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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, <i>et al.</i> (see attached Exhibit A)
	)	
	)	
	)	
Case No. 39576	)	STATE OF IDAHO'S BRIEF IN SUPPORT OF
	)	MOTION TO STRIKE AFFIDAVIT OF JOSEPHINE P.
	)	BEEMAN IN SUPPORT OF POCA TELLO'S POST-
	)	TRIAL BRIEF
_____	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general,
and submits the *State of Idaho's Brief in Support of Motion to Strike Affidavit of Josephine P.*
Beeman in Support of Pocatello's Post-Trial Brief in the above-entitled matter.

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I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

The State of Idaho filed a *Motion to Strike Affidavit Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* on May 3, 2007. The matter is set for hearing on May 4, 2007.

ii. Course of the Proceedings

The district court entered its *Eighth Amended Trial Scheduling Order* on November 21, 2006 and set this matter for five days of trial commencing on February 26, 2007.

The district court entered its *Amended Order Setting Deadlines and Additional Pretrial Conference* on January 29, 2007. This order set the date of February 14, 2007 as the deadline to file trial briefs and exchange witness/exhibit lists.

The district court entered its *Order Granting Pocatello's Motion for One-Day Extension of Time to File Trial Memorandum and Exchange Witness/Exhibit Lists* on February 15, 2007.

The City of Pocatello, hereinafter the "City," filed the City's *Notice of Service of Pocatello's Witness and Exhibit List* on February 16, 2007, which evidenced the City's service of *Pocatello's Witness and Exhibit List* on the State of Idaho on or about February 15, 2007.

When the trial did not conclude on February 26, 2007, the district court entered its *Notice Setting Hearing* on March 6, 2007, which set the matter for one additional day of trial on March 8, 2007. The district court stated as follows on the commencement of the trial on March 8, 2007: "We are scheduled, as you know, for the final day of trial in the City of Pocatello's State-based claims." Tr. Vol. VI, p. 1012, L. 9-11. The trial concluded on March 8, 2007.

The City served the following documents on the State of Idaho by hand delivery on the afternoon of April 30, 2007: (1) *Pocatello's Post-Trial Brief* and (2) an *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief*, hereinafter "*Beeman's Affidavit*." The

second document purports to authenticate eleven additional exhibits. None of these exhibits were introduced into evidence at trial; none of these exhibits are listed on *Pocatello's Witness and Exhibit List*.

The State of Idaho filed its *Motion to Strike Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief, Brief in Support of Motion to Strike*, and *Notice of Hearing* on May 3, 2007. This matter was set for hearing on May 4, 2007 at 10:00 a.m.

ARGUMENT

I. THE PRE-TRIAL ORDERS PRECLUDE CONSIDERATION OF *BEEMAN'S AFFIDAVIT IN SUPPORT OF POCATELLO'S POST-TRIAL BRIEF*.

I.R.C.P. 16(d) states in part as follows:

After the conference, the court shall make an order which recites the action taken at the conference . . . and **such order when entered controls the subsequent course of action**, unless modified at the trial to prevent manifest injustice.

(Emphasis added).

I.R.C.P. 16(h) states in part as follows:

In the event no final pre-trial conference is held, **the court may enter an order directing the parties to file with the court and serve on all opposing counsel . . . a list of all exhibits to be offered at trial . . .** Any exhibits . . . discovered after such disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered. **Failure to comply with this rule may be grounds for excluding an exhibit from admission into evidence . . .**

(Emphasis added).

Here, the district court entered its *Eighth Amended Trial Scheduling Order* on November 21, 2006 and set this matter for five days of trial commencing on February 26, 2007. When the trial did not conclude on that date, the district court entered its *Notice Setting Hearing* on March 6, 2007, which set the matter for one additional day of trial on March 8, 2007. The trial concluded on March 8, 2007.

The City has filed "*Beeman's Affidavit*," on April 30, 2007. It purports to authenticate eleven additional exhibits for consideration by the district court. *Pocatello's Witness and Exhibit List* does not list any of the documents that are attached to *Beeman's Affidavit*.

