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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
DELIVERY CALL OF RANGEN, INC.'S
WATER RIGHT NOS. 36-02551 & 36-
7694

Docket No. CM-DC-2011-004

**RANGEN, INC.'S REPLY IN
SUPPORT OF MOTION FOR
PROTECTIVE ORDER AND
REQUEST FOR STATUS
CONFERENCE**

Rangen, Inc., through its attorneys, submits the following Reply in Support of Motion for Protective Order and Request for Status Conference.

I. INTRODUCTION

IGWA and the City of Pocatello contend that Rangen should be required to answer extensive interrogatories and produce thousands of pages of business records

**RANGEN, INC.'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
AND REQUEST FOR STATUS CONFERENCE- 1**

related to two facilities it leased in the past – The Woods/Decker Springs facility and First Ascent, a facility Rangen leased to conduct research on warm water fish such as tilapia (Rangen’s Research Hatchery is a cold water facility). They argue that the information they are seeking is necessary to determine “how much water is currently needed to meet fish production and/or research needs at the Hatchery.” IGWA’s Response, at p. 4. IGWA’s position is without merit for the reasons set forth below.

II. ANALYSIS

1. From the outset, it is important to recognize that the amount of water Rangen “currently” needs is not an issue to be decided in this case. Rangen has decreed water rights for over 76 cfs at its Research Hatchery and has been experiencing declining flows for decades. It is presently receiving only a fraction of the water to which it is entitled (e.g., approximately 15 cfs at the present time), is saddled with empty raceways throughout the facility, and has tailored its operation at the Research Hatchery to beneficially use the water that is available. The fact that Rangen has shrunk its operation to take into account declining flows cannot be a factor used to limit its ability to make this call.
2. Second, it is important to recognize that “need” is not a proper focus of this call either. Rangen is entitled to beneficially use all of the water encompassed by its water rights fish propagation so long as the water is not being wasted.
3. Contrary to the Intervenor’s assertion, Rangen does not contend that the Intervenor cannot conduct broad discovery concerning the Research Hatchery. IGWA’s Response, p. 1. It is true that the parties have a genuine dispute concerning what constitutes “material injury” and the relevance of the discovery

that IGWA has done (the Director has made it clear that the issue of what constitutes material injury will be resolved at another time). Nevertheless, Rangen has not prevented the intervenors from conducting extensive discovery as to how Rangen operates its Research Hatchery. In fact, to avoid lengthy discovery battles, Rangen has allowed the Intervenor, their attorneys and experts to inspect the facility on two occasions, opened the doors to its proprietary research records, and produced decades of water flow measurements, water quality data, and fish production records, including feed, mortality and disease records. The Intervenor's "fear" about not having access to information so that they can try and carry their burden of proof by clear and convincing evidence is greatly exaggerated.

4. Rangen's position is that IGWA's recent discovery request for information and production of records concerning two leased facilities (one of which is a warm water facility not suitable for trout production) that it no longer operates is not permissible because the matters IGWA seeks to discover are not reasonably calculated to lead to the discovery of admissible evidence.
5. Rule 26(b)(1) of the Idaho Rules of Civil Procedure governs the scope of discovery. The rule states:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought

will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

IRCP 26(b)(1)(emphasis added).

6. Rule 401 of the Idaho Rules of Evidence defines what is “relevant.” The rule states:

“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.

IRE 401.

7. Rule 42 of the Departments Conjunctive Management Rules sets forth certain factors that the Director may consider when determining material injury. The Rule states:

Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

- a. The amount of water available in the source from which the water right is diverted.
- b. The effort or expense of the holder of the water right to divert water from the source.
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met by alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

8. To resolve whether Rangen's Motion for Protective Order should be granted, the Director has to look at the information sought by the Intervenors and ask whether it is relevant to any of the factors set forth in Rule 42 or whether it is reasonably calculated to lead to the discovery of admissible evidence. For example, IGWA's Interrogatory No. 22 requests that Rangen identify the following items at the Woods/Decker Springs facility:

- a. Spring outlets that supply the Water Rights.
- b. Points of diversion of the Water Rights.
- c. Points of discharge of the Water Rights.
- d. Course(s) of water flow of the Water Rights between the point(s) of diversion and point(s) of discharge.
- e. Devices used to measure the quantity or quality of water flow.

