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OFFICE OF THE
ATTORNEY GENERAL

Claimants:

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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. 36-00134A
) 36-00135B
)

Case No. 39576

)
) MOTION IN LIMINE
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COME NOW, the Claimants through their counsel of record and move the court to enter an order in limine, which precludes the following from being introduced as evidence or testimony at trial, and limits expert testimony by IDWR to those opinions and conclusions disclosed to the claimants through discovery. This motion in limine is made under I.R.C.P. 16 and 37, I.R.E. 104 and 403, and other rules as set out below. This motion

1 is supported by the affidavit of Patrick Brown and its attachments, all of which is being
2 submitted contemporaneously with this motion.

3 **I. THE COURT SHOULD EXCLUDE UNDISCLOSED DOCUMENTS.**

4 On July 17, 1995, IDWR submitted a Witness and Exhibit List at the master's
5 request. That Witness and Exhibit List identifies documents which may be utilized at trial
6 including one entitled "World Maps of Potential Evapotranspiration, Plant Development, and
7 Spring Greening and Autumn Browning of Vegetation, Based on the Solar Thermal Unit
8 Model" by Montana Agricultural Experiment Station. Another document is entitled
9 "Irrigation Diversion Requirement Analysis", Jeff Peppersack, (1995). Each of those two
10 documents, as well as any other documents which were not disclosed to the claimants
11 during discovery should be excluded from evidence for several reasons:

12 1. The court's trial scheduling order included a discovery cutoff of June
13 30, 1995. Even though IDWR is no longer a party to the subcase, they were a party at the
14 time and were fully aware of the discovery cutoff date and the claimants desire to know
15 what potential evidence existed. Affidavit of Patrick D. Brown and Exhibits A-D. IDWR
16 responded to the Candys' Interrogatory No. 5 about what exhibits IDWR may utilize at trial
17 but failed to identify either of the above two documents. Exhibit D, pp. 7 - 9. Additionally,
18 the Candys Request for Production No. 2 requests a copy of each exhibit that may be
19 utilized at trial. Exhibit D, p. 17. Copies of the above documents were not identified or
20 produced pursuant to written or oral discovery requests and, in fact, were not even
21 identified before the discovery cutoff. Affidavit of Patrick Brown. Consequently, the
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1 claimants have been foreclosed from conducting discovery about the documents, their
2 sources of origin, and the basis therefore. The documents should be excluded as their late
3 disclosure contravenes this court's scheduling order entered pursuant to Rules 16 and
4 because nondisclosure cannot be substantially justified, given IDWR has had since at least
5 1990, when it purportedly investigated the claims, to obtain information, form opinions and
6 produce documentation. Nevertheless, disclosure occurred only after the discovery cutoff,
7 depriving claimants of a reasonable opportunity to prepare to meet the opinions and
8 conclusions contained in the documents, including by retaining experts to respond or by
9 uncovering information which underlie the documents, or may address the same topics but
10 draw different conclusions contained in the documents.

11 2. Under I.R.E. 403 the probity, if any, of the documents is substantially
12 outweighed by the prejudicial effect to the Candys as the Candys have not been given the
13 opportunity to ask even the most rudimentary questions about the nature, the source, basis,
14 or authenticity of the documents, let alone opinions, conclusions and reasons therefore
15 contained in such documents. Candys can not prepare to meet the substance of those
16 documents without knowing the underlying basis for those conclusions or manner in which
17 they may be alleged to apply to the instant situation. It is unfairly prejudicial to the Candy's
18 to admit evidence which the Candy's have asked to have disclosed, but which was not,
19 especially given the technical nature of the documents.

20 3. The documents are not subject to meaningful cross-examination
21 because, despite numerous opinions and conclusions in the documents, the documents do
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1 not state the basis for testimony, and cannot speak in response to questions asked on cross-
2 examination.

3 4. IDWR should be estopped from referring to or utilizing such documents
4 as exhibits or as a basis for any testimony because, under the attached discovery requests
5 and responses, the Candys' sought disclosure of such information, conducted discovery and
6 prepared for trial in reliance on the representations that no maximum beneficial use had
7 been determined nor irrigation analysis performed, and that all documents IDWR possessed
8 had been disclosed so that Candys could prepare for trial. See Exhibit A, pp. 98 - 127; and
9 Exhibit B, pp. 3 - 4. Allowing late disclosure and any utilization of or reference to the
10 documents would prejudice the Candys in that they are not prepared to meet the substance
11 of the documents and have justifiably relied to their detriment upon statements of IDWR,
12 in not having prepared for that which they did not know about.

