District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho
OCT - 8 2015
By
Clerk
Deputy Clerk

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

RANGEN, INC., an Idaho Corporation, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as 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 THE APPLICATION FOR TRANSFER 79560 IN THE NAME OF NORTH SNAKE GWD, MAGIC VALLEY GWD, AND SOUTHWEST IRRIGATION DISTRICT	Case No. CV-2015-1130 **MEMORANDUM DECISION**

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when Rangen, Inc. ("Rangen") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The order under review is the Director's *Amended Final Order Approving Application for Transfer* ("*Final Order*") issued on March 18, 2015. The *Final Order* approves application for transfer number 79560 in the name of the North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District (collectively, "Districts"). Rangen asserts that the *Final Order* is contrary to law in several respects and requests that this Court set it aside and remand for further proceedings.

B. Course of proceedings and statement of facts.

Rangen owns and operates a fish propagation and research facility in the Thousand Springs area near Hagerman, Idaho. MP R., Ex.1018, p.3.[1] On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department. *Id.* at 1. It alleged Rangen is short water under two senior rights due to junior ground water use. *Id.* The Director issued a curtailment order concluding that Rangen's rights are being materially injured. MP R., Ex.1018. The order provided for the curtailment of certain ground water rights that divert from the Eastern Snake Plain Aquifer with priority dates junior to July 13, 1962. *Id.* at 42. The Director instructed, however, that affected juniors could avoid curtailment if they proposed and had approved a mitigation plan that complied with certain specifications. *Id.*

The Idaho Ground Water Appropriators, Inc. ("IGWA") submitted multiple mitigation plans on behalf of affected users. Its fourth mitigation plan was proposed on August 27, 2014. MP R., pp.1-24. IGWA proposed to acquire 10 cfs of mitigation water under water right number 36-7072 held by SeaPac of Idaho, Inc. ("SeaPac"). *Id.* It would then deliver that water approximately 2.5 miles to Rangen's facilities via a pump and pipeline project. *Id.* On October 29, 2014, the Director approved IGWA's fourth mitigation plan on the condition that it obtain

[1] There are multiple agency records made part of the record in this matter. The first is the agency record from the Director's hearing on IGWA's fourth mitigation plan. That record will be referred to herein as "MP R., p.__." The second is from the Director's hearing on the transfer that is the subject of this proceeding. That record will be referred to herein as "R., p.__."

the necessary transfer approval to authorize use of SeaPac's water right at Rangen's facilities. MP R., p. 197.

On September 12, 2014, IGWA filed an application for transfer with the Department on behalf of the Districts. R., pp.2-60. The application sought to make changes to the place of use and nature of use of SeaPac's water right. *Id.* With respect to place of use, the application sought to add Rangen's facilities as an additional authorized place of use. *Id.* With respect to nature of use, the application sought to add "mitigation" as an additional authorized use. *Id.* Rangen protested the transfer on the grounds that it violates Idaho Code § 42-222(1). *Id.* at 71-74. No other protests were filed. Following hearing, the Director issued his *Final Order* conditionally approving the transfer. *Id.* at 367-387. The Director determined that the transfer may result in a depletion of up to 10 cfs of flow into the Snake River between Kimberly and King Hill, and that such depletion may injure other water rights. *Id.* at 372-373. Therefore, as a condition of approval, the Director required that IGWA and the Southwest Irrigation District undertake "future aquifer enhancement activities sufficient to offset 10 cfs of depletion of flow in the Snake River between Kimberly and King Hill." *Id.* at 373. The Director further required that "IGWA must provide documentation of aquifer enhancement activities from the previous year to establish that sufficient mitigation will be provided in the upcoming season," and that "[i]f sufficient mitigation is not provided, the transfer will be void." *Id.* at 375-376. These conditions were implemented by the Director to mitigate any injury resulting from the transfer. *Id.*

With respect to the remaining criteria of Idaho Code § 42-222(1), the Director found that the transfer will not result in an enlargement of the original right, is consistent with the conservation of water resources, is in the local public interest, and will not adversely affect the local economy. *Id.* at 373-375. On March 19, 2015, Rangen filed the instant *Petition for Judicial Review*, asserting that the Director erred in several respects in his *Final Order*. The case was reassigned by the clerk of the court to this Court on March 31, 2015. On April 20, 2015, the Court entered an *Order* permitting the Districts to appear as intervenors. The parties subsequently briefed the issues raised on judicial review. A hearing on the *Petition* was held before this Court on September 24, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or September 25, 2015.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. The Director's *Final Order* is affirmed on the grounds that it does not violate Idaho Code § 67-5279(3).

