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JUN 08 2017

Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT
TRANSFER APPLICATION NO. 81039 IN
THE NAME OF WALLACE AND PERMIT
NOS. 78-12439 IN THE NAME OF
KALINOWSKI AND 78-12447 IN THE
NAME OF HENLEY AND APPLICATION
NO. 78-12445 IN THE NAME OF
WALLACE

**MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE AND MOTION
IN LIMINE TO EXCLUDE CERTAIN
DOCUMENTS AND TESTIMONY**

INTRODUCTION

The Applicant/Protestants Wallaces on June 4, 2017, submitted two documents to the hearing officer which fail to meet any standard for introduction as either testimony or an evidentiary exhibit at the contested case hearing to be held on June 14, 2017. For the following reasons, the Applicant/Protestants, Kalinowski and Henleys, hereby move this Hearing Officer to strike the documents from the record and further grant the Motion in Limine to exclude the same from introduction at the hearing.

STANDARD

When ruling on the admissibility of evidence, a hearing officer is not bound by the Idaho Rules of Evidence, but rather it "should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development." IDAPA 37.01.01.600. "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." *Id.*; see also *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 163, 125 P.3d 515, 519, (2005); see also I.C. § 67-5251(1). Trial courts also have broad discretion when ruling on motions in limine. *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000). A trial court's motion in limine ruling is reviewed under an abuse of discretion standard. See *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 767-768, 86 P.3d 475, 481-482 (2004)(citing *Leavitt*, 133 Idaho at 631, 991 P.2d at 356). This standard requires a three-pronged inquiry to determine whether the district court (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. See *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 767-768, 86 P.3d 475, 481-482 (2004) (Citing *Leavitt*, 133 Idaho at 631, 991 P.2d at 356; *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

"All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." I.R.E. § 402. Evidence is considered relevant if it has "any tendency to 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." Idaho Rule of Evidence § 401. Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." I.R.E. § 403.

ARGUMENT

I. Expert and Lay Witnesses Testimony Must Meet Certain Standards to be Admissible, Even in an Administrative Action:

Idaho Rule of Evidence 701 governs opinion testimony given by lay witnesses. IRE

Rule 701 provides:

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (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, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

IRE Rule 701. *State v. Enyeart*, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993) (a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, so long as the witness's opinion is based on his or her perception; and the opinion must be helpful to a clear understanding of the witness' testimony or a determination of a fact in issue).

The first requirement of IRE 701 is that the lay witness opinion testimony needs to be based upon his own perception. See IRE 701; see also *State v. Johnson*, 119 Idaho 852, 858, 810 P.2d 1138, 1144, (Idaho Ct. App. 1991) (Doctor did not qualify as an expert, and likewise his testimony was not based upon his own perception, but what others had stated to him). This is consistent with IRE 602 that provides a witness may not testify to a matter unless the witness has personal knowledge of the matter. IRE 602; see *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. N.Y. 2005) (Rule 701 simply recognizes lay opinion as an acceptable "shorthand" for the "rendition of facts that the witness personally perceived."). The limitation of lay witnesses is to testifying to opinions gleaned from factual information that they personally perceived. See, e.g., *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1192–1193 (9th Cir. 2005) (in wrongful death suit arising from accident at railroad crossing, district court improperly thwarted

highway patrol officer's testimony about angle of decedent's truck to railroad tracks on basis that it would "call for expert testimony that was not disclosed"; witness's perception of angle of tire mark would not constitute expert opinion, but was percipient witness's observation admissible under Rules 601 and 602 or permissible lay witness opinion, based on personal observation, under Rule 701, citing Weinstein's).

Idaho Rule of Evidence 702 governs testimony given by expert witnesses. The rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." IRE 702. Lay witnesses are limited to testifying to opinions gleaned from factual information that they personally perceived, whereas a qualified expert, may testify to opinions derived from information—even inadmissible information—that the expert did not personally perceive, but that was made known to the expert before or at trial. *See e.g., Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1192–1193 (9th Cir. 2005) (district court improperly thwarted highway patrol officer's testimony about angle of decedent's truck to railroad tracks on basis that it would "call for expert testimony that was not disclosed"; witness's perception of angle of tire mark would not constitute expert opinion, but was percipient witness's observation admissible under Rules 601 and 602 or permissible lay witness opinion, based on personal observation, under Rule 701); *See, e.g., Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385–386 (9th Cir. 1992) (trial court erred in excluding affidavits of plaintiffs' three experts based on their knowledge of medical literature).

