

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 36-02551) CM-DC-2011-004
AND 36-07694)
(RANGEN, INC.)) ORDER DENYING IN PART
) IGWA'S MOTION IN LIMINE
) TO EXCLUDE DAVID BROCK
_____)

FINDINGS OF FACT

On January 9, 2013, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Director of the Idaho Department of Water Resources ("Director" or "Department") a *Motion in Limine to Exclude Brock, and Request for Expedited Decision* ("Motion") and *Affidavit of Candice M. McHugh in Support of Motion in Limine*. According to the Motion, on December 31, 2012, Rangen, Inc. ("Rangen") designated David Brock as a potential lay witness. The Motion asserts Mr. Brock is a nutritionist employed by Rangen and will testify as to "what type of feed research Rangen could do if more water were available at the facility." *Motion* at 3 citing *Rangen's Supplemental Response to IGWA's Interrogatory No. 6*. Based on this response, the Motion states that Mr. Brock "appears to be an expert witness disguised as a lay witness." *Id.* at 5. Because Mr. Brock was not timely designated as an expert witness, IGWA requests that the Director preclude Mr. Brock from testifying at the hearing. Alternatively, if the Director allows Mr. Brock to testify, the Motion asks as follows: (1) Mr. Brock should only be permitted to testify to non-expert, factual matters; (2) IGWA should be allowed to depose Mr. Brock;¹ (3) IGWA should be allowed to revise its expert reports; (4) the hearing schedule should be revised to accommodate revisions to the expert reports; and (5) the Director should award costs and attorneys fees to IGWA for Rangen's failure to timely disclose Mr. Brock. *Motion* at 4-5.

On January 11, 2013, in response to the Motion, the Director issued an *Order Shortening Time to File an Answer to Motion in Limine* ("Order Shortening Time"). The order shortened the period of time for parties to respond to IGWA's Motion to seven days, and "specifically request[ed] that if Rangen files an answer to IGWA's Motion in Limine, that Rangen explain how the testimony of Mr. Brock is relevant to this proceeding." *Order Shortening Time* at 1.

On January 16, 2013, Rangen filed a *Response in Opposition to IGWA's Motion in Limine to Exclude Brock* ("Rangen Response") and *Affidavit of Robyn M. Brody in Opposition to IGWA's Motion in Limine to Exclude Brock* ("Brody Affidavit"). The Rangen Response asserts

¹ On January 16, 2013, the Director signed a *Subpoena Duces Tecum for David Brock*, submitted to the Director by the City of Pocatello. Mr. Brock is scheduled to be deposed on January 22, 2013 in Twin Falls, Idaho.

Mr. Brock was initially not identified as a potential witness because Rangen did not believe he had “any information that is relevant to the matters to be decided by Director Spackman.” *Rangen Response* at 2. The Rangen Response states Rangen “recently made the decision to disclose Brock, a lay witness, out of an abundance of caution because it has become apparent . . . IGWA fundamentally disagrees as to what constitutes ‘material injury.’” *Id.* (emphasis in original). The Rangen Response then analyzes and interprets the meaning of material injury from the Idaho Supreme Court’s decision in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). The Rangen Response opposes IGWA’s request for costs and attorneys fees, and concludes by stating it “identified Mr. Brock as a lay witness 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.” *Id.* at 7.

On January 17, 2013, the City of Pocatello (“Pocatello”) filed a *Response Regarding Rangen Inc.’s Response in Opposition to IGWA’s Motion in Limine to Exclude Brock* (“Pocatello Response”). The Pocatello Response asserts that, by addressing the legal standards of material injury, the “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, implying such evidence should be excluded.” *Pocatello Response* at 2. “This amounts to an attempt by Rangen to force the Hearing Officer to rule on its *Motion for Partial Summary Judgment Re: Material Injury* . . . filed January 9, 2013, before parties have an opportunity to respond.” *Id.*

On January 17, 2013, IGWA filed a *Reply in Support of its Motion in Limine to Exclude Brock* (“Reply”). The Reply states that, contrary to the Order Shortening Time, Rangen failed to explain how Mr. Brock’s testimony would be relevant. Additionally, the Reply states that “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 . . .” *Reply* at 4.

