IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO SCHOOLS FOR EQUAL EDUCATIONAL OPPORTUNITY, et. al., Plaintiffs, vs. THE STATE OF IDAHO, Defendant.	Case No.: 94008 ORDER CONFIRMING REFERRAL TO THE SPECIAL REMEDIAL MASTER AND DETAILED ORDER OF REFERENCE

The Court, in the exercise of its discretion, determined that the exceptional nature of this case at this stage required the services of a special remedial master with the technical expertise to aid the Court and the parties in narrowing the focus of the dispute to solely those issues which are truly in dispute and to provide the court with current, accurate information on school safety hazards and the most-cost efficient method of addressing such hazards. This Order confirms the appointment of the special remedial master effective November 21, 2002. Upon his acceptance of the responsibility, the master began his work as outlined in his testimony. This Order clarifies the procedures to be followed with respect to any challenges to his eventual factual findings and sets forth the Court's legal basis for its Decision. It also confirms the Order designating the party responsible for the payment of the master's costs.

1. Authority to Appoint a Master. The authority of courts to appoint a master is found in Idaho Rule of Civil Procedure Rule 53(a)(1) which provides as follows:

> Masters - Appointment and compensation.
> The court in which any action is pending may appoint a special master therein. Except where these rules are inconsistent with the law, the word "master" includes a referee, a commissioner, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court as

> the court may direct. The master shall not retain the report as security for compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

Under I.R.C.P.53(b) the reference to a master is "the exception and not the rule." In a case being tried without a jury, the referral to a master is made "only upon a showing that some exceptional condition requires it."

2. *Exceptional condition*. This case is now in the remedy phase. At this stage, it presents unique challenges. The most efficient, least costly method to advance this case at this stage requires the use of a special master who has special technical expertise, specifically, an architect with broad experience, who can provide the Court and the parties with neutral, current, accurate information on existing safety hazards and the most cost-efficient method to remedy them. Any remedy would be fashioned by the Court after an opportunity for both sides to address it. Any serious hazards will be given priority treatment.

The case was filed on October 30, 1990. It has been appealed three separate times. In its last Decision, the Idaho Supreme Court remanded the case to the trial court with the instruction to hold a trial to resolve the question of "whether the Legislature had provided the means for school districts to fund facilities that offer a safe environment conducive to learning." *Idaho Schools for Equal Educational Opportunity v. the State of Idaho*, 132 Idaho 559, 976 P.2d 913 (S. Ct. 1998)(ISEEO III). In ISEEO III, the Idaho Supreme Court stated that it did "not express any opinion at this time about the appropriate relief that should be granted if the trial court decides that Plaintiffs are entitled to relief." Id. at 568.

The need for a trial arose from the mandate contained in the Idaho Constitution which provides that : "it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." Idaho Constitution Art. IX, § 1.

The Supreme Court held that this section of the Idaho Constitution meant that, at a minimum, there was a duty on the part of the Legislature to provide a system of school funding which ensures that schools are safe.

Based upon the instructions on remand, there was an extensive trial before the Court, acting without a jury. By agreement of the parties and with the consent of the Court, direct testimony was submitted in writing. Actual trial time was then focused on cross-examination and redirect. The testimony was voluminous. On February 5, 2001, the Court released its Findings of Fact and Conclusions of Law. The Court concluded that the overwhelming evidence in the case was that the system of school funding was inadequate to ensure the safety of Idaho's school children. In its Summary, the Court set forth its conclusion that the current system of funding, particularly as it affects rural areas, was inadequate. The Court reserved jurisdiction over any remedy, and, initially, deferred to the Legislature to design a system which could more readily address the serious shortcomings in the funding system. The Findings of Fact addressed the evidence received in the case with the exception of evidence relating to the problems of schools in the Silver Valley which had not been presented at that time. Because the problems relating to the Silver Valley schools were unique and related to environmental contamination, the Court determined that it was preferable to issue its Findings of Fact and Conclusions of Law in 2001 in order to give the Legislature the greatest possible flexibility in dealing with the inadequacy of the funding system at a time when an unusually large surplus gave the State more options to devise a solution than are normally available. Also, the complex nature of the problem and the fact that there are a variety of legislative tools available to improve the system of funding school safety simply warranted giving the Legislature a full and fair opportunity to act first. There is no question whatsoever that the Legislature has the power and the responsibility to devise an adequate system of school funding which meets constitutional muster. However,

