

**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**

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

On November 13, 2018, Telford Lands LLC (“Telford”) filed a *Motion to Proceed to Hearing without IDWR Technical Memo* (“Motion”) with the Idaho Department of Water Resources (“Department” or “IDWR”) in the above-referenced contested case pursuant to Rule 260 of the Department’s Rules of Procedure (IDAPA 37.01.01). On November 30, 2018, Protestant Darrell E. McDonald (“McDonald”) filed an *Answer to Applicant’s Motion to Proceed to Hearing without IDWR Technical Memo* (“Answer”). On December 3, 2018, Telford filed a *Reply Brief in Support of Motion to Proceed to Hearing without IDWR Technical Memo*.

Pursuant to Rule 270.02 of the Department’s Rules of Procedure (IDAPA 37.01.01), answers to motions or responses to motions must be filed within fourteen days of the filing of the motion. The Answer filed by McDonald was filed seventeen days after Telford’s Motion was filed and is, therefore, not timely.

On October 1, 2018, the hearing officer for this contested case requested a technical staff memorandum (“staff memo”) from the Department’s Hydrology Section. The hearing officer indicated that a staff memo prepared in 2013 for a separate contested case (Application 77610 – Parkinson Farms) could be used as a starting point for the requested staff memo. The hearing officer requested that the 2013 Parkinson Farms memo be updated 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.

Telford asserts that the hearing officer's request for a staff memo in this contested case should be withdrawn and raises three arguments against the staff memo request: 1) The hearing officer's request for a staff memo in a pending contested case is not authorized by statute or rule and is therefore a violation of the Idaho Administrative Procedures Act; 2) The time required to complete the staff memo will result in an unreasonable delay, causing detrimental impact to Telford; and 3) The questions presented by the hearing officer, forming the basis of the requested staff memo, are irrelevant. Each of the arguments raised by Telford will be addressed below.

Authority to Request Staff Memo in an Existing Contested Case

The Department's Rules of Procedure (IDAPA 37.01.01) contain a number of references to technical analysis or memos prepared by agency staff and describe the extent to which agency staff may participate in contested case proceedings:

RULE 157: RIGHTS OF PARTIES AND OF AGENCY STAFF

Subject to Rules 558, 560, and 600, all parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments.

RULE 201: TAKING OF APPEARANCES – PARTICIPATION BY AGENCY STAFF

The presiding officer at a formal hearing or prehearing conference will take appearances to identify the representatives of all parties or other persons. In all proceedings in which the agency staff will participate, or any report or recommendation of the agency staff (other than a recommended order or preliminary order prepared by a hearing officer) will be considered or used in reaching a decision, at the timely request of any party the agency staff must appear at any hearing and be made available for cross-examination and otherwise participate in the hearing, at the discretion of the presiding officer, in the same manner as a party.

RULE 600: RULES OF EVIDENCE – EVALUATION OF EVIDENCE

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

RULE 602: OFFICIAL NOTICE – AGENCY STAFF MEMORANDA

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.

RULE 650: RECORD FOR DECISION

01. Official Record. The agency shall maintain an official record for each contested case and (unless statute provides otherwise) base its decision in a contested case on the official record for the case.

02. Contents of Record. The record for a contested case shall include:

- a. All notices of proceedings;
- b. All applications or claims or appeals, petitions, complaints, protests, motions, and answers filed in the proceeding;
- c. All intermediate or interlocutory rulings of hearing officers or the agency head;
- d. All evidence received or considered (including all transcripts or recordings of hearings and all exhibits offered or identified at hearing);
- e. All offers of proof, however made;
- f. All briefs, memoranda, proposed orders of the parties or of the presiding officers, statements of position, statements of support, and exceptions filed by parties or persons not parties;
- g. All evidentiary rulings on testimony, exhibits, or offers of proof;
- h. All staff memoranda or data submitted in connection with the consideration of the proceeding;
- i. A statement of matters officially noticed; and
- j. All recommended orders, preliminary orders, final orders, and orders on reconsideration.

These rules, when considered together, clearly contemplate the preparation of staff memos to address the technical issues of existing contested cases. Rule 650.02.h describes staff memos “submitted in connection with the consideration of the proceeding.” IDAPA 37.01.01.650.02.h. Rule 600 confirms that “[t]he agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.” IDAPA 37.01.01.600. It is significant that Rule 600 refers to the agency’s “experience, technical competence and specialized knowledge,” rather than the presiding officer’s “experience, technical competence and specialized knowledge.” The most straight-forward way for the Department to apply its “experience, technical competence and specialized knowledge” in a contested case is through the preparation of a case-specific staff memo.

