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BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 AND 36-07694	)	Docket No. CM-DC-2011-004
(RANGEN, INC.)	)	**CITY OF POCATELLO AND IDAHO GROUND WATER APPROPRIATORS, INC.'S MOTION TO COMPEL PRODUCTION OF RESEARCH LIST**

COME NOW, City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through their undersigned counsel, and move the Director to issue an Order compelling Rangen, Inc. ("Rangen") to disclose a document discovered at the deposition of David Brock on January 22, 2013.

I.R.C.P. 37(a)(2) CERTIFICATION

Pocatello and IGWA certify, in accordance with Idaho Rule of Civil Procedure ("I.R.C.P.") 37(a)(2), that they have made a good faith attempt to secure the documents

requested herein without court action. The attempts made are set forth in the January 22, 2013 deposition transcript of David Brock and are excerpted below for the Director's convenience.

INTRODUCTION

In the captioned matter Rangen has claimed, *inter alia*, that its inability to conduct certain research at the Rangen Hatchery amounts to injury to its water rights. Pocatello and IGWA have attempted to investigate Rangen's claimed injury to the research uses of its water rights and have expended substantial resources to understand how Rangen uses water, how it used water in the past and what need, if any, it has for more water. Until the deposition of Mr. Brock, on January 22, 2013, Rangen's witnesses (and produced documents) did not substantiate claims of injury to research.

At Mr. Brock's deposition on January 22, 2013, he testified that he had created in the "late summer" or possibly the "fall [or] winter" of 2012 a list of research projects Rangen had been unable to undertake due to water supply shortages. Brock Dep. 149:18–23, Jan. 22, 2013. Pocatello and IGWA requested that document (referred to within as the "Research List") and Rangen declined to produce it, arguing first that it was attorney work product and then, later, that it was subject to the attorney-client privilege. As detailed within, neither of these defenses to production of the Research List is applicable.

Due to Rangen's willful withholding of the Research List and then precluding investigation of the nature and contents of the disputed document at the deposition—including inviting this Motion to Compel, Pocatello and IGWA are substantially prejudiced. Brock Dep. 144:10–13, 144:20–145:4 (during attempts to inquire into the nature of the Research List, Rangen's counsel stated: "[y]ou're going to have to take it up with the Director"). Pocatello and IGWA respectfully request that the Director compel production of the Research List and award

them attorneys fees for the expense of briefing this Motion to Compel or, in the alternative, that the Director exclude the Research List and testimony about it from this matter altogether.

STATEMENT OF FACTS

1. At Doug Ramsey's first deposition in September of 2012, Pocatello and IGWA first learned that Rangen was asserting injury to its ability to conduct research at the Rangen Hatchery. Ramsey Dep. vol. I, 124:13–17, Sept. 12, 2012. At Doug Ramsey's second deposition in November, IGWA asked "What research has Rangen wanted to do in the last ten years but has been unable to do because of reduced water flows?" Ramsey replied that he could not give "specifics." Ramsey Dep. vol. II, 323:25–324:3, Nov. 13, 2012.

2. On December 21, 2012 Rangen finally designated David Brock as a witness. Mr. Brock was identified as a witness with "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 that facility." Rangen, Inc.'s Third Supplemental Responses to IGWA's First Set of Discovery Requests ("Rangen's Third Response") at 5, Dec. 21, 2012. During the course of Pocatello's deposition of David Brock, Pocatello learned that Rangen personnel had assembled the Research List which includes research ideas that Rangen claims could not be done because of lack of water:

> Q. What additional studies would you have conducted had you had additional flows? Do you have a database list, anything of study ideas that you were not able to conduct?
>
> A. No, not a list. I mean I think it -- at some point in this process we put together a list of research ideas that I believe was submitted to you guys, I thought. That was the intent of it. But not a -- I haven't had an ongoing, you know, write down. "Can't do because of water", no.
>
> Q. So you have something you put together for this litigation, but not anything that existed beforehand?

A. Right.

Brock Dep. 98:4–17 (emphasis added).

