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RECEIVED
NOV 13 2018
Department of Water Resources
Eastern Region

Attorneys for Applicants

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 82318 IN THE NAME OF
TELFORD LANDS LLC, MICHAEL AND
SHANNON TELFORD

**MOTION TO PROCEED TO HEARING
WITHOUT IDWR TECHNICAL MEMO**

Telford Lands LLC and Michael and Shannon Telford (hereinafter collectively the “Applicant” or simply “Telford”), by and through their counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., files this *Motion to Proceed To Hearing Without IDWR Technical Memo*. This motion is being filed pursuant to the Rules of Procedure of the Idaho Department of Water Resources, specifically IDAPA 37.01.01.260.

BACKGROUND

The Applicants filed Transfer No. 82318 (“82318” or “Telford Transfer”) on April 24, 2018. 82318 was originally protested by the City of Arco, Young Harvey Walker, Joel S. Anderson, the Big Lost River Irrigation District (“BLRID” or “District”), and Darrell E. McDonald. The City of Arco has since withdrawn its protest.

The prehearing conference in this matter was held on August 28, 2018, in Arco, Idaho. At the prehearing, the Applicants presented a PowerPoint presentation which explained the reasons

for the transfer and addressed the concerns written in the protest documents, including specific reasons why the Telford Transfer is different from a previously filed transfer submitted by Parkinson Farms (Transfer No. 77610).

The Parkinson Farms transfer was ultimately denied, but during the contested case proceedings, the Director—without citing to any procedural rule of the Department or other legal authority—suggested that the hearing officer “should request a memorandum from the Department’s technical staff.” *Order Remanding Contested Case to Hearing Officer*, at 5 (February 6, 2013).

Based on documents from the Parkinson Farms contested case, the Hearing Officer did request the memorandum of Department staff on February 14, 2013 to be provided by April 30, 2013, approximately 45 days from the date of the request. *Request for Staff Memorandum* (February 14, 2013). The memo was eventually prepared by Dennis Owsley of the Hydrology Section of IDWR and submitted to the parties to the contested case. The memo is referred to herein as the “Owsley Memo” (dated April 30, 2013), and it was described by the hearing officer in the cover letter to the Owsley Memo as containing “new information that may not have been available to the parties at the time of the hearing,” and as a result of such new information, the hearing officer informed the parties that they “will now be given an opportunity to augment the administrative record with additional evidence relating to the topics addressed in the staff memo.” *Letter from James Cefalo to Parties*, May 1, 2013, at 1.

At the prehearing conference on the Telford Transfer, the District—though its counsel—suggested that the 2013 Owsley Memo should be “updated” for purposes of the Telford Transfer. It was unclear to the Applicants what questions the District had in mind, and on that basis, did not object at the time to the request to update the Owsley Memo. The hearing officer allowed two

weeks for the District to submit its questions, which were:

1 - On the questions in the Owsley staff memo, all references to the Parkinson well should be changed to the Telford wells.

2 - What would be the impact on rising water if all of the rights in the Telford application were diverted at the Island Wells and/or the new "Hansen well"?

3 - Has the hydrogeology of the Big Lost River aquifer and subunits changed since the Owsley staff memo was written? If so, how?

[4] -Are any of the wells described in the application located in the Eastern Snake Plain Aquifer?

[5] - In light of the discontinuous clay layers and vertical movement of water between clay layers in the vicinity of the Hansen well, will casing the well to a 100' depth provide a safeguard to impacts on rising water?

The Applicants raised concerns with these questions, and ultimately the hearing officer modified the District's questions as follows:

1) Update the description of the general hydrogeology of the Big Lost River basin if there have been changes to the hydrogeology of the basin or the aquifer units/sub-units since April 2013.

2) What would be the impact on the rising water if the full diversion rate authorized by the eight ground water rights included in the transfer application (29.84 cfs) were diverted from the Island Wells and/or the proposed Hansen Well? Would the analysis change if the Island Wells were limited to a diversion rate of 17.34 cfs?

3) Do any of the proposed points of diversion described in Application 82318 divert water from the Eastern Snake Plain Aquifer?

4) At the site of the proposed Hansen Well, would casing the well (no perforations) to a depth of 100 feet prevent an impact on rising water?

5) References to the Parkinson Farms application or the specific details of that application can be removed.

Email from James Cefalo to Parties, October 9, 2018. Additionally, the hearing officer informed

the parties of the following timeline for Mr. Owsley:

Mr. Owsley is heavily involved in measurement and analysis of water levels in the ESPA over the next two months. He estimated that an updated memo for this contested case could be completed **by the end of January**.

Id. (emphasis added).