A staff memo is an important tool the Department uses to accomplish its review of transfer applications under Idaho Code § 42-222. In all transfer applications, whether protested or not protested, the Department has a responsibility to ensure that a proposed change will not injure other water rights. Idaho Code § 42-222. Telford argues that, once an application for transfer is protested, the Department is then prohibited from preparing a staff memo evaluating the hydrologic effects of the proposed change. According to Telford, the Department is limited to the technical analysis provided by the parties and any pre-existing staff memos when determining whether an application should be approved or denied. Telford's interpretation of the Department's Rules of Procedure severely restricts the Department's ability to complete its review under Idaho Code § 42-222.

Consider, for example, a contested case where the applicant submits a technical expert report and the only protestant in the case has a narrow issue of protest and does not submit any technical information. Assuming there were no pre-existing staff memos for the area, under Telford's interpretation of the rules, the expert report provided by the applicant would be the only technical information allowed in the administrative record. The Department would have no mechanism to refute or validate any of the technical information provided by the applicant's expert. This outcome is clearly inconsistent with Rule 600, which declares that the agency should apply its "experience, technical competence and specialized knowledge" to decide contested cases. The Department must be able to evaluate an application and the technical information provided by any of the parties in order to complete its statutorily mandated review of the application. This is accomplished by preparing a case-specific staff memo.

Telford argues that a request for a staff memo to address the technical issues in an existing contested case "turns the agency into an advocate and is contrary to the burden of proof allocation between the applicant and the protestant." *Motion* at 7. This is an incorrect characterization of the purpose of staff memos. The technical information contained in a staff memo is meant to increase the technical information available to all of the parties. It does not shift the burden of proof for any of the parties.

Telford also argues that staff memos prepared in an existing contested case "allows the full resources of [the Department] to be used against an applicant who already has significant burdens of proof to satisfy and protestants in the case to argue against." *Motion* at 10-11. "This unlawful procedure infringes on the Applicant's due process and allows protestants to enjoy the benefits of having an expert without the need to pay for the expert's services." *Id.*

This, again, is an incorrect characterization of the purpose of staff memos. Staff memos are requested in contested cases to augment the record with technical information about the watershed, aquifer or subject property. Staff memos should not advocate for approval or denial of any application. The technical information included in a staff memo could benefit either side of a contested case. Ultimately, the parties still bear their respective burdens of proof. All parties have the ability to use the technical information contained in a Department staff memo to support their positions in a contested case.

The preparation of a staff memo for an existing contested case does not diminish the due process rights of any of the parties. All parties have the opportunity to cross-examine a technical representative of the Department about the staff memo. IDAPA 37.01.01.602. In addition, the parties have the right to present technical information rebutting any of the conclusions of the staff memo.

To summarize, the Department's Rules of Procedure clearly contemplate agency staff memos being used in contested cases before the Department. The rules do not prohibit the agency from requesting memos to address the technical issues of existing contested cases. In fact, Rule 650 specifically refers to staff memos submitted in connection with the consideration of an existing contested case. Staff memos prepared for contested cases should provide technical data and analysis but should not advocate for any specific outcome. All parties may rely on the data and analysis contained in a staff memo to support their arguments. All parties have the ability to examine or cross-examine a technical representative of the Department about the staff memo.

Time Required to Complete Staff Memo

Telford asserts that the time required to prepare a staff memo "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." *Motion* at 14. Dennis Owsley, a technical hydrologist for IDWR, has been assigned to prepare the requested staff memo in this contested case. Mr. Owsley has agreed to complete his staff memo prior to January 11, 2019. The administrative hearing for this case has been scheduled for March 6-7, 2019. Application 82318 was filed with the Department on April 24, 2018. Therefore, the hearing will be held less than one year after the application was filed. Because Application 82318 originally included seven parties, four of whom were represented by counsel, and technical issues of protest, conducting an administrative hearing within one year of the original filing date does not constitute an unreasonable delay.

Substance of the Questions Presented to Department Technical Staff

Telford raises a number of concerns about the wording of the questions formulated by the hearing officer to be addressed in the requested staff memo. Some of Telford's concerns have merit. Each of the questions will be discussed separately below.

Question 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.

Telford argues that this question is unnecessary because hydrogeology generally does not change over a period of five years. The question is also deficient because it directs Mr. Owsley to use his 2013 memo as a starting point for the new memo. It is improper for a hearing officer to require the incorporation of a previous staff memo into a new staff memo. In this case, the

hearing officer should not have presumed that Mr. Owsley would use his previous memo as a starting point for summarizing the hydrogeology of the Big Lost River Basin. Mr. Owsley should be free to characterize the hydrogeology of the Big Lost River Basin in any way he deems appropriate. Question 1 should be withdrawn.

Question 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?

