

NOV 05 2020

WATER RESOURCES  
WESTERN REGION

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*Attorneys for Big Willow Ranch, LLC*

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

IN THE MATTER OF APPLICATION  
FOR PERMIT NO. 65-23867 IN THE  
NAME OF BIG WILLOW RANCH, LLC

BIG WILLOW'S MOTION IN LIMINE  
TO EXCLUDE EXPERT WITNESS  
TESTIMONY AND EVIDENCE  
OFFERED BY IDFG

Applicant Big Willow Ranch, LLC ("Big Willow"), through its attorneys Givens Pursley LLP, pursuant to Idaho Department of Water Resources Rules of Procedure 260 and 565 (IDAPA 37.01.01.260 and .565), hereby moves the Hearing Officer for an order prohibiting protestant Idaho Department of Fish and Game ("IDFG") from calling expert witnesses, soliciting expert witness testimony, and/or offering documentary evidence containing expert opinions or statements in support of its protest at the evidentiary hearing scheduled in the above-captioned matter.

Big Willow requests that the Hearing Officer grant this motion because IDFG did not serve an expert report to support its protest by the October 30, 2020 deadline set forth in the Hearing Officer's *Notice of Hearing and Scheduling Order* dated September 18, 2020 ("Scheduling Order").<sup>1</sup>

<sup>1</sup> Big Willow served its initial expert reports upon the Hearing Officer and the parties on October 30, 2020. See *Declaration of Terry Scanlan, P.E., P.G.* (Oct. 30, 2020) ("*Scanlan Declaration*") and *Declaration of Ron Shurtleff, Watermaster, Water District No. 65* (Oct. 29, 2020) ("*Shurtleff Declaration*"). Big Willow has not received an initial expert report from any other party. On November 2, 2020, Big Willow's undersigned attorney

IDFG protested Big Willow's Application for Permit No. 65-23867 ("*Application*") alleging that it conflicts with the local public interest. A copy of IDFG's protest is attached to this motion as Exhibit A.

IDFG's protest states that "IDFG is filing this protest per Idaho Code §42-203A(4) to offer the Idaho Department of Water Resources (IDWR) technical assistance with decision making and recommendations to avoid, minimize, or mitigate adverse effects on public interest resources (Idaho Code §42-203A(5)(e); IDAPA 37.03.08.45.01.e.ii)." IDFG's protest also states: "IDFG is specifically concerned that the requested water diversion project may affect Payette River summer flows and sport fisheries within the affected reach of the Payette River."

Idaho Code § 42-203A(5)(e) requires the Department to determine whether a water right application "will conflict with the local public interest as defined in section 42-202B, Idaho Code." Idaho Code § 42-202B(3) defines local public interest as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." IDAPA 37.03.08.45.01.e.ii describes one factor the Department will consider when determining whether a proposed water use conflicts with the local public interest: "The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use."

IDFG bears the burden of proof on the subject matter of its protest. IDWR's Water Appropriation Rule 40.04.b.ii states that "[t]he protestant shall bear the initial burden of coming forward with evidence [to present a prima facie case] for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more

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requested confirmation via email from IDFG's attorney that IDFG did not in fact serve an initial expert report, but he has not received a response.

cognizant than the applicant.” IDAPA 37.03.08.040.04.b.ii.<sup>2</sup> IDFG clearly is more cognizant than Big Willow of the effect that Big Willow’s proposed water use might have on recreation, fish, and wildlife resources. Indeed, their own protest contends that “IDFG’s mission encompasses assessment of potential water appropriation effects on public interest fish and wildlife resources.” (Emphasis added.) Big Willow, on the other hand, is in the agriculture business and is neither knowledgeable, nor can reasonably be expected to be knowledgeable, about issues involving recreation, fish, and wildlife resources.

Accordingly, to the extent IDFG intends to present expert witness testimony or evidence at the hearing concerning the *Application’s* potential effects on recreation, fish, or wildlife resources, IDFG was obligated to submit an initial expert report containing such testimony or evidence by the *Scheduling Order’s* October 30 deadline.<sup>3</sup> Idaho Rule of Civil Procedure 26(b)(4)<sup>4</sup> states that “A party must disclose to the other parties by answer to interrogatory, or if required by court order, the identity of any witness it expects to ask to present evidence under Rule 702, 703 and 705, Idaho Rules of Evidence.” (Emphasis added.) That rule also requires that, “[f]or individuals retained or specially employed to provide expert testimony in the case or who are employees of the party,” the expert disclosure must include:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;

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<sup>2</sup> The applicant for a water right has the “initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5),” IDAPA 37.03.08.040.04.b.i, and “the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable.” IDAPA 37.03.08.040.04.b.ii.

