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**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
BIG WOOD & LITTLE WOOD
WATER USERS ASSOCIATION &
BIG WOOD CANAL COMPANY'S
MOTION IN LIMINE AND
RESPONSE TO PARTIES
MOTIONS**

COMES NOW, the BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION,
as the representative of its individual parties to the above-entitled matter, and the BIG WOOD
CANAL COMPANY ("BWLWWU" and "BWCC"), collectively, by and through its attorneys

**MEMORANDUM IN SUPPORT OF BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION &
BIG WOOD CANAL COMPANY MOTION IN LIMINE - 1**

of record, RIGBY, ANDRUS & RIGBY LAW, PLLC, JAMES LAW OFFICE, PLLC, and FLETCHER LAW OFFICE, hereby submits this memorandum in support of its previously filed *Motion in Limine* (“Association’s Motion”) filed May 31, 2021 in the above-entitled proceeding.

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. ‘A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.’ I.R.E. 702 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. ARGUMENT

a. The Notice, Order Denying Motions and Scheduling Order should limit testimony and exhibits only to those who divert within the area of potential curtailment, referred to as Bellevue Triangle, pursuant to the Orders and IDAPA rules.

The Big Wood & Little Wood Water User Association and Big Wood Canal Company previously filed its Motion *in limine* to “prohibit parties who are not at risk of curtailment from calling expert witnesses and fact witnesses in the administrative proceeding that is currently pending in the above entitled matter.”¹ Additionally, the Cities of Bellevue, Ketchum, Hailey, and the Sun Valley Company have filed a Joint Motion to Strike, a Motion *in limine* and a Motion to Limit the Scope of Evidence and Request for Expedited Decision June 3rd, 2021 (“Cities”) along with a Memorandum in Support. Furthermore, the South Valley Ground Water District and the Galena Ground Water District filed a Joint Motion *in limine* to Reclassify Certain Participants, and to Exclude Testimony and Evidence related to Potential Injury Outside Silver Creek or Little Wood River on June 3rd 2021 (“GWDs”).

The Cities, and the GWDs Motions recognize the Director’s May 4, 2021 *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). Wherein 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. Both the City’s and GWD’s stated

¹ *Assn Motion in Limine* at 2.

Motion's recognize the *Scheduling Order* which 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 BWLWWU and BWCC's also recognize this area as being the only area of consideration for the hearing based upon the parameters established by the Director.

The Cities and GWD's both argue that the surface water users that divert from the Big Wood should not be allowed to testify in the upcoming hearing. However, to limit these surface water users from testifying but allow other parties who are not at risk of curtailment to put forth exhibits and call witnesses has no basis. The Cities, and similarly situated parties, have no risk of curtailment of their water rights for the 2021 irrigation year. The Cities' position is that "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."² Just because a case or controversy could result in precedence for the future does not raise to the level of 'standing' and the Director has deemed "it necessary pursuant to Rules 554 and 560 of the Department's Rules of Procedure to limit the participation of those parties that do not have a direct interest in this proceeding. IDAPA 37.01.01.554 and .560."³

² *Cities Memorandum in Support of Motions* pg. 5

³ *Scheduling Order* pg 3

According, IDAPA 37.01.01 governs who should meaningfully participate and to what degree. The Director has clearly said that “Because this proceeding is focused on ground water uses in the Bellevue Triangle and will not result in curtailment this year outside the Potential Area of Curtailment, the third group (Outside Bellevue Triangle Water Users) may participate in discovery; but before they will be allowed to call witnesses at hearing, they must submit a list of witnesses they intend to call and also submit an explanation of what each witness intends to testify about. The Director reserves the right to limit any testimony or cross examination that is duplicative, repetitive, or irrelevant. They will be allowed to participate in all briefing.”⁴

Clearly, under this direction, witnesses who detail how they use water outside the Bellevue Triangle are not relevant and should be allowed in the proceeding. Additionally, it is questionable what experts called by those in Group 3 could arguably testify to beyond the expert testimony that will be presented by Group 1 and 2 experts. Allowing any testimony, including expert testimony, aimed at protecting interests outside of the Bellevue Triangle will not only delay the proceedings but prejudicially affect senior surface water users by confusing the issues and effectively enlarging the scope of the proceedings when the Director has clearly intended to limit it. If the Director, at some point in the future, expands the proceeding in a subsequent hearing to include ground water users north of the Bellevue Triangle, those parties who are not in the Bellevue Triangle and who are not at risk of being curtailed will then be in a position to put on evidence concerning water use and address other issues before the hearing. Standing contains three elements, “the plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘like[lihood]’ that the injury ‘will

⁴ *Scheduling Order* pg 3-4

be redressed by a favorable decision.”⁵ Furthermore, standing may not be based on speculation and that abstract injury is not enough.” If the injury has not already occurred, it must be “imminent, not conjectural or hypothetical.”⁶ The Cities argument that an unfavorable decision here *may* potentially impact them later is neither an injury nor imminent and flies in the face of jurisprudential understanding of standing and the IDAPA rules.

