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*Attorneys for South Valley Ground Water District and Galena Ground Water District*

**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

**MOTION IN LIMINE TO  
RECLASSIFY CERTAIN  
PARTICIPANTS, AND TO  
EXCLUDE TESTIMONY AND  
EVIDENCE RELATED TO  
POTENTIAL INJURY OUTSIDE  
SILVER CREEK OR LITTLE  
WOOD RIVER**

COMES NOW, the SOUTH VALLEY GROUND WATER DISTRICT (“SVGWD”) by  
and through its attorneys of record, BARKER ROSHOLT & SIMPSON LLP and THE GALENA

**MOTION IN LIMINE**

GROUND WATER DISTRICT (“Galena GWD”) by and through its attorneys of record, LAWSON LASKI CLARK, PLLC, and move the Director, pursuant to Rule 524 of the Rules of Procedure of the Idaho Department of Water Resources, Idaho Rule of Evidences 401-403, and the May 25, 2021 *Prehearing Order; Scheduling Order* (“*Scheduling Order*”), to reclassify three members of the Big Wood and Little Wood Water Users Association (“Association”): (1) Sabala Farms, Inc., (2) David and Nicole Hults, and (3) Nick and Jennifer Westendorf, as group three participants, and to exclude testimony and evidence from those parties concerning potential injury not subject to the Director’s *Notice* as such testimony and evidence is irrelevant evidence, will create confusion, and cause the parties and Department to expend unnecessary time and resources. Additionally, SVGWD and Galena GWD move the Director to exclude testimony and evidence from the Association and Big Wood Canal Company (“BWCC”) as it relates to any surface water rights to sources outside of Silver Creek or the Little Wood River.

### **SUMMARY**

Following the pre-hearing conference held on May 24, 2021, the Director issued the *Scheduling Order*, in which the numerous participating parties in this matter were divided into five groups for the purpose of clearly delineating the scope of the hearing, the nature of the hearing, and expediting the hearing by limiting participation and by limiting the scope of discovery. Only the first two groups will be allowed to fully participate in the proceeding, including “the right to participate in discovery, call witnesses, cross-examine witnesses and participate in legal briefing.” *Scheduling Order*, p. 3. The third group is allowed to participate in discovery and is allowed to identify and call witnesses at the hearing, where the Director reserves the right to limit testimony that is, *inter alia*, irrelevant. *Id.*, p. 4.

The first group is comprised of those “holders of surface water rights from Silver Creek or Little Wood River.”<sup>1</sup> *Id.*, p. 1 (emphasis added). Of significance to this motion is the absence of holders of surface water rights from the Big Wood River in the Director’s description of group one. This omission makes sense however, as only the surface water right holders from Silver Creek and Little Wood River are the subject and purpose of the Director’s May 4<sup>th</sup> *Notice* initiating this case.

The *Scheduling Order* lists the Association in group one. As of the 2017 *Petition for Administration*, the Association had dozens of members diverting water from both the Little Wood and the Big Wood Rivers. Only a smaller subset of those members, fourteen (14), have filed notices to participate in this matter. Additionally, three of the listed Association members are parties whose sole surface water rights are to the Big Wood River: (1) Sabala Farms, Inc., (2) David and Nicole Hults, and (3) Nick and Jennifer Westendorf (collectively, “Big Wood Holders”). *See* Sabala Farms Exhibits 2, 4, and 5; Westendorf Exhibits 2, 4, and 5; Hults Water Right Nos. 37-22795 and 37-499B. For the reasons discussed below, the Director should reassign the Big Wood Holders to group three, and should limit their testimony, as well as any testimony on behalf of the Association to exclude evidence regarding any claimed injury to their Big Wood River water rights.

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<sup>1</sup> Additionally, the *Notice* initiating this proceeding and the *Scheduling Order* describe two different areas of concern for the 2021 irrigation season. The *Notice* references “Silver Creek and tributaries,” while the *Scheduling Order* includes “Silver Creek or Little Wood River.” The Director’s *Notice* is different than the *Scheduling Order*, and nothing in either indicates that injury to Big Wood River rights in 2021 is at issue in this proceeding. As such, SVGWD and Galena GWD reserve all legal rights and defenses to challenge this defective *Notice* on judicial review.

## ARGUMENT

### A. The Big Wood Holders Should be Reclassified in Group Three to Provide Clarity About Their Participation in This Matter.

Despite the Director's definition of group one as "holders of surface rights from Silver Creek or Little Wood River," three parties have been included in group one who do not hold surface rights in either Silver Creek or Little Wood River, that is, the Big Wood Holders. Group three is defined as "holders of surface and ground water rights that divert within Basin 37 but outside the [Bellevue Triangle]." *Scheduling Order*, p. 2. The Big Wood Holders possess water rights to the Big Wood River, an area within Basin 37, but outside the Bellevue Triangle, and should therefore, be reclassified within group three, and be held to the limitations and requirements on participation discussed in the *Scheduling Order*. See Exhibit A.