<sup>3</sup> The *Scheduling Order*, p. 2, states that “Expert witness reports shall be due and served no later than October 30, 2020. Rebuttal reports shall be due and served no later than November 13, 2020.”

<sup>4</sup> The Department’s Rule of Procedure 520.02 states that “[u]nless otherwise provided by statute, rule, order or notice, the scope of discovery . . . is governed by the Idaho Rules of Civil Procedure (see Idaho Rule of Civil Procedure 26(b)).”

- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

IDFG did not disclose such information by the *Scheduling Order*'s October 30 deadline (and it still has not). If IDFG had disclosed such information, Big Willow could prepare to address it at the hearing, including by likely filing a rebuttal expert report. Without an initial expert report from IDFG, however, Big Willow will be severely prejudiced at the hearing if IDFG is allowed to call expert witnesses, solicit expert witness testimony, and/or offer documentary evidence containing expert opinions or statements on the local public issues raised in IDFG's protest.

In response to this motion, IDFG may contend that it is entitled to file a rebuttal report in response to Big Willow's initial expert reports. However, any such rebuttal must be limited to the subject matter addressed in the *Scanlan Declaration* and the *Shurtleff Declaration* (and the documents referenced therein) which, among other things, includes matters of water quantity, sufficiency of supply, and water rights administration, but does not include analysis of alleged effects on recreation, fish, or wildlife resources. Big Willow will object to and move to strike any expert opinions, statements, or other evidence concerning recreation, fish, or wildlife resources that IDFG may attempt to introduce in this proceeding through a rebuttal report or otherwise.

In conclusion, Big Willow respectfully requests that the Hearing Officer issue an order prohibiting IDFG from calling expert witnesses, soliciting expert witness testimony, and/or

offering documentary evidence containing expert opinions or statements in support of its protest at the evidentiary hearing.

DATED this 5th day of November, 2020.

GIVENS PURSLEY LLP



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Michael P. Lawrence  
*Attorneys for Big Willow Ranch, LLC*

## EXHIBIT A



IDAHO DEPARTMENT OF FISH AND GAME  
SOUTHWEST REGION  
3101 South Powerline Road  
Nampa, Idaho 83686

Received by: RECEIVED  
Receipt #: W448107  
Date: 6/19/2020  
JUN 18 2020  
WATER RESOURCES  
WESTERN REGION

Brad Little / Governor  
Ed Schriever / Director

June 18, 2020

N. Miller, Western Regional Manager  
Idaho Department of Water Resources  
Western Region  
2735 Airport Way  
Boise ID 83705

**Re: Protest of Water Appropriation Application-for-Permit No. 65-23867; Big Willow Ranch LLC**

Dear Mr. Miller:

The Idaho Department of Fish and Game's (IDFG) mission is to protect, preserve, perpetuate and manage Idaho's fish and wildlife resources for the public interest (Idaho Code 36-103). Accordingly, IDFG has reviewed Application-for-Permit No. 65-23867 submitted by Big Willow Ranch, LLC to appropriate 40 CFS of public waters from the Payette River for irrigation on approximately 5,411 acres of previously unirrigated land for the purpose of growing crops.

IDFG's mission encompasses assessment of potential water appropriation effects on public interest fish and wildlife resources. IDFG is specifically concerned that the requested water diversion project may affect Payette River summer flows and sport fisheries within the affected river reach of the Payette River

Because the application contains limited information to assess fish, wildlife, and associated recreation effects, IDFG is filing this protest per Idaho Code §42-203A(4) to offer the Idaho Department of Water Resources (IDWR) technical assistance with decision making and recommendations to avoid, minimize, or mitigate adverse effects on public interest resources (Idaho Code §42-203A(5)(e); IDAPA 37.03.08.45.01.e.ii).

Thank you for the opportunity to review and comment. Please initiate Interagency Billing for the \$25.00 fee (PCA 11806; B799) to the attention of Tom Bassista (IDFG Headquarters, P.O. Box 25, Boise ID 83707). If information becomes available to alleviate concerns about potential adverse fishery and summer flow effects, IDFG may amend or remove this protest. For questions and to arrange informal follow-up discussions, please contact John Cassinelli (Regional Fisheries Manager) or Tom Bassista (Technical Assistance Program Coordinator) at 208-610-4032.

Sincerely,

A handwritten signature in black ink that reads "Brad Compton".

Brad Compton  
Southwest Regional Supervisor

Cc: Ann Vonde, Deputy Attorney General  
Mr. J.G. Schwarz  
M:/Mitigation

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**BIG WILLOW'S MOTION IN LIMINE TO EXCLUDE EXPERT WITNESS TESTIMONY  
AND EVIDENCE OFFERED BY IDFG**

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### CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2020, a true and correct copy of the foregoing was filed and/or served upon the following individual(s) by the means indicated:

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By: \_\_\_\_\_

Michael P. Lawrence