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DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
TWIN FALLS COUNTY

RANGEN, INC., an Idaho corporation,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as the Director of the Idaho Department of Water Resources,

Respondents,

and

NORTH SNAKE GROUND WATER DISTRICT, MAGIC VALLEY GROUND WATER DISTRICT, and SOUTHWEST IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR TRANSFER 79560 IN THE NAME OF NORTH SNAKE GWD, MAGIC VALLEY GWD, SOUTHWEST IRRIGATION DISTRICT.

Case No. CV-2015-1130

DISTRICTS' RESPONSE BRIEF

North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District (collectively the "Districts") submit this response brief pursuant to Rule 84(p) of the Idaho Rules of Civil Procedure and the *Stipulated Amended Briefing and Hearing Schedule* filed May 15, 2015.

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STATEMENT OF THE CASE

1. Nature of the Case

In this appeal, Rangen challenges the *Amended Final Order Approving Application for Transfer* ("Final Order") issued by the Director of the Idaho Department of Water Resources (IDWR) on March 18, 2015.[1] The Final Order approves the Districts' water right transfer no. 79560, allowing the place of use of a 10 cfs portion of water right no. 36-7072 to be changed from the SeaPac fish hatchery at Magic Springs to be used for mitigation at the Rangen fish hatchery near Billingsley Creek.

2. Procedural History

Rangen's recitation of the procedural history is sufficient.[2]

3. Statement of Facts

Rangen's recitation of the facts is sufficient.[3]

4. Standard of Review

Rangen's explanation of the he standard of review is adequate.[4]

SUMMARY OF THE DISTRICTS' RESPONSE

This Court need not consider Rangen's arguments concerning the Final Order because Rangen does not have standing to challenge it. If the Court does consider Rangen's arguments, its appeal should be denied because Rangen has not proven that the Director exceeded his authority, abused his discretion, or erred in some other way. Rangen's arguments concerning injury to other water rights are without merit because the

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[1] Agency R., Vol. 2, pp. 396-416.

[2] *Rangen Inc.'s Opening Br.*, pp. 3-4.

[3] *Id.* at 4-5.

[4] *Rangen Inc.'s Opening Br.*, pp. 5-6.

Director imposed a mitigation condition that removes the possibility of injury. Rangen's arguments concerning enlargement in use are without merit because the water will continue to be used for fish propagation and the mitigation condition alleviates injury to other water rights.

RESPONSE

Water right transfer no. 79560 is one component of the Districts' implementation of the Director's *Order Approving IGWA's Fourth Mitigation Plan* entered October 29, 2014, which this Court has upheld.[5] The Final Order approves the transfer under Idaho Code § 42-222, which authorizes water right transfers so long as:

(1) no other water rights are injured thereby,

(2) the change does not constitute an enlargement in use of the original right,

(3) the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code,

(4) the change will not 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, and

(5) the new use is a beneficial use.

Rangen contends the Director erred with respect to items (1) and (2). Rangen also contends the Application is speculative, though this is not a statutory basis for denying the Application.

As explained below, the Court need not consider Rangen's arguments because Rangen does not have standing to challenge the Final Order. If the Court does consider Rangen's arguments, they should be rejected.

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[5] *Rangen v. IDWR et al.*, Twin Falls County Case No. CV-2014-4633 (May 13, 2015).

1. Rangen does not have standing to challenge the Final Order because its substantial rights have not been prejudiced.

Under Idaho Code § 67-5279(4), an agency action must be affirmed "unless substantial rights of the appellant have been prejudiced." This is an element of standing.[6] Standing is a constitutional requirement.[7] It demands a "personal stake" in the outcome of the case.[8] Speculative or unsubstantiated claims of injury are insufficient to establish standing.[9]

Standing is a threshold requirement for judicial review. The Final Order "may be affirmed solely on the grounds that the petitioner has not shown prejudice to a substantial right."[10] Thus, this Court "may forego analyzing whether an agency erred in a manner specified by I.C. § 67-5279(3) if the petitioner does not show that a substantial right was violated."[11]