until it acts, the Court will have to act. Under our system of government, no branch of government is free to ignore the mandates imposed by the founding documents. The Legislature's duty to establish and maintain a system of school funding so that schools provide a "safe environment conducive to learning" is imposed by the Idaho Constitution. The system of school funding no longer meets that mandate. While courts cannot draft and pass legislation, they are required to ensure that the law is followed. *Marbury v. Madison*, 5 U.S. (1Cranch) 137, 2 L.Ed. 60 (1803), set forth one of the most essential concepts of our system of government when it announced the principle that the interpretation of the Constitution is committed to the courts. When a constitutional violation has been found to exist, the courts may be required to act until the Legislature decides upon a constitutionally adequate system of funding. *In Re Alabama Coalition for Equity, Inc. v. James,* 713 So.2d 669 (1997), *Washakie County School Dis. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980). There is no question that establishing a system of funding which will allow schools to address serious safety issues is complex, however, in the meantime, safety hazards must be remedied.

Unfortunately, there are no funding mechanisms which allow for a district to replace an unsafe school or engage in substantial repairs even if a majority in the district are willing to shoulder a heavier tax burden if a minority opposes the increase. There is likewise no readily available mechanism to deal with sudden catastrophic issues which necessitate substantial repair or replacement. There are no mechanisms to deal with large emergency items. No district carries such a substantial reserve that it could deal with an immediate catastrophic failure.[1] While the State provides direct assistance with many costs connected with education, it provides

[1] A school inspection system which regularly inspected for serious safety issues including structural, electrical and other major system issues as well as more minor issues would probably greatly reduce or eliminate unexpected catastrophic failures. To date, the Division of Building Safety lacks the personnel and financial resources to assume this function.

no direct assistance for addressing unsafe school buildings. There are currently no state funds available to assist districts in meeting critical safety needs.[2]

If the Court is to act, it must have current, accurate information about existing safety hazards and the most cost effective means of addressing the hazard.[3] The least expensive and most efficient method to gather the information necessary to act lies in the use of a special remedial master.

It has become apparent that a more traditional litigation approach to the remedy phase of this unusual trial is far too costly, too slow, and, frankly, too inefficient, to warrant continuing in this fashion. Considerable trial time has been spent exploring issues which turned out to be largely undisputed. For example, approximately five trial days spread out over several months was spent on detailing problems in the Lapwai School District alone with examining deteriorating buildings and unsafe conditions through live testimony and videotapes. The only real dispute was in deciding which unsafe condition was the most serious. The State's experts would have prioritized the problems differently and would have addressed the solutions differently but there was a considerable area of agreement. Moreover, both the State and the Plaintiffs' experts agree that a uniform methodology would be beneficial and would reduce the time necessary to get a more accurate picture of current problems. Receiving architectural and engineering reports from school districts which have hazardous buildings or conditions still requires the review by someone with technical expertise, a review which may be drawn out because of the lack of a uniform methodology. The State's experts also agree that evaluating the existence and degree of a safety risk requires technical expertise. Experts for both sides agree

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[2] The Legislature previously funded a small loan program which has now been exhausted.
[3] The Legislature would also benefit from current, accurate information about the condition of Idaho schools as well but this is not the primary purpose of the appointment of a special remedial master.

that it is generally not possible for even experts to glean essential safety information from videotapes of the schools. Under the current procedure, an architect or structural engineer, possibly an industrial engineer and an accountant for each side have to evaluate each building, be subject to discovery from the opposite side who has also retained an architect, a structural engineer, possibly an industrial engineer and an accountant. The result has been and will be the needless consumption of litigation resources. In 1993, when the Legislature looked at the condition of Idaho's schools in its Facilities Needs Assessment Study, there were 652 schools with 875 buildings and a student population of 231,654. Over half of those schools had serious safety problems. According to the most recent Idaho Department of Education Statewide Summary, there were 245,377 students enrolled in Fall 2000-2001in 672 schools (the number of buildings was not specified but it would be improbable that it would be fewer than 875). The cost involved in duplicate sets of experts examining several hundred school sites is enormous both in dollars and time. Because of the technical aspect of this phase of the trial, proceedings have also been bifurcated with Plaintiffs providing both prefiled testimony and live testimony, a gap to allow further discovery by the State, and then State testimony, followed by the Plaintiffs' rebuttal. Both the State and Plaintiffs have expressed concern about the level of resources which will be consumed by approaching this case in the traditional manner and the probability of great delay. In discussing the referral to a special remedial master, it was noted that the State estimated its costs alone at $1.7 million if the case proceeds as it has. In contrast, the master estimated that his cost for review of the buildings identified as presenting serious safety issues would be in the range of $400,000. Even if that figure is somewhat higher, it still is cheaper to have one set of reviewers instead of two or three. None of the money spent by either side is being used to make any repairs or rebuild a single inadequate building. An additional problem

