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Attorneys for Rangen, Inc.

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

**IN THE MATTER OF THE SECOND
MITIGATION PLAN FILED BY THE IDAHO
GROUND WATER APPROPRIATORS FOR THE
DISTRIBUTION OF WATER TO WATER RIGHT
NOS. 36-02551 AND 36-07694 IN THE NAME
OF RANGEN, INC.**

“TUCKER SPRINGS”

Docket No. CM-MP-2014-003

**RANGEN, INC.’S RESPONSE IN
OPPOSITION TO IGWA’S
MOTION IN LIMINE**

Rangen, Inc. (“Rangen”), through its attorneys, submits the following Response in Opposition to IGWA’s Motion in Limine.

I. INTRODUCTION

IGWA has filed a Motion in Limine seeking to limit the evidence that Rangen and the other Protestants can present at the hearing of this matter. IGWA’s Motion should be denied for the reasons set forth below.

II. ARGUMENT

A. The Director Should Not Adopt a Bright-Line Exclusionary Rule for Evidence Disclosed after a Deadline.

IGWA argues that the Director should adopt a bright-line rule precluding Rangen and the other Protestants from presenting any evidence or offering any testimony that was not timely disclosed. IGWA's request is ironic since Director Spackman ordered IGWA to disclose the evidentiary details of its mitigation plan, including engineering, rights-of-way, water availability and associated water rights, and construction and delivery schedules by May 12, 2014. See *Notice of Hearing, Order Authorizing Discovery, and Scheduling Order dated May 2, 2014*. While IGWA produced engineering drawings in compliance with the Scheduling Order, IGWA did not disclose a 95 page expert report from SPF Engineering until May 19, 2014 – a week late. Rangen and the other Protestants have had two weeks to analyze the plan, conduct discovery and prepare for a three-day hearing.

IGWA does not cite any rules, statutes or other authority in support of its position. IGWA's position is actually contrary to the spirit of IDWR's Rules of Procedure which expressly provide for a liberal construction of the rules and also provide that traditional rules of evidence and civil procedure generally do not apply:

The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest. Unless required by statute, or otherwise provided by these rules, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency.

Rule 52 (IDAPA 37.01.01.052) (emphasis added). Consistent with the common sense approach embodied in Rule 52, Director Spackman told the parties when this hearing was set that he would allow amendments to witness lists and additions to evidence because of the short timeframes involved in this matter, and that he would not get involved in motions for sanctions. The Director stated:

Everybody is worried about being surprised. Given the short time frames we're operating under, I will allow some amendments to witness lists and additions to evidence as we go forward. I recognize to some degree that it may prejudice the parties. If they feel it has prejudiced them in some way, then come to me and you can move for a continuance or something else, but I don't intend to get involved in motions for sanctions and those kinds of things with the short time frames that we have.

Transcript, p. 36, lines 13-22 (attached as Exhibit 1 to Brody Affid.) The Director has already stated that late amendments will be allowed. If IGWA is actually prejudiced by the late disclosure of a witness or evidence then it is up to IGWA to bring a motion at the time the evidence is to be presented and to ask for an appropriate remedy. The Director should not adopt the bright-line rule IGWA is advocating and should deny IGWA's Motion in Limine.

B. Rangen Has Alleged Injury to Other Water Rights and Has Standing to Raise that Issue.

IGWA contends that Rangen should be precluded from arguing that any water rights downstream of Tucker Springs or on Riley Creek will be materially injured if the mitigation plan is implemented. Without citing any statutes, rules or case law, IGWA argues: (1) Rangen did not allege material injury to others in its protest; and (2) Rangen does not have standing to raise material injury to others. IGWA has misread Rangen's Protest and its argument is contrary to CM Rule 43.

