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DEPARTMENT OF
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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 No. 31-11845
	)	
	)	BRIEF IN SUPPORT OF THE STATE OF IDAHO'S
	)	MOTIONS TO LIMIT THE TESTIMONY OF BRYCE
Case No. 39576	)	CONTOR, TO EXCLUDE THE TESTIMONY OF
	)	CHUCK BROCKWAY, TO COMPEL DISCOVERY,
	)	AND FOR AN EXPEDITED HEARING
_____	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorneys general, files this *Brief in Support of the State of Idaho's Motions to Limit the Testimony of Bryce Contor, to Exclude the Testimony of Chuck Brockway, to Compel Discovery, and for an Expedited Hearing.*

BRIEF IN SUPPORT OF THE STATE OF IDAHO'S MOTIONS TO LIMIT
THE TESTIMONY OF BRYCE CONTOR, TO EXCLUDE THE TESTIMONY
OF CHUCK BROCKWAY, TO COMPEL DISCOVERY, AND FOR AN
EXPEDITED HEARING

I. MOTION TO LIMIT THE TESTIMONY OF BRYCE CONTOR

Mr. Contor was retained for his expert services and should not now be allowed to cloak his expert opinions under a veil of lay testimony. The record shows that “Mr. Contor had been retained to advise Mr. Jernberg regarding Water Right No. 31-11845.” Claimants/Objectors’ *Supplemental Answers to Interrogatories and Responses to Requests for Admissions and Production* at 5. On April 26, 2006, the Claimants/Objectors submitted the affidavit of Mr. Contor in support of their motion for summary judgment, in which Mr. Contor offers a list of expert opinions that include, but are not limited to, the following: “That in 2004, [Mr. Contor] measured the discharge of the two Jernberg wells and confirmed that the historical pumping capacity was still in place and in use;” “That the 1986 Idaho Department of Water Resources (IDWR) field exam correctly represented the irrigation in place at the time of the commencement of the Snake River Basin Adjudication on Jernberg’s ranch land because the 1986 IDWR field exam was based on actual field inspection while irrigation was occurring;” and “That [Mr. Contor] found 1100 acres were being irrigated in [his] photo analysis of Mr. Jernberg’s ranch.” *See Affidavit of Bryce A. Contor in Support of Motion for Summary Judgment* at 2–3.

Claimants/Objectors have continued to retain Mr. Contor for his professional services. At the deposition of Mr. Contor, it was discovered that Mr. Contor conducted a GIS analysis of the ditch system on the PPU in July of 2006, as well as an additional analysis of certain soil survey data. *See e.g. Analysis of Place-of-Use Elevations*, attached to the *Affidavit of David I. Stanish Dated November 17, 2006*.

The Claimants/Objectors have not identified Mr. Contor as an expert witness, however, but rather as a lay witness.

A. ANY TESTIMONY RELIANT UPON THE SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE OF MR. CONTOR SHOULD BE EXCLUDED

To the extent that Mr. Contor attempts to offer opinions based on the scientific, technical or other specialized knowledge that Mr. Contor gained as part of the professional services for which he was employed by the Claimants/Objectors, those opinions or inferences should be excluded.

Idaho Rule of Evidence 701 dictates that Mr. Contor, as a lay witness, cannot offer opinions or inferences that are “based on scientific, technical or other specialized knowledge within the scope of Rule 702.” *See* I.R.E. 701. Mr. Contor has been offered as a non-expert witness to “testify as to the beneficial use of the PPU over the last twenty years.” *See Answers to Interrogatories and Responses to Requests for Admissions and Production* at 4–5 and *Claimants/Objectors’ Supplemental Answers to Interrogatories and Responses to Requests for Admissions and Production* at 6–8. It is anticipated that Mr. Contor will attempt to offer opinions to the following: (a) the discharge rate of the wells on the PPU; (b) the number of acres irrigated based on his interpretation of thermal images of the PPU; (c) the capacity of the ditch system on the PPU based on his interpretation of GPS elevation data; (d) the number of irrigable acres for the PPU based on his analysis of NRCS soil survey data; (e) the reliability of the information contained in the IDWR 1987 beneficial use exam; and (f) a general statement as to beneficial use under water right no. 31-11845. All of these opinions and inferences require “scientific, technical or other specialized knowledge within the scope of Rule 702,” *see* I.R.E. 701, and require a level of understanding outside of the “common knowledge and experience of the average person.” *Dodge-Farrar v. American Cleaning Services Co., Inc.*, 137 Idaho 838, 843, 54 P.3d 954, 959 (Ct. App. 2002) (finding that a layperson may testify to the causation of

medical symptoms or injuries if it is within the usual and ordinary experience of the average person and if such testimony satisfies Idaho Rule of Evidence 701).

