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ATTORNEYS FOR THE IDAHO
DEPARTMENT OF WATER RESOURCES

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. 36-00003C,
	)	36-00047, 36-00079, 36-00089A,
	)	36-00108B, and 36-10223
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO QUASH AND MOTION
Case No. 39576	)	FOR PROTECTIVE ORDER, MOTION
	)	FOR SANCTIONS, AND MOTION FOR
	)	EXPEDITED HEARING
	)	
	)	
	)	

Descriptive Summary

This is IDWR's memorandum in support of its motion to quash six subpoenas and deposition notices served on it by counsel for claimants in the above-referenced subcases, as well as its motion for a protective order vacating those depositions and prohibiting the claimants from seeking to undertake discovery against IDWR pending completion of court-ordered settlement conferences. It also is IDWR's memorandum in support of its motion for sanctions against counsel for these claimants, and in support of its motion for expedited hearing requested for Monday, January 8, 1996.

MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND
MOTION FOR PROTECTIVE ORDER, MOTION FOR SANCTIONS,
AND MOTION FOR EXPEDITED HEARING, Page 1

Factual Background

At shortly before 3:00 p.m. on Friday, January 5, 1996, IDWR had delivered to it six subpoenas duces tecum and accompanying notices of deposition duces tecum. Each deposition notice and companion subpoena is for a separate SRBA subcase; and each purports to require IDWR to designate one or more of its officers, directors, managing agents or other employees to be deposed at the offices of Hepworth, Lezamiz & Hohnhorst, Ctd., in Twin Falls.

This law firm (HWRO counsel) is legal counsel of record for the claimants/objectors in the six subcases. The six subcases are part of a larger group of approximately 165 subcases whose claimants/objectors have been identified by HWRO counsel as members of the Hagerman Water Right Owners, Inc. (HWRO). All of these claimants/objectors, as well as HWRO itself, are represented by HWRO legal counsel.

The six depositions are scheduled over a two day period, the first beginning at 10:15 a.m. on Tuesday, January 9, 1996. (See attachments to Affidavit of David B. Shaw, filed contemporaneously herewith). Each of the six depositions is scheduled to begin fifteen minutes following the time set by the SRBA Court for a mandatory court-sponsored settlement conference in that particular subcase. The six settlement conferences are among the first of 47 settlement conferences set throughout the month of January involving objections filed by HWRO members.

Each of the deposition notices directs IDWR to designate one

or more persons to testify with regard to the following:

All knowledge, information, and opinions of IDWR or in its possession, custody, or control:

(a) concerning the existence, nature, and extent of a water right under [that individual subcase number];

(b) concerning use of water under that claim or on the property claimed; and

(c) concerning IDWR's past, present, or future administration of water on that land or in association with that claim of right or use.

Notice of Taking Deposition Duces Tecum Upon Oral Examination of Idaho Department of Water Resources, dated January 4, 1996, at 2. Each deposition notice further directs the deponent

. . . to bring with him to said deposition the following: all documents of any type in your possession, control, and custody that relate to the above matters.

Id. at 2.

IDWR had received no prior notice that such depositions were intended or even contemplated. No one from the office of HWRO counsel has contacted anyone at IDWR to discuss these depositions or even to inquire as to available dates. No one has requested informal meetings with IDWR staff to exchange information despite repeated offers by IDWR counsel and staff.

The mandatory settlement conferences for these six subcases have been scheduled since mid-September of last year.

Contemporaneously with the submission of this memorandum, IDWR has filed with the Court its Motion to Quash and Motion for Protective Order; Motion for Sanctions; Motion for Expedited Hearing, as well as the supporting Affidavit of David B. Shaw.

MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND
MOTION FOR PROTECTIVE ORDER, MOTION FOR SANCTIONS,
AND MOTION FOR EXPEDITED HEARING, Page 3

This memorandum explains the basis for and rationale underlying each of the grounds that IDWR asserts for the relief and redress requested in its motions.