Idaho Code § 42-222 governs water right transfers. It requires that any person who desires to make a change to the point of diversion, place of use, period of use or nature of use of a water right shall make application to the Department for approval of such change. I.C. § 42-222(1). The Director may approve a transfer application provided, among other things, no other water rights are injured thereby and the change does not constitute an enlargement in use of the original right. *Id.* In this case, the Director found that the Districts' application results in neither injury nor enlargement. R, p.375. Rangen asks this Court to reverse and remand on both counts.

i. The Director's finding that the transfer will not result in injury to other water rights is affirmed.

Water right number 36-7072 is the subject of the Districts' transfer application. R., p.4. It authorizes SeaPac to divert 148.2 cfs from Thousand Springs for fish propagation purposes at its facilities located in Gooding County, Idaho. MP R., Ex.1001, pp.21-22. SeaPac's use of water under the right is non-consumptive, and water that leaves its facilities discharges directly into the Snake River as return flow. R., p.379; Ex. 4002, p.5. Rangen asserts that the amount of return flow discharging into the Snake River under the right will be diminished as a result of the transfer. Considerations of mitigation aside, Rangen is correct. Unlike water used in SeaPac's facilities, water used in Rangen's facilities does not discharge directly into the Snake River. R., p.379; Ex. 4002, p.5. It is discharged as return flow into Billingsley Creek, a tributary to the Snake River. *Id.* While there, it is undisputed that the return flow is subject to evaporation and diversions by downstream water users on the Creek. *Id.*; Tr., pp.21-35. The result is that less return flow under the right will discharge into the Snake River if 10 cfs is used at Rangen's facilities as opposed to SeaPac's.[2] *Id.*

Rangen asserts that the diminishment of return flow results in impermissible injury to other water right users. Rangen points to water rights held by the Idaho Power Company on the Snake River, as well as what will be referred to herein as "trust water rights," held by other users. Idaho Power holds senior hydropower water rights on the Snake River. In 1984, the State and Idaho Power entered into the Swan Falls Agreement. R., pp.286-318. Under the Agreement, Idaho Power agreed to subordinate its rights at Swan Falls from 8,400 cfs down to an average daily flow of 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31. R., p.289. That portion of Idaho Power's rights above those average daily flows would be held in trust by the State for future upstream beneficial use by other water users. I.C. § 42-203B(2) & (3). The water so held in trust is referred to herein as "trust water." Over time, various water users located throughout the basin appropriated the trust water and received what have been referred to as "trust water rights." Trust water rights enjoy the subordination of Idaho Power's senior water rights only so long as the average daily flows established in the Swan Falls Agreement are met. If those flows fall short, trust water rights are subject to curtailment.

[2] Further, the return flow that does return to the Snake River under the transferred right will be returned at a location downstream as compared to the return flow entering the Snake River under the original right. However, the record does not establish that there are any junior rights in the intervening distance that would be affected by this change.

The average daily flows identified in the Swan Falls Agreement are measured at the Murphy U.S.G.S. gauging station located on the Snake River immediately below Swan Falls. R., p.289. The record establishes that the Districts' transfer will result in the diminishment of up to 10 cfs of return flow into the Snake River upstream from the Murphy gauging station. *Id.* at 370, Ex. 4002; Tr.,pp.23-25. Conditions of mitigation aside, the Director recognized a potential for injury to the holders of trust water rights if the diminishment contributes to a drop of the Snake River at the Murphy gauge below the minimum daily flow requirements of the Swan Falls Agreement. *Id.* at 372-373.

