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Rangen, Inc. v. Idaho Dep't of Water Res., 371 P.3d 305 (Idaho 2016)

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rights of other water users, the Authority may choose which of its conditional water rights it wishes to divert and make absolute.

Accordingly, the supreme court reversed the order of the Water Court that the July 4, 2004 diversion must be allocated to the Senior Lake Creek Right, and remanded the case with instructions to make 0.47 cfs of the Junior Eagle River Right absolute.

Tina Xu

IDAHO

Rangen, Inc. v. Idaho Dep't of Water Res., 371 P.3d 305 (Idaho 2016) (affirming the district court's ruling that: (i) the Idaho Department of Water Resources' approval of a mitigation plan that deferred consideration of injury to other water users was not an abuse of discretion; (ii) a mitigation plan that included curtailment and insurance as contingencies was adequate to assure protection to senior priority rights; and (iii) construction of a water pipeline across private land to a place of beneficial use did not constitute an unlawful taking under Idaho's eminent domain laws).

On December 13, 2011, Rangen, Inc. ("Rangen") filed a petition for a delivery call with the Idaho Department of Water Resources ("IDWR"), alleging groundwater pumping by junior appropriators in the Eastern Snake Plain Aquifer ("ESPA") materially injured its water rights. In response, IDWR's director (the "Director") issued an order that curtailed some junior-priority groundwater pumping in the ESPA. The order allowed junior-priority groundwater users to avoid curtailment by participating in an approved mitigation plan providing 9.1 cubic feet per second ("cfs") of water to Rangen. Idaho Ground Water Appropriators, Inc. ("IGWA"), who represented junior priority users in ESPA, submitted several mitigation plans to IDWR. On October 8, 2014, the Director conditionally approved IGWA's Fourth Mitigation Plan (the "Plan"), which required IGWA build and maintain a pumping station, pipeline, and other necessary facilities for the transport of water ("the Magic Springs Project"). Under the Plan, SeaPac of Idaho, Inc. agreed to sell or lease 10 cfs of water to IGWA. IGWA would then pump that water to Rangen through the Magic Springs Project.

The conditional plan hinged on IGWA obtaining approval for its Application of Transfer from SeaPac of Idaho, Inc. The Director declined to rule on the Application of Transfer in the order. The Plan also required IGWA to purchase an insurance policy that covered Rangen's losses of fish attributable the Magic Springs Project's failure. Last, the Director ordered Rangen state in writing that it would accept the water delivered and the construction of the Magic Springs Project on its land. If the conditions failed, IDWR would suspend the Plan. Nevertheless, IGWA constructed the Magic Springs Project's pipeline during the conditional period.

After approval, Rangen petitioned the district court to review the Director's decision. The district court affirmed the decision. Rangen then appealed to the Supreme Court of Idaho, challenging that: 1) the Director abused his discretion when he deferred consideration of potential injury to other water users until proceedings on IGWA's Application for Transfer; 2) the Director erred by approving a plan with inadequate contingency provisions; and 3) the Director's order constituted an unlawful taking of Rangen's property and should be set aside.

First, the Supreme Court of Idaho held the Director did not abuse his discretion by deferring consideration of potential injury to other water users until the proceedings on IGWA's Application for Transfer. Here, Rangen argued the Director did not have discretion to defer consideration of injury to water users under Conjunctive Management Rule ("CMR") 43.03j and that it was unreasonable to ignore those factors. CMR 43.03 and subsection (j) state the Director "*may*" consider "whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge." The supreme court began its analysis by interpreting the CMR's regulatory language.

The supreme court found that a plain reading of the CMR gave the Director discretion to defer consideration because the word "may" was permissive rather than imperative. The supreme court compared the regulatory language to its interpretation in another case that required the Director consider several factors in determining injury prevention. The case was distinguishable as it referred to a different subsection that stated, "the mitigation plan *must include*. . . ." After undertaking this analysis, the supreme court turned to Rangen's assertion that it was unreasonable to ignore the factors under CMR 43.03j.

