of IDWR as part of the mitigation plan the Districts will file once a permit is issued for water right 36-16976.

²⁹ Idaho Code § 42-5224(1) and (11).

³⁰ IDAPA 37.03.08.035.03.b.ix.

³¹ Ex. 1004.

Thus, the Districts' Application meets the requirements of Idaho Code § 42-202(1)(d) and Water Appropriation Rule 35.

1.F Quantity.

The Districts' Application complies with Idaho Code § 42-202(1)(d) by listing 12 cfs as "the amount of water to be diverted and used."

1.G Time for completion.

The Districts' Application complies with Idaho Code § 42-202(1)(e) by listing five years as the "time required for the completion of construction of such works and application of the water to the proposed use."

1.H Place of use.

The Districts' Application complies with Idaho Code § 42-202(4) and Water Appropriation Rule 35.03.b.iii by including a legal description of the place of use, along with a map identifying the place of use.

As explained above, the permit issued to the Districts may be assigned to Rangen to develop for fish propagation just as any other fish propagation water right. Thus, the legal description and map encompassing Rangen's entire fish hatchery is appropriate.

With respect to the mitigation use, the hearing officer questioned Scott King whether the place of use should include the raceways at the Rangen fish hatchery, or whether it should be limited to the diverting works constructed by the Districts to deliver mitigation water to Rangen. These questions reflect the fact mitigation is a unique beneficial use of water, and IDWR has not adopted any formal policy as to how the place of use should be identified on water rights used for mitigation.

IDWR's Water Appropriation Rules do not define "mitigation," but the Rules for Conjunctive Management of Surface and Ground Water Resources do, describing it as "actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply."³² Mitigation is a flexible concept that can be adapted to a wide variety of circumstances, so it is no surprise IDWR has not pigeonholed it by imposing strict regulations as to how mitigation water rights may be used or described.

³² IDAPA 37.03.11.010.15.

The use of water for mitigation is unique in that it involves two corresponding beneficial uses—the mitigation actions by the junior (the owner of the mitigation right) and the subsequent use of that water by the senior (the owner of the right to which mitigation is owed). This is obviously the genesis of the hearing officer’s questions as to how the place of use should be described on the permit for the Districts’ Application.

With other mitigation water rights, IDWR has found it unnecessary to list the senior’s property as the place of use of mitigation water, instead using conditions to describe how the mitigation will occur.

For example, when IDWR issues a new water right on condition the appropriator provide mitigation by ceasing use of an existing water right, it typically imposes a condition on the new right that reflects the cessation in use of the existing right. IDWR does not typically require the appropriator to file a transfer application to change the place of use of the existing right to list the senior’s property that benefits from the mitigation.

IDWR took this approach with the Kohring water right, Exhibit 1026, which was issued with a “mitigation from storage” as a beneficial use. Under that right, Kohring is allowed to store water in a pond that can be released into the Snake River to meet the minimum flows at the Murphy Gauge imposed by the Swan Falls Agreement. The permit does not contain a legally described place of use for the “mitigation from storage” beneficial use. Instead, it contains conditions explaining the mitigation water is intended to be released into Jacks Creek from where it will flow into the Snake River in the event Snake River flows drop below the Swan Falls minimums.

There are obvious reasons for not listing the senior’s property as the place of use of a mitigation water right. One is that mitigation water sometimes benefits a large number of seniors, and it would be impractical to list all such property. Another is that Water Appropriation Rule 45.01.c.i requires the appropriator to have “legal access to the property necessary to construct and operate the proposed project.”³³ With mitigation, the junior does not take control of or operate the senior’s property. Rather, the junior delivers water to the senior for the senior to use on its property.

For example, the Kohring water right accomplishes its mitigation use by releasing water for Idaho Power to generate hydropower with at Swan Falls Dam. Kohring does not own or control the hydropower plant, he simply delivers water to Idaho Power to use at its facility.

³³ IDAPA 37.03.08.045.01.c.i.

Likewise, when IGWA rents storage water from the Water District 01 reservoir system to provide mitigation to the Surface Water Coalition (SWC), IGWA delivers that water to the SWC headgates at which point the SWC takes control of the water to use with their canal systems.³⁴

Mitigation for fish farms works the same way. Under the Over-The Rim (OTR) mitigation plan approved by IDWR, IGWA was to interconnect a series of groundwater wells above the Snake River canyon rim in the Thousand Springs area and pipe water over the rim to the Snake River Farm fish hatchery owned by Clear Springs Foods, Inc.³⁵ The Director's approval of the plan required IGWA to file transfer applications to change the groundwater water rights accordingly.³⁶ While the transfers were not completed due to a settlement agreement between the parties, the plan clearly anticipated IGWA would simply deliver water to Clear Springs to use in its facility, without taking over operation of the raceways themselves.

