

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE SECOND)	
MITIGATION PLAN FILED BY THE)	CM-MP-2014-003
IDAHO GROUND WATER)	
APPROPRIATORS FOR THE)	ORDER REGARDING
DISTRIBUTION OF WATER TO)	IGWA'S CORRECTED
WATER RIGHT NOS. 36-02551 AND)	SECOND MOTION IN
36-07694 IN THE NAME OF)	LIMINE AND NOTICE
RANGEN, INC.)	OF HEARING
_____)	

On June 3, 2014, the Idaho Ground Water Appropriators Inc. (“IGWA”) filed *IGWA’s Corrected Second Motion in Limine and Notice of Hearing* (“Second Motion in Limine”). The Second Motion in Limine seeks to prohibit the following testimony and presentation of evidence at the June 4-6 mitigation plan hearing:

1. Evidence about water quality or temperature necessary to raise trout at the Rangen Inc. (“Rangen”) fish hatchery.
2. Evidence about permitting that may be required by other state or federal agencies to install the Tucker Springs piping project.
3. Evidence, in the form of a letter, identified as a confidential settlement communication protected by rule 408 of the Idaho Rules of Evidence.

Water Quality and Temperature Evidence

IGWA argues that Rangen should be prohibited from presenting testimony about water quality and water temperature concerns because Rangen refused to quantify “minimum and maximum water quality and water temperature parameters necessary to raise trout” in the Rangen fish hatchery. *Second Motion in Limine* at 2.

The Director reviewed Rangen’s answers to IGWA’s interrogatories and is disappointed in Rangen’s non-responsive answers. Rangen has raised fish for decades and, as a research facility, should know what water quality and temperature concerns would be important.

Nonetheless, IGWA's expert witnesses could also identify important water quality and water temperature concerns. This is not a subject that is unique to Rangen's fish rearing facility. Rangen's non-responsiveness did not prejudice IGWA in its preparation for hearing. The Director will allow Rangen to present evidence about water quality and water temperature.

Additional Permitting

IGWA argues the Director should prohibit Rangen from presenting any evidence about other governmental permitting requirements because Rangen did not timely disclose a specific report prepared by a Rangen expert witness about permitting required by other government entities. *Second Motion in Limine* at 2.

The Director recognizes that discovery deadlines for this hearing were very short. If discovery delays cause prejudice to a party, the issue must be addressed. The Director has reviewed the report Rangen seeks to present and does not believe the report prejudices IGWA. The report simply outlines additional governmental permits which may be required of Rangen. This is an issue that IGWA should have anticipated. Moreover, IGWA is not required to have completed other permitting at the time a mitigation plan is proposed. *Final Order Concerning the Over-the-Rim Mitigation Plan* at 9, Doc. No. CM-MP-2009-004 (Mar. 18, 2011). If additional permitting is required, the proponent of a mitigation plan should establish that permits required by other government entities are attainable and should estimate the time for completion of additional permitting. Because IGWA is not prejudiced by the report, Rangen may present evidence about permitting required by other governmental entities.

Admissibility of Letter

IGWA asks the Director to prevent Rangen from introducing a May 23, 2014 letter prepared by IGWA and sent to the protestants to the Second Mitigation Plan. *Second Motion in Limine* at 3. "To avoid improper disclosure or insinuations concerning the contents of the letter at the hearing, IGWA requests an advance ruling that neither the existence of the letter nor its contents may be referred to by Rangen or its counsel in this matter." *Id.*

Idaho Rule of Evidence 408 states: "Evidence of conduct or statements made in compromise negotiations" is not admissible. The letter qualifies as a statement made in compromise negotiations. Specifically, the letter asks the protestants not to participate in the second mitigation plan hearing because their protests will be more properly considered at the transfer hearing.

Whether IGWA intends to go forward with the Tucker Springs Project is part of this negotiation. In other words, the negotiation is: Don't participate in this mitigation plan hearing/proceeding because we may pursue other projects identified in the third mitigation plan and participation in this proceeding would be a waste of time.

The May 23, 2014 letter is evidence of conduct or statements made in compromise negotiations. The letter doesn't state IGWA does not intend to pursue the project, only that another possible mitigation plan might be a better alternative.

The Director will not accept the May 23, 2014 letter into evidence.

ORDER

IT IS HEREBY ORDERED that the portion of *IGWA's Corrected Second Motion in Limine and Notice of Hearing* related to (1) water quality and water temperature, and (2) additional governmental permitting is **DENIED**.

IT IS FURTHER ORDERED that the portion of *IGWA's Corrected Second Motion in Limine and Notice of Hearing* seeking to prohibit the admission of IGWA's May 23, 2014 letter is **GRANTED**.

DATED this 5th day of June, 2014.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2014, the above and foregoing document was served on the following by providing a copy of the *ORDER REGARDING IGWA'S CORRECTED SECOND MOTION IN LIMINE AND NOTICE OF HEARING* in the manner(s) selected:

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