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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Objectors/Claimants,

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In re: 36596

Subcase No.31-11845

Case No. 39576

OBJECTION TO STATE'S MOTION
TO ALTER OR AMEND SPECIAL MASTER'S
MEMORRANDUM DECISION AND
ORDER RE: COSTS AND ATTORNEYS FEES

COMES NOW Robinson & Associates, the attorneys of record for
Objectors/Claimants, Ben D. Jernberg and Idaho Properties, LLC, (hereinafter "Claimants"), and
does hereby object to the State of Idaho's *Motion to Alter or Amend Special Master's
Memorandum Decision and Order Re: Costs and Attorney's Fees.*

The State presents two issues to be reviewed by the Court. First, correction of a
clerical error and second the reconsideration of its "conclusion that the expert fees should not be
awarded because the case was not exceptional within the meaning of I.R.C.P. 54."

I. CORRECTION OF THE CLERICAL ERROR

The Claimants do not believe that the State is entitled to collect \$442.50 as its
costs for the Claimants witness Dr. Dale Stukenholtz. The awarded was granted under Rule

54(d)(1)(C)(8), which permits "[r]easonable expert fees for an expert who testifies at a deposition or at a trial of an action not to exceed the sum of \$2,000 for each expert witness for all appearances. Dr. Stukenholtz was the Claimants' witness and the State did not therefore incur any expert fees pursuant to Rule 54(d)(1)(C)(8). It is not disputed that the State incurred costs for travel to take the deposition but the rule does not contemplate that such travel costs should be awarded as a matter of right under the above-cited rules. Therefore, the State is not entitled to the \$442.50 as a cost as a matter of right.

However, if the Court maintains its position as to the award of \$442.50 then the total amount of the award should be \$2,454.60 rather than \$2,054.60 as the deposition costs of \$2,012.10 (Joe Llamas, Omar Llamas, Paul Stukenholtz and Dr. Dale Stukenholtz) combined with the \$442.50 equals \$2,454.60. Therefore, if the Court allows the \$442.50 the Claimants have no objection that the clerical mistake should be corrected to reflect an amount owing of \$2,454.60.

II. THE REQUESTED COSTS WERE PROPERLEY FOUND TO NOT BE
EXCEPTIONAL WITHIN THE MEANING OF I.R.C.P. 54

The State requests the Court to reconsider its determination that the costs in this matter were not exceptional and to award the State its out-of-pocket witness fee expenses in the amount of \$99,848.43. *State of Idaho's Motion to Alter or Amend Special Master's Memorandum Decision and Order Re: Costs and Attorneys Fees*, pg. 3.

The Court is familiar with the facts of this case and has already made a well-reasoned decision as to the fees and costs that the State is entitled to under the civil rules of procedure and the Claimants will therefore not recite the procedural history of the case as the

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3 State has done. The essence of what is before the Court is whether its *Memorandum Decision*
4 *and Order* of December 31, 2008 was properly determined. It was.

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6 **a. The Requested Discretionary Costs Were Not Exceptional**

7 As the Court sated in its *Memorandum Decision*, the "State's arguments are well
8 constructed; however, the court views the issues in this subcase as unusual, but not "exceptional"
9 within the meaning of I.R.C.P. 54. For example, the State's litigation strategy is undoubtedly
10 influence by its management role for the Eastern Snake Plain Aquifer. That management
11 responsibility involves oversight of a huge number of water users who pump from the aquifer. It
12 cannot be said that a connection to the aquifer is enough to convert a subcase into an
13 "exceptional" case under Rule 54." *Memorandum Decision and Order*, pg. 10. Again, the Court
14 correctly determined that "the irrigation methods used, the type of soil and land covered, and the
15 primitive nature of the ditch system were facts which weighed in favor of the results sought by
16 the State. Ultimately, however, the court cannot say that these facts or issues were so novel as to
17 be "exceptional" under Rule 54." *Id.*

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19 There was no extraordinary reason that the State had to soil test. The State
20 brought a *Motion* to grant it access to the Claimants' property to soil test. After an *Objection* by
21 the Claimants, the State argued that because they had done it in prior federal reserve claims, it
22 was necessary in this case. At page 6 of the State's *Brief in Support of State of Idaho's Motion to*
23 *Alter or Amend*, the State cites an August 15, 2006 hearing in which their claimed reason for
24 wanting to do soil testing was necessary because it's "an issue of whether there is a beneficial use
25 here and what you can do with that land." *Brief in Support of State of Idaho's Motion to Alter or*
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3 *Amend*, pg. 6. Again, the State requested such testing, Claimants objected and should not be
4 subjugated or required to pay the State's costs. Furthermore, at page 4 of the *Brief in Support of*
5 *State of Idaho's Motion to Alter or Amend*, the State explains the reason for getting the soil test
6 was that, when the State looked at the disputed property, it appeared that most of the land that
7 was within the place of use for this water right was classified by the Soil Conservation Service at
8 the time as not irrigable. *Brief in Support of State of Idaho's Motion to Alter or Amend*, pg. 4.
9 Because the State already had soil surveys, they could have presented those to the Court at any
10 hearing or trial. This further establishes that the Court was correct in denying these charges as
11 extraordinary because such evidence was presumptively already in the State's hands, and seeking
12 to do the survey was merely collecting duplicative evidence and wasteful.
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15 By the State's own admission in their *Brief*, they have used soil samples before.
16 At page of the *Brief in Support of State of Idaho's Motion to Alter or Amend*, they state that if the
17 "federal reserved water right matters are excluded from consideration because of their unique and
18 factual legal issues, the State has never participated in a litigation of a single subcase in the
19 Snake River Basin Adjudication that has involved the number of experts or the complexity of the
20 issues that the present case involved." Again, by their own admission, they have used these soil
21 samples before. The simple fact that they were done in federal reserved water rights does not
22 make the case exceptional.
23