Notwithstanding, the Director found that the transfer will not result in injury to other water rights. *Id.* at 375. His finding is based upon conditions of approval included in his *Final Order* to prevent such injury. *Id.* The Director recognized that IGWA and the Southwest Irrigation District have undertaken various aquifer enhancement activities in the recent past as a result of delivery calls. *Id.* at 373. Those activities include ground water recharge, conversions from ground water irrigation to surface water irrigation, and the voluntary dry-ups of acreage irrigated with ground water. *Id.* at 370. Based on model runs utilizing ESPAM 2.1, the Director found that the benefits of the aquifer enhancement activities to the Snake River upstream from the Murphy gauge between Kimberly and King Hill exceed the return flow depletion caused by the transfer. *Id.* at 370 & 372. Therefore, as a condition of approval, the Director required that IGWA and the Southwest Irrigation District undertake "future aquifer enhancement activities sufficient to offset 10 cfs of depletion of flow in the Snake River between Kimberly and King Hill." *Id.* at 373. The Director further required that "IGWA must provide documentation of aquifer enhancement activities from the previous year to establish that sufficient mitigation will be provided in the upcoming season." *Id.* at 375-376. If sufficient mitigation is not provided, "the transfer will be void." *Id.*

Under Idaho Code § 42-222(1), the Director has the express authority to approve an application for transfer in whole or in part "upon conditions." Therefore, the Court finds that the Director did not exceed his authority, or act contrary to law, in approving the transfer conditioned to prevent injury. The Court further finds that the Director's finding of no injury based on the imposition of those conditions is supported by substantial competent evidence in the record. The model runs conducted by the Districts' experts, as well as the Department's independent model runs, establish that the subject aquifer enhancement activities more than

offset the depletions to the Snake River that will result from the transfer. R., Ex. 4003, p.17; R., pp.379-385. The record thus establishes that flows at the Murphy gauge will not be diminished by the transfer. *Id.* Nor will the transfer result in a reduction of the quantity of water available to existing water rights. *Id.* Since the Director's finding of no injury is supported by substantial competent evidence in the record, it must be affirmed. *See e.g.*, *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001) (providing, an agency's factual determinations are binding on the court "so long as the determinations are supported by substantial competent evidence in the record").

ii. The Director's finding that the transfer will not result in an enlargement of the original right is affirmed.

Rangen next argues that the Director erroneously determined the transfer will not result in an enlargement. Under Idaho Code § 42-222(1), the Director may approve a transfer application provided "the change does not constitute an enlargement in use of the original right." To determine whether an enlargement will result, the Director evaluates whether any element of the original right will be increased as a result of the transfer. *Id.* In this case, it is undisputed that the transfer will not result in an increase in the rate of diversion or duration of diversion of the original right. Rather, Rangen argues that the transfer will result in an enlargement of the consumptive use of water under the original right. Under Idaho law, consumptive use is not an element of a water right. I.C. § 42-202B(1). However, Idaho Code § 42-222(1) provides that the Director "*may* consider consumptive use . . . as a factor in determining whether a proposed transfer would constitute an enlargement in use of the original right." (emphasis added). Consumptive use is "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 vapor, incorporated into products, or otherwise does not return to the waters of the state." I.C. § 42-202B(1).

SeaPac's water right authorizes water to be used year round for non-consumptive fish propagation purposes. MP R., Ex.1001, p.21. Under the Districts' transfer application, the transferred water will likewise be used for year round non-consumptive fish propagation purposes, albeit at Rangen's facilities as opposed to SeaPac's. *Id.* at 3. Therefore, the transfer

does not involve a request to change the nature of use from a non-consumptive use (i.e., fish propagation) to a consumptive use (i.e., irrigation, commercial, industrial, etc.).[3]

That said, evidence in the record shows that once water used under the transfer is discharged from Rangen's facilities as return flow into Billingsley Creek, other water users on the Creek may divert and consumptively use that return flow. R., Ex.4002, p.5; Tr., pp.21-35. The local Watermaster testified that once the return flow enters into Billingsley Creek it simply is not possible to administer it so as to preclude diversions by downstream users:

