

R E C E I V E D

NOV 22 1995

Department of Water Resources
Adjudication Bureau

Claimants:

Dan H. and Irma R. McFaddan, Walten E.
Mildren, Hagerman Water Users Association,
Harry R. Gisler, Ya-Ta-Hay Investments, Inc.

Attorney Name and Address:

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED
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P.O. Box 389
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Telephone: (208)734-7510IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

* * * * *

In Re SRBA

) Subcase No. 36-00048A, 36-10283A,
) 36-00051A, 36-0021B, 36-15168,
) 36-00049
)

Case No. 39576

) CLAIMANT'S MEMORANDUM IN
) SUPPORT OF OBJECTION AND
) MOTION TO STRIKE AFFIDAVITS
) AND PRECLUDE INTERVENTION
)

* * * * *

Claimants in each of the subcases submit the following in support of their objections, motions to strike and opposition to granting leave to file late objections or responses in the subcases. Because Faulkner, May, and Ambrose have each submitted affidavits which should be stricken for the same reasons, what the claimants say below about

CLAIMANT'S MEMORANDUM IN SUPPORT OF OBJECTION AND MOTION
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one affidavit is equally applicable to all. Additionally, the deposition testimony of each affiant and the deposition testimony of Mike Cranney, provides further evidence for denying intervention or participation by any of the four entities who seek to participate in these subcases.

1. EACH AFFIDAVIT CONTAINS NEITHER EVIDENCE NOR ALLEGATION OF PERSONAL KNOWLEDGE OF THE AFFIANT AND THEREFORE MUST BE STRICKEN AS INSUFFICIENT.

Pursuant to Idaho Rules of Evidence 602, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that a witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness." Personal knowledge is defined in Black's Law Dictionary as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay. ... In the laws of evidence [personal knowledge] means something which the witness actually saw or heard, as distinguished from something he learned from some other person or sources." BLACK'S LAW DICTIONARY 873 (6th ed.1990).

Idaho Rule of Civil Procedure 56(e) provides substance to the term "personal knowledge" by enumerating the necessary requirements for affidavits to support or oppose summary judgment motions. The rule states: "supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein." The general requirements of Rule 56(e) regarding the affiant's competency and personal knowledge of admissible facts when combined with the Idaho Rules of Evidence are reasonable requirements for every affidavit.

Personal knowledge is the backbone of any valid affidavit, and is lacking in each subject affidavit. No affidavit includes a statement of the affiant's competency and personal knowledge, nor any additional allegations from which to infer personal knowledge regarding the claims to which the affiant is objecting. Additionally, as pointed out below, each affiant admits during his deposition that he has no personal knowledge of the contents of the Director's Report, the IDWR files, or the "reputable studies" upon which the department purportedly relied, which form the basis of each objection.

Because each affidavit is silent as to the affiant's personal knowledge of the facts in his affidavit as required by I.R.E. 602, and because each affiant concedes that he has no personal knowledge of the water rights claimed by the claimants, each affidavit must be stricken.

2. EACH AFFIDAVIT CONTAINS STATEMENTS OF HEARSAY AND ARE THEREFORE INADMISSIBLE

Hearsay is defined by I.R.E. 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to I.R.E. 802, hearsay is not admissible unless it falls within an accepted exception to the hearsay rule.

Each affidavit is full of statements that qualify as hearsay. For example, each affiant claims in an affidavit that "reputable studies, including the Department's, indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as [claimant's]." This blatant offer of truth is hearsay, just as much as the assertions that the Department determined what the beneficial use is.

I.R.E. 803(8) lays out a hearsay exception for public records and reports, which are presumed by the rule to be trustworthy. The IDWR Director's Report, may be considered a public record or report of a public agency. Each affiant states that "based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, [we] decided not to participate in this subcase, choosing instead to rely on the Director's Report and IDWR's defense of its pleading." Even if each affiant relied on information from the Director's Report, an IDWR official statement, each affiant in his deposition admitted he had not read the Director's Report and therefore there is no applicable hearsay exception. Additionally, the Director's Report may not be within this exception, since Rule 803(8)(D) excludes "factual findings resulting from special investigation of a particular complaint, case, or incident". The Director's Report consists of factual findings in particular water right claims, and as such is excluded from the Rule 803(8). Each affidavit should be stricken.