CONCLUSIONS OF LAW

IGWA’s Motion asks the Director to exclude Mr. Brock as a witness at the Rangen delivery call hearing. The Director agrees with IGWA and Pocatello that Rangen’s response concerning the legal and factual standards associated with material injury are beyond the scope of the Motion. The Director will not, in this order, address any interpretations of material injury.

Attached to the Brody Affidavit is an excerpt of a deposition transcript showing that IGWA and Pocatello knew of Mr. Brock, and his employment with Rangen, as early as September 12, 2012. *Brody Affidavit* at Exhibit 3. Rangen is correct that IGWA and Pocatello could have deposed Mr. Brock any time after September 12, 2012. The Director concludes, however, that it was reasonable for IGWA and Pocatello to assume Mr. Brock would not testify until Rangen disclosed him as a potential witness. Furthermore, in the interests of economy to its clients, the Director concludes it was reasonable for IGWA and Pocatello to not notice Mr. Brock for deposition until he was identified by Rangen as a potential witness. Mr. Brock is scheduled to be deposed on January 22, 2013.

The Director disagrees with IGWA's assertion that the "season for disclosing Mr. Brock as a witness passed months ago." *Motion* at 4. Rangen is obligated to update its discovery responses. Rangen did just that when it identified Mr. Brock as a potential witness. Given the facts, the Director does not find that Rangen's December 31, 2012 lay witness disclosure was untimely. Nevertheless, while the Director agrees that Mr. Brock was timely disclosed as a potential witness, the Director does not agree with Rangen's assertion that, "according to the *Third Amended Scheduling Order* . . . the final deadline for disclosing witnesses . . . is not until April 8, 2013." *Rangen Response* at 6-7 (emphasis added). The *Third Amended Scheduling Order* (November 21, 2012) does not establish a witness "disclosure" deadline; rather, it establishes April 8, 2013 as the deadline for parties to "exchange[] . . . [w]itness lists and exhibits." *Third Amended Scheduling Order* at 2 (emphasis added). April 8, 2013 is a deadline to identify witnesses who have been previously disclosed and may appear at the hearing. April 8, 2013 is not a deadline to make parties aware of previously undisclosed witnesses. With the hearing set to commence on May 1, 2013, the Director warns the parties that the time to disclose potential witnesses is rapidly approaching.

By its own admission, Rangen states that Mr. Brock is a "lay witness." *Rangen Response* at 2 (emphasis in original). The Director accepts Rangen at its word and concludes that Rangen has made at least a facial showing in its Response that Mr. Brock may be able to provide relevant testimony concerning his employment at the hearing. If Rangen calls Mr. Brock as a witness at the hearing, the Director will consider Mr. Brock a lay witness. If IGWA or Pocatello believe Mr. Brock is offering expert opinion at the hearing, objections to his testimony will be entertained. Idaho Rule of Evidence 701-02. If IGWA or Pocatello believe Mr. Brock's testimony at the hearing is irrelevant, the Director will entertain those objections.

Because the Director does not conclude that Rangen failed to timely disclose Mr. Brock as a potential lay witnesses, the Director will not grant IGWA's request to revise its expert reports, will not grant IGWA's request to revise the hearing schedule, and will not grant IGWA's request for an award of costs and/or attorneys fees.

ORDER

Based upon and consistent with the foregoing, the Director hereby DENIES IN PART IGWA's *Motion in Limine to Exclude Brock*. Rangen may call Mr. Brock as a lay witness at the hearing. The Director denies IGWA's request to revise its expert reports, IGWA's request to revise the hearing schedule, and IGWA's request for an award of costs and/or attorneys fees. The deposition of Mr. Brock should proceed as planned.

Dated this 18th day of January, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2013, the above and foregoing document was served on the following by providing a copy of the *ORDER DENYING IN PART IGWA'S MOTION IN LIMINE TO EXCLUDE DAVID BROCK* in the manner selected:

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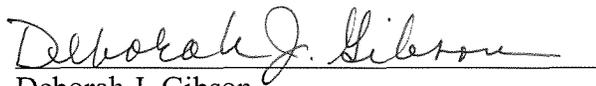
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