

RECEIVED

JUN 05 2013

DEPARTMENT OF  
WATER RESOURCES

Robyn M. Brody (ISB No. 5678)  
Brody Law Office, PLLC  
P.O. Box 554  
Rupert, ID 83350  
Telephone: (208) 434-2778  
Facsimile: (208) 434-2780  
robynbrody@hotmail.com

J. Justin May (ISB No. 5818)  
May, Browning & May, PLLC  
1419 W. Washington  
Boise, Idaho 83702  
Telephone: (208) 429-0905  
Facsimile: (208) 342-7278  
jmay@maybrowning.com

Fritz X. Haemmerle (ISB No. 3862)  
Haemmerle & Haemmerle, PLLC  
P.O. Box 1800  
Hailey, ID 83333  
Telephone: (208) 578-0520  
Facsimile: (208) 578-0564  
fxh@haemlaw.com

*Attorneys for Rangen, Inc.*

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION  
FOR DELIVERY CALL OF RANGEN,  
INC.'S WATER RIGHT NOS. 36-02551  
& 36-07694

(RANGEN, INC.)

Docket No. CM-DC-2011-004

**RANGEN'S RESPONSE IN  
OPPOSITION TO IGWA'S  
MOTION TO STRIKE PORTIONS  
OF EXHIBITS 1284 AND 1299**

COMES NOW, Rangen, Inc. ("Petitioner" or "Rangen"), by and through its attorneys, and hereby submits the following Response in Opposition to *IGWA's Motion to Strike Portions of Exhibits 1284 and 1299 Containing the Expert Opinions of Charles E. Brockway, David Colvin and Jim Brannon* ("IGWA's Motion to Strike") filed with the Idaho Department of Water Resources on May 22, 2013.

## **BACKGROUND AND INTRODUCTION**

The Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a motion requesting that the Director strike portions of hearing Exhibits 1284 and 1299 which contain the expert opinions of Charles E. Brockway (“Brockway”), David Colvin (“Colvin”), and Jim Brannon (“Brannon”). Along with its motion, IGWA submitted proposed struck-out versions of Exhibits 1284 and 1299, which are Brockway, Colvin, Brannon’s initial and rebuttal expert reports. The proposed stike-outs detail specifically the portions of these expert reports to which IGWA objects. The basis for the objection is essentially that with regard to these specific portions of the reports, Brockway, Colvin, and Brannon do not have sufficient expertise regarding the raising of fish.

## **ARGUMENT**

The portions of the expert reports that IGWA seeks to strike primarily provide background information, facts, and personal observations upon which some of Brockway, Colvin, and Brannon’s opinions are based. Experts commonly and properly rely upon such information, facts, and observations in forming their opinions. *See I.R.E 703*. IGWA was provided ample opportunity to cross examine regarding these facts and observations. To the extent that the proposed stricken portions include expert opinions, those opinions are within the area of Dr. Brockway’s expertise. These opinions do not require any particular knowledge or expertise with regard to the biology of fish.

In this case, Dr. Brockway visited the Rangen facility on numerous occasions and spoke extensively with Rangen personnel. Dr. Brockway’s opinions are based upon personal observations as well as his extensive experience and expertise with how water is diverted, measured, and used in Idaho. He has been either measuring water or studying water measurements since 1954. *Transcript of Hearing, May 6, 2013, Vol.IV, p.920 L. 7-20*. He has studied Rangen’s water rights, has made site visits to the Rangen facility, has identified spring

sources and/or diversion boxes, examined Rangen's diversion structures, and reviewed Rangen's water measurements. *Transcript of Hearing, May 6, 2013, Vol.IV*, p.922 L. 2-14, p.982 L.1-16, p.983 L.20-22 and p.987 L.1-4. The hearing officer acknowledged during the hearing that "I've seen enough of Dr. Brockway in my tenure here that he's recognized as an expert witness in broad areas of not only water rights but water measurement and evaluation of water systems." *Transcript of Hearing, May 6, 2013, Vol.IV*, p.925 L. 17-21.

An observer is qualified to testify because he has firsthand knowledge of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw.

*IHC Hospitals, Inc. v. Board of Commissioners*, 108 Idaho 136, 143-4, 697 P.2d 1150, 1157-6 (1985) (quoting McCormick on Evidence § 13 (2d ed. 1972)). An expert's power to draw inferences is warranted in areas where the average layman's knowledge is limited. The expert must have sufficient expertise in the area "that his opinion or inference will probably aid the trier in his search for truth." *Id.*

There is no basis for striking portions of the expert reports setting forth observations. For instance, IGWA has struck-out the following sentence on page 8 of Exhibit 1284: "At the time of the site visits, there was not enough flow to operate the small raceways, leaving them dry. The limited flow also dried up three of the five large raceways and one of the four 'CTR' raceways." This is simply a statement based upon personal observation. At the time of site visits there was limited water available at the facility and a number of raceways were dry including those enumerated. Virtually all of the lay and expert witnesses in this case have made similar observations. It cannot be seriously disputed that Rangen does not have sufficient water available to fill all raceways in the facility. Similarly, there is no basis for objection to the observation on page 21 of Exhibit 1284 that "[u]tilization of the increased spring discharge

within the Rangen Research Hatchery will allow increased fish production as well as rehabilitation of the research facilities and historical fish propagation research.” It requires no particular expertise to understand the simple fact that, as Dr. Brockway testified, you can’t raise fish in empty raceways, and conversely if you had water in raceways you could raise fish. *Transcript of Hearing, May 14, 2013, Vol.X, p.2390 L. 3-13.*

Brockway has knowledge from his visits to the Rangen Facility, identifying Rangen’s spring sources and/or diversion boxes and measuring the flow, and in speaking to Rangen employees, that Rangen needs good quality water in order to produce fish.

