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

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02551 & 36-07694

(RANGEN, INC.)

Docket No. CM-DC-2011-004

**IGWA'S RESPONSE TO
RANGEN'S MOTION IN LIMINE TO
EXCLUDE JOHN S. CHURCH**

Idaho Ground Water Appropriators, Inc. ("IGWA"), acting for and on behalf of its members, submits this memorandum pursuant to IDAPA 37.01.565 in response to *Rangen, Inc.'s Motion in Limine to Exclude Testimony of John S. Church* ("Motion") dated August 15, 2012. For the reasons that follow, the *Motion* must be denied.

ANALYSIS

- 1. It would be an abuse of discretion to exclude Mr. Church from the hearing based on speculation as to what his testimony may be.**

The *Motion* asks the Director to issue an order "prohibiting the Idaho Ground Water Appropriators, Inc. ("IGWA") from offering any testimony from Economist John S. Church at the hearing of this matter." (*Motion* at 1; emphasis added.) While the *Motion* takes issue with testimony offered previously by Mr. Church in other cases, it does not ask the Director to exclude a certain type of evidence; rather, it requests the exclusion of *any* testimony that he may offer in this case. In other words, the *Motion* asks the Director to exclude Mr. Church entirely, irrespective of what evidence he may seek to offer.

Rule 600 of the Rule of Procedure of the IDWR permits the Director to "exclude evi-

ence that is irrelevant.” IDAPA 37.01.01.600 (emphasis added). It does not authorize the complete exclusion of a competent witness, irrespective of the evidence offered by that witness. *Id.* Moreover, Rule 600 takes a liberal approach to the admission of evidence, providing that the Director is “not bound by the Idaho Rules of Evidence,” and that “[e]vidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development.” IDAPA 37.01.01.600.

It would be improper and an abuse of discretion for the Director to entirely exclude a witness from this proceeding, especially before that witness has offered any testimony. This case is in the early stages of development, in the midst of discovery, before any expert report has been submitted, and it is unknown what issues may arise that require evaluation by Mr. Church. It is certainly not enough that one party speculates as to what testimony he may offer. If witnesses could be excluded based merely on speculation that they may seek to offer irrelevant testimony, then all witnesses could be excluded.

Because the *Motion* seeks to exclude Mr. Church entirely, irrespective of the testimony he may offer, the *Motion* must be denied.

2. The Director should not effectively rewrite Rangen’s *Motion* by treating it as a motion to exclude economic evidence.

Proponents of motions bear the obligation to “state with particularity the grounds therefor ... and set forth the relief or order sought.” Idaho Rule of Evidence 7(b)(1). Rangen made a strategic decision in making its far-reaching request to exclude Mr. Church entirely, as opposed to seeking to exclude a specific type of evidence. The Director should not effectively rewrite Rangen’s *Motion* by treating it as a motion to exclude economic evidence. It was Rangen’s duty to state the relief it sought, which it did. Since Rangen requested relief that the Director cannot properly grant (i.e. the exclusion of Mr. Church entirely, irrespective of what evidence he may seek to offer), the Director need not address the issue of whether and to what extent economic evidence may be relevant in this proceeding.

3. If the Director decides to treat Rangen’s *Motion* as a motion to exclude all economic evidence, the *Motion* must still be denied.

Rangen’s *Motion* is predicated on the mistaken assumption that economics have no place whatsoever in water right administration. Rangen would have the Director believe that responding to a delivery call consists of nothing more than comparing decrees, turning headgates, and

shutting off pumps. As the Director knows, there is more to it than that.

Conjunctive Management Rule (CM Rule) 42 lists a number of factors that the Director may consider when responding to a delivery call, and economic issues bear directly or indirectly on a number of them, such as “the effort or expense of the holder of the water right to divert from the source” (42.01.b; emphasis added), the “cost of exercising [] a senior priority surface or ground water right” (42.01.c; emphasis added), the “amount of water being diverted and used as compared to the water rights” (42.01.e), whether the senior’s water needs can be met via alternate diversion and conveyance efficiency and conservation practices (42.01.g), and whether the senior’s water needs can be met using alternate points or means of diversion (42.01.h). Economics may also bear on determinations involving futile call, the feasibility of mitigation plans submitted under CM Rule 43, and reasonable use of water. In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 876-77 (2007) (“*AFRD2*”), the Idaho Supreme Court held that these determinations are within the constitutional bounds of the Director’s discretion when administering water rights.