> Q. Okay. And then we talked about if water went down Billingsley Creek. Now, Frank, do you know how many diversions there are on Billingsley Creek?
>
> A. Downstream of the Curren? Or –
>
> Q. Yeah, downstream of the Curren.
>
> A. I'm going to say there's approximately 11.
>
> . . .
>
> Q. Okay. And then within Billingsley Creek. I think your testimony is something like 230 diversions?
>
> A. Water rights, yes.
>
> . . .
>
> Q. Now, if – and we talked a lot about this. If the 10 cfs of water was diverted down Billingsley Creek, it would be consumed by all those 230-plus water users; correct?
>
> A. Yes, it would.
>
> Q. And I think your testimony is that little, if any, would return to the Snake River; correct?
>
> A. During the irrigation season, yes.
>
> Q. Okay. Now there was some testimony about, you know – and Counsel, Mr. Budge, has asked you if the Director ordered you to make sure that 10 cfs of water could get to the Snake River, you couldn't do that today, could you?
>
> A. It's very unlikely I could get that done.

[3] While the transfer application seeks to add a "mitigation" purpose of use to the original right, it does not alter the fact that water under the transfer will still be used for non-consumptive fish propagation purposes consistent with the original right. As the Director noted, the "mitigation" purpose of use "only reflects that water delivered to Rangen pursuant to the transfer will help satisfy mitigation obligations imposed by the Curtailment Order." R., p.373.

Q. Okay. I believe your testimony is that today it would be impossible to do that?

A. Well, I -- I just don't think I could get it in there. Without some major improvements on the system, today I don't think it's possible.

Tr., pp.23-26.

It is Rangen's contention that the diversion and consumptive use of the return flow by downstream users results in an enlargement of consumptive use under the original right. This Court disagrees. It is not fairly stated that the consumptive use by downstream users constitutes an enlargement *of the original right*. It does not. The consumptive use complained of is simply not made pursuant to, or under, the transferred right. Indeed, the record establishes the use of water under the transferred right is, consistent with the original right, non-consumptive. MP R., Ex.1001, p.3. Rather, the consumptive use complained of is made pursuant to, and under, separate water rights held by downstream water users on Billingsley Creek. R., Ex.4002, p.5; Tr., pp.21-35. The plain language of Idaho Code § 42-222(1) requires the Director to evaluate whether the transfer will result in "an enlargement in use of the original right." Since the transfer does not result in an increase in consumptive use under or pursuant to the original right, it cannot constitute an enlargement of the original right.

Where, as here, a transfer results in the diminishment of return flow to a water source due to the consumptive use of that return flow by downstream water users, an affected junior appropriator may appropriately complain of injury, not enlargement. The enlargement of a water right implicates issues in addition to injury. The "no injury rule" protects junior appropriators as to the conditions of the stream existing at the time of the appropriation. Incidental changes to the existing conditions resulting from a proposed transfer violate this protection and have the potential to cause injury to junior appropriators. However, in approving such a transfer the director can impose appropriate conditions mitigating for any resulting injury. An enlargement, however, is the expansion of the beneficial use of the original water right beyond the limitations set forth in its previously established elements. In effect, a separate water right is being created. This not only causes injury to other junior appropriators, but also runs afoul of the prior appropriation doctrine if the proposed enlarged portion of the original right is accorded the same priority date as the original right. Enlargement would require a separate water right for the

enlarged portion of the right. *See e.g.* I.C. § 42-1426 (addressing enlargements in adjudication process). However, this cannot be accomplished through the transfer provisions of Idaho Code § 42-222.

In his *Final Order*, the Director therefore properly treated the issue as one of injury, and not of enlargement. R., pp.372-374. As set forth above, the Director adequately addressed injury to junior users resulting from the diminishment of return flow through the imposition of mitigating conditions. R., pp.3735-376. Since the Director's finding of no enlargement is supported by substantial competent evidence in the record, it must be affirmed.

iii. Rangen's argument that the Director erred in approving an additional purpose of use of "mitigation" under SeaPac's right is unavailing.