Because the Owsley Memo was specific to the Parkinson Farms transfer, it is incorrect to assert the position that the Owsley Memo will simply be “updated” for purposes of this proceeding. The Owsley Memo was specific to the Parkinson Farms transfer and what was proposed in that transfer. It would only be “updated” if Parkinson Farms filed a transfer asking for the same change or similar changes to its water rights. Accordingly, for purposes of this motion and hereafter, it is the position of Telford that what is being requested is a new technical memo from the Department for the Telford Transfer. Telford has not stipulated to preparation of this memo. As explained below, this request from the hearing officer to Mr. Owsley for a new technical memo from the Department should be withdrawn.

ARGUMENT

- A. A hearing officer’s solicitation of a technical memorandum from Department staff in a contested case proceeding is not provided for in the Department’s procedural rules or Idaho statutes, and therefore, is based upon unlawful procedure in violation of the Idaho Administrative Procedures Act.**

If the hearing officer’s decision in this contested case is appealed, judicial review of the hearing officer’s final decision will be governed by the Idaho Administrative Procedures Act (Idaho Code § 67-5201, *et seq.*, hereinafter the “Act”). Idaho Code § 42-1701A. It is therefore important for the hearing officer to ensure his actions are not contrary to the statutory provisions under the Act, primarily the provisions which provide that a reviewing court must affirm the

agency decision 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 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); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

Specific to the unlawful procedure basis for overturning an agency decision, “[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal.” *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)). This requirement applies not only to courts, but also to state administrative agencies. *Id.* (citing *Stivers v. Pierce*, 71 F.3d 732 (9th Cir.1995)); *See also Spencer v. Kootenai Cty.*, 145 Idaho 448, 453, 180 P.3d 487, 492 (2008) (a county’s failure to comply with its own ordinances and rules constituted “‘unlawful procedure’ within the meaning of I.C. § 67-5279,” although the error was cured by additional procedures).

In IDWR contested cases, hearing officers are appointed from among Department staff and are captured within the definition of the “agency” under the Department’s procedural rules found at IDAPA 37.01.01: “Reference to the agency in these rules includes the agency director, the board, **hearing officer appointed by the agency** or the board, or presiding officer.” IDAPA 37.01.01.051 (emphasis added) (IDAPA rules will be referred to hereinafter simply as “Rule” followed by the three-digit reference to each rule); *see also* Rule 410 (. . . hearing officers may be employees of the agency or independent contractors). In a contested case, “[r]ules 100 through 799 govern procedure before the Department and the Board **in contested cases**, . . .” Rule 050 (emphasis added). The hearing officer “may not permit deviation from these rules when it finds

that compliance with them is **impracticable, unnecessary or not in the public interest.**” Rule 052 (emphasis added).

Different than contested administrative proceedings, the Director of IDWR (and his staff) are independent experts and technical assistants to the court, not parties or decisionmakers in water right adjudication proceedings. Idaho Code § 42-1401B. The rules and procedures governing an adjudication are in the Idaho Rules of Civil Procedure, Idaho Rules of Evidence, and Administrative Order #1 (“AO1”). In the Snake River Basin Adjudication proceedings, it was common for the court to request a “706 Report” from the Department—as the independent expert to the court—pursuant to Idaho Code § 42-1412(4) and Idaho Rules of Evidence 703, 705, and 706. *See, e.g., Basin-wide Issue in Basin 34, Order Requiring Supplemental Report (“706 Report”) from IDWR on Certain Issues in Basin-wide Issues 5-34, I.R.E. 703, 705, 706, and I.C. § 42-1412(4), Subcase No. 91-5-34, January 27, 2000, available at <https://www.idwr.idaho.gov/files/adjudication/20000127-Order-for-Supplemental-Report-on-Basin-Wide-Issues-5-34.pdf>.*

Conversely, “the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence **do not apply** to contested cases before the agency.” Rule 052 (emphasis added). Accordingly, the procedural authority for a hearing officer to request the preparation of a technical memorandum from a fellow IDWR employee to **specifically address matters subject to dispute in the contested case** must be provided in the Department’s procedural rules. Rule 413 of the Department’s procedural rules outlines the hearing officer’s scope of authority:

413. SCOPE OF AUTHORITY OF HEARING OFFICERS (RULE 413).

The scope of hearing officers' authority may be restricted in the appointment by the agency.

