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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

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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	)	Subcase: 36-00134B and 36-00135A
	)	
Case No. 39576	)	ORDER DENYING MOTION FOR
	)	SUMMARY JUDGMENT
	)	

Background

The claimant, Rangen, Inc., filed its *Motion for Summary Judgment* in these two companion subcases on April 30, 1996. Attached to the *Motion* and brief were affidavits of Thorleif Rangen and Tim O'Keefe. On May 16, 1996, IDWR lodged its "Report Regarding Purpose of Use" discussing the basis for its recommendations of the purpose of use for the two claims.

A hearing on the *Motion* was held on May 30, 1996, at the SRBA Courthouse in Twin Falls, Idaho. J. Dee May appeared for the claimant and Brent R. King appeared for IDWR.

Both claims were based on rights decreed to High & Fritchman Company in *New International Mortgage Bank v. Idaho Power Company* entered in the United States District Court on March 22, 1932. The decree awarded to High & Fritchman two water rights "developed and diverted from the waters, seeps, springs and rivulets in the rim rock above the head waters of Billingsley Creek, by means of a tunnel commonly known as the Curran Tunnel, or Curran Spring"- 3.2 cfs with a priority date of October 9, 1884, and 4.8 cfs with a priority date of April 1, 1908.

The main issue presented in the *Motion* is whether year 'round fish propagation can properly be included as a purpose of use for the two claims. Rangen claimed 1.46 cfs for fish propagation under 36-00134B and .16 cfs for fish propagation under 36-00135A. Both claims

also included domestic and irrigation uses. IDWR recommended only domestic and irrigation uses because fish propagation on Rangen's property did not begin until the early 1950's.

Rangen's Arguments

Rangen argued that both claims should include fish propagation because of certain language in the 1932 *New International* decree. It reasoned that fish propagation was a recognized beneficial use of water in Idaho in 1932. Therefore, when U.S. District Judge Charles G. Cavanaugh included the language "and other purposes" in his decree, he was referring to "fish propagation, recreation, aesthetics, and such other uses as may arise in the future."¹ Alternatively, even though fish propagation on Rangen's property first began 18 years after the *New International* decree, Rangen argued that its predecessor legally changed a portion of the decreed water rights from irrigation to fish propagation before Idaho's mandatory permit system.

During oral argument, Rangen conceded that its predecessor (1) continued the same domestic and irrigation uses after fish propagation began and, (2) its use of water for fish propagation was not limited to the irrigation season. However, Rangen argued that it used its irrigation water more efficiently and thus transferred some irrigation water (a consumptive use) to fish propagation (a non-consumptive use) without increasing the diversion. There was no evidence of how much irrigation water was conserved and then transferred or how much water continues to be used for domestic and irrigation uses.

Discussion

1. Decree

There is some confusion concerning the *New International* decree because one version is on file with the District Court Clerk for Gooding County, the county where Rangen's property is located, and another version is on file with the National Archives and Records Administration (NARA) in Seattle, Washington. The copy of the decree from Gooding County, produced by claimant's counsel, appears to be a typed duplicate, including the Judge's signature typed out. This document was probably recorded in Gooding County for the convenience of area residents. The NARA copy is certified by the director of the National Archives-Pacific NW Region and is a photocopy of the original, complete with the judge's signature. While both copies are certified by their respective custodians, it is apparent that only the NARA copy should be considered by the court. It is maintained by the agency charged with maintaining U.S. Government records,

¹ Claimant's *Brief in Support of Motion for Summary Judgment*, p. 5.

including this decree entered in the U.S. District Court for the District of Idaho, Southern Division.

Another problem with the *New International* decree is that there is no consecutive page numbering throughout the 36 page document. "Page 2", "Page 3" and "Page 4" are numbered, then it skips to the 31st page numbered "-2-". There are no other page numbers. Also, the 33rd page, entitled "High & Fritchman Company", seems to be out of order amongst the three pages defining Idaho Power's water right. It is likely the decree was prepared in segments and then fastened together, but without consecutive page numbering to keep the order straight.

