

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 81039 IN THE NAME OF)
MICHAEL AND/OR EULLA WALLACE)**

**ORDER DENYING MOTION
FOR SUMMARY JUDGMENT**

PROCEDURAL HISTORY

On July 12, 2016, Michael and/or Eulla Wallace (“Wallace”) filed Application for Transfer No. 81039 (“Application 81039”) with the Idaho Department of Water Resources (“Department”), seeking to change the points of diversion for water right 78-10067. The Department published notice of Application 81039 on August 3 and 10, 2016. James L. and Sandra J. Henley (“Henley”) and Edward Kalinowski filed protests to Application 81039. Henley and Kalinowski (collectively, “Protestants”) are represented in this matter by attorney Shelley Davis.

On March 28, 2017, Protestants filed a *Motion for Summary Judgment* (“Motion”) and *Memorandum in Support of Motion for Summary Judgment* (“MSJ Memo”) pursuant to Rule 260 of the Department’s Rules of Procedure (IDAPA 37.01.01). The Motion asks the Hearing Officer to dismiss Application 81039.¹ Wallace filed no response to the Motion.

STANDARD OF REVIEW

The Department’s Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize the filing of motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.260 and 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated caselaw as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56.

FINDINGS OF FACT

1. Water right 78-10067 authorizes the diversion of 0.16 cfs from Springs tributary to Threemile Creek for domestic use and the irrigation of 4.0 acres. Application 81039 proposes to change the points of diversion for water right 78-10067. The two existing points of diversion are

¹ On December 28, 2016, the Department issued an order consolidating Application 81039 (filed by Wallace), Application for Permit 78-12439 (filed by Kalinowski) and Application for Permit 78-12447 (filed by Henley) for hearing. In their MSJ Memo, Protestants argue in support of Applications 78-12439 and 78-12477. Protestant’s Motion, however, does not request any specific action on Applications 78-12439 or 78-12477. Therefore, this order only addresses Protestants’ request to dismiss Application 81039.

located in Lot 3 (SENWSW), Section 9, T19N, R02E. The two proposed points of diversion are located in Lot 3 (NWNWSW), Section 9, T19N, R02E.

2. On May 3, 1988, Leonard M. and/or Sheryl K. Wallace filed a Notice of Claim for water right 78-10067 (“Claim 78-10067”) in the Snake River Basin Adjudication (“SRBA”). Claim 78-10067 described two points of diversion from springs: one in the SENWSW, Section 9, T19N, R02E and one in the SWNWSW, Section 9, T19N, R02E. Claim 78-10067 did not identify a government lot in the legal description for the points of diversion.

3. On November 6, 2007, the SRBA Court issued a partial decree for water right 78-10067. The points of diversion were both located in Lot 3 (SENWSW), Section 9, T19N, R02E.

4. The springs, which have historically supplied water to the Wallace property, are located in Lot 3 (NWNWSW), Section 9, T19N, R02E. One of the springs is located on property currently owned by Henley. The other spring is located on property currently owned by Kalinowski.

5. Wallace filed Application 81039 to change the legal description of the points of diversion for water right 78-10067 because Wallace believes “the Department made a clerical error in describing the two points of diversion for [Wallace’s] springs” in its recommendation to the SRBA Court for the water right. Affidavit of Eulla Wallace, ¶ 8.

ANALYSIS

Protestants argue Application 81039 should be dismissed because an application for transfer “is not a proper proceeding to attempt to correct, interpret or modify an SRBA decree.” *MSJ Memo* at 5. To support their argument, Protestants rely on a recent decision of the Idaho Supreme Court, *Rangen, Inc. v. Idaho Dept. of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016). Because the *Rangen* case is central to the reasoning and outcome of this order, it is worthwhile to restate some of the underlying facts from that case.

“Rangen owns and operates a fish research and propagation facility at the head of Billingsley Creek.” *Rangen*, 159 Idaho at 801, 367 P.3d at 196. “East of the Rangen facility, water emanates from several springs on talus slopes just below a canyon rim.” *Id.* Water also emanates from the Martin-Curren Tunnel, commonly referred to as the Curren Tunnel.” *Id.* Rangen diverts water near the mouth of the Curren Tunnel. *Id.* Rangen also diverts water at the head of Billingsley Creek, which forms from the water emanating from the several springs on the talus slope. *Id.* Rangen’s diversion from Billingsley Creek is referred to as the “Bridge Diversion.” *Id.*

“Rangen holds five water rights for the Rangen facility which were decreed through the [SRBA].” *Id.* The elements of two of these water rights, 36-2551 and 36-7694, were at issue in the *Rangen* case. The source of water listed on the SRBA decrees for water rights 36-2551 and 36-7694 is the Martin-Curren Tunnel. *Id.* at 801-802, 367 P.3d at 196-197. The point of diversion location listed in the SRBA decrees for water rights 36-2551 and 36-7694 is the SESWNW of Section 32, T07S, R14E. *Id.* at 802, 367 P.3d at 197.