The State of Idaho has not received an expert report from Mr. Contor, and therefore, the State of Idaho has been deprived of the opportunity to fully and effectively prepare for any expert-related testimony by Mr. Contor. The purpose of the expert report requirement is to “impose[] an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.” F.R.C.P. 26 (commentary). The Court’s *Order Granting Motion to Vacate Trial Date and Third Amended Trial Schedule* was clear—all expert reports were to be submitted no later than October 31, 2006.

Claimants/Objectors should be held to their choice to have Mr. Contor testify as a lay witness rather than an expert witness; the Claimants/Objectors neither submitted an expert report for the State of Idaho’s review nor provided a statement of “the subject matter on which the expert [Mr. Contor] is expected to testify, the substance of the opinions to which the expert is expected to testify, and the underlying facts and data upon which the expert’s opinions are based.” *See Supplemental Answers to Interrogatories and Responses to Requests for Admissions and Production* at 7–8. Allowing Mr. Contor to testify to matters of an expert nature at this stage in the litigation would frustrate the purpose of the expert report requirement and would allow the Claimants/Objectors to circumvent the Court’s discovery order. With these interests in mind, the Court should exclude any opinions or inferences offered by Mr. Contor that are based on his “scientific, technical or other specialized knowledge.” *See* I.R.E. 701; *see also* I.R.C.P. 37(b) (authorizing a Court to sanction a party who disobeys a discovery order by “prohibiting that party from introducing designated matters in evidence”).

B. MR. CONTOR SHOULD NOT BE CONSIDERED AN EXPERT WITNESS

Claimants/Objectors should not now be allowed to re-characterize Bryce Contor as an expert witness. Mr. Contor has explicitly been offered as a lay witness and not as an expert witness. In their *Answers to Interrogatories and Responses to Requests for Admissions and Production* and their *Supplemental Answers to Interrogatories and Responses to Requests for Admissions and Production*, the Claimants/Objectors identified Bryce Contor as a “fact witness” who “can testify as to the beneficial use of the PPU over the last twenty years.” Mr. Contor was not one of the persons identified as an expert witness in either discovery response. A true and correct copy of pages four and five of the Claimants/Objectors’ original discovery response and pages six, seven, and eight of the Claimants/Objectors’ supplemental discovery response are attached to the *Affidavit of David I. Stanish Dated November 17, 2006*.

Furthermore, this Court’s *Order Granting Motion to Vacate Trial Date and Third Amended Trial Schedule* dated July 18, 2006 required all expert reports be submitted no later than October 31, 2006. The State of Idaho has not received an expert report from the Claimants/Objectors’ witness Bryce Contor.

C. MR. CONTOR’S TESTIMONY SHOULD BE LIMITED TO HIS PERSONAL OBSERVATIONS OF THE APPLICATION OF WATER TO THE JERNBERG PROPERTY

As a lay witness, Mr. Contor should be allowed to testify only in regard to his personal observations of the application of water on the Jernberg property. The State of Idaho does not dispute that Mr. Contor’s previous employment with the North Water Measurement District required him to drive the access road through the PPU. The State of Idaho does not dispute that Mr. Contor has personally walked portions of the PPU. The State of Idaho has no objection to Mr. Contor testifying to his personal knowledge of the application of water on the PPU.

The State of Idaho objects, however, to Mr. Contor offering opinions or inferences based upon the scientific, technical or other specialized knowledge that Mr. Contor gained in his professional capacity as a consultant to the Claimants/Objectors.

II. MOTION TO EXCLUDE THE TESTIMONY OF CHUCK BROCKWAY

Claimants/Objectors have failed to comply with this Court's *Order Granting Motion to Vacate Trial Date and Third Amended Trial Schedule* dated July 18, 2006, which required all expert reports be submitted no later than October 31, 2006. The State of Idaho has not received an expert report from the Claimants/Objectors' witness Chuck Brockway. The Claimants/Objectors should not be allowed to circumvent the Court's discovery order, and Mr. Brockway should be excluded from testifying in this matter. *See* I.R.C.P. 37(b) (authorizing a Court to sanction a party who disobeys a discovery order by "prohibiting that party from introducing designated matters in evidence").

Furthermore, allowing Mr. Brockway to testify would frustrate the purpose of the expert report requirement and prejudice the State of Idaho. As described by the Federal Rules of Civil Procedure, the purpose of the expert report requirement is to "impose[] an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." F.R.C.P. 26 (commentary). Without the benefit of an expert report, the State of Idaho has been deprived of both the opportunity to investigate the opinions to be offered by Mr. Brockway and the opportunity to arrange for a rebuttal witness. In this way, the State of Idaho will be prejudiced by the testimony of Mr. Brockway.