Rangen claims the Idaho Supreme Court has since ruled out any consideration of economics, citing the holding in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011), that Idaho Code § 42-226 does not apply to delivery calls by spring users against groundwater users. (*Motion* at 3-8.) Rangen contends that this ruling means that “there is no place for economic analysis” in conjunctive water administration. *Id.* at 8. That decision, however, does not go nearly as far as Rangen would like.

The *Clear Springs* decision addresses the concept of full economic development into two different contexts. Part of the decision addresses Idaho Code § 42-226 which provides that full economic development of underground water resources means that “[p]rior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels” as opposed to historic levels. IGWA had argued in that case that the effect of section 42-226 is that senior spring users are protected in the amount of spring flow that discharges from the ESPA under the maintenance of reasonable pumping levels as opposed to historic levels. The Court ruled otherwise, holding that “section 42-226 only applies to appropriators of ground water.” *Clear Springs*, 150 Idaho at 803.

The Court also considered the concept of full economic development as it relates to the Director’s duty to consider the public’s interest in maximizing beneficial use of water resources.

The Court held that

[t]here is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between "full economic development" and the "optimum development of water resources in the public interest." They are two sides of the same coin. Full economic development is the result of optimum development of water resources in the public interest. ... The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Id. at 808. Consistent with the policy of maximum beneficial use, the Court affirmed that a senior is not protected in an unreasonable means of diversion, and not entitled "to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." *Id.* at 809. The Court further held that the economic arguments made by IGWA were relevant to the issue of whether a senior is employing reasonable means of diversion, explaining that "[u]nder the law, the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development must challenge the Spring Users' means of diversion." *Id.* at 810.¹

Rangen points to the statement in *Clear Springs* that, "A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm," as support for its proposition that all economic considerations are off-limits. (*Motion* at 5; quoting *Clear Springs*, 150 Idaho at 803.) When read in context, however, that statement simply affirms that amongst groundwater pumpers (where Idaho Code § 42-226 applies) the Director is still required to administer groundwater rights by priority as necessary to maintain reasonable pumping levels. *Clear Springs*, 150 Idaho at 802-03. In no way does the statement abrogate the Court's holding—five pages later in the decision—that economic considerations may be taken into account when evaluating reasonable use. Not does the statement in any way condition the Director's authority to take into account the economic considerations involved in determining material injury under CM Rule 42 and evaluating mitigation plans under CM Rule 43.

Because the CM Rules clearly authorize the Director to consider economic issues when determining material injury and evaluating mitigation plans, and because the Idaho Supreme Court affirmed in *Clear Springs* that economic considerations may be taken into account when

¹ While the Court refused to consider the reasonableness of *Clear Springs*' means of diversion, it nonetheless clearly affirmed that economics are relevant to that analysis.

determining reasonable use, Rangen's *Motion* must be denied.

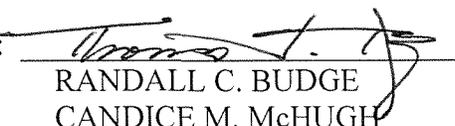
CONCLUSION

The *Motion* must be denied because Rangen seeks to exclude Mr. Church entirely from this case, irrespective of what testimony he may offer, and it would be improper and an abuse of discretion for the Director to entirely exclude a competent witness before that witness has offered any testimony. The Director should not treat Rangen's *Motion* as a request to exclude all economic evidence, because Rangen did not request such relief. If the Director nonetheless considers the *Motion* as such, it must still be denied because economic issues bear directly or indirectly on a number of material injury and mitigation plan factors, and because the Idaho Supreme Court specifically held in *Clear Springs* that economic considerations may be relevant to determinations of reasonable use and reasonable means of diversion.

Finally, IGWA opposes Rangen's request for a hearing. While IGWA will participate in a hearing if desired, it believes the issues are sufficiently clear and straightforward to enable a decision on the pleadings, without the time and expense of oral argument.

RESPECTFULLY SUBMITTED this 20th day of August, 2012.

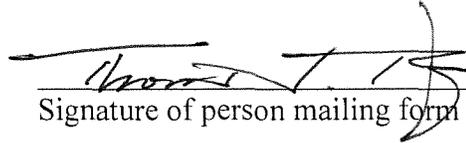
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CERTIFICATE OF MAILING

I hereby certify that on this 28th day of August, 2012, the foregoing document was served on the following persons in the manner indicated.

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