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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**MEMORANDUM IN OPPOSITION TO MOTION *IN LIMINE* TO EXLCUDE EXPERT REPORT OF JOHN CHURCH**

Idaho Ground Water Appropriators, Inc. ("IGWA") hereby submits its Memorandum in Opposition to Motion *in Limine* to Exclude Expert Report of John Church. The Surface Water Coalition's ("SWC") Motion *in Limine* seeks to exclude the expert report of John Church pursuant to Idaho Rule of Evidence 403 and Rules 42 and 43 of the Idaho Department of Water Resources' ("IDWR" or "Department") Conjunctive Management Rules.

IGWA opposes the Motion on the following grounds: (1) economic considerations are a part of Idaho's prior appropriation doctrine which is to be applied by the Director in this case; (2)

the Church Report directly addresses SWC's claims of material injury; (3) the Idaho Rules of Evidence do not apply to this proceeding and even if they did apply, the probative value of John Church's expert report is not substantially outweighed by any perceived danger of unfair prejudice, confusion of the issues, waste of time, or needless presentation of cumulative evidence; and (4) the Department's Conjunctive Management Rules do not preclude the Director from hearing evidence of economic considerations associated with SWC's delivery call.

I.
FACTS

On January 14, 2005, SWC filed a letter and petition with the Department seeking priority administration of water rights within Water District 120. Thereafter, on May 2, 2005, the Director issued an Amended Order concerning the SWC delivery call.

In the May 2 Order, the Director stated in his findings of fact: "Department staff contacted individuals employed by the University of Idaho Agricultural Extension Agents and by the U.S. Department of Agriculture Farm Service Agency as County Directors [in Lincoln, Gooding, Jerome, and Twin Falls Counties] to glean information about shortages in the amounts of water available for irrigation in recent years." May 2 Order, p. 25, ¶ 110.

The May 2 Order's findings of fact also state: "in Lincoln County...FSA Director estimates losses in crop production to be 35 percent because of shortages in surface water supplies, although the losses were not primarily the result of shortages in supplies from the Snake River"; "In Gooding County,...overall yields were near normal"; "In Jerome County,...shortages in surface water supplies have caused only slight declines in crop production"; and "In Twin Falls County,... Twin Falls Canal Company experienced some loss in crop production, the last cutting of hay was reduced, and yields from corn crops were reduced largely because of delayed harvest, not shortages of water." May 2 Order, p. 25, ¶s 111-114.

On June 14, 2005, SWC submitted its Initial Statement of Issues to Raise at Hearing. Therein, SWC expressed its intent to raise the following issues:

> 29. Whether or not material injury to the water supply under a senior water right, when said water could be applied to a beneficial use, which occurs as a result of ground water withdrawals, is material injury to the right, without regard to the extent of injury to a crop that could and should have been irrigated or the value of such crops.
>
> 30. Whether or not there is sufficient foundation to support comments made by agricultural extension agents of the University of Idaho or employees of the United States Department of Agriculture in regard to shortages in the amounts of water available for irrigation in any particular year.

On or about December 30, 2005, in compliance with the Director's Second Amended Scheduling Order dated November 25, 2005, IGWA submitted for the Director's consideration the Expert Report of John Church ("Church Report").

Because the issue was raised by the Director in the May 2, 2005 Order and by SWC in its issue statement, the Church Report addresses the issue of recent reduced crop production and yields resulting from alleged insufficient water supplies. Specifically, Mr. Church states in his report: "I have seen no documentation that any surface water users receiving their water supply from the Coalition members actually have dried up acreage in the recent drought of 2004, or in 2005." Church Report, ¶ 12. Mr. Church continues: "There is no concrete evidence that surface-irrigated lands in Twin Falls, Jerome and Gooding Counties have been taken out of irrigation due to lack of water since 1990, and there appears to be no correlation between water supply and farm production in these counties." Church Report, ¶ 13. Finally, Mr. Church concludes: "In my opinion, economic forces unrelated to water supply are the major determinates of the state of Idaho's agricultural economy." Church Report, ¶ 16.