(7-1-93)

01. **Scope of Authority.** Unless the agency otherwise provides hearing, officers have the standard scope of authority, which is:

(7-1-93)

a. Authority to schedule cases assigned to the hearing officer, including authority to issue notices of default, of prehearing conference and of hearing, or to provide for the use of informal procedure, as appropriate;

(4-5-00)

b. Authority to schedule and compel discovery, when discovery is authorized before the agency, and to require advance filing of expert testimony, when authorized before the agency;

(7-1-93)

c. Authority to preside at and conduct hearings, accept evidence into the record, rule upon objections to evidence, rule on dispositive motions upon completion of the applicant's or petitioner's case in chief, and otherwise oversee the orderly presentations of the parties at hearing; and

(4-5-00)

d. Authority to issue a written decision of the hearing officer, including a narrative of the proceedings

before the hearing officer and findings of fact, conclusions of law, and recommended or preliminary orders by the hearing officer, following the submission of evidence through stipulation of the parties, affidavits, exhibits, or hearing testimony.

(4-5-00)

There is nothing in this rule outlining the authority of the hearing officer that allows the hearing officer to request a 706 Report (such as those allowed in the SRBA) or other technical memorandum as a matter of procedure to address the matters in dispute in the contested case.

Preparation of a technical memorandum which specifically addresses the matters in dispute in a contested case—such as specific analysis for a proposed transfer—turns the agency into an advocate and is contrary to the burden of proof allocation between the applicant and the protestant. Idaho Code § 42-222 describes the criteria that the hearing officer must find the applicant has satisfied in a contested transfer. The applicant's burden of proof on these criteria, which is challenged by protestants to the application, is outlined in the standard attachment to the letter to the parties to a contested case:

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.

As a hearing officer, he or she acts in a quasi-judicial capacity, which entitles the hearing officer to evaluate evidence presented at the hearing, and if such evidence assists “the parties’ development of the record,” it should be admitted. Rule 600. Otherwise, it should be excluded, and at all times, the hearing officer must be cognizant of the record he or she is creating upon which a decision will be based and that may need to be compiled if the contested case is appealed. See *Schroeder v. Partin*, 151 Idaho 471, 476, 259 P.3d 617, 622 (2011) (“[a] party’s burden of

proof encompasses both the burden of production and the burden of persuasion. Since [defendant] bore the burden of production [in support of defendant's affirmative defense], [defendant] would have to bear the consequences if the record [on review] did not" support the defense (citations and internal quotations omitted)); *see also Regan v. Kootenai Cty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (*citing Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973))); *Idaho Cty. Nursing Home v. Idaho Dep't of Health & Welfare*, 124 Idaho 116, 120, 856 P.2d 1283, 1287 (1993) (remanding the matter back to the agency to decide, "based solely upon the **present** evidentiary record ... without the taking of any new or additional evidence," because the hearing had already occurred and findings of fact should not be made on review).

Contrary to this clear legal authority that a decision on appeal needs to be based on the record created before the hearing officer, the Director nevertheless remanded the Parkinson Farms transfer to the hearing officer (after the hearing officer approved the transfer) with suggestions for additional evidence that "should" be addressed in a technical memo from his agency. It is apparent that the Director did not agree with the conclusion of the hearing officer, but the hearing officer's decision was based upon evidence in the record, and there was not sufficient evidence in the administrative record upon which the Director could reverse the hearing officer. As a result, the Director remanded the matter with a suggestion that more evidence should be placed in the record.¹

Based on these actions of the Director, there was no other way to describe the Owsley Memo but as new information, and the hearing officer even acknowledged that the Owsley Memo

¹ After remand and consideration of the Owsley Memo, the hearing officer again approved the transfer by issuing a *Second Preliminary Order Approving Application for Transfer* on January 7, 2014. That decision was overturned by the Director upon issuance of the *Final Order Denying Application for Transfer* dated May 29, 2014.

was new information in his cover letter associated with the memo:

The staff memo prepared by Mr. Owsley includes information that was not part of the original administrative record for this contested case. **Because the memo contains new information** that may not have been available to the parties at the time of the hearing, the parties will now be given an opportunity to augment the administrative record with additional evidence relating to the topics addressed in the staff memo.

Letter from James Cefalo to Parties, May 1, 2013, at 1.

Based on the above, promulgation and use of the Owsley Memo in the Parkinson Transfer proceedings in 2013 to generate “new information” was based upon unlawful procedure, and the District’s attempts to seek an “update” of that memo by IDWR technical staff for the Telford Transfer—which will generate a brand-new technical memorandum specific to the Telford Transfer—is not expressly allowed under the Department’s procedural rules and is therefore based upon unlawful procedure. Notably, neither Director Spackman’s suggestion to the hearing officer on remand to have IDWR prepare a technical memo, nor hearing officer James Cefalo’s *Request for Staff Memorandum*, contain a citation to any procedural rule or statute that provides authority for this procedure. The Director seemingly blurred the ability of the Department to prepare a Rule 706 Report, allowed in the SRBA, with the ability to prepare a document equivalent to a 706 report (called a “technical memorandum” by the Director) in a contested case before the Department with a Department employee designated as the hearing officer. The Department employee designated as the hearing officer does not have authority to request contested-case-specific memoranda in matters which allows the Department to cause the full resources of an administrative agency to be used against an applicant who already has significant burdens of proof to satisfy and protestants in the case to argue against. This unlawful procedure infringes on the Applicants’ due process rights and allows protestants to enjoy the benefits of having an expert without the need to pay for the

expert's services. The applicant already has the burden to prove its case, and it is the protestant's obligation—not the hearing officer's—to rebut an applicant's evidence.