Pocatello and IGWA requested the list, which Rangen claimed was attorney work product, and refused to produce:

> MR. HUTCHINS: Do we have that?
>
> MS. BRODY: No, you don't.
>
> THE WITNESS: No.
>
> Q. (BY MR. HUTCHINS:) Okay. So are you still in the process of putting it together?
>
> MS. BRODY: As far as I'm concerned, it's privileged, and we have not -- I mean if we decide to use it or whatever, we will. But I mean it was at our request, the attorneys' request that it be done.

Brock Dep. 98:18–99:1 (emphasis added).

Pocatello and IGWA challenged the claim to privilege:

> MS. McHUGH: So you're claiming --
>
> MS. BRODY: It's attorney work product.
>
> MS. McHUGH: You're claiming attorney work product for a list that he produced, that he created?
>
> MS. BRODY: At our request with other input.
>
> MR. HUTCHINS: Okay. We'll probably have to talk about that.
>
> MR. HAMMERLE: Let's just mark it.
>
> MR. HUTCHINS: I think that's a central issue in this case.

Brock Dep. 99:3–12 (emphasis added).

3. Later in the deposition, when IGWA attempted to question Mr. Brock regarding the list of research ideas, Rangen's counsel prohibited him from answering, this time changing the claim to attorney-client privilege:

> In a question from Mr. Hutchins, you stated that you put together a list of research that could not be done because of lack of water.
>
> Am I characterizing your testimony correctly?
>
> MR. HAMMERLE: Are you asking for the document that we've designated attorney-client privilege?
>
> MS. McHUGH: I'm asking if I've correctly characterized his prior testimony.
>
> MR. HAMMERLE: With respect to what?
>
> MS. McHUGH: To the research list of projects that could not be done because of lack of water.
>
> MR. HAMMERLE: Object. Attorney-client privilege. I'll instruct the witness not to answer it, if that's the list you're asking about.

Brock Dep. 143:2–16.

Mr. Hammerle then objected to IGWA's inquiries regarding the nature of the document—inquiries which are required in order to understand if the elements of any claimed privilege actually exist:

> MR.HAEMMERLE: He's not going to testify about it. <u>You're going to have to take it up with the Director.</u> And if that's what you want to do, you know, you have the ability to do that.
>
> MS. McHUGH: I think I can at least talk to the witness about the document to see whether or not he has knowledge of it. I don't think -- not the contents of it at this point, but in order to understand whether or not the privilege is -- the elements of the privilege actually exist.

Brock Dep. 144:10–19 (emphasis added).

> Q. When was the first time you became aware that you were disclosed as a witness in the Rangen delivery call case?
>
> MR. HAEMMERLE: Okay. Candice, I'm going to object because I think this whole line of questioning is probably related to something else rather than this list that we're talking about today. If it's related to your claim of prejudice, that we had set this up somehow to your prejudice, I think that's what you're trying to do now, which is different. You know, I don't know what that has to do with this

> deposition. I'm not going to let you, no matter how many questions you ask, get at the list.
>
> MS. McHUGH: Fair enough, Fritz.
>
> MR. HAEMMERLE: You know, you can make your arguments to Gary, and we'll have to live with his decision.

Brock Dep. 147:8–24.

The document in question is protected by neither attorney work product nor attorney-client privilege. For the reasons identified below, Rangen should be compelled to produce this document.

ARGUMENT

The Idaho Department of Water Resources' Rules of Procedure, IDAPA 37.01.01.520–528 permit discovery in administrative proceedings. The Idaho Rules of Civil Procedure governing discovery permit the identification and production of documents which are relevant to the subject matter of the pending action unless protected by privilege. Idaho Rule of Civil Procedure 26(b)(1) states as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .

The rules of discovery allow parties to obtain information that is "relevant to the subject matter involved in the pending action" or relating to "the claim or defense of any other party" or that is "reasonably calculated to lead to the discovery of admissible evidence." I.R.C.P. 26(b)(1). The relevancy of the material sought by IGWA and Pocatello is shown by Rangen's own designation of Mr. Brock. On December 21, 2012, Rangen disclosed Mr. Brock as the witness who would testify to "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 that facility." Rangen's Third Response at 5. I.R.C.P. 37(a)(2) allows a party to move for an order compelling inspection of documents in accordance with a discovery request.

