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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 STATE OF IDAHO'S
	)	MOTION TO ALTER OR AMEND SPECIAL
Case No. 39576	)	MASTER'S MEMORANDUM DECISION AND
	)	ORDER RE: COSTS AND ATTORNEYS FEES
	)	
	)	
	)	

The State of Idaho, by and through the undersigned deputy attorney general, lodges this
*Brief in Support of State of Idaho's Motion to Alter or Amend Special Master's Memorandum
Decision and Order Re: Costs and Attorneys Fees.*

I. STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDINGS

This case involves a dispute over the discretionary costs awarded by the Court in the
litigation of an objection to the Director's Recommendation of a water right.

B. COURSE OF THE PROCEEDINGS

The Snake River Basin Adjudication District Court entered a partial decree for water right no. 31-2395 on February 22, 2002. The quantity was limited to 3.65 c.f.s. and 1,134 AFY.

The Director recommended water right no. 31-11845 with a quantity of 4.99 c.f.s. and with a combined use limitation that read as follows: "Right nos. 31-2395 and 31-11845 are limited to a total combined diversion rate of 6.48 cfs and to a total combined annual diversion volume of 1134 AF." The basis for the combined use limitation was that the places of use for water right nos. 31-2395 and 31-11845 were identical.

The claimant objected to the quantity described for water right no. 31-11845 and to the combined use limitation.

The Court entered its *Order Granting Motion Requesting Additional Time and Second Amended Trial Schedule* on April 5, 2006. The *Order* directed that "[t]he parties shall schedule a field examination the 3rd week of May or shortly thereafter, depending on weather." A field examination occurred on May 15, 2006.

The claimant filed a *Motion for Summary Judgment, Affidavit of Michael P. Tribe, Affidavit of Ben D. Jernberg, and Affidavit of Bryce A. Contor* on April 28, 2006 and lodged a *Memorandum in Support of Motion for Summary Judgment*. The *Affidavit of Bryce Contor* stated that "this affiant found 1100 acres were being irrigated in my photo-analysis of Mr. Jernberg's ranch [using a 1987 photo]. . . . Your affiant found nothing that would contradict IDWR's 1986 finding that Mr. Jernberg was irrigating 1124 acres."¹ The *Affidavit of Ben D. Jernberg* stated "[t]hat when water is available, this affiant flood irrigated the entire 663 acres

¹ This statement applied to the entire acreage then previously licensed under water right no. 31-7311.

of pasture that was originally listed in the conditions of Water Right no. 31-7311.” *Id.* at 1 (emphasis added).

On May 26, 2006, the State lodged a *Brief in Opposition to Motion for Summary Judgment* and filed the *Affidavit of Carter Fritschle Dated May 19, 2006* in support of its brief. Both documents included pictures taken from the field examination on May 15, 2006 to show the present condition of the place of use.

On May 26, 2006, the Idaho Department of Water Resources (“IDWR”) filed a *Supplemental Director’s Report Regarding Subcase No. 31-11845*. The *Supplemental Director’s Report* stated: “[t]he field inspection also led the Department to believe that much of the pasture land is at a little higher elevation than the ditches and thus, cannot be watered with the distribution system in place.” *Supplemental Director’s Report* at 13.

On May 30, 2006, the claimant filed an *Affidavit of Joe Llamas in Support of Motion for Summary Judgment* (hereinafter “*Llamas Aff.*”) and a *Second Affidavit of Michael P. Tribe in Support of Motion for Summary Judgment* and lodged a *Reply Memorandum in Support of Motion for Summary Judgment*. Mr. Joe Llamas stated:

Your affiant has irrigated all the lands on Jernberg’s Mud Lake ranch as recently as 2002. . . . When water was available, I helped pump the full capacity of Mr. Jernberg’s two wells onto all of the pasture and dry graze owned by Mr. Jernberg.

Llamas Aff. at 2.

