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BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING)
 FOR DISTRIBUTION OF WATER TO)
 THE FEDERAL ON-STREAM)
 RESERVOIRS IN WATER)
 DISTRICT 63)
)

**MEMORANDUM IN SUPPORT OF
 JOINT MOTION IN LIMINE OF
 IRRIGATION ENTITIES**

COME NOW, the Boise Project Board of Control, New York Irrigation District, Farmers Union Ditch Company, Ltd., and the Ditch Companies (hereinafter "Irrigation Entities"), by and through their respective counsel of record, and hereby submit this Memorandum in Support of Motion in Limine filed jointly by the parties, pursuant to the Idaho Administrative Procedure Act, and Idaho Department of Water Resources Rules of Procedure 37.01.01.260. For the

reasons set forth below, the Irrigation Entities request that this Presiding Officer limit the scope of testimony elicited from certain witnesses identified by the Idaho Department of Water Resources, and United Water Idaho, Inc.

PERTINENT FACTS

The Presiding Officer issued his Fifth Amended Scheduling Order and Notice and Notice of Hearing on May 20, 2015. In the Order the Presiding Officer identified June 19, 2015, as the date on which expert witnesses in this proceeding must be identified and further stated that the deadline applied “to any experts who may testify for IDWR at the hearing.”

On June 19, 2015, the Presiding Officer identified Elizabeth Cresto as the expert for the Department and stated that her testimony would “will relate to discussion of the November 4, 2014, Memorandum she prepared on the subject of ‘Accounting for the distribution of water to the federal on-stream reservoirs in Water District 63.’” On the same date, in two separate filings, the Boise Project Board of Control, New York Irrigation District and Ditch Companies identified Dr. Jennifer Stevens as an expert who would testify to a number of issues relating to the contested case, and David B. Shaw as an expert witness who would provide testimony relating to the parties’ ‘concerns and/or objections’ regarding Basin 63 water accounting and the coordination necessary between Basin 63 water right accounting and the Boise River Water Control Manual. No other expert witnesses were identified by any other party.

On July 31, 2015, the deadline identified by the Presiding Officer as the date on which to identify witnesses and exhibits, the Department identified additional witnesses, as did United Water Idaho, Inc., and the Irrigation Entities. Among the witnesses identified by the Department is Liz Cresto, already identified as an expert witness, as well as A. Kenneth Dunn and David R. Tuthill, both past-Director’s of the Idaho Department of Water Resources. United Water

identified these same witnesses, as well as Karl J. Dreher, another past-Director of the Idaho Department of Water Resources. United Water also filed a Motion requesting that the Presiding Officer issue subpoenas to Ms. Cresto, Robert J. Sutter, Karl J. Dreher, and David R. Tuthill to appear at hearing in this contested case.

STANDARD

When ruling on the admissibility of evidence, a hearing officer is not bound by the Idaho Rules of Evidence, but rather evidence “should be taken by the agency to assist the parties’ development of the record, not excluded to frustrate that development.” IDAPA 37.01.01.600. “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 provided by statute or recognized in the courts of Idaho.” *Id.*; see also *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 163, 125 P.3d 515, 519, (2005); see also I.C. § 67-5251(1). Tribunals must exercise discretion when ruling on motions in limine. *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000). A motion in limine ruling is reviewed under an abuse of discretion standard. See *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 767-768, 86 P.3d 475, 481-482 (2004)(citing *Leavitt*, 133 Idaho at 631, 991 P.2d at 356). The governing legal standard requires a three-pronged inquiry to determine whether the tribunal (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. See *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 767-768, 86 P.3d 475, 481-482 (2004) (Citing *Leavitt*, 133 Idaho at 631, 991 P.2d at 356; *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

ARGUMENT

The Irrigation Entities request an Order of this Presiding Officer that no witness, other than those identified by the Department and those identified by the Irrigation Entities be allowed to provide experts opinions or testimony in this contested case. In this proceeding, the testimony of all other identified witnesses must be limited that of a lay witness. The Director's Order made it clear that experts had to be identified as experts by a date certain. The failure to timely disclose any additional expert witnesses prevents that party from attempting to elucidate expert testimony from a witness not disclosed as an expert.

