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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	))))))))	**POCATELLO AND IGWA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE**

On December 11, 2007, Pocatello and IGWA filed a Motion for Summary Judgment and Motion in Limine ("Motion") on the grounds that the SWC had a burden to demonstrate injury as a contestant of the Department's May 2 Order, and that, as of the close of discovery, it had failed to meet its burden in this case. Further, Pocatello and IGWA moved for exclusion of any evidence late-identified by the SWC in support of its contentions of injury. To date, the Bureau of Reclamation ("Bureau") is the only party that has answered. No response brief has been filed by the SWC.

The Bureau suggests: "either the Rules of Civil Procedure and the Rules of Evidence apply to the Idaho Department of Water Resources ("IDWR") administrative proceedings or they do not." Bureau's Response at 2. The Bureau goes on to argue that, even if these Rules do apply, IGWA and Pocatello's Motion is untimely. As an initial matter, the Motion in Limine requested by Pocatello and IGWA's Motion is not untimely. Second, the Motion could not be filed until discovery had concluded and we'd had an opportunity to review deposition transcripts and all the expert reports because it relies on what the SWC and Bureau have *not* done in the way of disclosing facts and evidence related to the SWC's central claims of injury in this case. As such, the Motion is timely in the context of this case, and is also useful because it serves to focus certain fundamental issues that are still in dispute.

Except for this brief concession about what it means if the Idaho Rules of Evidence ("IRE") and Idaho Rules of Civil Procedure ("IRCP") do apply, the Bureau's arguments are circumscribed to address only the application of the IRE and IRCP to this matter, asserting that the legal analysis Pocatello and IGWA offered in its Motion, based on IRE 700, 701 and 702 to exclude lay testimony as a basis for finding injury, is irrelevant because the IRE do not apply to

this proceeding. Because the Bureau does not discuss the following issues, we conclude that it concedes these points:

1. That late-disclosed evidence of injury should be foreclosed and the *in limine* portion of Pocatello and IGWA's Motion should be granted. Late evidence is prejudicial and likely unreliable, as it cannot be thoroughly tested by cross-examination or evidence that may be offered by the ground water users to challenge the assertions.

2. That neither SWC witnesses nor Bureau witnesses have offered opinions or factual evidence of injury in this matter, and that no other evidence of injury has been proferred to date.

The only issue remaining then, is whether the Hearing Officer should grant Pocatello and IGWA's Motion that the SWC has not met its burden of proof despite the fact that the arguments rely in part on the IRE. Pocatello and IGWA argue that the Motion should be granted. As discussed within the Motion, whether the IRE are applied to sort out which evidence is reliable and relevant, or whether the looser standards available to the Hearing Officer under the IDAPA 37.01.01 are applied, the outcome is the same: the SWC and Bureau have not provided factual evidence of injury to its water rights. Therefore, as a matter of law, the SWC has failed to meet its burden to demonstrate injury as a contestant of the IDWR's Orders.

I. LEGAL STANDARDS FOR ACCEPTING EVIDENCE AVAILABLE TO THE HEARING OFFICER

Under the IDWR's Rules of Procedure, IDAPA 37.01.01 ("IDWR's Procedures"), Rule 600 provides:

> 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...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...***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 31.01.01.600 (emphasis added). The Idaho Supreme Court has recognized that hearing officers conducting IDWR hearings have broad discretion to accept or reject evidence. *See*

Chisholm v. Idaho Dept.of Water Resources, 125 P.3d 515 (Idaho 2005). Thus, the Hearing Officer has discretion to determine whether the IRE apply, whether the "prudent person" standard of the IDAPA applies, or whether, as a practical matter, the "prudent person" standard is indistinguishable from the IRE for purposes of conducting this hearing.

Although the Hearing Officer has discretion to conduct the hearing more informally than a district court proceeding or to decline to impose every detail of the IRE, this does not mean that all evidence, whatever its provenance, is admissible. Some evidence offered may be untimely disclosed; some may be prejudicial; some may be irrelevant; and some may be unreliable. Following the Rule 600 "prudent person" standard does not mean the evidence offered in this proceeding is subject to no scrutiny by the Hearing Officer, or even to less scrutiny than if the IRE applied. Rather, any evidence presented must comply with general notions of relevance and reliability.

II. INJURY IS A QUESTION OF FACT

Injury to water rights is a question of fact and the decision to order administration is a mixed question of fact and law.[1] The Bureau mixes concepts when it argues that the Hearing Officer should "make a legal determination of injury". Bureau's Response Brief at 6. This is an administrative hearing. If there are no facts in the record in support of a party's position regarding material injury, the Hearing Officer may determine "material injury", but the question on appeal will be whether the Hearing Officer's decision was supported by "competent and substantial evidence". I.C. § 5279(3)(d); *Barron v. Idaho Dept. of Water Resources*, 18 P.3d 219, 222 (Idaho 2001). If there are no facts in the record that support a finding of material injury, the determination will be reversed. So the threshold question is: have facts been

[1] In other words, the Hearing Officer must consider the facts in the record and whether or not the facts trigger the constitutional or statutory authority of the Department to take action to avoid or mitigate injury to seniors.

introduced through the written record or in the course of discovery to support the SWC's contentions of injury?