The *Reply Memorandum* argued that “[a]ny evidence the State has produced regarding the current condition of the uncultivated pasture is irrelevant. . . . A true picture of the beneficial use cannot be gleaned from the photographs taken by Fritschle” *Id.* at 5–6. Counsel for the claimant argued at the summary judgment hearing that “when water has been put to that field,

the grass grows high enough that it even covers most of that space.” Tr. June 2, 2006 Hearing, p. 23, L. 19–21.

The IDWR filed a letter dated June 1, 2006 with the Court that advised the Court of an additional field inspection to prepare a topographic map of the place of use. The Department conducted the field inspection and sent its topographic map to the parties on June 27, 2006.

The Court held a status conference on June 28, 2006. Counsel for the State addressed the issue of the topographic map in the following statement at the status conference: “The problem that I have with the map, it’s got a lot of wonderful information on it, but it appears to be missing data along the elevations, . . . so you can’t really tell, make some final conclusions, about some of the aspects of what can be taken down the ditch and what can’t be.” Tr. June 28, 2006 Hearing, p. 5, L. 9–15. Ms. McHugh, IDWR attorney, responded as follows: “The department is aware of and has taken note of Mr. Barber’s concern and actually had some discussion, but we just hadn’t had a chance to have a meeting. But this afternoon we discussed some concerns that we also had here about whether we needed some supplemental information, we would do that and then provide it to the court and the parties with a final copy of the map along with a brief explanation of what the department’s conclusions would be from the map.” Tr. June 28, 2006 Hearing, p. 9, L. 10–22.

Counsel for the State also made the following statement about the soils at the permissible place of use: “As I advised the court and the parties in the informal discussion, a day or two before our last status conference, I made a determination to get a copy of the soil survey for this area. When I did that and looked at it, it appeared that most of **the land that was within the place of use for this water right was classified by the soil conservation service at the time as not irrigable.**” Tr. June 28, 2006 Hearing, p. 6, L. 6–14 (emphasis added). Counsel for the State

continued later in the hearing: “I think, though, to assist Mr. Tribe and Mr. Ling, the soil stuff I need to get that to him. And I will represent to the court, I will make my best effort to get the map I have prepared along with the descriptions or the soil copied . . . and send a letter to Mr. Tribe and Mr. Ling today so they can look at the evidence that will at least be offered by the state of Idaho.” The State transmitted that information to the claimant on June 28, 2006 by facsimile and by U.S. Mail. *See* Letter from Barber to Ling of 6/28/06 at 1.

The State filed its *Motion to Vacate Trial Date, To Enter an Amended Trial Schedule Order, and to Request an Expedited Hearing* on July 10, 2006. One of the purposes of the motion was to provide time for an on-the-ground review of the soils. In support of the motion, the State also filed *Exhibit 23: Affidavit of Norman C. Young Dated July 11, 2006*, which explained that the consulting firm for whom he worked had conducted extensive review of the soils on the Duck Valley Indian Reservation. *Id.* at 2. The Court thereupon entered its *Order Granting Motion to Vacate Trial Date and Third Amended Trial Schedule* on July 18, 2006.

The State of Idaho then filed on August 14, 2006, its *Motion to Shorten Time, To Compel Discovery, and for an Expedited Hearing* after claimants refused to allow soil sampling on the claimant’s property. The matter was heard on August 15, 2006, and the following colloquy occurred between the Court and counsel for the State of Idaho:

THE COURT: Mr. Barber, if I might ask one question that occurred to me, and it may relate a little bit to Mr. Tribe’s objection. . . . I’m just wondering, I haven’t seen a lot of soil testing in the SRBA, and I know you’ve done some soil testing in other litigation. Is there—Mr. Tribe seems to be saying, if I’m reading between the lines correctly, that—why do we need soil samples in the SRBA? Can you give us any sort of context for why, in this kind of situation, you think that—and I guess my concern, too, is, it’s a more invasive kind of a test than we’ve had in other cases. What’s the background for that?