Rangen contends the Final Order prejudices its substantial rights on the basis that (a) "the Orders diminish Water Right Nos. 36-02551 and 36-07694, as those rights were decreed by the Snake River Basin Adjudication and permitted and licensed by the Department;" and (b) the Director failed "to follow consistent and appropriate procedure when evaluating water rights issues that are related to Rangen's Call and the critical water shortages in the Hagerman Valley."[12] As explained below, neither argument has merit. In fact, it is so obvious that Rangen has not suffered prejudice to substantial rights that the Districts contend they should be awarded attorney fees for having to defend against Rangen's appeal.

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[6] *State v. Kalani-Keegan*, 155 Idaho 297, 302-03 (Ct. App. 2013).

[7] *Evans v. Teton County*, 139 Idaho 71, 75 (2003).

[8] *Miles v. Idaho Power Co.*, 116 Idaho 635, 641 (1989).

[9] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 (U.S. 1992).

[10] *Kalani-Keegan*, 155 Idaho at 301.

[11] *Id.*

[12] *Rangen Inc.'s Opening Br.*, p. 25.

1.1 There is no evidence to support Rangen's assertion of diminishment of water right nos. 36-02551 and 36-07694.

Rangen offers no explanation of how the Final Order diminishes water right nos. 36-02551 and 36-07694, nor evidence to support the allegation. Indeed, there is none. The Final Order does nothing to affect the decreed elements of water rights 36-02551 and 36-0764. On the contrary, it *increases* the supply of water available to Rangen. Rangen's claim of diminishment to water right nos. 36-02551 and 36-07694 simply has no basis in fact.

1.2 Rangen does not explain what procedure was purportedly not followed, nor how the purported failure prejudices its substantial rights.

Rangen's claimed "prejudice by the failure of the Director and Department to follow consistent and appropriate procedure when evaluating water right issues that are related to Rangen's call and the critical water shortages in the Hagerman Valley" is misplaced if for no other reason than the Final Order does not adjudicate Rangen's delivery call or water shortages in the Hagerman Valley. The issues in this case are limited to whether the transfer application satisfies the criteria of Idaho Code § 42-222.

Rangen contends "the approach of pumping water around amongst short water sources within the Hagerman Valley in order to allow continued mining of the aquifer is short-sighted and merely exacerbates the problem."[13] Whatever relevance this argument has to IGWA's Fourth Mitigation Plan, which has already been adjudicated, it has no bearing on the water right transfer factors in Idaho Code § 42-222.

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[13] *Id.*

Rangen cites *Hawkins v. Bonneville County Board of Commissioners* for the proposition that "Rangen has a substantial right in having the correct procedure and legal principles applied to its call and any mitigation plans or transfer application related to its call."[14] This argument is mistaken for two reasons. First, the *Hawkins* decision refers to the standing of the applicant for a permit, which, in this case, is the Districts, not Rangen. Second, the *Hawkins* decision reaffirms that actual injury is required to show prejudice to a substantial right, opposed to speculative or unsubstantiated claims of injury:

> Since a party *opposing* a landowner's request for a development permit has no substantial right in seeing someone else's application adjudicated correctly, he or she must therefore show something more. The petitioner opposing a permit must be in jeopardy of suffering substantial harm if the project goes forward, such as a reduction in the opponent's land value or interference with his or her use or ownership of the land. . . .
>
> Thus, . . . it is not enough that Hawkins may be able to show that the County substantively misapplied its own ordinance. The Board does not prejudice Hawkins' substantial rights merely by incorrectly adjudicating someone else's application for a variance.[15]

Having cited *Hawkins*, Rangen must be aware that prejudice to a substantial right requires "something more" than simply "having the correct procedure and legal principles applied;" that it requires showing Rangen is "in jeopardy of suffering substantial harm" if the transfer is approved. Rangen's opening brief offers not even an iota of evidence of actual harm to its substantial rights.

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[14] *Id*.

