

RECEIVED

MAY 03 2013

DEPARTMENT OF  
WATER RESOURCES

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)  
[tjb@racinelaw.net](mailto:tjb@racinelaw.net)

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

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 Exclude  
Exhibit 4 to the Rebuttal Report of  
Charlie E. Smith**

Idaho Ground Water Appropriators, Inc. (IGWA) respectfully moves the Director pursuant to Idaho Rules of Civil Procedure 26(e) and 37(b) and Idaho Rules of Evidence 403, 702, and 703, to exclude exhibit 4 to the Rebuttal Report of Charlie E. Smith dated February 8, 2013. As explained below, exhibit 4 is not admissible as expert opinion because it lacks proper foundation or appropriate methodology. Therefore, IGWA asks that exhibit 4 be deemed inadmissible for any and all purposes in this hearing.

**ANALYSIS**

The decision whether to admit or deny expert opinion requires the Court to act as a gatekeeper against pseudo-scientific opinion that is not supported by a proper foundation. 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. The court must preliminarily assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning or methodology can be properly applied to the facts in issue. *Inama v. Brewer*, 132 Idaho 377, 380

(1998). 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 (Idaho Ct. App. 1992). Further, where expert testimony is submitted simply to vouch for the credibility of another witness, it encroaches on the jury's vital and exclusive function to make credibility determinations, and therefore does not assist the trier of fact as required under I.R.E. 702. *State v. Perry*, 139 Idaho 520 (2003). In *Inama*, 132 Idaho at 380, the Idaho Supreme Court upheld a trial court's decision to exclude an expert's opinion based on the legal principle that "there's a difference between having an opinion as an expert and merely rehashing what other people have told you." The court must balance the probative worth of the expert testimony, focusing on the degree of relevance and materiality of the opinions offered, against the danger of unfair prejudice in allowing the expert testimony. See I.R.E. 403; see also *Davidson v. Beco Corp., Inc.*, 114 Idaho 107 (1987).

Exhibit 4 to the Rebuttal Report is a copy of 90-page expert report submitted by John R. MacMillan in a different case. Mr. MacMillan's report was submitted on behalf of Clear Springs Foods, Inc., and is based on facts involving the operations of Clear Springs Foods, Inc. There is not a single reference in Mr. MacMillan's report to Rangen or its aquaculture operation that is the subject of this case. Exhibit 4 is unsubstantiated by facts involving Rangen. As such, it cannot be relied upon by the Director in making his decision in this case, and is not admissible into evidence. *Ryan*, 123 Idaho 42.

Mr. Smith's Rebuttal Report is less than two pages long. The expert report of Mr. MacMillan is 90 pages long. The report of Mr. MacMillan is submitted essentially in lieu of Mr. Smith's own expert analysis of the facts of this case. It is clearly just a rehash of something said by a different witness in a different case, and as such is not admissible. *Inama*, 132 Idaho at 380. The fact that Mr. Smith vouches for the credibility of Mr. MacMillan does not make Mr. MacMillan's report admissible in this case. *Perry*, 139 Idaho 520.

Finally, IGWA would be significantly prejudiced if Mr. MacMillan's report were admitted into evidence in this case, or if Mr. Smith were permitted to testify to opinions rendered by Mr. MacMillan but not by Mr. Smith. Rangen has not at any time identified Mr. MacMillan as an expert in this case; IGWA has for that reason not deposed Mr. MacMillan; and IGWA will have no opportunity to cross-examine Mr. MacMillan at the hearing.

**CONCLUSION**

Based upon the foregoing, IGWA respectfully asks the Director to declare Exhibit 4 to the Rebuttal Report of Charlie E. Smith to be inadmissible at the hearing for any and all purposes. It is further requested that Exhibit 4 be stricken from the Rebuttal Report of Charlie E. Smith on file with the Department.

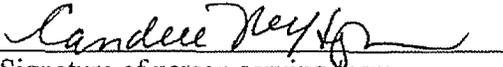
DATED this 2<sup>nd</sup> day of May, 2013.

RACINE OLSON NYE BUDGE &  
BAILEY, CHARTERED

By:   
CANDICE M. McHUGH  
*Attorneys for IGWA*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of May, 2013, I caused to be served a true and correct copy of **IGWA's Motion to Exclude Exhibit 4 to the Rebuttal Report of Charlie E. Smith** upon the following persons in the manner indicated

  
Signature of person serving form

**Original:**

Director, Gary Spackman  
Idaho Department of Water Resources  
PO Box 83720  
Boise, ID 83720-0098  
Attn: Deborah Gibson  
[Deborah.Gibson@idwr.idaho.gov](mailto:Deborah.Gibson@idwr.idaho.gov)  
[Kimi.white@idwr.idaho.gov](mailto:Kimi.white@idwr.idaho.gov)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery on May 3, 2013
- 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  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[chris.bromley@idwr.idaho.gov](mailto:chris.bromley@idwr.idaho.gov)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Robyn M. Brody  
Brody Law Office, PLLC  
PO Box 554  
Rupert, ID 83350  
[robynbrody@hotmail.com](mailto:robynbrody@hotmail.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Fritz X. Haemmerle  
Haemmerle & Haemmerle, PLLC  
PO Box 1800  
Hailey, ID 83333  
[fxh@haeinlaw.com](mailto:fxh@haeinlaw.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

J. Justin May  
May, Browning & May, PLLC  
1419 West Washington  
Boise, ID 83702  
[jmay@maybrowning.com](mailto:jmay@maybrowning.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Sarah Klahn  
Mitra Pemberton  
WHITE JANKOWSKI, LLP  
511 16<sup>th</sup> St., Suite 500  
Denver, Colorado 80202  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)  
[mitrap@white-jankowski.com](mailto:mitrap@white-jankowski.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

Dean Tranmer  
City of Pocatello  
PO Box 4169  
Pocatello, ID 83201  
[dtranmer@pocatello.us](mailto:dtranmer@pocatello.us)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

C. Thomas Arkoosh  
ARKOOSH LAW OFFICES  
PO Box 2900  
Boise, ID 83701  
[tom.arkoosh@arkoosh.com](mailto:tom.arkoosh@arkoosh.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- 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  
[jt@idahowaters.com](mailto:jt@idahowaters.com)  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

W. Kent Fletcher  
Fletcher Law Office  
PO Box 248  
Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail

Jerry R. Rigby  
Hyrum Erickson  
Robert H. Wood  
Rigby, Andrus & Rigby, Chartered  
25 North Second East  
Rexburg, ID 83440  
[jrigby@rex-law.com](mailto:jrigby@rex-law.com)  
[herickson@rex-law.com](mailto:herickson@rex-law.com)  
[rwood@rex-law.com](mailto:rwood@rex-law.com)

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail