

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 36-16976 IN THE NAME	)	
OF NORTH SNAKE GROUND WATER	)	ORDER DENYING
DISTRICT ET AL. AND APPLICATION	)	GROUND WATER DISTRICTS'
FOR PERMIT NO 36-17002 IN THE	)	MOTION IN LIMINE
<u>NAME OF RANGEN INC.</u>	)	

On September 11, 2014, Aberdeen American Falls Ground Water District (GWD), Bingham GWD, Bonneville-Jefferson GWD, Jefferson Clark GWD, Madison GWD, Magic Valley GWD and North Snake GWD ("the Districts") filed a Motion in Limine, asking the Department to exclude certain evidence from the administrative records for the above referenced contested cases. More specifically, the Districts asked the Department to exclude all evidence relating to past water diversions by Rangen from Billingsley Creek. The Districts' Motion in Limine asserts that "[e]vidence of prior water diversions . . . is irrelevant to the statutory factors governing IDWR review of permit applications."

Rule 600 of the Department's Rules of Procedure (IDAPA 37.01.01) states that a hearing officer 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." The term "relevant" is not defined in the Department's Rules of Procedure but carries a generally accepted definition within the legal community. "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (See Rule 401, Idaho Rules of Evidence)

Evidence derived from Rangen's past diversion from Billingsley Creek at the point of diversion proposed in Application 36-17002 is relevant to the pending contested cases in two ways. First, evidence of Rangen's past diversion addresses the question of the sufficiency of the water supply. (See Idaho Code § 42-203A(5)(b))

Rule 40.05.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) lists the type of information an applicant should provide relative to the sufficiency of the water supply. The rule states: "Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year." (IDAPA 37.03.08.40.05.d.i)

Evidence derived from Rangen's past diversion is directly related to the capacity of the proposed system, the demand of the proposed beneficial use, the physical design of the proposed system, the expected peak diversion rate, and the annual volume requirements of the proposed

system. Such evidence will help the hearing officer determine whether the elements listed in Application 36-17002 are consistent with available water supplies and system capacity.

Second, evidence derived from Rangen's past diversion is relevant to the question of injury to existing water rights. (See Idaho Code § 42-203A(5)(a)) Rangen's Rule 40.05 disclosures state that Rangen's proposed diversion will be non-consumptive and will not injure downstream water rights. Evidence derived from past diversion may be offered to support the assertion that a system is non-consumptive.

The Districts' motion notes that the evidence relating to Rangen's diversion from Billingsley Creek was excluded from the pending water call proceedings before the Director of the Department. The review criteria and burdens of proof in a water call are very different from those used in a contested case for an application for permit. The Director's determination on admissibility of evidence in the water call proceedings has no bearing on the admissibility of evidence in the pending contested cases.

The Districts' motion suggests that admitting any evidence of Rangen's past diversion from Billingsley Creek would create an unfair presumption that Rangen's application should be approved. Before any permit can be issued, Rangen must satisfy all of the elements listed in Idaho Code § 42-203A(5). Past diversion from Billingsley Creek does not make Rangen's application any more or less likely to be approved.

ORDER

IT IS HEREBY ORDERED that the Districts' Motion in Limine is DENIED. The Districts' proposal to exclude all evidence relating to Rangen's past diversion from Billingsley Creek is rejected. However, the hearing officer reserves the right to exclude individual exhibits on a case-by-case basis, even those exhibits identified in the Districts' Motion, based on the standards set forth in the Department's Rules of Procedure.

Dated this 15th day of September, 2014.

A handwritten signature in dark ink, appearing to read 'J. Cefalo', is written over a horizontal line.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2014, true and correct copies of the documents described below were served by email to the following:

Document Served: Order Denying Ground Water Districts' Motion in Limine

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