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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

Case No. 39576

Subcase No. **01-00006**

MOTION TO COMPEL DISCOVERY
I.R.C.P. 37(a)

COMES NOW the Claimant, American Falls Reservoir District No. 2 (AFRD No. 2) by and through its counsel of record, C. Tom Arkoosh and Isaac Keppler of Capitol Law Group, PLLC, and herby submits this *Motion to Compel Discovery*. For the reasons set forth herein, AFRD No. 2 respectfully asks this Court to order the State of Idaho to provide complete responses to discovery questions propounded upon it by AFRD No. 2 on or about October 21, 2010.

I.R.C.P. 37(a) provides in pertinent part that if a party fails to answer an interrogatory submitted under Rule 33, the discovering party may move for an order compelling an answer in

accordance with the request. I.R.C.P. 37(a)(2). An evasive or incomplete answer is treated like a failure to answer. I.R.C.P. 37(a)(3). If a party is asserting that a privilege applies, the burden of establishing privilege rests on the party asserting it. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704. (2005).

Moreover, the option to produce records in lieu of answering the question is only a “sufficient answer” where the “burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.” I.R.C.P. 33(c).

This motion is brought for the following reasons:

1. On or about October 21, 2010, counsel for AFRD No. 2 propounded certain discovery requests upon the State of Idaho. One of the primary purposes of this discovery was to learn what the State’s position *actually* is in SRBA subcase 01-06. To that end, AFRD No. 2 propounded the following requests and received the following responses¹:

INTERROGATORY NO. 10: Please describe how you contend the water received by American Falls Reservoir District No. 2 (AFRD No. 2) is categorized as natural flow and water received by AFRD No. 2 is categorized as storage water in language other than that set out in the Eagle Decree and the Palisades Contracts.

ANSWER TO INTERROGATORY NO. 10: [objections and “statement of understanding” omitted]. The State answers as follows:

Beginning May 1 of a given year or irrigation season, the natural flow available to the March 30, 1921 priority is split evenly between American Falls Reservoir District No. 2 and the American Falls Reservoir storage right up to a maximum of

¹ The Entirety of the State’s Responses are attached hereto and incorporated herein as Exhibit 1 to this Motion.

850 c.f.s. delivered to American Falls Reservoir District No. 2 under water right 01-0006 unless and until the storage water right for American Falls Reservoir has filled. If the storage water right for the American Falls Reservoir fills after May 1, American Falls Reservoir District No. 2 may thereafter divert up to 1,700 c.f.s. as natural flow while water right no. 01-0006 remains in priority.

All of American Falls Reservoir District No. 2's diversions prior to May 1 of a given year or irrigation season are to be charged as storage water if the storage water right for American Falls Reservoir does not fill in that given year or irrigation season.

All other determinations of whether American Falls Reservoir District No. 2's diversions are to be accounted for as natural flow or storage water are to be made by the Watermaster in accordance with applicable Idaho law and Water District No. 1 policies and practices.

INTERROGATORY NO. 12: Please identify the language found in the documents identified in Exhibit A², attached hereto and incorporated herein, which you claim supports your contention identified in the answer to Interrogatory No. 10. By "identify the language," this interrogatory requests that you recite page and line of whatever language you contend supports your contention identified in the answer to Interrogatory No.10.

ANSWER TO INTERROGATORY NO. 12: The State objects to this interrogatory to the extent it seeks disclosure of information protected by the attorney work product doctrine. Subject to and without waiving this objection, and pursuant to I.R.C.P. 33(c), the State answers that such documents speak for themselves and provides on the enclosed CD copies of documents identified in Exhibit A.

² "Exhibit A" refers to the index for the documents (approximately 2,600 pages) served upon AFRD No. 2 by the State of Idaho on August 10, 2010, following the deposition of the State of Idaho which was held on July 7, 2010, as responsive to the I.R.C.P. 30(b)(6) Notice of taking the Deposition of the State of Idaho.

2. The answer to Interrogatory No. 12 is wholly insufficient. The referenced documents (at least those that have not been produced earlier) clearly have some significance to the State of Idaho. However, after review, counsel for AFRD No. 2 is unable to discern what that significance is.

3. To that end, counsel for AFRD No. 2, sought to obtain more complete answers without necessitating court action. See reproduction of December 6, 2010, *Letter to Michael Orr*, attached hereto and incorporated herein as Exhibit 2.

4. On December 20, 2010, counsel for the State of Idaho responded by way of letter, asserting its position that AFRD No. 2's Interrogatory No. 12 sought "attorney work product" and that its response was a "sufficient answer" pursuant to I.R.C.P. 33(c) because the information sought could be "derived or ascertained" from the documents provided. See December 20, 2010, Letter to Isaac Keppler, attached hereto and incorporated herein as Exhibit 3.

5. In sum, the State's answer to Interrogatory No. 12 is evasive and incomplete. When the State's deposition was noticed, it designated Anthony Olenichak. The State's interpretation of the 01-06 water right was drafted by counsel after consultation with Anthony Olenichak. If he, or some other person, is the "client" who is driving the State's participation in this action, then AFRD No. 2 wants to know and is entitled to know which documents of those provided are deemed supportive of that position by that "client". This request does not seek attorney work product, and, contrary to the assertion by the State, the burden for AFRD No. 2 to derive the answer from the documents themselves is clearly much greater than it is for the State

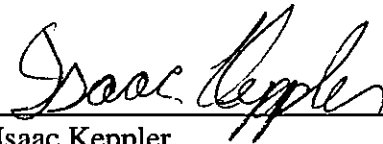
to simply provide the answer. For these reasons, AFRD No. 2 asks this Court to compel the State of Idaho to provide a complete answer to Interrogatory No. 12, as discussed above.