SWC now moves the Director to preclude IGWA from presenting any evidence of economic considerations, including the Church Report. SWC Motion and Supporting Memorandum. As demonstrated below, this motion should be denied.

II.
ARGUMENT

A. Idaho's prior appropriation doctrine encompasses the concept of full economic development

Despite SWC's assertions, Idaho's prior appropriation doctrine is not simply a determination of who has the most senior priority date as among right holders competing for the same water. Idaho's prior appropriation doctrine includes, among other things, consideration of principles like material injury, maximum use and benefit, waste, and full economic development.

The Idaho Constitution enunciates the state policy of securing "optimum development of water resources in the public interest." Idaho Const. art. XV, § 7. Even long before the Idaho Constitution was amended in 1964 to add the reference to "optimum development," the Idaho Supreme Court had found that pursuant to Article XV, "[t]he policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home Irr. Dist. v. Duffy,* 79 Idaho 435, 442-43, 319 P.2d 965, 968-69 (1957) (citing Idaho Const. art. XV).

Further support for this view of the prior appropriation doctrine is found in the Ground Water Act enacted in the 1950's, wherein the Idaho Legislature provided: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground resources . . . ." Idaho Code § 42-226. Many years later, the Idaho Supreme Court held: "the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, s 7. Full economic development of Idaho's ground water resources can and

will benefit all of our citizens." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).[1]

More recently, the Court reiterated:

> The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it. Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of the limited resource. The policy of the law of the State is to secure the maximum use and benefit, and the least wasteful use, of its water resources.

State v. Hagerman Water Right Owners ("Partial Forfeiture Decision"), 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (quoting *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990)) (emphasis added).

Accordingly, the Director should hear evidence of the relative economic harms and benefits resulting from potential curtailment of ground water pumping on the ESPA in order to take account of "all elements of the prior appropriation doctrine as established by Idaho law," including "full economic development as defined by Idaho law." IDAPA §§ 37.03.11.020.02 and 37.03.11.020.03.

B. The Church Report directly addresses SWC's claims of material injury.

Material injury is the cornerstone of any delivery call. Without asserting and providing evidence of material injury, a delivery call must fail. IDAPA §§ 37.03.11.020.04 and 37.03.11.030.01. Rule 30 of the Conjunctive Management Rules provides:

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[1] SWC cites *Baker* and summarizes it as follows: "The court declined to grant the junior appropriators a proportional or pro rata right in the aquifer based on economic considerations." SWC Memorandum, p. 6. However, the *Baker* opinion does not indicate that the Court considered economics in making its decision. In fact, *Baker* very clearly sets forth that economic considerations can be taken into account: "Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Baker*, 95 Idaho at 584.

Contrary to SWC's assertions, *Baker* does not stand for the proposition that a Court (or in this case the Director) should not or cannot consider economic evidence in the context of answering a delivery call from a senior water right holder. *Baker* simply stands for the proposition that pro rata or proportional rights in a common water source are contrary to Idaho's prior appropriation doctrine. *Baker*, 95 Idaho at 583.

> When a delivery call is made...the petitioner shall file with the Director a petition in writing containing, at least, the following
>
> ...
>
> b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner
>
> ...
>
> c. All information, measurements, data or study results available to petitioner to support the claim of material injury.

As a part of the Director's findings of fact regarding SWC's claimed material injury, the May 2 Order discusses Department staff contacting agricultural extension agents and Farm Service Agency Directors to glean information about recent crop production and yield numbers in Lincoln, Gooding, Jerome, and Twin Falls Counties. May 2 Order, p. 25, ¶s 110-114. It would therefore appear that the Director believes such information is necessary to a determination of material injury.

As set forth above, the Church Report directly addresses the question of alleged material injury to the SWC members' irrigation water rights. The Church Report evaluates information related to the agricultural economic output in the counties where the SWC members are located and concludes that nothing in the economic data supports a conclusion that there were crop losses, or less valuable crops produced, in these areas during the recent drought as compared to other periods when there were no allegations of injury from ground water pumping. Church Report, ¶s 12-16.

