

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	ORDER ON MOTION
FOR TRANSFER No. 84698)	TO EXCLUDE
IN THE NAME OF MARION OGLE)	EXPERT WITNESS
_____)	

On December 15, 2021, the Idaho Department of Water Resources (Department) received a *Motion to Exclude Expert Witness and Memorandum in Support* ("Motion") from the applicant in this contested case. The Motion seeks to exclude or limit expert testimony by Scott King on behalf of protestant Salubria Holdings LLC ("Salubria"). On December 22, 2021, Salubria filed its *Response to Motion to Exclude Expert Witness* ("Response") with the Department.

Ogle asserts in its Motion that Salubria's has failed to adequately disclose expert witness information required by *Hearing Notice/Scheduling Order* and rules that govern discovery in this contested case. Specifically, Ogle asserts that Salubria's responses to Ogle's discovery requests concerning expert witness information is governed by Rule 26(b) of the Idaho Rules of Civil Procedure (Rule 26(b)), and Salubria's responses did not comply with the standards of Rule 26(b). Further, Ogle asserts Salubria's expert witness disclosure pursuant to the *Hearing Notice/Scheduling Order* is insufficient because Salubria did not disclose an expert report.

Salubria asserts that the *Hearing Notice/Scheduling Order*, "does not reference or incorporate the Idaho Rules of Civil Procedure's discovery provisions." and that the *Hearing Notice/Scheduling Order* is, as contemplated by IDAPA 37.01.01.520.02, an order that governs the scope of discovery in lieu of Rule 26(b). In other words, Salubria asserts the *Hearing Notice/Scheduling Order* governs the scope of discovery and the expert witness disclosure requirements of Rule 26(b)(4) do not apply. Nevertheless, Salubria asserts that its responses to Ogle's discovery requests and its expert witness disclosure do substantially comply with Rule 26(b)(4).

ANALYSIS

The Hearing Officer is authorized to issue an order authorizing discovery and to schedule discovery when discovery is authorized before the agency. IDAPA 37.01.01.413.01(b). Unless otherwise provided by statute, rule, order or notice, the scope of discovery, other than statutory inspection, examination, investigation, etc., is governed by the Idaho Rules of Civil Procedure (see Idaho Rule of Civil Procedure 26(b)). IDAPA 37.01.01.520.02. The presiding officer shall provide a schedule for discovery in the order authorizing discovery, but the order authorizing and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure. IDAPA 37.01.01.521

The hearing officer finds that the expert witness disclosure deadline in the *Hearing Notice/Scheduling Order* does not limit the scope of discovery to something less than what is required by Rule 26(b) as contemplated by IDAPA 37.01.01.520.02. The limited expert

witness information required to be disclosed in the *Hearing Notice/Scheduling Order* does not limit the scope of discovery governed by Rule 26(b) or the obligation to disclose expert information pursuant to interrogatory as required by Rule 26(b)(4)(A).

Ogle's Interrogatory 4 asks Salubria to provide information nearly identical to that required to be disclosed under Rule 26(b)(4)(A)(i). Salubria responded that the questions were premature, but that Salubria would supplement the responses, "with the information requested for each potential expert witness at the time each potential witness is disclosed in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*."

Salubria's November 19, 2021 expert witness disclosure, filed pursuant to the *Notice/Scheduling Order*, did provide supplemental responses to the interrogatory and did conform to the requirements of the *Notice/Scheduling Order*. However, the hearing officer finds that the supplemental responses do not fully respond to the interrogatory and the requirements to disclose under Rule 26(b)(4).

The hearing officer finds that neither Rule 26(b), nor the *Hearing Notice/Scheduling Order* requires preparation of an expert report and Salubria's disclosure was not deficient for failure to provide a report.