The only instances where a hearing officer can permit deviation from the Department's procedural rules is found at Rule 052, where the hearing officer "may permit deviation from these rules when it finds that compliance with them is **impracticable, unnecessary or not in the public interest.**" Rule 052 (emphasis added). Nowhere in the Parkinson matter did the Director or hearing officer make specific findings that the need to comply with the rules was impracticable, unnecessary, or not in the public interest which would permit a deviation from the procedural rules. Similarly, in this contested case relative to the Telford Transfer, the hearing officer has made no such findings. Administrative rules—which are subject to the rulemaking process that receives significant public input and scrutiny—are established for a reason. Just like rules in any sport, rules are established to ensure fair play and no surprises in how the game is to be played so the parties all know what they are getting into as they participate. For that reason, any departure from the Department's procedural rules by the hearing officer should be analyzed with strict scrutiny and, at a minimum, justified in writing with cogent analysis as to why there is a need to depart from the rules and allow for a contested-case-specific technical memorandum from other Department staff. This has not been done, and the Applicant maintains that there is no sufficient justification in this case to subject the Applicant to defending against the technical memorandum and being subject to the associated delay with preparation of that technical memorandum.

Having established that request for a contested-case specific memorandum is a departure from the Department's procedural rules, the hearing officer should withdraw his request for preparation of the Telford technical memorandum and schedule the hearing accordingly. The District and other protestants are very familiar with the transfer process and can hire their own

experts to submit reports based upon existing information and previously-issued reports to support their legal position.

Finally, it is anticipated that the protestants will cite to or rely upon Rule 602 to justify arguments in favor of the contested-case-specific technical memorandum process. Rule 602 provides:

602. OFFICIAL NOTICE – AGENCY STAFF MEMORANDA (RULE 602).

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability. (7-1-93)

Rule 602 does not allow for the contested-case-specific technical memorandum process. Rather, it allows the hearing officer to take judicial notice of already **existing** information, including **existing** agency staff memoranda. One cannot take judicial notice of a technical memorandum that has not yet been prepared. It is typical in judicial proceedings for the court to take judicial notice of existing information the court believes is relevant to the proceeding. That is not what is happening in this matter. Here, the hearing officer—at the District's request—is asking for the preparation of **new analysis and information**, not merely the recognition of **existing analysis and information**. In our view, this is why neither the Director nor the hearing officer cited to Rule 602 in the Parkinson Transfer proceedings as it is self-evident that this rule does not apply.

To be clear on Telford's position on Rule 602, and as an example, Mr. Owsley has prepared other documents associated with the Big Lost River Basin aquifer system that are general in nature, and **not** specific to any contested case. For example, Owsley prepared a presentation entitled *Big Lost Aquifer System* for a Water Improvement and Solutions Team Meeting dated December 10,

2014, which is available at <https://idwr.idaho.gov/files/general/20141210-Big-Lost-Aquifer-System.pdf>. This document contains “generally recognized technical or scientific facts” that a hearing officer may reference in his decision-making capacity. This Owsley presentation is proper to refer to, but a contested-case specific memorandum such as the Owsley Memo in the Parkinson Farms matter and the technical memo now being requested for the Telford Transfer seeks information under a process that is not allowed under the Department’s procedural rules and is therefore based on unlawful procedure.

For the above reasons, the hearing officer’s request for a new Owsley memo is based upon unlawful procedure and such request must be withdrawn.²

B. Preparation of the Telford technical memorandum will result in unreasonable delay resulting in detrimental impact to the Applicants.

In addition to the lack of authority to request a technical memorandum from IDWR addressing the Telford Transfer, this process will result in unreasonable delay to Telford. In the hearing officer’s email from October 9, 2018, the parties were informed that Mr. Owsley is “heavily involved in measurement and analysis of water levels in the ESPA over the next two months” and that Mr. Owsley estimated “that an updated memo for this contested case could be completed by the end of January.” *Email from James Cefalo to Parties*, October 9, 2018. Additionally, there is no guarantee that the memorandum will even be completed by that date.