Argument in Support of Motions

MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER

IDWR has moved the Court, pursuant to Rule 45(b)(2), Idaho Rules of Civil Procedure, for its order quashing the six subpoenas duces tecum and deposition notices duces tecum described above and attached to the supporting Affidavit of David B. Shaw, on the ground that the depositions in question are unreasonable and oppressive, particularly so since each deposition is scheduled to begin fifteen minutes after the beginning time scheduled for the court-ordered mandatory settlement conference set for that subcase. IDWR has further moved the Court, pursuant to Rule 26(c), Idaho Rules of Civil Procedure, for a protective order vacating the six depositions and prohibiting HWRO counsel from undertaking to depose any IDWR employee or instituting any other formal discovery against IDWR during the pendency of court ordered settlement conferences between IDWR and any claimants identified as members of HWRO. IDWR has so moved for the following reasons:

1. Discovery during the pendency of the settlement conferences is burdensome, oppressive, and prejudicial to the Court's intention that good faith settlement negotiations shall occur before the HWRO subcases progress toward trial.

Although a non-party, IDWR has been ordered by the SRBA Court to attend all proceedings. The Court has made it clear that this order encompasses all court ordered mandatory settlement

conferences.¹

In mid-September of last year the SRBA Court entered orders setting 52 settlement conferences involving Basin 36 subcases during the month of January, 1996. Of these, all but five involve claimants identified as HWRO members, and all of whom are represented by HWRO counsel. IDWR anticipates that the Court soon will be entering orders scheduling the approximately 100 remaining HWRO subcases for mandatory settlement conferences.

On December 14, 1995, HWRO counsel filed a motion to stay proceeding in all HWRO subcases pending determination and resolution of HWRO's motion to designate Basinwide Issues 10 and 11. In the motion for stay HWRO counsel argued that settlement efforts would not be productive until those basinwide issues are certified and decided. Special Master Dolan rejected that contention in his Order Denying Motion to Stay Subcases, entered January 2, 1996. In his order Special Master Dolan stated as follows:

It would be premature to stay these subcases at least until the parties have the opportunity to explore settlement of some, if not all, issues. Besides, settlement conferences are

¹ To minimize the costs to the court and the claimants, IDWR makes extensive efforts to promote the resolution of contested water rights through settlement. In addition to the substantial time commitment required to attend status conferences, IDWR also commits the efforts of technical, legal, and administrative staff in compiling information to be exchanged at the settlement conference, identifying settlement options consistent with available fact and law, reviewing settlement proposals for such consistency, documenting agreements reached at the settlement conference, and continuing settlement efforts as to matters not resolved at the settlement conference.

an ideal opportunity to discuss pre-trial matters and possibly avoid procedural wrangling and major expenses.

Order Denying Motion to Stay Subcases, entered January 2, 1996, at 2. (Emphasis added.) Thus the Special Master made it perfectly clear that--notwithstanding the pendency of the motion to designate basinwide issues 10 and 11--he intended these settlement conferences to go forward for the purpose of attempting to resolve all issues outside the ambit of the partial forfeiture question presented by proposed basinwide issues 10 and 11. He further emphasized that the settlement conferences should be held to more clearly focus on the precise issues that cannot be settled, and to explore procedural questions in the hope of avoiding wrangling and expense to both the claimants and the public. In short, Special Master Dolan obviously contemplates a very full discussion agenda for each two hour court supervised settlement conference. In apparent response to the entry of this order,² HWRO counsel served the subpoenas and deposition notices for six individual subcases that intentionally overlap the very times set by the court for the settlement conferences for those subcases. Indeed, each deposition is set to commence exactly fifteen minutes after the commencement time for the counterpart settlement conference, leading to the inescapable conclusion that HWRO counsel believes that each

² The file stamp and certificate of service of the order together show that the order was entered and served by mail on HWRO counsel late in the afternoon of January 2nd. It presumably would have been received by HWRO counsel on January 3rd or 4th. The date of execution shown on the subpoenas and deposition notices is January 4th.

settlement conference will last only about fifteen minutes. It is IDWR's opinion that this peculiar circumstance strongly evidences a lack of any intention on the part of HWRO counsel to conscientiously and in good faith carry out the mandate expressly laid down by Special Master Dolan in his January 2nd order denying the motion to stay these and all other HWRO subcases.

