

**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: SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec 32, T07S, R14E, B.M. (Billingsley Creek)
 SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec 32, T07S, R14E, B.M. (Springs)

Place of Use: SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec 31, T07S, R14E, B.M.
 SE $\frac{1}{4}$ NE $\frac{1}{4}$ 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 24th 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
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Pocatello, ID 83204-1391

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City of Gooding
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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.