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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

**REPLY TO STATE OF IDAHO'S
RESPONSE TO AFRD NO. 2'S MOTION
TO COMPEL DISCOVERY**

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 *Reply to State of Idaho's Response to AFRD No. 2's Motion to Compel Discovery*.

While admirable in the length of its response to AFRD No. 2's *Motion to Compel*, the State of Idaho (State) places a premium on form over substance, ignores the factual context in

which Interrogatory No. 12 arose, and attempts to hide its contentions, which should be discoverable, behind a guise of “work product” privilege.

However, the State’s objection is without merit. Prior to AFRD No. 2 serving written discovery on the State, but after the State’s deposition, it provided documents as being responsive to the Notice of Deposition. AFRD No. 2 is entitled to inquire as to how those documents are responsive and has done so, initially choosing to use interrogatories, rather than deposing a witness on the significance of 2,600 pages. While the State may take issue with the form of Interrogatory No. 12, the goal of the question is clear: to obtain the same information that should have been available at the State’s deposition.

ARGUMENT

I. IT IS EVIDENT FROM THE CONTEXT IN WHICH INTERROGATORY NO. 12 AROSE THAT THE STATE SHOULD HAVE ALREADY DISCLOSED ITS CONTENTIONS WITH RESPECT TO THE DOCUMENTS AT ISSUE.

Prior to August 3, 2010, the SRBA subcase 01-06 Director’s Report contained language materially different than that set forth in the *Eagle Decree*; said language appeared to substantially reduce and alter the quantity of AFRD No. 2’s water right in comparison to the historical right, as set forth and memorialized in the *Eagle Decree*.

In order to discover the State’s position with respect to the prior Director’s Report, and its role in creating it, AFRD No. 2 took the deposition of the State of Idaho pursuant to I.R.C.P. 30(b)(6). The Notice of Deposition, which is part of the record in this subcase, was filed on June 30, 2010. The Notice specified as follows:

Pursuant to I.R.C.P. 30(b)(6), the matters on which the deponent will be examined includes:

1. Any claimed explanation, reason, justification, or policy, whether based in law or fact or otherwise, for the difference between the language of the water right under license No. 15134 as set forth in the Eagle Decree and as recommended in the SRBA Director's report under water right 01-06. The specific language on which an explanation is sought is set forth below:

- a. The *Eagle Decree* provides as follows:

The right to divert as natural flow during each irrigation season under water license No. 15134, having a March 30, 1921, priority, as follows: From May 1 of each irrigation season continuing during that season so long as there is natural flow available for that priority, the first 1,700 cubic feet per second of flow to be available one-half (1/2) to American Falls Reservoir District No. 2 and one-half (1/2) to American Falls Reservoir, except that in any year in which American falls Reservoir is full to capacity on April 30 or fills after that date, taking into account any water that may be temporarily stored to its credit in upstream reservoirs, all water diverted by American Falls Reservoir District No. 2 within the maximum of 1,700 cubic feet per second during the year prior to the initial storage draft on American Falls Reservoir after the reservoir finally fills in that year shall be considered as natural flow under water license No. 15134. Nothing herein shall prevent American Falls Reservoir District No. 2 from diverting water under said license prior to May 1 of a given irrigation season but all such diversions shall be charged as storage in the event the reservoir is not full on April 30 of that season or does not fill after April 30 of that season.

Water available at American Falls Reservoir for the March 30, 1921, priority under water license No. 15134, other than that to be available to American Falls Reservoir District No. 2 as

provided above, to be available for storage in American Falls Reservoir.

b. The Director's Report provides as follows:

This right is limited to a maximum of 850 cubic feet per second (cfs) of the first 1,700 cfs diversion of natural flow available to the March 30, 1921, priority when the American Falls storage right (1-2064) has not completely filled for the season, with any remaining amount not diverted by American Falls Reservoir District #2 made available to American Falls Reservoir. If the American Falls Reservoir storage right (1-2064) completely fills after March 15 during the irrigation season, the maximum 1,700 cfs of natural flow available to the March 30, 1921, priority may be diverted under this right (1-6) beginning the day after the American Falls Reservoir storage right (1-2064) has completely filled.

The deponent, State of Idaho, must designate a person or persons who will testify regarding matters known or reasonably available to the State of Idaho relative to the above matters.