Moreover, if HWRO counsel is permitted to take these six depositions, one must ask what will happen to the remaining 41 HWRO subcase settlement conferences already scheduled for the month of January? Will HWRO attend 41 more fifteen minute settlement conferences and take 41 additional depositions? What about the approximately 100 HWRO subcases that have yet to be set for mandatory settlement conferences?

It seems that if HWRO counsel is permitted to eviscerate six of the first seven HWRO settlement conferences, there is no principled basis upon which to deny him the opportunity to eviscerate all of the remaining HWRO settlement conferences now scheduled or hereafter to be scheduled. Thus, if HWRO counsel succeeds at this, all the remaining settlement conferences will be rendered meaningless. And if that becomes the case it will become a phenomenal waste of time for Settlement Moderator Bilyeu and IDWR even to participate. If such becomes so, the remaining conferences that are already scheduled should be vacated and all as yet unscheduled HWRO subcases should be stayed. The result of this will be that HWRO counsel will have in practical effect received

the very stay he requested; the very stay that has already been once denied him by Special Master Dolan.

The better course of conduct is to vacate these six depositions, thereby affording HWRO counsel no option but to attend the settlement conferences, and therein to participate fully in carrying out Special Master Dolan's directive as expressed in his January 2nd order.

2. Depositions at the present time are unnecessary.

If it is the contention of HWRO counsel that not even partial settlement of any of these subcases is possible because of the "partial forfeiture" issue that has been raised by him in HWRO's motion to designate basinwide issues 10 and 11, then these depositions are unnecessary since by HWRO counsel's own tacit admission that issue is a pure issue of law; otherwise it would not be suitable for the basinwide issue treatment that HWRO counsel has proposed for it.

On the other hand, if it is HWRO counsel's contention that there are factual issues in dispute between IDWR and the claimants that ought to be explored in depositions, then these depositions ought not to be had at this time because disputed factual issues are the very types of issues Special Master Dolan intends IDWR and the HWRO claimants to address, refine, focus and--hopefully--settle during the settlement conferences. Accordingly, the very question of whether depositions are even necessary or proper in any of these subcases ought not be addressed until after the settlement

conferences have been completed.

3. Neither the Court nor the claimants have yet requested, pursuant to Idaho Code §42-1412(4), IDWR to present the basis of its recommendations.

Idaho Code §42-1412(4) (1994) provides that:

. . . the district court or a party may request the director or his designee to present the basis for the recommendations in the director's report.

(Emphasis added.) At present neither the court nor any party to any of the six above-listed subcases has requested IDWR to present the basis for its recommendation of any of the water rights in question. Any form of formal discovery against IDWR relating to the basis for its recommendation of a water right--if formal discovery is appropriate at all--should be preconditioned upon a request of the court or counsel to participate in the subcase by presenting the basis for its recommendations.

To the extent that formal discovery serves the purpose of revealing information as to the basis for IDWR's recommendations, this information is readily available through means less burdensome than formal discovery. IDWR has repeatedly offered to produce information as to the basis for its recommendations of these claimants' claims, it has produced extensive information both formally and informally, and it is prepared to conduct further information exchange if it has further information the claimants desire that has not already been made available. Thus, the only purpose that formal discovery serves it to determine IDWR's testimony at trial. Absent a request for the basis for IDWR's

recommendations, formal discovery is purposeless since no such testimony will be offered.