MR. BARBER: Let me address that. First off, let me provide you a little background that I believe Mr. Young, in the affidavit that we filed in July, addressed it briefly. . . .

. . .

MR. BARBER: Let me tell you what's happened. I don't think the Court is perhaps aware of that. We've had several different Federal Reserve[d] Water Right Matters before the Court. One of those was with the Fort Hall Indian Reservation. That did not involve any soil testing. We never got to that point in time.

We did in the Shoshone Paiute/Duck Valley matter. And certainly, if you look at the expert reports prepared by the United States, they did a very thorough soil analysis. We had an outfit in the field last summer, digging pits all over the place, out there at the Indian Reservation. And it was the same issues we're addressing here, and that is whether this land can really be beneficially irrigated.

Now, that was in the context of a Federal Reserve[d] Water Right. But when you come down to it, the measure of that water right is a practicably irrigable acre standard. Whether, in fact, you can irrigate land is also an issue on a State-based water right. It's an issue of whether there's a beneficial use here and what you can do with that land.

Tr. August 15, 2006 Hearing, p. 13, L. 18–p. 15, L. 12.

IDWR filed its *Second Supplemental Director's Report Regarding Subcase No. 31-11845* on September 28, 2006, which stated, in part, as follows:

After reviewing all the data that was developed by the topographic survey and notes and field observations, the Department concludes that 324.5 acres is the maximum possible number of irrigated acres within the claimed place of use for water right nos. 31-11845 and 31-2395.

Id. at 4–5.

On October 31, 2006, the State served the following expert reports on the Objectors:

1. Dr. J. Wayne Burkhardt, *Vegetation Reconnaissance of the Jernberg Property Relative to Irrigation Water Rights Claims* [hereinafter *Exhibit 24: Expert Report of Dr. J. Wayne Burkhardt*].²
2. Glen H. Logan, *Expert report of Glen H. Logan, Professional Soil Scientist, regarding the Physical and Chemical Characteristics of soils on 672.9 acres of land in Jefferson County, Idaho* [hereinafter *Exhibit 25: Expert Report of Glen H. Logan*].
3. Robert W. Hill, Ph.D., P.E., *Expert Report of Dr. Robert W. Hill Regarding the Snake River Basin Adjudication Case No. 39576; Subcase No. 31-11845; Evaluation of Beneficial Use of Uncultivated Land near Mud Lake in Southeastern Idaho* [hereinafter *Exhibit 26: Expert Report of Robert W. Hill*],

² The State of Idaho retained the numbering assigned to these expert reports from its *Second Amended Exhibit List*.

Ph.D., P.E.].

4. David B. Shaw and Norman C. Young, *Expert Report of David B. Shaw and Norman C. Young Evaluating Diversion and Beneficial Use of Water Under Claim No. 31-11845 (Idaho Properties, LLC.)* [hereinafter *Exhibit 27: Expert Report of David B. Shaw and Norman C. Young*].

Notice of Service of State of Idaho's Reports of Expert Witnesses at 1-2.

The claimant served the expert report of Dale Stukenholtz on the State on October 31, 2006.

The State wrote counsel for the claimant on October 16, 2006, and stated as follows:

The Respondent, State of Idaho, has reviewed the offer of judgment that it received in your letter dated October 6, 2006, and declines the offer of judgment for the following reasons:

The experts for the State of Idaho have conducted an extensive review of the amount of beneficial use that has occurred within the permissible place of use for water right no. 31-11845. Our expert on soils has concluded that very little of the land, which is classified as soil type 93 within the permissible place of use, can be considered irrigable because of the extreme stony nature of the soil, among many other reasons. The acreage of this soil type 93 within the permissible place of use is 351.9 acres. Furthermore, the analysis of topography by the Idaho Department of Water Resources establishes that much of the permissible place of use cannot be physically irrigated within the existing ditch system. The inability of the existing ditch system to irrigate much of the permissible place of use is confirmed by Idaho's forage expert. He found sagebrush that was over twenty years of age within the permissible place of use shows that irrigation of that land has not occurred.

