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JUN 02 2021

DEPARTMENT OF  
WATER RESOURCES

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**MEMORANDUM IN SUPPORT OF  
JOINT MOTION TO STRIKE, MOTION  
IN LIMINE, AND MOTION TO LIMIT  
THE SCOPE OF EVIDENCE, AND  
REQUEST FOR EXPEDITED DECISION**

COMES NOW the Cities of Bellevue, Hailey and Ketchum and Sun Valley Company (“Joint Parties”) by and through their counsels of record, and hereby file this *Memorandum in Support of Joint Motion to Strike, Motion in Limine and Motion to Limit the Scope of Evidence, and Request for Expedited Decision* (“*Joint Motion*”) in the above captioned matter.

**MEMORANDUM IN SUPPORT OF JOINT MOTION TO STRIKE, MOTION IN LIMINE, AND MOTION TO LIMIT THE SCOPE OF EVIDENCE, AND REQUEST FOR EXPEDITED DECISION**

## I. STANDARD OF REVIEW

A motion in limine is a request for a protective order to limit or exclude evidence at trial and applies only prospectively, the purpose of this type of motion is to avoid injection into trial matters which are irrelevant, inadmissible and prejudicial. *State v. Wallmuller*, 125 Idaho 196, 198, 868 P.2d 524, 526 (Ct. App. 1994). A decision to grant or deny a motion in limine is left to the broad discretion of the trial court. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005). Similarly, the trial court is afforded broad discretion in admitting expert evidence and its judgment will not be disturbed on appeal absent a clear abuse of that discretion. *Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009); *Polk v. Larrabee*, 135 Idaho 303, 314, 17 P.3d 247, 258 (2000).

“When a ‘trial court is being asked to admit or to strike evidence, the initial question . . . [is]: Is the evidence relevant?’ *State v. Hocker*, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989). ‘Evidence that tends to prove the existence of a fact of consequence in the action, and has any tendency to make the existence of a fact more probable than it would be without the evidence, is relevant.’ *Id.* ; I.R.E. 401. ‘All relevant evidence is admissible . . . [e]vidence which is not relevant is not admissible.’ I.R.E. 402. Relevant evidence can be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . waste of time, or needless presentation of cumulative evidence.’ I.R.E. 403.” *Elliott v. Murdock*, 161 Idaho 281, 287, 385 P.3d 459, 465 (2016).

## II. PROCEDURAL BACKGROUND

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-hearing Conference, and Hearing* (“Notice”). The Cities of Bellevue, Hailey and Ketchum, and the Sun Valley Company

all timely filed Notices of Intent to Participate and attended the pre-hearing conference on May 24, 2021. On May 14, 2021, Sun Valley Company filed a *Motion to Dismiss* and City of Bellevue filed a *Motion for More Definite Statement, Motion for Clarification and Motion to Postpone the Hearing*. On May 22, 2021 the Director issued an *Order Denying Motions to Dismiss, For Continuance or Postponement and for Clarification or More Definite Statement* (“*Order Denying Motions*”). A hearing in this matter is scheduled to begin on June 7, 2021.

### III. ARGUMENT

#### ***The Notice, Order Denying Motions and Scheduling Order Limit the Scope of the Hearing, Thus Certain Evidence Should be Excluded***

The *Notice* states:

NOTICE IS HEREBY GIVEN that pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding ground water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 I A( 11 ), within the Wood River Valley south of Bellevue, as depicted in the attached map.

*Notice* at 1 (emphasis added). The introduction to the *Notice* states:

Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 (“*Model*”) show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season ....

Based on the information from the *Model*, the Director of the Idaho Department of Water Resources (“*Department*”) believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 I A( 11 ), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

*Id.* (emphasis added).

Subsequent to the *Notice*, the Director further clarified that the scope of this proceeding is the “in-season administration of ground water rights diverting in the Bellevue Triangle during the 2021 irrigation season.” *Order Denying Motions* at 8. The *Order Denying Motions* also described the scope of this proceeding as follows:

The Notice is the legally operative document that establishes the potential area of curtailment for purposes of this administrative proceeding, and also the timeframe during which curtailment could potentially occur. Under the Notice, the “Potential Area of Curtailment” is limited to the area depicted in the map attached to the Notice, and the timeframe for potential curtailment of ground water rights within this area is limited to the 2021 irrigation season.

*Order Denying Motions* at 10 (emphasis added).

The Director then further clarified this statement in his May 25, 2021 *Prehearing Order*; *Scheduling Order* (“*Scheduling Order*”):

A question was raised at the hearing about the boundary the Director will consider for potential curtailment. The area Jennifer Sukow considered in her staff memo was smaller than the boundary in the Potential Area of Curtailment. The Director will limit the Potential Area of Curtailment to the area considered in Jennifer Sukow’s staff memo.