The foundation for establishing a witness' qualifications as an expert must be offered before his testimony will be received in evidence. *Hobbs v. Union Pac. R.R.*, 62 Idaho 58, 108

P.2d 841, (1940). The admissibility of expert testimony is a question for the hearing officer to decide. I.R.E. 104. The decision whether to exclude rests upon whether the witness is qualified as an expert, based upon personal knowledge or facts reasonably relied upon by experts in the field, and whether its probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the fact finder, or by considerations of undue delay, waste of time and cumulative evidence. *See Earl v. Cryovac*, 115 Idaho 1087, 1090, 772 P.2d 725, 728, 136 (Idaho Ct. App. 1989). *See State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992) (it was proper to exclude evidence of pastor's testimony dealing with a scientific theory for which adequate foundation had not been laid or expertise established); *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997) (plaintiff was not qualified as a medical expert, and therefore could not give her opinion about whether the standard of care was breached by the defendants; plaintiff was a lay person and not competent to testify about the cause of her injury, including her statements that the injury occurred during surgery and that her rotator cuff was not torn before surgery).

II. The Hobie Alter Letter Must be Stricken, and Cannot be Relied Upon Because it Lacks Any Foundation from Which to Determine he Might be an Expert, No Prior Foundation was Laid Prior to Submitting the Letter, It was Untimely, Contains False Information and is Irrelevant:

Mr. and Mrs. Wallace first identified Mr. Alter as a proposed expert witness in their disclosures provided on or about May 19, 2017. On May 22, 2017, counsel for Dr. Kalinowski and the Henleys requested telephonic contact information for Mr. Alter from the Wallaces, but no information was provided. *See Ex. 1*, May 22, 2017, email to Mr. and Mrs. Wallace. Mr. Alter had not earlier been identified as an expert witness, and no report was timely provided pursuant to the Department's December 28, 2016, *Order Consolidating Cases, Authorizing Discovery, and Setting Disclosure Deadlines*. For these reasons, Dr. Kalinowski and the Henleys have been

prejudiced by the Wallaces failure to timely provide information to them in order to provide an opportunity to examine Mr. Alter as the foundation for and substance of the letter.

The substance of the letter itself is also objectionable because it appears to contain information irrelevant to the proceedings before this Hearing Officer, and also contains what appears to be mere supposition that amounts to falsehood. Mr. Hobie Alter, Sr., the father of the author of the letter was the developer of the Timber Ridge Subdivision, and he passed away in March, 2014. *See* Ex. 2, Obituary of Hobart Alter, Sr. It is unclear what role Mr. Alter, Jr., played in the development of the subdivision, if any, and Dr. Kalinowski and the Henleys have had no opportunity to speak to Mr. Alter, Jr., concerning the same. Additionally, the letter mainly refers to “water easements across some of the lots....that we sold.” *See* Alter letter, June 2, 2017. The letter appears to relate solely to the Wallaces transfer application no. 81039, and easements are not at issue in that proceeding. The Wallaces’ burden of proof in that proceeding is to demonstrate that their later filed transfer application will not injure the earlier filed water right applications of Dr. Kalinowski and the Henleys. Whether there is legal access to the points-of-diversion located on the Kalinowski and Henley properties is not something that this Hearing Officer is entitled to resolve in this proceeding. *Lemmon v. Hardy*, 95 Idaho 778, 779-781, 519 P.2d 1168, 1169-1171 (1974). Furthermore, the statement in the letter that “[t]hese Water Easements on the Plat are exclusive to the Wallace parcel,” is not supported by any evidence, and from a review of the records of Adams County, no such exclusive easement has ever been recorded. Therefore the statement is false.

Further, Mr. Alter, Jr.’s testimony fails to demonstrate any characteristic essential to the designation of expert witness. It is not, “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” I.R.E. 702.

The Wallaces provided no foundation or supporting documentation to attempt to establish that Mr. Alter, Jr. qualifies as an expert. As the June 2, 2017, letter of Mr. Alter Jr., was not timely submitted, contains irrelevant and unreliable information, and does not bear any indicia of being provided by an expert, the same must be stricken, and the same should be prevented from being introduced at the contested case hearing in these consolidated matters.