While this predicament may seem trivial, it bears on the very issue presented in the pending *Motion*. The language "and other purposes" relied upon by Rangen to support its claim to fish propagation use does not appear on the page describing the High & Fritchman water rights. Only water rights granted to New International, 68 named parties and Idaho Power contain the language "and other purposes":

"Page 3"- the plaintiff, New International, was decreed a certain amount of water for "the irrigation of its hereinafter described land and for domestic *and other purposes* thereon..." (italics added).

6th page- "the defendants, counterclaimants, cross-complainants and interveners [sic] hereinafter named do have the use of, and the right to use, for irrigation, domestic, power *and other purposes* on the lands set after their respective names..." (italics added). Then followed the names, amounts of water and sources, priority dates, diversion points and land descriptions for 68 named parties, more or less in alphabetical order.

32nd page- Idaho Power's water rights were decreed "for irrigation, domestic *and other purposes*..." (italics added).

Big Bend Irrigation and Mining Company was awarded 1903 priority date water "for irrigation and domestic purposes ... and for the watering of stock and other domestic use" and 1906 priority date water for "irrigation ... and for domestic purposes." (30th page) High & Fritchman, "the defendant and intervenor", was awarded 1884 priority date water "for irrigation and domestic purposes" and 1908 priority date water "for irrigating and raising crops thereon and for watering stock and other domestic purposes during the non irrigation season." (33rd page)

A fair reading of the *New International* decree suggests that the court intended to describe each parties' water right separately, apart from the other parties' rights. There was no general

language describing permissible uses applicable to all rights. Hence, only New International, the 68 named parties and Idaho Power can claim uses under the phrase, “and other purposes”, whatever that may entail. Therefore, Rangen, as successor in interest to part of the High & Fritchman water rights, is left with valid claims for only irrigation, domestic and stockwater uses.²

The claimant’s suggestion that the *New International* decree awarded High & Fritchman some use of water “in the future” is not supportable. A general maxim of water law is that water must be *diverted* with an *intent* to appropriate it for a *beneficial use* before there can be a valid appropriation.³ To support a constitutional appropriation of water, and hence entitle an appropriator to a decreed water right, the three elements must exist at the time the decree is entered. In these subcases, the only element Rangen has proven is that fish propagation was a *beneficial use* in 1932 when the decree was entered.⁴ Water was not *diverted* with an *intent* to use the water for fish propagation on its property until 1950. Under these circumstances, Rangen may be entitled to a constitutional appropriation of water for fish propagation with a priority date of 1950, but no earlier.

2. Change of Use

Even if Rangen cannot claim fish propagation under the phrase “and other purposes”, the issue remains whether its predecessor lawfully changed part of the decreed water rights before enactment of Idaho’s mandatory permit system. Specifically, did Rangen’s predecessor properly change some of its water right from irrigation to fish propagation? There was no evidence that Rangen’s predecessor changed part of the irrigation right through any state proceeding. Hence, Rangen was left to argue that there is a common law, as opposed to statutory, right to change the use of a decreed water right.

² During the hearing on the pending *Motion*, it was suggested that fish may qualify as “stock” for stock watering use. However, stock watering use “means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.” I.C. § 42-1401A, (12). Livestock is defined as “cattle, horses, mules or asses.” I.C. § 25-1101. Elsewhere, livestock means “cattle, swine, bison, horses, mules, or asses.” I.C. § 25-3301, (3). Yet another definition of livestock includes “cattle, calves, horses, mules and swine.” I.C. § 25-1721, (d). Wildlife means “any form of animal life, native or exotic, generally living in a state of nature.” I.C. § 36-202, (g). Because fish raised in aquaculture or on fish farms are not livestock or wildlife, fish are not “stock” for stock watering use.

³ *Water Law*, 2d ed., David H. Getches, p. 80 (1990).

