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Department of Water Resources

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

In Re SRBA)
)
Case No. 39576) BRIEF IN SUPPORT OF
) MOTION FOR SUMMARY
) JUDGMENT
)
) SUBCASE NOS. 36-00134B
) and 36-00135A
)

This brief is submitted to Special Master, Terrance Dolan, in support of the Claimant's, Rangen, Inc.'s, Motion for Summary Judgment filed in the above entitled case. It was anticipated that along with this brief both participants namely, Rangen, Inc., and the Idaho Department of Water Resources (hereafter IDWR), would be filing a Standard Form 5 setting out the facts which do not appear to be in dispute; however, the Claimant submitted a proposed Standard Form 5 to Mr. Brent King, counsel for IDWR, on April 30, 1996, but as yet such form has not been returned for filing. In anticipation that such Standard Form 5 will be filed prior to the hearing on Claimant's Motion for Summary Judgment, Claimant would start this brief by giving to the Special Master a summary of the pertinent facts which Rangen feels are undisputed; this brief statement of facts will be followed by a synopsis of the issues which are still unsettled and need to be addressed by the Special Master and will conclude with argument as to Rangen's position with respect to those issues.

A. Facts

The entire controversy revolves around two (2) sister water rights, #36-00135A which was appropriated April 1, 1908 for .40 cfs (21 Acre feet total consumptive use) and #36-00134B which was appropriated October, 1884, for 1.70 cfs (21

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Acre feet total consumptive use). Both of these water rights were confirmed both as to priority date and amount in the Decree entered in the case of New International Mortgage Bank v. Idaho Power (USDC, Idaho, Equity No. 1602, entered March 23, 1932).

Since the date of appropriation, Rangen or it's predecessors in interest have used all of the allocated water; originally such use was for the consumptive uses of irrigation (of approximately seven (7) Acres) and domestic (providing for three (3) homes and two (2) offices). In the Decree entered by the Court in 1932, the uses to be allowed for said water rights were as follows: On page two the Court said the water rights covered by the Decree were to be used for "irrigation of it's hereinafter described land and for domestic and other purposes thereon . . .". (emphasis added).

On page 3 the Decree states that said water rights shall "have the use of, and the right to use, for irrigation, domestic, power and other purposes." (emphasis added).

Rangen's predecessor in interest, Mr. Harry Bean, continued to use the water under the herein described water rights for irrigation and domestic use up until 1950 when Mr. Bean began construction of raceways and ponds to be used for fish propagation (this construction is shown on the aerial photographs to be shown to the Court, if necessary, at the hearing on the Motion for Summary Judgment). It is Rangen's understanding, however, that the IDWR has conceded that the use of the water for fish propagation commenced in 1950. It should be kept in mind that use of a portion of the water for fish propagation was of a non-consumptive nature.

When Rangen obtained ownership of the subject real property they obtained more water rights, enlarged the fish propagation facility (started by Mr. Bean) and continued to use the water from Water Right Nos. 36-00135A and 36-00134B (in addition to otherwise appropriated water for the purposes of irrigation, domestic and fish propagation).

From the date of appropriation (1884 and 1908), Rangen or it's predecessors in interest have consistently and continuously used all water allocated clear up to the present

day. The only change that has occurred was that the use of 1.46 cfs as to #36-00134B and .16 cfs as to #36-00135A was changed from a consumptive use (irrigation and domestic) to the non-consumptive use of fish propagation in 1950. No more water was used. In fact the impact of such use was reduced because of the non-consumptive nature of the fish propagation use.

There is no question that Rangen constitutionally appropriated all of the Decreed water for irrigation, domestic and fish propagation use by 1950, which was long before there were any legal requirements to apply for a permit either as to appropriation of new rights or, as effects this case, to change the use of said water.

When Rangen filed it's Notice of Claim in the Adjudication, they claimed their water (as to amount, priority and use) as follows:

1. #36-00134B - 1.70 cfs with a total consumptive use of 21 Acre feet, priority date October 9, 1884, allocated by use as follows: Irrigation .140 cfs; domestic .100 cfs; fish propagation 1.460 cfs.

2. #36-00135A - .40 cfs with a total consumptive use of 21 Acre feet, priority date of April 1, 1908, allocated by use as follows: irrigation .140 cfs; domestic .100 cfs; fish propagation .16 cfs.

The Notice of Claim was for no more water than was originally appropriated, no more water than was Decreed in 1932, and no more water than Rangen and it's predecessors in interest had used since originally appropriated in 1884 and 1908 respectively.

The IDWR recommends that:

1. The use of the water for fish propagation should be disallowed for the reason that at the time the Decree was entered in 1932 there was no use of the water for fish propagation either by Rangen or it's predecessors in interest.

