

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

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS. 36-02551)	CM-DC-2011-004
AND 36-07694)	
(RANGEN, INC.))	ORDER GRANTING IN PART
)	AND DENYING IN PART
)	RANGEN'S MOTION TO STRIKE
)	JOHN S. CHURCH REPORT
)	

FINDINGS OF FACT

On February 1, 2013, Rangen, Inc. (“Rangen”) filed with the Director of the Department of Water Resources (“Director” or “Department”) a *Motion to Strike Portions of John S. Church Report (Sections 5, 8, and 9) and to Enforce Order Partially Granting Motion in Limine* (“Motion”). The Motion asserts that sections 5, 8, and 9 of the *John S. Church Expert Witness Report* (“Church Report”) advance economic balancing arguments that were rejected by the Idaho Supreme Court in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), and are precluded from being raised in this proceeding by the Director’s September 20, 2012 *Order Partially Granting Rangen, Inc.’s Motion in Limine to Exclude Testimony of John S. Church, Granting Request to Designate Expert and Denying Request for Hearing* (“Order re Motion in Limine”). Rangen attached the Church Report to its Motion.

On February 14, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Response to Rangen’s Motion to Strike Portions of the John S. Church Report* (“Response”). Citing the Idaho Rules of Civil Procedure, the Response argues that the Motion should be denied because it does not state, with particularity, which passages in sections 5, 8, and 9 of the Church Report should be stricken. The Response goes on to argue how each section is not based on economic balancing; thereby concluding that the Church Report does not violate *Clear Springs* or the *Order re Motion in Limine*.

Rangen did not file a reply.

CONCLUSIONS OF LAW

In *Clear Springs*, the Court was asked by junior-priority ground water users to opine on the scope of “full economic development,” as defined in Idaho Code § 42-226. *Clear Springs* at 800-01, 252 P.3d at 81-82. Junior-priority ground water users argued, “any economic benefit to the Spring Users resulting from the curtailment orders would be more than offset by the severe economic damage to others caused by the curtailment of the Groundwater Users’ water rights.” *Id.* at 803, 252 P.3d at 84. According to the Court, “The reference to ‘full economic development of underground water resources’ does not mean that the ground water appropriator who is producing the greater economic benefit or would suffer the greatest economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators. If that were the basis for allocating water in times of shortage, then water would be allocated among farmers based upon the market prices of their respective crops and their expected yields.” *Id.* at 802, 252 P.3d at 83. Thus, the Court held, “A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm.” *Id.* at 803, 252 P.3d at 84. The Court also made it expressly clear that Idaho Code § 42-226 “only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . .” *Clear Springs* at 805, 252 P.3d at 85. Thus, Idaho Code § 42-226 cannot be used as a basis in a delivery call between senior-priority surface water users and junior-priority ground water users.

On September 20, 2012, the Director issued his *Order re Motion in Limine*. There, the Director was asked by Rangen “to exclude all testimony of John S. Church, an expert economist retained by” IGWA. *Order re Motion in Limine* at 1. Rangen acknowledged that Mr. Church had yet to submit his expert report, but his “economic work and opinions are well known to the Department and the parties.” *Rangen’s Motion in Limine to Exclude Testimony of John S. Church and Request for Hearing* (August 15, 2012). “In support of its motion, Rangen attached Church’s deposition transcript and expert report from a different administrative proceeding, and also attached a copy of IGWA’s opening brief in *Clear Springs*.” *Order re Motion in Limine* at 1. Because IGWA had yet to submit an expert report from Mr. Church, the Director agreed with IGWA “that it would not be appropriate to exclude *all* of Mr. Church’s testimony because there are some areas where the Court in *Clear Springs* left the door open for some economic analysis.” *Id.* (emphasis in original). As such, the Director ordered as follows: “Economic evidence, including testimony by Church, is excluded to the extent it revisits the balancing of economic interests raised and rejected in *Clear Springs*. However, IGWA is not foreclosed from trying to use economic evidence as part of a reasonable means of diversion argument.” *Id.* at 2.

Here, Rangen asks the Director to exclude sections 5, 8, and 9 from the Church Report, alleging “they are a rehash of the same argument that IGWA made and lost when *Clear Springs* made its call.” *Motion* at 3. IGWA argues that, because Rangen’s Motion does not state with “particularity” which portions of sections 5, 8, and 9 should be stricken, its Motion should be denied for failure to comply with “I.R.C.P. 7(b)(1) and 11(a)(1).” *Response* at 2. IGWA’s argument is unavailing, however, because the Idaho Rules of Civil Procedure “do not apply to contested case proceedings . . .” IDAPA 37.01.01.052. Rangen’s Motion meets the

requirements of the *Department's Rules of Procedure*, IDAPA 37.01.01.260, and will be considered by the Director.

