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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 MOTION IN LIMINE TO EXCLUDE BROCK, AND REQUEST FOR EXPEDITED DECISION**

Idaho Ground Water Appropriators, Inc. (IGWA) hereby moves the Director pursuant to Rule 524 of the Rules of Procedure of the Idaho Department of Water Resources and Rules 26(e), 33(a), 37(d), and 37(e) of the Idaho Rules of Civil Procedure to exclude David Brock from testifying in this case. If the Director allows Mr. Brock to testify, he will need to be deposed, the expert reports submitted previously will need to be revised and resubmitted, and the hearing schedule will need to be continued as a result. IGWA requests an expedited decision so the parties can proceed with Mr. Brock's deposition as soon as possible if necessary. This motion is supported by the Affidavit of Candice M. McHugh filed herewith.

SUMMARY

On December 21, 2012, Rangen for the first time identified David Brock as a witness in this case, and for the first time disclosed to IGWA that he possesses information related to Rangen's claim of material injury. Mr. Brock has been designated a lay witness, but his purported testimony constitutes expert testimony. The disclosure of Mr. Brock is excessively late, violates the Rules of Procedure of the Department of Water Resources, and prejudices IGWA. Therefore, Mr. Brock must be excluded from offering testimony in this case.

Should the Director permit Mr. Brock to testify anyway, IGWA must be permitted to depose Mr. Brock and revise its expert reports, Rangen should be ordered to pay all expenses associated therewith, and the hearing schedule revised.

ANALYSIS

A crucial issue in this case, as in all conjunctive management cases, is whether Rangen is suffering material injury. Rangen had a statutory obligation to make a prima facie showing of material injury in its *Petition for Delivery Call*. Idaho Code §42-237(b) requires that the *Petition* include, "A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected." (Emphasis added.) The Idaho Supreme Court held in *American Falls Reservoir District No. 2 v. IDWR* that while this does not require Rangen to re-prove that it is entitled to its decreed water right, it does mean Rangen must demonstrate that it "is suffering material injury." 143 Idaho 862, 877-78 (2007); *see also* CM Rule 40.01. The *Petition for Delivery Call* doesn't meet the minimum statutory requirement. It contains a conclusory statement that "Rangen has been, and is currently being, materially injured by junior priority ground water pumping," but it cites no facts to support that allegation. (*Petition for Delivery Call* at 4.)

Given the *Petition's* failure to explain the basis of Rangen's claim of material injury, IGWA promptly served discovery requests upon Rangen on May 23, 2012, that included the following interrogatories:

> **Interrogatory No. 5:** Name and identify the last known address and phone number of each person you may call as a witness at the hearing in this matter action [sic] and briefly state the facts to which you expect such witness to testify.
>
> **Interrogatory No. 6:** State the name, address, and telephone number of each person with knowledge of facts relating to your claim of material injury, and describe in general fashion the substance of facts to which each person has knowledge.
>
> **Interrogatory No. 7:** Identify and describe in detail all documents that you or your attorney are aware of that in any way pertain to your claim of material injury.

(Ex. A to *McHugh Aff.*)

Rangen's answers to these discovery requests were critical to IGWA's ability to investigate and prepare defenses to Rangen's claim of material injury. Rangen responded on June 27, 2012, with a long list of people, including six Rangen employees, who may have knowledge of facts relative to its claim of material injury. Mr. Brock was not listed. Per the Director's order,

Rangen filed a list of its lay witnesses on August 21, 2012. Mr. Brock was not listed. In early September IGWA deposed all six of the Rangen's employees identified in its lay witness disclosure. At the depositions IGWA inquired into the rationale for Rangen's claim of material injury. Two of the deponents mentioned Mr. Brock's name in their depositions, but neither indicated that he possessed knowledge relative to Rangen's use of water or allegation of material injury. (Ex. C and D to McHugh Aff.) IGWA's counsel understood that while Mr. Brock was employed by Rangen as a nutritionist, he did not possess information relative to the Rangen's claim of injury to its use of water, and Rangen did not supplement its discovery responses or witness disclosure following the depositions to add Mr. Brock as a witness or to identify him as someone possessing knowledge related to Rangen's claim of material injury.

IGWA retained four different experts to analyze information discovered from Rangen and to prepare expert reports, which were filed with the IDWR on December 21, 2012, as ordered by the Director. On the same day, Rangen supplemented its responses to IGWA's first set of discovery requests as follows:

> **Supplemental Response to Interrogatory No. 5:** See Rangen's Lay Witness Disclosure. In addition to the persons identified in Rangen's Lay Witness Disclosure, Rangen may call David Brock, a nutritionist employed by Rangen, Inc.
>
> **Supplemental Response to Interrogatory No. 6:** The people who may have knowledge of the facts relating to Petitioner's claim of material injury include the following persons:
>
> a) David Brock, Nutritionist, Rangen, Inc., 115 13th Ave. S., P.O. Box 706, Buhl, Idaho 83316-0706, (208) 543-6421. Mr. Brock has knowledge and information concerning feed research that has been conducted at the Research Hatchery in the past and what type of feed research Rangen could do if more water were available at the facility.