Having the requested Owsley memo by the end of January will result in unreasonable delay to Telford. No matter the content of that memorandum, it is likely that one or more of the parties in this proceeding will seek to depose Mr. Owsley, resulting in additional delay. In the Parkinson

² If the parties to a contested case proceeding stipulated to preparation of a technical memorandum, such a stipulation is between the parties by agreement, and it does appear that such a memorandum could be prepared and utilized in the contested case. In this case, however, Telford raised concerns with the District’s questions, and has not stipulated to the questions now posited to Mr. Owsley by the hearing officer.

Transfer proceedings, it was specifically contemplated that Owlsey's deposition may need to be taken. See *Letter from James Cefalo to Parties*, May 1, 2013, at 1 ("Please also provide notice on or before May 17, 2013 if you intend to depose Mr. Owsley prior to the potential administrative hearing.").

This process, if allowed to continue, will result in unreasonable delay for Telford, as it is necessary for Telford to have a decision before the commencement of the 2019 irrigation season to allow for proper water management planning. Since Telford first purchased farm ground in the Big Lost River Basin a decade ago, they have worked diligently to address conveyance loss matters by investing in canal lining, attempting to work with the District to improve conveyance system efficiency, and litigating against opposition to those efforts. See, e.g., *Telford Lands LLC v. Cain*, 154 Idaho. 981 303 P.3d 1237 (2013) (upholding eminent domain for pipeline intended to address conveyance loss issues). Despite these efforts, conveyance loss remains the single biggest threat to Telford's operations. Concerning conveyance losses and Idaho's aversion to them, consider language from the aforementioned *Telford Lands LLC v. Cain* case:

During his deposition, the manager of the Irrigation District was shown a document listing shrinkage by week during the irrigation seasons in 2009 and 2010, and the shrinkage was from 35% to 40%. He testified that to his knowledge, the percentages were roughly accurate. He also testified that the conveyance loss is apportioned equally for everyone who has water transported via the Moore Canal. Thus, the question is whether conveyance losses of 35% to 40% from using the Moore Canal make the canal not reasonably adequate or sufficient for the Ranchers' purposes?

"The contour and formation of the state and its industries of mining and irrigation made it absolutely necessary for the complete development of the resources of the state to have very liberal laws on the subject of eminent domain." *Connolly v. Woods*, 13 Idaho 591, 598–99, 92 P. 573, 576 (1907). That is why the framers inserted Article I, § 14, into our Constitution. *Id.* at 599, 92 P. at 576. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). **An unreasonable and excessive conveyance loss is against public policy.** *Basinger v. Taylor*, 36 Idaho 591, 597, 211 P. 1085, 1086

(1922) (a conveyance loss of 50%). In *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912), we rejected the contention of an appropriator that he should have been awarded 240 inches of water instead of 160 inches because he lost about half the water as it flowed in his ditch from the point of diversion to his land. In doing so, we stated that **“it stands every water user in hand to construct his ditch so that there will be the least possible waste of water, and, no doubt by either piping or cementing portions of the ditch where the greatest waste occurs, [appellant] can save much of his water.”** *Id.* at 254, 125 P. at 1040. In *Reynolds Irr. Dist. v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1948), the owners of the servient estate complained that the owner of the easement for an irrigation ditch across their property was tiling a portion of the ditch, thereby depriving them of their right to use it. In rejecting their argument, we stated, “Assuming that it is being installed to prevent waste, or to increase the effective use of water, it is the policy of the law to encourage rather than discourage such measures.” *Id.* at 334, 206 P.2d at 786. In *Reno*, we held that where appropriators had performed work in the channel of a natural watercourse to reduce the amount of water lost by infiltrating into the ground, they were entitled to be awarded the amount by which they thereby increased the flow of water. 32 Idaho at 6, 178 P. at 83. **These cases show that this State's policy to secure the maximum use and benefit, and least wasteful use, of its water resources includes taking reasonable measures to reduce conveyance losses of irrigation water.**

Telford Lands LLC v. Cain, 154 Idaho 981, 987–88, 303 P.3d 1237, 1243–44 (2013) (emphasis added).

Yet with Telford’s attempt to drill a well closer to his property and stack water rights to allow flexibility and efficiency in water management to irrigate a common place of use consistent with the principles articulated by the Idaho Supreme Court, the District inexplicably remains steadfast in opposing Telford’s efforts to make the most efficient use of water resources even though the District possesses no ground water rights, owns no wells, and there is no proposal by Telford to alter the District’s water delivery system. Delay in this proceeding caused by the District’s request for the hearing officer to request a new technical memorandum will affect

Telford's 2019 water resource planning. The only relevant question relative to the District's interests in this matter appears to be simply whether the Telford Transfer will have a measurable effect on the District's ability to deliver storage water to its patrons. That question is not one of the questions posited to Owsley. Accordingly, irrespective of the unlawful procedure, the unreasonable delay alone associated with Mr. Owsley's unavailability to prepare a new technical memo until the end of January is sufficient justification for the hearing officer to grant this motion.