The information contained in the Church Report is relevant, admissible evidence that must be heard by the Director in evaluating SWC's asserted material injury.

C. Idaho Rule of Evidence 403

1. The Idaho Rules of Evidence do not apply to this contested case.

Pursuant to the Director's Amended Order of May 2, 2005, "[a]ny hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01." Amended Order of May 2, 2005, p. 48. Admission of evidence in contested cases before the Department is governed by IDAPA § 37.01.01.600. Rule 600 provides:

> Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at the hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. 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. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

(Emphasis added). Rule 52 also provides in part: "Unless required by statute, or otherwise provided by these rules, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency." IDAPA § 37.01.01.052.

The Idaho Rules of Evidence, including Rule 403, do not apply to this proceeding before the Department. Accordingly, SWC's Motion *in Limine* to exclude the Church Report based upon application of Idaho Rule of Evidence 403, is improperly before the Director and must be denied. The Church Report should be taken into evidence to "assist the parties' development of a record, not excluded to frustrate that development." IDAPA § 37.01.01.600.

2. The probative value of the Church Report is not substantially outweighed by any danger of unfair prejudice, confusion of the issues, waste of time, or needless presentation of cumulative evidence.

Although I.R.E. 403 does not apply in these proceedings before the Director, SWC nonetheless seeks to exclude the Church Report based on several considerations provided for in Rule 403. By addressing these concerns herein, IGWA does not admit to or consent to application of Rule 403 to the Church Report.

Idaho Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added). The rule amounts to a balancing test, whereby a judge (in this case, the Director) will balance the relative "costs" of the evidence against its benefits. 22 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5214 (1978); *Beard v. George*, 135 Idaho 685, 689, 23 P.3d 147, 151 (2001) ("A ruling under I.R.E. 403 requires the trial court to balance the probative value of the evidence against the prejudicial nature of the evidence").

> Unless the judge concludes that the probative worth of the evidence is "substantially outweighed" by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted. If, on the other hand, the balance goes against probative worth, the judge is not required to exclude the evidence but he "may" do so. In other words, the process of balancing is a prerequisite to the exercise of discretion but it is not a formula for its exercise....

22 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5214 (1978).

"[T]he purpose of requiring probative worth to be 'substantially outweighed' is to further the policy of favoring the admissibility of evidence." 22 Charles Alan Wright and Kenneth W.

Graham, Jr., Federal Practice and Procedure: Evidence § 5221 (1978). Even if SWC's Motion *in Limine* based upon Rule 403 were properly before the Director, the balancing required under Rule 403 favors admission of the Church Report.

a. Alleged danger of unfair prejudice

"In Rule 403, 'prejudice' does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." 22 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5215 (1978).

SWC does not claim that the Church Report has the capacity to persuade the Director by illegitimate means. Rather, SWC claims that it will suffer unfair prejudice if the Director admits the Church Report because the report improperly focuses "attention to criteria that do not apply to the conjunctive management of water rights in the State of Idaho." SWC Memorandum, p. 3. As set forth above, economic considerations have a place in Idaho's prior appropriation doctrine and in determining material injury in a delivery call.

In any event, even if SWC's allegation were true, it still fails to state any "unfair prejudice" as that term is used in Rule 403. SWC's allegation is more akin to a challenge to the relevance of the Church Report. Relevance is not an issue under Rule 403, Rule 403 by its very language (quoted above) presupposes that the evidence at issue is relevant.

Idaho law requires that its water resources be put to their maximum use and benefit and encourages the full economic development of Idaho's ground water resources. The Church Report analyzes the economic effects of the proposed curtailment of ground water pumping on the ESPA and evaluates the alleged material injury suffered by SWC. Therefore, SWC will not suffer any unfair prejudice if the Director considers the Church Report.

b. Alleged danger of confusion of issues

The Church Report presents no risk of confusing the issues in this case. The central issue is whether SWC members have suffered material injury that can be redressed, consistent with Idaho's prior appropriation doctrine and the Conjunctive Management Rules, by curtailing ground water pumping by IGWA members on the ESPA. The Director and his employees have an unmatched wealth of knowledge concerning application of Idaho's prior appropriation doctrine to a delivery call like the one made by SWC. This matter is not being tried to a panel of layperson jurors.

