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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. 63-02529, 63-03163, 63-03274, 63-03323
	)	63-03324, 63-09109, & 63-10435
	)	
	)	IDAHO'S RESPONSE TO CLAIMANT'S MOTION
Case No. 39576	)	FOR PROTECTIVE ORDER AND BRIEF IN
	)	SUPPORT OF MOTION TO SEVER
	)	
	)	

COMES NOW the State of Idaho (hereinafter the "State"), by and through the undersigned deputy attorney general, and responds to the *Motion for Protective Order* of Claimant DBSI Tiegs 979 LLC by filing its *Motion to Sever Subcase Nos. 63-03163 and 63-03274 from the Consolidated Proceeding and Request for Expedited Consideration* and by lodging *Idaho's Response to Motion for Protective Order and Brief in Support of Motion to Sever*.

COPY

I. STATEMENT OF THE CASE

i. Nature of the Proceedings

This case involves objections to the inclusion of an annual diversion volume limitation in the Director's Recommendation for seven water rights. The present matter is a discovery dispute regarding answers to discovery and a motion to sever two subcases from the consolidated proceeding to resolve the discovery dispute.

ii. Course of the Proceedings

The district court entered its *Summary Judgment Scheduling Order* on November 3, 2008, which set the date of February 16, 2009 as the date for completion of summary judgment discovery.

iii. Statement of Facts

The State served by U. S. Mail the *State of Idaho's First Set of Discovery Requests to DBSI Tiegs 979 LLC* on October 20, 2008. Answers were due on November 24, 2008. Before the answers were due, Mr. Dylan Lawrence, attorney for DBSI Tiegs 979 LLC, called David J. Barber, deputy attorney general, and asked for an extension of time to December 24, 2008, for a service of a response. Mr. Lawrence confirmed that request in an e-mail to Mr. Barber on November 17, 2008, a copy of which is attached as Exhibit 1 to the *Affidavit of David J. Barber Dated January 8, 2009* (hereinafter "*Barber's Affidavit*"). Mr. Barber responded and agreed to the extension in an e-mail dated November 20, 2008, which is attached as Exhibit 2 to *Barber's Affidavit*.

On or about December 11, 2008, David J. Barber, deputy attorney general, went to the U.S. Bankruptcy Court in Boise and reviewed its files. The terminal available for public use was used to search for DBSI Tiegs 979 LLC and DBSI Housing Inc. Neither entity had filed for protection under the bankruptcy laws. The Notice of Commencement of Chapter 11 Bankruptcy

for Case No. 08-12687 was also obtained. This document identified several hundred DBSI entities as debtors.

At this time, Mr. Barber did not remember the details of the discussion with Mr. Lawrence about the DBSI bankruptcy. Therefore, he looked for any relevant e-mails and failed through inadvertence to find the e-mails attached as Exhibits 1 and 2 to *Barber's Affidavit*. In addition, the Annual Report Form filed on behalf of DBSI Tiegs 979 LLC on May 13, 2008, caused further confusion because it incorrectly described the managing member of DBSI Tiegs 979 LLC as DBSI Housing Inc. A copy of that Annual Report Form is attached as Exhibit 3 to *Barber's Affidavit*.

Mr. Barber sent a demand letter dated December 15, 2008 regarding answers to the discovery previously served on DBSI Tiegs 979 LLC. A copy of this letter is attached as Exhibit 4 to *Barber's Affidavit*. Mr. Lawrence responded in a letter dated December 16, 2008. After Mr. Barber reviewed the letter and the e-mails that he had misplaced, he replied in a letter dated December 17, 2008. A copy of this letter is attached as Exhibit 5 to *Barber's Affidavit*. That letter apologized for the letter dated December 15, 2008 and also stated that he would honor the extension of the discovery deadline to December 24, 2008, which was agreed to in the misplaced e-mails.

On December 23, 2008, Mr. Dylan Lawrence sent Mr. Barber an e-mail about the motion for protective order. Mr. Barber responded to that e-mail in a letter dated December 29, 2008. A copy of this letter is attached as Exhibit 6 to *Barber's Affidavit*.