Pursuant to I.R.C.P. 30(b)(1), the deponent is required to bring to the deposition the following items and documents:

- 1. All documents, records, memoranda, and any other items relative to the above issue(s).**

See Notice of Deposition of State of Idaho, filed June 30, 2010.

The State designated Anthony Olenichak as its witness. Mr. Olenichak brought a small amount of documents with him to the deposition, but noted that there may be other documents, records or memoranda that were responsive to the Notice. The State's witness was examined with respect to the documents that he did bring with him. The parties specifically agreed to leave

the deposition open in the event further inquiry was required, including inquiry on additional documents that were responsive to the Notice of Deposition. See Exhibit 5 to *Second Affidavit of Michael C. Orr*, July 7, 2010, Deposition of the State of Idaho, Testimony of Anthony Olenichak, pp. 84-86.

The testimony offered at that deposition was critical to the posture of this subcase. On behalf of the State, Mr. Olenichak explained that it was he who drafted the prior Director's Report, and attempted to explain the State's (or his) belief as to the correct interpretation of the *Eagle Decree* as it relates to the present 01-06 subcase. By all appearances, the State has fully adopted this testimony. The State has indicated that its position has not changed as a result of the Amended Director's report.

On August 10, 2010, the State provided approximately 2,600 pages of additional documents that it deemed responsive to AFRD No. 2's June 30, 2010, *Notice of Deposition of the State of Idaho*. Primarily because of these additional documents, AFRD No. 2 moved to vacate the summary judgment schedule in place at that time. In response, the State of Idaho filed an Objection to that motion, and a *Motion for a Protective Order*, asking the Court for a "blanket" order that "No further discovery be had in this subcase until the Special Master has heard motions for summary judgment."¹ See *State of Idaho's Motion for Protective Order*, filed September 22, 2010. The State's objection was overruled and its Motion for Protective Order

¹ Interestingly, the State only maintained its position that "no further discovery is necessary" until this Court denied its motion for a protective order. Following that denial, the State promptly served additional discovery requests on AFRD No. 2.

denied. See *Order Granting Motion to Stay Summary Judgment Schedule and Denying Motion for Protective Order*, filed September 24, 2010.

Following the issuance of that Order, AFRD No. 2 sent a series of discovery requests to the State. As correctly identified by the State, Interrogatory No. 12 and Exhibit “A” referred to therein, asked the State to identify the portions of the 2,600 pages that it deemed supportive of its contentions in this subcase. The State responded to this interrogatory by providing an additional copy of the documents upon which AFRD No. 2 inquired.

Recognizing that a number of the 2,600 pages of documents were historical, and in the public domain, most of these documents were new in the sense that, to counsel’s knowledge, they had not previously been identified as having relevance to the 01-06 subcase. Since they were provided as being responsive to the Notice of Deposition of the State of Idaho, AFRD No. 2 should have had the opportunity to inquire of the State’s witness about these documents. Rather than require the parties and attorneys to gather, and depose the State’s witness on all 2,600 pages information, AFRD No. 2 initially chose to save the time and money of all parties involved, and inquire in the form of interrogatories, which, consistent with the Idaho Rules of Civil Procedure, should have been answered in a complete and meaningful manner.

II. INTERROGATORY NO. 12 IS A “CONTENTION INTERROGATORY” THAT DOES NOT SEEK ATTORNEY WORK PRODUCT.

Just as it could have done during the State’s deposition, AFRD No. 2 has asked the State to identify the portions of documents that it deems supportive of its position. The State refused. In its brief, the State correctly points out that “an interrogatory otherwise proper is not

necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." I.R.C.P. 33(b)(1). This rule is an express recognition of the validity of contention interrogatories. While there is a dearth of Idaho case law relating to "contention interrogatories," federal courts have dealt with this issue in numerous contexts. Since the Idaho Rules of Civil Procedure were patterned after the federal rules, See, e.g., *Donaldson v. Donaldson*, 111 Idaho 951 (Ct. App. 1986), the federal court analysis is instructive on this issue.

Some people would classify as a contention interrogatory any question that asks another party to indicate *what* it contends. Some people would define contention interrogatories as embracing only questions that ask another party *whether* it makes some specified contention...Another kind of question that some people put in the category "contention interrogatory" asks an opposing party to state all the facts on which it bases some specified contention. Yet another form of this category of interrogatory asks an opponent to state all the evidence on which it bases some specified contention. Some contention interrogatories ask the responding party to take a position, and then to explain or defend that position, with respect to *how the law applies to facts*. A variation on this theme involves interrogatories that ask parties to spell out the legal basis for, or the theory behind, some specified contention.