Colorado has also answered the question of whether injury is a legal question or a factual question. *State Engineer v. Castle Meadows, Inc.* 856 P.2d 496, 507-08 (Colo. 1993)(holding injury is a question of fact and rejecting State Engineer's determination that injury arose as a matter of law); *see also* C.R.S. § 37-92-305(8). While the laws involving determination and administration of water rights in Colorado are different from those in Idaho, the logic of this decision is applicable here, this decision is instructive for purposes of this hearing.

Pocatello and IGWA respectfully suggest that there has been no disclosure of injury evidence by the Bureau or the SWC, either in written testimony, reports, or in the documentary evidence received during discovery. As the Bureau's Response Brief does not identify instances of injury evidence already in the record of this matter, the Hearing Office may not even need to move to the next level of considering what rules, if any apply to exclude such testimony. If no facts have been offered by the SWC or the Bureau to prove injury to the SWC's water rights, then the question of admissibility does not arise.

III. THE BUREAU SUGGESTS THAT EVEN IF EVIDENCE OF INJURY HASN'T BEEN DISCLOSED, THE HEARING OFFICER CAN USE THE RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES AND THE STANDARDS IDENTIFIED BY *AFRD #2* TO DETERMINE WHETHER THERE IS INJURY TO THE SWC'S WATER RIGHTS

The only disclosed theory of injury to the SWC's water rights is that found in their Initial Statement of Issues filed in this matter:

> Whether or not material injury to the water supply under a senior water right, when said water could be applied to a beneficial use, *which occurs as the result of ground water withdrawals*, is material injury to the right, *without regard to the extent of injury to a crop that could and should have been irrigated or the value of such crops.*

SWC's Initial Statement of Issues, June 14, 2005, ¶29 at page 6 (SWC Issue Statement). After this mention of injury in the SWC Issue Statement, it is difficult if not impossible to find another mention of injury to the SWC's water rights in their pleadings and disclosures in this matter. Nonetheless, the Bureau argues that the Hearing Officer should rely generally on the Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR") and also suggests that injury may be determined under a rubric from *AFRD #2 v. IDWR*: "how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." Implicitly conceding that the SWC and the Bureau have not disclosed any evidence of injury in this case, the Bureau identifies the following algorithm:

- Lay witness testifies about "how much water he has, what crops he grows with that amount of water, and what effect a dryer or wetter year has on his crop yield."
- Expert testifies about "'how, when, where, and to what extent the diversion and use of water from one source impacts the water flows in another source' by looking at the CMR 42 factors among others."

Bureau's Response Brief at 5-6.

If the Hearing Officer accepts this approach, the lay testimony referred to above must be exclusively qualitative. The SWC is under a continuing obligation to disclose evidence responsive to the *Requests for Production* filed by IGWA and Pocatello in August of 2005; however, to date no documentary evidence has been provided that details, quantitatively, the items that a lay witness would testify about. The expert testimony would be interesting—but useless without a concomitant opinion that the impacts to surface water from ground water diversions are injurious.

It may be that the SWC and the Bureau's theory is still that *any* reduction in supply is material injury.[2] In that case, for the SWC and the Bureau to prevail, these parties are still required to present factual testimony, based on the engineering analyses conducted by their experts, that *any* reduction in supply is injury.

It could also be that the SWC and the Bureau have a different theory about what quantity of water causes injury to the SWC's water rights, we just don't know because neither their witnesses, nor their expert reports, nor their documents disclosed in this matter provides any hint into what (in the view of the SWC and the Bureau) constitutes material injury or, what is not.

IV. IF ANY TESTIMONY IS PRESENTED ON THE ISSUE OF INJURY BY THE SWC, IT MUST BE TIMELY, RELEVANT AND RELIABLE

The Hearing Officer has wide discretion to accept or exclude evidence in this matter. IDAPA 37.01.01.600; I.C. § 67-5251(1). In general, the Hearing Officer's determinations about what to admit or exclude should be guided by concepts of relevance and reliability. Far from being a restraint on the Hearing Officer's discretion in considering which evidence to admit or exclude, Rule 37.01.01.52 is designed to authorize the Hearing Officer to impose the rules that are necessary to a "just, speedy and economical determination of all issues presented to the agency." Further, the Hearing Officer is "not bound by the Idaho Rules of Evidence," meaning not that the Hearing Office is barred from considering questions of admissibility based on the IRE, but instead that imposition of the guarantees for reliability and relevance incorporated into the IRE is expressly authorized. IDAPA 37.01.01.600. "All other evidence may be admitted if it

[2] This theory would seem to be foreclosed by the Idaho Supreme Court's decision in *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Res*, 154 P.3d 433, 447 (Idaho 2007)("*AFRD#2*")("Clearly...the Director may consider factors such as those [under CMR 42] in water rights administration...If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting tge water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.").

is of a type commonly relied upon by prudent persons in the conduct of their affairs." IDAPA 37.01.01.600; I.C. § 67-5251(1).