2. That the amount of water appropriated be reduced to .05 cfs for #36-00135A and .09 for #36-00134B for domestic and irrigation uses only.

3. The IDWR has indicated that they will allow the fish propagation use but only with a 1950 priority date.

Even though, in the whole scope of the Adjudication, the amount of water in dispute in this case is small the impact of losing the water and most especially its priority date as to fish propagation is critical to Rangen. One reason for its importance is because of the peculiar system set up in Curren Tunnel (the source of this water) to access and transport the water not only to Rangen but to several other water users whose water rights also are obtained through the Curren Tunnel.

B. Issues

The two issues that remain in dispute are as follows:

1. How is the language "and other purposes" contained in the 1932 Decree to be interpreted. Was such language to include fish propagation or not.

2. Since the use of the water for fish propagation began in 1950 on Rangen's real property and since this was prior to the States mandatory permit requirement for a change of use, does Rangen's satisfaction of the constitutional elements of appropriation (intent, diversion, beneficial use) allow Rangen to have the water for fish propagation as claimed both as to amount and priority.

C. Argument

1. Issue Number One.

It is Rangen's position, as to issue number one, that first of all fish propagation was recognized as a use of water prior to or at least by 1932 when the Decree was entered. Even if said use was not prevalent in Southern Idaho in 1932, such use most probably would have been known by the judge. The fact that such use of water was recognized

in 1932 clearly reduces, if not eliminates, the IDWR argument that, since fish propagation was not available, use of water in 1932 that "and other purposes" only could refer to uses known at the time. If the Special Master would refer to the Affidavit of Tim O'Keefe which accompanies this brief, it is clear that such use was known in 1932.

Rangen would agree that even, if the judge did not know of such use for water as fish propagation and if he intended to just limit the use to known uses at the time, he could have simply listed the known uses in the Decree and not added the "and other purposes" language. It is Rangen's argument that the language "and other purposes" refers to other uses known or unknown including uses of fish propagation, recreation, aesthetic, and such other uses as may arise in the future.

2. Issue Number Two.

Rangen would argue as to issue number two that the mandatory permit system which required a water user to apply for a change of use in order that such change of use be valid was not passed by Idaho's Legislature until 1971; and, since Rangen's use of a portion of the water under Water Right Nos. 36-00135A and 36-00134B for fish propagation commenced in 1950, that clearly there was no requirement that Rangen apply for a change of use permit to allow a change of use to fish propagation. The question then becomes whether Rangen satisfied the constitutional requirements for change of use and appropriation which was the law as it existed in 1950. Under the 1950 law, Rangen was required to have the intent to appropriate (this is clearly present); Rangen has to divert the water from the source (Rangen did so through the piping system set up in Curren Tunnel) and, lastly, Rangen had to show that the water was put in the beneficial use of fish propagation (this also is clearly satisfied).

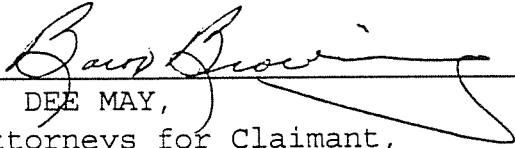
Once the constitutional requirements of the law in 1950 had been satisfied, Rangen then had legally changed a portion of it's already appropriated and Decreed water for a different use -- that of fish propagation. There was no gap in use which would have caused either the water right to be reduced or the priority date changed.

By way of general argument this writer would like to comment that it is difficult to follow why the IDWR is so concerned about this use of fish propagation since such use is one which, because of its non-consumptive nature, does not increase the amount of water being taken (the amount is still exactly as originally appropriated and as confirmed in the 1932 Decree) but actually reduces the impact on the stream, since it returns the portion used for fish propagation back into the stream for use by downstream Claimants. This would appear to be a benefit to the IDWR, Rangen, and all downstream users. So, even from a practical if not legal standpoint, Rangen should prevail to defeat the objection of the IDWR to Rangen's claim as set out in the Notice of Claim filed previously.

Respectfully Submitted.

DATED this 15 day of May, 1996.

ELLSWORTH, MAY, SUDWEEKS, STUBBS,
IPSEN & PERRY

For 
J. DEE MAY,
Attorneys for Claimant,
Rangen, Inc.

CERTIFICATE OF MAILING

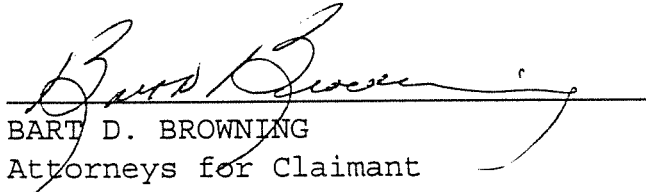
I certify that on May 15, 1996, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
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