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DEPARTMENT OF
WATER RESOURCES

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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 REPLY IN SUPPORT OF
ITS MOTION TO STRIKE
PORTIONS OF EXHIBITS 1284
AND 1299**

Idaho Ground Water Appropriators, Inc. (IGWA) submits this reply to *Rangen's Response in Opposition to IGWA's Motion to Strike Portions of Exhibits 1284 and 1299* dated June 5, 2013 (Rangen's Reply).

Rangen's Reply does not object to most of the statements that IGWA asks to be stricken from exhibits 1284 and 1299 (see exhibits C and D to the *Affidavit of Candice M. McHugh in Support of IGWA's Motion to Strike Portions of Exhibits 1284 and 1289*), but it does ask that the five statements set forth below not be stricken. Rangen contends that these statements are "background information, facts, and personal observations upon which some of Brockway, Colvin, and Brannon's opinions are based," and that "[t]o the extent that the proposed stricken portions include expert opinions, those opinions are within the area of Dr. Brockway's expertise." (Rangen's Reply at 2.) IGWA agrees that observations alone are admissible to the extent they are relevant. The problem with the following five statements is that they go beyond mere observation, containing opinions that Dr. Brockway clearly is not qualified to render.

Below are the five statements that Rangen contends should not be stricken from the expert reports of Dr. Brockway, Mr. Colvin, and Mr. Brannon, along with an explanation of why these statements are inadmissible:

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 (3) of the five (5) large raceways and one (1) of the four (4) CTR raceways. (Ex. 1284, p. 8)

Rangen contends: “This is simply a statement based upon a personal observation.” (Rangen’s Response at 3.) Not true. While personal observation may have revealed dry raceways, the foregoing statement renders an opinion as to how much water is required to operate the small raceways as well as the cause of the dry raceways. This opinion is not admissible without actual knowledge of fish production, fish research, and how Rangen operates its facilities, which Dr. Brockway, Mr. Colvin, and Mr. Brannon all admitted they do not possess. In fact, evidence was presented that Rangen does not run water through raceways when it isn’t raising fish in them, which would explain the reason for dry raceways. IGWA does not object to a personal observation that a raceway was dry; it vehemently objects to unqualified opinions by Dr. Brockway, Mr. Colvin, or Mr. Brannon as to the reason a raceway was dry.

Rangen also argues the following sentence should remain:

Utilization 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. (Ex. 1284, p. 21.)

Rangen claims this sentence means nothing more than “you can’t raise fish in empty raceways.” (Rangen’s Response at 4.) IGWA agrees you cannot raise fish in empty raceways, but that is not what it says. It contains an opinion that any amount of increased flow will increase fish production, allow rehabilitation of research facilities, and result in historical fish propagation research. These are opinions about what Rangen *could* do if it had more water. These opinions require expertise in fish propagation and research, which Dr. Brockway, Mr. Colvin, and Mr. Brannon all admitted they do not possess.

Rangen also contends that the following three (3) sentences should remain:

- Available Rangen spring flows were being utilized appropriately and efficiently according to the adjudicated water rights. (Ex. 1284, p. 9.)

- The current Rangen research hatchery diversion structures are reasonable and that they fully utilize available water to Rangen's water rights. Diversion structures are consistent with industry standard for aquaculture facilities in the Magic Valley. Based on our knowledge of other area facilities, the Rangen Hatchery is consistent with the industry standard of practice for conservation and beneficial use of available water and does not waste diverted water. (Ex. 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. (Ex. 1284, p. 1286.)

These are not mere observations. They are opinions concerning the use of water for fish propagation and research purposes, and aquaculture industry standards.

Rangen had the obligation to qualify Dr. Brockway, Mr. Colvin, or Mr. Brannon as experts in those fields if it wanted the foregoing opinions to be admissible. Not only did Rangen fail to meet its burden, Dr. Brockway, Mr. Colvin, and Mr. Brannon admitted on cross-examination that they were not rendering opinions concerning fish propagation, fish research, aquaculture industry standards, or how Rangen operates its facility. (See exhibits A and B to the *Affidavit of Candice M. McHugh in Support of IGWA's Motion to Strike Portions of Exhibits 1284 and 1299.*)

Therefore, IGWA asks that its *Motion to Strike Portions of Exhibits 1284 and 1299* be granted in its entirety.

Dated this 14th day of June, 2013.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
THOMAS J. BUDGE
Attorneys for IGWA

CERTIFICATE OF SERVICE

I certify that on this 24th day of June, 2013, I caused to be served a true and correct copy of **IGWA's Reply in Support of Its Motion to Strike Portions of Exhibits 1284 and 1299** on the following persons in the manner indicated:



 Signature of person serving form

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