THE RESEARCH LIST IS NOT ATTORNEY-CLIENT PRIVILEGED

"The burden of showing that information is privileged . . . is on the party asserting the privilege." *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (2005). In order to be protected by the attorney-client privilege, Rangen must demonstrate that the Research List fits the following criteria: "(1) the communication must be confidential within the meaning of the rule, and (2) the communication must be made between persons described in the rule for the purpose of facilitating the rendition of professional legal services to the client. *State v. Allen*, 123 Idaho App 880, 85–86, 853 P.2d 625, 630–31 (1993). *See also* I.R.E. 502(b). In this instance, Pocatello and IGWA are seeking only the Research List—no attorney advice or other communications accompanying the list. The list itself is not a communication, but instead is a "tangible thing[] prepared by a party in anticipation of litigation." *United Heritage Prop. & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, No. 1:CV 10-456-BLW, 2011 WL 781249, at *4 (D. Idaho Mar. 1, 2011) (applying the work product privilege rather than the attorney-client privilege to notes made by the adjusters, even when they included attorney communications). As such, the Research List does not fall within the scope of "privileged communications" that would require protection under the attorney-client privilege, and as such is not protected under Idaho Rule of Evidence 502.

Even if the Research List could be construed as a communication, it was not intended to be confidential. Mr. Brock characterized it as follows: "at some point in this process we put together a list of research [the Research List] ideas that I believe was submitted to you guys, I thought. That was the intent of it." Brock Dep. 98:8–11 (emphasis added). To be considered

confidential, a communication must "'not be intended to be disclosed to third persons.'" *Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996) (quoting I.R.E. 502(a)(5)). Based on testimony of Rangen's representative, David Brock, Pocatello and IGWA established that the Research List was not intended to be a confidential communication between attorney and client. The Research List must be produced.

THE RESEARCH LIST IS NOT PROTECTED ATTORNEY WORK PRODUCT

Even if the Research List "was not prepared in the normal course of business" as claimed by Rangen's attorney [Brock Dep. 166:20–24], the Research List is relevant and therefore otherwise discoverable, as Pocatello and IGWA have a "substantial need of the materials in the preparation of [their] case[s]" and they are "unable without undue hardship to obtain the substantial equivalent of the materials by other means," and discovery of the list should be compelled. I.R.C.P. 26(b)(3).

Inability to do research is central to Rangen's claim of injury in this case and its alleged need for more water. Pocatello and IGWA have been asking for the information contained on the Research List since at least November 2012, but Rangen's employees claimed not to be able to give "specifics" when questioned. Ramsey Dep. vol. II, 323:25–324:3. Pocatello and IGWA have tried repeatedly to obtain a specific accounting of unperformed research projects, but have been unable to do so. Accordingly, Pocatello and IGWA are unable to obtain a substantial equivalent of the list by any other means, fulfilling the requirements of Rule 26(b)(3). The Research List must be produced.

RANGEN'S ACTIONS REGARDING THE RESEARCH LIST ARE PREJUDICIAL TO POCATELLO AND IGWA'S ATTEMPTS TO DEFEND THE DELIVERY CALL AND RANGEN'S WILFULL WITIH HOLDING OF THE RESEARCH LIST SHOULD BE PUNISHED WITH SANCTIONS

If the Director grants Pocatello and IGWA's request to compel the Research List, I.R.C.P. 37(a)(4) requires that he "shall" grant reasonable costs and attorneys fees incurred in obtaining the order, following a hearing on the matter. Rangen's belief that the Research List is protected by privilege does not excuse their failure to disclose the Research List. Rangen was obligated to disclose by supplemental disclosure the existence of the Research List. I.R.C.P. 26(e) requires supplementation of responses and IGWA's first set of discovery specifically requests supplementation of the responses in accordance with the I.R.C.P. and also requests that if any document is withheld for privilege purposes that it be identified. IGWA's First Set of Discovery Requests ¶¶ g and h, May 23, 2012. I.R.C.P. 26(b)(5)(A) requires the party making a claim of privilege related to a document to do so expressly. The Rule requires a description of the nature of the document, communication, or thing not produced or disclosed. I.R.C.P. 26(b)(5)(A). Rangen has not made such a disclosure.