Rangen argues that the Director erred in approving a change in the nature of use of SeaPac's right to mitigation. This Court recently held that "mitigation" is a viable beneficial use. *Memorandum Decision*, Gooding County Case No. CV-2015-083, pp.15-16 (August 7, 2015). The Court's analysis on that issue is incorporated herein by reference and will not be repeated. The Court further finds that the use of "mitigation" is not speculative under the facts and circumstances presented here. Speculation, at least with respect to the appropriation of water, is defined as "an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence." IDAPA 37.03.08.045.01.c. In this case, there is no evidence in the record establishing a lack of intent on behalf of the Districts to apply the water identified in their transfer application to beneficial use with reasonable diligence. To the contrary, the record establishes that the Districts have a mitigation obligation to Rangen. MP R., Ex.1018. To address that obligation, the Director approved IGWA's fourth mitigation plan. MP R., pp.178-240. The transfer was filed in conjunction with, and as a necessary part of, that mitigation plan. *Id.* at 197. Since the Districts have a mitigation obligation to Rangen, and since the water that is the subject to the transfer will be used pursuant to an approved mitigation plan, the Court finds that the Director did not abuse his discretion in approving an additional purpose of use of "mitigation" under SeaPac's right.

B. The Director's *Final Order* is affirmed on the alternative grounds that Rangen has failed to establish its substantial rights have been prejudiced.

Under Idaho Code § 67-5279(4), a decision of the Director must be affirmed unless the petitioner can establish that its substantial rights have been prejudiced. In this case, it cannot be said that the Director's *Final Order* prejudices Rangen's substantial rights. Rangen first argues that its senior water rights are prejudiced by the *Final Order*. However, the record establishes that Rangen's senior water right numbers 36-2551 and 36-7694, which are the subject of its delivery call, are not diminished in any way as a result of the Director's *Final Order*. Indeed, in his *Final Order* the Director expressly finds that no water rights, including those held by Rangen, are injured as a result of his approval of the transfer. To the contrary, the purpose of the transfer is to increase the water supply available to Rangen under its senior rights pursuant to a mitigation plan previously approved by the Director. Therefore, Rangen has failed to establish that its water rights are prejudiced by the *Final Order*.

Rangen's additional argument that its substantial rights to have the correct procedures and legal standards applied to the transfer application proceeding is likewise unavailing. Rangen had a fair and meaningful opportunity to participate in the transfer proceeding and to present evidence before the Department concerning the Districts' transfer application. The Court further finds that the Director, in analyzing the transfer under Idaho Code § 42-222, applied the correct legal standard and properly adjudicated the Districts' application in a manner consistent with Idaho law and within the bounds of his discretion. Since Rangen has failed to establish that its substantial rights have been prejudiced, the Court finds that the Director's *Final Order* must be affirmed via operation of law. I.C. § 67-5279(4).

C. The Districts are not entitled to an award of attorney fees on judicial review.

The Districts seek an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Court holds that the Rangen has presented legitimate questions for this Court to address

regarding the Director's approval of the application for transfer. These include, but are not limited to, whether the transfer impermissibly results in injury and/or enlargement. The Court does not find Rangen's arguments on these issues to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies the Districts' request for attorney fees.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Amended Final Order Approving Application for Transfer* issued on March 18, 2015 **is hereby affirmed.**

Dated October 8, 2015

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION was mailed on October 08, 2015, with sufficient first-class postage to the following:

RANGEN, INC
Represented by:
FRITZ X HAEMMERLE
HAEMMERLE LAW OFFICE
PO BOX 1800
HAILEY, ID 83333
Phone: 208-578-0520

IDAHO DEPARTMENT OF WATER
Represented by:
GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

RANGEN, INC
Represented by:
J JUSTIN MAY
1419 W WASHINGTON
BOISE, ID 83702
Phone: 208-429-0905

MAGIC VALLEY GROUND WATER
NORTH SNAKE GROUND WATER
SOUTHWEST IRRIGATION DISTRICT
Represented by:
RANDALL C BUDGE
201 E CENTER ST STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

RANGEN, INC
Represented by:
ROBYN M BRODY
BRODY LAW OFFICE, PLLC
PO BOX 554
RUPERT, ID 83350
Phone: 208-434-2778

MAGIC VALLEY GROUND WATER
NORTH SNAKE GROUND WATER
SOUTHWEST IRRIGATION DISTRICT
Represented by:
THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

~~DIRECTOR OF IDWR~~
~~PO BOX 83720~~
~~BOISE, ID 83720-0098~~

Julie Murphy
Deputy Clerk