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ATTORNEYS FOR IDAHO GROUND WATER APPROPRIATORS, INC.

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 REPLY IN SUPPPORT OF MOTION TO COMPEL**

By and through their undersigned counsel, the City of Pocatello ("Pocatello") and Idaho Ground Water Appropriators, Inc. ("IGWA"), hereby submit this Reply in support of their Motion to Compel Production of Research List ("Motion") dated January 30, 2013.

INTRODUCTION

At Doug Ramsey's deposition on September 12, 2012, IGWA and Pocatello learned for the first time that Rangen, Inc. ("Rangen") was primarily a hatchery research facility claiming water rights injury to its ability to conduct research. Motion at 3. Accordingly, Pocatello and IGWA requested and obtained certain records related to Rangen's research. Rangen's records

produced to date do not substantiate Rangen's claims of injury to its ability to conduct research—nearly every research project Rangen has conducted in the past could be done today with Rangen's current flows. Expert Rebuttal Report of John Woodling at 3, 16, Feb. 8, 2013.

On December 21, 2012 Rangen disclosed nutritionist David Brock as a person 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 the facility." Rangen, Inc.'s Third Supplemental Response to IGWA's First Set of Discovery Requests at 5, Dec. 21, 2012. During his deposition, Mr. Brock testified about a "research list" that he understood had been developed to be provided to Pocatello and IGWA. After Mr. Brock's disclosure of the Research List containing information about research projects that either could have been or would be performed but for allegedly inadequate water flows, counsel for Rangen prevented Mr. Brock from answering even foundational questions about the Research List, even though contents of the document are squarely within Mr. Brock's knowledge, and even though Mr. Brock testified that the information had been compiled for Pocatello and IGWA. But for Mr. Brock's honesty regarding the existence of the document, the document would not have come to light. To make matters worse, the information contained in the Research List is directly related to Mr. Brock's disclosed area of knowledge, and even though Pocatello and IGWA had requested by subpoena duces tecum that Mr. Brock bring such materials to the deposition, Rangen did not disclose the existence of the document in any way—not even by means of a privilege log. The Motion to Compel followed.

Rangen has failed to demonstrate that the information contained in the Research List is protected by attorney-client privilege. To the extent the Research List is covered by the work product privilege, Rangen has not overcome Pocatello and IGWA's showing of "substantial

need." Rangen is not substantially justified in its continued withholding of this information, and Pocatello and IGWA respectfully request that the Director require Rangen to disclose the Research List and award attorneys fees.

ARGUMENT

I. The attorney-client communication privilege does not apply.

Rangen, as the party claiming privilege, must demonstrate that the document in question was a confidential communication, i.e. that it was not intended to be disclosed to third parties. Motion at 7–8. Mr. Brock created the Research List, and stated that his intent in doing so was that it be disclosed to Pocatello and IGWA. Brock Dep. 98:8–11. This fact alone defeats any claim Rangen might have had to attorney-client privilege. Rangen erroneously argues that *Farr v. Mischler*, 129 Idaho 201, 923 P.2d 446 (1996) does not apply because it concerned the attorney-client privilege as codified in Idaho Rule of Evidence 502, which the Idaho Department of Water Resources ("Department") has not explicitly adopted. Rangen is incorrect; although the Director is not confined by the Rules of Evidence at hearing, the Department's Rule 600 recognizes "any evidentiary privilege provided by statute or recognized in the courts of Idaho." IDAPA 37.01.01.600. The Director is free to refer to case law interpreting the Idaho Rule of Evidence 502 attorney-client privilege especially where no analogous rule exists under the Departments Rules of Procedure.

Rangen claims that the Research List is privileged simply because it "came about" after a communication between Ms. Brody and Mr. Courtney. The fact that the Research List originated with a communication from Rangen's attorneys does not automatically make the Research List privileged—for the "attorney-client privilege to apply, the communication must be confidential within the meaning of the rule and made between persons described in the rule for the purposes of rendering legal advice." *Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446,

452 (1996) (emphasis added). *Cf.* Response ¶ 4 (claiming that the Research List is privileged simply because it "came about" after a communication between Ms. Brody and Mr. Courtney). Rangen has not alleged, much less demonstrated, that the Research List was compiled "for the purposes of rendering legal advice", and the fact that it was developed in response to a request from Rangen's attorneys does not *de facto* make it so.

Further, Rangen has not disputed the facts surrounding the communications with Mr. Brock regarding his preparation of the Research List—Mr. Brock made clear that he was asked to prepare the Research List for IGWA and Pocatello's use. Brock Dep. 98:8–11. Rangen cannot allege now, after the fact, that the communications with Mr. Brock were confidential in nature such that the Research List itself is somehow privileged—designation of confidentiality, in order for the rules of discovery to properly function, must necessarily occur at the time of the communication. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S. Ct. 677, 685 (1981) (applying the attorney-client privilege to communications between corporate counsel and lower level employees where the communications were designated confidential at the time the communication was made.).

Mr. Brock's deposition testimony indicates that the Research List was not "confidential" in nature at the time of its creation, and that in fact that Mr. Brock was led to believe that the list he created was intended for disclosure to Pocatello and IGWA. Brock Dep. 98:8–11 ("[A]t 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."). There is no basis to conclude the Research List was originally intended to be confidential, or that this was ever conveyed to Mr. Brock. Rangen has not met its burden to demonstrate the applicability of the attorney-client privilege. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (2005).

