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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
	)	
	)	REPLY 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 *Reply Brief In Support Of Idaho's Motion For Protective Order*.

I. STATEMENT OF THE CASE

ii. Additional Course of the Proceedings

A hearing on the State's *Motion for Protective Order* was set for January 22, 2009 at 2:00 p.m.

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"), filed an *Affidavit of Matthew J. McGhee* and lodged their *Response in Opposition to State of Idaho's Motion for Protective Order* (hereinafter "Claimants' Opposition Brief") on January 15, 2009.

iii. Additional Statement of Facts

The policy to include an annual volume of diversion limitation in the Director's Recommendation of these water rights is a policy determination made by the Idaho Department of Water Resources, (hereinafter "IDWR"). The IDWR and the Idaho Water Resource Board (hereinafter the "IWRB") are those entities in state government with primary responsibility for the determination of state water policy. *Affidavit of David J. Barber Dated January 8, 2009*, at 3. Although both entities have responsibility for state water policy, they each have distinct roles. The IDWR is the independent technical advisor to the district court in the Snake River Basin Adjudication (hereinafter the "SRBA"); it is not a party to the SRBA. IDWR also administers the water right application, permit, and license program and the distribution of water in accordance with the prior appropriation doctrine. In contrast, the IWRB is responsible for developing the State's water plan, appropriating and protecting instream flows, and participates in the SRBA as a full party. *Affidavit of David J. Barber Dated January 20, 2009*, at 2.

The IWRB has eight authorized members, but no independent staff. The legislature directed that the IWRB be within the IDWR, and IDWR provides full administrative services to the IWRB. *Id.*

The IWRB has adopted Policy 1E entitled Water Measurement and Policy 1G entitled Reasonable Use. *Affidavit of David J. Barber Dated January 20, 2009*, at 2. IDWR adopted the

policy to include an annual volume of diversion limitation in the water rights where the source of water is ground water. *Affidavit of David J. Barber Dated January 8, 2009*, at 3.

The State has determined that the appropriate person to be designated as the knowledgeable representative of the State is the Director of the IDWR, and the Director has consented to testify on the State's behalf. In addition, the IDWR has informed the State that the Director of the IDWR is designated as the knowledgeable representative of the IDWR. *Affidavit of David J. Barber Dated January 20, 2009*, at 2-3.

ARGUMENT

I. CLAIMANTS' REQUESTS TO CONDUCT DUPLICATE DEPOSITIONS OF REPRESENTATIVES OF THE STATE OF IDAHO AND OF THE IDAHO DEPARTMENT OF WATER RESOURCES IN ACCORDANCE WITH I.R.C.P. 30(b)(6) ARE UNDULY BURDENSOME AND OPPRESSIVE.

- A. I.R.C.P. 30(b)(6) grants broad discretion to the organization served with the deposition notice to designate its witness, and the primary limitation is that witness must be knowledgeable about the subject matter of the deposition.

I.R.C.P. 30(b)(6) states as follows:

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or **other persons who consent to testify on its behalf**, and may set forth, for each person designated, the matters on which the person will testify. . . . **The persons so designated shall testify as to matters known or reasonably available to the organization.**

Id. (emphasis added). Under I.R.C.P. 30(b)(6) an organization is entitled to designate the person who is knowledgeable about the subject matter described in the deposition notice. The State in its *Affidavit of David J. Barber Dated January 8, 2009* pointed out that "it would designate a knowledgeable person from IDWR" as its representative for the deposition presently scheduled for January 27, 2009. *Id.* at 3. Since the Claimants had also served a *Notice of Rule 30(b)(6) Deposition Duces Tecum of the State Idaho Department of Water Resources*, the State argued in its

Brief in Support of Idaho's Motion for Protective Order that is was unduly burdensome for dual depositions of a representative from IDWR. *Id.* at 4.

The Claimants responded that “the State’s designation of an IDWR employee as its Rule 30(b)(6) representative would be inappropriate.” *Claimant’s Opposition Brief*, at 5. The Claimants argue that the State misconstrues its distinct role and the role of IDWR in the SRBA. The Claimants point out that Idaho Code § 42-1401B(1)(3) defines the IDWR an “independent expert and technical assistant,” that IDWR is not a party to the SRBA, and that the State is a party. *Id.*

While the State acknowledges the distinct roles of the IDWR and IWRB, the designation of the IDWR as an “independent expert and technical assistant” does not preclude a representative from IDWR from testifying on behalf of the State here. I.R.C.P. 30(b)(6) authorizes the organization that is served with the deposition notice to designate “**other persons who consent to testify on its behalf.**” A leading authority on the comparable federal rule confirms that the organization the subject of the 30(b)(6) deposition has the discretion to choose its witness as follows:

This procedure should be distinguished from the situation in which a party wants to take the deposition of a specific individual associated with the corporation or organization. Because Rule 30(b)(6) imposes on the organization the obligation to select the individual witness, the party seeking discovery is not permitted to insist that it choose a specific person to testify unless the person designated is an officer, director, or managing agent whom the corporation may be required to produce under Rule 30(b)(1).

