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**BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

)	CM-MP-2009-02
)	
IN THE MATTER OF DISTRIBUTION OF)	RESPONSE TO UNIT A's MOTION
WATER TO WATER RIGHT NOS. 36-)	TO STRIKE AND/OR MOTION IN
02356A, 36-07210, AND 36-07247)	LIMINE RE: TESTIMONY OF DR.
)	CHARLES E. BROCKWAY
(Blue Lakes Delivery Call))	
)	
_____)	

COMES NOW, A&B IRRIGATION DISTRICT (“A&B”), by and through its counsel of record, BARKER ROSHOLT & SIMPSON LLP, and hereby submits this *Response to Unit A's Motion to Strike and/or Motion in Limine RE: Testimony of Dr. Charles E. Brockway*. For the reasons stated below, the Director should deny the motion.

INTRODUCTION

Unit A claims that a portion of Dr. Brockway’s testimony should be stricken under Idaho Rules of Evidence 702 and 704. Importantly, those rules do not constrain the Hearing Officer’s consideration of evidence in this proceeding in the manner suggested by Unit A. As such, the

motion should be denied. Moreover, even under the Rules of Evidence, Unit A's argument fails.

Those rules state:

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The language that Unit A seeks to have stricken is:

Q. IN YOUR OPINION, DOES THE A&B MITIGATION PLAN SATISFY THE RULE 43 FACTORS TO BE CONSIDERED BY THE DIRECTOR?

A. Yes. In my opinion A&B's conversion of the approximately 1,378 acres to a surface water supply will prevent injury to Blue Lakes' senior surface water rights caused by pumping under the junior rights subject to the call. Based upon the analysis provided in the attachments to my testimony, along with the model simulations performed by Dr. Wylie, it is my opinion that the plan meets the applicable criteria of Conjunctive Management Rule 43.

Brockway Testimony, 6. Unit A claims that those 7 lines are made without foundation and usurp the Director's ability to make a legal conclusion as to the proposed mitigation plan.

To the contrary, Dr. Brockway is qualified as an expert. Dr. Brockway has provided expert testimony in numerous contested cases before the Department, including cases involving Rule 43 Mitigation Plans under the Conjunctive Management Rules. Dr. Brockway provides the necessary foundation for his opinion in the first two pages of his testimony, thereby meeting the requirements of I.R.E. 702. In the challenged statement, Dr. Brockway states twice that he is giving his opinion. He offers his expert opinion that the plan is adequate under Rule 43, which is well within the province of expert testimony under Idaho law. As such, even assuming the Rules of Evidence apply, which they do not, Unit A's motion should be denied

ARGUMENT

I. The Idaho Rules of Evidence Do Not Bind the Director.

Unit A fails to recognize the applicable standard of review in this case. The Idaho Rules of Evidence are not binding in this matter. The Idaho Administrative Procedure Act states that “All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.” Idaho Code § 67-5251(1). IDWR’s Rules of Procedure follow the statute’s approach and further provide that:

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. . . . All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

IDAPA 37.01.01.600 (emphasis added).

Idaho’s APA and the Department’s Rules of Procedure provide a more liberal standard for taking evidence in the furtherance of a complete hearing and record. It is undisputed that the testimony provided by Dr. Brockway is “of a type commonly relied upon by prudent persons in the conduct of their affairs”. Dr. Brockway reviewed ESPAM simulations estimating the depletion caused by pumping under A&B’s junior rights and the benefit provided by the conversion of 1,378 acres to a surface water supply. Based upon that review, Dr. Brockway provided his expert opinion that A&B’s mitigation plan would prevent injury to Blue Lakes’ senior surface water right. Dr. Brockway is a qualified hydrologist and has extensive experience with the ESPAM. Providing an opinion on the benefits of actions taken under a mitigation plan is clearly “of a type commonly relied upon by [expert witnesses] in the conduct of their affairs”. Therefore, the Director should allow and consider this testimony based upon the above standard.

II. Dr. Brockway's Testimony Complies With the Idaho Rules of Evidence.

Despite the fact that they are not binding on the Director, Unit A's argument nonetheless fails under the Idaho Rules of Evidence. Unit A's argument that Dr. Brockway's testimony lacks foundation is completely without merit. Idaho Rule of Evidence 702 qualifies an expert based on "knowledge, skill, experience, training, or education." I.R.E. 702. Additionally, I.R.E. 702 "favors admissibility of expert testimony" *State v. Rodgers*, 119 Idaho 1047, 1051, 812 P.2d 1208, 1212 (1991). The court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs. *State v. Konechny*, 134 Idaho 410, 418, 3 P.3d 535, 542 (Ct. App. 2000) (citations omitted).

Dr. Brockway provides, in detail, his extensive experience and background on pages 1 and 2 of his testimony. In addition to his three engineering degrees, including a Ph.D. in Water Resources Engineering, Dr. Brockway testifies that he has been involved in "water resource studies and research in Idaho and the western United States since 1964." *Brockway Direct Testimony*, 1. He further testifies about his experience as a research and graduate student instructor in charge of water resources research for 32 years with the University of Idaho. *Id.* That research, as noted in the testimony, included the development of the ground water model for the Eastern Snake Plain Aquifer, water resource planning, and management of irrigation system evaluations. *Id.* Dr. Brockway also testifies as to his specific familiarity with the subject at hand, stating:

I am very familiar with the ESPAM model which Dr. Wylie utilized to evaluate the impact of A&B pumping and the benefits of the proposed mitigation components. I serve on the Eastern Snake Hydrologic Modeling Committee which serves as the advisory committee to IDWR on the ESPA ground water model. I have discussed with Dr. Wylie the model simulations which he performed in his evaluations. In my opinion, the model input he utilized correctly depicts the impact of water use on A&B and the model was

utilized correctly. I therefore have no reason to duplicate the effort and run the model personally.