C. The substance of the questions submitted to Owsley request analysis on irrelevant information or unreasonable assumptions, are answered as a matter of law, or can be analyzed by the District's own expert or experts.

In addition to the procedural concerns discussed above, the questions submitted to Owsley—based upon the questions submitted by only one protestant, the District—request analysis on irrelevant information or are based upon hypothetical and unrealistic assumptions, are answered as a matter of law, or can be analyzed by the District's own expert or experts. Each question is specifically addressed below.

1. Update the description of the general hydrogeology of the Big Lost River basin if there have been changes to the hydrogeology of the basin or the aquifer units/sub-units since April 2013.

Hydrogeology is defined as the “area of geology that deals with the distribution and movement of groundwater in the soil and rocks of the Earth's crust (commonly in aquifers).” Hydrogeology, *Wikipedia* (available at <https://en.wikipedia.org/wiki/Hydrogeology>). As described in Crosssthaite et al., *Water Resources in the Big Lost River Basin, South-Central Idaho* (1970), a report cited extensively in the Owsley Memo, the Big Lost River Basin consists of an alluvial (gravel, sand, cobble, and clay) aquifer bounded on either side by bedrock formations. In

some places the alluvial aquifer is over 2,000 feet thick, and clay layers from of up to 50 feet in thickness act locally as water confining layers. These clay layers create what have been called in this question “aquifer units” or “sub-units.” As the elevation decreases from Mackay to Arco, ground water flows in the same direction.

This question asks, from 2013 until now (a period of only five (5) years) where there has been an update in the hydrogeology in the Big Lost River basin. Given that it has taken centuries to create the Big Lost River Basin’s current geology over a very extended time period, it is logical to assume that there have been no changes to the hydrogeology—how water moves through that geology—of the Big Lost River Basin in the last five (5) years. It remains an alluvial aquifer bounded by bedrock, with clay layers and locally confined layers that create “aquifer units” or “sub-units.” Based on the plain language of this question, it is easily answered and there is no need to update the well-documented hydrogeology of the Big Lost River basin.

2. What would be the impact on the rising water if the full diversion rate authorized by the eight ground water rights included in the transfer application (29.84 cfs) were diverted from the Island Wells and/or the proposed Hansen Well? Would the analysis change if the Island Wells were limited to a diversion rate of 17.34 cfs?

This question unreasonably and unnecessarily requests analysis on the diversion of 29.84 cfs from the Island Wells and 29.84 cfs from the Hansen Well. As Telford explained in the prehearing conference, the main reason for stacking water rights in a transfer is to create a combined place of use to allow water diverted from all of the water rights described in the transfer to be used on that place of use. Telford has already agreed—and reiterates that they will stipulate to this condition at the hearing on this matter—that Telford will not upgrade the Island Wells to produce 29.84 cfs but will maintain the current horsepower and design of the Island Wells to maintain its current discharge. In other words, except for typical maintenance of the pump and

related infrastructure, the Island Wells will remain in their current state.

Based on WMIS data for the Island Wells (WMIS Nos. 31 and 186) over the past four (4) years, the Island Wells average a diversion rate of between 13 and 14 cfs. Water District No. 34 uses the WMIS data for administration purposes, and the amount measured is close to the 12 cfs currently authorized for the Island Wells under Water Right No. 34-7037. The Folkman water rights (34-2401A and 34-4015), which are located further upgradient from the Island Wells, allow for the diversion of 5.34 cfs. These rights combined allow for the diversion of 17.34 cfs, an amount that exceeds the 13 to 14 cfs that are currently diverted from the Island Wells.

Accordingly, it is unreasonable and unnecessary to ask and answer the question of what the impacts will be if the Island Wells divert the full 29.34 cfs of Telford's water rights or even the 17.34 cfs. Based upon the stipulation provided herein that the diversion amount will remain as it has historically, these questions are not helpful or appropriate based on their plain language because they seek answers to a hypothetical scenario as Telford has already agreed not to upgrade the Island Wells to produce 29.84 cfs but will maintain the current horsepower and design of the Island Wells to maintain their current discharges. Furthermore, it would be impractical, if not impossible, to even equip the Island Wells to produce 29.84 cfs, and such an undertaking would be contrary to Telford's stated desire to have a system in place that minimizes conveyance losses. Outfitting the Island Wells to produce 29.84 cfs would divert all of Telford's water further up the system, resulting in more losses, which is contrary to public policy. Perhaps most important is that altering the Island Wells to produce 29.84 cfs to divert all of Telford's water there would not get more water to the Telford farm. Telford needs the flexibility proposed in its transfer to pump water at locations where conveyance losses are minimized, and those locations will vary depending on various factors. But having a 29.84 cfs well where all of Telford's water rights will be diverted

would necessarily ensure that Telford would suffer conveyance losses from those wells for most of the year. This is contrary to what the transfer is requesting because otherwise, the Telford Transfer would propose elimination of the other well locations as authorized points of diversion. For all these reasons, the stated question is based on unreasonable and unrealistic assumptions.