The Director recently followed suit in approving the Tucker Springs mitigation plan which allows the Districts to pipe water from Tucker Springs to the Rangen fish hatchery.³⁷ This too was approved with a requirement that the Districts' file a transfer application change an existing Tucker Springs water right to allow its delivery to the Rangen facility.³⁸ This plan has stalled due to complications overcoming protests from other water users, but again demonstrates the mitigation would be accomplished by delivering water to Rangen to use in its facility.

The Districts' Application is no different. The Districts will secure the water right, procure easements, install diversion and conveyance facilities, and physically divert and deliver water to Rangen to use in its facility. Following the same format as the Kohring permit, there need not be a legal description for the "mitigation" place of use; rather, conditions should be used to explain the mitigation water is delivered to Rangen.

The Districts' Application complies with the place of use requirements of Idaho Code § 42-202(4) and Water Appropriation Rule 35.03.b.iii by both identifying the Rangen fish facilities and providing a narrative description that sufficiently explains the purpose of the mitigation use.

³⁴ Ex. 1032.

³⁵ Ex. 1033.

³⁶ Ex. 1033 p. 9; *see also*, excerpt from *Opinion and Recommendation Concerning the Over-The-Rim Plan* attached hereto as **Appendix A**.

³⁷ Ex. 1035.

³⁸ *Id.* at 9 ¶17; *see also Id.* at 16 ¶7.

2. The Districts' Application meets the criteria for approval set forth in Idaho Code § 42-203A.

Under Idaho law, there is a constitutional right to appropriate unappropriated water: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied."³⁹ Accordingly, the Idaho Legislature has instructed IDWR to approve any permit application unless:

- (a) it will reduce the quantity of water under existing water rights,
- (b) the water supply is insufficient for the purpose for which it is sought to be appropriated,
- (c) such application is not made in good faith, is made for delay or speculative purposes,
- (d) the applicant has not sufficient financial resources with which to complete the work involved therein,
- (e) it will conflict with the local public interest as defined in section 42-202B, Idaho Code,
- (f) it is contrary to conservation of water resources within the state of Idaho, or
- (g) it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.⁴⁰

In deciding whether an application meets these criteria, IDWR must "determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied."⁴¹ If necessary to satisfy these criteria, IDWR "may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions."⁴²

³⁹ Idaho Const., Art. 15, § 3.

⁴⁰ Idaho Code § 42-203A(5).

⁴¹ *Id.*

⁴² *Id.*

2.A The Districts' Application will not injure other rights.

The Districts' Application will not "reduce the quantity of water under existing water rights" under Idaho Code § 42-203A(1)(a) because fish propagation is deemed a non-consumptive use of water, and any water diverted under water right 36-16976 for fish propagation or mitigation will return to Billingsley Creek upstream from other diversions.

Scott King testified there may be a small amount of evaporation from running water through raceways, but it is small enough to be considered *de minimis*, causing IDWR to treat it as non-consumptive. In Basin 36 specifically, IDWR has included a non-consumptive use condition on permits issued for fish propagation.⁴³

The Districts contend IDWR should apply the same non-consumptive use condition to the Districts' Application, confirming there will be no material injury to other water rights. If IDWR changes course and deems the Districts' Application to be consumptive, the permit should still be issued, recognizing that priority administration may prevent the Districts from diverting water under the right unless they provide mitigation to downstream water users.

2.B The water supply is sufficient.

In considering whether "the water supply is insufficient for the purpose for which it is sought to be appropriated" per Idaho Code § 42-203A(5)(2), Water Appropriation Rule 45.01.b asks whether water is available "in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant)."⁴⁴

The Districts' Application seeks to appropriate 12 cfs. Exhibits 1022 and 1037 show the combined water flow from Billingsley Creek and the Curren Tunnel since 1995. During the last five years the combined flow peaked at approximately 22 cfs, in 2012. Flow from the Curren Tunnel alone peaked at nearly 10 cfs that year, as shown in Exhibit 1022. Thus, peak flow in Billingsley Creek over the last five years is approximately 12 cfs—the amount of water applied for in the Districts' Application.

As to economic feasibility, the Districts' Application is being pursued to avoid curtailment of all groundwater rights junior to July 13, 1962, in the Magic Valley.⁴⁵ These rights collectively supply water to 157,000 acres of irrigated farmland, more than a dozen cities, most of Idaho's dairy indus-

⁴³ Exs. 1024, 1025, 1029.