[15] *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 232-33 (2011).

Since Rangen has clearly failed to demonstrate prejudice to substantial rights, this Court should deny its appeal without consideration of its arguments concerning the Final Order itself.

1.3 The Districts should be awarded attorney fees.

The Districts believe it is so clear that Rangen has not been substantially prejudiced by the Final Order that the Districts' fees on appeal should be awarded under Idaho Code § 12-117, Idaho Rule of Procedure 54(e)(1), and Idaho Appellate Rules 40 and 41.

2. The Final Order prevents injury to Snake River water rights by requiring mitigation.

Rangen contends the Director "exceeded his authority by approving a transfer that causes injury to other water users."[16] Specifically, Rangen refers to the water rights owned by Idaho Power in the Snake River at Swan Falls Dam.[17]

This Court need not address Rangen's injury argument specifically because Rangen does not own any water rights in the Snake River; thus, it has no standing to assert injury to Snake River water rights.

Should the Court consider Rangen's injury argument, it must be noted that Rangen cites the wrong standard of review. The Director obviously has statutory authority to evaluate injury to water rights. What Rangen actually complains of is the Director's factual determination that the transfer will not injure other water rights. This is an important distinction since findings of fact must be upheld unless they are "not supported by substantial evidence on the record as a whole."[18]

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[16] *Rangen, Inc.'s Opening Br.*, p. 9.

[17] *Id.* at 9-10.

[18] Idaho Code § 67-5279(3)(d).

The Director found no injury will occur so long as "IGWA and Southwest Irrigation District will continue into the future aquifer enhancement activities equal to the rate of flow to be diverted from Magic Springs due to the transfer," which the Director made a condition of approval of the transfer.[19] This finding is supported by several exhibits, by testimony of both expert and fact witnesses, and by computer model predictions, as explained in findings of fact 4 through 16 of the Final Order. This easily meets the "substantial evidence" threshold. Further, the conditional approval is within the Director's legal authority since Idaho Code § 42-222 specifically allows the Director to "approve the change in whole, or in part, or upon conditions."

3. The Director did not abuse his discretion in finding no enlargement.

Rangen also contends the Director "erred by concluding that there was no enlargement of the original right." Specifically, Rangen says the Director "erred by ignoring the fact that the transferred water will be fully consumed in Billingsley Creek and will not return to the Snake River."[20] This argument is both misleading and incorrect.

First, the statement that 10 cfs "will not return to the Snake River" is misleading. While it is possible that all 10 cfs of the water piped from Magic Springs to Billingsley Creek could be diverted and consumed without returning to the Snake River during the irrigation season, it is undisputed that essentially all 10 cfs will return to the River during the non-irrigation season, and that a portion of it is likely to return to the River

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[19] *Am. Final Order Approving Application for Transfer*, p. 10 (R. Vol. 2, p. 405).

[20] *Rangen, Inc.'s Opening Br.*, p. 18.

during the irrigation season. the reality is that during the non-irrigation season.[21]

Second, the Director did not ignore the fact that some of the transferred water may be diverted from Billingsley Creek and consumed before reaching the Snake River. This is precisely why he imposed the mitigation condition discussed above.

Third, Rangen assumes that any additional consumption automatically results in enlargement, but this is not the law. While Idaho Code § 42-222 prohibits the Director from approving a transfer if doing so constitutes "an enlargement in use of the original right," it does not define "enlargement in use." However, it does make clear that additional consumption does not automatically result in enlargement, by saying: (a) "the director *may* consider consumptive use, as defined in section 42-202B, Idaho Code, *as a factor* in determining whether a proposed change would constitute an enlargement in use of the original water right;" and (b) a transfer "shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby."[22] Even Rangen's expert, Dr. Brockway, admitted that increased consumption does not necessitate a finding of enlargement.[23]

Fourth, under Idaho Code § 42-202B(1), consumptive use is measured by the use made of the water before it re-enters the public water supply. The statute defines "consumptive use" as:

> that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water

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[21] Erwin, Tr. 12:23-18:8.

