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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
FOR DELIVERY CALL OF RANGEN,
INC.'S WATER RIGHT NOS. 36-02551
& 36-07694

Docket No. CM-DC-2011-004

**RANGEN, INC.'S RESPONSE
IN OPPOSITION TO IGWA'S
MOTION IN LIMINE TO
EXCLUDE BROCK**

Rangen, Inc. ("Rangen") submits the following Response in Opposition to IGWA's Motion in Limine to Exclude Brock.

I. SUMMARY

Idaho Ground Water Appropriators, Inc. ("IGWA") has filed a Motion in Limine to exclude David Brock, a Rangen employee, as a witness. IGWA claims that Mr. Brock is an expert witness disguised as a lay witness and that Rangen's disclosure of him is

excessively late and prejudicial. IGWA's arguments are without merit for the reasons discussed below, and its Motion in Limine should be denied.

II. ARGUMENT

1. David Brock is an employee of Rangen. He works as an aquaculture feed nutritionist.
2. Rangen did not identify Mr. Brock by name as a lay witness in its Preliminary Witness Disclosure in August 2012 or in its original answers to IGWA's First Set of Interrogatories because Rangen does not believe that he has any information that is relevant to the matters to be decided by Director Spackman.
3. Rangen recently made the decision to disclose Brock, a lay witness, out of an abundance of caution because it has become apparent from the various interrogatories, requests for production and deposition questions that have been propounded that Rangen and IGWA fundamentally disagree as to what constitutes "material injury."
4. The Idaho Supreme Court recently addressed the "material injury" issue in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 810-11, 252 P.3d 71, 91-92 (2011). In Clear Springs, IGWA argued that "... a decreased water supply is not sufficient to show material injury." Id. Instead, IGWA argued that "... there must be evidence showing that with more water the Spring Users could produce more fish and profitably sell them."
5. The Supreme Court rejected IGWA's argument. The Supreme Court explained that:

The first appropriator of water for useful or beneficial purposes has the prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned. The right to appropriate water is for “beneficial uses,” not merely for profitable businesses. Beneficial use is not defined in the Constitution, nor has it been comprehensively defined by statute or by this Court. However, a beneficial use is not limited to a use that generates a profit, or even income. For example, the Constitution lists using water for “domestic purposes” as a beneficial use. We have held that “firefighting” is a beneficial use of water. Likewise, the legislature has declared as beneficial uses “drinking water,” “the watering of domestic livestock,” using low temperature geothermal resources “primarily for heat value,” using instream water “for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality”, and using water in lakes and water discharging from springs for “scenic beauty.”

Spackman, 150 Idaho at 811, 252 P.3d at 92 (citations omitted).

6. The Spackman Court also explained that:

“Material injury” is defined by the Conjunctive Management Rules as “[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.” IDAPA 37.03.11.010.14. The Rule requires impact upon the exercise of a water right. It does not require showing an impact on the profitability of the senior appropriator’s business. Such a holding would conflict with Article XV, § 3 of the Idaho Constitution, which states that “[p]riority of appropriation shall give the better right as between those using the water.” It would also require the Director or watermaster to examine the businesses of the senior and junior appropriators to determine which one could make the greater profit from the use of the water when there is a shortage. If business profitability was the basis for appropriation, decreed water rights would become meaningless. The issue would be which appropriator at the time could make the greater profit by using the water.

Spackman, 150 Idaho at 811, 252 P.3d at 92 (emphasis in original).

7. After setting out the foregoing analysis, the Spackman Court held that:

The amounts of the Spring Users' water rights had already been decreed based upon the amounts of water that they had diverted and applied to the beneficial use of fish propagation. Subject to the rights of senior appropriators, they are entitled the full amount of water they have been decreed with that use. As we have stated, "Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference."

Id. (citations omitted) (emphasis in original).

8. Despite the Supreme Court's unequivocal ruling in the Spackman case, IGWA appears to be positioning itself to make the same argument in this case. IGWA begins its Motion in Limine by arguing that Rangen's Petition for Delivery Call is deficient because it does not contain facts upon which Rangen contends its use of its water rights are being adversely affected. See IGWA's Motion in Limine at p. 2 (emphasis in IGWA's Motion).
9. Rangen's Petition for Delivery Call sets forth the basis for Rangen's call in painstaking detail. It contains Rangen's water decrees, a diagram of the Research Hatchery, photographs of the Research Hatchery, and water measurement records showing the dramatic decline in Rangen's water flows. The Petition explains the interconnection between Rangen's spring flows and junior-priority groundwater pumping and attaches preliminary expert reports based on ESPAM2.0 showing the significant spring flow recovery that would be made if junior-priority groundwater pumping in the area encompassed by ESPAM2.0 were curtailed. Rangen's Petition is not the typical "cursory letter" that has been sent to the Director in the past. Rangen carefully followed the Conjunctive Management Rules and spelled out its position precisely. By arguing that Rangen failed to set forth the basis for its material injury claim, it is clear that IGWA

does not agree that showing a shortage of water is enough to demonstrate “material injury.”

