DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV - 4 2002
By _____ Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**Consolidated Subcase: 75-13316 (Wild & Scenic Rivers)**
Case No. 39576	**SCHEDULING ORDER AND ORDER RE: COSTS FOR THE PREPARATION OF EXPERT REPORTS**

I.
SCHEDULING ORDER

Pursuant to the scheduling conference held on October 15, 2002, and the *Motion for Scheduling Order* filed by the State of Idaho on that same date, the following scheduling order shall apply.

December 5, 2002	Discovery open except as set forth below.
January 3, 2003	Claimant's disclosure of all witnesses and disclosure of all expert witness reports.
November 28, 2003	Objectors' disclosure of all witnesses and disclosure of all expert witness reports.
February 9, 2004	Disclosure of any rebuttal witnesses and disclosure of all rebuttal expert witness reports.
April 1, 2004	All discovery completed. This means all discovery served and responses completed, including but not limited to, the taking of all depositions of lay and expert witnesses, all interrogatories, requests for production/inspection and

	admissions. Motions to compel should be filed accordingly so as to accommodate this deadline.
May 14, 2004	Deadline for filing any dispositive motions.
June 21, 2004	Deadline for hearing any dispositive motions.
July 5, 2004	Deadline for filing other pretrial motions.
July 19, 2004	Pretrial Conference: Exhibit and witness lists exchanged, deadline for hearing any remaining pretrial motions.
August 9, 2004	Trial date. **Commencing at 9:00 a.m. at the SRBA Courthouse, 253 3rd Avenue North, Twin Falls, Idaho.**

II.
THE MATTER OF COSTS FOR PREPARATION OF EXPERT REPORTS

At the scheduling conference the parties raised the issue of costs for the preparation of the expert witness reports. The United States argues that the party requesting the expert witness reports should bear the costs associated with the preparation of said reports in accordance with Idaho Rule of Civil Procedure 26(b)(4)(C). I.R.C.P. 26(b)(4)(C) provides for the party seeking discovery to pay a reasonable fee for the time spent by the expert witness in responding to the discovery request. The State of Idaho argues that the disclosure of expert reports should be governed in a manner similar to the Federal Rules of Civil Procedure. Unlike the Idaho Rules of Civil Procedure, the Federal Rules of Civil Procedure provide for the automatic disclosure of expert witness reports. Fed.R.Civ.P. 26(a)(2)(B). This Court finds that under the history and circumstances of this consolidated subcase that the following shall govern with respect to costs associated with the preparation and disclosure of expert reports.

The SRBA District Court, with respect to federal and tribal instream flow claims, has in the past ordered the automatic disclosure of expert reports similar in practice to the federal rules. On May 4, 1995, Judge Hurlbutt issued an ***Order Governing Discovery on***

the United States and Native American Indian Tribes for Instream Flow Claims During the Statutory Objection and Response Periods (Discovery Order). Pursuant to the ***Discovery Order,*** the United States and Tribes were required to compile and submit affidavits containing detailed information regarding the methodology used to quantify the federal and tribal instream flow claims, including the subject Wild and Scenic River claims. The ***Discovery Order*** also required that the United States and the Tribes "submit statements identifying the experts each presently intends to rely on at trial; stating the subject matter on which those experts are expected to testify; and stating the substance of the facts and opinions to which the expert is expected to testify, in accordance with Idaho Rule of Civil Procedure 26(b)(4)." The intended purpose for the disclosure was to "provide claimants in the Snake River Basin Adjudication adequate information to formulate objections or responses to federal instream flow claims." The ***Discovery Order*** clearly contemplated the automatic disclosure of a significant amount of information regarding the facts, data, and methodologies upon which the expert witness was expected to rely. Further, because the ***Discovery Order*** did not address the allocation of costs the inference is that the United States would bear its own costs associated with the disclosure. This Court notes that the disclosure requirement was also appropriate given the fact that the Idaho Department of Water Resources does not investigate claims to federal reserved water rights. Additionally, if no party objected to the federal reserved water right claims, the United States would still have to make a *prima facie* showing to the Court regarding the nature and extent of the claimed right. In order to make a determination, at a minimum the Court would require an expert witness report in the form of an affidavit from any experts relied on by the United States.

The extent to which the initial disclosures were complied with or modified is not clear from the record. However, the United States has subsequently amended its claims twice since the close of the objection and response period. Initially the claims were for "all unappropriated flows." Hence the quantification methodology would involve a determination of all unappropriated flows as of the date of the reservation. Following remand the standard is now the minimum amount necessary to fulfill the enumerated

primary purposes of the reservation. Presumably the quantification methodology, data, and experts have changed substantially to meet this new standard.

THEREFORE, the Court will require the United States at its own expense, to comply with the terms of the disclosure requirements set forth in the ***Discovery Order*** taking into account the amended claims and the standard for quantification following remand.

The State of Idaho has already agreed to assume costs associated with preparing and serving an expert report on the United States. The Court will therefore require that the State of Idaho, or any other party relying on expert testimony at trial, to provide disclosure to the United States of the information set forth in I.R.C.P. 26(b)(4)(A)(i). Each party to bear its own costs for these disclosures.

Any additional discovery by any party will be pursuant to the Idaho Rules of Civil Procedure and the Court will take up the allocation of any expert fees associated with further discovery (depositions etc.) at the appropriate time.

IT IS SO ORDERED 11-4-02

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SCHEDULING ORDER AND ORDER RE: COSTS FOR THE PREPARATION OF EXPERT REPORTS was mailed on November 05, 2002, with sufficient first-class postage to the following:

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