Rangen filed its Protest in this matter on April 3, 2014. Paragraphs 9 and 10 of Rangen's Protest unambiguously raise the issue of injury to downstream users. The Protest states in relevant part:

IGWA's Second Mitigation Plan is simply speculation without any information or detail. Rangen has previously considered and rejected similar projects for a variety of reasons. *IGWA's Second Mitigation Plan does not address critical factors such as:* project feasibility, necessary access easements and rights-of-way, monitoring, maintenance and repair of the delivery system, delivery system security, *potential injury to other water users*

Rangen, Inc.'s Protest to IGWA's Second Mitigation Plan, ¶ 9 (emphasis added).

Similarly, paragraph 10 states:

In general, the Second Mitigation Plan is vague and ambiguous, does not provide for adequate mitigation, provides no certainty that replacement water will be delivered to prevent injury to Rangen, *provides no certainty that it will not injure water users downstream of Tucker Springs*, is contrary to existing findings and determinations of the Director and the District Court, is not in compliance with Idaho law

Id. at ¶ 10 (emphasis added).

Rangen, as the holder of the senior water right, has standing to oppose a mitigation plan being proposed to mitigate its delivery call. Rangen raised the issue of injury to downstream users because this is one of the enumerated factors that the Director must consider under CM Rule 43 and because injury to other water rights impacts the overall feasibility of the mitigation plan. CM Rule 43.03 provides a long list of factors to consider. Rule 43.03.j states in relevant part:

Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

j. *Whether the mitigation plan* is consistent with the conservator of water resources, the public interest or *injures other water rights*,

or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.043.j (emphasis added).

From the outset of the Status Conference on April 30, 2014, IGWA has tried to eliminate injury to downstream users from the Director's consideration of this Mitigation Plan. IGWA actually advised the downstream users during opening comments that their concerns would best be addressed in a transfer application proceeding – not this Mitigation Plan hearing. See *Transcript*, p. 4, line 15 – p. 5, line 6. The Director made it clear to the Protestants that they had standing and the right to participate in this hearing. See *Transcript*, p. 14, ll. 1-15. Rule 43 expressly provides that the Director should consider injury to downstream users when determining whether to approve this Mitigation Plan. Because material injury to other water rights is a Rule 43 factor and impacts the overall feasibility of the Mitigation Plan, Rangen has standing to raise the issue and has properly done so in its Protest. As such, IGWA's Motion in Limine should be denied.

III. CONCLUSION

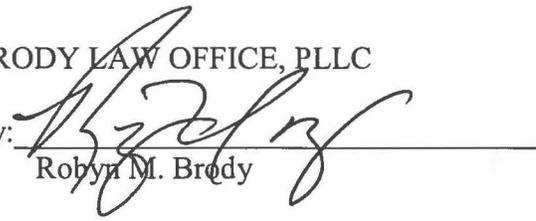
There is no basis for limiting the scope of this Mitigation Plan hearing in the manner that IGWA requests. IGWA has been trying to get the Protestants out of this matter since the first Status Conference. Rangen and the rest of the IGWA's Motion in Limine should be denied in its entirety.

DATED this 3rd day of June, 2014.

BRODY LAW OFFICE, PLLC

By: _____

Robyn M. Brody

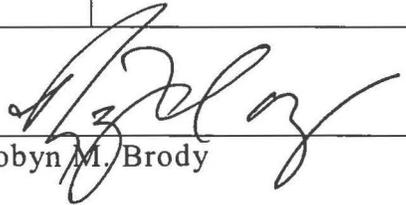
A handwritten signature in cursive script, appearing to read "Robyn M. Brody", is written over a horizontal line. The signature is positioned to the right of the printed name "Robyn M. Brody".

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 3rd day of June, 2014 she caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Randall C. Budge Thomas J. Budge RACINE OLSON NYE BUDGE & BAILEY CHARTERED 201 E. Center St. P.O. Box 1391 Pocatello, ID 83204 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
John K. Simpson Paul Arrington BARKER ROSHOLT & SIMPSON, LLP 195 River Vista Place, Suite 204 Twin Falls, Idaho 83301-3029 jks@idahowaters.com pla@idahowaters.com jlw@idahowaters.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
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