10. The fact that IGWA is positioning itself to rehash what constitutes “material injury” is also apparent in the discovery that has been propounded. Attached as Exhibit 1 to the Affidavit of Robyn M. Brody in Opposition to Motion in Limine to Exclude Brock (hereinafter Brody Aff) are copies of the Subpoenas Duces Tecum which IGWA and the City of Pocatello requested that the Director issue. The scope of the discovery set forth in those subpoenas is staggering. In a nutshell, these subpoenas call for Rangen to produce twenty-five years of fish production information. The information includes, but is not limited to, fish production numbers broken down by raceway, feed usage, mortalities, flow indices, EPA compliance reports and business contracts. After the Rangen employees were deposed in September 2012, IGWA also requested to inspect Rangen’s research records located at the Research Hatchery. See email exchange attached as Exhibit 2 to Brody Aff. Rangen gave IGWA, the City of Pocatello and their experts access to decades of research records and the intervenors arranged for the scanning and production of nearly 2,000 documents. These documents are in addition to the over 17,000 documents which Rangen has produced at its own expense. IGWA and the City of Pocatello also just recently took a second deposition of Doug Ramsey, a research scientist at the Research Hatchery, about the research that has been done at the facility.

11. The identification of Brock should come as no surprise to IGWA. Doug Ramsey identified David Brock during his first deposition and explained Mr. Brock's role in the research process:

Q: Oh, okay. That's a nice service. So – and you mentioned that you – you perform research or your assist with performance of research when it's possible to do that at the hatchery; is that right?

A: Yes, I perform that. Yeah.

Q: You do that? You're in charge of that?

A: Yes.

Q: Do you design the tests?

A: Yes, I do at times, uh-huh.

Q: Who do you work with on that?

A: I work with David Brock primarily in terms of getting the research proposal together.

Q: And how does that work? You get a research proposal together, and who do you submit it to?

A: Submit it to my boss, Joy Kinyon, for approval.

Q: Okay. All right. And I think I saw David Brock's name a couple of times.

A: He's a nutritionist for the company.

Ramsey Depo., p. 8, line 12 – p. 9, line 5 (attached as Exhibit 3 to Brody Aff.). IGWA actually came to Twin Falls and deposed Doug Ramsey again in November 2012 (after he explained Brock's role in the research process during his September 2012 deposition). IGWA could have taken Brock's deposition at that time, but did not request to do so.

12. The bottom line is that Rangen made a good faith effort to disclose all lay witnesses in August, 2012 in compliance with the Director's request. Mr. Haemmerle pointed out during the August Status Conference that other lay witnesses might be discovered after the disclosures were made. Mr. Haemmerle remarked: “. . . some other lay witnesses may be found and disclosed after the fact, I suppose.” August Transcript, p. 12 line 24 – p. 13, line 4 (attached as Exhibit 4 to Brody Aff.). That is why Rangen filed a Preliminary Lay Witness disclosure and identified “Other Rangen Employees” as witnesses. See Rangen's Preliminary Witness Disclosure. The final deadline for disclosing witnesses

according to the Third Amended Scheduling Order is not until April 8, 2013. Discovery is ongoing, and, in fact, Mr. Brock's deposition has been scheduled for January 22, 2013 at the request of the City of Pocatello. Pocatello has also made it clear that even if the Department were to grant IGWA's motion, it intends to go forward with Mr. Brock's deposition. See Exhibit 5 to Brody Aff. This puts Rangen in an untenable situation – making Mr. Brock's knowledge and information available to the intervenors, but making him unavailable to Rangen at a hearing if necessary to refute the intervenors' arguments. If the Director grants IGWA's Motion in Limine to Exclude Brock, he should also include a provision that precludes his deposition from being taken.

III. CONCLUSION

Rangen identified Mr. Brock as a lay witness so that he can explain his role in the research process at the Rangen Hatchery and the research in which he has been involved and would be involved if there were more water. IGWA's claim that he is an expert witness in disguise is overstated and so is IGWA's claim of unfair prejudice. IGWA's Motion in Limine should be denied and its request for costs or fees should also be denied since the recent disclosure by Rangen is justified and awarding costs or fees in this circumstance would be unjust. If the Director grants IGWA's Motion in Limine, Rangen requests that the intervenors be precluded from taking the deposition of David Brock.

DATED this 16th day of January, 2013.

BRODY LAW OFFICE, PLLC.

By: 

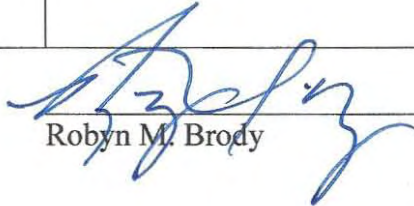
Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 16th day of January, 2013 she caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

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