Brockway Direct Testimony, 3. His testimony also states that he has “participated as an expert witness in numerous water right permit, transfer, and delivery call proceedings before IDWR.” *Id.*, at 2. Recently, Dr. Brockway has provided expert testimony in two other Rule 43 Mitigation Plan contested cases before the Department. *See e.g., Ground Water Districts’ First Amended Mitigation Plan* (filed September 5, 2008) and *Ground Water Districts Third Mitigation Plan (Over-the-Rim Plan)* (filed March 12, 2009) (Clear Springs Snake River Farms Delivery Call).

Dr. Brockway’s testimony is based on his substantial education, background and experience, which provides an unassailable foundation upon which his expert opinion is based. There is nothing to suggest that his opinion is based on “unsubstantiated personal beliefs.” Dr. Brockway is more than qualified to provide testimony on the adequacy of the mitigation plan, including assessing the estimated benefits of the actions taken by A&B on the Blue Lakes Spring.

Unit A further argues that Dr. Brockway’s testimony is deficient because it does not enumerate factors listed under Conjunctive Management Rule 43 on mitigation plans. This argument is without merit. There is no requirement that Dr. Brockway’s testimony must address or otherwise identify which Rule 43 factors are met by the mitigation plan. That non-exhaustive list of factors guides the Director on whether or not a mitigation plan will prevent injury to the senior water right holder.

What Dr. Brockway’s testimony does do, however, is discuss in detail the methods used to calculate the likelihood of A&B mitigation water reaching Blue Lakes, as required of a mitigation plan. Additionally, he incorporates by reference, and attaches as exhibits, two reviews he authored regarding IDWR’s analysis of A&B depletions from August 2009 and

January 2010. These reviews provide additional analysis on the science behind his opinion that the mitigation plan is adequate under Rule 43.

III. Dr. Brockway's Expert Opinion does not Invade the Province of the Trier of Fact.

Idaho Rule of Evidence 704 allows that "Testimony in the form of an opinion... is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." I.R.E. 704. An expert witness may testify in the form of an opinion if the expert's specialized knowledge will assist the trier of fact in understanding the evidence or determine a fact in issue. *State v. Konechny*, 134 Idaho 410, 418, 3 P.3d 535, 542 (Idaho Ct. App. 2000).

Rule 704 must be read in the light of Rule 702. *State v. Walters*, 120 Idaho 46, 55, 813 P.2d 857, 866 (1990). I.R.E. 702 "broadly allows an expert witness to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. Alger*, 115 Idaho 42, 50, 764 P.2d 119, 127 (Idaho Ct. App. 1988)(Internal quotations omitted). Rule 704 provides that otherwise admissible opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." I.R.E. 704. The "wide reach of the rules governing expert testimony is derived from a fundamental policy favoring admissibility of all relevant evidence.... Any concern for invasion of the jury's fact-finding mission is obviated by Rule 704, which permits experts to render opinions on ultimate issues." *Alger*, 115 Idaho at 50, 764 P.2d at 127 (referencing I.R.E. 401). The Idaho Supreme Court has held as much, writing:

It is clear that *the opinion testimony of an expert witness is not objectionable solely because it purports to invade the province of the jury in deciding ultimate facts*. The Idaho Rules of Evidence, § 704, provides: "Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Sidwell v. William Prym, Inc., 112 Idaho 76, 80, 730 P.2d 996, 1000 (1986) (emphasis added).

An additional safety net preventing an expert from “invading” the province of the fact finder is the “well established rule that the opinion of an expert is not binding on the trier of fact, and ...may be rejected, even where uncontradicted.” *Rueth v. State*, 103 Idaho 74, 78, 644 P.2d 1333, 1337 (1982) (citations omitted). Additionally, “It is within the province of the jury... to weigh the testimony of witnesses....” *City of McCall v. Seubert* 142 Idaho 580, 586, 130 P.3d 1118, 1124 (2006). Rather than “invade the province of the trier of fact,” as accused by Unit A, Dr. Brockway’s expert testimony is offered to assist the fact finder and is allowable as an expert opinion on the ultimate issue. The Director, as the trier of fact in this proceeding may weigh that evidence in reaching his decision.

CONCLUSION

Ample foundation is provided for Dr. Brockway’s qualification to testify as an expert on the adequacy of A&B’s Mitigation Plan. Dr. Brockway’s testimony is offered to assist the trier of fact in deciding whether the mitigation plan should be approved. This testimony does not invade the province of the Director as trier of fact and fully complies with Idaho Rules of Evidence 702 and 704. Moreover, the Hearing Officer, while not bound by the Idaho Rules of Evidence, is encouraged under the Idaho APA to liberally include evidence in furtherance of a complete and robust record. For these reasons, and the reasons stated above, the Director should deny Unit A’s *Motion to Strike and/or Motion in Limine RE: Testimony of Dr. Charles E. Brockway*.

DATED this 9th day of February, 2010.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2010, the above and foregoing **RESPONSE TO MOTION TO STRIKE AND/OR MOTION IN LIMINE RE: TESTIMONY OF DR. CHARLES E. BROCKWAY** was sent to the following by U.S. mail, postage prepaid, and e-mail at the listed e-mail addresses:

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