“On December 13, 2011, Rangen filed a petition for delivery call alleging that junior priority ground water pumping in the [Eastern Snake Plain Aquifer] was materially injuring its water rights .

...” *Id.* Within the delivery call proceedings, the Director concluded that Rangen’s water rights were limited to the flow from the Curren Tunnel. *Id.* at 803, 367 P.3d at 198. Further, the Director concluded that “Rangen was not entitled to divert water from the Bridge Diversion because it was not within the decreed point of diversion.” *Id.*

The primary issue before the Idaho Supreme Court in *Rangen* was “[w]hether the Director erred in concluding that Rangen is entitled to divert water only from the mouth of the ‘Martin-Curren Tunnel’ and only within the ten-acre tract described in its partial decrees.” *Id.* The Court concluded that “Rangen’s partial decrees entitle it to divert only that water emanating from the Martin-Curren Tunnel and only within the decreed ten-acre tract.” *Id.* at 806, 367 P.3d at 201. “If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA.” *Id.* The Court further concluded: “Because the Bridge Diversion lies outside the specified point of diversion in its partial decrees, the water rights at issue here do not entitle Rangen to divert water via the Bridge Diversion.” *Id.* at 807, 367 P.3d at 202.

Protestants argue the *Rangen* decision stands for the proposition that a water right holder cannot pursue a transfer application to change a point of diversion on the water user’s SRBA partial decree. *MSJ Memo* at 4. The Protestants’ argument is not supported by the *Rangen* decision and is contrary to the plain language of Idaho Code § 42-222(1).

The *Rangen* decision stands for the proposition that a delivery call proceeding is not the proper forum to challenge the elements of a decreed water right. Delivery call proceedings such as Rangen’s are water right administration matters wherein the Director must interpret SRBA partial decrees. Within the Rangen delivery call proceeding, Rangen argued the Director should authorize Rangen to use its historical points of diversion even though such points of diversion are not listed on Rangen’s SRBA partial decrees. The Idaho Supreme Court rejected Rangen’s argument, holding the Director must administer water rights consistent with the plain language of Rangen’s SRBA partial decrees. *See Rangen*, 159 Idaho at 806, 367 P.3d at 201. The Court also held that Rangen’s challenges to the elements of its water rights within the delivery call proceeding constituted an “impermissible collateral attack” on the SRBA partial decrees. *Id.*

The *Rangen* decision does not stand for the proposition that a water right holder cannot pursue a transfer application to change a point of diversion on the water user’s SRBA partial decree. Transfer proceedings are distinguishable from delivery call proceedings. In transfer proceedings, a water right holder seeks to change the elements of his water right in accordance with Idaho Code § 42-222(1). Here, Wallace does not seek to have water right 78-10067 administered differently from the plain language of the SRBA partial decree like Rangen did in its delivery call proceeding. Instead, Wallace seeks to change the points of diversion for water right 78-10067 pursuant to Idaho Code § 42-222(1).

Idaho Code § 42-222(1) states, in pertinent part:

Any person, entitled to the use of water whether represented by license . . . or by decree . . . who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Section 42-222(1) states that any person with a decreed water right can file an application to change the authorized point of diversion for the right. It does not carve out any exceptions. The restriction advanced by the Protestants—that water users cannot utilize transfer applications to change points of diversion on their SRBA partial decrees—is contrary to the plain language of Idaho Code § 42-222(1).

The statement of facts and caselaw set forth in Protestants' MSJ Memo do not establish that the Protestants are entitled to judgment in their favor (dismissal of Application 81039) as a matter of law.

CONCLUSIONS OF LAW

Protestants have not demonstrated they are entitled to judgment as a matter of law. Protestants argument that the *Rangen* decision prohibits water right holders from pursuing transfer applications to change points of diversion on their SRBA partial decrees is not supported by the *Rangen* decision and is contrary to the plain language of Idaho Code § 42-222(1).

ORDER

IT IS HEREBY ORDERED that the Motion filed by Protestants is DENIED.

Dated this 13th day of April 2017.



James Cefalo
Water Resource Program Manager

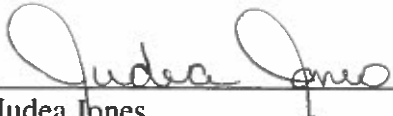
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April 2017, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Denying Motion for Summary Judgment (Application 81039)

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