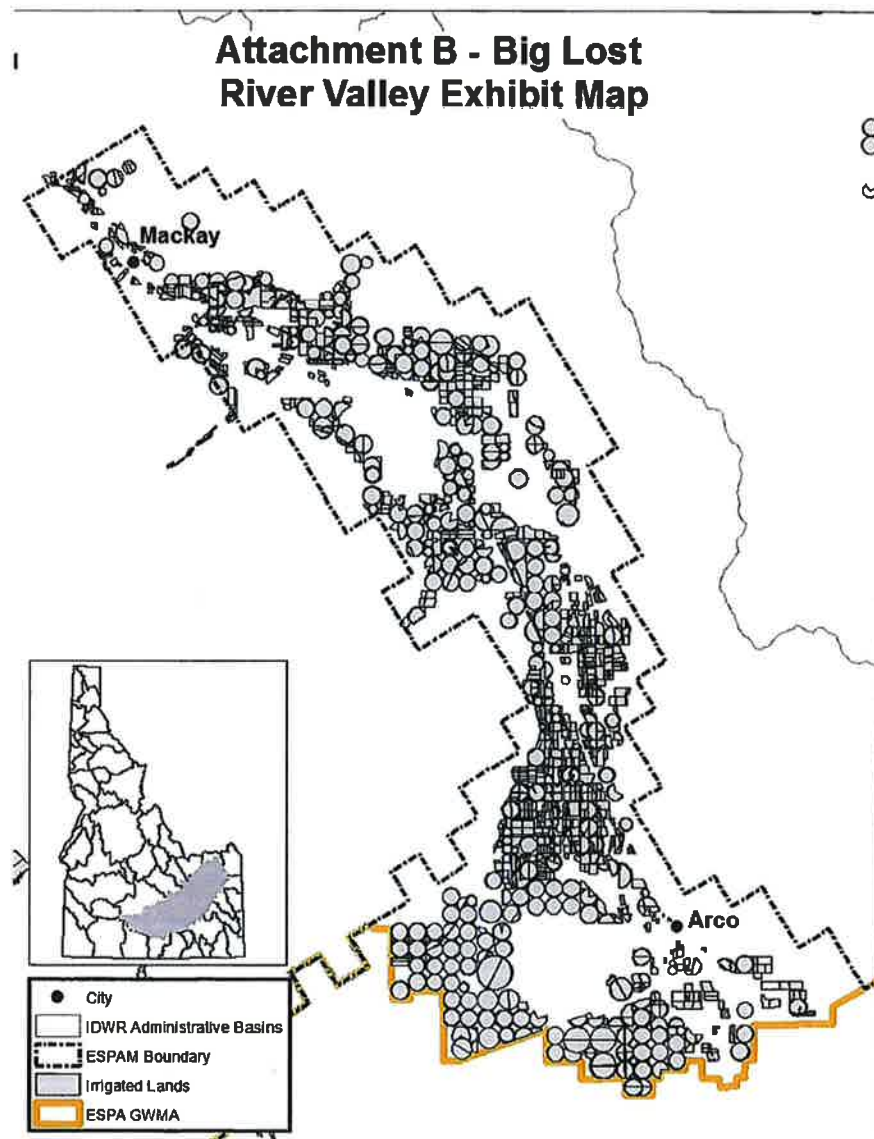
Similarly, as to the Hansen Well, the absolute maximum amount that could be produced there is 10 cfs, with the likely amount to be produced from this well likely closer to 5 cfs. Telford has already agreed—and reiterates that it will stipulate to this condition at the hearing on this matter—that Telford will limit diversions from the Hansen Well to no more than 10 cfs. Accordingly, it is unreasonable and unnecessary to ask and answer the question of what the impacts will be if the Hansen Well diverts the full 29.34 cfs of Telford’s water rights because it is hypothetical. Based upon the stipulation provided herein that the diversion amount will not exceed 10 cfs, this question is not helpful or appropriate.

3. Do any of the proposed points of diversion described in Application 82318 divert water from the Eastern Snake Plain Aquifer?

