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DEPARTMENT OF  
WATER RESOURCES

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ATTORNEYS FOR CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION )  
OF WATER TO WATER RIGHT NOS. ) Docket No. CM-DC-2011-004  
36-02551 AND 36-07694 )  
) **CITY OF POCATELLO'S RESPONSE**  
(RANGEN, INC.) ) **REGARDING RANGEN, INC.'S RESPONSE**  
) **IN OPPOSITION TO IGWA'S MOTION IN**  
\_\_\_\_\_ ) **LIMINE TO EXCLUDE BROCK**

The City of Pocatello ("City" or "Pocatello") hereby submits this Response to address *Rangen, Inc.'s Response in Opposition to IGWA's Motion in Limine to Exclude Brock* ("Response"), filed January 16, 2013.

**INTRODUCTION**

Pocatello finds it necessary to address Rangen, Inc.'s ("Rangen") allegations in its Response that it has been put in an "untenable" position by Pocatello and Idaho Ground Water Appropriators, Inc. ("IGWA") with respect to the deposition of Mr. Brock. Response at 7. To be clear, Pocatello noticed the deposition of Mr. Brock—with Rangen's consent—so that it may

understand what discoverable information he has as soon as possible, given Rangen's untimely disclosure of Mr. Brock as a witness. Any "untenable" position Rangen claims to find itself in is due entirely to its failure to disclose Mr. Brock at an earlier date. Nevertheless, Pocatello agrees that if the Director grants *IGWA's Motion in Limine to Exclude Brock, and Request for Expedited Decision* ("Motion"), the deposition of Mr. Brock is not necessary.

However, Rangen's Response goes beyond the scope of responding to IGWA's Motion by arguing that research and production records are not relevant in this proceeding, and implying such evidence should be excluded. This amounts to an attempt by Rangen to force the Hearing Officer to rule on its *Motion for Partial Summary Judgment Re: Material Injury* ("Summary Judgment Motion"), filed January 9, 2013, before parties have an opportunity to respond. Rangen is not entitled to the relief it seeks in its Response; it is also not entitled to the relief sought in its Summary Judgment Motion. Pocatello will file a response to Rangen's Summary Judgment Motion to be timely filed next week; for now, Pocatello's arguments are limited to Rangen's erroneous legal positions found in its Response to IGWA's Motion.

### **ARGUMENT**

Rangen claims that it was not required to disclose Mr. Brock because "showing a shortage of water is enough to demonstrate 'material injury'", and thus Brock, who is a nutritionist for Rangen, does not have information relevant to this delivery call. Response at 5. First and foremost, this explanation is inconsistent with Rangen's previous responses to discovery in this matter. Rangen disclosed multiple other employees that have information relevant to research, nutrition, and production records. *See, e.g.*, Rangen, Inc.'s Response to IGWA's First Set of Discovery Requests at 4-5, dated June 27, 2012, attached as an exhibit to IGWA's briefing in this matter. Rangen has also produced fish production records and records of the scientific research conducted at the Rangen facility without objection. Response at 5.

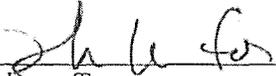
Rangen’s willing disclosure of research information is appropriate; its own fish expert describes Rangen as a “research hatchery.” Research is the beneficial use to which Rangen puts its water rights and it claims, *inter alia*, that it has insufficient water to conduct research (a claim belied by the documents produced thus-far by Rangen). Rangen admits that it disclosed Mr. Brock “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.” Response at 7. Information regarding Rangen’s water use is unquestionably relevant under Idaho law. “While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. . . . the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007).

Rangen’s past use of water for research, and its ability to use more water for more research are subjects relevant to several material injury factors in the Conjunctive Management Rules. *See, e.g.*, IDAPA 37.03.11.042.01.e, g. Contrary to Rangen’s Response, information related to research conducted at the hatchery is not precluded by *Clear Springs Foods, Inc. v. Spackman*. There, the Idaho Supreme Court found that “profitability” is not the measure of beneficial use of a water right, and did not address the question before the Director in Rangen’s delivery call: whether more water would mean increased beneficial use for research by Rangen. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (Idaho 2011), *cf.* Response at 4. Contrary to Rangen’s arguments, the beneficial use doctrine is alive and well in Idaho. *See* Response at 4 (alleging facts related to Rangen’s “use of its water rights” are not relevant to the delivery call proceedings) (emphasis in original).

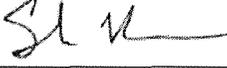
Accordingly, Pocatello requests that the Director limit his ruling on IGWA's Motion to the matter of whether Rangen's untimely disclosure of Mr. Brock is prejudicial to other parties in this matter, and reject Rangen's attempt to obtain a broader ruling regarding the material injury standard.

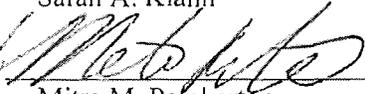
Respectfully submitted this 17th day of January, 2013.

CITY OF POCA TELLO ATTORNEY'S OFFICE

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WHITE & JANKOWSKI

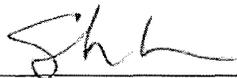
By   
Sarah A. Klahn

By   
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCA TELLO

## CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of January, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Response regarding Rangen, Inc.'s Response in Opposition to IGWA's Motion in Limine to Exclude Brock for Docket No. CM-DC-2011-004** upon the following by the method indicated:



\_\_\_\_\_  
Sarah Klahn, White & Jankowski, LLP

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