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DEPARTMENT OF
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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 REPLY IN SUPPORT
OF ITS MOTION IN LIMINE
TO EXCLUDE BROCK**

On January 10, 2013, Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Motion in Limine to Exclude Brock, and Request for Expedited Decision*. On January 11, 2013, the Director issued an *Order Shortening Time to File an Answer to Motion in Limine*. On January 16, 2013, Rangen, Inc. ("Rangen") filed *Rangen, Inc.'s Response in Opposition to IGWA's Motion in Limine to Exclude Brock* ("Rangen's Response"). This is IGWA's reply to *Rangen's Response*. As explained below, Mr. Brock should be excluded from testifying in this case because *Rangen's Response* fails to explain how his testimony is relevant to this proceeding provide, and fails to provide a compelling reason for his excessively late disclosure.

The Director's *Order Shortening Time to File an Answer to Motion in Limine* specifically asks Rangen to "explain how the testimony of Mr. Brock is relevant to this proceeding." *Rangen's Response* does not do this. It does not state what Mr. Brock will testify to, nor how his testimony is relevant. Rather, it states that Rangen "does not believe that he has any information that is relevant to the matters to be decided by Director Spackman." (*Rangen's Response* at 2.) This alone should be enough to exclude Mr. Brock from testifying in this case.

Rangen's statement that Mr. Brock has no relevant information obviously conflicts with its recent disclosure of him as someone having information relevant to the issue of material injury. Yet, instead of explaining how Mr. Brock's testimony is relevant to that issue, Rangen states only that it disclosed him late "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.'" (*Rangen's Response* at 2.) Rangen then dedicates the bulk of its response to arguing why IGWA's understanding of material injury is mistaken. *Id.* at 2-5.

Rangen's arguments about what does not qualify as material injury are beyond the scope of IGWA's motion in limine and should not be considered. The fact that Rangen may disagree with IGWA's theory of the case does not excuse it from timely producing information relevant to IGWA's case. Without a summary judgment ruling or protective order that absolves Rangen from producing information relevant to IGWA's theory of the case, it has a duty to disclose all such information. There was and is no such order, and responding to IGWA's motion on limine is not an appropriate means for seeking such an order. Therefore, IGWA will not in this brief address Rangen's mistaken interpretation of the *Clear Springs Foods* decision or its other arguments concerning material injury.

What matters is that Mr. Brock purportedly possesses information that is relevant to IGWA's theory of the case, and that Rangen did not timely disclose that to IGWA. IGWA's focus on Rangen's actual use of water has been obvious from the beginning. IGWA's first discovery requests were served on Rangen in May of 2012 and asked about how water is used within the facility (interrogatories 8-9), water conservation and re-use practices (interrogatories 12-13), facility development and configuration (interrogatories 17-19), fish stocking and rearing decisions (interrogatories 20 & 29), water treatment processes (interrogatory 25), fish production (interrogatories 26-28), dissolved oxygen and gas saturation parameters (interrogatory 30), and water turnover rates (interrogatory 31). These inquiries clearly focus on how water is actually used by Rangen. They were served on Rangen in May of 2011. IGWA followed up with depositions of Rangen employees in early September, inquiring into such matters as fish production, flow indices, feed usage, business contracts, and research by Rangen. (*Rangen's Response* at 5.)

Rangen admits that it became "apparent from the various interrogatories, requests for production and deposition questions" that Mr. Brock possessed information relevant to the issue

of material injury. *Id.* at 2. Rangen should have disclosed Mr. Brock at or shortly after the September depositions. The depositions prompted Rangen to produce thousands of additional pages of research documents, necessitating a second deposition of Mr. Ramsey in early November. Yet, Rangen remained silent as to Mr. Brock and did not name him throughout that entire two month process. Rangen cannot on one hand produce thousands of pages of documents and allow extensive deposition questioning about its use of water, implicitly acknowledging that such information to be discoverable, while on the other hand secretly refusing to identify Mr. Brock on the basis that such information is not relevant. If Mr. Brock indeed possesses information relevant to the issue of material injury, Rangen should have disclosed that long ago. It is too late to disclose additional witnesses now that opening expert reports have been submitted, expert reply reports are in the works, and expert depositions are scheduled next month.

Rangen attempts to justify its late disclosure of Mr. Brock by arguing that IGWA should have known it was coming, since Doug Ramsey mentioned Mr. Brock in his deposition. (*Rangen's Response* at 6: "The identification of Mr. Brock should come as no surprise to IGWA.") Mentioning that Mr. Brock is a nutritionist who assists with research is a far cry from stating that he possesses information about research and water use that Mr. Ramsey himself did not know. Rangen identified Mr. Ramsey as the person most knowledgeable about research at the Rangen facility. His testimony quoted in *Rangen's Response* is consistent with that. When asked whether he performs research or simply assists with it, Mr. Ramsey testified that he performs it. *Id.* He testified that while Mr. Brock helps him put research proposals together, he is the person who submits them to his boss. IGWA understood from these and other deposition responses that Mr. Ramsey is the authority to explain the relationship between research and water use at Rangen. If Rangen personnel knew otherwise, it had a duty to disclose that to IGWA at the depositions or soon thereafter.

Rangen finally argues that it has until August 8, 2013, to disclose witnesses. This assertion misconstrues the Director's *Third Amended Scheduling Order* and is inconsistent with applicable rules of procedure. The *Third Amended Scheduling Order* does not state, as Rangen contends, that the final deadline for disclosing witnesses is April 8, 2013. (*Rangen's Response* at 7.) It states: "April 8, 2013 - Witness lists and exhibits exchanged." (Emphasis added.) This deadline is for trial preparation purposes so the parties know which of the previously disclosed witnesses will actually be called at trial, and which of the previously produced documents will be

presented as exhibits. It assumes that all witnesses and exhibits were already disclosed “seasonably” as required by procedural rules.


CONCLUSION

Rangen’s Response does not explain what Mr. Brock will testify to, or how his testimony is relevant to this proceeding, nor does it provide a compelling justification for him being disclosed so late in the hearing process. Rangen’s arguments about material injury are beyond the scope of IGWA’s motion in limine, should not be considered, and in any case do not provide a valid justification for Rangen’s failure to timely supplement discovery responses when it became abundantly clear that Mr. Brock possessed information relevant to IGWA’s theory on the issue of material injury. Rangen’s failure to timely disclose Mr. Brock violates the Rules of Procedure of the Department of Water Resources and prejudices IGWA by introducing a new theory to the case that may require IGWA to retain yet another expert witness who can testify to feed research. Allowing Mr. Brock to testify will require additional depositions and like necessitate continuation of the hearing schedule. IGWA asks the Director to maintain the current schedule and avoid additional expenses to the parties by excluding Mr. Brock from testifying in this case.

If Mr. Brock is not excluded from testifying, rules instruct the Director to require Rangen to pay the reasonable expenses and attorney fees caused by its failure to disclose him timely. I.R.C.P 37(d); see also I.R.C.P. 37(e).


DATED this 17th day of January, 2013.

RACINE, OLSON, NYE, BUDGE &
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By: 
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CERTIFICATE OF MAILING

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Cc: T. J. Budge; Becky J. Harvey
Subject: Docket No. CM-DC-2011-004 [Rangen, Inc.] =IGWA's Reply in Support of Motion in Limine
Attachments: 20130117 IGWA Reply in Support of Motion in Limine to Exclude Brock.pdf

Please see IGWA's Reply in Support of Motion in Limine that was fax filed with IDWR today.

Hard copies will follow in the mail to everyone except IDWR.

Thank you.

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