Ogle's Motion asks the Hearing Officer to exclude or limit testimony by Salubria's expert witness, Scott King. While Ogle has expressed aversion to simply compelling complete disclosure¹, the hearing officer concludes that supplementing the disclosure in advance of Ogle's scheduled January 13, 2022 deposition of Mr. King is viable and will not be prejudicial to Ogle.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Ogle's Motion to Exclude Expert Witness is Denied.
2. On or before January 10, 2022, regarding Mr. King's expert testimony, Salubria must serve Ogle supplemental responses to Interrogatory 4, parts (c) and (d) consisting of specific, disclosure of the opinions to be expressed and the basis and reasons therefor, as well as the data or other information considered by him in forming his opinions.

Dated this 4th day of January, 2022



Nick Miller
Hearing Officer

¹ "To permit a late disclosure of the facts and opinions to which Protestant's expert will testify would be extremely prejudicial to the Applicant. For Protestant's expert to unload new facts and opinions now, within a few weeks of the close of discovery, would be prejudicial and would not allow for adequate preparation for hearing." Motion at 10.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January 2022, I served a true and correct copy of the foregoing document (ORDER ON MOTION TO EXCLUDE EXPERT WITNESS) on the following by the method(s) indicated below:

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Nick Miller
Hearing Officer

PRE-HEARING CONFERENCE AND/OR HEARING PROCEDURE APPLICATION FOR TRANSFER

ISSUES

Applications for transfer are filed for the purpose of changing a point of diversion, purpose of use, period of use or nature of use of all or part of a licensed, decreed or statutory water right. Section 42-222, Idaho Code, identifies the following potential issues that the department can consider in connection with an application for transfer:

1. Will the proposed transfer reduce the quantity of water under existing Water Rights?
2. Will the proposed transfer constitute an enlargement in use of the original right?
3. Will the proposed transfer be contrary to the conservation of water resources within the State of Idaho?
4. Will the proposed transfer conflict with the local public interest, where local public interest is defined as interests that the people in the area directly affected by a proposed water use and its potential effects on the public water source?
5. Will the proposed transfer adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates?
6. If the proposed transfer is for a municipal use, is it necessary to provide reasonably anticipated future needs for a municipal service area and is the planning horizon consistent with Sections 42-222 and 42-202B, Idaho Code?
7. Will the proposed transfer change the nature of use from an agricultural use, and would such a change significantly affect the agricultural base of the local area?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 5, 6, 7, 8, and 9 above and must provide evidence for the department to evaluate these criteria.

The initial burden of proof on issue 4, if applicable, lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for these issues.

PROCEDURE

The department generally conducts an informal conference with the parties to determine the issues and to try to settle a protested matter before a hearing is scheduled. If a hearing is held, the department will issue a written decision based on the hearing record.

CONFERENCE

The purpose of a pre-hearing conference is to provide the opportunity for the parties and the department to familiarize themselves with a contested matter and to attempt to resolve the matter. At the conference, the department may also formulate and simplify the issues to avoid unnecessary proof, identify documents, schedule discovery, exchange proposed exhibits or prepared testimony, limit witnesses, discuss settlement or make settlement offers, schedule hearings, establish procedure at hearing, and address other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. When attending the conference, please bring a calendar with your schedule for the next two–six month period from the date of the prehearing conference for the purpose of scheduling a hearing. Parties will be expected to discuss their availability at the prehearing conference for the purpose of scheduling the hearing.

HEARING

A hearing may be conducted according to Sections 42-1701A (1) and (2), Idaho Code and the department's Rules of Procedure. Copies of Idaho Code and the department's rules are available upon request or by accessing the department's website at: www.idwr.idaho.gov. The department records formal hearings, and copies of a hearing recording are available upon request. There may be a charge for reproducing the recording.

The hearing will likely be conducted by a hearing officer appointed by the Director rather than by the Director himself. If so, the hearing officer will prepare a recommended or preliminary order. Parties can petition for reconsideration of a decision or file exceptions. A brief to support exceptions may request oral argument. Parties may seek judicial review of any final order issued by the Director.

EXHIBITS

A party who plans to offer an exhibit as part of the hearing record must provide a copy of the proposed exhibit to the parties and to the hearing officer.

AMERICANS WITH DISABILITIES ACT

Any hearing scheduled will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please notify the department no later than ten (10) days prior to the hearing.