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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 63-03174
	)
Case No. 39576	) ORDER STRIKING PORTIONS OF
	) SUPPLEMENTAL DIRECTOR'S
	) REPORT;
	)
	) ORDER GRANTING STATE OF
	) IDAHO'S MOTION FOR PROTECTIVE
	) ORDER

On January 18, 2008, the State of Idaho, by and through Deputy Attorney General James D. Carlson, filed the *State of Idaho's Motion for Protective Order (Motion)*, seeking a protective order pursuant to I.R.C.P. 26 (c) vacating the oral depositions of Deputy Attorneys General Garrick L. Baxter and Andrea L. Courtney. The *Motion* was accompanied by a memorandum in support thereof and the affidavits of Garrick L. Baxter and Andrea L. Courtney. On January 22, 2008, the claimant of the above-captioned water right, Jerry L. Tlucek and Mary Lou Tlucek, by and through their attorneys Scott L. Campbell and Dylan B. Lawrence, filed a *Response to State of Idaho's Motion for Protective Order*. The matter was heard on January 22, 2008.

The issues involved in the State's *Motion for Protective Order* originate with the *Supplemental Director's Report Regarding Subcase No. 63-3174* filed on September 14, 2007. The Department filed the *Supplemental Director's Report* in response to the ***Order Requesting 706 Report from IDWR***, filed April 25, 2007, which asks IDWR to explain the basis for its inclusion of an annual volume limitation, expressed in acre-feet per year (AFY) in the *Director's Report* for the subject water right claim. For the most part, the *Supplemental Director's Report* consists of legal analysis regarding the Department's conclusion that it is authorized by "statute, practice, and policy" to include the AFY

limitation in the *Director's Report* for the claim, even though the license on which the claim is based has no such expressed limitation.

On January 4, 2008, the Tluceks filed a *Motion for Summary Judgment*, together with a *Brief* in support thereof, and the *Affidavit of Scott Campbell in Support of Motion for Summary Judgment*. Oral argument on summary judgment is scheduled for February 1, 2008. In their *Brief*, the Tluceks raise and argue the issue of whether the *Supplemental Director's Report* complies with the Idaho Rules of Evidence. Specifically, the Tluceks argue that the *Supplemental Director's Report* is a legal brief as opposed to an expert report pertaining to facts, and secondly, that it was the Department's attorneys who wrote the report, not qualified experts with specialized scientific or technical expertise. Accordingly, the Tluceks argue, the SRBA Court "should totally disregard the Supplemental Director's Report." *Brief* at p. 4. As explained below, this Special Master agrees in part with the Tluceks that the those sections of the *Supplemental Director's Report* that set forth legal argument --as opposed to factual analysis -- do not entirely comply with the Idaho Rules of Evidence regarding expert reports and expert testimony. Although IDWR's role is similar to that of an expert to which I.R.E. 706 typically applies, it is not identical.

The role of the Director in the adjudication is defined by I.C. § 42-1401B which provides:

Role of the director in an adjudication. – (1) The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

(2) The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.

(3) The director shall not be a party to an adjudication.

I.C. § 42-1401B. The purpose of the 706 report is to provide the litigants with the underlying basis for the Director's recommendation. As such an accurate explanation requires that the department provide a factual analysis and state the rule of law on which

it relied in forming the recommendation. Excluding the legal basis for the recommendation undermines the utility of the 706 report, and it is therefore appropriate for a 706 report prepared by the department to include some discussions of law. That being said, in the instant case the *Supplemental Director's Report* was very light on factual analysis¹, and the legal analysis therein goes beyond a foundational statement to the point of advocacy.

