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DEPARTMENT OF  
WATER RESOURCES

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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 TO STRIKE PORTIONS OF  
JOHN S. CHURCH REPORT**

Idaho Ground Water Appropriators, Inc. (IGWA) respectfully submits this response in opposition to *Rangen, Inc.'s Motion to Strike Portions of John S. Church Report (Sections 5, 8 and 9) and to Enforce Order Partially Granting Motion in Limine* (referred to herein as "*Rangen's Motion*") filed with the Idaho Department of Water Resources on February 1, 2013.

*Rangen's Motion* should be denied at the outset because it fails to specify which statements or opinions of John S. Church that Rangen contends should be stricken from his report. Rangen objects to sections 5, 8 and 9 of the report, but does not identify which statements or opinions in those sections purportedly conflict with the *Order Partially Granting Motion in Limine*. (*Rangen's Motion* 3.) Instead, Rangen ask the Director to delete those sections entirely, as if every statement in them violates the *Order Partially Granting Motion in Limine*. It is obvious from reading those sections that the majority of the statements made there do not even arguably conflict with the *Order Partially Granting Motion in Limine*.

Idaho Rules of Civil Procedure provide that every motion "shall state with particularity the grounds therefore" and be "well grounded in fact." I.R.C.P. 7(b)(1) and 11(a)(1). Applied to

a motion to strike, this at least requires Rangen to identify the particular statements or opinions that it claims violate the *Order Partially Granting Motion in Limine*.

Rangen's failure to identify particular statements or opinions that it seeks to strike places IGWA in the position of having to either divine which statements Rangen believes violate the *Order Partially Granting Motion in Limine*, or address every single sentence in sections 5, 8 and 9 of the report. Neither imposition is fair or acceptable. The burden is on Rangen to prove that its motion should be granted. It is not enough to make a broad, generalized allegation of impropriety, and expect a ruling from the Director, without specifying which particular statements in the Church report Rangen contends violate the *Order Partially Granting Motion in Limine*. Therefore, IGWA asks the Director to deny *Rangen's Motion* because it lacks an acceptable degree of particularity as required by I.R.C.P. 7(b)(1) and 11(a)(1).

If the Director elects to address *Rangen's Motion* despite the lack of particularity, it must still be denied because, as explained below, the John S. Church report does not violate the *Order Partially Granting Motion in Limine*. IGWA agrees with Rangen that it would not be appropriate for Mr. Church to advance an argument that water should be allocated among water users based on who makes the most profitable use of it. (*Cf. Rangen's Motion 2.*) However, economic evidence can be considered with regard to issues involving reasonable use of water, reasonable conveyance efficiencies, and reasonable means of diversion. The *Order Partially Granting Motion in Limine* (September 20, 2012) acknowledges this, ruling that while economic evidence is not admissible for the purpose of balancing economic interests, it is admissible to support arguments concerning reasonable use of water and reasonable means of diversion. (*Order at 2.*)

Section 5 of the Church report provides a general overview of the trout farming industry. It says nothing of how much money Rangen could make if junior-priority groundwater rights are curtailed, nor does it speak of how much economic harm will result from curtailment. It simply gives a high-level review of the aquaculture industry, which provides context for certain decisions made by Rangen as to how it uses water, and corroborates other evidence to be submitted in this case. The explanation of Mr. Church that commercial fish production is a competitive industry that is pressured by foreign imports and increasing feed prices is by no means offered to demonstrate that the economic costs of curtailment to juniors outweigh the economic benefits to Rangen. It is offered to corroborate other evidence of why Rangen has elected to not produce fish commercially and to not raise as many fish with its current water supply as it could, includ-

ing Rangen’s own admission that it has purposefully elected to not use the Rangen Research Hatchery to compete with the commercial fish producers who buy fish feed from Rangen. This goes to the question of whether Rangen’s alleged injury to fish production is credible. It further serves to provide context for Rangen’s contract with Idaho Power, and its hatchery being operated as a conservation hatchery as opposed to a commercial fish production facility.