6. Pursuant to I.R.C.P. 37(a)(2), Counsel certifies that that it has attempted to confer in good faith to secure a complete response without court action.

A hearing is requested on this motion.

DATED this 2 day of March, 2011.

CAPITOL LAW GROUP, PLLC

A handwritten signature in cursive script, appearing to read "Isaac Keppler", is written over a horizontal line.

Isaac Keppler

Attorneys for American Falls Reservoir District #2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of March, 2011, I served a true and correct copy of the foregoing document by depositing a true and correct copy thereof in the United States mail, postage prepaid, in an envelope addressed to the following individuals at the addresses below listed:

Bret Andersen
Robyn Andersen
322 E. Main
Burley, Idaho 83318

M. Evan Call
4373 Cold Water Road
American Falls, Idaho 83211

Josephine Beeman
409 W. Jefferson St.
Boise, Idaho 83702

Sarah Klahn, Esq.
White & Jankowski, LLP
511 16th St., Suite 500
Denver, CO 80202

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P.O. Box 207
Twin Falls, Idaho 83303-0207

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Heyburn, Idaho 83336

Randall C. Budge
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Pocatello, ID 83204-1391

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P.O. Box 248
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Burley, Idaho 83318

IDWR Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Jerry R. Rigby
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Rexburg, Idaho 83340-0250

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Rupert, Idaho 83350

John K. Simpson
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251 E. Front St., Suite 400
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Dean Tranmer
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Pocatello, ID 83205-4169

E. Gail McGarry
United States, Department of Interior
Bureau of Reclamation
1150 N. Curtis Road, Suite 100
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United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street MSC 033
Boise, Idaho 83724

Martin & Lorraine Muecke
1250 W. 300 S.
Heyburn, Idaho 83336

Chief, Natural Resources Division
State of Idaho Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

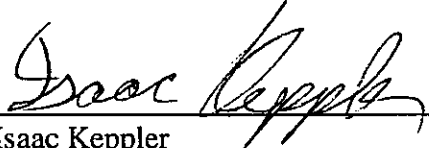

Isaac Keppler

EXHIBIT 1

ORIGINAL

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

MICHAEL C. ORR (ISB # 6720)
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Attorneys for the State of Idaho

**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 no. 01-00006
)
) **STATE OF IDAHO'S RESPONSES TO**
) **AMERICAN FALLS RESERVOIR**
) **DISTRICT NO. 2'S FIRST SET OF**
) **INTERROGATORIES AND REQUESTS**
) **FOR PRODUCTION OF DOCUMENTS**
) **TO THE STATE OF IDAHO**
)

General Objections

1. The State of Idaho, hereinafter referred to as the "State," has not completed its own investigation and/or discovery. Accordingly, the responses that follow are based upon the best knowledge, information, and belief of the State at this time. The

State reserves the right to make any further responses if it appears that any omission or error has been made in connection with these responses or that more accurate information is, or has become available. These responses are made without prejudice to the State's right to use later discovery or to present at, during or prior to trial such evidence, as may be later discovered or evaluated.

2. The State objects to American Falls Reservoir District No. 2's ("AFRD No. 2") discovery requests to the extent the definitions and instructions therein purport to require discovery responses beyond that required under the Idaho Rules of Civil Procedure. These responses are provided in accordance with the Idaho Rules of Civil Procedure regardless of any definitions and instructions in AFRD No. 2's discovery requests.

3. These responses are subject to all objections, including, but not limited to, competence, relevance, materiality, and admissibility. These responses are further subject to all objections that would require the exclusion of any statement, material, or information herein provided if such interrogatory were asked of, or any statement, material, or information provided were made by witnesses present and testifying in court. All such objections are reserved and may be interposed at the time of trial. Information otherwise responsive to AFRD No. 2's discovery requests that is not provided on the basis of a claim of privilege is identified in the "privilege log" appended hereto.

4. No incidental or implied admissions are intended. The fact that the State has responded to any discovery request, or part thereof, should not be taken as an admission that the State accepts that the discovery request or the response or objection thereto constitutes admissible evidence. Similarly, the fact that the State has responded

to all or part of an interrogatory is not intended to, and shall not be construed to be a waiver by the State of all or part of any objection to other interrogatories. The State's answers to any discovery requests do not constitute a waiver of the State's right to object to any future additional, or supplemental discovery requests regarding the same or similar matters.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1: Please separately identify each communication which is relevant or which you intend to offer in evidence at the trial of this action for any purpose.

ANSWER TO INTERROGATORY NO. 1: The State objects to this interrogatory to the extent it seeks disclosure of any communications protected by the attorney-client privilege and/or the attorney work product doctrine; to the extent it calls for a legal conclusion; and to the extent it seeks communications that have already been provided to AFRD No. 2 or otherwise are already in AFRD No. 2's possession, or are equally available to AFRD No. 2.

The question of what communications are "relevant" in this subcase ultimately is a legal determination, and this interrogatory is vague and ambiguous because it does not explain AFRD No. 2's subjective understanding of what constitutes a "relevant" communication. Further, any attempt by the State to determine what communications are "relevant" for AFRD No. 2's purposes would depend in significant part upon what issues, facts, and occurrences, etc., AFRD No. 2 views as "relevant" to this subcase, and AFRD No. 2 has not adequately identified such issues, facts and occurrences for purposes of the State's response to this interrogatory. Moreover, any determination of what communications are "relevant" for purposes of trial will depend upon what issues, if any, are raised and resolved through pre-trial motions, upon any stipulation of the parties or order of the Court defining the issues for trial, and what claims, defenses, issues and arguments AFRD No. 2 intends to raise at trial, which have not been disclosed to the State. Finally, the State has not completed its review and preparations for trial and has not yet identified all communications that it believes may be potentially relevant, and thus any determination by the State at this stage of the litigation as to what communications are "relevant" are preliminary and subject to change.