This ruling should not be construed so as to wholly prevent IDWR from making statements to the SRBA Court, whether in "706 Reports" or otherwise, as to the legal foundations under which IDWR conducts its business.² Obviously the Department is required to have a very detailed and comprehensive understanding of the body of law in Idaho concerning water rights and the administration thereof. For example, assume that IDWR had recommended a water right disallowed by reason of five years non-use. In a 706 report regarding such a case, the report would be expected to include a discussion of the factual information that IDWR relied upon in making its conclusion of non-use, and a discussion of IDWR's expert analysis and interpretation of that information. Such a report would be incomplete without at least a reference to Idaho's forfeiture statute, I.C. § 42-222, as well as any relevant case law on the subject, and any relevant Department administrative rules, policies, guidelines, etc. In other words, it is not improper for an expert to make a foundational statement as to his or her understanding of the law relevant to their area of expertise. This is particularly true for IDWR, which is obligated to recommend water rights in accordance with Idaho law.

¹ The deposition testimony of Dave Tuthill, Jr., Exhibit B to the *Affidavit of Scott L. Campbell in Support of Motion for Summary Judgment* provides several examples of factual information that could have been included in the *Supplemental Director's Report*, but was not. On pages 27-28, Director Tuthill explains how in the 1970's IDWR developed a map showing irrigation requirements statewide, and how that study has been updated since that time. On pages 22-24, Director Tuthill explains that for the Boise Valley, 4.5 acre-feet per acre is adequate for irrigation purposes based upon a 60% to 70% efficiency, and how, as a practical matter, the 4.5 acre feet limitation wouldn't limit water usage unless the user were to be extremely inefficient in applying water. On pages 25-26, Director Tuthill explains that the volumetric limitations imposed by IDWR are based upon the highest consumptive-use crops that could be grown in the area. Finally, on pages 78-84 of the deposition testimony of Don V. Shaff (Exhibit A to *Campbell Aff.*), Mr. Shaff discusses IDWR's perspective on why volumetric limitations on groundwater irrigation rights are necessary for purposes of water rights administration and forecasting future water supplies.

² It should also be noted that the legal conclusions of the Department are not afforded *prima facie* weight pursuant to I.C. § 42-1411(4) as are its factual conclusions.

On balance, because the legal basis of the Director's recommendation is not binding on the Court, and the case will not be tried to a jury, in the interests of avoiding delay, **Section III. C. of the *Supplemental Director's Report* is hereby stricken from the record in this subcase and will not be considered by this Special Master.**

Because of the striking of the section of the *Supplemental Director's Report* that would be pertinent to the Tluceks desired depositions of Deputy Attorneys General Baxter and Courtney, this Special Master does not need to decide the issues presented herein which juxtapose the I.R.E. 706 right to depose the expert with the attorney-client privilege set forth in Idaho Rule of Professional Conduct 502.

In accordance with the foregoing, the State's *Motion* for a protective order is **granted** pursuant to I.R.C.P. 26(c), and the subpoenas of Deputy Attorneys General Baxter and Courtney are **quashed** pursuant to I.R.C.P. 45(d).

Dated

Jan 29, 2008



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER STRIKING PORTIONS OF SUPPLEMENTAL DIRECTOR'S REPORT ORDER GRANTING STATE OF IDAHO MOTIONFOR PROTECTIVE ORDER was mailed on January 29, 2008, with sufficient first-class postage to the following:

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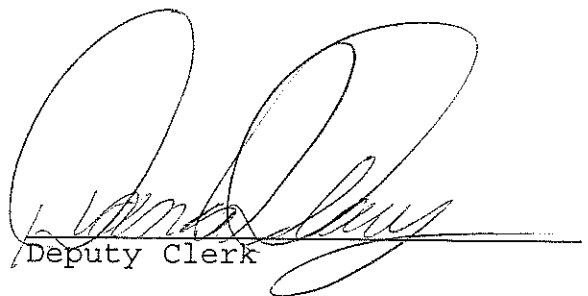
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A large, stylized handwritten signature in black ink, likely belonging to the Deputy Clerk mentioned in the footer. The signature is written over a horizontal line.