In addition, if such a request is not a prerequisite to formal discovery, then the claimant could conduct comprehensive discovery against IDWR to discover all the information in IDWR's possession both supporting and undercutting the claimant's claim, and yet at trial present only the favorable evidence and none of the evidence unfavorable to the claimant's position. The Special Master is left with an incomplete record upon which to base the master's report, and IDWR is forced to subsidize, at taxpayer expense, the claimant's effort in creating that one-sided record through costly formal discovery processes. It is precisely this situation that the statute avoids by allowing the court or the parties to request IDWR to present the basis--the complete basis, not only the portion favorable to the claimant--for IDWR's recommendation.

4. Counsel for these claimants has failed to provide reasonable notice of the depositions, as is required by Rule 30(b)(1), Idaho Rules of Civil Procedure.

I.R.C.P. 30(b)(1) expressly provides that

[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice . . .

(Emphasis added.) In the present case IDWR was served at mid-afternoon on Friday with notice of six depositions to be conducted over two days, the first of which was set for mid-morning the following Tuesday. Thus IDWR was provided in effect with barely one and one half working days in which to designate persons to testify upon an expansive array of topics, scour its voluminous

records for all documents relating to that expansive array of topics, make copies of those documents, make the necessary travel arrangements, and travel the 125 miles to Twin Falls! IDWR posits that this is facially and egregiously unreasonable.

Moreover, HWRO counsel did not even extend to IDWR the courtesy of inquiring as to available dates. IDWR had no notice or warning of any kind prior to the service of the six subpoenas and deposition notices.

5. IDWR is not available for depositions at the scheduled times.

IDWR is under a court order to attend all SRBA proceedings. It is IDWR's general practice and policy to have the water agent who investigated the claim and prepared the preliminary recommendation in attendance at the settlement conference where IDWR believes that the agent's participation is likely to facilitate the resolution of some or all of the disputed issues. The water agent who investigated the claim and prepared the preliminary recommendation, in virtually all HWRO subcases, is Mr. Steve Clelland, who presently is scheduled to be present in all of the HWRO settlement conferences throughout the month of January.

Therefore, if HWRO seeks to depose the witness who can best testify from personal knowledge as to the investigation and recommendation of the water rights in question, that agent is

unavailable.³ The only way to make that agent available is to eviscerate the settlement conferences themselves by turning them into fifteen minute sound-bite reruns, a course of action, which, as IDWR has already pointed out above, should not be permitted.

While there are other IDWR personnel who may be capable of testifying to some of the topics proposed by HWRO counsel, it is both unreasonable and unfair to require them to prepare for and attend depositions upon such ridiculously short notice.

6. The deposition notices' direction for designation of deponents is both overly broad and burdensome.

The scope of inquiry proposed by HWRO counsel for these depositions is so broad that there is no single person at IDWR who can testify authoritatively as to all the potential topics; the designation of several members of IDWR staff will be required. HWRO counsel took the depositions of seven IDWR personnel over a period of several days in the Candy subcases in order to explore in

³ HWRO has previously argued strenuously that the Special Master should decide issues grounded upon affidavit or deposition testimony only when that testimony is based upon personal knowledge. See generally, Consolidated Memorandum Opposing Intervention [by certain groundwater claimants in certain HWRO subcases], Motion to Strike [affidavit of legal counsel for groundwater claimants], Objections and Motions to Strike Affidavits [of certain groundwater claimants], and Memorandum in Support of Objection and Motion to Strike Affidavits and Preclude Intervention, all filed or lodged by HWRO counsel in Subcase Nos. 36-00021B, 36-00039D, 36-00048A, 36-00049, 36-00051A, 36-02169, 36-04260B, 36-10283A and 36-15168 on or about November 21, 1995. Therefore IDWR presumes that the prospective deponent or deponents that HWRO counsel believe should be designated for these depositions are the person or persons who can testify based upon personal knowledge of the matters to be inquired into by HWRO counsel.

detail the basis of IDWR's recommendation of only those two claims in the SRBA. For the current depositions HWRO counsel proposes inquiring not only into all adjudication aspects of the water rights in question, but also into all uses of the water generally and even into the past, present and future administration of those water rights. And for this task HWRO counsel has allotted himself approximately 90 minutes per water right.

