

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

IN THE MATTER OF THE AMENDED THIRD
MITIGATION PLAN FILED BY THE IDAHO
GROUND WATER APPROPRIATORS FOR
THE DISTRIBUTION OF WATER TO WATER
RIGHT NOS. 36-02551 & 36-07694 IN THE
NAME OF RANGEN, INC.

Docket No. CM-MP-2014-005

**ORDER DENYING RANGEN'S MOTION
TO DISMISS PROPOSALS ONE, TWO,
THREE, AND FOUR OF IGWA'S
AMENDED THIRD MITIGATION PLAN**

BACKGROUND

On June 10, 2014, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed *IGWA's Amended Third Mitigation Plan and Request for Hearing* ("Third Mitigation Plan") with the Director ("Director") of the Idaho Department of Water Resources ("Department"). The Third Mitigation Plan was filed in response to the Rangen, Inc. ("Rangen") delivery call and "pending and threatened delivery calls" from other water users in Water District 36A and was intended "to provide mitigation to Rangen and other water users in the Water District 36A." *Third Mitigation Plan* at 1. The five components of the Third Mitigation Plan are: 1) Sandy Ponds recharge and Sandy Pipe delivery; 2) improvements to the Curren Tunnel diversion; 3) direct delivery of water right no. 36-16976; 4) recirculation of Rangen water rights; 5) the Aqua Life project.

Notice of the Third Mitigation Plan was published and timely protests were filed by the following: Ruth Musser-Lopez; Little Sky Farms, c/o C. Tom Arkoosh; Alvin and Hope Musser Living Trust, c/o Marjorie M. Mikels; Buckeye Farms, c/o John K. Simpson; Thousand Springs Water Users Association, Inc., c/o Travis Thompson; Robert & Susan Gisler, c/o Travis Thompson; Rangen, c/o Robyn Brody, Fritz Haemmerle and Justin May; Blind Canyon Aquaranch, Inc., c/o Gary Lemmon; US Fish & Wildlife Service, c/o Tim Mayer; Bret and Kathleen McKenzie; Vaughn McKnight; and Jamie and Katherine Martin.¹

A *Notice of Status Conference and Hearing* was issued on July 8, 2014, wherein the hearing on the Third Mitigation Plan was set for September 8-10, 2014.

¹ Ruth Musser-Lopez and Vaughn McKnight subsequently withdrew their protests. Patrick D. Brown has also filed a notice of appearance on behalf of the Alvin and Hope Musser Living Trust.

A status conference was held on July 22, 2014. Various concerns were raised by the protestants regarding the scope, breadth, and complexity of the Third Mitigation Plan and the timing of the hearing.

On July 25, 2014, the Director issued an *Order Limiting Scope of Mitigation Plan; Limiting Scope of Hearing; Setting Deadline to Submit Engineering Plans* (“Order Limiting Scope”) which documented verbal rulings made by the Director at the status conference in response to concerns raised. The Director granted IGWA’s request to limit the scope of the Third Mitigation Plan to only the Rangen water rights; set a deadline for IGWA to submit engineering plans; and limited the scope of the hearing scheduled for September 8-10 to three components: 1) Sandy Ponds recharge and Sandy Pipe delivery; 2) recirculation of Rangen water rights; and 3) the Aqua Life project. *Order Limiting Scope* at 3.

On July 25, 2014, Rangen filed a *Motion to Dismiss Proposals One, Two, Three and Four of IGWA’s Amended Third Mitigation Plan* (“Motion to Dismiss”). On July 28, 2014, IGWA filed *IGWA’s Response to Rangen’s Motion to Dismiss Proposals 1,2,3 and 4 of IGWA’s Third Mitigation Plan* (“IGWA’s Response”).