[22] Idaho Code § 42-222 (emphasis added).

[23] Brockway, Tr. 231:7-223:7 (rough draft) (responding to the hypothetical posed with exhibit 4018).

> vapor, incorporated into products, or otherwise **does not return to the waters of the state**.[24]

Rangen's enlargement argument is based on consumptive use that occurs *after* the transferred water exits the Rangen fish hatchery and discharges into Billingsley Creek. This novel interpretation of enlargement is not legally supported.

The Director clearly retains a degree of discretion in evaluating enlargement, and discretionary issues must be affirmed so long as the Director "perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason."[25] In this case, the Director noted that water right no. 36-7072, which has been used for fish propagation at Magic Springs, will continue to be used for fish propagation at Rangen,[26] and that Rangen's argument regarding consumptive use was "mooted by the condition of approval requiring IGWA and Southwest Irrigation District to continue into the future aquifer enhancement activities sufficient to offset any depletion in the Snake River between Kimberly and King Hill due to the transfer."[27] This ruling was reached by an exercise of reason and is within the outer limits of the Director's discretion; therefore, it should be affirmed.

4. The mitigation condition is appropriate.

Rangen next argues: "The Director's determination that any injury or enlargement is offset by mitigation activities that have been or will be provided by IGWA and Southwest Irrigation District is not supported by

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[24] Emphasis added.

[25] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 813 (2011) (quoting *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54 (2006)).

[26] *Am. Final Order Approving App. for Transfer*, pp. 7-8 (Agency R., Vol. 2, pp. 402-03).

[27] *Id.* at 8 (Agency R., Vol. 2, p. 403).

substantial evidence."[28] Rangen offers two sub-arguments in support. First, it contends the Director cannot rely on mitigation activities conducted by IGWA because "IGWA is not the applicant in this matter."[29] Second, Rangen complains that the "First Mitigation Plan consists of the very same mitigation activities relied upon by the Director and IGWA to mitigate for the injury caused by the transfer."[30]

Rangen has again failed to demonstrate prejudice to substantial rights by the Director's recognition of IGWA's aquifer enhancement activities; thus, Rangen has no standing to challenge this aspect of the Final Order. But should the Court consider Rangen's arguments they can be easily dispensed with.

With respect to the first argument, Rangen has again mistakenly sought review under the "substantial evidence" standard when it is actually a discretionary matter. There is no dispute that IGWA's aquifer enhancement activities add water to the Snake River. Rangen's gripe is with the Director's discretionary decision to allow IGWA's aquifer enhancement activities to mitigate the transfer. Since Rangen has not challenged the Director's exercise of discretion, this Court can summarily deny Rangen's argument.

Regardless, the mitigation condition is appropriate because the Districts are members of IGWA, they conduct aquifer enhancement activities through IGWA, they put on evidence of the effects of their (IGWA's) aquifer enhancement activities and asked the Director to acknowledge such activities mitigate impacts to the Snake River, and IGWA does not oppose the mitigation condition.

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[28] *Rangen Inc.'s Opening Br.*, p. 20.

[29] *Id.*

[30] *Id.* at 21.

With respect to Rangen's second argument (that the "First Mitigation Plan consists of the very same mitigation activities relied upon by the Director and IGWA to mitigate for the injury caused by the transfer"), this too is a matter of discretion. There is no dispute that IGWA's aquifer enhancement activities add water to the Curren Tunnel (thus, providing mitigation to Rangen under IGWA's First Mitigation Plan) in addition to numerous other springs and to the Snake River directly. Rangen's argument is that the Director erred by allowing the Districts to receive multiple mitigation benefits from their aquifer enhancement activities. This is, frankly, an absurd argument.

Rangen further contends the Director erred by not "evaluat[ing] the debits [resulting from groundwater pumping] on the other side of the accounting equation."[31] In other words, it is Rangen's position that IGWA's aquifer enhancement activities cannot mitigate impacts from the subject transfer until such activities first fully offset the cumulative impacts of groundwater pumping on Snake River flows. This argument mixes apples and oranges.

