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DEPARTMENT OF  
WATER RESOURCES

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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 Nos. 63-02529, 63-03163, 63-03274, 63-03323 |
|                | ) | 63-03324, 63-09109, & 63-10435                      |
|                | ) |                                                     |
|                | ) | BRIEF IN SUPPORT OF IDAHO'S                         |
| Case No. 39576 | ) | MOTION FOR PROTECTIVE ORDER                         |
|                | ) |                                                     |
|                | ) |                                                     |
|                | ) |                                                     |
|                | ) |                                                     |

COMES NOW the State of Idaho (hereinafter the "State"), by and through the undersigned deputy attorney general, and lodges this *Brief In Support Of Idaho's Motion For Protective Order*.

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 dispute concerns a proposed

deposition of a representative of the State that is duplicative, unduly burdensome and oppressive and may be seeking attorney work product that is not the proper subject of discovery.

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.

The Claimants, Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, Kevin Tlucek, and DBSI Tiegs 979, LLC (hereinafter the "Claimants"), served a *Notice of Rule 30(b)(6) Deposition Duces Tecum of the State of Idaho* (hereinafter "*Idaho's Rule 30(b)(6) Notice*") on December 17, 2008, which set the date and time of Tuesday, January 27, 2009 at 9:30 a.m. for the deposition of the representative of the State. The *Idaho's Rule 30(b)(6) Notice* states, in part, as follows:

Pursuant to Idaho Rule of Civil Procedure 30(b)(6), the State must designate one or more knowledgeable representatives to testify on its behalf at this deposition. Specifically, examination is requested on the State's interest in the above-referenced subcases, and the basis for the State's position that annual diversion volume ("ADV") limitations should be included on those water rights.

*Id.* at 2.

The Claimants served a *Notice of Rule 30(b)(6) Deposition Duces Tecum of the Idaho Department of Water Resources* (hereinafter "*IDWR's Rule 30(b)(6) Notice*") on December 17, 2008, which set the date and time of Tuesday, February 3, 2009 at 9:30 a.m. for the deposition of the representative of IDWR. *IDWR's Rule 30(b)(6) Notice* states, in part, as follows:

Pursuant to Idaho Rule of Civil Procedure 30(b)(6), the Idaho Department of Water Resources has a duty to designate one or more knowledgeable representatives to testify on its behalf at this deposition. Specifically, examination is requested on the basis of IDWR's Director's Report recommendations for each of the above-referenced water rights, particularly the inclusion annual diversion volume limitations on each of those water rights.

*Id.* at 2.

iii. Statement of Facts

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 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.

*Affidavit of David J. Barber Dated January 8, 2009, 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. Just like any other party to the Snake River Basin Adjudication, 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). If the State were required to designate a representative to testify at the deposition of the State presently scheduled for January 27, 2009, at 9:30 a.m., it would designate a knowledgeable person from the IDWR as its representative, since that agency developed the policy on the subject of the deposition. Since the Office of the Attorney General consists of the Attorney General elected by the people of the State, over one hundred deputy attorney generals, criminal investigators, and various administrative support staff, it would not designate a person from the Office of the Idaho Attorney General to answer this water policy question. *Affidavit of David J. Barber Dated January 8, 2009, at 3.*

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## ARGUMENT

### I. CLAIMANTS' REQUEST TO DEPOSE A REPRESENTATIVE OF THE STATE OF IDAHO IS DUPLICATIVE, UNDULY BURDENSOME AND OPPRESSIVE AND MAY BE SEEKING ATTORNEY WORK PRODUCT THAT IS NOT THE PROPER SUBJECT OF DISCOVERY.

- A. The Claimants duplicate notices of deposition under I.R.C.P. Rule 30(b)(6) to IDWR and the State on the same subject are unduly burdensome and oppressive.

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 Claimants have served notices of Rule 30(b)(6) depositions on IDWR and the State regarding the same subject--the inclusion of the annual volume diversion limitations included in the various water rights. The Claimants' Rule 30(b)(6) deposition of IDWR will provide the Claimants the opportunity to explore the policy reasons for the inclusion of annual volume limitations in water rights from the representative of the agency that developed that policy. The Claimants' Rule 30(b)(6) deposition of the State is an apparent request the same information. If that deposition were allowed to proceed, the State would designate a knowledgeable person from the IDWR to testify at that deposition. The State would not designate as its representative any of the

personnel of the Office of the Idaho Attorney General. The Claimants have made no showing that the existing deposition of IDWR will not provide the information desired by the Claimants and have made no showing why it needs to depose a representative from IDWR twice on the same subject.

- B. If the Claimants' notice of deposition under I.R.C.P. Rule 30(b)(6) served on the State is attempting to depose a deputy attorney general regarding the filing of the response by the State in these subcases, then the notice of deposition requests a deposition of opposing counsel and attorney work product that is not the proper subject of discovery.

The Idaho Supreme Court has addressed the issue of depositions of opposing counsel in *State v. Dunlap*, 141 Idaho 50, 106 P.3d 376 (2005) as follows:

This Court adopted a three-prong test to determine when it might be appropriate to depose opposing counsel. . . . It would have to be shown that there is no other means to obtain the information other than deposing counsel; the information sought would be relevant and not privileged; and the information is crucial to the preparation of the case. . . . The district court decision to deny the admission of witness testimony is reviewed under the abuse of discretion standard.

*Id.* at 65. Here, the scheduled deposition of the IDWR provides the Claimants the forum for obtaining any relevant information behind the policy of the annual volume diversion limitation. The State intends to appear solely for the purpose of presenting legal argument in support of the policy set forth in the Director's recommendations for these water rights. The rationale for IDWR's policy will be the subject of Claimants deposition of IDWR's designated witness. The only purpose for deposing the State as opposed to IDWR, is to inquire into the attorney's thought processes for determining to support IDWR's recommendation. The Claimants have not demonstrated that the information sought is not privileged, they have not explained why the information is crucial to their case; they have not demonstrated an adequate basis for the Rule 30(b)(6) deposition of the State. Such a request is oppressive and unduly burdensome and requests information that is not subject to discovery.

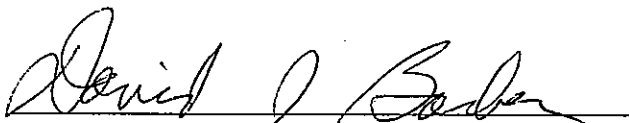
## CONCLUSION

For all the reasons stated, the district court should enter a protective order that the deposition of the State presently set for January 27, 2009 at 9:30 a.m. not be had.

DATED this 8<sup>th</sup> 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 8<sup>th</sup> day of January 2009, I caused to be served the original and/or copy of this BRIEF IN SUPPORT OF IDAHO'S MOTION FOR PROTECTIVE ORDER 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., 10<sup>th</sup> 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

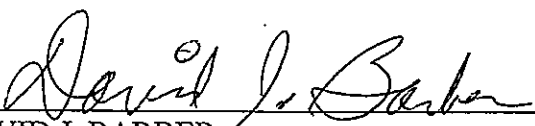
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IDWR Document Depository  
STATEHOUSE MAIL  
322 East Front St.  
Boise, ID

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

Chief of Natural Resource Division  
Office of the Attorney General  
State of Idaho  
P.O. Box 44449  
Boise, Idaho 83711-4449

Not Applicable

  
\_\_\_\_\_  
DAVID J. BARBER  
Deputy Attorney General