

4. In his December 21, 2012, corrected January 17, 2013, Dr. Brendecke opined that, within the Rangen spring cell, flows from the Martin-Curren Tunnel accounted for approximately 75% of the total Rangen flow. Ex. 2401, p. 3-4, Fig. 3.9.

5. Dr. Brendecke opined in his reports that there are sources of uncertainty in ESPAM 2.1, but Dr. Brendecke did not quantify the sources of uncertainty.

6. During his May 15, 2013 testimony, Dr. Brendecke was ultimately asked by counsel for IGWA for his opinion as to the amount of water Rangen can reasonably expect to receive through curtailment. In order to arrive at this conclusion, Dr. Brendecke was asked by counsel to write words and values on a flip chart. Ex. 1462. Dr. Brendecke started with a rounded figure of 18 cfs for “ESPAM2.1.” Dr. Brendecke then reduced this figure to a rounded figure of 17 cfs to account for “ACGW” (area of common ground water supply). These rounded figures were reasonably consistent with prior ESPAM 2.1 results (17.89 and 16.94, respectively), as stated above.

7. Dr. Brendecke then reduced 17 cfs to 11 cfs to account for a “correction” to the “water budget.” Ex. 1462. Dr. Brendecke then reduced 11 cfs to 8.8 cfs to account for “conceptual uncertainty.” *Id.* Counsel for Rangen and the Surface Water Coalition (“SWC”) objected to this testimony. The objections generally concerned the assertion that Dr. Brendecke had not previously assigned values to these factors. Dr. Brendecke finally reduced the amount of water Rangen could expect to receive through curtailment by the amount of water expected to flow through the “Curren Tunnel.” Ex. 1462. When reducing the amount of water by the flow through the “Curren Tunnel,” Dr. Brendecke opined that Rangen could reasonably expect to receive 6.6 cfs through curtailment. *Id.*

8. Counsel for Rangen and SWC orally objected to Dr. Brendecke rendering an opinion on values he had not previously disclosed. Counsel for Rangen and SWC sought to strike that testimony of Dr. Brendecke. The Director allowed Dr. Brendecke to testify, but stated he would take the motion to strike under advisement. The Director allowed opposing parties to cross-examine Dr. Brendecke.

CONCLUSIONS OF LAW

1. The decision to grant or deny a motion to strike is within the discretion of the hearing officer. *Garner v. Povey*, 151 Idaho 462, 259 608 (2011). The hearing officer is “not bound by the Idaho Rules of Evidence.” IDAPA 37.01.01.600.

2. Precise values assigned by Dr. Brendecke to his “correction” to the “water budget” and for “conceptual uncertainty” were not previously disclosed. The Director cannot find in Dr. Brendecke’s reports that he previously assigned precise values for “correction” to the “water budget” and for “conceptual uncertainty.” During cross-examination by counsel for Rangen concerning previous disclosure of a value for “conceptual uncertainty,” Dr. Brendecke stated he did not recall assigning a value. During cross-examination by counsel for SWC, Dr. Brendecke stated conceptual uncertainty is “not quantifiable with any degree of precision.” Dr.

Brendecke also stated that his assignment of a value for conceptual uncertainty is “an estimate.” Dr. Brendecke stated “the quantification [for conceptual uncertainty] hasn’t appeared before.” Finally, Dr. Brendecke stated “the numbers [for conceptual uncertainty and correction to the water budget] were written on that chart [Exhibit 1462]” for the first time today. During re-direct, Dr. Brendecke stated his 20% value for conceptual uncertainty comes from his “composite” model at the Rangen spring cell, and that actual conceptual uncertainty across ESPAM 2.1 would be higher than 20%.

3. The Director concludes that Dr. Brendecke did assign a value to the flow at the Martin-Curren Tunnel, Ex. 2401, p. 3-4, Fig. 3.9, which he testified to at the hearing.

4. While the parties were allowed to cross-examine Dr. Brendecke, the parties were not afforded to discover the bases upon which he assigned his numerical values for “correction” to the “water budget” and for “conceptual uncertainty.” Given the amount of time the parties have been in discovery, Dr. Brendecke had ample time to disclose any values he would assign to these factors.

5. Because the parties were not afforded the opportunity to discover the bases of Dr. Brendecke’s opinions, the Director agrees to strike Dr. Brendecke’s testimony concerning values he assigned to “correction” to the “water budget” and “conceptual uncertainty.”

ORDER

Based upon the foregoing, the Director GRANTS the oral motion to strike the testimony of Dr. Brendecke concerning values assigned to his to “correction” to the “water budget” and “conceptual uncertainty.”

DATED this 16th day of May, 2013.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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