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DEPARTMENT OF
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
DELIVERY CALL OF RANGEN, INC.'S
WATER RIGHT NOS. 36-02551 & 36-
7694

Docket No. CM-DC-2011-004

**RANGEN, INC.'S REPLY IN
SUPPORT OF MOTION IN LIMINE
TO EXCLUDE TESTIMONY OF
JOHN S. CHURCH AND REQUEST
FOR HEARING**

Rangen, Inc., through its attorneys, submits the following Reply in Support of Motion in Limine to Exclude Testimony of John S. Church and Request for Hearing:

1. The day after IGWA filed its Response in Opposition to Rangen's Motion to Exclude John S. Church, IGWA submitted its Responses to Rangen's First Set of Discovery Responses. See Notice of Service dated August 29, 2012.

**RANGEN'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE
TESTIMONY OF JOHN S. CHURCH AND REQUEST FOR HEARING - 1**

2. In its first set of discovery requests, Rangen asked IGWA to identify the subject matter on which its experts are expected to testify. See Interrogatory No. 4 in IGWA's Responses to Rangen's First Set of Discovery Requests (attached hereto as Exhibit 1).

3. In response to Interrogatory No. 4, IGWA disclosed that:

John S. Church may testify concerning the reasonableness of water use by Rangen, the reasonableness of utilizing alternate means or points of diversion, the effects of curtailment, and other economic matters.

See Response to Interrogatory No. 4 in IGWA's Responses to Rangen's First Set of Discovery Requests. Church's proposed testimony is inappropriate and inadmissible for several reasons.

4. To begin with, IGWA steadfastly refuses to recognize that the Idaho Supreme Court held in Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011) that: "*A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm.*" 150 Idaho at 803, 252 P.3d at 8 (emphasis added). IGWA argues in its Response that when "read in context" this statement ". . . simply affirms that amongst groundwater pumpers . . . the Director is still required to administer groundwater rights by priority as necessary to maintain reasonable pumping levels." See IGWA's Response, p. 4. IGWA's reading of the Supreme Court's opinion misses the mark.

5. In Spackman, IGWA argued that the District Court erred when it ruled that the Curtailment Orders entered by the Department did not violate the "full economic development" provision of I.C. § 42-226. In analyzing this issue, the Supreme Court took a multi-prong approach. First, it went through a lengthy analysis of the legislative changes to I.C. § 42-226 to demonstrate why the statute only applies to groundwater

users – not surface water users such as Clear Springs and Rangen. After giving the legislative history and explaining why it made IGWA’s argument untenable, the Court went on to explain that IGWA’s position was also contrary to I.C. § 42-223a, Article XV, § 3 of the Idaho Constitution, the “Full Economic Development of Underground Water Resources” provision in the Conjunctive Management Rules (IDAPA 37.03.11.010.07), and the State Water Plan. It was in the Court’s discussion of section 42-223a and these other provisions that it held that: “A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm.” 150 Idaho at 803, 252 P.3d at 8. There is nothing in the Court’s discussion limiting the application of the holding to groundwater pumpers only. This holding applies to all water disputes and means that there is no room in this case for Church to testify concerning the economic effects of curtailment. IGWA’s attempt to limit the Court’s holding is untenable.

5. Contrary to IGWA’s assertion, the Spackman Court did not leave the door open for Church’s economic analysis in the later part of its decision. See Response, p. 4. In addressing IGWA’s full economic development argument later in its opinion, the Spackman Court explained that:

Under the law, the Groundwater Users’ arguments regarding reasonable aquifer levels and full economic development must challenge the Spring Users’ *means* of diversion. The factors that the Director may consider in determining whether the holder of a water right is suffering material injury and using water efficiently and without waste include “[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable *means* of diversion . . . , including the construction of wells . . . to divert and use water from the area having a common ground water supply under the petitioner’s surface water right priority.”

Spackman, 150 Idaho at 809-10, 252 P.3d at 90-91 (discussing Rule 42) (emphasis added).

6. Challenging the *means* of diversion involves engineers and geologists – not economists. If IGWA wants to argue that Rangen should be required to drill a well (as it argued Clear Springs should do), then Brendecke and Hinckley, IGWA’s hydrologist and geologist, should be called to address those issues, not Church.

7. Finally, IGWA contends that Church can address the economics of a Mitigation Plan. See IGWA’s Response, p. 3. Rule 43 does not support IGWA’s position. To begin with, IGWA has not submitted a Mitigation Plan. If IGWA does submit a Mitigation Plan, the submission triggers an entirely separate analysis and hearing process under Rule 43. Rule 43.02 provides:

Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

IDAPA 37.03.11.043.02. Until such time as IGWA submits a Mitigation Plan and the Director schedules a hearing, IGWA cannot justify Church’s testimony using the “possibility” of a mitigation plan.

