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

IN THE MATTER OF DISTRIBUTION)
 OF WATER TO VARIOUS WATER)
 RIGHTS HELD BY OR FOR THE)
 BENEFIT OF 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)
)
)
 (Water District Nos. 34, 110, 120 and 130))
 _____)

**SURFACE WATER COALITION'S
 RESPONSE TO POCATELLO'S &
 IGWA'S MOTION FOR SUMMARY
 JUDGMENT & MOTION IN LIMINE**

COMES NOW, 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 (collectively the “Surface Water Coalition,” “SWC” or “Coalition”), by and through counsel of record, and hereby submits this *Response to Pocatello’s & IGWA’s Motion for Summary Judgment & Motion in Limine*. For the reasons stated below, the Hearing Officer should deny Pocatello’s and IGWA’s (the “groundwater users”) motion.

INTRODUCTION

As has become the practice in these proceedings, the groundwater users have once again filed an unnecessary, time consuming and baseless motion in an attempt to evade their responsibilities under the Conjunctive Management Rules (the “CMR”).¹ Rather than focus on their duties to raise defenses, the groundwater users now attack the expert and lay testimony to be offered by the Coalition. In essence, the groundwater users argue that the Coalition has not met its burdens since its experts were not authorized to provide legal testimony regarding material injury. In making the argument, the groundwater users pick and choose which rules and law will apply – apparently, hoping that the Hearing Officer and other parties would ignore their violations of other rules.

At the very least, the groundwater users’ motion is untimely. The motion was filed just 3 ½ weeks before the suggested hearing date and 5 weeks before the trial in this matter is set to begin. Importantly, the last deposition conducted by the groundwater users of any Coalition experts in this matter took place on October 26, 2007. From that point, the groundwater users delayed any filing until the eleventh hour. This, alone, should result in a rejection of the motion. Indeed, under Civil Rule 56, such disrespect for timeliness would result in a rejection of the

¹ The groundwater users *Motion to Compel* was denied during the status conference held in this matter on December 20, 2007.

motion.² Had the groundwater users truly been concerned with this alleged failing in the Coalition's evidence, they should have filed the appropriate motions in a timely manner. Since they failed to do this, their motion should be denied.

In addition, however, the groundwater users' motion is based on a flawed notion of the distribution of burdens of proof in this matter. In essence, the groundwater users assert that the Coalition cannot meet its burden simply because the Coalition's experts have not been authorized to provide legal testimony regarding material injury. The groundwater users conveniently ignore the volumes of evidence prepared by the Coalition's experts addressing the extent of the injuries suffered by the Coalition. Furthermore, after all the evidence has been presented, it is the *Hearing Officer's* duty to make a determination as to whether or not the Coalition has suffered material injury and whether or not, and to what extent, the groundwater users have caused that material injury.

In making this finding, the Hearing Officer will have the factors of CMR 42 as a guide. While many of these factors may require expert testimony and opinions, as have already been filed in this matter, other factors necessitate the use of farmers, managers as those on the ground who personally experience the impacts of the depleted water supplies. To that extent, the Coalition identified numerous potential lay witnesses on November 14, 2007, as required by the scheduling order. In addition, the Coalition will be pre-filing direct testimony for many of these witnesses on January 4, 2008. The Hearing Officer simply cannot exclude this evidence, which is necessary for making a finding of material injury pursuant to CMR 42. Accordingly, the

² As discussed below, Parts II & III, it is the Coalition's contention that the Civil Rules and Rules of Evidence do not apply to these proceedings as there is no law, rule or order stating otherwise. However, the groundwater users base their motion of Rule of Evidence 701. At the same time, the groundwater users conveniently fail to cite to, or even recognize, Civil Rule 56, which contains specific time frames for filing a motion for summary judgment. They cannot have it both ways. Either the rules apply or they do not. Either way, however, the ground water users' motion is untimely and should be denied.

Hearing Officer should deny the groundwater users' motion.

DISCUSSION

I. Burden of Proof

The groundwater users' burden of proof argument is nothing more than a veiled attempt to shift their burdens onto the Coalition. They base their argument on an incorrect interpretation of the applicable law and regulations and a misstatement of the Coalition's position.

In the May 2, 2005, *Order (May 2nd Order*"), the Director determined that the Coalition was suffering material injury as a result of out-of-priority diversions by groundwater users. This decision was made using the CMR's and their associated burdens of proof and presumptions.