III. MOTION TO COMPEL DISCOVERY

A. IN THE EVENT THE COURT ALLOWS MR. BROCKWAY TO TESTIFY, THE COURT SHOULD COMPEL MR. BROCKWAY TO DISCLOSE ALL DOCUMENT RELATED TO HIS INVOLVEMENT IN THIS MATTER

In the event the Court allows Mr. Brockway to testify in this matter, the Court should order the Claimants/Objectors to supplement their answer to Interrogatory No. 7, which reads, in part:

For each such person identified [as an expert witness], please state the subject matter on which the expert is expected to testify, the substance of the opinions to which the expert is expected to testify, and the underlying facts and data upon which the expert's opinions are based.

See Supplemental Answers to Interrogatories and Responses to Requests for Admissions and Production at 7. Claimants/Objectors answer provides neither the substance of the opinions to which Mr. Brockway is expected to testify nor the underlying facts and data upon which Mr. Brockway's opinions are based:

Mr. Brockway is expected to testify regarded the hydrological system of the PPU for Water Right No. 31-11845. It is expected that Mr. Brockway will testify on the findings of the State's experts and their finds.

Supplemental Answers to Interrogatories and Responses to Requests for Admissions and Production at 7-8. This answer is entirely incomplete, especially given the level of detail and precision provided by the experts who complied with the discovery order and supplied an expert report. *See* I.R.C.P. 26(b)(4) (allowing for the discovery of "[a] complete statement of all opinions to be expresses and the basis and reasons therefore") (emphasis added).

In addition, and in the event the Court allows Mr. Brockway to testify in this matter, the Court should order Mr. Brockway to produce any and all documents related to his involvement in this matter.

B. THE COURT SHOULD COMPEL MR. CONTOR TO DISCLOSE THE CONTENTS OF CERTAIN EMAILS RELATED TO THIS MATTER

In the event the Court allows Mr. Contor to testify to matters related to Mr. Contor's scientific, technical or other specialized knowledge within the scope of Idaho Rule of Evidence 702, the Court should order Mr. Contor to disclose the contents of certain emails in Mr. Contor's possession.

On November 10, 2006, the above-captioned deputy attorneys general, David Barber and David Stanish, conducted the deposition of the Claimants/Objectors' witness Bryce Contor. In compliance with the State of Idaho's *Notice of Taking Deposition of Bryce Contor (Duces Tecum)*, Mr. Contor brought with him a number of documents and records related to this above-captioned matter. Among the records were three data CDs accompanied by hard copy indexes of the CDs' contents. Two of the CDs were marked as deposition Exhibits 13 and 14 and were turned over to the possession of the deputy attorneys general. The third CD contained, among other things, two emails written by Mr. Contor to the Claimants/Objectors' attorney, Michael Tribe. After some discussion off of the record, the following agreement was reached: Mr. Tribe objected on the record to the disclosure of the CD on the basis of an attorney work product privilege; and Mr. Tribe agreed to mail a copy of the CD's contents, excluding the objected-to emails, to the State of Idaho. The State of Idaho received a redacted copy of this CD on November 17, 2006.

If Mr. Contor is allowed to testify to matters of an expert nature, the objected-to emails should not be protected by the attorney work product privilege. Pursuant to Idaho Rule of Civil Procedure 26(b)(4)(i), the State of Idaho is entitled to discover "[a] complete statement of all opinions to be expressed and the basis and reasons therefore." Without the benefit of an expert

report or the disclosure sought under Interrogatory No. 7, the State of Idaho has been deprived of its right to the discovery authorized under Rule 26(b)(4)(i). The Court should compel discovery of the objected-to emails in order to ensure that the State of Idaho is provided the full opportunity to prepare for trial that it is entitled to under the rules of civil procedure.

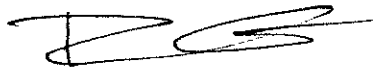
IV. CONCLUSION

Based upon the expert report requirements set forth in the Court's discovery order, the State of Idaho's motions to limit the testimony of Bryce Contor and to exclude the testimony of Chuck Brockway should be granted. Absent such relief, the Claimants/Objectors should be compelled to comply with the discovery requests set forth above.

RESPECTFULLY SUBMITTED this 17th day of November 2006.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



DAVID I. STANISH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 17th day of November 2006, I caused to be served the original and/or copy of this BRIEF IN SUPPORT OF THE STATE OF IDAHO'S MOTIONS TO LIMIT THE TESTIMONY OF BRYCE CONTOR, TO EXCLUDE THE TESTIMONY OF CHUCK BROCKWAY, TO COMPEL DISCOVERY, AND FOR AN EXPEDITED HEARING on each of the following persons by the indicated method.

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Claimant Ben Jernberg
Claimant Idaho Properties, LLC
Represented by:
Roger D. Ling
Michael P. Tribe
LING ROBINSON & WALKER
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Rupert, ID 83350

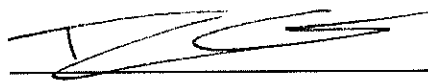
- ☐ U.S. Mail, postage prepaid
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IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

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Not Applicable



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