8. More importantly, even if a Mitigation Plan were part of the January hearing, Rule 43.03 does not involve any economic analysis. Rule 43.03, like Rule 42, depends upon the input of engineers, hydrologists, and geologists. There is no role for an economist.

9. The Spackman Court got it right when it explained that:

The reference to “full economic development of underground water resources” [as used in I.C. § 42-226] does not mean that the groundwater appropriator who is producing the greater economic

benefit or would suffer the greater economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators. If that were the basis for allocating water in times of shortage, then water would be allocated among farmers based upon the market prices of their respective crops and their expected yields.

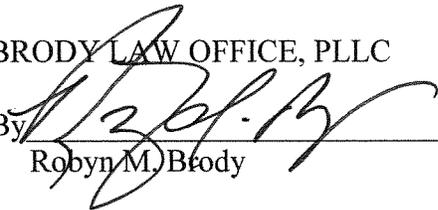
Spackman, 150 Idaho at 802, 252 P.3d at 83 (emphasis added).

10. There is no role for Church in this case. Rangen should not be required to incur an unnecessary expense to hire an economist to rebut Church simply because his formal report has not yet been disclosed. IGWA has disclosed the subject matter of his testimony and testimony concerning these matters is not admissible at the hearing in January. As such, Rangen's Motion in Limine should be granted.

DATED this ____ day of September, 2012.

BRODY LAW OFFICE, PLLC

By


Robyn M. Brody

HAEMMERLE & HAEMMERLE, PLLC

By


Fritz X. Haemmerle

MAY, BROWNING & MAY

By

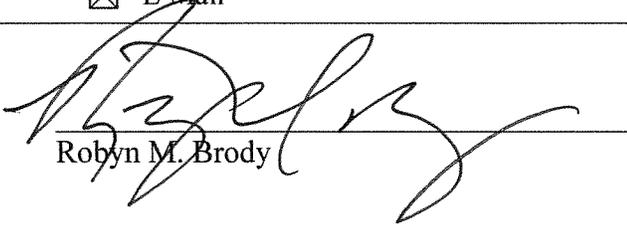

J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 4th day of September, 2012 she caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

| | |
|--|--|
| Original: Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov | <input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail |
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Robyn M. Brody

water rights, Rangen's water rights, water use by Rangen, the hydrogeology of the Rangen area and related matters.

4. **INTERROGATORY NO. 4:** Please identify any experts or consultants with whom you or your attorneys or representatives expect to call as an expert witness at trial. For each such consultant or expert, please state:

- a. The subject matter on which the expert is expected to testify;
- b. The substance of the opinions to which the expert is expected to testify;
- c. The underlying facts and data upon which the expert opinions are based, in conformity with I.R.C.P. 24(b)(4) and I.R.E. 705; and
- d. Identify all documents upon which your experts or consultants relied.

Response to Interrogatory No. 4: The substance and underlying data of all expert opinions will be produced in compliance with the Director's June 12, 2012, Scheduling Order, as amended. Without limiting in any way the matters on which IGWA's expert will testify, the general subjects to which they may testify are as follows:

- a. Charles Brendecke may testify concerning spring flows, hydrology of the Eastern Snake Plain Aquifer (ESPA), the ESPA Model, effects of curtailment, and other technical and scientific matters.
- b. Tom Rogers may testify concerning the use and usability of water by Rangen for fish production and other purposes and other aquaculture matters.
- c. John S. Church may testify concerning the reasonableness of water use by Rangen, the reasonableness of utilizing alternate means or points of diversion, the effects of curtailment, and other economic matters.
- d. Bern S. Hinckley may testify concerning spring flows, geology of the Eastern Snake Plain Aquifer (ESPA), and other technical and scientific matters.

5. **INTERROGATORY NO. 5:** Do you contend that Rangen is suffering any material injury with respect to the use of its Water Rights as a result of the collective or individual junior-priority groundwater pumping of any of IGWA's member Ground Water Districts or their individual irrigators, municipalities, commercial or industrial entities or mitigation members? If your answer is no, then please explain what facts you are relying upon and identify witnesses or documents which support your claim.

Response to Interrogatory No. 5: Objection: this interrogatory seeks a legal conclusion and is therefore beyond the scope of permissible discovery. Without waiving said objection,

