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BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 AND 36-07694	)	Docket No. CM-DC-2011-004
(RANGEN, INC.)	)	**CITY OF POCATELLO'S RESPONSE TO RANGEN'S MOTION FOR PROTECTIVE ORDER**

COMES NOW, the City of Pocatello ("Pocatello"), by and through its undersigned counsel, to respond to Rangen's Motion for Protective Order ("Motion"). The core of a conjunctive management delivery call is examining the nature and extent of the senior's beneficial use. *AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433, 447-448 (2007). Rangen's beneficial uses of its water rights are fish research and fish production, yet Rangen's Motion seeks to withhold information integral to an understanding of how Rangen conducted research and/or produced fish in the past. Its failure to be forthcoming with these materials is prejudicial to junior ground water users, including Pocatello. Pocatello respectfully requests that Rangen's

Motion for Protective Order be denied. Pocatello also incorporates IGWA's Response brief by reference.

I. RANGEN'S COSTS ASSOCIATED WITH PROVIDING INFORMATION IN RESPONSE TO DISCOVERY ARE NOT EXCESSIVE; 75% OF THEM WERE SELF-IMPOSED

Rangen's Motion (at pages 5-6) suggests that the sums it has expended to date should preclude its providing the disputed materials to IGWA and Pocatello. In fact, to avoid discovery, the test Rangen must satisfy is whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.". Adams v. United States, 4:CV 03-49-BLW, 2010 WL 5137893 (D. Idaho Dec. 9, 2010). Put another way, the measure is an estimate of how much responding to the request would cost in relation to the benefit sought by the discovering party, not what Rangen has spent previously. If Rangen believed the amounts expended previously were burdensome, they should have objected at that time.[1] There is no 'cutoff' in discovery when you decide you have spent enough, its measured on a request by request basis. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established

[1] Rangen complains about bills of $4300 and $7300 related to various discovery efforts it has undertaken. Pocatello has had its own discovery expenses—including a special trip to the Rangen facility in October after a Rangen witness, during the September depositions, accidentally disclosed the existence of a room full of fish research reports conducted at the Rangen facility that was previously withheld. The $7300 charge for the forensic computer specialist about which Rangen complains was incurred because of Rangen's internal decision to recover certain electronic materials. Despite its present allegation that this cost was unreasonable, Rangen never conferred with Pocatello and IGWA regarding whether the parties would agree to exclude said materials from the scope of discovery in this matter, nor did it request production by an alternative, less expensive method. Indeed, neither IGWA or Pocatello requested recovery of this information—and certainly not on Rangen's dime. *See,* Affidavit of Candice McHugh. And although Rangen's counsel sent a letter announcing the efforts of the forensic computer specialist (referred to in Rangen's brief and the Affidavit of Robyn Brody), Rangen's counsel has never explained why they were making the effort to recover said materials in the first place.

that a failure to object to discovery requests within the time required constitutes a waiver of any objection.").

As described below, the information sought in IGWA's discovery requests related to Woods Pond and Decker Springs is critical to understanding the patterns of water use made by Rangen prior to 2003. If Rangen doesn't want to pay to scan and produce this information electronically, the Idaho Civil Rules allow it to make the relevant documents available for examination by opposing counsel and, as occurred with the documents obtained from IGWA and Pocatello's October field trip to Rangen's research repository, for opposing parties to pay the cost of obtaining copies of those documents.

II. RANGEN SUGGESTS THAT FISH PRODUCTION NUMBERS ARE NOT RELEVANT TO AN INVESTIGATION OF ITS BENEFICIAL USES

Rangen objects to IGWA's request for information from other facilities in which Rangen has raised fish on the ground that fish production information is not relevant to its delivery call. To the contrary, Rangen's beneficial use of its water supply is the core of a delivery call and IGWA and Pocatello have been attempting to understand how many fish Rangen has produced over the history of the facility. This has nothing to do with Rangen's profit—fish production is the decreed use for Rangen's water right; fish production and research are the actual beneficial uses to which Rangen has put the water. Under these circumstances, IGWA and Pocatello are entitled to test whether Rangen's use of water has been, *inter alia,* "reasonable".

Towards that end, and with the understanding that IDWR does not have fish expertise of its own, our experts have been attempting to reconstruct Rangen's historical fish production (integral to understanding Rangen's historical beneficial uses) to be helpful to the Director in his evaluation of the delivery call. To date, our experts have been unable to substantiate historical Rangen fish production numbers based on the size and water flows in the facility; that these other

facilities have been used is without dispute. *See, e.g.,* Exhibit 31. Deposition testimony establishes that Rangen previously relied on the other facilities to "grow out" fish, or for other fish production purposes.[2] Thus, an understanding of Rangen's fish production relationship with the other facilities (whether it was "growing out" fish or simply maintaining fish at other facilities for periods of time) is critical to understanding the basis for Rangen's historical production numbers. In addition, Rangen has conducted fish research at other facilities.[3] In short, understanding of historical practices versus current fish production practices vis a vis water use goes to the question of whether, *inter alia,* Rangen's water use has been efficient and reasonable, and whether Rangen's means of diversion are reasonable. Without information related to fish production at Rangen's other facilities, comparisons of Rangen's current fish production with past fish production is the metaphorical comparison of apples and oranges.

III. ALTERNATIVELY, THE DIRECTOR COULD LIMIT EVALUATION OF RANGEN'S FISH PRODUCTION TO THE PERIOD 2003-2012 TO AVOID HISTORICAL COMPARISONS THAT WOULD REQUIRE DISCLOSURE OF INFORMATION REGARDING RANGEN'S OTHER FACILITIES

However, another way to evaluate the beneficial uses of Rangen's water rights over time is to exclude the periods of time during which Rangen owned or operated additional facilities. This takes out of the equation the increased capacity provided by the other facilities, and allows a direct comparison between what was done historically from 2003 forward with what is being done today to evaluate beneficial uses. IGWA and Pocatello are comfortable with limiting evaluation of fish production and research beneficial uses to the period from 2003-2012[4]. From IGWA and Pocatello's perspective, such a limitation would resolve this discovery dispute, avoid

[2] *See,* Attachment 1, deposition excerpts from Joy Kinyon's deposition on September 10, 2012. 46:24-47:24; 76:19-77:14; 78:4-78:22; Kinyon 83:5.
[3] *See,* Attachment 1, 26:6-29:20.
[4] However, given the various problems with Rangen's flow information, Pocatello and IGWA believe such a date restriction should apply only to evaluations of beneficial use related to fish production and fish research.

the allegedly "burdensome" discovery that Rangen seeks to avoid, and allow an "apples to apples" comparison of fish production and fish research.

Respectfully submitted this 28TH day of January, 2013.

CITY OF POCATELLO ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Response to Rangen's Motion for Protective Order [with no Confidential Information included]** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:

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CONFIDENTIAL INFORMATION

The enclosed is subject to the terms of the *Protective Order* entered on August 31, 2012 and is being disclosed pursuant to its terms. The enclosed documents may not be used other than in connection with the above-referenced delivery call.

EXHIBIT 31

to deposition for Joy Kinyon

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ATTACHMENT 1

deposition excerpts from Joy Kinyon's deposition on September 10, 2012