Even if Rangen had the information to answer this interrogatory, a description of the spring outlets that supply the Woods facility and the other information requested in this interrogatory do not make any of the factors set forth

in Rule 42 any more or less probable or shed any light on those factors nor is their identification likely to lead to evidence that is relevant.

9. On a final note, IGWA asserts in its Response that Rangen has engaged in a pattern of late disclosures. IGWA's Response, p. 5. IGWA also claims that Rangen "purportedly" knows "shockingly" little about its operation. IGWA's Response, p. 5. The City of Pocatello actually accused Rangen of withholding production documents during Joy Kinyon's deposition because the documents were not in a convenient format for their purposes:

MS. KLAHN: And you've made it as difficult as possible for us to put our arms around that and yet you're standing in front of the Director asking him to curtail the entire ESPA including the third largest city in Idaho and we're supposed to figure out what the trends are because Rangen's never done it. That's not credible. I'm sure you guys have done it. Take the financial information out of it, send us the summaries in Excel and quit making it so difficult and expensive.

Kinyon Depo., p. 89, lines 11-20 (attached as Exhibit 1 to Supplemental Brody Affidavit in Support of Motion for Protective Order). In its Response, IGWA also asserted that Rangen withheld information regarding its licensing with the Department of Agriculture and that it was only through IGWA's request to the Department of Agriculture that it learned of the leased facilities. IGWA's Response, p. 6. The Intervenors knew from the first set of documents Rangen produced in September, 2012 that Rangen had operated other fish propagation facilities in the past. Rangen produced monthly production reports such as that attached as Exhibit 2 to Supplemental Brody Aff which identified the other facilities by name and contained redactions of the production data because it was not the subject of any discovery requests and was not relevant to any of the issues

to be decided in this matter. The Intervenors actually questioned Rangen personnel about the company's use of other facilities during their depositions. For example, the following exchange took place with Joy Kinyon on September 10, 2012:

- Q. What does "Woods" refer to?
A. At that point in time we were leasing some dirt ponds.
Q. And what did you do with those dirt ponds?
A. Just additional fish production.
Q. Oh, okay. You raised fish in them?
A. Correct.
Q. Where were those located?
A. In Hagerman.
Q. On the same property as the --
A. No. They were north of Hagerman.
Q. On the rim?
A. No. It's down closer to the river.
Q. Does Rangen still lease those ponds?
A. No.
Q. When did you stop?
A. I believe it was in 2002 time frame.
Q. Okay. Why did you stop leasing them?
A. It wasn't a very cost-efficient project in dirt ponds. We had a lot of upkeep to the ponds, and the rent was high.
Q. What's the water source for the Woods ponds?
A. Spring water that -- Woods is located on the old Bliss Grade Road, if that means anything.

Kinyon Depo., p. 76, line 19 – p. 77, line 18 (attached as Exhibit 1 to Supplemental Brody Aff). IGWA made its request to the Department of Agriculture on November 14, 2012 – approximately two months after it questioned Kinyon about the Woods/Decker Springs facility. See Exhibit 3 to Supplemental Brody Aff (letter from Department of Agriculture to IGWA's attorney's re: request for information made on November 14, 2012).

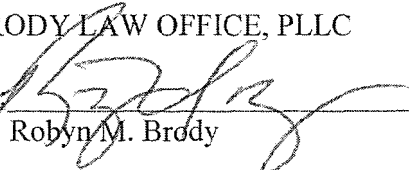
10. Given the increasing intensity of the allegations being made and the flurry of discovery motions, Rangen requests a status conference with the Director in an effort keep the parties moving in the right direction.

III. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that its Motion for Protective Order be granted and that a status conference be convened.

DATED this 1st day of February, 2013.

BRODY LAW OFFICE, PLLC

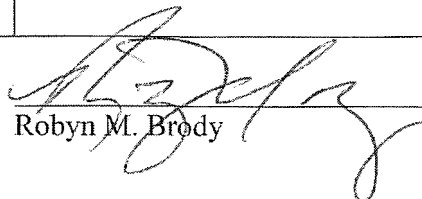
By: 
Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 1st day of February, 2013 she caused a true and correct copy of the foregoing document to be served upon the following using the methods shown:

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