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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
	)	
Case No. 39576	)	RESPONSE TO STATE OF IDAHO'S
	)	MOTIONS TO LIMIT AND EXCLUDE
	)	TESTIMONY, TO COMPEL DISCOVERY
	)	<u>AND FOR AN EXPEDITED HEARING</u>

COME NOW the Claimants/Objectors, Ben D. Jernberg and Idaho Properties, LLC, by and through their attorney of record, Michael P. Tribe of the firm Ling, Robinson & Walker, and hereby responds to 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*. Based upon the State's motions, affidavit and brief, it is unclear when the expedited hearing is planned. In the *Notice of Hearing*, the expedited hearing was requested for November 17, 2006 at 9:00 a.m. Clearly that date has passed and the subject *Motion and Notice of Hearing* were not served via facsimile transmission on the objectors/claimants until well after 5:00 p.m. November 17, 2006. If the Court permits the *Motion*, claimants/objectors have prepared the following response:

RESPONSE TO STATE OF IDAHO'S MOTIONS

- 1 -

Regarding the testimony of Bryce Contor, Mr. Contor was initially listed as a fact witness but based on his expertise and background discovered by both parties throughout these proceedings, claimants/objectors will move to qualify Mr. Contor as an expert witness at the trial of this matter. At this time, the State has taken advantage of the fact that the discovery deadline in this matter was complete on October 31, 2006. However, this Court allowed a window for experts to be deposed from November 1 to November 17, 2006. Mr. Contor was deposed on November 10, 2006 with the understanding that the deposition was permissible because he would be an expert witness at the trial. The State now asks to have it both ways, to (1) exclude Mr. Contor as an expert witness while (2) using the court's filing schedule to its advantage which allowed the deposition of experts after the October 31 deadline. For that reason, Mr. Contor should be permitted to be qualified as an expert at trial. Mr. Contor was formerly an employee of the Idaho Department of Water Resources ("IDWR"), has a general background in licensing adjudication rights and has a general knowledge of soils, water measurement and all other aspects of the licensing process. Mr. Contor is expected to testify regarding IDWR processes and his personal observations of the claimants'/objectors' proposed place of use, as well his general knowledge of irrigation practices in the State of Idaho, specifically Jefferson County. The State has incurred no prejudice as it had the opportunity to depose Mr. Contor. No expert report was produced because Mr. Contor is no longer actively working on this case as he is currently employed with the State of Idaho and will be testifying only to matters in which he assisted Mr. Jernberg prior to his employment with the State.

Furthermore, in the *Order Granting Motion to Vacate Trial Date and Third*

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3 *Amended Trial Schedule* dated July 18, 2006, the Court gave an October 31, 2006 deadline to
4 complete discovery and submit expert reports. However, there is no rule in the Idaho Rules of
5 Civil Procedure which mandates an expert report nor does the State point to anything in the
6 record wherein the Court made submission of expert reports mandatory. It is
7 claimants'/objectors' attorney's understanding that expert reports are permissive and to be
8 provided merely for the Court's information. At page 2 of the State's *Brief* and on page 2 of the
9 State's *Motion to Limit the Testimony of Bryce Contor*, it is true that Mr. Contor was retained for
10 his expert services; however, paragraph two stating that claimants/objectors have continued to
11 retain Mr. Contor for his professional services is false. As of September of 2006, Mr. Contor
12 was no longer actively working on this case on behalf of the claimants/objectors because he was
13 then employed by the State of Idaho. The State's motion is untimely as this is not the proper
14 time to decide the merits of whether or not Mr. Contor can or will be qualified as an expert
15 witness at trial; that decision is for the Court to make at trial.
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18 As to the State's *Motion to Exclude the Testimony of Chuck Brockway*, claimants/
19 objectors likewise believe Mr. Brockway's testimony should not be excluded for failing to file an
20 expert report as the report was neither mandated by the Special Master nor is required under the
21 Idaho Rules of Civil Procedure. Mr. Brockway, however, will most likely not be called at the
22 trial of this matter.
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24 With regard to the State's *Motion to Compel Discovery*, at page 8 of the State's
25 *Brief in Support of the State of Idaho's Motions to Limit the Testimony of Bryce Contor, to*
26 *Exclude the Testimony of Chuck Brockway, to Compel Discovery, and for an Expedited Hearing,*
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3 the State requests the Court to compel Mr. Contor to disclose the contents of certain emails with
4 regard to this matter. The subject emails were personal communication between Mr. Contor and
5 claimants'/objectors' attorney of record. Rule 26(b)(3) of the Idaho Rules of Civil Procedure
6 states:
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8 [A] party may obtain discovery of documents and tangible things
9 otherwise discoverable under subdivision (b)(1) of this rule and prepared
10 in anticipation of litigation or for trial by or for another party or by or for
11 that other party's representative (including the party's attorney, consultant,
12 surety, indemnitor, insurer, or agent) only upon a showing that the party
13 seeking discovery has substantial need of the materials in the preparation
14 of the party's case and that the party is unable without undue hardship to
15 obtain the substantial equivalent of the materials by other means. In
16 ordering discovery of such materials when the required showing has been
17 made, the court shall protect against disclosure of the mental impressions,
18 conclusions, opinions, or legal theories of an attorney or other
19 representative of a party concerning the litigation, including communi-
20 cations between the attorney and client, whether written or oral.

21 The State has all relevant material that Mr. Contor prepared or reviewed as a prior consultant for
22 claimants/objectors in this matter and Mr. Contor should not be prevented from testifying at the
23 case nor should the objection to emails be compelled.
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25 Wherefore, claimants/objectors pray that:

26 1. The State's *Motion* to limit the testimony of Bryce Contor be denied based
27 upon a lack of an expert report requirement set forth in the Court's discovery order and that
28 claimants/objectors not be compelled to comply with the State's discovery requests set forth in
its *Motion* and *Brief*; and

2. The State's request for an expedited hearing should be denied as this
matter should be addressed at the time of trial.

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3 Respectfully submitted, this 21st day of November, 2006.

4 LING, ROBINSON & WALKER

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6 By: Michael P. Tribe
7 Michael P. Tribe
8 Attorneys for Claimants/Objectors
9 Ben D. Jernberg and Idaho Properties, LLC
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11 CERTIFICATE OF MAILING

12 I hereby certify that on the 21st day of November, 2006, I caused to be served a
13 true and correct copy of the foregoing *Response to State of Idaho's Motions*, by the method
14 indicated below, and addressed to the following:

15 David J. Barber
16 Deputy Attorney General
17 State of Idaho
18 P. O. Box 44449
19 Boise, Idaho 83711-4449

☒ U. S. Mail
☐ Hand Delivery
☒ Facsimile Transmission (208) 334-2690

20 Michael P. Tribe
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