This interrogatory is also vague, ambiguous, unreasonably overbroad and unduly burdensome because it does not define any date range or any other applicable temporal limitation for purposes of identifying "relevant" communications, nor does it limit its scope to communications sent or received by the State, and therefore encompasses all communications sent by or to any person, entity, organization or government office since the genesis of the dispute over AFRD No. 2's claimed right to divert natural flow, which was in the early 1930s. This interrogatory is also vague, ambiguous, overbroad, and unduly burdensome with respect to the term "communication," which is not defined and

which could be understood to include any document that has any communicative character, such as a court order or an agency report. Further, given the above, this interrogatory's definition of "identify each communication" also is unreasonably overbroad and unduly burdensome because it seeks multiple pieces of information regarding each "communication" that is "relevant."

Moreover, many of the communications sought under this interrogatory are already in the possession of AFRD No. 2, such as communications previously provided to AFRD No. 2 by the State in response to AFRD No. 2's request for copies of the FOIA documents the State received from the United States, and in the State's document production to AFRD No. 2 pursuant to its Rule 30(b)(6) deposition of the State.

Subject to and without waiving these objections, and pursuant to I.R.C.P. 33(c), the enclosed CD contains copies of certain documents, including documents previously provided to AFRD No. 2, that may be "communications" that are "relevant" for purposes of this interrogatory. (Some of these documents are e-mail printouts that printed with the date of printing (Nov. 18, 2010) in the "date" field of the e-mail header rather than the date the e-mails were actually sent. The cause of this discrepancy has not yet been determined. Therefore, for such e-mails the date of sending was handwritten on post-it notes that were attached to the printouts. Thus, in such a case the date of the e-mail is the handwritten date that appears on the e-mail printout, and not the date of November 18, 2010 that appears in the "date" field in the e-mail's header.) The State reserves the right to offer in evidence at trial any other "communications" that it subsequently discovers or deems to be "relevant," and will disclose any such documents in accordance with the Idaho Rules of Civil Procedure and any applicable order of the Court.

With respect to verbal communications, in the years since the question of AFRD No. 2's claimed right to divert natural flow was first raised in the 1930s, the State's departments, agencies, employees, agents, officers, representatives, and/or attorneys have verbally communicated on various occasions, either in personal meetings or by telephone, with various persons, entities, and organizations, including but not limited to departments, agencies, employees, agents, officers, representatives, and/or attorneys of the federal government, regarding the issues raised in this subcase. Although the State has no record of such verbal communications that would allow the State to provide the numerous pieces of information AFRD No. 2 seeks with respect to each individual instance of such verbal communication, the State refers to its answer to Interrogatory No. 3 for a list of persons with whom it has communicated in connection with this subcase.

INTERROGATORY NO. 2: Please separately identify each document which is relevant or which you intend to offer in evidence at the trial of this action for any purpose.

ANSWER TO INTERROGATORY NO. 2: The State's objections to Interrogatory No. 1's request that the State "identify" each "communication" that is "relevant" or that the State intends to offer in evidence at trial are equally applicable to this interrogatory's request that the State "identify" each "document" that is "relevant" or that the State intends to offer in evidence at trial. Thus, the State's objections to Interrogatory No. 1 are incorporated and re-asserted here with respect to this interrogatory's request that the

State "identify" each "document" that is "relevant" or that the State intends to offer in evidence at trial. Subject to and without waiving these objections, and pursuant to I.R.C.P. 33(c), the State provides the documents in the enclosed CD, most of which are already in AFRD No. 2's possession. In addition, there are a number of documents, many of which are voluminous and portions of which may be "relevant" or offered as evidence at the trial of this action, that are equally available to AFRD No. 2 including: the "Related Documents" that are available on IDWR's website for water rights nos. 01-0006 and 01-2064; the annual watermaster reports for Water District 1 ("black books"); and Water District No. 1's daily water right accounting records, some of which are available on Water District No. 1's website. These documents are also available for inspection at IDWR's state office in Boise and/or in Water District No. 1's office in Pocatello during normal business hours.

IDWR's state office is located in the Idaho Water Center, 322 East Front Street, Boise, Idaho (208-287-4800). The Water District No. 1 office is located at 900 North Skyline Drive, Suite A, Idaho Falls, Idaho (208-525-7161). The url for IDWR's website is <http://www.idwr.idaho.gov/>; the url for Water District No. 1's website is <http://www.waterdistrict1.com/>.

INTERROGATORY NO. 3: Please identify each person with whom you or your representatives have communicated or who you or your representatives have interviewed seeking information relating to this action or any issue in this action.

ANSWER TO INTERROGATORY NO. 3: The State objects to this interrogatory as unreasonably overbroad and unduly burdensome; and also objects to this interrogatory to the extent it seeks information that has already been provided to AFRD No. 2 or otherwise is already in AFRD No. 2's possession, or is equally available to AFRD No. 2. Like Interrogatory No. 1, this interrogatory is unreasonably overbroad and unduly burdensome because the "issues in this action" had their genesis in the early 1930s when the dispute began over AFRD No. 2's claimed right to divert natural flow, and therefore this interrogatory appears to ask the State to identify all persons with whom the State has communicated or that the State has interviewed to obtain information regarding AFRD No. 2's right to divert natural flow since that time. Further, much of the information sought under this interrogatory is already in AFRD No. 2's possession in the documents that the State has provided to AFRD No. 2, or that are otherwise already in the possession of AFRD No. 2, or was disclosed in AFRD No. 2's depositions in this subcase of Gary Spackman (Jul. 28, 2010), Anthony Olenichak (Jul. 7, 2010 and Oct. 6, 2008), Lyle Swank (Oct. 7, 2008), and Ron Carlson (Oct. 7, 2008). Subject to and without waiving these objections, and pursuant to I.R.C.P. 33(c), the State refers to the documents on the enclosed CD and to the transcripts and exhibits for the depositions referenced above, and further identifies the following as persons with whom it has communicated or who it has interviewed seeking information relating to this action:

