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

In Re SRBA

Case No. 39576

Subcase Nos. 63-00166A 63-00166B
63-00167A 63-00167B
63-00179A 63-00179C
63-32580

**OBJECTION TO IDWR'S NOTICE OF
I.C. § 42-1425 FACT-FINDING HEARING**

Pioneer Irrigation District, through undersigned counsel of record, hereby files
this Objection to IDWR's Notice of I.C. § 42-1425 Fact-Finding Hearing, pursuant to this
Court's oral order during the November 1, 2010 status conference.

**OBJECTION TO IDWR'S NOTICE OF
I.C. § 42-1425 FACT-FINDING HEARING - 1**

Client:1844418.1

1. Pioneer Objects To The Statement That The Trial Constitutes The “Sole Remedy” For Parties To Challenge IDWR’s Determination At The Injury/Enlargement Hearing

Pioneer objects to the following statement in IDWR’s hearing notice:

If any of the Parties are dissatisfied with the determination of IDWR, the sole remedy shall be the *trial* in this matter to be scheduled at a later time by Special Master Booth.

(Notice, p. 1, ¶ 4 (emphasis added).)

Specifically, Pioneer objects to the proposition that the trial is the proper avenue for an aggrieved party to challenge IDWR’s injury/enlargement determinations. Idaho Code Section 42-1425 provides in pertinent part:

If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further *hearing* to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his *findings and conclusions*. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director’s determination, they may seek *review* before the district court.

IDAHO CODE § 42-1425(2)(a) (emphasis added).

Therefore, the plain language of Section 42-1425 specifically states that the aggrieved party may seek “review” before this Court. Use of the term “review” suggests judicial review of an agency action pursuant to the Idaho Administrative Procedure Act, not a trial. However, it is the language of the statutes governing IDWR administrative procedures that are dispositive on this issue. Idaho Code Section 42-1701A specifically provides:

All hearings required by law to be held before the director of the department of water resources *shall be conducted* in accordance with the provisions of *chapter 52, title 67, Idaho Code*, and *rules of procedure promulgated by the director*.

* * *

Any person who is aggrieved by a final decision or order of the director is entitled to *judicial review*. The judicial review *shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code*.

IDAHO CODE § 42-1701A(1), (4) (emphasis added).

In other words, all hearings, including an injury/enlargement hearing pursuant to Section 42-1425, “shall be conducted” in accordance with both the Idaho Administrative Procedure Act, and IDWR’s Rules of Procedure, IDAPA 37.01.01. The Idaho APA specifically includes provisions for judicial review of agency actions. IDAHO CODE §§ 67-5270 – 67-5279.

This is a critical distinction, because the legal standards that apply at a trial are much different than the standards of review under the Idaho APA. In the SRBA, IDWR’s Director’s Report recommendations are *prima facie* evidence of the nature and extent of the water right. IDAHO CODE § 42-1411(4). However, once rebutted, that presumption of correctness “disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant.” *State v. Hagerman Water Right Owners*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997) (quoting MCCORMICK, EVIDENCE § 345, at 823 (1972)). And, of course, the typical evidentiary burden in the SRBA, as with any civil action, is a preponderance of the evidence. *See generally A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997); *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 459, 926 P.2d 1301, 1306 (1996).

By contrast, the standards of judicial review under the Idaho APA differ significantly from the “preponderance” burden that would apply at trial:

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole;
- or
- (e) arbitrary, capricious, or an abuse of discretion.

IDAHO CODE § 67-5279(3).

And, of course, judicial review under the Idaho APA has a specific set of procedures which govern the process. *See* IDAHO CODE §§ 67-5270 – 67-5279; I.R.C.P. 84, I.A.R. 34-36. In short, based upon the plain language of Idaho Code Section 42-1701A, the proper recourse for a party aggrieved by the results of the injury/enlargement hearing is judicial review pursuant to the Idaho APA, *not* the trial as reflected in IDWR's hearing notice.

2. Pioneer Objects To The Statement That "No Testimony Of Any Kind" Will Be Permitted At The Hearing

Pioneer objects to the statement that, "[n]o testimony of any kind will be permitted at the hearing." (Notice, p. 1, ¶ 3.) First, Section 42-1425's requirement that IDWR issue its "findings and conclusions" after the injury/enlargement hearing suggests a more formal administrative process. *See generally* IDAHO CODE § 67-5248(2) (requiring findings of fact in administrative orders).

In addition, as previously noted, the Idaho APA is specifically applicable to "all hearings" before IDWR, including an injury/enlargement hearing conducted pursuant to Section

42-1425. The Idaho APA specifically states that at an administrative hearing, the hearing officer:

(a) Shall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues, *including such cross-examination as may be necessary.*

(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.