Under Idaho Code § 42-222, the transfer must be approved so long as "no other water rights are injured thereby." Thus, mitigation is required only to avoid injury *resulting from the transfer*. It would exceed the Director's authority to require the Districts, as a condition of the transfer, to mitigate impacts not related to the transfer. Rangen's argument about mitigation of impacts unrelated to the transfer should be denied since it exceeds the statutory analysis.

In addition, Rangen mistakenly assumes that all groundwater pumping causes injury to Snake River water rights, when the only rights that are capable of being injured by the transfer are subordinated hydropower

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[31] *Id*. at 22.

rights. So long as Snake River flows at the Murphy Gauge meet certain minimum flows, there can be no injury at all.

For these reasons, this Court should deny Rangen's argument that the mitigation condition is not supported by substantial evidence.

5. The transfer is not speculative.

Rangen contends "the Director exceeded his authority in this case by approving a transfer changing the beneficial use from 'fish propagation' to 'fish propagation/mitigation."[32] Specifically, Rangen says the transfer is speculative.[33]

To begin, it must again be noted that Rangen cites the incorrect legal standard. It is well within the Director's legal authority to approve changes to beneficial use under Idaho Code § 42-222. What Rangen complains of is the Director's discretionary decision to allow the change proposed by the transfer. Rangen's relentless effort to avoid the more difficult "abuse of discretion" standard is impressive, yet inappropriate.

Substantively, Rangen's argument is equally weak. The Districts have a mitigation obligation to Rangen. Their Fourth Mitigation Plan has been approved. This transfer is necessary to implement the Fourth Mitigation Plan. There is nothing speculative about it.

To the extent Rangen challenges mitigation as a permissible beneficial use, this Court has already heard this argument and rejected it.[34]

Rangen finally claims the transfer is speculative because the Districts "have not shown sufficient rights to the place where the water is to be

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[32] *Rangen Inc.'s Opening Br.*, p. 22.

[33] *Id.* at 23.

[34] *Memorandum Decision & Order*, pp. 15-16, Gooding County Case No. CV-2015-083. The Districts ask that the Court take judicial notice of this order pursuant to I.R.E. 201(d).

transferred to, namely, the Rangen facility."[35] This argument challenges the Districts' condemnation powers. This Court has heard and rejected this argument as well.[36]

6. The Final Order does not violate the ESPA Moratorium Order

Almost in passing, Rangen claims the transfer might implicate the ESPA Moratorium Order.[37] This is not included in the list of issues on appeal in Rangen's brief, but given the argument the Districts deem it appropriate to point out that the moratorium applies to new permits ("a moratorium is established on the processing and approval of presently pending and new applications for permits"),[38] and that transfers are regularly approved within the moratorium area.[39] Further, even if the Moratorium Order applied, it allows the Director to approve the transfer if:

a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or

b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.[40]

The Director found that the transfer satisfies both exceptions.[41]

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[35] *Rangen Inc.'s Opening Br.*, p. 24.

[36] *Memorandum Decision & Order*, p. 17, Gooding County Case No. CV-2015-083.

[37] *Rangen Inc.'s Opening Br.*, p. 9. This issue is not listed in Rangen's issues presented on appeal. *Id.* at 5.

[38] *Amended Moratorium Order*, Ex. 5007, p. 4.

[39] King, Tr. 81:21-82:10.

[40] *Amended Moratorium Order*, Ex. 5007, p. 5.

[41] *Am. Final Order Approving App. for Transfer*, pp. 8-9 (Agency R., Vol. 2, pp. 403-404).

CONCLUSION

For the foregoing reasons, the Districts respectfully ask this Court to deny Rangen's petition for judicial review of the Final Order and award the Districts' attorney fees.

DATED this 20th day of August, 2015.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

Randall C. Budge
T.J. Budge

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2015, a true and correct copy of the foregoing was served on the following persons by the method(s) indicated:

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T. J. Budge

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