Anthony Olenichak
Program Manager
Water District 1

900 North Skyline Drive
Suite A
Idaho Falls, Idaho 83402-1718
208-525-7161

Lyle Swank
Watermaster
Water District 1
Regional Manager
Idaho Department of Water Resources
900 North Skyline Drive
Suite A
Idaho Falls, Idaho 83402-1718
208-525-7161

Gary Spackman
Interim Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Garrick Baxter
Deputy Attorney General
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Ray Williams
Paralegal
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Carter Fritschle
Adjudication Section Manager
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Richard Rigby
Senior Advisor
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Michael Holliday
Senior Water Right Agent
Idaho Department of Water Resources
900 North Skyline Drive
Suite A
Idaho Falls, Idaho 83402-1718
208-525-7161

Ronald D. Carlson
208-346-6289

Matt Howard
Water Rights Analyst
United State Bureau of Reclamation
1150 North Curtis Road
Boise, Idaho 83706
208-378-5003

E. Gail McGarry
Manager, Water Rights and Acquisition
United State Bureau of Reclamation
1150 North Curtis Road
Boise, Idaho 83706
208-378-5306

Robert Sutter
824 East Bannock Street
Boise, Idaho 83712
208-345-3599

INTERROGATORY NO. 4: Please separately identify each person who, according to your information or knowledge or the information or knowledge of your representatives, has relevant knowledge of any of the issues or any of the occurrences which are relevant to his action and state the substance of the facts and opinions which constitute such relevant knowledge.

ANSWER TO INTERROGATORY NO. 4: The State objects to this interrogatory as calling for legal conclusions and as vague and ambiguous to the extent it requires the State to determine what constitutes “relevant” knowledge and/or “relevant” issues and facts. See the State’s objections to Interrogatory No. 1, which are incorporated herein by this reference. The vagueness and ambiguity of this interrogatory in this respect is compounded by its confusing reference to “relevant” knowledge of “relevant” issues or occurrences. The State further objects to this interrogatory to the extent it seeks information that is already in AFRD No. 2’s possession in the documents that the State has provided to AFRD No. 2 or that are otherwise already in the possession of AFRD No. 2, or was disclosed in AFRD No. 2’s depositions in this subcase of Gary Spackman (Jul. 28, 2010), Anthony Olenichak (Jul. 7, 2010 and Oct. 6, 2008), Lyle Swank (Oct. 7, 2008), and Ron Carlson (Oct. 7, 2008). Subject to and without waiving these objections, and pursuant to I.R.C.P. 33(c), the State refers to the documents on the enclosed CD, and further identifies the following as persons who may have “relevant” knowledge of any of the issues or occurrences that are “relevant” to this action, and the substance of such “relevant” knowledge:

David R. Tuthill, Jr.
Idaho Water Engineering
208-378-1513

Mr. Tuthill was the Director of IDWR when the original Director’s Report for water right no. 01-0006 was filed with the Court and may have “relevant” knowledge and/ or opinions regarding the “relevant” issues in this subcase. The State is unsure of the extent or nature of any such knowledge and/or opinions Mr. Tuthill may have other than what was set forth in the original Director’s Report for water right 01-0006.

Anthony Olenichak
Program Manager, Water District 1
900 North Skyline Drive
Suite A
Idaho Falls, Idaho 83402-1718
208-525-7161

Mr. Olenichak is the Program Manager for Water District No. 1 and may have “relevant” knowledge and/or opinions regarding the “relevant” issues in this subcase. Any such knowledge and/or opinions Mr. Olenichak may have are already known to AFRD No. 2 because it has deposed Mr. Olenichak twice in this subcase (Jul. 7, 2010 and Oct. 6, 2008).

Lyle Swank
Watermaster
Water District 1

Regional Manager
Idaho Department of Water Resources
900 North Skyline Drive
Suite A
Idaho Falls, Idaho 83402-1718
208-525-7161

Mr. Swank is the Watermaster for Water District No. 1 and Mr. Olenichak's supervisor, and may have "relevant" knowledge and/or opinions regarding the "relevant" issues in this subcase. Any such knowledge and/or opinions Mr. Swank may have are already known to AFRD No. 2 because it has deposed Mr. Swank in this subcase (Oct. 7, 2008).

Gary Spackman
Interim Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Mr. Spackman is the interim Director of IDWR and may have "relevant" knowledge and/or opinions with respect to the "relevant" issues in this subcase. Any such knowledge and/or opinions are already known to AFRD No. 2 because it has deposed Mr. Spackman in this subcase (Jul. 28, 2010), and because Mr. Spackman has filed an amended Director's Report for water right no. 01-0006.

Richard Rigby
Senior Advisor
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho
208-287-4800

Mr. Rigby formerly worked for the United States Bureau of Reclamation for a number of years and may have "relevant" knowledge and/or opinions regarding the "relevant" issues in this subcase. The State is unsure of the extent and/or nature of any such knowledge and/or opinions Mr. Rigby may have.

Ronald D. Carlson
208-346-6289

Mr. Carlson is the former Watermaster for Water District No. 1 and may have "relevant" knowledge and/or opinions regarding the "relevant" issues in this subcase. Any such knowledge and/or opinions Mr. Carlson may have are known to AFRD No. 2 because it has deposed Mr. Carlson in this subcase (Oct. 7, 2008).