*Scheduling Order* at 4 (emphasis added).

In short, the *Notice* states that the surface water source that is at issue is Silver Creek and its tributaries. The *Order Denying Motions* and the *Scheduling Order* limit the area of potential curtailment to an area that is south of Bellevue and located with an area known as the Bellevue Triangle. Thus, given the limited scope of the hearing, pumping of groundwater outside the area of potential curtailment identified in the *Notice* and *Order Denying Motions* (as clarified by the

*Scheduling Order*) is not relevant to whether or not the curtailment of groundwater pumping within the potential curtailment area impacts water supplies in Silver Creek or its tributaries.

In addition, the *Notice*, being the “legally operative document,” states that the senior water rights that are sought to be protected divert water from “Silver Creek and its tributaries.” To include protection to senior water rights from any other source would render the *Notice* vague and misleading, and would be prejudicial to water users whose diversions may impact sources other than Silver Creek and its tributaries as described in the *Notice*. Given the senior water rights that are purported to be protected are limited to Silver Creek and its tributaries, evidence of any impact of groundwater pumping to sources other than Silver Creek and its tributaries is not relevant and should be excluded.

Furthermore, as set forth in the *Notice* and again reiterated in the *Order Denying Motions*, the only relevant timeframe is the 2021 irrigation season. Thus, evidence regarding the impact of groundwater pumping to any source, but specifically Silver Creek and its tributaries, in any other period is irrelevant and outside the scope of the proceeding.

The Joint Parties filed expert disclosures based on the limited scope of the proceeding. Accordingly, it would be prejudicial to the Joint Parties (whose water rights and uses are located outside the area of potential curtailment described in Jennifer Sukow’s May 17, 2021 Staff Memo) if evidence is allowed or facts established that are outside the scope of this proceeding described in the *Notice* and *Order Denying Motions* (as clarified by the *Scheduling Order*).

Further, the Director made comments at the May 24, 2021 pre-hearing conference indicating that he anticipates other proceedings to “spring” forth from this proceeding. However, given the truncated schedule and the limited scope of this proceeding, using facts developed here in future proceedings or as established facts outside the facts and circumstances of the 2021

irrigation season on any source, but specifically on Silver Creek and its tributaries, will prejudice parties in future proceedings that may have a broader or different scope than this proceeding.<sup>1</sup> Thus, limiting the use of facts developed in this proceeding to this proceeding and only this proceeding as limited in geographic scope and timing as set forth in the *Notice, Order Dismissing Motions* and *Scheduling Order* is the only reasonable way to protect the integrity of future proceedings and the rights of water users located outside the Potential Area of Curtailment identified by the Director in this proceeding.

#### IV. CONCLUSION

Based on the foregoing, the information that is struck through in the Staff Memos attached as Exhibits A, B, C and D to the *Joint Motion* should be excluded from the record in the above matter as outside the scope of the proceeding. Furthermore, any evidence regarding surface water sources other than Silver Creek and its tributaries should be excluded as outside the scope of this proceeding. Also, groundwater pumping outside the area of potential curtailment identified in Jennifer Sukow's May 17, 2021 Staff Memo should be excluded as outside the scope of this proceeding. Impacts or facts relating to groundwater pumping outside the 2021 irrigation season should be excluded as outside the scope of this proceeding. Finally, any facts developed in this proceeding should be limited to the scope of this proceeding and to the 2021 irrigation season only.

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<sup>1</sup> As an example, it would be prejudicial to the Cities of Bellevue, Hailey and Ketchum and Sun Valley Company if facts established in this proceeding concerning the construction, application, and uncertainty of the Wood River Valley groundwater flow model (version 1.1) (the "Model"), including results of model runs therefrom, *res judicata* effect in future proceedings. As noted, the scope of this proceeding is limited to groundwater pumping in an area of potential curtailment identified in Jennifer Sukow's May 17, 2021 Staff Memo. This area is much smaller than the Model's entire boundary, which encompasses the water rights and uses of Cities of Bellevue, Hailey and Ketchum and Sun Valley Company. Because the scope of this proceeding does not involve areas within the Model boundary encompassing the Joint Parties' water rights or uses, the Joint Parties should not be precluded from establishing facts concerning the Model based on their own evidence presented in a future proceeding that actually involves their water rights and uses.



Because of the truncated nature of this proceeding, and pursuant to IDAPA 37.01.01.270.02, IDAPA 37.01.01.565, an expedited decision is requested on this *Joint Motion* so that parties can properly prepare testimony and evidence for the upcoming hearing.

Dated this 2<sup>nd</sup> day of June, 2021.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of June, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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