ANALYSIS

A. The Director Will Consider Sandy Ponds Recharge

IGWA requested mitigation credit for Sandy Ponds recharge as part of its first mitigation plan. *Final Order on Reconsideration* at 7 (May 16, 2014). The Director determined:

Recharge of ground water from the Sandy Ponds cannot be quantified because evidence presented at the Mitigation Plan hearing attempting to determine recharge from the Sandy Ponds was deficient. Recharge calculations are based upon inflows and outflows of water in relation to a recharge site. When asked what information would be needed to calculate credit for Sandy Pond recharge, Department employee Jennifer Sukow testified, “We would need accurate measurements of the water that flowed into the ponds and then all of the outflows from the ponds.” Sukow Tr. Vol. II, p. 303-04.

....

... IGWA provided detailed measurement records showing the amount of water that flows into the Sandy Ponds. IGWA Ex. 1032-1033. No such records were provided showing outflows from the Sandy Ponds. Because the Director cannot quantify recharge in the Sandy Ponds due to the lack of evidence, the Director cannot recognize any credit for recharge in the Sandy Ponds.

Id. at 8.

In its Third Mitigation Plan, IGWA asserts that, to resolve the Department’s measurement concern, new measuring devices are being installed on the Sandy Pipeline “to accurately determine the amount of recharge through the Sandy Pond. . . .” *Third Mitigation*

Plan at 2. IGWA “requests approval of the proposed measuring devices and, once the measuring devices are installed, mitigation credit for recharge that occurs via the Sandy Ponds....” *Id.*²

Rangen argues that installing measuring devices cannot address problems with quantification of past recharge. *Motion to Dismiss* at 2. This argument misstates IGWA’s request. IGWA is not requesting, and will not receive, mitigation credit for any past recharge activities occurring through the Sandy Ponds as part of its Third Mitigation Plan. IGWA is requesting authorization for credit for future recharge activities. The recharge mitigation plan is similar to IGWA’s recharge mitigation plan approved by the Director in the Surface Water Coalition (“SWC”) delivery call. *Order Approving Mitigation Plan*, CM-MP-2009-006 (May 14, 2010). Under the SWC delivery call recharge mitigation plan, IGWA may accrue mitigation credits from recharge but, because the amount of any credit cannot be computed until after the recharge occurs, the specific credit amount, if any, must be calculated at a later date using the ESPA model.

Rangen also argues IGWA cannot receive mitigation credit for Sandy Ponds recharge because the only water identified in the Third Mitigation Plan related to the proposal is waste water dependent upon approval of protested application for permit no. 36-17011 that is currently pending before the Department. *Motion to Dismiss* at 2. In response, IGWA asserts Rangen’s argument is misplaced because “IGWA can rent water from Water District 1 or Northside Canal Company water to conduct recharge via the Sandy Ponds regardless of whether [the application] is approved.” *IGWA’s Response* at 2. The pending application is not IGWA’s only way to legally undertake recharge at the Sandy Ponds. If the mitigation plan is approved, to receive future mitigation credit for recharge activities at the Sandy Ponds, IGWA must present evidence sufficient to demonstrate it has legal authority to deliver a specific quantity of water from a specific source to the Sandy Ponds for the purpose of recharge. Furthermore, the dependency of a mitigation plan on a pending application is not a fatal deficiency in the mitigation plan. A plan can be conditionally approved provided the applicant has taken significant steps towards accomplishing the mitigation plan. *See Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* at 16 (May 16, 2014). Dismissal of the proposal at this stage as proposed by Rangen is unwarranted.

Rangen also argues IGWA cannot receive mitigation credit for the Sandy Ponds proposal because “the Sandy Ponds are not an approved recharge site” and that, “given the location and nature of the Sandy Ponds, little or no benefit would be expected to accrue to the Martin Curren Tunnel as a result of water delivered to the Sandy Ponds.” *Motion to Dismiss* at 3. It is unclear what Rangen means by its statement that “the Sandy Ponds are not an approved recharge site.” If Rangen has specific information related to what approvals it asserts would be required for recharge activities at the Sandy Ponds, it should present that information at the hearing. Further, Rangen’s assertion that little or no benefit would be expected to accrue to the Martin Curren

² IGWA’s Third Mitigation Plan proposed “direct delivery to other senior water users via the Sandy Pipeline.” *Third Mitigation Plan* at 2. As a point of clarification, while direct delivery via the Sandy Pipeline is not discussed in the *Motion to Dismiss* or *IGWA’s Response*, because senior water users other than Rangen are not being considered at the hearing scheduled for September 8-10, the Director will not consider Sandy Pipe delivery at that hearing.