As the Director acknowledged, Dr. Brockway also has extensive knowledge of water rights and how water is diverted and used throughout Idaho. This knowledge includes how water is diverted, measured, and used at other aquaculture facilities’. *Transcript of Hearing, May 6, 2013, Vol.IV, p.927 L. 7-16.* Given this experience and expertise, his opinions on Rangen’s diversion and use of water “will probably aid the trier in his search for truth.” This includes in particular opinions that:

- “[A]vailable Rangen spring flows were being utilized appropriately and efficiently according to the adjudicated water rights . . .” Exhibit 1284, p. 9.
- “[T]he current Rangen Research Hatchery diversion structures are reasonable and that they fully utilize available water to Rangen’s water rights. The diversion structures are consistent with industry standard for aquaculture facilities in the Magic Valley. Based upon our knowledge of other area facilities, the Rangen Hatchery is consistent with the industry standard practice for conservation and beneficial use of available water and does not waste diverted water.” Exhibit 1284, p. 11.

- “It is our opinion that there is insufficient spring flow available to operate the Rangen facility and that the available Rangen spring flows are being utilized appropriately and efficiently according to the adjudicated water rights. There is no evidence of wasted water.” Exhibit 1284, p. 26.

Other testimony has been provided in this case by witnesses called by various parties including Rangen regarding the appropriate loading levels for raceways, conduct of research, and the particular manner in which water is utilized by fish in hatcheries. This testimony may also provide useful information to the Director in making a decision in this case. However, the fact that other information may also be useful is not a basis for striking Dr. Brockway’s opinions.

#### **CONCLUSION**

IGWA’s Motion to Strike should be denied.

DATED This 5th day of June, 2013.

MAY, BROWNING & MAY

By

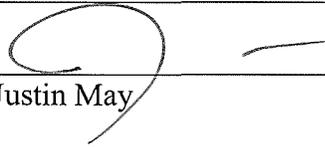
  
\_\_\_\_\_  
J. Justin May

**CERTIFICATE OF SERVICE**

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 5th day of June, 2013 she caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

<p><b>Original:</b>          Director Gary Spackman          Idaho Department of Water          Resources          P.O. Box 83720          Boise, ID 83720-0098          deborah.gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input checked="" type="checkbox"/>          U.S. Mail <input type="checkbox"/>          Facsimile <input type="checkbox"/>          Federal Express <input type="checkbox"/>          E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter          Chris Bromley          Idaho Department of Water          Resources          P.O. Box 83720          Boise, Idaho 83720-0098          garrick.baxter@idwr.idaho.gov          chris.bromley@idwr.idaho.gov          kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/>          U.S. Mail <input type="checkbox"/>          Facsimile <input type="checkbox"/>          Federal Express <input type="checkbox"/>          E-Mail <input checked="" type="checkbox"/></p>
<p>Randall C. Budge          Candice M. McHugh          Racine, Olson, Nye, Budge &amp;          Bailey, Chartered          P.O. Box 1391          101 South Capitol Blvd, Ste. 300          Boise, ID 83704-1391          Fax: 208-433-0167          rcb@racinelaw.net          cmm@racinelaw.net          bjh@racinelaw.net</p>	<p>Hand Delivery <input type="checkbox"/>          U.S. Mail <input type="checkbox"/>          Facsimile <input type="checkbox"/>          Federal Express <input type="checkbox"/>          E-Mail <input checked="" type="checkbox"/></p>
<p>Sarah Klahn          Mitra Pemberton          White &amp; Jankowski          Kittredge Building,          511 16th Street, Suite 500          Denver, CO 80202          sarahk@white-jankowski.com          mitrap@white-jankowski.com</p>	<p>Hand Delivery <input type="checkbox"/>          U.S. Mail <input type="checkbox"/>          Facsimile <input type="checkbox"/>          Federal Express <input type="checkbox"/>          E-Mail <input checked="" type="checkbox"/></p>
<p>Dean Tranmer          City of Pocatello</p>	<p>Hand Delivery <input type="checkbox"/>          U.S. Mail <input type="checkbox"/></p>

<p>P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<p>Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt &amp; Simpson, L.L.P. 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 Facsimile: (208) 735-2444 tlt@idahowaters.com jks@idahowaters.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>C. Thomas Arkoosh Arkoosh Law Offices 802 West Bannock, Suite 900 Boise, ID 83701 Tom.arkoosh@arkoosh.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Jerry R. Rigby Hyrum Erickson Robert H. Wood Rigby, Andrus &amp; Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>

  
\_\_\_\_\_  
J. Justin May