Rangen claimed it was unreasonable for the Director to not consider CMR 43.03j for two reasons. Rangen first claimed the Director would not find injury to other users because IGWA had completed construction of its pipeline and accordingly had failed to consider potential injury to other users. The supreme court rejected this argument, finding it unclear how potential injury to users would occur without consideration, as the Plan provided other users with the opportunity to raise issues at the later proceeding. Furthermore, Rangen failed to submit any evidence to the court showing the Director would allow construction based on the pipeline's construction and IGWA bore the risk when it built the pipeline early. Rangen also argued the Director should have conducted the injury analysis in the Plan because the later transfer proceeding went forward under a different regulatory provision than CMR 43.03j. In response, the supreme court again pointed to the Director's discretion provided by the CMR. After determining the Director did not abuse his discretion by delaying Application of Transfer Proceedings, it turned to Rangen's challenge that the Plan did not include adequate contingency provisions.

The supreme court found the contingencies were adequate because the IDWR did not avoid curtailment of junior-priority rights in the event that the Plan became unavailable. CMR 43.03c requires mitigation plans "assure protection of the senior priority right in the event the mitigation water sources becomes unavailable." Under this regulation, Rangen argued curtailment was not a contingency because it was a natural and legal consequence that occurs without mitigation, and that the benefits of curtailment can take years to materialize and would not immediately remedy its injury. The supreme court rejected this argument, finding the Plan offered sufficient protection to Rangen's right through the combination of a curtailment and insurance. It noted the insurance policy would provide as a safeguard if curtailment failed to provide a remedy. Rangen then challenged that the insurance plan's adequacy for compensating potential losses it would suffer if a shortage occurred. The supreme court allayed these concerns by stating the insurance policy covered exactly the type of injury Rangen discussed.

Finally, the supreme court turned to Rangen's argument that IDWR's order constituted an unlawful taking of senior owner's property. Rangen argued the Director's order amounted to an unlawful taking because it forced senior owners to choose between granting IGWA an easement or risk losing water that they were entitled to because the order allowed IGWA to suspend its mitigation obligation if Rangen did not allow the pipeline's construction. The supreme court found that even if it interpreted the Director's order to require Rangen to grant IGWA an easement because Idaho's constitutional eminent domain power extends to property of public use after just compensation. Under the Idaho Constitution, right of ways for the construction of pipelines to convey water to the place of beneficial use fall under that power. This would allow the state to take the property after just compensation. Since Rangen did not allege that it was not provided just compensation, the supreme court rejected this claim.

Accordingly, the supreme court upheld the district court's partial affirmation of the Director's order conditionally approving the Plan.

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MONTANA

Curry v. Pondera Cty. Canal & Reservoir Co., 370 P.3d 440 (Mont. 2016) (holding that: (i) the Water Court did not err in concluding that the number of shares issued by water company determined the company's rights; (ii) water supply company's rights corresponded to size of service area as opposed to a historical place of use; and (iii) the Water Court erred in determining water supply company put storage rights to beneficial use prior to 1973).

The Curry Cattle Company ("Curry") is a private landowner in Montana and owns shares to irrigation rights in the Birch Creek Flats ("Flats"). Curry obtained these rights in 1988, some of which are the oldest rights in the Marias River Basin. Pondera County Canal & Reservoir Co. ("Pondera") provides land owners in Pondera County with water shares for beneficial use. Pondera possesses water rights to divert from Birch Creek, as well as a complete distribution system to serve the area.

This case originates from a dispute between the parties regarding waters in the Birch Creek. Pondera's predecessors in interest secured some of the water rights in question through the Carey Land Act ("Act"), a federal law meant to encourage relocation to the American West. In response, Montana set up the Montana Carey Land Board ("MCLB"), which sought to meet the requirements laid out in the Act. The Act functioned by setting up operating companies comprised of shareholders who had rights to water as determined by acres of land owned. Under the Act, the operating company maintains ownership of the water rights for a service area. In this case, the service area is accompanied by 72,000 water shares. Land owners in the service area may acquire these water shares. Pondera's predecessors operated under the Act and began appropriating water for irrigation and sale in the late 1800s, eventually organizing as the Pondera Canal Company. The Company officially registered as an operating company under the requirements of the Carey Act in 1927. As currently