Matt Howard
Water Rights Analyst
United State Bureau of Reclamation
1150 North Curtis Road
Boise, Idaho 83706
208-378-5003

Mr. Howard works for the United States Bureau of Reclamation and may have "relevant" knowledge and/or opinions regarding the "relevant" issues in this subcase. The State is unsure of the extent or nature of any such knowledge and/or opinions Mr. Howard may have.

Robert Sutter
824 East Bannock Street
Boise, Idaho 83712
208-345-3599

Mr. Sutter formerly worked for IDWR and was involved with the development of the computerized water rights accounting program used by Water District No. 1. Mr. Sutter may have "relevant" knowledge and/or opinions regarding the "relevant" issues in this subcase. The State is unsure of the extent and nature of any such knowledge and/or opinions Mr. Sutter may other than the content of the above-referenced computer program, which was discussed in AFRD No. 2's depositions of Anthony Olenichak (Oct. 6, 2008 and Jul. 7, 2010), Lyle Swank (Oct. 8, 2008), and Ronald Carlson (Oct. 7, 2008).

In addition, the State answers that based on the fact that AFRD No. 2 identified David Shaw, Lynn Harmon, John Rosholt and Craig Hobdey in its answers to Interrogatories Nos. 2-5 and 9 in "American Falls Reservoir District No. 2's Answers to State of Idaho's First Set of Discovery Requests and Amendments to State of Idaho's First Discovery Requests" (Jul. 16, 2010), it appears that these persons may have "relevant" knowledge and/or opinions of the "relevant" issues in this subcase. AFRD No. 2 is already aware of any such knowledge and/or opinions held by these persons because they are agents, employees or representatives of AFRD No. 2.

INTERROGATORY NO. 5: Please separately identify each person who you may call as a lay witness at the trial of this action and state the substance of the facts and opinions to which such lay witness is expected to testify.

ANSWER TO INTERROGATORY NO. 5: The State has not completed its review and preparations for the trial of this matter and has not yet determined who it may or will call as a lay witness at trial. Further, any such determinations necessarily are dependent on a determination of the trial issues, which in turn depend largely upon the claims, defenses, issues and arguments raised by AFRD No. 2 and other parties, both at trial and in any pre-trial motions, and which have not yet been fully described or identified. The State reserves the right to call as a lay witness at the trial of this action any of the persons identified in the State's answer to Interrogatory No. 4. (See the State's answer to Interrogatory No. 4 regarding the substance of the facts and opinions as to which the State anticipates that such persons would testify if called as lay witnesses.) The State also reserves the right to call as lay witnesses any persons other than those identified in the State's answer to Interrogatory No. 4 who are subsequently discovered or disclosed to the State, or subsequently determined to have "relevant" knowledge. The State will identify any such persons in accordance with the Idaho Rules of Civil Procedure and any applicable orders of the Court.

INTERROGATORY NO. 6: Please separately identify each person retained or specifically employed by you as an expert in anticipation of this litigation or in preparation for the trial of this action whom you do not expect to call as a witness at the trial of this action and state with respect to any reports made to you by the expert the subject matter thereof and the location of each such expert.

ANSWER TO INTERROGATORY NO. 6: The State objects to this interrogatory because it seeks information protected by the attorney work product doctrine and as exceeding the permissible scope of discovery. I.R.C.P. 26(b)(4)(B). Subject to and without waiving these objections, the State answers that it has retained a consultant that it does not expect to call as an expert witness in the trial of this action.

INTERROGATORY NO. 7: Please separately identify each person whom you may call as an expert witness at the trial of this action and state the subject matter on which such expert witness is expected to testify, the substance of the facts to which such expert witness is expected to testify and the substance of the opinions to which such expert witness is expected to testify.

ANSWER TO INTERROGATORY NO. 7: The State has not yet determined whether it will call any expert witness in the trial of this action. The State reserves the right to call expert witnesses and if so will disclose any such expert witnesses in accordance with the Idaho Rules of Civil Procedure and any orders entered by the Court.

INTERROGATORY NO. 8: Please separately identify each exhibit which you may offer into evidence at the trial of this action and as to each such exhibit which consists of more than 15 pages or more than 3,000 words, quote or otherwise specifically designate each portion of such exhibit which you contend is the relevant portion thereof.

ANSWER TO INTERROGATORY NO. 8: The State's objects to this Interrogatory on the same grounds and for the same reasons set forth in the State's answer to Interrogatories Nos. 2 and 3. The State also objects to this interrogatory to the extent it seeks disclosure of information protected by the attorney work product doctrine. Subject to and without waiving these objections, and pursuant to I.R.C.P. 33(c), the State answers that it has not completed its review and preparations for the trial of this matter and has not yet determined what exhibits it may or will offer into evidence at trial. The State asserts that it may offer into evidence at trial some or all of the documents provided on the enclosed CD, in the "Related Documents" on IDWR's website for water rights nos. 01-0006 and 01-2064, and/or the annual watermaster reports for Water District 1 ("black books") and Water District 1's daily water right accounting records, and that such documents speak for themselves. The State also reserves the right to offer into evidence as exhibits at trial any other document or tangible thing that is subsequently discovered or disclosed to the State, and will identify such exhibits in accordance with the Idaho Rules of Civil Procedure and any applicable orders of the Court.

INTERROGATORY NO. 9: Please separately identify each person who supplied answers to these interrogatories and designate the answer or part thereof supplied by such person. (This interrogatory is intended to discover principal sources of information and does not seek to ascertain the identity of mere draftsman or persons responsible for the mechanical preparation of these answers.)

ANSWER TO INTERROGATORY NO. 9: The answers to these interrogatories were drafted by legal counsel based on review of the documents and depositions referenced herein. Anthony Olenichak was consulted in connection with Interrogatories Nos. 3 and 10.

INTERROGATORY NO. 10: Please describe how you contend the water received by American Falls Reservoir District No. 2 (AFRD No. 2) is categorized as natural flow water and received by AFRD2 No. 2 is categorized as storage in language other than that set out in the *Eagle Decree* and the Palisades Contracts.

