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Department of Water Resources
Adjudication Bureau

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DISTRICT COURT-SRBA
TWIN FALLS CO ID 8760
FILED *OK*

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)
)
Case No. 39576)
_____)

Subcase Nos. See Exhibit A

ORDER REGARDING AUGUST 22, 1996,
DEPOSITION OF IDWR

36-30 *ed*

INTRODUCTION

On August 22, 1996, Hagerman Water Right Owners, Inc. (HWRO) deposed the Bureau Chief of the Idaho Department of Water Resources (IDWR) to establish the basis for IDWR's recommendations regarding the consumptive use element to be included in any partial decree for each of the above-referenced water rights. In the course of the deposition, a number of disputes arose. The following represents the Court's ruling on each disputed issue submitted to the Court by the parties and by IDWR.

1. As A Non-Party, IDWR Is Not Entitled To Cross-Examine Witnesses During Depositions.

During the deposition, IDWR's attorney tried to cross-examine the witness. The Court rules that, because IDWR is not "a party to the adjudication," it may not cross-examine the witness. Idaho Code § 42-1401B(3).

2. Documents And Memoranda Prepared For IDWR By Its Attorneys To Provide Legal Advice Are Protected From Discovery By I.R.E. 502(b).

HWRO seeks both the production of a memorandum prepared by IDWR's legal staff providing legal advice to the SRBA Bureau Chief regarding his recommendation for inclusion of an element for consumptive use for each of the above-referenced water rights and the legal basis of the SRBA Bureau Chief's ultimate recommendation. The Court finds that the recommendation of a water right is a mixed question of law and fact and IDWR is required to disclose the basis of its recommendation for each water right in the SRBA. Therefore, where the recommendation is based in whole or in part on a legal principle or case, the witness must disclose any legal issue that formed the basis of IDWR's ultimate conclusion.

Such disclosure, however, does not extend to those documents or memoranda prepared as attorney-work product or that are protected by the attorney client privilege. Although, IDWR is not a party to the SRBA, it nonetheless retains the right to protect privileged legal analysis.

The Court rules that this memorandum is protected by the attorney-work product and attorney-client privileges. I.R.E. 502(b) allows IDWR to "refuse to disclose" any "confidential communication made for the purpose of facilitating the rendition of professional legal services."

In this case, IDWR's legal counsel prepared a document apprising the SRBA Bureau Chief of the law relevant to the recommendation of consumptive use. Presumably, the document contains

legal analysis, conclusions and advice that are intended to assist the SRBA Bureau Chief in

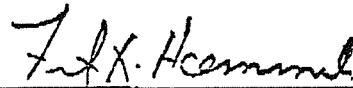
developing consumptive use recommendations. As such, the document is protected from disclosure by I.R.E. 502(b)(1).

3. The State Of Idaho Is Not Permitted To Ask Questions Related To The Admissibility Of IDWR's Consumptive Use Analysis.

During the deposition, the State of Idaho attempted to examine IDWR's witness regarding IDWR's consumptive use analysis. HWRO objected, contending the State's participation in these sub-cases is limited to questions of law and not the factual development of the record. The State contends its questions relate to the ultimate admissibility of IDWR's evidence. Admissibility of evidence is a question of law and the State argues it is allowed to ask questions related to admissibility in a deposition. The State is correct that the admissibility of evidence is a question of a law. *See* I.R.E. 104(a); State v. Pressnall, 119 Idaho 207, 211, 804 P.2d 936 (App. 1991) (questions of "general admissibility" are "presented to the trial court as a question of law"). However, the Court rules that it is not necessary for the State to pursue issues related to admissibility before the evidence is offered to the Court.

All of the above is so ordered.

DATED: August 29, 1996.

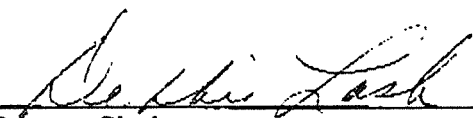


FRITZ X. HAEMMERLE
Special Master
Snake River Basin Adjudication

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the ORDER REGARDING AUGUST 22, 1996 DEPOSITION OF IDWR was faxed on August 29, 1996, to the following:

Matt McKeown
Deputy Attorney General
Natural Resources Division
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449
(208) 334-2690



Deputy Clerk

EXHIBIT "A"

List of Subcases

Lynn J. Babington and Karen L. Babington	36-00003C
Walter J. Bonning, II and Judy L. Bonning	36-00108B
Dale E. Boyer and Elaine Boyer	36-00079
William E. Norris, David L. and Linda C. Cropper,	
Blaine Richard and Vivian Cropper, Dave and	
Nancy Anderson	36-00047
Mildred Culbertson	36-10409
Frank C. Erwin and Peggy Erwin	36-00092
Michael J. Fleming	36-00064B
Keith L. Fuell and Jolene Fuell	36-00086C
Frank L. Glauner and Jean Glauner	36-00039E
Mattie P. Grigg	36-102838
George J. Korbis and Nellie W. Korbis	36-00039N
Marilyn J. Miller	36-00085A
Howard L. Morris and Rhonda K. Morris	36-00061
Howard L. Morris and Rhonda K. Morris	36-00062
Howard L. Morris and Rhonda K. Morris	36-00063
Mark Potter and Susan Potter	36-00039J
Edna M. Rea	36-00003A
Roger Shaffer	36-00034B
Doyt H. Simcoe and Roxie Simcoe	36-00003F
Richard D. Simon	36-00035J
Dick J. Veenendaal and Sigrid E. Veenendaal	36-00039C
Edith L. Vernon	36-00003E
Paul E. Watkins and Inez S. Watkins	36-00106
Basil Lester Zink and Myrle Hyde Zink	36-00103F

DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
STATE OF IDAHORECEIVED
AUG 30 1996
Department of Water Resources
Adjudication BureauDANIEL C. HURLBUTT, JR.
PRESIDING JUDGE
(208) 736-3011
FAX (208) 736-2121SRBA CHAMBERS
P.O. BOX 2707
TWIN FALLS, IDAHO 83303-2707TO: Matt McKeown
DD AG's OfficeTelephone: _____
Fax: 334-2690FROM: SNAKE RIVER BASIN ADJUDICATION
Telephone: 208-736-3011
Fax: 208-736-2121No. Of Pages Including Cover Sheet: 6

Order re: August 22, 1996 Depo of TDWR & Cert. of ^{Service} ~~Parting~~
on the AG's Office by fax signed by Debbie Lash. You will need
to attach another cert. of service on claimants, etc.
Any questions - please call.

Thank Tiffney

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