3. EACH AFFIDAVIT CONSISTS OF CONCLUSORY STATEMENTS OF LAW AND FACT AND THEREFORE MUST BE STRICKEN.

"The averment of facts in an affidavit to be used in a judicial proceeding must be sufficiently definite to warrant the judicial action sought, and such facts must be stated as warrant the court in drawing the legal conclusions sought to be established. Averments which merely state opinions or legal conclusions or characterizations, speculations, and inferences, instead of facts are insufficient." State v. Snyder, 88 Idaho 479,483, 401 P.2d 548 (1965).

Each affiant improperly reaches legal conclusions within his affidavit, claiming for example that a movant's "claim is so unreasonable as to be facially invalid." These legal conclusions must be stricken. Further, each affiant attempts to predict what the IDWR would have done if it had remained a party to the suit, when he alleges that "the facts of this situation show that the IDWR, had it remained a party to this subcase, would have been, without substantial outside assistance, able to defend its report and significantly reduce the claimed diversion rate by [the movant]." This is speculation, which renders the affidavits insufficient. And the assertion that there was reliance on the Director's party status and pleadings is nothing more than a vague characterization, floating in some unknown time zone, which lacks any factual basis. There are no facts from which to conclude that reliance was in anyway manifested by particular conduct.

4. NO AFFIDAVIT CONTAINS AN ALLEGATION THAT THE AFFIANT HAS AUTHORITY TO ACT FOR THE ENTITY OF WHICH HE IS AN OFFICER OR PARTNER, OR ALLEGATIONS THAT THE AFFIANT DID ACT FOR THE ENTITY OF WHICH HE IS AN OFFICER OR PARTNER IN SIGNING THE

AFFIDAVIT, AND THIS LACK OF AUTHORITY RENDERS THE AFFIDAVIT IRRELEVANT AND INCOMPETENT EVIDENCE.

For a court to consider evidence, that evidence must "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. In the terms of I.R.E. 402, "evidence which is not relevant is not admissible."

Each affidavit indicates that the affiant is either a partner or an officer which is the Movant in this matter, but does not indicate the affiant's authority to act for that entity. Because there is no information from which the Court may deduce each affiant's authority to speak for the Movant, each affidavit is irrelevant and should be stricken. Moreover, the lack of testimony concerning the affiant's authority to speak for the entity renders each affidavit incompetent, and each should therefore be stricken.

5. EACH AFFIDAVIT VIOLATES THE IDAHO RULES OF EVIDENCE RELATING TO OPINION TESTIMONY.

Opinion testimony by lay and expert witnesses is allowed by the Idaho Rules of Evidence. I.R.E. 701 relating to lay testimony allows opinion testimony that is "(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." Experts who are qualified by knowledge, skill, experience, training, or education may be utilized "to assist the trier of fact understand the evidence or to determine a fact in issue" pursuant to I.R.E. 702.

There is no reference in any affidavit to any "perception" of the affiant: no affiant alleged to have seen a claimant's claims or to know what amount would be reasonably necessary to irrigate each claimant's land. The opinions stated in the affidavits, such as that a claim is "facially invalid", for example, therefore are not supported by the affiants' perception, and would not be helpful to the trier of fact, and should not be heard.

Further, the affiants did not lay the necessary foundation within the affidavits to qualify themselves as experts in the subject matter. For this reason, the opinions as contained in each affidavit will not assist the trier of fact to either understand the evidence or determine a fact in issue. Accordingly, each affidavit should be stricken.

6. IN THE DEPOSITION TESTIMONY OF MAY, FAULKNER, AMBROSE AND CRANNEY, EACH ADMITS THAT THEY HAVE NO PERSONAL KNOWLEDGE CONCERNING THE HAGERMAN VALLEY RIGHTS AND REFUSED TO DISCLOSE THE HEARSAY INFORMATION THEY POSSESS PURSUANT TO THE ATTORNEY-CLIENT PRIVILEGE.

