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JUN 25 2010
DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY**

In Re SRBA	)	Subcase No. 2-2318A
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO STRIKE
_____	)	

Diane B. Kritz, Charles J. Kritz, Jr., and Raymond C. Barker, Jr. ("Objectors"), by and through their counsel of record, respectfully submit the Memorandum in Support of their Motion to Strike inadmissible portions of the Affidavit of William Wilkerson, Sr. filed on June 10, 2010, and the Affidavit of Launie T. Mashburn submitted as Exhibit H to the Affidavit of Jon C. Gould filed on June 10, 2010.

A. Standard of Review on Motion to Strike Affidavits and Argument.

Under the Idaho Rules of Evidence, the evidence must be relevant to be admissible, as stated in Rule 402:

All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Mr. Wilkerson's Affidavit describes the various elevations he ascribes to his property.

See ¶¶ 13, 23. No question is currently at issue in this Subcase as to whether flood irrigation can or should be used as part of Water Right No. 02-2318A. As Mr. Young notes in his Affidavit in Opposition filed on June 24, 2010, at ¶ 8(c), a pump is required to deliver water to Mr.

Wilkerson's property, whether the point of diversion is assumed to be the claimed Snake River point of diversion or Jump Creek which borders Mr. Wilkerson's property. Consequently, these statements from Mr. Wilkerson regarding the elevation of his property are not relevant, therefore are inadmissible and should be stricken.

In order to testify in a case, a witness must show personal knowledge in order to establish foundation for the testimony or evidence that is offered, as stated in Rule 602:

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

In paragraphs 7 and 8 of his Affidavit, Mr. Wilkerson cites conclusory statements that he "was informed" about various matters, with no person identified making these alleged statements, no dates or other foundational matters provided. In paragraph 10, he makes a similarly conclusory statement that "Snake River RV Resort personnel" have prevented him from accessing the point of diversion and from diverting water since he acquired his property in 1998.

Necessary elements such as dates, who was present and what was said are not provided.

Accordingly, these statements should be stricken as lacking the requisite foundation.

Lack of personal knowledge is also a defect in Mr. Mashburn's Affidavit. Mr. Mashburn's capacity to testify about the ownership of Water Right No. 02-2318A or the 13 Acre Parcel is at issue, as Mr. Mashburn was never an owner of Water Right No. 02-2318A, as shown on IDWR's list of owners, Exhibit I to the *Ellers Affidavit*. Nor did he have ownership of the 13 Acre Parcel for the entire period his affidavit purports to cover. See Exhibits E, F and G to *Affidavit of Debra K. Ellers in Opposition to Claimant's Motion for Summary Judgment*.

Accordingly, the Mashburn Affidavit should be stricken as it relates to the description and status of Water Right No. 02-2318A in ¶¶ 4, 5, 6, 7, 10, and 11.

Testimony by experts is also placed at issue in the Wilkerson Affidavit.

Rule 702. Testimony by experts.

If 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.

Mr. Wilkerson testifies in ¶ 4 that he has "gained knowledge of irrigation from my work as a farm hand in 1957 and 1958 and my 25 years as a fireman." However, he does not show how this qualifies him to render the expert opinion in ¶ 23 that the ditch would need to be approximately 60 feet deep, and that a typical grade for an open ditch is one foot per 100 feet. Therefore, paragraph 23 of the Wilkerson Affidavit should be stricken as inadmissible.

Hearsay is not admissible under I.R.E. 801, unless one of the exceptions to the hearsay rule is established. The statements in Wilkerson Affidavit paragraphs 7 and 8 that "I was informed" are plainly hearsay, and should be stricken. The Mashburn Affidavit statements in paragraphs 11 and 12 also purport to offer into evidence the statements of Mr. Mashburn's

attorney and those of Mr. Brumley, both of which are inadmissible hearsay and should be stricken.

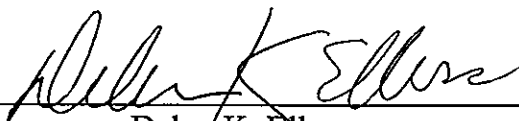
Finally, the “Best Evidence Rule” against oral testimony of written contents is violated in both the Wilkerson and Mashburn Affidavits. Idaho Code § 9- 411, Secondary evidence of writings—When admissible—provides in relevant part: “There can be no evidence of the contents of a writing other than the writing itself....” Certain limited exceptions are permitted, but none has been shown here. The Wilkerson Affidavit in its paragraph 12 references the contents of a survey conducted by a register surveyor, with the elevations and distances set forth in paragraphs 13, 14 and 15. Not having produced the survey or shown that one of the exceptions in I.C. § 9- 411 exists , Wilkerson is barred under the Best Evidence Rule from testifying about it, and these paragraphs should be stricken.

In paragraph 11 of his Affidavit, Mr. Mashburn testifies about the contents of a letter his attorney allegedly sent to Mr. Brumley. Without having produced the letter or shown that one of the exceptions to the Best Evidence Rule applies, this paragraph should also be stricken as inadmissible.

Whether on motion or in trial, the rules of evidence should be given effect to ensure reliable evidence is presented in the case. Accordingly, Objectors respectfully request that the Court strike the inadmissible portions of the Wilkerson and Mashburn Affidavits as discussed above.

DATED this 24th day of June, 2010.

DEBRA K. ELLERS,
ATTORNEY AT LAW

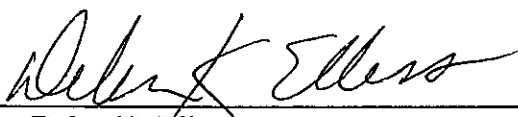
By: 
Debra K. Ellers

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2010, I caused to be served copies of the foregoing Motion to Strike by the methods indicated below:

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