III. The Statement/Petition Provided by Wallaces Lists Fifteen Previously Unidentified ‘Witnesses’ and Constitutes Hearsay and Must be Excluded:

A second document provided by the Wallaces referred to as a ‘statement signed by our neighbors in the Timber Ridge Subdivision,’ but it appears to be a statement drafted or originating from the Wallaces and then signed by fifteen people including the signatories’ apparent addresses and a year. None of the fifteen individuals were listed as witnesses in the Wallaces’ Discovery Responses received by counsel for Kalinowski and Henleys on May 22, 2017. No separate Witness Disclosure was filed by Wallaces, on or before May 31, 2017, pursuant the *Order Consolidating Cases, Authorizing Discovery, and Setting Disclosure Deadlines*. The Statement/Petition was not provided to counsel for Kalinowski and the Henleys until Sunday, June 4, 2017, approximately 10 days before the contested case hearing.

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” I.R.E. 602. In order for this to be established the witness must be available for cross examination. Here, the signatories to the prepared statement offer nothing more than black book hearsay, i.e. “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.” I.R.E. 801(c). It is axiomatic that “[h]earsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho.”

I.R.E. 802. Idaho Rule of Evidence sets out the exceptions to the admission of hearsay testimony, none of which apply in this instance, and none of which has been argued by the Wallaces.

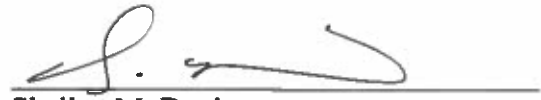
Counsel for Kalinowski and Henleys have no information about the signatories to the prepared statement, the circumstances under which the signatures were elicited, nor has counsel or will counsel be able to adequately contact and examine the signatories in order to determine whether the statements contain the necessary indicia of trustworthiness. *Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 168, 938 P.2d 189, 195 (1997). As the deadline to identify witnesses has past, and the contested case hearing is to be held in 10 days, this Court must strike the Statement/Petition submitted by Wallaces, and make a ruling that no witness not previously disclosed by the Wallaces in response to discovery may be allowed to testify. To do otherwise would greatly prejudice Dr. Kalinowski and the Henleys.

CONCLUSION

While this Hearing Officer is not strictly bound in this administrative proceeding by the Idaho Rules of Evidence, it is bound to see that Dr. Kalinowski and the Henleys basic procedural due process rights are not violated. Allowing the June 2, 2017, letter and Statement/Petition to be received into evidence without any meaningful opportunity to examine the purported witness would undermine that basic right. For the foregoing reasons, Dr. Kalinowski and Mr. and Mrs. Henley hereby request that the Hearing Officer grant this Motion to Strike and Motion in Limine striking the documents from the record, and preventing evidence to be introduced at the contested case hearing concerning the same.

DATED this 5th day of June, 2017.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'S. M. Davis', is written over a horizontal line.

Shelley M. Davis

Attorney for Applicants/Protestants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2017, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND MOTION IN LIMINE TO EXCLUDE CERTAIN DOCUMENTS AND TESTIMONY** to be filed with or served upon the following parties by the indicated methods:

Served on:

Mike and Eulla Wallace
3288 Wallace Lane
New Meadows, ID 83654

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

James Cefalo
Hearing Officer
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email



Shelley M. Davis
Attorney for Protestants/Applicants

EXHIBIT 1

Shelley Davis

From: Shelley Davis
Sent: Monday, May 22, 2017 11:21 AM
To: Mike & Sissy Wallace
Cc: Shelley Davis
Subject: RE: Response to Question

Dear Mr. and Mrs. Wallace:

Will you please provide phone contact information for Mr. Alter, listed as your potential expert witness in your discovery responses?

Best Regards,

Shelley M. Davis
Barker Rosholt & Simpson LLP
1010 W. Jefferson St., Ste. 102
Boise, ID 83702
(208) 336-0700

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From: Mike & Sissy Wallace [mailto:4_mykids@frontiernet.net]
Sent: Friday, May 19, 2017 5:49 AM
To: James Cefalo <James.Cefalo@idwr.idaho.gov>; Shelley Davis <smd@idahowaters.com>; Mike & Sissy Wallace <4_mykids@frontiernet.net>
Subject: Response to Question

Dear Hearing officer:

Here are the Response to the question from Wallace regarding Transfer 81039 & Application for permit 78-12445.