ANSWER TO INTERROGATORY NO. 10: The State objects to this interrogatory as vague and ambiguous. Subject to and without waiving this objection, the State understands this interrogatory as requesting a description or explanation, in language other than that in the *Eagle Decree* and/or the Palisades Contracts, of the State's view of the correct method for determining, under the *Eagle Decree* and/or the Palisades Contracts and applicable Idaho law, and for purposes of administering water right 01-0006, what portion of AFRD No. 2's overall diversions from the Snake River are to be

considered natural flow diversions, and what portion of AFRD No. 2's overall diversions from the Snake River under water right 01-0006 are to be considered storage water diversions. The State answers this as follows:

Beginning May 1 of a given year or irrigation season, the natural flow available to the March 30, 1921 priority is split evenly between American Falls Reservoir District No. 2 and the American Falls Reservoir storage right up to a maximum of 850 c.f.s. delivered to American Falls Reservoir District No. 2 under water right 01-0006 unless and until the storage water right for American Falls Reservoir has filled. If the storage water right for American Falls Reservoir fills after May 1, American Falls Reservoir District No. 2 may thereafter divert up to 1,700 c.f.s. as natural flow while water right no. 01-0006 remains in priority.

All of American Falls Reservoir District No. 2's diversions prior to May 1 of a given year or irrigation season are to be charged as storage water if the storage water right for American Falls Reservoir does not fill in that given year or irrigation season.

All other determinations of whether American Falls Reservoir District No. 2's diversions are to be accounted for as natural flow or storage water are to be made by the Watermaster in accordance with applicable Idaho law and Water District No. 1 policies and practices.

INTERROGATORY NO. 11: Please identify the individuals who made the determination resulting in the answer to Interrogatory No. 10, when such determination was made, and by what authority it was made.

ANSWER TO INTERROGATORY NO. 11: The State's answer to Interrogatory No. 10 reflects the plain language and actual intent of the *Eagle Decree*, the Palisades Contracts, and the instructions of the Commissioner of Reclamation to the Superintendent of the Minidoka Project, dated April 6, 1936 and approved by the Secretary of the Interior, as well as how such language historically has been interpreted and understood by the State. The answer to Interrogatory No. 10 was drafted by legal counsel after review of the documentary record and depositions referenced herein, and in consultation with Water District 1 Program Manager Anthony Olenichak, on Friday, November 19, 2010.

INTERROGATORY NO. 12: Please identify the language found in the documents identified in Exhibit A, attached hereto and incorporated herein, which you claim supports your contention identified in the answer to Interrogatory No. 10. By "identify the language," this interrogatory requests that you recite page and line of whatever language you contend supports your contention identified in the answer to Interrogatory No. 10.

ANSWER TO INTERROGATORY NO. 12: The State objects to this interrogatory to the extent it seeks disclosure of information protected by the attorney work product doctrine. Subject to and without waiving this objection, and pursuant to I.R.C.P. 33(c), the State answers that such documents speak for themselves and provides on the enclosed CD copies of documents identified in Exhibit A.

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1: Please produce each and every document and/or other physical or tangible object that supports your answers to Interrogatory Nos. 1 through 11, above. Also, please produce each and every document and/or physical or tangible object identified, described or discussed in your responses to Interrogatory Nos. 1 through 12, above. With respect to each such document or object, please indicate the number of the interrogatory or interrogatories to which the document or object is responsive.

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1: Copies of the documents responsive to this request for production are provided on the enclosed CD. The documents are organized into directories that named so as to correspond to the applicable interrogatories. Many of the documents are responsive to more than one of the interrogatories and thus appear in more than one folder. The majority of the documents on the CD are already in the possession of AFRD No. 2.

RESPONSE TO REQUEST FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that your answer to Interrogatory No. 14 identifies all the language which you contend supports your contention identified in the answer to Interrogatory No. 10.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Denied. There is no "Interrogatory No. 14" in AFRD No. 2's first set of discovery requests.

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DATED this 22nd day of November, 2010.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