Telford argues that the diversion rates set forth in the question are inaccurate. Although Telford's water rights, in combination, authorize a total diversion rate of 29.84 cfs, Telford now asserts that it will not divert more than 14 cfs from the Island Wells nor more than 10 cfs from the proposed Hansen Well. *Motion* at 17-19. These diversion limits, however, are not stated in Application 82318. The hearing officer's attempt to define the amounts of water to be diverted from any of the proposed points of diversion confuses the issues of the case and results in an unnecessary constraint on Mr. Owsley. Question 2 should be revised and simplified as follows:

Will the changes proposed in Application 82318 have any effect on the rising waters at the south end of the Big Lost River Valley?

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

Telford objects to this question, arguing that the Department has already determined that the Telford Wells divert exclusively from the Big Lost River Aquifer. Telford references the area of common ground water supply used by the Department in various delivery call proceedings and the boundaries of the recently-created ESPA Ground Water Management Area to argue that all of the Telford wells involved in Application 82318 are outside of the ESPA. Telford's arguments highlight the ambiguity of the question posed by the hearing officer. Mr. Owsley does not need to prepare a staff memo outlining the location of administrative boundaries. Maps describing the relevant administrative boundaries are already available to the hearing officer through previous orders of the Department. The question originally posed to Mr. Owsley was intended to solicit analysis of the hydrologic connection between Telford's existing and proposed points of diversion, not to solicit information about administrative boundaries. Therefore, the question should be revised to more-accurately reflect the technical information sought by the hearing officer. Question 3 should be revised as follows:

Please describe the composition (sand, gravel, basalt, etc.) of the aquifer layers supplying water to each of Telford's existing wells and describe the hydrologic connection between the existing wells and the proposed wells, if one exists.

Question 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?

Telford objects to this question on the basis that the technical information requested is of the type that should be prepared by the experts retained by the parties. As noted above, consistent with the Department's Rules of Procedure, hearing officers have the authority to request staff memos addressing technical issues associated with specific contested cases. The proposal to case a portion of the proposed Hansen well was proposed by Telford as a means of avoiding any impacts to the rising waters at the south end of the Big Lost River Valley. Telford bears the burden of demonstrating that the changes proposed in Application 82318 will not inure other water rights. This burden includes demonstrating that any proposed mitigation measures will sufficiently prevent injury to other water rights.

Although the hearing officer could rely solely on the technical information provided by the parties about the sufficiency of mitigation proposals, the hearing officer may also request a staff memo to evaluate the technical components of Telford's mitigation proposal. It was proper for the hearing officer to ask Mr. Owsley to evaluate whether casing the proposed Hansen Well would mitigate any impacts to the rising waters. The question originally posed to Mr. Owsley was too restrictive, however, because it set forth a specific depth of casing. The technical analysis prepared by Mr. Owsley will be more useful to the hearing officer and the parties if it is not limited to a specific depth, but more generally addresses the concept of casing out upper aquifer layers as a means of preventing injury to existing water rights. Question 4 should be simplified and revised as follows:

If you find that the diversion of ground water from the proposed Hansen Well will have an effect on the rising waters, would casing the well (maintaining a zone of no perforations) to any depth minimize or eliminate the effect on the rising waters?

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

As stated above, it is unnecessary for the hearing officer to influence the extent to which Mr. Owsley incorporates information from the staff memo he prepared in 2013 for the Parkinson Farms case. Mr. Owsley should be free to incorporate data, analysis, including references to Parkinson Farms, from the previous staff memo if he believes it is useful for the technical analysis in the pending contested case. Question 5 should be withdrawn.

ORDER

IT IS HEREBY ORDERED that Telford's Motion is DENIED. Mr. Owsley shall continue to prepare the staff memo requested by the hearing officer. The questions posed to Mr. Owsley on October 1, 2018 should be disregarded. The staff memo prepared by Mr. Owsley should be completed on or before January 11, 2019, and should address the following questions:

1. Will the changes proposed in Application 82318 have any effect on the rising waters at the south end of the Big Lost River Valley?
2. If you find that the diversion of ground water from the proposed Hansen Well will have an effect on the rising waters, would casing the well (maintaining a zone of no perforations) to any depth minimize or eliminate the effect on the rising waters?
3. Please describe the composition (sand, gravel, basalt, etc.) of the aquifer layers supplying water to each of Telford's existing wells and describe the hydrologic connection between the existing wells and the proposed wells, if one exists.

This is an Interlocutory Order issued pursuant to IDAPA 37.01.01.710.

DATED this 5th day of December 2018.



JAMES CEFALO
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2018, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the following:

Document Served:

Notice of Hearing and Scheduling Order

Order Denying Motion to Proceed to Hearing without IDWR Technical Memo

CERTIFIED MAIL Application for Transfer No. 82318

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