In re Convergent Technologies Securities Litigation, 108 F.R.D. 328, 332 (U.S. Dist. Ct. for the Northern District of California, 1985).

In re Convergent Technologies Securities Litigation dealt with the same argument that is presented here by the State. There, the Plaintiff argued that the contention interrogatories sought to invade interests protected by the work product doctrine. The Court stated:

This argument, on the surface, seems to raise troublesome issues. On closer examination, however, its persuasiveness seems to evaporate.

Id. at 335.

The Court went on to discuss the interaction between the use of contention interrogatories and the protection afforded by the work product doctrine. The Court cited the advisory committee notes to the 1970 amendments, stating:

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these materials are protected against discovery.

Id. Ultimately, the Court required the Plaintiff to answer the contention interrogatories at a later date, when the Plaintiffs would be in a position to give meaningful answers. *Id.* at 345.

Like the comparative federal rule, Idaho Rule of Civil Procedure 26(b)(3), only protects “documents and tangible things” from disclosure; answers to contention interrogatories are not protected. A party’s contentions or the facts underlying those contentions have usually been held not the ‘work product’ of the party’s attorney.” 35 ALR 3d. 412, p. 2b.

Notably, the State indicates that the historic documents provide “background” and “context” and “may be useful in resolving any ambiguities.” *State of Idaho’s Response to American Falls Reservoir District No. 2’s Motion to Compel Discovery*, p. 4. If this is true, the work product doctrine does not apply. “It is not enough to trigger work product protection that document’s subject matter relates to subject that might conceivably be litigated...” See, e.g.

U.S. v. Textron Inc. and Subsidiaries, 577 F.3d 21, 2009-2 U.S. Tax Cas. (CCH) P 50574, 104 A.F.T.R.2d 2009-5719 (1st Cir. 2009).

Therefore, if, as the State suggests, the material is simply “background” and “context” information, then answers to contention questions regarding that information could not possibly constitute work product.

At this juncture, AFRD No. 2 has asked the State to identify the portions of documents that it deems supportive of its position. Admittedly, some mental exercise is necessary to complete these interrogatories. Moreover, if the State does not know which documents it deems supportive, AFRD No. 2 does not contend that it can require the State to conduct such an exercise only for the purpose of answering the interrogatory. Nor does AFRD No. 2 seek to force the State to conduct AFRD No. 2’s document review for it.

However, it was the State that identified the documents as “responsive.” The State’s only objection is that the interrogatory seeks work product. The State has never articulated any other objection or reasoning for failing to provide a complete response. Presumably, any document or information relating to the Snake River Basin could be deemed “responsive” to the Notice of Deposition. If the State were acting in good faith, it could simply give, as requested, its view of how the documents provided support the State’s contention in this subcase.

After review, it is unclear how the documents are responsive to the Notice of Deposition; however, the State now refuses to respond to Interrogatory No. 12 under the guise of “attorney work product,” even though work product only extends to documents or other tangible things.

III. THE ATTORNEY GENERAL'S OFFICE HAS ATTEMPTED TO MANIPULATE ITS STATUS AS BOTH PARTY AND ATTORNEY TO OBTAIN AN ENHANCED LEVEL OF "WORK PRODUCT" PROTECTION.

It is not lost on AFRD No. 2 that pursuant to I.C. § 42-1401(C)(2) the Attorney General's (AG) Office has appeared in this action to represent the State of Idaho.² Therefore, for all purposes, the State is the AG, and vice versa. However, the State cannot use its status as both party and attorney to obtain an enhanced level of work product protection.

An item does not become a "work product" simply because its author was a member of the bar. It must be the result of a basic professional relationship between the lawyer and the party or it must have required the training, skill, and knowledge of a lawyer or the essential integrity implicit in the lawyer-client relationship. That is to say, in order to be "work product," the attorney's work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys. A lawyer acting independently without a client is in no position to claim any "work product."

35 ALR 3d. 412, p. 4.

The State's position is comparable to that of a *pro se* litigant or a lawyer without a client. Neither can hide its contentions or the facts underlying those contentions under the theory of work product. Sooner or later, those contentions must be revealed, or the litigation cannot proceed. If the State's theory of "work product" is accepted, then any document (whether historical or otherwise) it obtains and chooses to retain for the purpose of litigation would be work product. Compare *State of Idaho's Response to American Falls Reservoir District No. 2's*

² AFRD No. 2 has merely questioned whose or what interests the State/AG is attempting to advance in this action.