⁴⁴ IDAPA 37.03.08.045.01.b.

⁴⁵ Ex. 1008.

try, and numerous other businesses. Thus, there is enormous incentive to see this water right fully developed.

2.C The Districts' Application is made in good faith and is not speculative.

In considering whether the Application is “made in good faith” or “for delay or speculative purposes” under Idaho Code § 42-203A(5)(c), Water Appropriation Rule 45.01.c enquires into “the intentions of the applicant,” “legal access to the property necessary to construct and operate the proposed project,” whether the applicant “is in the process of obtaining other permits needed to construct and operate the project,” and whether there are “obvious impediments that prevent the successful completion of the project.” As discussed below, none of these considerations prevent approval of the Districts' Application.

2.C.i The Districts' Application is not speculative.

Rangen contends the Districts' Application is speculative because the Director had not issued a curtailment order prior to the filing of the Districts' Application. This argument is unreasonable and inconsistent with past practice of the IDWR, and it contradicts the position taken by Rangen in prior hearings.

It is unreasonable for Rangen to argue the Districts should wait until a curtailment order is issued before undertaking mitigation. The Rangen curtailment order plainly demonstrates this, having ordered curtailment to begin less than two months after the order was issued.

It is ironic Rangen would contend the Districts should have waited to file their Application, since Rangen has opposed each of IGWA's requests to stay curtailment by arguing that IGWA should have had mitigation in place *before* the curtailment order was issued.

More importantly, IDWR has approved preemptive mitigation on many occasions. For example, the Kohring permit was issued despite no breach of the Swan Falls minimum flows to date. IGWA's mitigation plan for the SWC is also preemptive, as it provides a mechanism to mitigate future curtailment orders that may or may not arise.

The Districts' Application was submitted after Rangen had filed its delivery call. The material threat of curtailment from that call is sufficient to overcome any argument the Districts' Application was speculative.

As an aside, it should also be noted that while the Districts' presently have a mitigation obligation of 9.1 cfs to Rangen, that decision has been appealed by Rangen, creating a risk the obligation could increase. Thus, the application to appropriate 12 cfs applied is not speculative.

2.C.ii The Districts have authority to exercise eminent domain to secure legal access.

An applicant is deemed to have legal access if he or she “has the authority to exercise eminent domain authority to obtain such access.”⁴⁶ As noted in the Districts’ Application, the Districts have authority under Idaho Code § 42-5224(13) to “exercise the power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights of access to property necessary to the exercise of the mitigation powers herein granted, both within and without the district.” The Districts have already initiated the condemnation process by delivering to Rangen the “Advice of Rights” form required by Idaho Code § 7-711A.⁴⁷

Rangen argued at the hearing that the Districts are incapable of perfecting water right 36-16976 because Rangen will not allow them to operate its fish hatchery. This argument fails for two reasons.

First, the Districts do not intend to operate Rangen’s hatchery. As explained above, mitigation is accomplished by delivering water to the senior to use on its property. Juniors who provide mitigation have never been charged with farming the senior’s land or operating the senior’s fish hatchery; the junior’s duty to mitigate is accomplished when the mitigation water is made available to the senior to use. The Districts will perfect their right by delivering water to Rangen in accordance with a mitigation plan approved by IDWR. They need not take over operation of Rangen’s hatchery.

Second, even if the Districts were required to have legal access to operate Rangen’s raceways, their power of eminent domain enables them to acquire such access, as it broadly extends to “easements, rights-of-way, and other rights of access to property necessary to the exercise of the mitigation powers herein granted.”⁴⁸

2.C.iii No other permits are required.

The only permit required to construct the Districts’ diversion structures is a stream channel alteration permit from IDWR. This will be obtained once the permit is issued and the Director approves a mitigation plan authorizing the Districts to use water right 36-16976 to provide mitigation to Rangen.

⁴⁶ IDAPA 37.03.08.045.01.d.i.

⁴⁷ Ex. 1014.

⁴⁸ Idaho Code § 42-5224(13).

Rangen inferred at the hearing the Districts would need NPDES permits. Again, however, this argument is predicated on the mistaken assumption the Districts will take control of and operate Rangen's hatchery. Since Rangen will continue to raise fish with the mitigation water delivered to it by the Districts, there is no need for the Districts to obtain NPDES or other fish-rearing permits.

2.C.iv There are no obvious impediments.

There are no other impediments that prevent completion of the project.

2.D Financial Resources.

