

Inc. – Availability of Spring Flow and Injury to Water Rights, was also prepared by Brockway, Colvin, and Brannon. Brockway and Colvin testified at the delivery call hearing; Brannon did not.

CONCLUSIONS OF LAW

1. Whether to grant or deny a motion to strike is within the discretion of the trier of fact and is reviewed for an abuse of discretion. *Mallonee v. State*, 139 Idaho 615, 623, 84 P.3d 551, 559 (2004). The evaluation of evidence in a hearing before the Department is governed by Rule 600 of the Department’s Rules of Procedure, which states as follows:

Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600.

2. At the hearing on Rangen’s delivery call, Colvin testified concerning ground water modeling and use of the Eastern Snake Plain Aquifer model in the Rangen delivery call. During cross-examination, Colvin specifically stated that he was not offering expert opinion regarding fish production, water quality, engineering, fish research, aquaculture industry standards, fish hatchery management, or the use of vertical wells to supplement Rangen’s water supply. Tr. Vol. 10, pp. 2423-2428. Brockway also testified concerning ground water modeling and use of the Eastern Snake Plain Aquifer model in the Rangen delivery call. Brannon did not testify at the hearing. The Motion to Strike does not concern opinions from Brockway, Colvin, or Brannon regarding ground water modeling.

3. Brockway testified at the hearing and provided expert opinion on subjects unrelated to ground water modeling. The Director summarized Brockway’s expert qualifications as follows: “Well, 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.” Tr. Vol. 4, p. 925. However, during cross-examination, Brockway testified he has no specialized knowledge in fish biology, fish research, or fish production. Tr. Vol. 5, pp. 1025-1026. The Director specifically preserved IGWA’s ability to move to strike certain portions of Rangen’s expert reports. *Id.* at p. 1030.

4. Based on the testimony at the hearing, the only person who arguably could have provided expert testimony as to the statements in Exhibit 1284 and Exhibit 1299 that IGWA presently seeks to strike was Brockway.

5. IGWA now moves to strike portions of Exhibit 1284 and Exhibit 1299. Rangen's Response did not address any statements IGWA moved to strike in Exhibit 1299. Because Rangen did not address Exhibit 1299, the Director will grant IGWA's request to strike portions of Exhibit 1299.

6. Unlike Exhibit 1299, Rangen did address Exhibits 1284 in its Response; however, Rangen only took exception with five statements that IGWA moved to strike. As to those statements in Exhibits 1284 that Rangen did not respond to, the Director will grant IGWA's requested relief.

7. The first statement IGWA moved to strike in Exhibit 1284, to which Rangen responded, is as follows:

At the time of the site visits, there was no 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.

Reply at 2 citing Exhibit 1284 at 8.

8. Rangen's Response states, "This is simply a statement based upon personal observation. At the time of the site visit there was limited water available at the facility and a number of raceways were dry including those enumerated." *Response* at 3. IGWA replies that Exhibit 1284 does not explain why the raceways were dry that particular visit. IGWA "vehemently objects to unqualified opinions by Dr. Brockway, Mr. Colvin, or Mr. Brannon as to the reason a raceway was dry." *Reply* at 2. The Director agrees with Rangen that the statement was based on personal observation. The statement specifically asserts that the raceways were dry "[a]t the time of the site visits . . ." Emphasis added. IGWA was provided with an opportunity at the hearing to explore the reasons why the raceways were dry during the time of the site visit. The Director will deny IGWA's motion to strike as to this particular statement.

9. The second statement at issue in Exhibit 1284 is as follows:

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.

Reply at 2 citing Exhibit 1284 at 21.

10. Rangen's Response states, "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 more fish. 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 with Rangen employees, that Rangen needs good quality water in order to produce fish.” *Response* at 4. In reply, 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.” Because the statement provides expert opinion on subjects that Brockway was not qualified to render expert opinions on, Tr. Vol. 5, pp. 1025-1026 (fish biology, fish research, fish production), the Director will grant IGWA’s motion to strike the second statement.

11. The third, fourth, and fifth statements at issue in Exhibit 1284 are as follows:

Available Rangen spring flows were being utilized appropriately and efficiently according to the adjudicated water rights.

Reply at 2 citing Exhibit 1284 at 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.

Reply at 3 citing Exhibit 1284 at 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.

Reply at 3 citing Exhibit 1284 at 26.

12. Rangen’s Response states that the third, fourth, and fifth opinions are supported by Brockway’s expert qualifications in “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.” *Response* at 4. IGWA replies that the above statements “are opinions concerning the use of water for fish propagation and research purposes, and aquaculture industry standards.” The Director disagrees. Unlike the second statement at issue, *supra*, which directly opined on “increased fish production . . . research . . . and historical fish propagation,” Exhibit 1284 at 21, the third, fourth, and fifth statements refer only to diversion and use of water. While Rangen uses water for fish propagation purposes, Brockway was qualified to render expert opinions about water rights, water measurement, and evaluation of water systems. Tr. Vol. 4, p. 925. The third, fourth, and fifth statements do not draw conclusions about fish biology or Rangen’s ability to increase fish production or perform research. The third, fourth, and fifth statement do draw conclusions about Rangen’s water rights and diversions; subjects that Brockway was qualified to render expert opinions on. The Director will deny IGWA’s motion to strike the third, fourth, and fifth statements.

ORDER

Based upon the foregoing, the Director GRANTS IN PART and DENIES IN PART the *Motion to Strike*. The Director grants IGWA's *Motion to Strike* portions of Exhibit 1299 that are identified in Exhibit D to the *McHugh Affidavit*. The Director grants in part and denies in part IGWA's *Motion to Strike* certain portions of Exhibit 1284.

IT IS FURTHER ORDERED that, within fourteen (14) days, IGWA shall provide to the Director and the parties a version of Exhibit 1284 that conforms with the order entered herein. Once received, the Director shall replace admitted hearing Exhibit 1284 with the version that IGWA is ordered to prepare. The Director shall also replace admitted hearing Exhibit 1299 with Exhibit D to the *McHugh Affidavit*.

Dated this 15th day of July, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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