As detailed above, and despite Rangen's disregard of its obligations under Rules 26(e) and 26(b)(5)(A), Rangen interfered at the deposition with Pocatello and IGWA's attempts to understand the nature of the document. Brock Dep. vol. I, 144:7–146:2. In the course of that discussion, Mr. Brock testified that he had created the Research List in "fall, winter" or possibly "late summer." Brock Dep. vol. I, 149:21–23. Even Pocatello and IGWA's attempts to inquire further into the timing of the creation of the document were frustrated by Rangen's continued and unsubstantiated objections.

> Q. Have you ever written down whether or not what projects you -- Rangen could do if more water were available at the Rangen research facility?
>
> A. Have I ever?

Q. Yes.

A. Yes.

Q. And who did you communicate that list to? Who did you send that list to? Okay. Let's back up.

When did you create such a list?

A. 2012, seems like fall, winter --

Q. Did you ever --

A. -- or late summer.

MR. HAMMERLE: I'm going to object. You're asking about the attorney-client privileged document, likely, that we requested.

Brock Dep. 149:12–150:1.

If the list was created in late summer—or even "fall [or] winter" Pocatello and IGWA are prejudiced from Rangen's willful withholding of the document. Pocatello and IGWA's opinions in this case have been developed on the premise that Rangen has been unable to identify and cannot explain the research it would have conducted had it had additional water supplies. Pocatello's fish expert did not disclose opinions in the opening round of expert reports precisely because Rangen had been unable to substantiate its claim that its water rights were injured due to foregone research projects. That bell cannot be unrung, and if the document is compelled, Pocatello and IGWA's cases will have to be re-made at this late date. To find out now, over six weeks past the disclosure of expert reports and less than one week before disclosure of rebuttal reports that this catalog of allegedly un-performed research projects has existed for months is the subject of sanctions.

Furthermore, Pocatello and IGWA will be significantly prejudiced if Rangen is permitted to put on evidence that it needs more water to perform the research identified on the Research

List, without timely disclosure of those research ideas and flow requirements to Pocatello and IGWA—at a minimum in the form of the Research List. Pocatello and IGWA have no way to test the efficacy of the claims implicit in the Research List, nor can Pocatello and IGWA evaluate whether or not the claimed research requires more flow than Rangen currently has, or frankly, whether the claimed research is even of the type that has ever before been within the purview of Rangen's research.

In accordance with I.R.C.P. 37(a)(4), appropriate sanctions in this matter would be to: 1) compel disclosure of the Research List, require Rangen to make Mr. Brock (or whichever witness is actually knowledgeable about the Research List) available again for deposition, and require Rangen to pay Pocatello and IGWA's attorneys fees for the expense of drafting this Motion to Compel and for the expense of deposing the yet-to-be-named individual who is knowledgeable about the Research List.

CONCLUSION

The Research List is not protected by the attorney-client privilege, because it is not a "communication", and in any event, according to Mr. Brock, was prepared with the intent to provide the Research List to Pocatello and IGWA. The Research List is not protected by attorney work product because, as Pocatello and IGWA have a substantial need for the document, which goes to Rangen's core claims of injury in this case, and we cannot obtain a substantial equivalent by any other means.

PRAYER FOR RELIEF

Pocatello and IGWA request that the Director enter an Order compelling Rangen to produce the Research List mentioned by David Brock at his January 22, 2012 deposition, and that a hearing be set for determination of whether costs and fees are a proper sanction, in accordance with I.R.C.P. 37(a)(4).

Dated this 30th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2013, I caused to be served a true and correct copy of the foregoing **Pocatello and IGWA's Motion to Compel Production of Research List** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:

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