Thank you

Mike & Sissy Wallace
3288 Wallace Lane
New Meadows, Idaho 83654

EXHIBIT 2

Hobart "Hobie" Alter

Born: October 31, 1933

Died: March 29, 2014

Location: Palm Desert, California

Tribute



Hobart "Hobie" Alter, who helped popularize surfing and sailing with the development of the foam surfboard and the "Hobie Cat" sailboat, has died. He was 80.

Surfboard, sailboat innovator dies

JOHN ROGERS, The Associated Press

LOS ANGELES (AP) — Two words — surfboards and Hobie — were all but synonymous in the early 1960s, when teenagers who saw movies such as "Gidget" and "Beach Party" rushed to the shores of Southern California to try a mesmerizing new water sport.

The lightweight, maneuverable boards built by a surfer dude known as Hobie carried people into the pastime that for decades had remained all but invisible outside California and

Hawaii.

Hobart Laidlaw Alter (it's unlikely many users of his gear knew his last name or even if he had one) toiled in a small beachfront shop in Dana Point, cranking out those boards by the thousands.

Hobie surfboards eventually became the linchpin of a multimillion-dollar, worldwide empire that, by the time its unassuming namesake died last week, had grown to include catamarans, skateboards, beach wear and more.

Hobie died Saturday at his Palm Desert home after a lengthy battle with cancer. He was 80.

The man who revolutionized surfing with a cheap, lightweight, easily maneuverable board might have stayed out of the limelight for most of his life, but the boards and catamarans he created did not.

"The basic surfboard structure for 90 percent of the surfboards around the world remains the foam core that he developed, and that was 50 years ago," Steve Pezman, publisher of Surfer's Journal and a longtime friend of Hobie, said Monday.

When Hobie built his first surfboard, about the time he graduated from high school in 1950, the old-fashioned, heavy wooden ones that had limited the sport to the strongest and most

determined athletes were beginning to give way to lighter balsa wood boards. But balsa wood was hard to come by.

A few years after Hobie moved his board-building operation out of his parents Laguna Beach garage in 1954, he and his friend Gordon "Grubby" Clark decided they could build a better board using a polyurethane foam core.

It took a year of trial and error, but they prevailed: The result was a board that was easy to shape, so light a child could carry it to the ocean, and so maneuverable a good surfer could do all sorts of stunts on it.

Soon Hobie was working with a small staff, producing 250 boards a week and struggling to keep up with demand.

His timing had been fortuitous.

"Gidget," the film based on author Frederick Kohner's surfing-obsessed teenage daughter and her goofy friends, had arrived in theaters in 1959, sending millions on a quest to ride the wild surf — preferably on a reasonably priced surfboard.

Soon the Hobie board, which retailed for a little more than \$100, and its distinctive logo were ubiquitous. The latter could be found painted on surfers' cars, sketched into wet beach sands, even carved into schoolroom desks.

As surfing spread around the world, Hobie moved on to sailing.

He had been a first-rate surfer, competing in Hawaii's Makaha International Surfing Championships in 1958 and 1959, and by the mid-1960s he was living in a beachfront home where he discovered it was impossible to launch a heavy sailboat from anywhere but a marina.

So he invented the lightweight Hobie Cat, a craft small enough to be strapped onto the roof of a car and light enough to be carried down to the beach and launched from the sand.

"Some people have described it as the great democratizing of yachting," Pezman said. "This was something you could wheel down to the beach and set out on it. It was affordable to blue-collar workers."

So it was fitting, perhaps, that the man who created it was always a blue-collar guy at heart.

The son of a second-generation orange grower, Hobie decided soon after high school that he did not want a job that required hard-soled shoes, a coat and tie, or hours that would take him away from things like surfing. His favored style of dress was jeans and a T-shirt, the latter sometimes covered by a ratty old sweater.

"I'm making money producing things that give me pleasure, doing exactly what I want to do," he told the Los Angeles Times in 1977. "I guess I'm really lucky that way."

Mostly noted for surfing and sailing, Hobie was memorialized on Huntington Beach's Surfing Walk of Fame in 1997 and enshrined in the National Sailing Hall of Fame in 2011.

He was also an avid skier and golfer. Pezman visited him a while back and found Hobie in his garage, working on a gadget he could use to improve his golf swing.

He is survived by his wife, Susan; daughter, Paula; sons Hobie Jr. and Jeff; sisters Carolyn and Lillian; eight grandchildren and one great-grandchild.

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tributes