which has occurred has been the expenditure of court and litigant resources on issues which are not before the court in this litigation, i.e., overcrowding. The use of a neutral special remedial master to identify dangerous school conditions and the most cost-efficient solution has multiple benefits:

1. it reduces the duplication of investigative resources currently occurring;
2. it permits the focus of trial time on only those matters genuinely disputed;
3. it is less costly;
4. it will allow for a uniform methodology;
5. it will be quicker;
6. it will allow the Court to prioritize the allocation of court resources by focusing evidentiary proceedings on the most serious problems first.

The most common criticism leveled at the use of masters is that, if improperly used, the parties are deprived of their right to have legal and factual disputes resolved by a court, an objection raised by the State in this case. In general, those objections are less serious in post-liability references to special remedial masters who are called upon to provide technical expertise and perform tasks which do not fall into neat categories. See, Moore's Federal Practice, Rule 53(3rd ed., 1997), 16 Manual for Complex Litigation, Third, 21.5 Special Referrals, et. seq. I.R.C.P. 53 sets forth the procedure to be followed. Either party can challenge any of the master's findings of fact which it contends are "clearly erroneous." I.R.C.P. 53(e)(2). Idaho has long recognized that the appointment of a master does not displace the district court's role as the ultimate trier of fact. *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989). While the Rule does require the Court to accept the master's findings of fact unless clearly erroneous, the Court is still required to independently review the evidence to see if the findings of fact are supported by substantial evidence and the Court remains the only source for any conclusions of

law. *Id.* Any remedy which will be fashioned in this case will be fashioned by the Court, albeit with the master's assistance in providing the factual information necessary to tailor a just and appropriate remedy.

Idaho has had fairly extensive experience in the use of special masters in a wide variety of situations. In the Snake River Basin Adjudication, special masters have been used to resolve numerous water right claims. E.g., *McCray v. Rosenkrance*, 135 Idaho 509, 20 P. 3d 693(2001), *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). Masters have also been appointed to conduct accountings. E.g., *Higley v. Woodward*, 124 Idaho 531, 861 P.2d 101(Ct. App. 1993). The Supreme Court has affirmed the use of masters in determining easement issues and resolving a quiet title action on mining claims. *Seccombe v. Weeks,* 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

In *Felton v. Prather*, 95 Idaho 280, 506 P.2d 1353 (1973), rejecting a writ of mandamus attacking the appointment of a master to perform a land survey, the Supreme Court noted that the decision of a trial judge to appoint a master was committed to the sound discretion of the trial judge under I.R.C.P. 53. In this case, there are many, many benefits to the appointment of a special remedial master to report back to the Court on the hazardous conditions which exist in Idaho schools and the most cost-effective method of dealing with any condition which presents a safety risk to Idaho school children not the least of which are cost, accuracy and timeliness.

3. Special Remedial Master. Charles Hummel has been a licensed architect in Idaho since 1953. He was the principal partner in Hummel Architects until his retirement three years ago. He has been involved in numerous Idaho projects including the Interagency Fire Center at Gowen Field, the design of the Hall of Mirrors for the State, the United States Courthouse for the District of Idaho, the renovation of Boise High School, and many other projects. He is well-qualified to

perform the task required by the Court. He has advised the Court that he can perform the review required by utilizing the method established by the State in its 1993 Study and some of the same firms. He has proposed a practical approach to the review required at this stage.