The Bureau agrees that the inquiry is whether the evidence relevant for determining material injury should comport with the "prudent person" standard identified above. Bureau Response at 5. As a practical matter, the "prudent person" standard seems to be aimed at admitting testimony into the record that is reliable and relevant. Rule 701 has similar principles underlying it: it is the primary reason that IRE 701 limits the scope of lay testimony to things within the experience of the witness. In fact, "the origins of Rule 701 can be traced to one of the most fundamental tenets of a rational system of evidence law: testimony should reliable and, thus, must be based on the perceptions of the witness rather than conjecture or secondhand information[3]." 29 FPP § 6251 (2007). This is a tie in to Rule 401's requirement that evidence be relevant. *Id.*

Idaho court law reflects this fundamental requirement. For example, in *Evans v. Twin Falls County*, 118 Idaho 210, 214 (1997), the Supreme Court upheld the district court's decision to exclude lay opinion that the deceased's heart attack was caused by an event that occurred more than eleven months prior. In *Marty v. State*, 122 Idaho 766, 768, 838 P.2d 1384, 1386 (1992), the Court agreed that a lay witness was not qualified to testify to hydrology to rebut expert opinion. While this hearing does not involve medical malpractice or eminent domain, the fundamentals underlying the evidence admitted are the same: all evidence must be sufficiently relevant and reliable. Furthermore, inevitably, the decision in this case will be appealed and the

[3] Nineteenth century evidence law embraced rigid exclusionary rules intended to prevent unreliable evidence from reaching juries. 29 FPP § 6252 (2007). As a result, it tended to exclude lay testimony as a general rule. *Id.* Today, rather than exclude such evidence, evidence law requires that it conform with strict notions of reliability. Therefore, Rule 701 requires not only that the witness have personal knowledge of pertinent facts, but that there is a rational relationship between perception and opinion. 29 FPP § 6252 (2007). This is a tie in to Rule 401's requirement that evidence be relevant. Thus, the modern rule imposes two conditions on the use of lay testimony: 1) that it be rationally based on the perception of the witness, and 2) that it be helpful. F.R.E. 701; I.R.E. 701.

appeal will be upheld only if the facts underlying it are "substantial and competent", and only if the evidence admitted is relevant and reliable.

But leave aside Rule 701 for a moment since that appears to be the source of dispute: what type of evidence is "commonly relied upon by prudent persons in conduct[ing] their affairs"? One of the key questions in this case is whether or not senior water rights held by the surface water coalition are being materially injured by junior ground water rights, and if so, to what extent? This question cannot simply be answered by lay testimony that gives a qualitative report about what happens on a given field when a farmer receives less water instead of more, especially when those facts have not been previously disclosed to the ground water users. Further, the answer to the question of whether junior ground water pumping is causing material injury to senior surface water rights cannot be answered by lay witnesses who state only the obvious: that in a given year or years, they have experienced occasional water shortages. This is not helpful in determining whether ground water users are the source of those shortages. As a result, lay witness testimony cannot establish that the shortages they allegedly suffered were the result of junior ground water pumping.

While Pocatello and IGWA do not concede that Rule 701 is inapplicable in this hearing, undisclosed lay witness testimony on a technical matter does not meet the "prudent person" standard any more than it meets the Rule 701 standard. The determinations to be made in this case are of critical importance to Idaho. Other than the fact that the SWC and Bureau have failed to disclose evidence of material injury, why would the SWC and the Bureau argue that the IDAPA should be interpreted to allow admission of less reliable and possibly irrelevant testimony that may result in a decision to order erroneous curtailment of ground water pumping to municipalities, and on hundreds of thousands of acres of irrigated agriculture?

Because the SWC has not presented any competent evidence of material injury, Pocatello and IGWA respectfully request its *Motion for Summary Judgment and Motion in Limine* be granted.

Respectfully submitted, this 2nd day of January 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 200, I caused to be served a true and correct copy of the foregoing **Pocatello's and IGWA'S Brief in Support of Motion for Summary Judgment and Motion in Limine** by electronic mail, facsimile or regular U.S. Mail, postage prepaid, to:

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