Tunnel is a factual issue. Rangen did not present facts to support its conclusion. The facts should be presented at the hearing and analyzed. The Director will not dismiss IGWA's proposal for recognition of mitigation credit for potential recharge from the Sandy Ponds.

B. The Director Will Consider Recirculation of Rangen Water Rights

IGWA proposed a direct-pump back and aeration system within the Rangen facility as part of its first mitigation plan. *Final Order on Reconsideration* at 1. The proposal was rejected because IGWA failed to present any evidence that it had, or could acquire, water rights or property access to construct and operate a pump-back and aeration system or provide even basic design plans in support of the proposal. *Amended Final Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* at 17 (May 16, 2014). IGWA failed to identify the location of the point where the water would be collected and pumped back to Rangen. *Final Order on Reconsideration* at 15. The Director also determined that, where, as in this circumstance, IGWA proposes to recapture water without consent of the water right holder, a new water right is needed. *Id.*

The Third Mitigation Plan includes preliminary design and engineering work to pump water from the bottom of Rangen's facilities to the top and states:

IGWA proposes to pump water from the bottom of Rangen's aquaculture facility back to the top where it can be re-used for fish propagation. The pump-back facility will be located at the west end of the Rangen property below the CTR Raceways, or on a ½ acre parcel of adjacent land that belongs to the Musser family. It will be designed to capture and recirculate up to 9.1 cfs of water to the head of the Rangen hatchery.

Third Mitigation Plan at 5.

IGWA has provided basic design plans in support of its proposal to construct and operate a pump-back and aeration system and identified the location of the point where water could be collected and pumped back to Rangen. While Rangen is correct that IGWA failed to present any information in the plans showing it has, or could acquire, water rights or property access to construct and operate a pump-back aeration system to recapture water from the bottom of Rangen's aquaculture facility, IGWA should have the opportunity to present information on these issues at hearing.³

C. The Director Already Ordered Proposals Concerning 36-16976 and Improvements to the Curren Tunnel Diversion Will Not Be Considered

Rangen asserts the Director should dismiss proposals set forth in IGWA's Third Mitigation Plan regarding direct delivery of water right no. 36-16976 and improvements to the Curren Tunnel diversion. *Motion to Dismiss* at 4-6. The Director already ordered the proposal

³ This is not an invitation to revisit permit no. 36-16976 however. The Director previously ordered that application will not be considered at the hearing on September 8-10. *Order Limiting Scope* at 3. IGWA will need to present other information related to water rights for the project.

addressing direct delivery of water right no. 36-16976 will not be considered at the hearing on the Third Mitigation Plan. *Order Limiting Scope* at 3. The Director also ordered the proposal concerning improvements to the Curren Tunnel diversion be bifurcated from the other issues presented at the September 8-10 hearing and scheduled for hearing at a later date. *Id.* Because the Director has already bifurcated the proceeding and ordered that issues related to improvement to the Curren Tunnel not be addressed at the September 8-10 hearing, Rangen's motion is denied. The denial is without prejudice. If Rangen believes the proposal concerning improvements to the Curren Tunnel diversion should not be considered at a hearing on that later date when scheduled, Rangen may file a motion to dismiss the proposal at that time.

ORDER

IT IS HEREBY ORDERED that Rangen's motion to dismiss proposals set forth in IGWA's Third Mitigation Plan is DENIED.

Dated this 19th day of August 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 19th, 2014, I served a true and correct copy of the forgoing document on the persons listed below by the method indicated.

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