The deposition of Ralph May reveals that he personally has no information concerning the cases in which he seeks to intervene and has never personally reviewed any of the files or the actual water use to which he seeks to intervene; in short, that he has no personal knowledge and is therefore not competent to have filed an affidavit meeting the requirements of the Rules of Evidence. For example, he admitted he had not ever looked at any of the IDWR studies or anything relating to such a study by IDWR (May Depo, p. 41, L. 6); stated he had never personally looked at the Director's Report (May Depo, p. 49,

L. 13), and had only had hearsay conversations with farmers who had read the Director's Report, although he had never personally read it (May Depo, p. 49, L. 6). May admitted, "I have no personal hands-on knowledge" of the water use of either the Ya-Ta-Hay or Gisler Farm (May Depo, p. 51, L. 22).

In May, 1993, when objections were due, May had not reviewed any pleadings (May Depo, p. 54, L. 22), didn't know then whether the IDWR's pleadings were or were not accurate (May Depo, p. 55, L. 23), and even as of yesterday when deposed, still didn't know since he had no personal knowledge nor review of the file (May Depo, p. 56, L. 5). He admitted that May Farms had not done anything before August 17, 1995, to obtain information about any of the subcases (May Depo, p. 26, L. 2), and instead waited until August 17, 1995, to ask the group's attorney to put together objections that would be filed on the deadline of August 18, 1995 (May Depo, p. 24, LL. 4-17). But, when asked specifically about the information that was the basis for intervention, May refused to answer, claiming that the attorney work product privilege precluded answering the following questions: What information did you look at in the process you undertook to determine what subcases to object to? (May Depo, p. 20, L. 23 - p. 21, L. 4); Tell me how May Farms determined which cases it would intervene in? (May Depo, p. 24, LL. 18-22). The inconsistency and unfairness of these claims to privilege from answering are best illustrated by May's testimony wherein he admitted that the information utilized in determining what subcases to attempt to intervene came solely from counsel (May Depo, p. 26, L. 22), but then stated:

Q. Do you assert that you have a privilege from disclosing what that information is because you obtained it from an attorney?

A. Yes.

(May Depo, p. 26, L. 23 - p. 27, L. 1). In other words, the affiant had no personal knowledge, had not personally reviewed anything and wouldn't disclose the basis of his position for trying to intervene based on the attorney-client privilege, i.e. I don't know and I won't tell you what is there to be known. Interestingly, what there is to be known, though, was not known in 1993. He had not been represented by counsel during the objection and response period in 1993. Further, when asked about his legal standing to filing such a motion based upon a claimed hydrological connection between his water and the water in Hagerman in which he sought to intervene, May admitted that any such alleged interconnection was speculation (May Depo, p. 37, L. 18) and that he didn't have any hard and fast information that the objections to water filings ever affected his water rights or vice versa (May Depo, p. 38, L. 8).

Similarly, the deposition of Tom Ambrose on behalf of Sand Springs Ranches revealed that he too lacked any personal knowledge, had not read any of the studies or pleadings to which reference was made in his deposition, and that, at best, the affidavit was based on inadmissible hearsay. When asked about the Mildren claim, Mr. Ambrose stated he had no personal knowledge (Ambrose Depo, p. 28, L. 14). He had no personal knowledge of what the Director's Report said as he had never read it (Ambrose Depo, p. 28, L. 21) and the only information he had about what may be contained in the Director's Report was hearsay information wherein "I've been told what it says." (Ambrose Depo, p.