Recently explained by the Supreme Court, *see AFRD#2 v. IDWR*, 154 P.3d 433 (2007),

The presumption of Idaho Law is that the senior is entitled to his decreed water right, but there may certainly be some post adjudication factors which are relevant to the determination of how much water is actually needed. The rules may *not* be applied in such as a way to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing the petition containing information about the decreed rights. The rules do give the director tools by and which to determine "how the various ground and surface water sources are interconnected and how, when, where, and to what extent the diversion and use of water from one source impact [others]." [] Once the initial determination is made that material injury is occurring or will occur, the junior then bares the burden of proving that the call would be futile or to challenge in some other constitutionally permissible way, the seniors call.

Id. at 448-49 (emphasis added). In other words, once the senior water right holder comes forward with its water right, a presumption attaches and the junior water right holder bears the burden of proof. The groundwater users' notions would turn this process on its head.

Both the Coalition and the groundwater users have sought a hearing on the Director's *May 2nd Order*. To the extent that the Coalition disagrees with the Director's determination that certain groundwater users were not materially injuring their senior water rights, the Coalition bears the burden, and will provide expert and lay testimony and evidence, to refute the Director's

determination. However, the Coalition does not bear the burden with regards to the other, unchallenged, portions of the *May 2nd Order*. To the extent that the Director found material injury, and to the extent that the groundwater users disagree with that determination, the burden is not now on the Coalition to prove the Director was correct. The Director's material injury determination has been made and it is the groundwater users' burden to show the Director was wrong. Of course, the Coalition can, and will, provide evidence to refute the groundwater users' expert testimony. However, a challenge by junior water users ***does not destroy the presumptions enjoyed by the senior water*** users in the initial proceedings.

The groundwater users appear to agree: "Accordingly, in a contested case under the CM Rules, where the senior calling for water appeals the Director's determination, the burden is on the appellant to provide an evidentiary basis that he or she was (or is) suffering injury." *GW Users Br.* at 7. To the extent that the groundwater users wish to turn the challenge of certain provisions of an order into a complete re-hearing of all potential factual issues with the burden being placed on the senior water user's shoulders, neither the Coalition nor the applicable law agree. To hold otherwise would abrogate the CMR process and render the burdens and presumptions associated with an administrative call superfluous.

Notwithstanding these burdens, it is the Hearing Officer's duty to make a final legal determination regarding the extent of material injury being suffered by the Coalition. During the hearing, the Coalition will provide evidence, from both its expert and lay witnesses, demonstrating that its senior water rights have been injured by junior groundwater depletions. Next, the groundwater users may, if they desire, present evidence to refute Coalition's evidence or raise an applicable defense. At that point, it will rest upon the Hearing Officer to consider all the facts and make a legal determination as to the extent of material injury.

II. Applicable Procedural Rules Demand the Admission of the Coalition’s Expert and Lay Testimony

The groundwater users’ motion ignores a number of regulations which require that the motion be denied. Most importantly, the groundwater users fail to discuss IDWR Procedural Rule 52 (IDAPA 37-01-01-52) which states that “unless otherwise provided 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.” (Emphasis added); *see* IDWR Rule 600 (“The presiding officer at hearing is not bound by the Idaho Rules of Evidence”). In the alternative, the Hearing Officer may order that the Civil Rules or Rules of Evidence apply. *See* IDWR Rule 50. The groundwater users fail to cite to any statute, rule or order indicating that the rules, on which their motion is based, apply in any manner to these proceedings. Accordingly, Evidence Rule 701 does not apply here.

Just because the Civil Rules and Rules of Evidence do not apply does not mean that the parties will have free reign to introduce whatever evidence they see fit. In particular, IDWR Rule 600 provides that the Hearing Officer may admit “all other evidence ... if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.” The rule also provides which evidence may be excluded: “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.”

CM Rule 42 provides the framework of what constitutes the “type [of evidence] commonly relied upon by prudent persons” in determining material injury. That rule provides a list of eight, non-exclusive, factors for the Director, or Hearing Officer, to consider when determining material injury. The Coalition’s expert and lay testimony will be geared, at least in part, to establishing these factors. To date, the Coalition has pre-filed a multivolume report

extensively, and exhaustively, addressing these factors, which, contrary to the groundwater user's assertions, create an insurmountable obstacle to IGWA's summary judgment motion. In particular, testimony from the Coalition's experts will show that "the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to ... a senior priority surface" right. CM Rule 42(1)(c). Likewise, lay testimony will be provided by to address other factors for material injury, including, the "amount of water available in the source from which the water is diverted" and the "effect or expense of the holder of the water right to divert water from the source." *Id.* at 42(1)(a) & (b).

