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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 Nos. 01-00023B, 01-00297, 35-02543, &
	)	35-04246
	)	
	)	STATE OF IDAHO'S BRIEF IN RESPONSE TO
Case No. 39576	)	OBJECTOR'S MOTION TO STRIKE AFFIDAVITS OF
	)	KARL J. DREHER AND MICHAEL HOLLIDAY
_____	)	

COMES NOW the State of Idaho, (hereinafter the "State"), by and through the undersigned deputy attorney general, and submits the STATE OF IDAHO'S BRIEF IN RESPONSE TO OBJECTOR'S MOTION TO STRIKE AFFIDAVITS OF KARL J. DREHER AND MICHAEL HOLLIDAY.

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I. STATEMENT OF THE CASE

ii. Additional Course of the Proceedings

On September 2, 2008, the district court entered its *Trial Scheduling Order*, which set the following dates, among others:

Discovery Cutoff: 3/6/2009

Dispositive Motions Deadline: 3/27/2009

Pretrial Conference: 5/21/2009

Trial: 6/6/2009

On March 26, 2009, the claimant filed its *Motion for Order Compelling Discovery*, *Motion to Clarify and/or Modify Trial Scheduling Order*, and *Motion for Summary Judgment*. The district court held its hearing on the first two motions on April 9, 2009 and entered its *Order Denying Motions* on April 14, 2009.

Objectors' A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company lodged the *Objectors' Response to Aberdeen-Springfield's Motion for Summary Judgment and Request Pursuant to Rule 56(f) to Allow Depositions to Proceed Before Hearing*, *Objector's Reply in Support of Joint Motion for Summary Judgment* and filed an *Affidavit of Travis L. Thompson in Support of Objector's Response to Aberdeen-Springfield Canal Company's Motion for Summary Judgment and Request Pursuant to Rule 56(f) to Allow Depositions to Proceed Before Hearing* and a *Notice of Hearing on Objectors' Objection and Motion to Strike and Rule 56(f) Request to Allow Depositions to Proceed Before Hearing*.

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I. THE DISTRICT COURT DOES NOT HAVE ANY BASIS TO STRIKE IDAHO EXHIBIT 1: AFFIDAVIT OF KARL J. DREHER DATED APRIL 15, 2009.

The Objectors' Motion to Strike *Idaho Exhibit 1: Affidavit of Karl J. Dreher Dated April 15, 2009* (hereinafter "*Dreher's Affidavit*") is made on the grounds of lack of foundation and that the statement is inadmissible in evidence. These attacks are misplaced. First, the Objector's fail to recognize Director Dreher's status as an expert. Idaho Code § 42-1701(2) requires that the Director of the Department of Water Resources "be a licensed or hydraulic engineer, and shall have had not less than five (5) years experience in the active practice of such profession . . ." In addition, Idaho Code § 42-1706 provides for a long list of additional duties of the director, which states, in part, as follows:

The director of the department of water resources shall make or cause to be made careful measurements of the flow in cubic feet per second of the various streams in the state whose waters are, or are likely to be, appropriated. . . . The director shall become familiar with the waterways and irrigable land in the state and the needs of the state as to irrigation matters **The director shall keep full and complete records of all measurements of streams surveys and examination or other valuable information that may come into his possession concerning any of the duties of the department**

Id. (Emphasis added). Furthermore, Director Dreher's qualifications to testify in court as an expert engineer are well known. See *Idaho Exhibit 4: Affidavit of Karl J. Dreher Dated April 29, 2009*.¹ Accordingly, Director Dreher is entitled to testify in his affidavit as an expert in accordance with the applicable rules of evidence and on matters related to the performance of his duty as Director of the Idaho Department of Water Resources (hereinafter "IDWR"). In particular, I.R.E. 702 states as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or

¹ The State of Idaho filed contemporaneous with this brief *Idaho Exhibit 4: Affidavit of Karl J. Dreher Dated April 29, 2009*, to make sure that Director Dreher's qualifications are a matter of record in these proceedings.

data need not be admissible in evidence in order for the opinion or inference to be admitted.

Id. (Emphasis added.)

Objectors challenge the admission of paragraphs 5, 7, 8, 9, and 10 on the basis of foundation and that the statements would be inadmissible. Generally, two comments respond to these objections. First, the IDWR maintains a massive amount of public records regarding water rights in Idaho. This data includes diversion data for the diversions in Basin 01 and application, permit and license files for individual water rights, among other documents. These records are admissible in evidence as business records or public records if duly certified by the custodian of the records. Furthermore, Director Dreher was charged as a matter of law with the gathering and overseeing of these records at the time of the settlement agreement. Since such records of IDWR are relied upon by the Director in performance of his duty as a technical expert in this legal proceeding, it was appropriate for Director Dreher to rely upon such data as the basis for his statements in the affidavit. Second, Director Dreher's statements constitute opinion testimony that is permissible for a person qualified as an expert and were done in furtherance of his duties as Director of the IDWR. Accordingly, the district court does not have any basis to strike *Dreher's Affidavit*.

II. THE DISTRICT COURT DOES NOT HAVE ANY BASIS TO STRIKE IDAHO EXHIBIT 2: AFFIDAVIT OF MICHAEL HOLLIDAY DATED APRIL 15, 2009.

The Objectors challenge the following statement in the *Idaho Exhibit 2: Affidavit of Michael Holliday Dated April 15, 2009*: "I prepared the recommendation consistent with IDWR's understanding of the agreement." *Objection to and Motion to Strike Affidavits*, at 7. Mr. Holliday earlier testified in his affidavit that he was a senior water resource agent, that he made these statements based on personal knowledge, and that he prepared the recommendation for water right no. 1-00023B. *Idaho Exhibit 2: Affidavit of Michael Holliday Dated April 15,*

2009, at 2. Simply put, this statement is a factual statement based on what he did based on his personal knowledge. That statement is admissible.

III. THE OBJECTOR'S REQUEST TO TAKE DEPOSITIONS IN ACCORDANCE WITH I.R.C.P. 56(f) REQUIRES CHANGES IN THE PRESENT TRIAL SCHEDULE ORDER.

The district court entered the present *Trial Schedule Order* on September 2, 2008, and the district court entered only a few days ago its *Order Denying Motions* regarding discovery propounded by the claimant as too late for completion in accordance with the existing *Trial Schedule Order*. The district court's *Order Denying Motions* was, in part, based on opposition by the Objectors who now desire that certain aspects be returned to the IDWR for some administrative determinations and for additional discovery. This administrative matter will certainly extend past the present trial date of June 6, 2009.

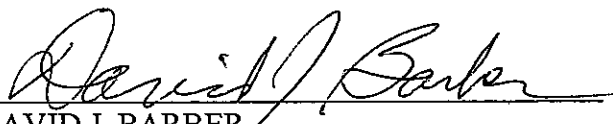
CONCLUSION

For the reasons stated, the State respectfully requests that the district court deny the *Objection to and Motion to Strike*.

RESPECTFULLY SUBMITTED this 29th day of April 2009

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