Section 8 of the Church report highlights the gross disparity between the amount of water curtailed and the amount expected to accrue to Rangen. It focuses on water, explaining that if the entire aquifer is curtailed as Rangen proposes it would eliminate beneficial use of 9,584 cfs by juniors to provide only 17 cfs to Rangen—less than two-tenths of one percent of the amount of water curtailed. Mr. Church’s conclusion from this disparity is that there are “many more reasonable alternatives than curtailment of nearly 479,000 acres of ground water irrigated lands that would increase the availability of usable waters at the Rangen Research Hatchery.” (*Church Report* 9.) This conclusion clearly does not by itself violate the *Order Partially Granting Motion in Limine* since it is based on a comparison of water use as opposed to a comparison of economic impacts. While section 8 does state that such a gross disparity will result in economic harm, that statement is made in reference to section 9 of the report and does not undermine the validity of the comparison of amount of junior water use that will be eliminated in comparison to the additional water that is projected to accrue to Rangen from curtailment.

Section 9 of the Church report builds on the disparity outlined in section 8, between the curtailed water use and benefit to Rangen, to demonstrate that curtailment is an inefficient means of providing water to Rangen. It explains that curtailment will result in a nearly-immediate and largely permanent net loss of annual economic output in southern Idaho on the magnitude of hundreds of millions of dollars in the near-term and billions of dollars in the long-term. This information is not provided to support an opinion that economic harm precludes curtailment. It is provided to support Mr. Church’s opinion “that it would be absurd to curtail ground water use in order to fractionally increase water flows to Rangen, without first requiring Rangen to take efforts on its own to augment or more efficiently use its water supply by employing measures that are available and have been utilized at other aquaculture facilities in Idaho.” This opinion relates back to section 7 of the Church report which addresses a number of options available to Rangen to increase its water supply by improving its diversion structures and conveyance facilities. The economic data provided in section 9 demonstrates that the high costs of curtailment make it rea-

sonable for the Director to require Rangen to make such improvements before looking to curtail junior rights. It goes to whether or not Rangen is making reasonable use of available water (CM Rule 42.01.a), whether it is reasonably and efficiently using its existing facilities to meet its needs (CM Rule 42.01.g), and whether it is reasonable to compel Rangen to pursue alternate means of diversion or conveyance before looking to curtail junior rights (CM Rule 42.01.h).

In this context, economic evidence is permissible. It is reasonable for the Director to consider the costs of curtailment when evaluating whether Rangen's reliance on an irrigation diversion at the top of the aquifer is reasonable, whether it is reasonable to require Rangen to incur the cost of installing pumping facilities, improving hatchery design, recirculating water, or installing additional wells. The Idaho Supreme Court acknowledged this in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011), when it explained:

There 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. The Court confirmed that a senior 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, and held that "the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development must challenge the Spring Users' means of diversion," *Id.* at 810 (emphasis added).

Since the economic data in section 9 of the Church report is offered to support his opinion that it is economically reasonable to require Rangen to make facility improvements before looking to curtail junior rights, and not to advance an argument that Rangen cannot generate profit from additional water or that water should be allocated based on who makes the most profit from it, such data does not violate the *Clear Springs Foods* decision or the *Order Partially Granting Motion in Limine*.

## CONCLUSION

*Rangen's Motion* should be denied because it fails to specify the statements or opinions of Mr. Church that Rangen contends violate the *Order Partially Granting Motion in Limine*, be-

cause rules of evidence are more lenient in administrative hearings, favoring admissibility, and because there are no statements or opinions in sections 5, 8 or 9 of Mr. Church's report that clearly violate the *Clear Springs Foods* decision or the *Order Partially Granting Motion in Limine*.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of February, 2013.

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By:



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## CERTIFICATE OF MAILING

I hereby certify that on the 14th day of January 2013, the above document was served upon the following persons in the manner indicated:

**Document Served: IGWA's Response to Rangen's Motion to Strike Portions of John S. Church Report**

  
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