4. Methodology and Scope of Referral. The best model for the special remedial master's review of safety conditions in Idaho schools is that utilized by the Legislature itself when it undertook a comprehensive review of the condition of all of Idaho's schools. The Legislature established the Statewide School Facilities Needs Assessment Committee through its passage of SB1158 which was charged with conducting a comprehensive study of all of Idaho's public schools, including their structural safety. The Committee developed a uniform inventory of all public school facilities using a small number of trained inspectors working from uniform criteria. One of the key tasks of the Committee was for its final report "to contain a property database with a physical condition audit of each facility and an estimate of the costs to make improvements with a prioritization of improvements including "life/safety considerations, building deterioration and functional improvements." Findings of Fact, Section F, 3. The database was designed to be updated periodically. While the Needs Assessment Study is now over ten years old, its methodology remains sound. Its Building Condition and Suitability Evaluation Manual needs to be updated to reflect the applicable current codes. Using the State's methodology will also be more cost-effective since no new mechanism need be created.

Because the site evaluation of each school by a trained staff member was a critical component of the Committee's work, the Committee took special steps to ensure uniformity and quality. The number of evaluators was kept to a minimum. They were all trained at the same time to ensure that the techniques used would be consistent. The two firms who conducted the inspections are available to be utilized in providing the updated information.

The Building Evaluation forms included the following areas for inspection:

a. Exterior Building Condition—including foundation/structure, walls, roofs, windows doors, trim.

b. Interior Building Condition—including floors, walls, ceilings, fixed equipment.

c. Mechanical Systems Condition—including electrical, plumbing, heating, cooling, lighting.

d. Safety/Building Code—including means of exit, fire control capability, fire alarm system, emergency lighting, fire resistance.

e. Provision of Handicapped Access

Each school was rated in each category with point ratings from unsatisfactory to good. Portables were inspected but were not included in the overall assessment for any particular school. After evaluating the physical condition of each school building, each building was scored and rated. A school score within the range of 0-30 meant: "Major problems exist; building is dangerous to occupy; very high maintenance and operational costs; renovation/remodeling costs normally higher than replacement costs." A score in the range of 31-49 meant: "Serious problems exist and need immediate attention, renovation/remodeling costs greater than 50% of replacement costs". A score in the range of 50-74 indicated that: "Serious problems developing: renovation/remodeling costs greater than 50% of replacement costs." A score of 75-89 signified only minor problems. A score of 90-100 indicated that no remodeling or renovation was needed. A score below 50 represented serious safety concerns.

The master is authorized to update the assessment tool to reflect the current building code applicable in the State of Idaho. He is authorized to review the architectural and engineering reports submitted to the Court by various school districts. Utilizing the study design, he is authorized to hire such necessary professionals to assist him in performing an on-site inspection of school facilities suspected of presenting serious safety risks, rating such buildings as set forth in the Needs Assessment Study, identifying those which present the most serious risk to their

occupants, and, where feasible, recommending the most cost-effective solution to remedy the risk. The master is authorized to use his sound professional judgment to accomplish the task assigned to him by the Court—to identify serious safety hazards in Idaho's schools, evaluate recommended solutions, and advise the Court of the most cost-effective remedy. While it is anticipated that the master will present a final report to the Court once he has performed his tasks, the master is authorized and urged to report immediately to the Court on any safety conditions which present an imminent risk of harm to the building's occupants. The Court will establish hearings on contested matters starting with the most serious conditions first. The master is also authorized to hire such support staff as he may need to perform the functions assigned by the Court.

5. *Cost.* I.R.C.P. 53(a)(1) permits the Court to establish the compensation for the master and to charge it against either or both parties. In this case, as already stated in the Court's oral Order Appointing the Special Remedial Master, the cost is assessed against the State. The reason for the assessment against the State is that the only reason that the Court is appointing a special remedial master to assist in the remedy phase is that the Legislature has not yet established a system which would meet its responsibility to ensure that the schools had a "safe environment conducive to learning." The Legislature has many options before it: it can fund school construction/safety remediation programs itself; create additional mechanisms or modify existing funding mechanisms to strengthen the ability of local districts[4] to meet these issues; or it could enact a program of mixed State and local funding. It is entirely up to the Legislature to choose its course of action to meet its constitutionally imposed duty, however, inaction is not an option. The courts are required to see that the constitutional requirements for school safety are met while a satisfactory system of school funding is decided upon. Because the duty is the

[4] It should be noted that some districts may lack the bonding capacity and financial resources to undertake repair or replacement of seriously dangerous facilities so some fail-safe mechanism may be essential.