(Ex. B to McHugh Aff.) Rangen has also produced 2,370 pages of additional documents between December 21, 2012 and January 8, 2013, many of which appear to relate to research and testimony to be offered by Mr. Brock.

Rangen's recent disclosure of Mr. Brock is excessively late, in violation of IDWR rules, and prejudicial to IGWA. Rule 524 of the Rules of Procedure of the Idaho Department of Water Resources requires Rangen to comply with the Idaho Rules of Civil Procedure in answering interrogatories. IDAPA 37.01.01.524. Rule 33(a) of the Idaho Rules of Procedure requires Rangen to answer "fully in writing under oath" within thirty days. Thus, it was Rangen's duty to identify

Mr. Brock the first time it answered interrogatory number 6 on June 27, 2012.

The Rules allow parties to supplement their discovery responses, but it mandates that it be done "seasonably." I.R.C.P. 26(e). If a party fails to timely answer or supplement responses to interrogatories, the Rules authorize the Director may take whatever action is "just" with regard to the failure, including "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence." I.R.C.P. 37(d) (incorporating I.R.C.P. 37(b)(2)(B)).

The season for disclosing Mr. Brock as a witness passed months ago. This is not newly discovered evidence. Since Mr. Brock can testify about past research performed by Rangen, he must have worked at Rangen for some time. Whatever information Mr. Brock has about Rangen's claim of injury, he had it when Rangen first made its delivery call and certainly when it responded to IGWA's first discovery requests last June. Even if Rangen did not initially intend to call him as a witness, it had an obligation to disclose him as someone possessing knowledge related to Rangen's claim of material injury. Had Rangen inadvertently overlooked Mr. Brock, or had deposition questioning given Rangen reason to believe they needed to buttress their allegation of material injury with information possessed by Mr. Brock, Rangen could have easily supplemented its witness list and discovery responses, but that should have been done months ago.

Rangen either knew that Mr. Brock had information related to its claim of injury, but neglected to inform IGWA, or Rangen is now trying to come up with new justifications for its allegation of material injury. It is far too late in the hearing schedule, with far too much time and expense invested, for Rangen to add a new claim of injury. It is certainly not appropriate, now that IGWA has submitted expert reports explaining its defenses to Rangen's claim of injury, to allow Rangen to add new witnesses and raise new justifications for its claim of material injury.

It cannot be overlooked that Rangen is the party making the delivery call. If Rangen has actually been injured, Rangen should understand the nature and breadth of that injury better than anyone else, and should have known it long ago. With ten experts having already prepared and submitted their opinions in this case, the season for Rangen to add any witnesses and new claims of injury has passed. Therefore, pursuant to I.R.C.P. 37(d) and 37(b)(2)(B), the Director should preclude Mr. Brock from testifying on behalf of Rangen.

Should the Director decide to allow Mr. Brock to testify despite being disclosed so late, he will need to be deposed, expert reports will likely need to be revised or supplemented, and the

hearing schedule will need to be revised to accommodate such events. It will put IGWA and others to a great deal of expense that could have been avoided had Mr. Brock been identified timely and deposed at the same time as Rangen's other employees. Recognizing this, the Rules instruct the Director to require Rangen "to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the [Director] finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." I.R.C.P 37(d); see also I.R.C.P. 37(e).

In addition, the Director must limit Mr. Brock's testimony to non-expert, factual testimony only. Rangen has stated that Mr. Brock will testify about "what type of feed research Rangen could do if more water were available at that facility." (Ex. B to McHugh Aff.) Opinions about what type of technical research Rangen could do in the future clearly qualifies as expert testimony under Rule 702 of the Idaho Rules of Evidence. Mr. Brock appears to be an expert witness disguised as a lay witness. Therefore, if the Director allows him to testify, Mr. Brock must be restricted to non-expert matters.

IGWA is not attempting to be difficult or unaccommodating. Rangen produced thousands of documents late, in some cases on the eve of depositions, and it continues to produce documents that existed and should have been produced months ago. IGWA has refrained from making an issue of this. However, the extremely late identification of Mr. Brock clearly crosses the line and prejudices IGWA. Rangen cannot be permitted to add new witnesses this late in the case. Therefore, IGWA respectfully asks the Director to exclude Mr. Brock from testifying.

Given the schedule in this case and the fact that rebuttal reports are due February 1, 2013, IGWA asks for an expedited decision on this motion and without a hearing.

RESPECTFULLY SUBITTED this 9th day of January, 2013.

RACINE, OLSON, NYE, BUDGE &
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By: Candice McHugh for
THOMAS J. BUDGE
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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of January, 2013, **IGWA'S MOTION IN LIMINE AND REQUEST FOR EXPEDITED DECISION** was served by U.S. Mail postage prepaid to the following:

Signature of person mailing form

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