13 In sum, despite requests by Candys through discovery for disclosure of
14 documents, opinions and conclusions, the underlying facts and data of all opinions and
15 inferences, and the reasons therefore, such disclosures were not made and it would be
16 unfair to allow the undisclosed documents to be admitted or otherwise utilized.

17 **II. THE COURT SHOULD EXCLUDE UNDISCLOSED EXPERT TESTIMONY.**

18 From their reading of IDWR's previous discovery responses in conjunction
19 with IDWR's witness list, submitted July 17, 1995, the Candy's are led to believe that Jeff
20 Peppersack and David Shaw may be held out as expert witnesses, rather than as
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1 "independent fact witnesses."^{1 2} In written discovery, Mr. Shaw and Mr. Peppersack were
2 identified as experts, Exhibit D, p. 6, not persons who investigated this case, Exhibit D,
3 p. 4. Consequently, the Candy's deposed Mr. Shaw and Mr. Peppersack to learn what
4 opinions they held as well as the underlying basis for any such opinions.

5 During the deposition, Mr. Peppersack testified that he had no opinions about
6 maximum beneficial use which had been made or could be made by the Candys. E.g.
7 Exhibit A, p. 111 and pp. 124 - 127. He stated that he lacked information which he
8 believed was required in order to form such an opinions. Id. Similarly, Mr. Shaw stated
9 that he generally agreed with the opinions and statements of Mr. Peppersack and that Mr.
10 Shaw would stand by previous answers to written discovery, which had been signed by Mr.
11 Shaw, and which disclosed that the department did not make a beneficial use determination.
12 Exhibit B, pp. 3 - 4; Exhibit D, p. 27, 36, 37.

13 It would be fundamentally unfair for the court to now allow Mr. Peppersack
14 or Mr. Shaw to state opinions and draw conclusions about what beneficial use could be
15 made by the Candy's under their claimed rights. The fundamental tenant of our system of
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17 ¹Judge Hurlbutt has interpreted the adjudication statutes not as making IDWR an expert,
18 but merely "an independent fact witness". See e.g. Order dated June 30, 1995, *ORDER*
19 *DIRECTING IDWR TO ATTEND HEARINGS*.

20 ²The Candy's belief is supported by, for example, the fact that Mr. Peppersack apparently
21 authored the "Irrigation Diversion Requirements Analysis" referred to in the above section,
22 which contains many opinions and conclusions previously undisclosed. It is also supported
23 by the fact that Peppersack and Shaw were not identified as persons who investigated these
claims, and consequently their testimony must be opinion testimony as it is not based on
personal knowledge.

evidence may be presented and to prepare to confront, rebut, or otherwise respond to any attempted presentation of fact or opinion. Notwithstanding whether IDWR is a party or merely a witness, disclosure of information from IDWR is what the Candy's required in order to prepare for trial. Consistent with those principles and the Candy's need, the Candy's spent time and money preparing to discover what confronted them. They did so within the time frame set out by this court. And they were told by IDWR that IDWR had no opinions with respect to the amount of beneficial use.

Moreover, IDWR's failure to determine beneficial use can not be predicated upon any lack of information since IDWR has been fully empowered to collect any information it considers relevant to performing its duty of determining the nature and extent of water rights (since at least 1987). Yet knowing full well that a discovery cutoff was approaching, IDWR allowed its two experts to be deposed and to state that they had no opinions. IDWR should be held to those representations, and the Candy's should not be prejudiced by now confronting opinions which are yet unknown and about which discovery could not have taken place. Therefore, the Candy's respectfully request the court to enter an order in limine prohibiting expert testimony by either Mr. Shaw or Mr. Peppersack with regard to beneficial use.

III. CONCLUSION.

In conclusion, Candy's request that the court exclude the use of all previously undisclosed documents, including those mentioned above, and that the court enter an order precluding Mr. Shaw or Mr. Peppersack from offering testimony about what they believe the

1 amount of water the Candy's may or may not need in order to adequately irrigate under
2 their water rights.

3 Respectfully submitted this 14 day of August, 1995.

4 HEPWORTH, LEZAMIZ & HOHNHORST,
5 CHARTERED

6 By: 

7 Patrick D. Brown
8 Attorneys for Claimants
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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 15 day of August, 1995, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Nicholas Spencer
Susan Hamlin
Deputy Attorneys General
IDWR
P. O. Box 44449
Boise, ID 83711-4449

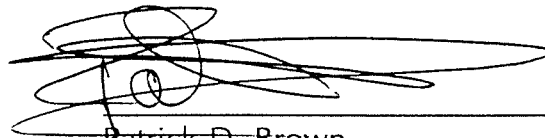
☒ U.S. Mail
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U.S. Department of Justice
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Patrick D. Brown

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