In considering whether the Districts have "sufficient financial resources with which to complete the work involved" per Idaho Code § 42-203A(5)(d), Water Appropriation Rule 45.01.d states: "A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue projection construction."

Idaho Code § 6-902 defines "governmental entity" as "the state and political subdivisions as herein defined." It then defines "political subdivision" as "any county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation."

Ground Water Districts are political subdivisions created by statute under Chapter 52, Title 42, Idaho Code, with authority to "levy assessments for the operation of the district and its programs."⁴⁹ They may collect their assessments on county tax rolls.⁵⁰ Lynn Carlquist testified the Districts assess their members to pay for mitigation projects, and that the Districts can raise the funds needed to develop water right 36-16976. Thus, the Districts' Application complies with Idaho Code § 42-203A(5)(d).

2.E Local Public Interest

In considering whether the Districts' Application "will conflict with the local public interest" under Idaho Code § 42-203A(5)(e), the Districts are responsible to present evidence "of any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be

⁴⁹ Idaho Code § 42-5224(5).

⁵⁰ Idaho Code § 42-5241(2).

knowledgeable,” and Rangen is required to “come forward with evidence for those factors . . . of which the protestant can reasonably be expected to be more cognizant than the applicant.”⁵¹ 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.”⁵²

The Districts’ Application will reasonably appropriate unappropriated waters of the State, thereby putting that water to beneficial use.⁵³ By approving the Districts’ Application, Rangen will be provided a source of supply for fish propagation, thus enhancing Rangen’s ability to raise fish, and a large portion of the Magic Valley economy will be sustained.

In short, approval of the Districts’ Application will only have a positive effect on the local public interest, whereas denying the Districts’ Application may ultimately devastate the local economy.

2.F The Districts’ Application is not contrary to the conservation of water resources.

The Districts’ Appropriation is for non-consumptive purposes of use and the means of diversion and conveyance system is reasonable. Thus, approving the Districts’ Application is not “contrary to conservation of water resources within the state of Idaho” under Idaho Code § 42-203A(5)(f).

2.G The Districts’ Application does not propose a place of use outside the watershed where the source of water originates.

IDWR need not consider whether approval of the Districts’ Application “will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates” under Idaho Code § 42-203A(5)(g) because the place of use is not “outside of the watershed or local area where the source of water originates.”

2.H There is no reallocation of Trust Water.

Trust Water reallocation does not apply because the Districts’ Application seeks purposes of use that are non-consumptive, are not for irrigation, and do not seek to store water.

3. Other Issues.

3.A Amendments.

⁵¹ IDAPA 37.03.08.040.04.b.ii.

⁵² Idaho Code § 42-202B(3).

⁵³ Idaho Const., Art. XV § 3.

Water Appropriation Rule 35.04 provides that a permit application shall be amended “whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended.”⁵⁴ Some amendments require advancing the priority date:

An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department.⁵⁵

On February 11, 2014, on the advice of IDWR, the Districts filed an amended Application to include the SWNE of Section 31 within the place of use. While the place of use in the original application mirrors the place of use in the SRBA partial decrees for Rangen’s existing water rights,⁵⁶ the current Public Land Survey System (PLSS) overlay utilized by IDWR indicates the tail end of the CTR Raceways extends into the SWNE of Section 31. The Districts have not evaluated the accuracy of the PLSS overlay in the immediate vicinity of Rangen, but had no objection to amending the place of use as suggested, provided “it will not affect the priority date of the application.”⁵⁷ Clarifying the place of use does not require advancing the priority date under Rule 35.04.

On May 27, 2014, the Districts amended their Application a second time to clarify the purpose of use for mitigation. The original application lists “mitigation for irrigation,” and explains the objective is to use the right “for mitigation purposes to protect groundwater use on the Eastern Snake Plain.”⁵⁸ The amendment revised the nature of use from “mitigation for irrigation” to, simply, “mitigation.”⁵⁹ The amendment did not seek to change the purpose of use, but to “clarify the existing purpose of use for mitigation.”⁶⁰ This amendment was also submitted “on condition that the

⁵⁴ IDAPA 37.03.08.035.04.a.

⁵⁵ IDAPA 37.03.08.035.04.

⁵⁶ *Cf.* Ex. 1000 with Exs. 1065 and 1067.

⁵⁷ Ex. 1002.

⁵⁸ Ex. 1000.

⁵⁹ Ex. 1004.

⁶⁰ Ex. 1005 p. 2.

priority date is not advanced.”⁶¹ While adding “an additional purpose of use” requires advancement of the priority date under Rule 35.0, clarifying an existing purpose of use does not.