A failure of the Coalition's experts to provide legal testimony as to the extent of material injury does not mean that the groundwater users are not materially injuring the Coalition's water rights. Indeed, as will be shown at hearing, the facts clearly show that junior out-of-priority diversions are injuring the Coalition's senior water rights – a determination repeatedly made by the Director. From that point, it is up to the Hearing Office to make a legal determination as to the extent of the material injury.

Since the Civil Rules and Rules of Evidence do not apply in these proceedings, absent statutory, regulatory or other authorization, the case law cited by the groundwater users, including *Marty v. State of Idaho*, 122 Idaho 766 (1992) and others, which address the standards under those rules also do not apply. Rather, the Hearing Officer is to be guided by requirement that all evidence that "is of a type commonly relied upon by prudent persons in the conduct of their affairs" is to be admitted. Obviously, water mangers and water users commonly rely upon whether factual information to predict or determine whether they have enough water to function and whether they are injured. The Hearing Officer should not prevent the Coalition from introducing such evidence. The groundwater users' motion is nothing more than an attempt to

prevent the Coalition from providing evidence consistent with the factors in CMR 42 and should be denied.

III. The Groundwater Users' Motion is Untimely

As stated above, the Civil Rules and Rules of Evidence do not apply in these proceedings as there is no statute, rule or Order making them applicable. However, the groundwater users have cherry-picked a few rules which, they argue, mandates the exclusion of the Coalition's testimony. They then ignore other rules which mandate the denial of their motion. The groundwater users cannot have it both ways.

Should the Hearing Officer determine that the Civil Rule and Rules of Evidence apply, then the groundwater users motion must be denied as untimely. In particular, Civil Rule 56(c) requires that motion for summary judgment be filed "as least twenty eight (28) days before the time fixed for the hearing." In addition, Civil Rule 56(a) requires that "a motion for summary judgment *must be filed* at least 60-days before the trial date." (Emphasis added). The groundwater users failed to comply with either of these provisions.

The groundwater users' motion was filed on December 11, 2007. This is only twenty-four (24) days prior to the hearing on all pre-hearing motions (January 4, 2008) and only thirty-six (36) days prior to the commencement of the hearing (January 16, 2008). Based on the plain language of the Civil Rules, the groundwater users' motion must be denied.

However, notwithstanding the Civil Rules, which, like the Rules of Evidence, do not apply here, the groundwater users' motion is untimely. As stated above, the last deposition conducted by the groundwater users of a Coalition expert witness was October 26, 2007. In addition, all expert rebuttal reports and testimony was due no later than November 7, 2007. At that time, the groundwater users should have been aware of any perceived deficiencies in the

Coalition's expert testimony. That notwithstanding, the groundwater users waited until the middle of December, just 3 ½ weeks before the suggested hearing date, and 5 weeks before the trial in these proceedings, to file their motion. Furthermore, should the Hearing Officer decide to hear the motion on January 4, 2008, as requested by the groundwater users, the Hearing Officer would only have 12-days until the evidentiary hearing commences. In light of the volumes of pleadings, expert reports and other documents filed in this matter, 12-days is not sufficient. As such, the groundwater users' motion should be denied.

CONCLUSION

The groundwater users' motion for summary judgment and motion in limine is nothing more than the latest in a series of attempts to distract the Hearing Officer and parties from the task at hand – namely, reviewing the Director's *May 2nd Order*. The groundwater users now attempt to exclude all evidence offered by the Coalition to establish that their senior water rights have been injured, consistent with the factors enumerated in CM Rule 42. In addition, the groundwater users delayed filing any pleading or discussing this matter with the Coalition until the eleventh hour. This untimely pleading should be denied.

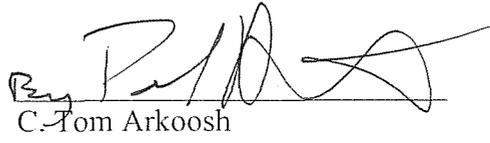
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Respectfully submitted this 3rd day of January, 2008.

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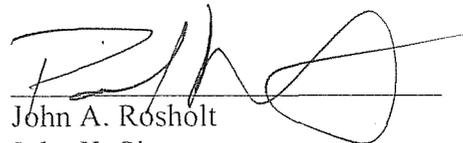
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2008, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S RESPONSE TO POCATELLO'S & IGWA'S MOTION FOR SUMMARY JUDGMENT & MOTION IN LIMINE** on the following by the method indicated:

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