7. The deposition notices' direction for production of documents is overly broad, burdensome, and beyond the scope of permissible discovery.

Pursuant to previous discovery and public information requests IDWR has already produced to HWRO counsel large numbers of documents that fall within the ambit of the document request contained in the deposition notices. However, the document request appears to be much broader than previous HWRO document requests, seeking as it does not only all documents appertaining to the adjudication of the water rights in question, but additionally all documents related to the use of this water and the past, present, and future administration of these rights. Thus the scope of the document request appears to extend far beyond what is relevant to the investigation and recommendation of these particular adjudication claims. Even if all these documents were determined to be relevant, searching through all department records for such documents is onerous and burdensome, particularly given the short time frame dictated by the subpoenas and deposition notices. Moreover, the task is made even more complicated by the fact that

IDWR has already produced so many documents to HWRO counsel, and those large numbers of documents would need to be compared to the additional documents to be provided in order to prevent tremendous duplication of effort and production.

Moreover, IDWR's records are open for public inspection generally and IDWR will provide copies of all documents requested upon payment of reasonable photocopying costs. For that reason it is unnecessary for HWRO counsel to use compulsory judicial process to obtain documents, except for the purpose of imposing upon IDWR the burden of examining all of its records in order to satisfy the document production requirement. The Court should not lightly countenance the wholesale shifting of the burden of a fishing expedition from HWRO counsel onto a public agency, and should require that such document requests be specific and narrowly tailored to satisfy the legitimate needs of the individual claimants.

8. Service of the subpoenas failed to comply with the requirements of Rule 4(d)(5), Idaho Rules of Civil Procedure.

I.R.C.P. 4(d)(5) provides in part as follows:

Upon the state of Idaho, or any agency thereof, service shall be made by delivering two (2) copies of the summons and complaint to the attorney general or any assistant attorney general.

(Emphasis added). IDWR posits that this provision applies by analogy to the present situation. IDWR is not a party to either the SRBA or any of these six subcases, nor has it yet even been requested to serve as a witness to present the basis for its

recommendations. Accordingly, the service of compulsory process such as a subpoena should be treated similarly to the service of other process that initiates a legal proceeding against a state agency.

One of the problems inherent in concluding otherwise is illustrated in the present case. Only one copy of each of the six subpoenas were provided to IDWR. These were personally delivered to Mr. David B. Shaw, IDWR Adjudication Bureau Chief, rather than to any of the deputy attorneys general representing IDWR.

Since Mr. Shaw is not an attorney he was unaware of the requirement of I.R.C.P. 45(c)(2) that the person being served the subpoena must at that time demand the payment of the standard witness fee and mileage allowance, and that the fee and mileage allowance must be tendered at that time if demanded. Mr. Shaw did not make that demand; the witness fee and mileage allowance was not tendered. Therefore, if these depositions do take place, the benefit of IDWR's testimonial services will be borne entirely by the public, without these claimants having to pay even the modest fees for those services that are provided for by law.

If I.R.C.P. 4(d)(5) is applicable in the present situation, service was not properly made, and the subpoenas should be quashed on the ground of defective service of process.

MOTION FOR SANCTIONS

IDWR has also moved the Court, pursuant to Rules 11(a)(1) and 26(f)(2), Idaho Rules of Civil Procedure, for its order sanctioning

HWRO counsel by ordering counsel to pay IDWR's reasonable attorney's fees incurred in bringing the present motions, in a sum to be subsequently determined.

I.R.C.P. 11(a)(1) addresses the legal import of the attorney's signature on court papers generally; I.R.C.P. 26(f)(2) addresses it specifically with regard to discovery papers. Both rules contain identical language providing that the attorney's signature on the paper constitutes a certification that the paper

. . . is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

I.R.C.P. 26(f)(2) adds the additional proviso that the signature constitutes a certification that the discovery request, response or objection is

. . . not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

In the Court's Order Denying Motions to Strike Affidavits and Order Granting Motions and Amended Motions to File Late Responses [in certain HWRO subcases], entered December 12, 1995, Special Master Dolan observed that the HWRO claimants and groundwater movants had

followed a particularly contentious motion practice and the court has been required to fashion its responses accordingly.