In order to be entitled to provide expert testimony, that witness must be timely disclosed in conformance with Idaho Rule of Civil Procedure 26(b)(4)(A). Without timely disclosure that a witness is intended to express expert opinions, the witness may only provide lay testimony.

Idaho Rule of Evidence 701 governs opinion testimony given by lay witnesses. IRE

Rule 701 provides:

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

IRE Rule 701, (emphasis added). *State v. Enyeart*, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993).

The first requirement of IRE 701 is that the lay witness opinion testimony needs to be based upon his or her own perception. See IRE 701; see also *State v. Johnson*, 119 Idaho 852, 858, 810 P.2d 1138, 1144, (Idaho Ct. App. 1991) (Doctor did not qualify as an expert, and likewise his testimony was not based upon his own perception, but what others had stated to

him). This is consistent with IRE 602 that provides a witness may not testify to a matter unless the witness has personal knowledge of the matter. IRE 602; *see United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. N.Y. 2005) (Rule 701 simply recognizes lay opinion as an acceptable "shorthand" for the "rendition of facts that the witness personally perceived.").

Idaho Rule of Evidence 702 governs testimony given by expert witnesses. The rule provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” IRE 702.

In this action, in accordance with Id. R. Civ. P. 26(b)(4)(A), and Idaho Rules of Evidence 701 through 705, all witnesses other than Elizabeth Cresto, Jennifer Stevens and David Shaw are lay witnesses and are not entitled to offer opinions on any scientific, technical or other specialized knowledge or as to any ultimate issues. No witness is qualified to offer legal opinions on what the law is or was, as not one person was named as an expert for such purposes, and even if they had been testimony about the law is not a proper subject for expert testimony. Furthermore, the opinion testimony of Ms. Cresto must be limited to those opinions expressed in her November 4, 2014, technical memo, and her expert deposition testimony.

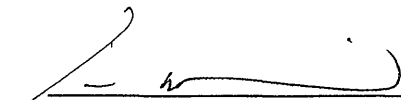
CONCLUSION

For the foregoing reasons, the Irrigation Entities hereby request that the Presiding Officer enter an order limiting the testimony of all witnesses not disclosed as expert witnesses in conformance with the Fifth Amended Scheduling Order and Notice of Hearing to that of a lay witness in conformance with Id. R. Civ. P. 26(b)(4)(A), and Idaho Rules of Evidence 701 through 705, and further limiting the expert testimony of Ms. Cresto to that consistent with the

contents of the November 4, 2014, technical memorandum and the deposition testimony previously given in this contested case.

Dated this 13th day of August, 2015

BARKER ROSHOLT & SIMPSON LLP



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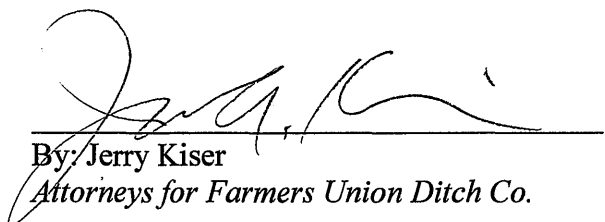
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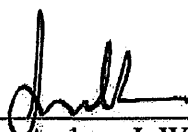
witness in conformance with Id. R. Civ. P. 26(b)(4)(A), and Idaho Rules of Evidence 701 through 705, and further limiting the expert testimony of Ms. Cresto to that consistent with the contents of the November 4, 2014, technical memorandum and the deposition testimony previously given in this contested case.

Dated this 13th day of August, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2015, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF JOINT MOTION IN LIMINE OF THE IRRIGATION ENTITIES** the method indicated below, and addressed to each of the following:

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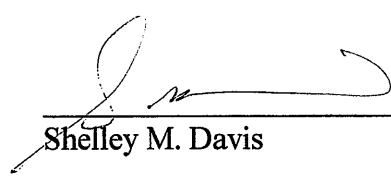
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