Mr. Barber further responded to Mr. Dylan Lawrence in e-mails that are dated January 5th and 6th of this year. Those e-mails are attached as Exhibits 7 and 8, respectively, to *Barber's Affidavit*.

The policy to include an annual volume of diversion limitation in the Director's Recommendation of these state water rights is a policy determination made by the Idaho Department of Water Resources (hereinafter "IDWR"). The IDWR and the Idaho Water Resource Board are those entities in state government with primary responsibility for the determination of state policy regarding the definition of state water rights. *Barber's Affidavit*, at 3.

The Office of the Idaho Attorney General filed Responses on behalf of the State on the issue of inclusion of an annual volume diversion limitation. The State through the Office of the Attorney General has a right to support this policy determination by the IDWR as provided by Idaho Code § 42-1401C(2).

The Office of Attorney General consists of the Attorney General elected by the people of the State of Idaho, over one hundred deputy attorney generals, criminal investigators, and various administrative support staff. *Barber's Affidavit*, at 3.

ARGUMENT

I. THE DISTRICT COURT SHOULD SEVER SUBCASE NOS. 63-03163 AND 63-03274 FROM THE CONSOLIDATED PROCEEDING AND PUT THESE TWO SUBCASES ON A SEPARATE LITIGATION SCHEDULE BECAUSE OF THE PENDING BANKRUPTCY PROCEEDING.

I.R.C.P. 26(c) states, in part, as follows:

Upon motion by a party or by a person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matter relating to a deposition, the court in the district where the deposition is to be taken may make any order **which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:** (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; . . .

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or

permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id. (emphasis added). Thus, I.R.C.P. 26(b)(4) grants the district court broad discretion to fashion an appropriate remedy based on the facts.

Here, the State served discovery on Claimant DBSI Tiegs 979 LLC on October 20, 2008. The bankruptcy filing occurred on November 6 and 10, 2008. *Barber's Affidavit* at Exhibit 4. Responses to the discovery were extended to December 24, 2008. Claimant DBSI Tiegs 979 LLC in its *Motion for Protective Order* asks for "a reasonable amount of time while it works through issues related to DBSI's bankruptcy filing." *Id.* at 2. A further extension is not warranted given the pending deadline for summary judgment discovery on February 16, 2009. Granting an extension at this time would require changes in the present summary judgment scheduling order.

The State filed a *Motion to Sever Subcase Nos. 63-03163 and 63-03274 from the Consolidated Subcase Proceeding and Request for Expedited Consideration*. The evident purpose of this motion is to preserve the present schedule for summary judgment for the other subcases and to provide a separate litigation schedule for the two subcases involving Claimant DBSI Tiegs 979 LLC. This change would accommodate the uncertainty presented by the bankruptcy filing. Granting this motion resolves the problems presented by the bankruptcy, and the State would not oppose entry of a order that stayed answers to this discovery until further order of the district court..

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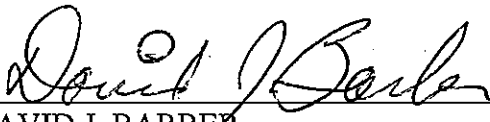
CONCLUSION

For all the reasons stated, the district court should grant the State's *Motion to Sever Subcase Nos. 63-03163 and 63-03274 from the Consolidated Proceeding and Request for Expedited Consideration.*

DATED this 8th day of January 2009.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 8th day of January 2009, I caused to be served the original and/or copy of this IDAHO'S RESPONSE TO CLAIMANT'S MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT OF MOTION TO SEVER on each of the following persons by the indicated method:

1. Original to:

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

- ☐ U.S. Mail, postage prepaid
☒ Hand Delivery
☐ Federal Express
☐ Facsimile: (208) 736-2121
☐ Statehouse Mail

2. Copies to the following persons:

Pioneer Irrigation District
c/o Scott L. Campbell & Dylan B. Lawrence
Moffat Thomas Barrett Rock & Fields, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile:
☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: (303) 312-7379
☐ Statehouse Mail

IDWR Document Depository
STATEHOUSE MAIL
322 East Front St.
Boise, ID

- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☒ Statehouse Mail

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Not Applicable



DAVID J. BARBER

Deputy Attorney General