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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE NORTH
SNAKE AND MAGIC VALLEY GROUND
WATER DISTRICTS' 2009 JOINT
MITIGATION PLAN FOR 2009
(Blue Lakes)

Docket No. CM-MP-2009-002

IN THE MATTER OF A&B IRRIGATION
DISTRICT'S RULE 43 MITIGATION PLAN

(Water Right Nos. 36-02356A, 36-07210, and
36-07427)

**MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE AND/OR
MOTION IN LIMINE RE: TESTIMONY
OF DR. CHARLES E. BROCKWAY**

Protestant Unit A Association ("Unit A"), by and through its attorneys of record, Perkins Coie LLP, submits this memorandum in support of its Motion to Strike and/or Motion in Limine Re: Testimony of Dr. Charles E. Brockway ("Motion in Limine").

I. RELIEF SOUGHT

Unit A seeks the entry of an order precluding A&B Irrigation District from presenting a portion of Dr. Charles E. Brockway's testimony set forth in the Direct Testimony of Charles E. Brockway, Ph.D., P.E., on page 6, lines 11-18, submitted on behalf of A&B Irrigation District on January 11, 2010. Dr. Brockway's testimony lacks foundation, constitutes a legal conclusion for which Dr. Brockway is not qualified to make, and invades the province of the trier of fact and

should be excluded.

II. TESTIMONY AT ISSUE

Unit A seeks to exclude the following testimony of Dr. Brockway:

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

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

(Direct Testimony of Charles E. Brockway, Ph.D., P.E., at 6, lines 11-18, submitted on behalf of A&B Irrigation District on January 11, 2010) (the "referenced testimony").

III. LEGAL STANDARD

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. *See generally State v. Wallmuller*, 125 Idaho 196, 868 P.2d 524 (Idaho Ct. App. 1994)(internal citation omitted). A decision to grant or deny a motion in limine is left to the broad discretion of the trial court. *See Murphy v. Gunter'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. *See Chapman v. Chapman*, 147 Idaho 756, 215 P.3d 476, 480 (2009); *Polk v. Larrabee*, 135 Idaho 303, 314, 17 P.3d 247, 258 (2000).

IV. DISCUSSION

A. The Referenced Testimony Lacks Foundation and Should be Excluded.

In order to render expert testimony in a particular case, a witness must first be qualified as an expert on the matter at hand. *State v. Hopkins*, 113 Idaho 679, 680, 747 P.2d 88, 89 (Idaho Ct. App. 1987)(citation omitted). The foundation for establishing a witness's qualifications as an expert must be offered before his testimony can be received in evidence. *State v. Johnson*, 119 Idaho 852, 855, 810 P.2d 1138, 1141 (Idaho Ct. App. 1991)(citation omitted). In this case, Dr. Brockway's testimony cited above lacks foundation and should be excluded.

In the referenced testimony, Dr. Brockway testifies that A&B's Mitigation Plan complies with Conjunctive Management Rule 43, which is a reference to IDAPA 37.03.11.043.03. Rule 43 contains the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior water rights, including:

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels,

compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g- Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

I. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior priority water rights from material injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.043.03.a-o.

Dr. Brockway does not specify which Rule 43 factors he believes A&B's Mitigation Plan

meets, or which Rule 43 factors he believes to be applicable, yet Dr. Brockway affirmatively states that the Mitigation Plan meets the Rule 43 factors. However, Dr. Brockway is not qualified to make such an opinion because it provides a legal conclusion to which no foundation has been provided. For example, the first factor under Rule 43 addresses whether the delivery, storage, and use of water pursuant to the proposed mitigation plan is in compliance with Idaho law. *See* IDAPA 37.03.11.043.03.a. If Dr. Brockway is permitted to testify that A&B's Mitigation Plan complies with Idaho law, he would be rendering a legal opinion that he is not qualified to make. Indeed, the Director is committed to the determination of whether A&B's Mitigation Plan complies with Idaho law and whether the Mitigation Plan prevents injury to water rights such as those of Unit A landowners. Allowing Dr. Brockway to provide a legal opinion in that regard should not be permitted.

Further, there are fifteen factors listed in Rule 43 and because Dr. Brockway does not discuss each of these factors, specify the factors at issue, nor provide the basis for his opinion that the Rule 43 factors are purportedly met, his opinion lacks adequate foundation. Because Dr. Brockway's opinion lacks foundation; it should be excluded at the hearing in this matter.

B. The Referenced Testimony Invades the Province of the Trier of Fact and Should be Excluded Pursuant to Idaho Rules of Evidence Rule 702 and Rule 704.

Idaho Rule of Evidence 702 provides that in order for a qualified expert to offer an opinion in any matter, it must be shown that his "scientific, technical, or other specialized knowledge will assist the trier of fact to *understand the evidence* or to *determine a fact in issue*." *See* Id. R. Evid. 702 (emphasis added). Rule 704 provides that expert opinion testimony that is otherwise admissible is not objectionable because it "embraces an ultimate issue to be decided by the trier of fact." *See* Id. R. Evid. 704. However, Rule 704 must be read in light of Rule 702. *Polk*, 135 Idaho at 314, 17 P.3d at 258.

Rule 704 does not open the door to all opinions on every subject. *See Fowler v. Kootenai*

County, 128 Idaho 740, 745, 918 P.2d 1185, 1190 (1996)(citation omitted). Expert testimony is admissible up to, but excluding the point at which the expert weighs the evidence, in essence evaluating the circumstances and rendering the same conclusion which the trier of fact is asked to decide. *Id.* 128 Idaho at 746, 918 P.2d at 1191. Stated another way, if the proposed expert testimony does not assist the trier of fact to understand the evidence or to determine a fact at issue, but rather, invades the province of the trier of fact, such testimony is not admissible. *See id.*; *and see Polk*, 135 Idaho at 314, 17 P.3d at 258.

The referenced testimony of Dr. Brockway should be stricken from the record and excluded at the hearing in this matter because it invades the province of the trier of fact, which in this case is the Director. Dr. Brockway's opinion does not simply embrace an ultimate issue to be decided by the Director in this matter, i.e. whether A&B's Mitigation Plan meets the Rule 43 factors and whether the Plan prevents injury to senior water rights, it weighs the evidence and renders the conclusion that the Director is being asked to make. Dr. Brockway's opinion that A&B's Mitigation Plan complies with the Rule 43 factors does not assist the Director to understand any evidence or determine any fact at issue; it opines in a conclusory fashion regarding the legal question to be decided in this case. Because the referenced testimony invades the province of the Director, it is inadmissible and should be excluded.

Additionally, the opinion is so vague and overbroad that it simply cannot be said to be of any assistance to the Director in this case. As set forth above, there are fifteen various factors to be considered by the Director under Rule 43, and these factors contain numerous subparts or considerations to be analyzed. Dr. Brockway does not provide an opinion regarding which specific factor(s) or subpart(s) he believes the A&B Mitigation Plan meets; he simply presents a broad sweeping conclusion that the Plan meets the Rule 43 factors. As such, the referenced testimony does not assist the trier of fact to understand the evidence or to determine a fact at issue and should thus be excluded.

V. CONCLUSION

Based upon the foregoing, Unit A respectfully requests that the referenced testimony of Dr. Brockway be stricken from the record and excluded at the hearing in this matter.

DATED: February 1, 2010.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 1, 2010, I caused a true and correct copy of the within named document to be forwarded with all required charges prepaid and properly addressed, by the method(s) indicated below, in accordance with IDAPA 37.01.01.303, to all of the parties of record in this proceeding, as follows:

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