Unless the Director elects, at some future date, to expand to scope of the proceedings there exists no grounds to allow testimony that would effectively expand the issues and not “limit the participation of those parties that do not have a direct interest in this proceeding. IDAPA 37.01.01.554 and .560.”⁷ Until a direct interest is shown according to Rules 554 and 560 those north of the Bellevue Triangle should not be allowed to offer factual or expert testimony based upon the Director’s criteria set forth in the *Notice and Scheduling Order*. Furthermore, the interests of the Group 3 parties have substantially similar interests and positions as those in Group 2. The Director should limit the number of them who examine witnesses or make and argue motions and objections to expedite the proceedings and avoid duplication pursuant to Rule 560.

b. A Motion to Strike portions of the Department’s staff memos is not appropriate as the basis for the evidence goes to *weight* not relevance, as the expert information is relevant.

⁵ *Tucker v. State*, 162 Idaho 19, 394 P.3d 54 (2017) (Burdick, C.J.) (quotation marks original) (citing *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.)).

⁶ *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *Lujan v. Defenders of Wildlife* (“*Lujan II*”), 504 U.S. 555, 560 (1992) (Scalia, J.)).

⁷ *Scheduling Order* pg 3

The Cities argue to Strike entire portions of expert staff reports as not being irrelevant.⁸ The admissibility of these provisions' relevance is gauged to what degree the trier of fact finds them helpful to the facts at issue as these are scientific, technical and specialized information. "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."⁹ Additionally, "Once the witness is qualified as an expert, the trial court must determine whether the expert's opinion testimony will assist the trier of fact in understanding the evidence."¹⁰ "This condition goes primarily to relevance. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). One aspect of relevancy is whether the expert testimony proffered in a case is sufficiently tied to the facts of the case such that the testimony will aid the [fact finder] in resolving a factual dispute. *Id.*¹¹

Here the Staff Reports have been prepared by Department to help the Director determine the matter currently before him. The degree of weight to be given to the Reports will be a decision to be made by the Director. To strike entire paragraphs of information out of the Director's own reports is eliminating information that was utilized by the Department to come to its conclusions, is relevant and, if stricken, would result in the Director having to make a decision based upon incomplete information.

⁸ Certain portions of four Staff Memos requested by the Director on May 11, 2021 in his Request for Staff Memorandum, be struck as irrelevant and outside the scope of the above-captioned proceeding, which portions are identified in "strike-out" format in the copies of the Staff Memos attached hereto as Exhibits A, B, C and D, incorporated herein by reference; Cities Motion pg. 2

⁹ I.R.E. 702

¹⁰ *Sidwell v. William Prym, Inc.*, 112 Idaho 76, 81, 730 P.2d 996, 1001 (1986)

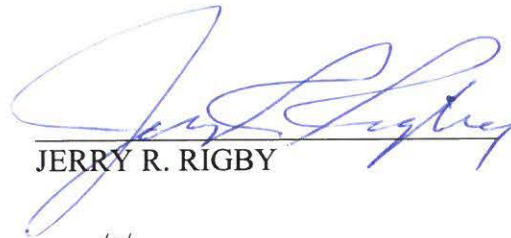
¹¹ *State v. Caliz-Bautista*, 162 Idaho 833, 835–36, 405 P.3d 618, 620–21 (Ct. App. 2017)

III. CONCLUSION

The Director should prohibit parties who are not at risk of curtailment from calling expert and factual witnesses based upon the limited scope of the hearing as set forth in the *Notice* and *Scheduling Orders*. Ground water users that have filed Notices of Intent to Participate in to these proceedings that have no risk of curtailment should not be allowed to call expert and fact witnesses in this administrative proceeding.

The Director can weigh the evidence as presented at the hearing concerning the Staff Memoranda and decide what information is relevant to the facts at issue in the case.

Dated this 4th day of June, 2021.



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/s/

JOSEPH F. JAMES

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/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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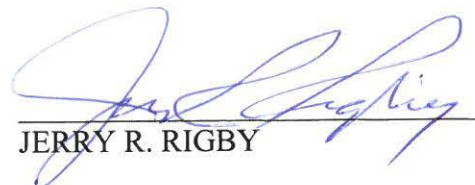
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