Church Report, Section 5

Section 5 of the Church Report is titled “A Brief Trout Farming Economic History.” *Church Report* at 3. Section 5 makes factual statements about the trout farming industry, along with economic data and interpretation of that data. Section 5 does not balance the economic costs and benefits of curtailment. The Director agrees with IGWA, “Section 5 of the Church report provides a general overview of the trout farming industry.” *Response* at 2. Section 5 should not be stricken.

Church Report, Section 8

Section 8 of the Church Report is titled “Rangen’s Request for Immediate Curtailment of Junior Groundwater Rights.” *Church Report* at 9. The first three paragraphs of Section 8 contain recitations of technical information from Leonard Rice Engineers, Inc.—on behalf of Rangen—and Dr. Brendecke—on behalf of IGWA—regarding the effects of curtailment at Rangen. Those paragraphs do not balance the economic costs and benefits of curtailment. The fourth paragraph of Section 8 contains no citation, so the Director assumes Mr. Church has drawn his own conclusion, which is stated as follows: “assuming a diversion rate of 0.02 cfs per acre, the curtailment of 479,200 ground water irrigated acres would immediately eliminate beneficial use of 9,584 cfs. By this comparison, Rangen would receive less than two-tenths of 1% (0.0018) of the curtailed water.” *Id.* Whether or not the Director agrees with Mr. Church’s assumptions is not relevant for purposes of evaluating Rangen’s Motion. Mr. Church certainly examines the impacts of curtailment in the fourth paragraph, but does not balance the economic costs and benefits of curtailment. The Director agrees with IGWA that the first four paragraphs of Section 8 are “based on a comparison of water use as opposed to a comparison of economic impacts.” *Response* at 3. The first four paragraphs of Section 8 should not be stricken.

The same cannot be said of the fifth paragraph, which states, “curtailment of ground water irrigators will cause [a] great deal of economic harm to the economy of the State of Idaho and in particular to the economy of south central Idaho, while having little effect on water flows at Rangen.” *Church Report* at 9. The implication of this paragraph is that Rangen will receive less economic benefit from curtailment than the economic costs that will be borne by others. The fifth paragraph of Section 8 should be stricken as it violates *Clear Springs* and the *Order re Motion in Limine*.

The sixth and final paragraph of Section 8 discusses “reasonable alternatives [to] curtailment of 479,000 acres of ground water irrigated lands that would increase the availability of usable water at the Rangen Research Hatchery.” *Church Report* at 9. The Church Report does not discuss what these reasonable alternatives are, other than they should be pursued. This paragraph does not balance the economic costs and benefits of curtailment and should not be stricken.

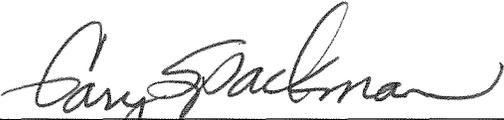
Church Report, Section 9

Section 9 of the Church Report is titled “Immediate Economic Impacts versus Longer-Term Economic Benefits.” *Id.* The first five paragraphs of Section 9 contain varying degrees of economic cost/benefit balancing (e.g. “economic impact”; “predicted or claimed economic benefits”; “loss of annual economic output in southern Idaho”; “small short-term benefits”). The Director will not parse out which sentences within those paragraphs could stand on their own, as economic balancing is so interwoven. In the sixth and final paragraph of Section 9, Mr. Church opines that Rangen should pursue alternative measures before curtailment is ordered. Because the sixth and final paragraph in Section 9 states that it draws its conclusions from prior paragraphs in Section 9 that are premised on economic cost/benefit balancing, the entirety of Section 9 should be stricken as it violates *Clear Springs* and the *Order re Motion in Limine*.

ORDER

Based upon the foregoing, the Director GRANTS IN PART and DENIES IN PART Rangen’s *Motion to Strike Portions of John S. Church Report*. Paragraph 5 of Section 8 and the entirety of Section 9 shall be stricken as they contain impermissible economic balancing of the costs and benefits of curtailment. The remaining paragraphs of Section 8 and the entirety of Section 5 are permissible and will not be stricken.

Dated this 4th day of March, 2013.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7/24 day of March, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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