⁴ “It is a well recognized fact that the propagation of fish for the market is rapidly becoming quite an industry in the Western States; in fact, all over this country. Although this is not one of the principal industries, there is no reason why water may not be appropriated for this use, as it certainly is a beneficial purpose.” 2 *Kinney on Irrigation and Water Rights*, 2d ed., § 700 (1912).

The general rule concerning changes in use throughout the West has been stated as follows:

When water has been once lawfully appropriated and the extent of the appropriation determined, the right thus acquired and the priority therefor is not lost by changing the use or purpose for which it was first appropriated and applying the water to some other use or purpose, provided that the change made does not materially injure the rights of others which have vested prior to the change.

2 *Kinney on Irrigation and Water Rights*, 2d ed., § 869 (1912).

However, the general rule does not seem to apply in Idaho, at least not before 1980. In that year, the Idaho Supreme Court was asked to determine whether IDWR had been granted statutory authority to approve a change in nature of use of a water right- from irrigation to manufacturing. The Court held that IDWR did *not* have such authority as the laws were then written. IDWR's authority was limited to granting changes in place of use and point of diversion.⁵ In a footnote, the Court referred to the common law right:

Other prior appropriation jurisdictions have recognized a common law right to change the nature of use of water without losing one's appropriation date. [citations omitted] This court has never had to consider this issue, nor is such an issue presented in this case.

Beker Industries, Inc. v. Georgetown Irr. Dist., 101 Idaho 187, 190, 610 P.2d 546, 549 (1980).

The closest Idaho seems to have come to allowing a change in use before 1980 was from one kind of mining to another:

[T]he change from one kind of mining, or use in mining to another, or from one place to another in such connection, does not invalidate an appropriation for mining purposes....

Zezi v. Lightfoot, 57 Idaho 707, 712, 68 P.2d 50, 52 (1937). Also, see *Water Rights Laws in Nineteen Western States-Vol. I*, Wells A. Hutchins, p. 637 (1971).

Idaho case law suggests that in 1950, there was no common law right to change the water right decreed to High & Fritchman from irrigation to fish propagation. Therefore, when Rangen's predecessor built the fish hatchery and applied irrigation water decreed under the *New International* decree to fish propagation, a constitutional appropriation may have been

⁵ Currently, both I.C. § 42-108 and § 42-222 provide for changes in point of diversion, place of use, period of use or nature of use.

accomplished with a 1950 priority date, but not a change in use.

From a practical standpoint, this conclusion is fair because there was never a determination that the change from irrigation to fish propagation caused no material injury to other appropriators. Although irrigation is consumptive and fish propagation is usually not, irrigation has a limited season of use. Normally, fish propagation is year 'round. If such a change in use were allowed, at some point there must have been proof that Rangen's predecessor's use of water year 'round caused no harm. Rangen offered no such proof, only the absence of objections to its claim filed 38 years after the change was made.

Rangen's reliance on Idaho's accomplished transfer statutes, I.C. §§42-1425, 1426 and 1427, is of no help because they sanction accomplished transfers only where (1) there is no injury to other existing water rights and (2) no enlargement of use of the original right. Then, the priority date is the date of accomplished transfer, *not* the date of the original right as claimed by Rangen.

Conclusions of Law

Having considered the pleadings, affidavits and arguments of counsel, the court believes that the claimant, Rangen, Inc., is not entitled to judgment as a matter of law. Rangen's claim that fish propagation is a valid use in Subcases 36-00134B and 36-00135A is not supported by the facts nor the law. At best, Rangen may be entitled to a separate water right for fish propagation based on beneficial use with a priority date of 1950.

Therefore, it is ordered that Rangen's *Motion for Summary Judgment* is **denied**.

DATED June 13, 1996.



TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER DENYING MOTION FOR SUMMARY JUDGMENT** was mailed on June 13, 1996, with sufficient first-class postage to the following:

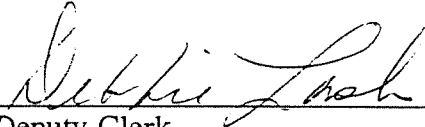
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