Id. at 3. Subsequently in the Order the Special Master stated that the court feels compelled to remind the Movants and Claimants of Rule 11(a)(1), Idaho Rules of Civil Procedure.

Id. at 5. The Special Master then went on to quote from that rule,

MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND
MOTION FOR PROTECTIVE ORDER, MOTION FOR SANCTIONS,
AND MOTION FOR EXPEDITED HEARING, Page 16

expressly emphasizing the language from that rule quoted above. IDWR views the Special Master's statements as a warning to all SRBA participants that the Court will not hesitate to impose sanctions whenever they are warranted. IDWR posits that this is such a case.

IDWR has brought its motion for sanctions on the ground that the totality of circumstances outlined above in the motion to quash and the motion for protective order establishes that HWRO counsel has interposed the subpoenas and deposition notices for the purpose of harassment and causing unnecessary delay to, and needless increase in the cost of IDWR's good faith participation in, the presently scheduled court-ordered HWRO settlement conferences. Moreover, IDWR believes it has demonstrated that, contrary to HWRO counsel's signatory certification, these discovery requests are in truth both exceptionally unreasonable and unduly burdensome.

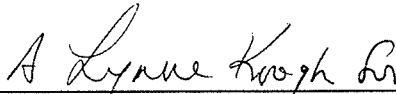
Yet even more pernicious than the cavalier attitude displayed to IDWR is the apparent disregard that HWRO counsel displays toward the goals that Special Master Dolan has expressly set forth for these settlement conferences. HWRO counsel appears determined to derail--or at the least debase the value of--these conferences. If he were to succeed, the result would be a waste of court time and resources as well as a waste of IDWR's resources. For this reason more than any other, sanctions are appropriate.

MOTION FOR EXPEDITED HEARING

IDWR has further moved the Court to set these motions for immediate hearing, at the Court's earliest convenience on Monday,

January 8, 1996, for the reason that the first of the depositions in question is presently scheduled for the following morning. IDWR has further requested that its legal counsel be permitted to appear and conduct oral argument via telephone.

DATED this 3rd day of January, 1996.

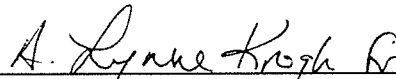


NICHOLAS B. SPENCER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 1996, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER, MOTION FOR SANCTIONS, AND MOTION FOR EXPEDITED HEARING on the following via facsimile transmission to the address and FAX number listed below.

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ATTORNEYS FOR THE IDAHO
DEPARTMENT OF WATER RESOURCES

**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. 36-00003C,
	)	36-00047, 36-00079, 36-00089A,
	)	36-00108B, and 36-10223
	)	
	)	
Case No. 39576	)	ORDER SETTING EXPEDITED
	)	HEARING
	)	
	)	
	)	
	)	

THE COURT having reviewed IDWR's Motion to Quash and Motion for Protective Order; Motion for Sanctions; Motion for Expedited Hearing, and the supporting memorandum and affidavit, submitted January 8, 1995;

AND being fully advised in the premises;

AND good cause appearing for setting the motions for expedited hearing;

NOW, THEREFORE, hearing on the above-listed motions is set for January _____, 1996, at the hour of _____, at the SRBA Courthouse, 253 Third Avenue North, Twin Falls, Idaho. Counsel for IDWR may appear and present oral argument by telephone.

DATED this _____ day of January, 1996.

TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of January, 1996, I served a true and correct copy of the foregoing ORDER SETTING EXPEDITED HEARING on each of the following persons by facsimile transmission to the addresses and FAX numbers listed below.

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Clerk of the SRBA Court