

**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 DENYING
DISTRIBUTION OF WATER TO)	IGWA'S MOTION IN
WATER RIGHT NOS. 36-02551 AND)	LIMINE
36-07694 IN THE NAME OF)	
RANGEN, INC.)	
_____)	

On May 29, 2014, the Idaho Ground Water Appropriator's filed *IGWA's Motion in Limine and Notice of Hearing* ("Motion in Limine"). The Motion in Limine seeks to prohibit the following testimony and presentation of evidence at the June 4-6 mitigation plan hearing:

1. All testimony and evidence that has not been fully and properly disclosed pursuant to the Director's Notice of Hearing, Order Authorizing Discovery, and Scheduling Order dated May 2, 2014 or in response to IGWA's discovery requests. The Order specifically sets forth deadlines in this matter. This Order also provides that any exhibits to be offered at the hearing must meet the requirements of the Department's Rules of Procedure, Rule 606. Non-compliance with the Department's Rules of Procedure and the Director's Order, should result in the exclusion of such testimony and evidence.
2. All testimony and evidence from Rangen of alleged injury to water rights not owned by Rangen. Rangen's protest does not assert injury to other water rights, and Rangen lacks standing to assert injury to other water rights.
3. All testimony and evidence of injury that derives from the transfer of the place of use of Idaho Department of Fish & Game water rights to include the Rangen hatchery, for the reason that the pending Application for Transfer is the proper forum for presenting such claims of injury.
4. In the event number 3 above is not granted, testimony and evidence from protestants having water rights in Tucker Springs or downstream on Riley Creek should be limited only to alleged injury resulting from the reduction in 10 cfs return flow from the Hagerman State Hatchery resulting from the 2nd Mitigation

Plan transfer of water to Rangen. Protestants should not be allowed to present evidence of other injury to their water rights caused by drought, changes in incidental recharge, or junior ground water pumping which is unrelated to and not relevant to this mitigation plan.

Exclusion of Evidence for Failure to Follow Proper Procedure

IGWA argues that the Director should issue an order in limine prohibiting any testimony or evidence offered that was not timely or properly disclosed, does not satisfy the Department's Rules of Procedure, or otherwise does not comply with the Director's orders.

Rule 600 of the Department's Rules of Procedure states:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IGWA's argument is deficient for two reasons. First, IGWA does not present any arguments that the evidence sought to be prohibited is "irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or" because of an "evidentiary privilege provided by statute or recognized in the courts of Idaho."

Second, motions in limine should identify specific factual information or factual subjects that should be excluded from evidence. IGWA asks the Director to issue an order excluding facts, at present unidentified to the Director, that may be relevant but may need to be excluded because of some yet to be determined deficiency in timing of disclosure, form, or conflict with an ordered directive or rule of procedure. IGWA seeks a general preemptive order that would amount to no more than a statement that Rangen cannot offer any evidence that would result in a subsequent exclusion of the evidence from the record. The order sought would not be helpful to the parties, to the Director, or to the record.

Evidence of Injury to Other Water Users Presented by Rangen

Generally, a party should not be able to assert an affirmative defense unique to another water user. Nonetheless, the Director must ensure that the agency decision protects existing water right holders. Rule 43 of the Conjunctive Management Rules establishes that the Director must evaluate injury when considering a proposed mitigation plan:

03. Factors to be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to rights include, but are not limited to, the following:

. . . .

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights

As an example, Rangen could call another water user as a witness to testify about injury, even though the other water user is not a formal party to the contested case. The Director should be able to consider whether the water user, testifying at the hearing, would be injured if the pending proposal were approved. IGWA's request for a blanket exclusion is too broad. Limitations may be determined by the Director at the hearing based on the specific evidence being offered.

Evidence About Injury that may be Presented at a Subsequent Hearing for a Contested Application for Transfer

If approval of an application for transfer is required for the proposed mitigation plan to be implemented, the final forum for determining injury is the application for transfer proceeding. Nonetheless, as discussed in the previous section, the Director must evaluate injury to other water rights when considering a proposed mitigation plan.

The application for transfer proceeding is the forum where the details of the application for transfer will be presented. The presentation of a proposal at a mitigation hearing is at a lesser level of detail. The test question to be answered is: Is there a way the mitigation plan can be implemented while compensating for any possible injury?


Evidence About Other Causes of Reductions in Tucker Spring Flows that are not Related IGWA's Proposal to Deliver Tucker Springs Water for Mitigation

Presentation of some general evidence about the various factors affecting spring flow is helpful to establish the general hydrology of the springs and hydrogeology of the aquifer. The detailed evidence is not necessary on this subject, however. The extent of evidentiary detail can be determined during the hearing.

ORDER

IT IS HEREBY ORDERED that *IGWA's Motion in Limine and Notice of Hearing* is **DENIED**.

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 DENYING IGWA'S MOTION IN LIMINE* in the manner(s) selected:

Randall C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE &
BAILEY CHARTERED
201 E. Center St.
P.O. Box 1391
Pocatello, ID 83204
rcb@racinelaw.net
tjb@racinelaw.net

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

Fritz X. Haemmerle
Haemmerle Haemmerle
P.O. Box 1800
Hailey, ID 83333-1800
fxh@haemlaw.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

Robyn Brody
Brody Law Office, PLLC
P.O. Box 554
Rupert, ID 83350-0554
robynbrody@hotmail.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

J. Justin May
May Browning & May PLLC
1419 W Washington
Boise, ID 83702-5039
jmay@maybrowning.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

Leo E. Ray
Starla Barnes
Big Bend Trout, Inc.
P.O. Box 479
Hagerman, Idaho 83330
fpi@fishbreedersofidaho.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

Michael J. Henslee, V.P.
Salmon Falls Land & Livestock Co.
95-A Bell Rapids Road
Hagerman, Idaho 83332
mjhenslee@gmail.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

Timothy J. Stover
WORST FITZGERALD & STOVER PLLC
P.O. Box 1428
Twin Falls, Idaho 83303
tjs@magicvalleylaw.com

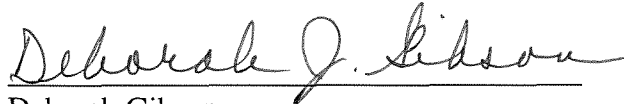
U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

John K. Simpson
Paul Arrington
BARKER ROSHOLT & SIMPSON, LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
jks@idahowaters.com
pla@idahowaters.com
jlw@idahowaters.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

Almer Huntley, Jr., President
Big Bend Irrigation & Mining Co., Ltd.
2721 South 900 East
Hagerman, Idaho 83332
plspe@hotmail.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail



Deborah Gibson
Administrative Assistant for the Director