The experts for the Respondent State of Idaho are continuing to work on their expert reports. The Respondent State of Idaho has incurred substantial expert witness fees to date and continues to incur substantial fees on a daily basis in the amount of several thousand dollars a day. If there is going to be a settlement in this matter, it needs to occur now.

Ex. 1 to Affidavit of David I. Stanish Dated January 30, 2009.

The State wrote counsel for the claimant again on October 30, 2006, and stated as follows:

The State of Idaho declines the offer of judgment for the same reasons that it declined the Claimants/Respondent's October 6, 2006 offer of judgment.

Again, the Respondent State of Idaho has incurred substantial expert witness fees to date and will continue to do so as its experts are deposed and its experts prepare for trial. If there is going to be a settlement in this matter, it needs to occur now.

Ex. 2 to *Affidavit of David I. Stanish Dated January 30, 2009*.

On November 29, 2006, the claimant filed a *Motion in Limine and Request for Expedited Hearing* and lodged a *Memorandum in Support of Motion in Limine*. The motion sought to exclude the expert reports of Glen Logan and Dr. Wayne Burkhardt “because the danger of unfair prejudice, confusion of the issues or waste of time substantially outweigh their probative value.” Objectors’ Mem. Supp. Motion in Limine at 2.

On April 3, 2007, an SF-5 was filed in this subcase.

The State lodged the *State of Idaho’s Memorandum of Costs and Attorney Fees* on April 17, 2007.

The claimant filed its *Objection to State’s Memorandum of Costs and Attorney Fees* on May 4, 2007.

The State lodged its *Brief in Support of the State of Idaho’s Memorandum of Costs and Attorney Fees* on June 28, 2007 and filed its *Affidavit of David J. Barber Dated June 27, 2007* on June 28, 2007.

The State filed the *State of Idaho’s Motion for Costs and Attorney Fees* on July 24, 2007. The Court entered its *Order of Reference Appointing Special Master Bilyeu* on July 24, 2007, which stated as follows:

A Memorandum of Costs and Attorneys Fees was timely filed by the State of Idaho. On July 24, 2007, a Motion for Costs and Attorneys Fees was filed by the State of Idaho for the above-captioned water right.

Therefore, IT IS ORDERED that Special Master Brigitte Bilyeu be appointed to preside over the above-captioned Motion and conduct all necessary proceedings necessary to issue a recommendation consistent with *AOI*, and the authority previously conferred in the *Order of Reference for Basin 31*, as to the

Motion and to the underlying merits.

Id. at 1.

Special Master Bilyeu issued a *Memorandum Decision and Order Re: Costs and Attorneys Fees* (hereinafter “*Memorandum Decision*”) on December 31, 2008. The Court made the following awards:

- (1) the amount of \$442.50 for the costs for witness Dr. Dale Stukenholtz and
- (2) the amount of \$2,012.10 for deposition reporting and transcribing.

Memorandum Decision at 8-9. The Court later summarized its order with the following statement: “The court awards the State of Idaho Costs of Right in the amount of \$2,054.60.” *Id.* at 12.

The SRBA District Court issued the Docket Sheet for December 2008 on January 9, 2009. The *Memorandum Decision* for subcase no. 31-11845 does not appear in the Docket Sheet for December 2008.

II. ARGUMENT

A. THE DISTRICT COURT SHOULD CORRECT THE ARITHMETIC ERROR THAT IT MADE IN ASSESSMENT OF COSTS IN THIS MATTER.

The Court concluded that the State was entitled to costs as follows:

- (1) \$442.50 for deposition costs of Dr. Dale Stukenholtz; and
- (2) \$2,012.10 for deposition reporting and transcribing costs.