30, L. 11). Mr. Ambrose explained, "I told you, I didn't read it. I don't know whether it's accurate. My attorney told me it was." (Ambrose Depo, p. 31, LL. 1-3). However, when asked the following specific questions about the water rights for which intervention was sought, Mr. Ambrose was instructed not to answer, claiming the following questions were protected by the attorney/client privilege: "For each of those cases, please tell me when you first became aware of any facts that suggest that the amounts they have is more than they can reasonable use." (Ambrose Depo, p. 23, L. 12); "And you claim the information you have is privileged . . . (Ambrose Depo, p. 24, L. 8) how do you know that the Department's position has any basis in fact at all" (Ambrose Depo, p. 28, L. 24). Even after explaining that the sole factual basis concerning the Director's Report was based upon what his attorneys had told him, the deponent was repeatedly told not to answer questions about the basis for objecting based on the attorney/client privilege. No answer was allowed when asked, "Why is it that you selected these two water rights to object to" (Ambrose Depo, p. 36, L. 21), or why Sand Springs had not objected in other subcases where the claimant sought more water than an inch per acre (Ambrose Depo, p. 36, L. 5). Like the others who were deposed, Mr. Ambrose had no personal knowledge about whether or not water used by Sand Springs Ranch did or did not affect the Hagerman Water Users Association or Mildren. (Ambrose Depo, p. 11, L. 15).

Mike Faulkner testified on behalf of Faulkner Land & Livestock, and admitted that despite the statement in his affidavit claiming he was testifying from personal knowledge, Faulkner admitted that he didn't even know IDWR's position regarding the Dan

McFaddan claim until he read it in the affidavit he was asked to sign (Faulkner Depo, p. 33, LL. 10-22). Despite the affidavit's statement that IDWR's position was based on reputable studies, Faulkner had not even looked at the studies and had no idea what study they had or had not done (Faulkner Depo, p. 34, LL. 1-7) and, in fact, did not even know if such a study had been done (Faulkner Depo, p. 34, L. 12). Faulkner's legal incompetence to filing an affidavit because of his lack of knowledge was also illustrated by the following questions and answers in his deposition:

Q. When was the first time that you read any part of IDWR files regarding Dan McFaddan's water rights?

A. Never have.

(Faulkner Depo, p. 28, L. 21-23). When asked how he could claim in an affidavit that the IDWR information was accurate, since he had never even read it, counsel again instructed the witness not to answer claiming attorney/client privilege. Similar unfounded attorney/client privilege claims were asserted to proper questions such as: "What did you do leading up to your decision that you would want to attempt to intervene or participate in the McFaddan cases?" (Faulkner Depo, p. 15, LL. 13-19); and "How is it that you selected Dan McFaddan's claims to object to in the Hagerman Valley?" (Faulkner Depo, p. 31, LL. 1-6). This witness, like the others before him, had no idea whether Mr. McFaddan's water rights had any impact on his claimed water rights, saying: "You know I really don't know . . ." "I have no idea." (Faulkner Depo, p. 20, LL. 3-9). Interestingly, recently in a prior water transfer hearing, Faulkner Land & Livestock had hired an expert who asserted that a person had to live southwest of Wendell, Idaho, to impact spring rights in the Hagerman

Valley (Faulkner Depo, p. 20, L. 10 - p. 21, L. 12), and all of Faulkner's land is north of Wendell.

Concerning the three objections filed by Mr. Cranney against three separate water right claimants, it was established that intervention was being sought even though Mr. Cranney had never been to the McFaddan property (Cranney Depo, p. 102, L. 10), hadn't seen the Walmsley farm (Cranney Depo, p. 102, L. 19), and he explained that as of the time of his deposition (November 20, 1995), no investigation had been conducted of any of the elements of these three gentlemen's claims (Cranney Depo, p. 73, L. 9). Like the others, Mr. Cranney also sought to shield inquiry into the unfounded basis for his claimed intervention by invoking the attorney/client privilege to questions such as: "What rights have you looked at?" (Cranney Depo, p. 46, L. 8). Similarly, when asked the basis for his claim for legal standing to assert a right of intervention, Mr. Cranney stated he didn't know whether his water right was or was not hydrologically connected to that of Mr. McFaddan (Cranney Depo, p. 34, L. 10). He stated he had no proof that he was connected to Mr. McFaddan's water (Cranney Depo, p. 36, L. 22) and opined this was something a hydrologist would have to address and to date one had not been consulted. (Cranney Depo, p. 37, LL. 6-11).

CONCLUSION

Based upon the facts and authorities cited above, the claimants' objections and motions to strike should be granted.

Dated this 21st day of November, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: 

Patrick D. Brown
Attorneys for Claimants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 21 day of November, 1995, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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