MICHAEL C. ORR
Deputy Attorney General

Privilege Log - State of Idaho
11/22/2010

1	A		B		C		D		E		F		G	
	Bates		Date		DocType		Author/From		To		Subject		Privilege	
2	IOAG000006598		3/23/2010		E-mail		David Stanish		Michael Orr, Shasta Kilminster-Hadley		Forwarding Olenichak E-mail & memo		WP	
3	IOAG000006615		3/23/2010		E-mail		David Stanish		Michael Orr, Shasta Kilminster-Hadley		Forwarding Olenichak E-mail		WP	
4	IOAG000006613		3/23/2010		E-mail		David Stanish		Michael Orr, Shasta Kilminster-Hadley		Forwarding Olenichak E-mail		WP	
5	IOAG000006609		3/23/2010		E-mail		David Stanish		Michael Orr, Shasta Kilminster-Hadley		Forwarding Olenichak E-mail		WP	
6	IOAG000006473		3/26/2010		E-mail		David Stanish		Michael Orr, Shasta Kilminster-Hadley		AFRD2 scheduling and discovery		WP	
7	IOAG000006474		4/26/2010		E-mail		David Stanish		Michael Orr		AFRD2 Documents		WP	
8	IOAG000006475		5/5/2010		E-mail		Michael Orr		Clive Strong		Olenichak e-mail		WP	
9	IOAG000006478		5/6/2010		E-mail		Michael Orr		Consultant		AFRD2 issues		WP	
10	IOAG000006620		5/12/2010		E-mail		Tony Olenichak		Michael Orr		Water District 1 records		AC, WP	
11	IOAG000006481		5/12/2010		E-mail		Michael Orr		Consultant		AFRD2 issues		WP	
12	IOAG000006482		5/12/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
13	IOAG000006618		5/12/2010		E-mail		Michael Orr		Tony Olenichak		Water District 1 records		AC, WP	
14	IOAG000006622		5/13/2010		E-mail		Tony Olenichak		Michael Orr		AFRD2 E-mail		AC, WP	
15	IOAG000006624		5/13/2010		E-mail		Tony Olenichak		Michael Orr		AFRD2 E-mail		AC, WP	
16	IOAG000006626		5/13/2010		E-mail		Michael Orr		Tony Olenichak		AFRD2 E-mail		AC, WP	
17	IOAG000006484		5/13/2010		E-mail		Michael Orr		Consultant		AFRD2 issues		WP	
18	IOAG000006494		5/18/2010		E-mail		Michael Orr		Consultant		AFRD2 issues		WP	
19	IOAG000006534		5/20/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
20	IOAG000006544		5/20/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
21	IOAG000006498		6/3/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
22	IOAG000006505		6/7/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
23	IOAG000006513		6/7/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
24	IOAG000006629		6/17/2010		E-mail		Tony Olenichak		Michael Orr		AFRD2 demand		AC, WP	
25	IOAG000006633		6/17/2010		E-mail		Michael Orr		Tony Olenichak		AFRD2 demand		AC, WP	
26	IOAG000006523		6/22/2010		E-mail		Michael Orr		Clive Strong		Interview		WP	
27	IOAG000006524		6/22/2010		E-mail		Clive Strong		Michael Orr		Interview		WP	
28	IOAG000006465		7/1/2010		E-mail		Michael Orr		Tony Olenichak		Deposition		AC, WP	
29	IOAG000006525		7/12/2010		E-mail		Michael Orr		Shasta Kilminster-Hadley		Deposition		WP	
30	IOAG000006487		8/4/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	
31	IOAG000006489		8/4/2010		E-mail		Consultant		Michael Orr		AFRD2 issues		WP	

Privilege Log - State of Idaho
11/22/2010

	A	B	C	D	E	F	G
32	IOAG000006526	8/4/2010	E-mail	Michael Orr	Consultant	AFRD2 issues	WP
33	IOAG000006527	8/4/2010	E-mail	Michael Orr	Consultant	AFRD2 issues	WP
34	IOAG000006529	8/4/2010	E-mail	Consultant	Michael Orr	AFRD2 issues	WP
35	IOAG000006531	8/4/2010	E-mail	Michael Orr	Consultant	AFRD2 issues	WP
36	IOAG000006540	8/4/2010	E-mail	Michael Orr	Consultant	AFRD2 issues	WP
37	IOAG000006549	8/4/2010	E-mail	Consultant	Michael Orr	AFRD2 issues	WP
38	IOAG000006554	8/5/2010	E-mail	Michael Orr	Clive Strong, David Stanish	Document review, AFRD2 discovery	WP
39	IOAG000006555	8/6/2010	E-mail	Clive Strong	Michael Orr	Document review, AFRD2 discovery	WP
40	IOAG000006557	8/23/2010	E-mail	Michael Orr	Clive Strong	Summary Judgment scheduling	WP
41	IOAG000006558	9/15/2010	E-mail	Olga Valdivia	Michael Orr	Forwarding document per request	WP
42	IOAG000006471	10/19/2010	E-mail	Michael Orr	Tony Olenichak	Notes on Water District 1 records	AC, WP
43	IOAG000006570	10/25/2010	E-mail	David Stanish	Michael Orr	AFRD2 & Minidoka/Palisades issues	WP
44	IOAG000006572	10/15/2010	E-mail	Michael Orr	Clive Strong	Notes on Water District 1 records	AC, WP
45	IOAG000006650	10/13/2010	Notes	Tony Olenichak	Michael Orr	Water District 1 records	AC, WP

EXHIBIT 2

December 6, 2010

Michael C. Orr
DEPUTY ATTORNEY GENERAL
Natural Resources Division
PO Box 83720
Boise, Idaho 83720-0010

Re: Responses to State of Idaho's First Set of Discovery Requests to American Falls
Reservoir District No. 2
Subcase No. 01-06

Dear Michael:

I have received and reviewed the *State of Idaho's Responses to AFRD No. 2's First Set of Interrogatories and Requests for Production of Documents*. As you know, prior to the time we served discovery requests upon the State, you provided us with thousands of pages of new material. I recognize that some of the documents you sent us overlapped with documents that we already have. However, most of the documents you sent were new, at least as to the 01-06 subcase.

You have stated in the past in words or substance that "all those documents should be deemed responsive to our notice of deposition." With that in mind, we have asked the State to identify which portions of the thousands of pages of new material are deemed supportive of the State's position. This Interrogatory does not seek attorney work product as you contend. We do not seek the work product of the Attorney General's Office. We are simply asking that your client identify those portions of the documents which it deems supportive. Please respond fully to this Interrogatory within 15 days of this letter.

Pursuant to I.R.C.P. 37(a)(2), please also consider this letter to be a good faith attempt to secure disclosure of the requested information without court action. Feel free to call me with any thoughts or questions.

Sincerely,

Capitol Law Group, PLLC

Isaac Keppler

EXHIBIT 3



RECEIVED - CAPITOL
CLERK - 1117

DEC 21 2010

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

December 20, 2010

Isaac D. Keppler
Capitol Law Group, PLLC
P.O. Box 32
Gooding, Idaho 83330

Re: State of Idaho's Responses to AFRD No.2's First Discovery Requests

Dear Isaac:

I have received and reviewed your letter dated December 6, 2010 regarding the State's responses to AFRD No. 2's first set of discovery requests. Your letter raised several points, each of which is addressed below.