Memorandum Decision at 8–9. However, when the Court later summarized its decision, it incorrectly stated that the total amount was \$2,054.60. *Id.* at 12. The sum of \$442.50 and \$2012.10 is \$2,454.60. The State respectfully requests the Court to correct its *Memorandum Decision* to reflect that amount.

B. GIVEN THE EXTRAORDINARY NATURE OF THE ISSUES IN THIS CASE, THE REQUESTED DISCRETIONARY COSTS WERE QUITE EXCEPTIONAL AND THEREFORE SHOULD HAVE BEEN AWARDED UNDER I.R.C.P. 54(d)(1)(D).

A critical factual determination in analyzing whether a cost is exceptional is whether this class of cases “generally involves” the type of costs claimed. *See Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). This case satisfies that requirement. Typically, trials of an objection to a Director’s Recommendation to a water right acquired under state law involving a claim that the land cannot be beneficially irrigated do not require a determination of the nature of the soil at the place of use. The Court noted this fact when the Court asked the following question of counsel for the State of Idaho at the hearing held on August 15, 2006:

THE COURT: Mr. Barber, if I might ask one question that occurred to me, and it may relate a little bit to Mr. Tribe’s objection. . . .I’m just wondering, **I haven’t seen a lot of soil testing in the SRBA**, and I know you’ve done some soil testing in other litigation. Is there—Mr. Tribe seems to be saying, if I’m reading between the lines correctly, that—why do we need soil samples in the SRBA? Can you give us any sort of context for why, in this kind of situation, you think that—and I guess my concern, too, is, it’s a more invasive kind of a test than we’ve had in other cases. What’s the background for that?

Tr. August 15, 2006 Hearing, p. 13, L. 18–p. 15, L. 12 (emphasis added). How many trials have involved the claim that the irrigation ditches cannot deliver the water to the place of use because the claimant is attempting to run water uphill? How many trials have involved the claim that the value of the claimed beneficial use is less than the cost of delivering the water to the fields? If federal reserved water right matters are excluded from consideration because of their unique factual and legal issues, the State has never participated in the litigation of a single subcase in the Snake River Basin Adjudication that has involved the number of experts or the complexity of the

issues that the present case involved. If this case cannot be classified as “exceptional,” then none can. Most respectfully, the State requests the Court to reconsider its conclusion on this issue.

C. THE REQUESTED DISCRETIONARY COSTS WERE ALSO NECESSARY, GIVEN THE EXTRAORDINARY NATURE OF THE ISSUES AND THE COURSE OF THE PROCEEDINGS.

When the State began evaluating its position, it became apparent that the claimant, claimant’s lay witnesses, claimant’s attorneys, and various experts of the claimant strongly disagreed with the Director’s Recommendation as to how much water the claimant was entitled to. The difficulty posed by such claims is how do you respond? The State could not simply state that it disagreed with the claimant; rather, the State had to scientifically disprove each factual claim that it believed to be inaccurate. Failure to do so could have led to similar claims, thereby exacerbating the demand on the Eastern Snake Plain Aquifer. As the Court is aware, surface water users have charged that the State has failed to adequately limit and regulate groundwater rights. Allowing a claim to be recognized when an independent government study concluded that the soils were not irrigable most certainly would have been viewed as further evidence of mismanagement. Accordingly, a comprehensive, thorough, and methodical response was demanded by the situation, resulting in the expert witness expenses now sought.

The disparity between the claimant’s position and the Director’s Recommendation provided the impetus for the State’s response. As in all SRBA proceedings, the Director’s Recommendation provided the baseline for this litigation; it entitled the claimant to a total diversion volume of 1,134 afa (when combined with 31-02395). In an attempt to settle this matter, on May 11, 2006, the State offered the claimant 1,160.3 afa. *See Ex. 70 to Aff. of David J. Barber Dated June 27, 2007.* That offer was rejected. On May 15, 2006, the State returned with a more generous offer, offering the claimant 1,727.25 afa. *See Ex. 72 to Aff. of David J.*

Barber Dated June 27, 2007. This offer was similarly rejected, and it became apparent that the State needed to begin to prepare for litigation.