In *Zolber v. Winters*, 109 Idaho 824, 712 P.2d 525 (1986) the Court concluded that a litigant "had the right to accept the answers to the interrogatories as true." 109 Idaho at 829, 712 P.2d at 530. Later, the Court summarized *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978) by stating that "since the plaintiff never supplemented his responses to include the accident related heart attack, he violated basic principles of discovery by attempting to present a case at trial substantially different than that revealed in discovery proceedings." 109 Idaho at 531, 712 P.2d 830. The Fifth Circuit Court of Appeals characterized the trial in *Shelak v. White Motor Co.* as a "trial by ambush" and succinctly stated the consequence of an inadequate disclosure of an opponent's contention as follows: "There was a day when litigants learned their opponents' contentions during trial. That day is said to have ended . . . [citations omitted] Affirmance of this case would authorize its return." 581 F.2d at 1159-1160.

The City is engaging in trial by ambush. These documents are not documents that were recently discovered as contemplated in I.R.C.P. 16(h). Rather, many of these documents appear to have been in the possession of the City for a long period of time. The offering of these exhibits at this time is simply a trial strategy of ambush by the City. The State of Idaho had a right to rely on the exhibit list submitted by the City. The district court has no basis to consider these documents because the trial has concluded; the fact finding has ended. The district court should not allow the City to make a case substantially different from what it represented in its own exhibit lists.

II. ASSUMING ARGUENDO THAT THE COURT FINDS DOCUMENTS ATTACHED TO THE AFFIDAVIT OF JOSEPHINE P. BEEMAN IN SUPPORT OF POCATELLO'S POST-TRIAL BRIEF WERE TIMELY OFFERED, SOME OF THE DOCUMENTS ARE INADMISSIBLE ON OTHER GROUNDS.

The State of Idaho has the following comments on the exhibits attached to the *Beeman's Affidavit*:

Exhibit 1 is described as "a true and correct copy of the State's Opening Brief, dated November 17, 1995, in the case of *Freemont-Madison v. IGWA and State*, [sic] Supreme Court Nos. 22354/22355." This description is a misstatement. Counsel has made notations in the brief regarding statements that counsel believes to be relevant in this matter. These notations appear on pages 12, 14, 17, and 18.

Exhibit 2 is described as "a true and correct copy of the State's Reply Brief, dated December 29, 1995, in the case of *Freemont-Madison v. IGWA and State*, [sic] Supreme Court Nos. 22354/22355." This description is a misstatement. Counsel has made notations in the brief regarding statements that counsel believes to be relevant in this matter. These notations appear on page 9.

Exhibit 3 is described as a "true and correct copy of the Idaho Department of Water Resources' Reply Brief, dated November 29, 2006, in the case of *American Falls Reservoir District #2, et al. and Rangen, Inc. et al. v. IDWR and IGWA*, Supreme Court Nos. 33249/33399. This document is not relevant to this proceeding.

Exhibit 4 is described as "a true and correct copy of the Pocatello's federal law water right claim." This document is not relevant to this proceeding.

Exhibit 6 is described as "a true and correct copy of the Draft Statewide Water Management Rules, dated July 6, 2001, interlineated with general comments by various attorneys, which was published for distribution at the June 24, 2002 Idaho Water Users

Association Conjunctive Administration Workshop in Sun Valley, Idaho.” This document is inadmissible hearsay.

Assuming *arguendo* that the consideration of the admissibility of the eleven exhibits was timely, five of the exhibits are inadmissible on other grounds.

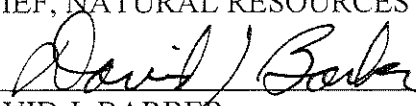
CONCLUSION

The district court should strike the *Beeman's Affidavit*, since it was submitted in violation of the various pre-trial orders of this court. Even if the district court determines to review the admissibility of the eleven exhibits, five of the documents are inadmissible for the reasons stated.

RESPECTFULLY SUBMITTED this 3rd day of May 2007.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION



DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 3rd day of May 2007, I caused to be served the original and/or copy of the *State of Idaho's Brief in Support of Motion to Strike Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* on each of the following persons by the indicated method:

1. One 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: _____
☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
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: _____
☐ Statehouse Mail

City of Pocatello
c/o Josephine P. Beeman
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702

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

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

Jeanette Wolfley
Attorney at Law
202 North Arthur
Pocatello, ID 83204

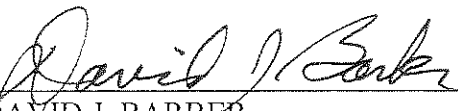
- ☒ U.S. Mail, postage prepaid
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IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail, postage prepaid
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- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief of Natural Resource Division
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State of Idaho
P.O. Box 44449
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Not Applicable



DAVID J. BARBER
Deputy Attorney General

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07322
29-07375
29-07450
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