The motivation for this question is unclear, but the plain language of this question is easily answered as a matter of law. In a very recent action of the Director, he has designated the Eastern Snake Plain Aquifer Ground Water Management Area (the “ESPA GWMA”). See *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, November 2, 2016, available at <http://www.idwr.idaho.gov/files/legal/orders/2016/20161102-Order-Designating-the-Eastern-Snake-Plain-Aquifer-GWMA.pdf> (hereinafter “GWMA Order”). That order described the area covered by the ESPA GWMA to be:

2. The boundary of the ESPA Ground Water Management Area is set forth in Attachment A. The boundary is the same boundary used in the Enhanced Snake Plan Aquifer Model Version 2.1 excluding: (1) lands in the Big Lost River Valley as delineated in Attachment B; (2) the portion of the Big Wood River ground water management area overlapping the model boundary; and (3) the portions of the Artesian City, Blue Gulch, Cottonwood, West Oakley Fan and Oakley Kenyon critical ground water areas overlapping the model boundary; and

GWMA Order at 25. The *GWMA Order* specifically excluded the Big Lost River Valley from the ESPA GWMA because “the Department is considering designation of a ground water management area or a critical ground water area within the Big Lost River Basin.” *Id.* at 23. A map delineating the Big Lost River Valley was included in the ESPA *GWMA Order*, and is replicated here:



Telford's place of use and wells that divert water for the place of use were specifically included within the Big Lost River Valley map, which for administration purposes means that all of Telford's water rights and wells will be subject to a ground water management area or critical ground water area designation in the Big Lost River Valley. Telford will be considered to divert from the Big Lost River aquifer and will be managed accordingly.

It should be noted that even though Telford and others are diverting from the Big Lost River aquifer, the Director stated that the "boundary of the ESPA ground water management area will be modified in the future to include the Big Lost River Basin if a separate management area is not designated for the Big Lost River Basin." *GWMA Order* at 23. The Director stated that he has this authority to include tributary basins because they are tributary to the ESPA, and the Big Lost River Basin is a tributary basin. For purposes of this question, however, the Director has determined that Telford is located within the Big Lost River Basin, not the ESPA (even though the Big Lost River Basin may eventually be included within the ESPA GWMA). For this reason, it is unnecessary for Owsley or any other Department representative to answer this question because it has already been answered. Telford does not divert from the ESPA—he diverts from the Big Lost River Basin.

4. At the site of the proposed Hansen Well, would casing the well (no perforations) to a depth of 100 feet prevent an impact on rising water?

This question is based upon Telford's representation, which he will stipulate to at hearing, that he will case the Hansen Well down to a depth of 100 feet. Concerning this stipulation, an expert or experts for the protestant can perform specific analysis to answer this question. It is inappropriate for the Department to perform such specific analysis. Telford asserts that this will

protect against impacts to other wells and impacts to flows in the Big Lost River. If the District or other protestants has cause to disagree, the District and the protestants should have to hire and pay for its own experts to answer this question specific to their water rights or stated interests in opposing the Telford Transfer to determine what impacts (or lack of impacts) casing down to 100 feet will have.

CONCLUSION

For the reasons set forth herein, the hearing officer's request for a new technical memo from the Department should be withdrawn. The hearing should proceed as expeditiously as possible because Telford is prepared to meet his burdens under Idaho Code § 42-222. The Telford Transfer will not reduce the quantity of water under existing rights because of the agreement to case the Hansen Well down to 100 feet and the flexibility afforded Telford under the transfer will reduce conveyance losses which will reduce water pumped from the Big Lost River aquifer. Telford has already produced technical analysis discussed at the prehearing to address the City of Arco's local well interference concerns, which resulted in the City's withdrawal of its protest. Further, there is no enlargement of Telford's water rights—in fact, there will be an overall reduction in the number of authorized acres for irrigation under the water rights. The transfer is not contrary to the conservation of water resources, rather, it is based primarily on the desire to conserve water resources in Idaho as “[a]n unreasonable and excessive conveyance loss is **against public policy**. *Basinger v. Taylor*, 36 Idaho 591, 597, 211 P. 1085, 1086 (1922) (a conveyance loss of 50%) (emphasis added). The transfer is in the local public interest because it reduces conveyance losses and allows more efficient use of the resource for a farm that contributes to the local economy. Finally, the transfer only affects water rights that are diverted from and used within the Big Lost River Basin. The transfer does not propose to change the place of use from the place

of use originally decreed under the water rights, rather, it merely seeks to create a permissible place of use for Telford's land and the recently-acquired Folkman farm.

TELFORD LANDS LLC
MICHAEL TELFORD AND SHANNON TELFORD



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2018, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

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