As with all water right claims, this was the claimant's case to make. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997) ("[I.C. § 42-1411(5) makes it clear that the claimant bears both the burden of production as well as the burden of proof as to each element of a claimed water right.>"). And by all accounts, the claimant's case-in-chief in August 2006 (i.e., before the majority of the State's expenses were incurred) was the same case-in-chief that the claimant was prepared to go to trial with in April 2007. Yet it appears that it took the development of the State's rebuttal case to convince them to settle. For it was only after the State developed its expert witness record did the claimant essentially retreat back to the Director's Recommendation, or more accurately, the Second Supplemental Director's Report of August 27, 2006, which provided for a total diversion volume of 1,135.8 afa (when combined with 31-02395). Again, the finally agreed-upon volume (i.e., 1,135.8 afa) was substantially less than that sought in the claimant's objection and substantially less than that offered by the State in settlement months before the State incurred its expert costs. That being so, it is quite evident that the State's costs played a critical and necessary role in this outcome. While the claimant's strategy in this case cost them very little in terms of money; it cost the State a great deal. It is that inequity that the State asks the Court to remedy, and as such, the interests of justice require the assessment of those costs against the claimant and/or its attorneys.

D. THE STATE OF IDAHO'S MOTION TO ALTER OR AMEND THE MEMORANDUM DECISION IS TIMELY.

Administrative Order No. 1 (hereinafter "*AOI*") § 13 sets forth the procedure regarding proceedings on a Special Master's Recommendation and states as follows:

The Special Master shall prepare and file with the court a *Special Master's Recommendation* which shall be served on the parties to the subcase and notice of its entry shall be reported in the Docket Sheet. Any party to the adjudication, including parties to the subcase, may file a *Motion to Alter or Amend* within 21 days from the date the *Special Master's Recommendation* appears on the Docket Sheet. . . . **Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the Special Master's Recommendation shall constitute a waiver of the right to challenge it before the Presiding Judge.**

Id. at 20 (emphasis in the original). Furthermore, *AOI*, § 2(v) defines a Special Master's Recommendation as follows: "A final written submission to the Presiding Judge containing the decisions and recommendations of the Special Master under the Order of Reference."

Here, Presiding Judge Melanson entered an *Order of Reference Appointing Special Master Brigitte Bilyeu* "to preside over the above-captioned Motion and conduct all proceedings necessary to issue a recommendation consistent with AO1." *Id.* at 1. Accordingly, the *Memorandum Decision* entered on December 31, 2008 constitutes a *Special Master's Recommendation* governed by the procedures in *AOI* § 13. Since the *Memorandum Decision* has not appeared on the SRBA Docket Sheet, the deadline for filing a *Motion to Alter or Amend* has not expired. Thus, the State of Idaho's *Motion to Alter Amend* is timely.

III. CONCLUSION

For the reasons stated, the State of Idaho respectfully requests the Court to reconsider its award of costs in this matter to correct the arithmetic error in the costs awarded in the *Memorandum Decision* and to award discretionary costs in the amount of the out-of pocket expert witness costs expended by the State.

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DATED this January 30, 2009.

LAWRENCE G. WASDEN
Attorney General

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

A handwritten signature in black ink, appearing to read "D. Stanish", written over a horizontal line.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on January 30, 2009 I caused to be served the original and/or copy of this BRIEF IN SUPPORT OF STATE OF IDAHO'S MOTION TO ALTER OR AMEND SPECIAL MASTER'S MEMORANDUM DECISION AND ORDER RE: COSTS AND ATTORNEYS FEES on each of the following persons by the indicated method.

1. Original to:

Clerk of the District Court
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2. Copies to

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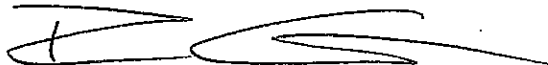
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