8A Wright, Miler & Marcus, *Federal Practice and Procedure: Civil 2d* § 2103 (2d ed. 1994). See also *Hi-Plains Elevator Machinery, Inc. v. Missouri Cereal Processors, Inc.*, 571 S.W.2d 273, 277 (1978). Since the filing of its *Motion for Protective Order*, the State has been able to refine who it would designate as its representative. It determined to designate the Director of the IDWR as the knowledgeable representative of the State, and the Director has consented to testify on behalf of the State. *Statement of Facts* (hereinafter “SOF”) at 3. In addition, the Director of the IDWR is

designated as the knowledgeable representative of the IDWR. *Id.* These designations are strictly in conformance with the procedures set forth in I.R.C.P. 30(b)(6). The organization that is served with the deposition notice has the discretion to designate its witness at the 30(b)(6) deposition. The primary requirement for such designation is that the person be knowledgeable about the subject of the deposition. Clearly, the Director meets this requirement.

B. Persons other than a representative from IDWR do not have the requisite knowledge on the subject matter of the 30(b)(6) deposition.

State government has two agencies with primary responsibility for formulating state water policy: (1) the IDWR and (2) the IWRB. Idaho Code § 42-1732 describes the relationship between the IDWR and IWRB as follows: “Pursuant to the provisions of article 15, section 7, of the constitution of the state of Idaho, there is hereby established as the constitutional water agency **within the department of water resources** the Idaho water resource board . . .” *Id.* (emphasis added).¹ The State concludes that the representative from IDWR is best able to respond to the subject matter described in the deposition notice.² The State does not believe that the designation of a representative from the IWRB for the deposition of the State of Idaho would be appropriate because (1) the IWRB did not develop the specific policy in question; (2) the director and other persons within IDWR are more knowledgeable on the subject matter of the deposition; and (3) the IWRB does not have staff, other than IDWR employees, to designate as its own representative. The

¹ This combination of IDWR and IWRB was required when the executive branch was reorganized in 1974 in accordance with the restrictions of article 4, section 20 of the constitution of the state of Idaho. The fact that the IWRB is “within the IDWR” has not precluded separate participation with different legal positions in litigation. *Idaho Power Company v. State*, 104 Idaho 570, 661 P.2d 736 (1983). Moreover, the IWRB is treated differently from IDWR in the adjudication. The IWRB has filed many notices of claim in the SRBA and participates as a full party. *Affidavit of David J. Barber Dated January 20, 2009.*

² For example, Policies 1E and 1G relate to the general subject matter of this litigation. Policy 1E states: “It is the policy of Idaho that the water resources of the state shall be quantified and their uses measured.” Policy 1G states: “It is the policy of Idaho to promote the reasonable use of water in accordance with state law.”

Board members of the IWRB are its only representatives separate from IDWR employees. Moreover, Board members have limited knowledge surrounding the formulation of this policy, and therefore are not appropriate persons for the State to designate as its representative at a deposition under I.R.C.P 30(b)(6).³

C. The Claimants' requests to take I.R.C.P. 30(b)(6) depositions of the representatives of the IDWR and of the State are duplicative, unduly burdensome, and oppressive.

I.R.C.P. 26(c) authorizes the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or **undue burden or expense . . .**" (emphasis added). Here, the Claimants have served two deposition notices under I.R.C.P. 30(b)(6) with the same subject of the deposition. The two organizations, the State and IDWR, have designated the same representative to testify at the depositions. The taking of two separate depositions on two different dates of the same representative is unduly burdensome. The district court should limit the Claimants to one deposition of the Director of the IDWR on February 3, 2009, and should grant the motion for a protective order that the deposition on January 27, 2009 not be had.

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³ As was pointed out in the State's *Brief in Support of Motion for Protective Order*, the designation of legal counsel is simply inappropriate for a variety of reasons. While trial counsel is knowledgeable about the Response that was filed to support the Director's Recommendations in these subcases and has developed a trial strategy, counsel has no personal knowledge about the formulation of the annual diversion volume limitation policy. *Affidavit of David J. Barber Dated January 20, 2009*, at 3.

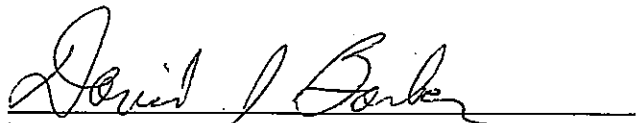
CONCLUSION

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 20th day of January 2009.

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