Motion to Compel Discovery (State's Brief), p. 24. This is an unacceptable result, particularly in the SRBA, where the facts all tend to be historical documents.

IV. THE STATE'S ANSWER IS INCOMPLETE AND EVASIVE.

It is not "hyperbole" that the State has failed to answer Interrogatory No. 12. It is fact. By rule, "an evasive or incomplete answer is to be treated as a failure to answer." I.R.C.P. 37(a)(3). It is only a "sufficient answer" to produce documents in lieu of an answer 1. Where the answer may be derived or ascertained from the documents themselves; AND, 2. 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). Here, neither portion of I.R.C.P. 33(c) has been satisfied, and so the answer cannot be sufficient.

As the State well knows, AFRD No. 2 already had in its possession the documents identified in Exhibit A to Interrogatory No. 12. In its response to Interrogatory No. 10, the State made a contention as to the interpretation of the water right at issue in subcase 01-06. See Exhibit 1 to AFRD No. 2's *Motion to Compel Discovery*. Interrogatory No. 12 sought nothing more than the application of fact to the State's contention that it set forth in its response to Interrogatory No. 10; specifically, as to which portions of the documents sent in response to, but after, the State's deposition are deemed supportive of that contention. Had these documents been provided prior to deposition, virtually the same question would have been asked of the State's witness, and it would not have been objectionable on any grounds.

Leaving aside any question of privilege for a moment, it is clear that when AFRD No. 2 asked a specific question about the State's contention with respect to documents already in

AFRD No. 2's possession, and the State responded by again providing the documents, this response is incomplete and evasive. Simply put, the answer to a contention interrogatory cannot be derived from 2,600 pages of historical documents, and where the State knows its contention, but AFRD No. 2 does not, the burden is not substantially the same.

This is not a situation where the State does not know what AFRD No. 2 seeks. It seeks a concise explanation of which documents are deemed supportive of the State's contention identified in its response to Interrogatory No. 10. AFRD No. 2 is not asking the State to guess what AFRD No. 2 wants. Were that the case, AFRD No. 2 *would* be in as good or better position to do so. But it is not. Therefore, the response is not sufficient, and under I.R.C.P. 37(a)(3), the State is deemed to have failed to answer.

V. IT IS "FAIR" TO REQUIRE THE STATE TO RESPOND.

The State has argued that it would be unfair to require a response where AFRD No. 2 has not provided "sufficient" responses to the same questions. A little context does away with this argument. The State has made a specific contention in its response to Interrogatory No. 10 as to what the 01-06 quantity element should state. At this stage, AFRD No. 2 makes no such contention, and does not perceive an obligation to "create" a position that it does not hold. There is nothing more to this argument.

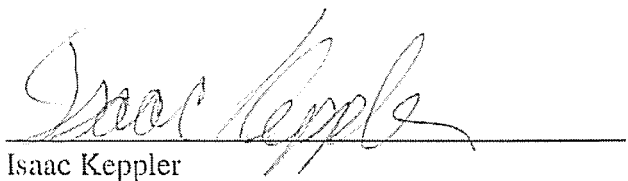
CONCLUSION

The State's objection is not well taken. It has not provided a sufficient response to Interrogatory No. 12, and can offer no sound reasoning as to why not. The question looms: what is the State trying to hide? If the State's response to Interrogatory No. 12 is "we don't know,"

then so be it. But, the State has never made this assertion. Instead, it has attempted to prevent open discovery by claiming work product privilege. In any case, it is the State that is driving up the cost of this litigation, as the ultimate result will no doubt be more depositions on the State's position. For all these reasons, AFRD No. 2 asks this Court to issue an order compelling the State to fully respond to Interrogatory No. 12, and to award AFRD No. 2 its costs and attorneys fees associated with this motion.

DATED this 29 day of March, 2011.

CAPITOL LAW GROUP, PLLC

A handwritten signature in dark ink, 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 29 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:

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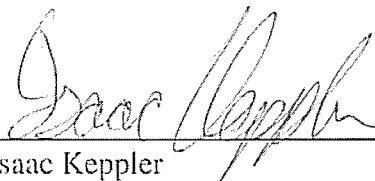
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