Neither amendment requires advancing the priority date under the plain language of Water Appropriation Rule 35.04. If, however, IDWR determines either amendment cannot be approved without advancing the priority date of the Districts’ Application, the Application should be approved without such amendment.

3.B Fairness.

Rangen’s only real argument in opposition to the Districts’ Application is that, in its view, it would be unfair to approve the Application since Rangen has historically diverted water from Billingsley Creek. The Districts have little sympathy for this argument.

The Rangen curtailment order itself is utterly unfair. The Districts’ members invested in land and equipment to utilize the vast ESPA based on the Legislative assurance that “a reasonable exercise of [priority] shall not block full economic development of underground water resources.”⁶² IDWR issued their water rights by concluding the water supply is sufficient to support them,⁶³ without any objection from Rangen or other spring users in the Hagerman area. The State later assured groundwater users in numerous public and private meetings, in order to secure their support for the Swan Falls Agreement, that spring flows in the Hagerman area would be deemed adequate, and spring users would not be permitted to curtail groundwater use, as long as the minimum Snake River flows established under the Agreement are maintained.

When push came to shove, however, the State abandoned these promises and ordered curtailment of hundreds of thousands of acres of groundwater irrigated farmland on the Snake River Plain, even though the Swan Falls minimum flows were being maintained. The Supreme Court upheld the ruling by characterizing a half-century of State promises as “prognostications” and “conjecture” with “no legal affect.”⁶⁴ This has left the Districts’ members struggling to stay afloat amidst heavy mitigation obligations, coming awfully close at times to, literally, losing the farm.

⁶¹ *Id.* p. 1.

⁶² Idaho Code § 42-226.

⁶³ Idaho Code § 42-203A(5)(b).

⁶⁴ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 799-800 (2011).

To make matters worse, the Districts have over the last two years been drug through an endless chess match commandeered by Rangen that, while occupying a great deal of IDWR resources, is not truly about water.

So, no, the Districts' have no sympathy for Rangen's fairness argument, nor does the argument have any place in IDWR's analysis of the Districts' Application. What matters is there is unappropriated water available in Billingsley Creek, and the Districts have a statutory right to appropriate it for mitigation purposes.

It is actually the priority date of the Districts' Application that Rangen is upset about. But priority, Rangen must understand, cuts both ways.

3.C Subordination.

The Districts' Application should include a subordination for the same reasons Rangen's Application should, discuss below.

RANGEN APPLICATION 36-17002

If the Rangen Application is approved, it should be conditioned as subordinate to non-consumptive future water uses. Idaho Code 42-203A(5) states the Director "may grant a permit upon conditions." As explained by Scott King, IDWR has imposed conditions on fish propagation water rights in basin 36,⁶⁵ and non-consumptive water rights in other basins,⁶⁶ the prevents them from curtailing junior-priority consumptive uses of water.

Rangen's counsel asserted at the hearing that IDWR has no legal authority to impose subordination conditions. Yet, IDWR has authority to deny permit applications altogether if they don't meet the criteria set forth in Idaho Code § 42-203A(5). If a subordination conditions is the difference between a permit being granted and denied, it is allowable by law. Should the appropriator find the condition too onerous, they are free to not develop the permit.

The subordination condition added to other non-consumptive water rights presumably stems from Water Appropriation Rule 45.03.f, which requires IDWR, when evaluating permit applications, to "consider the promotion of full economic and multiple use development of the water resources of the state of Idaho"⁶⁷ In addition, Rule 50.01 the states IDWR has the authority to issue permits with conditions "to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory

⁶⁵ Exs. 1024 and 1025,

⁶⁶ Exs. 1027 and 1028.

⁶⁷ IDAPA 37.03.08.045.03.f.

duties, the public interest, . . . to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.”⁶⁸

The subordination condition imposed on other non-consumptive uses is necessary to prevent them from effectively eliminating all future development of upstream water sources. The same condition should be imposed on the permit issued for Rangen’s Application, for the same reasons. The Districts suggest the following:

This water right shall be junior and subordinate to other rights for the use of water, other than fish propagation, wildlife, recreation, aesthetic purposes, and hydropower in 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 fish propagation, wildlife, recreation, aesthetic uses, or hydropower within the State of Idaho initiated later in time than the priority of this right.

DATED this 10th day of October, 2014.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
Thomas J. Budge
Attorney for the Ground Water Districts

⁶⁸ IDAPA 37.03.08.050.01.

CERTIFICATE OF MAILING

I certify that on this 10th day of October, 2014, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

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