24 **b. Discretionary Costs Were not Necessary**

25 At page 11 of the *Brief in Support of State of Idaho's Motion to Alter or Amend*,
26 the State writes: "When the State began evaluating its position, it became apparent that the
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3 claimant, claimant's lay witnesses, claimant's attorneys, and various experts of the claimant
4 strongly disagreed with the Director's Recommendation as to how much water the claimant was
5 entitled to." The State goes on to write that it "could not simply state that it disagreed with the
6 claimant; rather, the State had to scientifically disprove each factual claim that it believed to be
7 inaccurate." It is without question that every disputed or objected-to subcase in the SRBA has
8 claimants who "strongly disagree with the Director's Recommendation." A simple disagreement
9 does not make the costs necessary or extraordinary. The State again falls back on its argument
10 that failure to scientifically disprove each factual claim could have lead to similar claims, thereby
11 "exacerbating the demand on the Eastern Snake Plain Aquifer." Referring to the State's
12 responsibilities with the Eastern Snake Plain Aquifer does not make these discretionary costs
13 exceptional in this subcase. It is an awkward and disingenuous attempt to bootstrap prior claims
14 of mismanagement against the State onto the Claimants' back.
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17 At page 12 of the *Brief in Support of State of Idaho's Motion to Alter or Amend*,
18 the State also writes that the Claimants' "strategy in this case cost them very little in terms of
19 money; it cost the State a great deal." That statement demonstrates a great ignorance about the
20 Claimants' costs and strategy in this case. Furthermore, the State writes at the same page: "It is
21 the inequity that the State asks the Court to remedy, and as such, the interests of justice require
22 the assessment of those costs against the claimant and/or its attorneys." Again, the State cannot
23 pretend that it understands the Claimants' strategy or its costs. The Claimants have moved on
24 with their lives and are being forced to litigate this matter years after it has been resolved because
25 of the State's current *Motion* and will surely be forced to continue to litigate this matter even if
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3 the Court upholds its *Memorandum Decision and Order*. An inequity of resources spent by the
4 State is not a reason to alter or amend a Judgment under Idaho Rule of Civil Procedure 54.
5 Furthermore, if a proportional analysis was done as to expenses spent by the State and expenses
6 and costs expended by the Claimants, the true inequity would cut in favor of the Claimants.
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8 **III. Timeliness**

9 Based on the rules set forth by the State, the Claimants have no objection to the
10 timeliness, as it appears that an *Administrative Order* 1, section 13 has been complied with.
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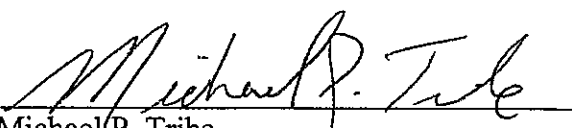
12 **IV. Conclusion**

13 The Claimants object to the State's *Motion to Alter or Amend* as to the clerical
14 error only and the fact that the Claimants do not believe that the State is entitled to the award of
15 \$442.50 for costs associated with the deposition of Dr. Dale Stukenholtz. However, if the Court
16 does uphold its decision to award the \$442.50, then the Claimants agree that the clerical error
17 should be changed to reflect that the Claimants owe \$2,454.60 rather than the \$2,054.60 stated in
18 the Court's original *Memorandum Decision and Order*.

19 The Claimants object on all grounds to the State's *Motion to Alter or Amend* with
20 respect to any additional award for discretionary costs for the State's out-of-pocket expert
21 witness costs expended by the State.
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23 DATED this 22nd day of June, 2009.

24 ROBINSON & ASSOCIATES

25 By: 

26 Michael P. Tribe

27 Attorneys for Objectors/Claimants

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of June, 2009, I caused to be served a true and correct copy of the foregoing *Objection to Motion to Alter or Amend*, by the method indicated below, and addressed as applicable to the following :

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
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Twin Falls, Idaho 83303-2707

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2. Copies to:

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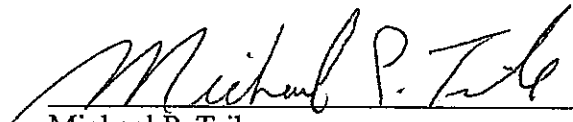
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