

Randall C. Budge (ISB# 1949)  
Candice M. McHugh (ISB# 5908)  
Thomas J. Budge (ISB# 7465)  
RACINE OLSON NYE BUDGE  
& BAILEY, CHARTERED  
101 S. Capitol Blvd., Suite 300  
Boise, Idaho 83702  
Telephone: (208) 395-0011  
[rcb@racinelaw.net](mailto:rcb@racinelaw.net)  
[cmm@racinelaw.net](mailto:cmm@racinelaw.net)  
[fjb@racinelaw.net](mailto:fjb@racinelaw.net)

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

RECEIVED

MAY 22 2013

DEPARTMENT OF  
WATER RESOURCES

**BEFORE DEPARTMENT OF WATER RESOURCES**

**STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION  
OF WATER TO WATER RIGHT NOS.  
36-02551 & 36-07694

(RANGEN, INC.)

Docket No.: CM-DC-2011-004

**IGWA'S MOTION TO STRIKE  
PORTIONS OF EXHIBITS 1284  
AND 1299 CONTAINING THE  
EXPERT OPINIONS OF CHARLES  
E. BROCKWAY, DAVID COLVIN,  
AND JIM BRANNON**

Idaho Ground Water Appropriators, Inc. (IGWA), by and through its attorneys of record, Racine Olson Nye Budge & Bailey, Chartered, hereby move the Director to strike portions of hearing Exhibits 1284 and 1299 which contain the expert opinions of Charles E. Brockway, David Colvin, and Jim Brannon for lack of expertise and foundation. This motion is supported by the affidavit of Candice McHugh filed herewith.

**LEGAL AUTHORITY**

The decision whether to admit or deny expert opinion requires the Court to act as a gatekeeper against pseudo-scientific opinion that can be misleading when not supported by a proper foundation and scientific background. The Idaho Supreme Court has held that for expert opinion testimony to be admissible, a witness must first be qualified as an expert. *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (1987). The threshold test for the admission of expert testimony is whether the scientific or other specialized knowledge of the expert will assist the

trier of fact to understand the evidence or to determine a fact in issue. I.R.E. 702. Expert opinion that is speculative, conclusory, or unsubstantiated by facts in the record is inadmissible as it is of no assistance to the jury in rendering its verdict. *Ryan v. Beisner*, 123 Idaho 42 (Ct. App. 1992). The court's function is to distinguish between scientifically sound reasoning from that of a self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs. *State v. Konechny*, 134 Idaho 410 (Ct. App. 2000); citing *Ryan*, 123 Idaho 42; (quoting *Landrigan v. Celotex Corp.*, 127 N.J. 404, 605 A.2d 1079, 1084 (1992)).

### ANALYSIS

Exhibits 1284, Brockway et al Opening Report and 1299 Brockway et al Rebuttal Report contain opinions and statements for which neither Dr. Brockway, Mr. Colvin, nor Mr. Brannon are experts or have sufficient foundation to render admissible expert opinion. Testimony elicited at the hearing and in their depositions demonstrates that they are not qualified to render expert opinions concerning:

- 1) the amount of water Rangen needs for fish propagation or research purposes;
- 2) the quality of water Rangen needs for fish propagation or research purposes;
- 3) whether Rangen is using water beneficially for fish propagation purposes;
- 4) whether Rangen is wasting water for fish propagation purposes;
- 5) whether Rangen's diversion and conveyance structures are adequate, reasonable, and efficient for fish propagation or research purposes;
- 6) whether Rangen's diversion and use of water comports with aquaculture industry standards;
- 7) whether Rangen's measurement of water comports with aquaculture industry standards;
- 8) whether Rangen could raise more fish with more water; and
- 9) whether Rangen could perform more research with more water.

Attached hereto as **Exhibit A** are excerpts from the hearing transcript that contain testimony of Dr. Brockway and Mr. Colvin demonstrating that they are not qualified to render expert opinion on the foregoing subjects. Attached hereto as **Exhibit B** is an excerpt from the deposition transcript of Mr. Brannon who did not testify at hearing; however, because he is a co-author of Exhibits 1284 and 1299 it is important for purposes of this motion to demonstrate that he is not qualified to render expert opinion on the foregoing subjects. Accordingly, IGWA asks that all statements concerning these subjects be stricken from Exhibits 1284 and 1299. Attached hereto as **Exhibits C** and **D** are copies of the Exhibits 1284 and 1299 with sentences and

opinions struck out that IGWA believes lack proper expertise and foundation. IGWA asks that the struck out versions of Exhibits 1284 and 1299 attached as **Exhibits C and D** respectively be substituted for the versions currently on file with the IDWR as exhibit numbers 1284 and 1299.

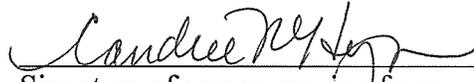
RESPECTFULLY SUBMITTED this 22nd day of May, 2013.

RACINE OLSON NYE BUDGE &  
BAILEY, CHARTERED

By:   
CANDICE M. MCHUGH  
THOMAS J. BUDGE  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I certify that on this 22nd day of May, 2013, I caused to be served a true and correct copy of the foregoing **IGWA'S Motion to Strike Portions of Exhibits 1284 and 1299 Containing Expert Opinions of Charles E. Brockway, David Colvin, and Jim Brannon** on the following persons in the manner indicated:

  
 \_\_\_\_\_  
 Signature of person serving form

<b>Original:</b> Director, Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 Attn: Deborah Gibson <a href="mailto:Deborah.Gibson@idwr.idaho.gov">Deborah.Gibson@idwr.idaho.gov</a> <a href="mailto:Kimi.White@idwr.idaho.gov">Kimi.White@idwr.idaho.gov</a>	<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
Garrick Baxter, Deputy Attorney General Chris Bromley, Deputy Attorney General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:chris.bromley@idwr.idaho.gov">chris.bromley@idwr.idaho.gov</a>	<input 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
Robyn M. Brody Brody Law Office, PLLC PO Box 554 Rupert, ID 83350 <a href="mailto:robynbrody@hotmail.com">robynbrody@hotmail.com</a>	<input 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
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC PO Box 1800 Hailey, ID 83333 <a href="mailto:fxh@haemlaw.com">fxh@haemlaw.com</a>	<input 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
J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, ID 83702 <a href="mailto:jmay@maybrowning.com">jmay@maybrowning.com</a>	<input 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
Sarah Klahn Mitra Pemberton WHITE JANKOWSKI, LLP 511 16 <sup>th</sup> St., Suite 500 Denver, Colorado 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>	<input 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

Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	<input 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
C. Thomas Arkoosh ARKOOSH LAW OFFICES PO Box 2900 Boise, ID 83701 <a href="mailto:tom.arkoosh@aelawlobby.com">tom.arkoosh@aelawlobby.com</a>	<input 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
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 <a href="mailto:slt@idahowaters.com">slt@idahowaters.com</a> <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a>	<input 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
W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input 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
Jerry R. Rigby Hyrum Erickson Robert H. Wood Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a> <a href="mailto:herickson@rex-law.com">herickson@rex-law.com</a> <a href="mailto:rwood@rex-law.com">rwood@rex-law.com</a>	<input 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