Where, as in this case, the Director of Idaho's agency responsible for the administration of all water rights under Idaho's prior appropriation doctrine is the fact-finder and judicial officer, it cannot be reasonably argued that the Church Report has any risk of confusing the issues. 22 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5224 (1978) (stating that Rule 403 will not have the same impact in court trials that it may have in jury trials).

c. Waste of time considerations

In a short section of its memorandum titled "Waste of Time," SWC claims that any evidence regarding the economic impact on junior users is "irrelevant" and that evidence of the current state of Idaho's agricultural economy is likewise "irrelevant." SWC Memorandum, p. 4. However, Rule 403, upon which SWC relies in its Motion *in Limine*, does not address the relevance of evidence. Again, Rule 403 presumes that the evidence is relevant, then addresses whether the evidence may be excluded based on other considerations, in spite of its relevance.

Therefore, SWC's allegations of irrelevance are completely misplaced in its pending Motion *in Limine* based upon Idaho Rule of Evidence 403.[2]

Nevertheless, the Director will not be wasting time or delaying the process by considering the Church Report. In the context of a delivery call by senior surface right holders, it is proper for the Director to hear evidence of and consider the economic ramifications of curtailing junior ground water rights on the ESPA to provide minimal amounts of water to senior surface rights. Idaho Code § 67-5242; IDAPA § 37.01.01.600; *see supra*, Sections II.A. and II.B.

d. Cumulative evidence considerations

"Cumulation of evidence is not bad *per se*; it is 'needless presentation' that is to be avoided. 'Cumulative evidence' implies more than repetition...." 22 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5220 (1978).

SWC claims that the probative value of the Church Report is substantially outweighed by considerations involving the needless presentation of cumulative evidence. SWC Memorandum, pp. 4-5. The basis for this assertion is that the Church Report includes (1) an Affidavit of John Church that was previously filed with the Department on March 23, 2005, and (2) three reports prepared by different organizations that individually discuss the economic considerations associated with curtailing ground water pumping in the ESPA. SWC Memorandum, pp. 4-5.

On March 23, 2005, IGWA filed the Affidavit of John Church with the Department in response to the SWC delivery call, attaching copies of the three economic reports—the Hazen

[2] To the extent SWC attempts to convert its Motion *in Limine* based upon I.R.E. 403 into an objection to the relevance of the Church Report, IGWA alleges that the relevance of the Church Report is set forth in Sections II.A. and II.B. of this memorandum. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. The Church Report is relevant because it provides evidence related to the full economic development of Idaho's ground water resources and the claimed material injury, both of which are of consequence in this case.

Report, the Hamilton Study, and the Snyder Study. The Church Report, filed on December 30, 2005, merely re-submitted the Church Affidavit and its exhibits as a convenience to the Director because the Church Report analyzes and comments upon these three economic studies. In fact, the Director's Scheduling Order of July 22, 2005, provides that the expert report "shall contain...the data or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinion."

As to the three economic reports themselves, it cannot be argued that they amount to needless cumulative evidence. Although each of them discuss, in some way, the economics associated with potential ground water pumping curtailment, each of the reports was prepared by a different organization with a slightly different focus, which SWC acknowledges. SWC Memorandum, pp. 4-5.

The Hazen Report focuses on the costs incurred in securing enhanced spring flows from the ESPA through ground water pumping curtailment. The Hamilton Study describes the economic value of the ESPA spring outflows and the economic damage that has occurred as a result of reduced spring flows. The Snyder Study examines the economic impacts of potential curtailment upon three categories of users—ESPA ground water irrigators, surface water users, and aquaculture interests. While these three studies may have some overlap, including all three in the Church Report is not "needless presentation of cumulative evidence."