IDAHO CODE § 67-5242(3) (emphasis added).

While Idaho Code Section 67-5241 provides IDWR with some limited ability to utilize less formal procedures, that ability is not applicable here. First, if the agency intends to utilize less formal procedures, Section 67-5241 specifically states that “the agency or the officer shall furnish a brief statement of the reasons for the decision to all persons involved.” IDWR’s hearing notice in this case contains no such explanation.

More fundamentally, however, IDWR’s hearing notice violates IDWR’s own Rules of Procedure. As previously explained, Section 42-1701A specifically incorporates those rules. While IDWR Rules of Procedure 100 and 101 generally authorize the use of informal proceedings, subsequent rules specifically preserve a party’s right to utilize formal hearing procedures:

If statute provides that informal procedures shall be followed with no opportunity for further formal administrative review, then no opportunity for later formal administrative proceedings must be offered following informal proceedings. Otherwise, except as provided in Rule 103, *any person participating in an informal proceeding must be given an opportunity for a later formal administrative proceeding before the agency, at which time the parties may fully develop the record before the agency.*

IDWR RULE OF PROCEDURE 102 (emphasis added).

Similarly:

Unless all parties agree to the contrary in writing, *informal proceedings do not substitute for formal proceedings and do not exhaust administrative remedies, and informal proceedings are conducted without prejudice to the right of the parties to present the matter formally to the agency.* Settlement offers made in the course of informal proceedings are confidential and shall not be included in the agency record of a subsequent formal proceeding.

IDWR RULE OF PROCEDURE 103 (emphasis added).

And, IDWR's Rules of Procedure clearly contemplate "the presentation of witnesses and examination of witnesses," "testimony presented . . . under oath," [e]vidence . . . taken by the agency," and the introduction of exhibits. IDWR RULES OF PROCEDURE 558, 559, 600, 606. Simply put, IDWR's own Rules of Procedure require a formal hearing with presentation of testimony under oath.

3. Pioneer Objects To The December 14, 2010 Hearing Date

Pioneer further objects to holding the injury/enlargement hearing on December 14, 2010. (Notice, p. 1, ¶ 2.) To be clear, Pioneer understands the logic in selecting that date because it was the date formerly scheduled for trial. In fact, it may have been counsel for Pioneer that initially suggested December 14 as a potential hearing date during the November 1 status conference. However, that was before a disagreement arose regarding the proper hearing procedures.

In short, Pioneer believes that holding the injury/enlargement hearing on December 14 is no longer feasible. It is Pioneer's understanding that objections to the hearing notice and procedures will be resolved by the Court during the November 30, 2010 status conference—a mere two weeks prior to the December 14 hearing. As counsel for Franklin noted during the November 1 status conference, resolving the applicable hearing procedures only two

weeks before the actual hearing does not leave the parties with adequate time to prepare for the hearing. Pioneer agrees with Franklin on this point.

Two other factors support Pioneer and Franklin on this point. First, the Court indicated that trial will likely not occur anytime prior to April 21 and 22, 2011. Pioneer does not see any practical advantage or justification to rush the injury/enlargement hearing, when so much time remains prior to trial. Second, Pioneer understands that Franklin is considering retaining Dr. David Tuthill, Jr. as an expert witness in these subcases, and Pioneer will be filing a motion in limine shortly seeking, among other things, to preclude such an arrangement, based upon the fact that Dr. Tuthill prepared the recommendations for 63-166B, 63-167B, and 63-179C.

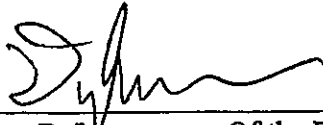
In summary, given that trial will not occur for several months, and given the uncertainties that still remain regarding hearing procedures and testimony, Pioneer objects to holding the injury/enlargement hearing on December 14, 2010.

4. Conclusion

Based upon the foregoing, Pioneer respectfully requests that the Court order IDWR to amend its hearing notice to reflect (1) that recourse from IDWR's determinations based upon the injury/enlargement hearing is in the form of judicial review pursuant to the Idaho APA, not the trial in this matter; (2) that the hearing format shall be a formal hearing pursuant to IDWR's Rules of Procedure, including testimony under oath; and (3) a later hearing date.

DATED this 19th day of November, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2010, I caused a true and correct copy of the foregoing **OBJECTION TO IDWR'S NOTICE OF I.C. § 42-1425 FACT-FINDING HEARING** to be served by the method indicated below, and addressed to the following:

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