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 APR 23 2013
 DEPARTMENT OF
 WATER RESOURCES

Attorneys for the Idaho Ground Water Appropriators, Inc.

**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

**RESPONSE TO MOTION TO
 COMPEL**

Idaho Ground Water Appropriators, Inc. (IGWA) submits the following response to Rangen's *Motion to Compel* dated April 17, 2013. This response is supported by the *Affidavit of Brian D. Higgs* filed herewith.

The *Motion to Compel* should be denied because it is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Idaho Rules of Civil Procedure restrict discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action." I.R.C.P. 26(b)(1). Mr. Haemmerle argues that Mr. Higgs' notes "seem like documents designed to lead to discoverable evidence" (Haemmerle Affidavit ¶7, emphasis added) but this is not enough to compel their production. Rangen has the duty to explain why the notes themselves are relevant, or what relevant information the notes will lead Rangen to discover. Rangen has not made that showing.

Further, the *Affidavit of Brian D. Higgs* demonstrates that the notes are not relevant to this case. They are private notes that he made many years ago, before ESPAM1.0 was completed, and long before ESPAM2.1. They have nothing to do with Rangen, or Mr. Higgs' work as watermaster for Water District 140, or his groundwater

measurements on behalf of Ground Water Districts. They are clearly irrelevant to Rangen's claim of material injury, or reasonable use of water, or the reliability of ESPAM2.1. Therefore, their discovery is not authorized under I.R.C.P. 26(b)(1).

Even if the notes did have some remote degree of relevance, their probative value is substantially outweighed by the danger of unfair prejudice; therefore, discovery is precluded under Rule 403 of the Idaho Rules of Evidence. As explained in the *Affidavit of Brian D. Higgs*, the concern of Mr. Higgs is not that his notes discredit Dr. Brendecke in any way—they don't—the concern is that they will be circulated amount water users, taken out of context, and used for malicious purposes. The fact that the notes were made more than a decade ago, long before ESPAM2.1 was created, by itself demonstrates that the notes have little if any probative value on the reliability or accuracy of ESPAM2.1, and it is inconceivable that the notes could have probative value on any other issue in this case. In contrast, the nature of the language used in the (private) notes lends them to use for improper purposes. Therefore, the notes are additionally precluded from discovery under I.R.E. 403.

For the foregoing reasons, IGWA respectfully asks the Director to deny Rangen's *Motion to Compel* filed April 17, 2013, because (i) Rangen has failed to demonstrate that the notes are relevant or reasonably calculated to lead to the discovery of relevant evidence (I.R.C.P. 26(b)(1)), and (ii) even if the notes have some probative value, it is substantially outweighed by the danger of unfair prejudice (I.R.E. 403).

In analyzing the *Motion to Compel*, IGWA authorized the Director to obtain from M&M Court Reporting the sealed Exhibit 284 and review it *in camera*. If the *Motion to Compel* is denied, IGWA asks the Director to return it by mail to IGWA and see that it is not made part of the IDWR's public records database.

DATED this 23rd of April, 2013.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED


Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of April, 2013, I served a true and correct copy of this document on the persons listed below in the manner(s) indicated.



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