### B. Evidence of Potential Injury to Water Rights Outside of Silver Creek or Little Wood River is Irrelevant and Should be Excluded.

The present matter was initiated by the Director's May 4, 2021 *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* ("Notice"). The *Notice* describes the limited purpose of the proceedings as "whether 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 water rights on Silver Creek and its tributaries during the 2021 irrigation season." *Notice*, p. 1 (emphasis added). And the *Scheduling Order* further reiterates that purpose, though expands the scope to include Silver Creek **and** Little Wood River. See *Scheduling Order*, p. 1. Thus, the purpose and scope of this matter is the potential injury to senior water right holders in the Little Wood River and Silver Creek drainage. The importance of clarifying the scope of the hearing and those affected parties is one of the reasons the Director divided participants into five groups in the *Scheduling Order*.

Evidence of potential injury to water right holders outside of the Silver Creek or Little Wood River is irrelevant in this proceeding. Idaho Rule of Evidence 401 defines relevant evidence as evidence which has any tendency to make a fact more or less probable than it would be without the evidence, and that the fact is of consequence in determining the action. Here, the purpose of the hearing is to determine injury, if any, to surface water rights to Silver Creek or the Little Wood River. Claims of injury to water rights in other sources will not address any issue within the stated scope of these proceedings and would not assist in making any relevant fact more or less probable.

Evidence which is not relevant is not admissible, and any evidence concerning potential injury to senior surface rights of the Big Wood Holders' is not relevant. *See* I.R.E. 402. As such, any evidence presented by the Big Wood Holders concerning potential injury to Big Wood water rights is irrelevant and inadmissible. In addition to being irrelevant evidence, testimony regarding the Big Wood Holders' claims of injury to Big Wood water rights should be excluded by the Director because: (1) it has no probative value to the issue of potential injury in the Little Wood-Silver Creek area; (2) it has no probative value to the issue of the effects and appropriateness of curtailment in the Bellevue Triangle; (3) it would improperly conflate alleged injury outside the Little Wood-Silver Creek area with injury within; (4) it has nothing to do with possible causation between curtailment in the Bellevue Triangle and injury in the Little Wood-Silver Creek area; and, (5) allowing presentation of irrelevant evidence will waste limited time without helping resolve the relevant issues in this matter. Additionally, the Association should be precluded from presenting evidence of potential injury as the Association does not own water rights. *See Order Dismissing Petition for Administration* (Docket No. CM-DC-2017-001) (finding individual water right holders of the Association are indispensable to proper resolution of a contested case, and the Association does not have standing on its own).

For similar reasons, BWCC should be precluded from presenting evidence of potential injury to its Big Wood water rights, and should be limited to testimony regarding potential injury in Silver Creek or Little Wood; specifically, as any evidence regarding the company's Big Wood River water rights would be irrelevant. For the preceding reasons, the Director should preclude the Big Wood Holders, the Association, and BWCC from offering any testimony about claims of potential injury to their Big Wood water rights.

C. Administrative Economy and the Interests of the Parties Will be Best Served by Excluding Irrelevant, Inadmissible Evidence and by Reserving Time for Issues within the Scope of These Proceedings.

The present matter is proceeding on an unprecedented short and expedited schedule, with the focus and scope of the hearing solely on potential injury to water rights on Silver Creek or Little Wood River. It is appropriate, given the shortened schedule and in the interests of administrative economy, to exclude unnecessary and irrelevant evidence, and to limit presentation of evidence and testimony to those parties with an actual interest in this matter. Further, the interests of all parties will be served by excluding irrelevant testimony as it allows the Department and the Parties to present the relevant evidence necessary for the Director to make an informed decision.

**CONCLUSION**

Based on the foregoing, South Valley Ground Water District and Galena Ground Water District request the Director grant this *Motion in Limine* by reclassifying (1) Sabala Farms, Inc., (2) David and Nicole Hults, and (3) Nick and Jennifer Westendorf as group three participants, and by precluding the introduction of evidence related to claims of potential injury to Big Wood River water rights from any party without interest in Silver Creek or the Little Wood River. SVGWD

and Galena GWD specifically request the Director to exclude the following proposed exhibits on that basis as well:

Sabala Farms Exhibits 1-9

Nick Westendorf Exhibits 1-7

David Hults Any exhibits pertaining to water right nos. 37-499B and 37-22795

(none listed in Big Wood & Little Wood Water Users Association Revised Exhibit List filed on June 2, 2021)

SVGWD and Galena GWD request the Director set this motion for oral argument at the start of the hearing, 8:30 a.m. on June 7, 2021.

Dated this 3<sup>rd</sup> day of June, 2021.

BARKER ROSHOLT & SIMPSON LLP

/s/ ALBERT BARKER

Albert P. Barker

*Attorney for South Valley Ground Water District*

LAWSON LASKI CLARK, PLLC

By: /s/ Heather E. O'Leary

Heather E. O'Leary

Attorneys for Galena Ground Water District

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of June, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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