Legislature's, and because it alone can perform the legislative function, it is responsible for the costs incurred in this remedy phase. Rule 53(a)(1) expressly authorizes the assessment of the costs of a master against one party only.

The State has argued that the costs for the master cannot be assessed against it and has relied upon *Chastain's Inc. v. State Tax Comm'n*, 72 Idaho 344, 350, 241 P.2d 167, 170 (1952). However, *Chastain's* does not hold that costs cannot be awarded against the State. In *Chastain's*, the Idaho Supreme Court expressly held that costs *are* allowed against the State where the writ of prohibition statute specifically provided that a successful applicant for a writ of prohibition would be entitled to its costs. It reasoned that since writs of prohibition are an ancient common law tool which has been used against state boards and commissions, the statute authorizing an award of costs in connection with writs of prohibition meant that by "necessary implication" that costs could be awarded against the State[5].

Nothing precludes the use of a special remedial master, or for that matter, a master of any type in litigation involving the State. In fact, masters in general, have been used in litigation involving states around the country. A court has inherent power to take such actions as are necessary to ensure the enforcement of its orders. I.C. § 1-212 embodies the long-standing principle that the Supreme Court has inherent power to make rules governing the procedure to be followed in all Idaho courts. In 1977, I.C. § 12-101 was enacted which states that the award of costs in a civil trial or proceeding is governed by the Idaho Rules of Civil Procedure. Rule 53 permits the assessment of a master's cost against one party. No party is exempted from its coverage. I.C. § 12-118 provides that costs awarded against the State when it is a party are to be paid out of the general fund and that the state controller "shall draw his warrant therefor on the

[5] *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1990), a criminal appeal, is completely inapplicable to this case. There is no provision comparable to I.R.C.P. 53 in the Idaho Criminal Rules.

general fund." In this case, the only party who has created the need for a special remedial master is the State acting through the Legislature. The Idaho Rules of Civil Procedure authorize the appointment of masters in "exceptional cases" and the assessment of the cost of the master against one party.

The compensation for the master is set at the hourly rate for principal architects most recently approved by the Division of Public Works for its own architectural work. The compensation for additional support personnel shall be that which is the reasonable fee for professionals/support personnel in this area during the same time period.

6. *Authority of the Special Remedial Master*. The master may require the production of evidence upon all matters embraced in this reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may procure the attendance of witnesses by the issuance of subpoenas as provided by I.R.C.P. Rule 45 if he deems it necessary. Not later than January 31, 2003, the master shall set a time and place for the first meeting of the parties or their attorneys to discuss his plan for the performance of his special remedial master functions. No hearings will be held until after the Final Report unless there is a designation of an Immediate Hazard. The master shall file a Draft Final Report after he has conducted his review of serious building safety conditions which shall be provided to the parties for their review and comment. All objections to the Special Remedial Master's Draft Final Report shall be made first in writing to the Special Remedial Master not later than thirty (30) days after the filing of a Draft Final Report. Thereafter, the Special Remedial Master shall file his Final Report. Objections to the Final Report are required within fourteen (14) days after the parties have been served with notice of the filing of the Final Report. Objections to an Immediate Hazard determination made by the Special Remedial Master prior to the Final Report must be made in writing within

fourteen(14) days of the designation of an Immediate Hazard. The Special Remedial Master shall rule on any objections and provide his reasons for his ruling to the Court.

7. Additional Instructions. The Special Remedial Master shall report back to the Court advising it of serious safety hazards in any school and the most cost-efficient method of remedying the hazard in his Final Report. In the event that the Special Remedial Master determines that a safety hazard presents, in his judgment, an unacceptable risk of serious harm to the safety of the building occupants, he may report those hazards immediately to the Court as an Immediate Hazard. The procedure for the handling of Immediate Hazards is outlined above. Upon receipt of the Special Remedial Master's Final Report or any Immediate Hazard Report and the Master's ruling on any objections to the factual conclusions stated therein, the Court shall contact counsel and shall forthwith establish a date of hearing for any factual findings challenged as clearly erroneous or for the ordering of any remedy.

It is so ordered.

Dated this 10th day of December, 2002

Deborah A. Bail
District Judge