II. Pocatello and IGWA have a substantial need for the Research List.

Rangen argues that because it disputes the "relevancy and admissibility of the evidence" Pocatello and IGWA do not have a substantial need for the Research List. Response ¶ 9. This argument does not refute the showing of "substantial need" made by Pocatello and IGWA. Rangen, as it has in earlier discovery disputes, conflates admissibility with discoverability, stating: "[t]here is no justification for setting aside the attorney work-product privilege in a case where the admissibility of the information sought is doubtful." Response ¶ 12. However, the Research List is discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence. I.R.C.P. 26(b)(1). While Rangen points out that the Director has not yet ruled on its pending summary judgment motion, this fact cuts in favor of disclosure under the liberal discovery standard of Idaho Rule of Civil Procedure 26(b)(1).

Mr. Brock's testimony establishes that the Research List is a specific list of projects that Rangen alleges cannot be done due to lack of water supplies. Rangen has repeatedly made general claims of such injury, but has always refused to provide specifics. Pocatello and IGWA must be provided with such specifics in order to rebut Rangen's claims to injury. Rangen attempts to avoid disclosure by splitting hairs: "[t]he list the Intervenors are seeking is NOT a list of research projects that Rangen had planned and could not perform." Response at 2. It is immaterial whether the Research List describes research projects which it claims could not be done in the past, or research projects that they claim cannot be done in the future.

Rangen's only (and inadequate) response to Pocatello and IGWA's showing of substantial need is to claim that the information sought could be "obtain[ed] . . . through other means." Response ¶ 11. Pocatello and IGWA have made repeated attempts to obtain the type of information contained in the Research List through "other means" since at least September of

2012. *See* IGWA's First Set of Discovery Requests, Interrog. No. 7, May 23, 2012; Ramsey Dep. vol. II, 323:25–324:3 (claiming inability to give "specifics" regarding research projects which could not be completed). Rangen's suggestion that Pocatello and IGWA serve it with yet another interrogatory and request for production is not another "means" to obtain said information—Rangen has made clear it will not produce this information unless ordered to by the Director, and this alternative "means" would simply result in another motion to compel and delay the discovery dispute over the Research List. Response ¶ 11.

Furthermore, the Research List was a document specifically within the scope of Brock's subpoena (Subpoena Duces Tecum for David Brock ¶ 3(c), (d), Jan. 16, 2013), and Pocatello and IGWA's attempts to inquire about the contents of the list were met with objections at every turn. *See* Motion at 4–6, 9–10; Brock Dep. 148:22–149:3. There are no other sources by which Pocatello and IGWA can obtain specific information regarding the list of research which Rangen would perform if it had additional water.

III. The Director may conduct an *in camera* inspection of the Research List and corresponding emails to determine whether said documents are privileged.

To date, Rangen has not even clearly identified the nature of the document(s) Mr. Brock referred to in his deposition, and in its Response for the first time alleges that the Research List cannot possibly be separated from email communications between Mr. Courtney and Ms. Brody. Response ¶ 4.

Rangen's wholesale disregard for the rules of discovery argues in favor of immediate disclosure of the document referred to by Mr. Brock to avoid further prejudice to Pocatello and IGWA. Alternatively, the Director could conduct an *in camera* review of the Research List document(s) and corresponding emails, which would permit the Director to determine the answers to the questions that Rangen refused to allow Mr. Brock to respond to during the

deposition regarding the nature of the Research List, whether a valid claim of privilege exists, and to resolve once and for all Rangen's repeated frustration of efforts to obtain information regarding its claims of injury to research in this case. *See Kirk,* 141 Idaho at 700, 116 P.3d at 30 (trial court had conducted *in camera* review of documents to evaluate a claimed privilege under IRE 502); *see also generally* Motion at 3-6.

If the Director determines that he wishes to conduct an *in camera* review of the documents, Pocatello and IGWA would consent to that procedure as part of resolution of their Motion *provided* that said inspection be conducted as soon as practicable to avoid any further delay and prejudice in this matter.

IV. Rangen has not provided a substantial justification for its failure to comply with the rules of discovery, and sanctions are appropriate unless the Director finds otherwise after *in camera* review.

The Director must grant attorneys fees unless he finds after hearing that Rangen's actions were "substantially justified." I.R.C.P. 37(a)(4). The Motion recounts the substantial prejudice suffered by Pocatello and IGWA from Rangen's withholding of this information, and identifies several discovery requests that Rangen should have produced the Research List in response to. *See* IWGA's First Set of Discovery Requests, Interrog. No. 7; Subpoena Duces Tecum for David Brock ¶ 3(c), (d). Rangen has provided no justification for its failure to provide a privilege log in response to a subpoena duces tecum issued by the Director, its refusal to allow witnesses to answer questions about the Research List, much less any legal basis to continue to withhold a key document less than three months before hearing.

If the Director is not convinced from the briefing as to the total lack of justification for Rangen's refusal to produce the Research List, Pocatello and IGWA request that the Director conduct an *in camera* review of the Research List and any associated communications to determine if Rangen's withholding was substantially justified.

Accordingly, the Director should award Pocatello and IGWA reasonable attorneys fees pursuant to Idaho Rule of Civil Procedure 37(a)(4) and hold a hearing to determine Pocatello and IGWA's fees for the expense of compelling disclosure of the Research List.

REQUEST FOR RELIEF

Pocatello and IGWA respectfully request that the Director enter an order:

1. Granting the Motion to Compel and request for attorneys fees, and setting a hearing on the amount of reasonable expenses incurred; or, in the alternative;
2. Conduct an *in camera* review of the Research List and corresponding communications to determine whether said documents are privileged and to determine whether Rangen's refusal to produce said documents is substantially justified;
3. Any other and relief the Director finds just and equitable.

Respectfully submitted this 20th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello and Idaho Ground Water Appropriators, Inc.'s Reply in Support of Motion to Compel** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:

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