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DEPARTMENT OF
WATER RESOURCES

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**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	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	
Case No. 39576	)	CITY OF POCA TELLO'S MOTION TO PRECLUDE
_____	)	SUBMISSION OF RESPONDENT SURFACE
	)	WATER COALITION'S REBUTTAL EXPERT
	)	REPORT

INTRODUCTION

Pursuant to the Seventh Amended Scheduling Order entered in these subcases, the expert reports of Respondent Idaho and the Surface Water Coalition were to be provided to Pocatello on October 24, 2006. No expert report has been filed by any of the Respondents.

The Rebuttal Report deadline provided in the Seventh Amended Scheduling Order is for the claimant City of Pocatello to respond to the expert opinions offered by the Respondents, which includes the Surface Water Coalition. It is not for the Respondents to proffer un rebutted expert opinions in a matter where Pocatello will ultimately bear the burden of proof. The

practical effect of the Surface Water Coalition's failure to provide its own expert reports when this Court ordered them due is this: it deliberately forecloses Pocatello's right to file a Rebuttal Report to their expert opinions. This is not what the Seventh Amended Scheduling Order provides. Under the Seventh Amended Scheduling Order, the expert reports for all Respondents were due on October 24, 2006. As of now, any expert report filed by the Surface Water Coalition is automatically late and in violation of this Court's Order. This Court has wide latitude in selecting a sanction for this kind of violation pursuant to Idaho Rule of Civil Procedure 37(e).¹

ARGUMENT

1. The State of Idaho, the United States of America, and the City of Pocatello negotiated the Second Amended Scheduling Order in January of 2005.² It was negotiated because the parties were concerned about a fair opportunity to present expert testimony. Idaho Rule of Civil Procedure 26 does not provide for mandatory disclosure of expert opinions, and the parties³ agreed during those discussions that expert opinions should be disclosed consistent with the rubric supporting Federal Rule of Civil Procedure 26. The logic behind Federal Rule of Civil Procedure 26 is as follows:

The expectation is that the timing and sequence of these disclosures will be directed by the court, probably on the basis of the conference required by Rule 26(f). The Advisory Committee Notes foresee that "in most instances the party with the burden of proof on an issue should disclose its expert testimony on that issue before the other parties are required to make their disclosures with respect to that issue." Failing direction from the court, the parties

¹ Idaho Rules of Civil Procedure 37(e) provides, "[i]n addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, or assess attorney's fees, costs or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules." I.R.C.P. 37(e).

² The first scheduling order in this matter was entered by the Court on May 12, 2004.

³ The Surface Water Coalition was not a part of those discussions because it did not move to intervene until the middle of 2006.

are to exchange expert information simultaneously 90 days before the trial date, although they have an additional 30 days after that to disclose evidence intended solely to contradict or rebut evidence on the same subject matter identified in another party's disclosures.

CHARLES ALAN WRIGHT ET AL., 8 FED. PRAC. & PROC. Civ.2d § 2031.1 (2006 supp.).

2. The parties subsequently agreed beginning with the Fourth Amended Scheduling Order, to a scheduling order that provided: (a) disclosure of expert opinions as directed by the Court via the scheduling order; (b) that Pocatello would be the first to disclose its expert opinions; (c) that the Respondents would then disclose their expert opinions in response to Pocatello's; and (d) that Pocatello would respond with rebuttal directed at Respondent's Opinions. *Compare* Second Amended Scheduling Order (January 31, 2005) *with* the Fourth (November 2, 2005) through Seventh Amended Scheduling Order (September 11, 2006).
3. The Surface Water Coalition is a Respondent in this matter. It failed to timely disclose its expert opinions on or before October 24, 2006, the date on which Respondent's reports were to be filed. The sanction for such disregard for the scheduling order should be that the Surface Water Coalition is precluded from providing expert testimony regarding issues in this case. *See* I.R.C.P. 37(e).
4. Alternatively, because the Surface Water Coalition's withholding of their expert report does not give Pocatello an adequate opportunity to provide a rebuttal of their report under the current scheduling order, the Court should hold a scheduling conference to revise the remaining deadlines in the case to provide time for Pocatello to submit a rebuttal report and for both parties to conduct expert depositions. Rule 37(e) provides the court the discretion to modify the Seventh Amended Scheduling Order.

Wherefore, Pocatello respectfully requests that this Court prohibit the Surface Water Coalition from providing any expert testimony in this case. This remedy is appropriate considering their failure to formally request an extension, their failure to comply with what is now the *Seventh* Scheduling Order in this case, and the unnecessary delay that will be caused by their failure to file their expert report. In the alternative, this Court should hold a scheduling conference to *again* revise the remaining deadlines in the case to provide time for Pocatello to submit a rebuttal report and for both parties to conduct expert depositions.

A proposed order has been provided for the Court's convenience.

Respectfully submitted this 3rd day of November 2006.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of November 2006, I caused a copy of the foregoing document to be served by U.S. First Class Mail on:

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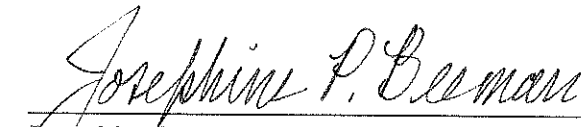
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EXHIBIT A (CITY OF POCA TELLO)

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
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29-13638
29-13639

**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	)	ORDER PRECLUDING THE SURFACE WATER
	)	COALITION FROM OFFERING EXPERT
	)	TESTIMONY IN THIS MATTER
Case No. 39576	)	
	)	Subcase Nos.: Exhibit A (City of Pocatello)

The Court has reviewed Pocatello's Motion to Preclude Submission of Respondent Surface Water Coalition's Rebuttal Expert Report and, being fully apprised on the premises, GRANTS the motion. The Surface Water Coalition shall be PRECLUDED from offering expert testimony in this matter.

Dated this _____ day of _____, 2006.

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

EXHIBIT A (CITY OF POCA TELLO)

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29-13639

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER PRECLUDING THE SURFACE WATER COALITION FROM OFFERING EXPERT TESTIMONY IN THIS MATTER** was mailed on _____, 2006, with sufficient first-class postage to the following:

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