The first paragraph of your letter states that the State provided AFRD No. 2 with "thousands" of pages of "new" material after the July 7 deposition of Tony Olenichak and before AFRD No. 2 served its first set of discovery requests. This statement is misleading.

The State provided the vast majority of this material to AFRD No. 2 more than four months ago, on August 10. Further, the documents in question consisted of approximately 2,640 pages, or about two banker's boxes. This is not an unusually large amount of material for a matter such as subcase 01-06, the roots of which go back to the late 1920s. Further, many of the documents were historic material pertaining to the construction of Palisades Reservoir and the *Eagle Decree* that had long been in the public domain, and of which AFRD No. 2 presumably was aware. A significant portion also consisted of the documents collected on IDWR's website under water right 01-06, which were available to the general public long before the deposition. I mention these points to clarify the facts underlying your letter's reference to "thousands" of pages of "new" material.

The first paragraph of your letter is also incorrect in stating that "most" of the documents that the State provided in response to AFRD No. 2's first set of discovery requests were "new." As the State's response expressly stated, the majority of the documents therein were already in the possession of AFRD No. 2. The State's responses

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P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8072
Located at 700 W. State Street
Joe R. Williams Building, 2nd Floor

12/21/10 K
CC: CLIENT

to AFRD No. 2's first set of discovery responses included only about 400 pages of "new" material. The rest of the material had been produced either by the State or AFRD No. 2 in this subcase, or was part of the United States' FOIA response to the State, which the State had shared with AFRD No. 2 prior to formal discovery.

Your letter's assertion that "most" of the documents the State provided in its responses of November 22 are "new" appears to be based on the incorrect assumption that any IOAG Bates number higher in sequence than the last such Bates number in the State's document production of October 29 (IOAG00002637) corresponds to "new" material. This assumption misconstrues the nature of the State's responses.

As the State's responses expressly state, the documents were provided pursuant to I.R.C.P. 33(c), which requires the responding party to specify the documents from which the answer to an interrogatory may be derived or ascertained, and to afford an opportunity for the documents to be inspected and/or copied. In order to comply with this rule, the State provided copies of the corresponding documents that the State and AFRD No. 2 had produced in this subcase. Many of these documents had not yet been assigned IOAG Bates numbers by the Attorney General's office, and therefore Bates numbers were assigned as part of the production process. While these documents had "new" Bates numbers, they were already in AFRD No. 2's possession.

Further, the ambiguity and apparently overlapping scope of many of AFRD No. 2's interrogatories meant that many documents were produced pursuant to more than one interrogatory in order to ensure compliance with Rule 33(c). When combined with the constraints of our document management and Bates numbering systems, this consideration resulted in some duplication of the documents that AFRD2 had produced to the State. Thus, some of these documents were produced more than once in the State's responses, but with different Bates numbers. While such documents had "new" Bates numbers, they were already in AFRD No. 2's possession.

With these considerations in mind, and in order to facilitate your review of the documents included in the State's responses of November 22, 2010, the State herewith identifies the documents that, to the State's knowledge, were not already in AFRD No. 2's possession prior to that date. The Bates numbers for such "new" documents are as follows: IOAG00003123 – IOAG00003131, IOAG00003366 – IOAG00003622, and IOAG00004404 – IOAG00004538.

The second half of your letter implies that Interrogatory No. 8 in AFRD No. 2's discovery requests was directed at the issue identified in AFRD No. 2's Rule 30(b)(6) notice of deposition of the State. Aside from the fact that this intention was not stated in the interrogatory, the issue raised by the deposition notice has been mooted. The purpose for which AFRD No. 2 deposed the State was to determine "[a]ny claimed explanation, reason, justification or policy . . . for the difference between the language of the water right license No. 15134 as set forth in the Eagle Decree and as recommended in the SRBA Director's report under water right 01-06." Notice of Deposition of State of Idaho at 2 (Jun. 29, 2010). As you know, the Director subsequently amended his

recommendation to recite the language of the Eagle Decree, so the issue identified in AFRD No. 2's notice of deposition has been resolved.

Your letter also asserts that by asking the State to specifically designate each portion of each document the State has produced in this subcase that supports the State's position, AFRD No. 2 is not seeking confidential attorney work product because the request is directed at the client. This statement is incorrect for several reasons. First, AFRD No. 2's discovery requests are not limited to the "client" but also expressly seek information "in the possession of your attorneys." American Falls Reservoir District No. 2's First Set of Interrogatories and Requests for Production of Documents to the State of Idaho at 3 (Oct. 21, 2010).

Second, the vast majority of the documents produced by the State—including those listed in "Exhibit A" to AFRD No. 2's discovery requests—were not reviewed or identified for production in this subcase by our client. Rather, this document review and production was conducted by the Attorney General's office as legal counsel for the State in this subcase. (I note that Mr. Arkoosh stated during Craig Hobdey's deposition that AFRD No. 2's document review and production also was handled by its legal counsel rather than by the client or its designated deponent. See Deposition of 30(b)(6) Witness, Craig D. Hobdey at 8-9 (Jul. 28, 2010).) Thus, AFRD No. 2's interrogatories clearly seek information that constitutes attorney work product.

In any event, the information AFRD No. 2 seeks under its interrogatories "may be derived or ascertained" from the documents identified and provided by the State. I.R.C.P. 33(c). Thus, the State's production of documents in response to AFRD No. 2's interrogatories pursuant to Rule 33(c) "is a sufficient answer" to the interrogatories. *Id.* Accordingly, and contrary to your letter, the State has fully responded to the interrogatories.

We believe that the foregoing discussion resolves the issues raised in your letter of December 6, 2010. Please feel free to contact me with any further thoughts or questions you may have on these matters.

Sincerely,



Michael C. Orr
Deputy Attorney General

MCO/olv