C. Conjunctive Management Rules

SWC relies upon Rules 42 and 43 of the Department's Conjunctive Management Rules for the proposition that "economic impact to junior ground water users should not be a consideration by the Director, when lawful senior appropriators have made a legitimate call and request for administration." SWC Memorandum, pp. 6-9. SWC finds it determinative that Rules

42 and 43 list factors that the Director "may" consider when determining material injury or evaluating a proposed mitigation plan, but fail to make specific mention of the economics involved in either decision. Id. However, what SWC fails to acknowledge is that the Director's decision making is not limited to consideration of the factors enumerated in Rules 42 and 43. Rule 42 provides: "Factors the Director may consider...include, but are not limited to, the following...." IDAPA § 37.03.11.042.01. Likewise, Rule 43 provides: "Factors that may be considered by the Director...include, but are not limited to, the following...." IDAPA § 37.03.11.043.03.

The Conjunctive Management Rules do not preclude the Director from considering the economic consequences of curtailing junior ground water rights to supply minimal amounts of water to senior surface water users. Rather, the Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA § 37.03.11.020.02. As set forth above in Sections II.A. and II.B., economic considerations are a recognized part of Idaho's prior appropriation doctrine and determinations of material injury.

D. Idaho Code § 67-5242 provides that parties shall be permitted to present evidence on all issues involved, with limited exceptions

Idaho Code § 67-5242(3)(b), specifically made applicable to this case by the Director's May 2 Order, provides: "At the hearing, the presiding officer: ... (b) Shall afford all parties the opportunity to respond and present evidence and argument on all issues involved, except as restricted by a limited grant of intervention or by a prehearing order." The limited exceptions provided for in this section are not at issue in this case because no prehearing order may issue based upon Idaho Rule of Evidence 403 or any other Idaho Rule of Evidence.

Therefore, pursuant to Idaho Code § 67-5242, the Director (as the hearing officer) shall afford IGWA the opportunity to present evidence regarding all issues involved, including the

economic considerations associated with SWC's claim of material injury and the curtailing of ground water pumping on the ESPA. *See supra*, Sections II.A. and II.B.

III.
CONCLUSION

Idaho's prior appropriation doctrine involves consideration of multiple factors, including the full economic development of Idaho's ground water. Therefore, the Church Report's discussion of the economic effects of curtailing ground water pumping on the ESPA is relevant, admissible evidence. Additionally, the Church Report specifically addresses the issue of SWC's material injury, which is the basis for the delivery call.

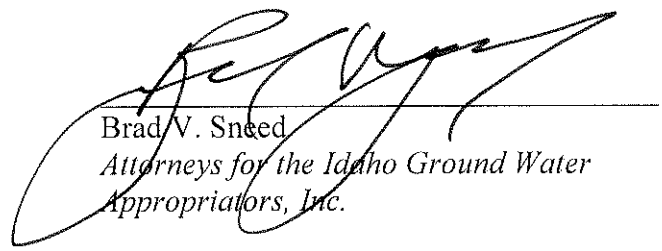
Despite SWC's Motion, the Idaho Rules of Evidence, including Rule 403, do not apply to this contested case before the Idaho Department of Water Resources. IDAPA §§ 37.01.01.052 and 37.01.01.600. "Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." IDAPA § 37.01.01.600. Nevertheless, should the Director apply Rule 403 to the Church Report, the required balancing favors admission of the Church Report. The probative value of the Church Report is not substantially outweighed by the cumulative dangers and risks associated with admission of the Church Report.

Lastly, the Department's Conjunctive Management Rules and Idaho Code § 67-5242 do not prohibit economic evidence from being presented at hearing. In fact, Idaho Code § 67-5242 mandates that a hearing officer take evidence on "all issues involved."

For all of the foregoing reasons, SWC's Motion *in Limine* to Exclude the Expert Report of John Church should be denied.

Respectfully submitted this 28th day of April, 2006.

GIVENS PURSLEY LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2006, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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