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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
Case No. 39576	)	
_____	)	Consolidated Subcase No. 92-00023
IDAHO POWER COMPANY,	)	
Plaintiff,	)	IDAHO POWER COMPANY'S
	)	MOTION TO AMEND AND
v.	)	RECONSIDER COURT'S
	)	SCHEDULING ORDER OF
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	DECEMBER 20, 2007 AND
Governor of the State of Idaho; LAWRENCE G.	)	MEMORANDUM IN SUPPORT
WASDEN, Attorney General of the State of	)	THEREOF
Idaho; IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources	)	
Defendants.	)	
_____	)	

INTRODUCTION

Plaintiff Idaho Power Company ("Idaho Power"), by and through its undersigned counsel in this action, submits this Motion respectfully asking the Court to: (1) amend its Scheduling Order of December 20, 2007 ("Scheduling Order") with respect to the timing of the exchange of expert witness disclosures and reports among the parties; and (2) reconsider the Scheduling Order insofar as it names the Idaho Ground Water Appropriators ("IGWA") a party to this action.

ARGUMENT

A. Motion to Amend Scheduling Order Regarding Expert Disclosures and Reports

Idaho Power filed its Complaint in this action on May 10, 2007. On May 30, 2007, the Defendant State of Idaho filed its Motion to Strike or Alternatively to Dismiss the Complaint and Petition for Declaratory and Injunctive Relief, which was heard by the Court on June 25, 2007. The Court issued its Order on the Motion on July 24, 2007, staying the proceedings until the close of the Objection period for Basin 02, except to allow discovery among the parties to proceed. Idaho Power and the State propounded and answered discovery during this period. However, as discussed below, this is a complex case and substantial discovery activity remains to be undertaken. A Status Conference and hearing on Idaho Power Company's Motion for Continuance of Stay was held December 18, 2007. The Court granted the continuance of stay except to allow summary judgment motions to proceed.

On December 20, 2007, the Court issued the Scheduling Order setting forth the timing of the proceedings and setting the matter for trial. The Scheduling Order requires Idaho Power to make its initial expert disclosures, with accompanying expert reports, on April 22, 2008.

Defendants are required to make their initial disclosures on June 23, 2008. Idaho Power's rebuttal reports are to be made on October 7, 2008 – nearly four months later. This schedule does not promote judicial efficiency, is inappropriate for litigation as complex as this case, and is prejudicial to Idaho Power.

The Swan Falls Settlement that is the subject of this litigation is a result of years of history and negotiation, both before and after the Swan Falls Agreement was executed. The Settlement is in fact the genesis of the SRBA, and is a key to water rights administration in the Snake River Basin. This litigation is based on that history, and implicates the administration of interconnected ground and surface water in the Basin. Properly preparing this case for trial will require the parties to analyze tens of thousands of pages of documents, undertake numerous fact witness depositions, and develop the testimony of experts who can address the factual basis for the allegations in the Complaint. This will require a carefully thought out discovery schedule that will allow both sides to adequately develop evidence to be adduced at trial.

The first problem with the Court's current schedule is with the date for initial expert disclosures (April 22, 2008). The State filed a broad motion for summary judgment on the eve of the December 18, 2007 status conference. Although the State has not yet filed its brief in support of its motion, Idaho Power anticipates the brief will raise fundamental issues in the case that may require an extensive response. As a result, the parties will be consumed by briefing and argument on that motion through the end of February. It will be extremely difficult for Idaho Power to work with appropriate experts and for the experts to develop reports in that time frame, given this briefing.

In addition, despite the parties' efforts to date, considerable discovery remains to be undertaken, including the taking of numerous depositions of individuals included in the

extensive potential witness lists of the parties (The discovery responses to date have named a total of 76 individuals as potential witnesses). Many of these witnesses are out of state, or will otherwise be difficult to locate and coordinate. Moreover, the parties have not yet engaged in substantial production of documents, which will entail several tens of thousands of pages. Review and organization of these documents will be necessary for deposition preparation.

Moreover, it may well be necessary for Idaho Power's experts to review documents produced in the case. Indeed, Idaho Power has already encountered difficulty locating certain documents which may be relevant to expert analyses, and if such documents are not located would need to obtain them through discovery, only after which would they be available for expert review and consideration. Although expert reports can presumably be amended if necessary to reflect later documents produced, it would be more expeditious if initial expert reports were delayed until document production and depositions of fact witnesses are more complete. The Scheduling Order requiring completion of Idaho Power's expert disclosures and reports by April 22, 2008, less than two months after the completion of the summary judgment proceedings, is therefore prejudicial to Idaho Power. The alternative schedule proposed below would lessen such prejudice and would still maintain the currently set trial date.

The second problem with the Scheduling Order is with the date for the production of expert rebuttal reports (October 7, 2008). This date is approximately six months after the date of Idaho Power's initial reports (April 22, 2008), and four months after the date of the State's initial reports (June 23, 2008). Idaho Power believes this length of time between initial and rebuttal reports is unnecessary for both parties, and that this time can be shortened so as to better coordinate the initial reports with fact discovery and document production.

For these reasons, Idaho Power moves this Court to amend its Scheduling Order as to the close of discovery and the disclosure of experts and expert reports, to reflect the following:

- July 29, 2008 – Idaho Power's/Participants' Initial Expert Disclosures and Rule 26(b)(4) Reports.
- September 29, 2008 – State's/Participants' Initial Expert Disclosures and Rule 26(b)(4) Reports.
- October 27, 2008 – Idaho Power's/Participants' Rebuttal Expert Disclosures
- November 10, 2008 - Close of Discovery.

B. Motion to Reconsider Court's Scheduling Order Declaring Parties

In its December 20, 2008 Scheduling Order, the Court stated, “[a]ll parties who filed objections or responses to any of the subject water rights claims set forth below in regards to the issue of ownership of the claims and/or interpretation and application of the Swan Falls Agreement as it pertains to the subject claims are parties to Consolidated Subcase 92-23.” Scheduling Order at p. 1. Based on the Court’s review of the files in the individual subcases, the Court determined that IGWA is such a party. *Id.*, p. 2.

Idaho Power respectfully requests that the Court reconsider its Order with respect to IGWA’s status as a party, based on the applicable provisions of statutes and rules of this Court. Administrative Order 1, which dictates the procedures to be followed in the Snake River Basin Adjudication states, “[a]ny party to the adjudication, who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*.” Administrative Order 1 (“AO1”), Procedures in the SRBA, Rule 10(k). A “party” to the SRBA is defined as “[a]ny claimant as defined in I.C. §§ 42-1401A(1) and (6).” *Id.* at Rule 2(q). A “claimant” is defined in I.C. § 42-1401A(1) as “any person asserting ownership of rights to the use of water within the

state of Idaho or on whose behalf ownership of rights to the use of water is asserted." (emphasis added). A "party" is any person who is served or joined in an action. Idaho Code §§ 42-1401A(1) and (6).

IGWA is an organization representing a collection of both organizational and individual water right claimants and appropriators. IGWA is not a claimant in the SRBA pursuant to Idaho Code § 42-1401A(1) and (6), does not assert the ownership of the use of water, is not one on behalf of which the ownership of the use of water is asserted, is not a named party to this action, and has not been joined in this action by any named party. Moreover, IGWA is not a named party in the Complaint and is not a party to the Swan Falls Agreement. Therefore, IGWA has no standing to participate in this action.

Significantly, a Special Master in the SRBA recently determined IGWA's lack of standing on this same basis. On January 3, 2008, Special Master Dolan, in his Order Denying IGWA's Motion for Reconsideration of Order Denying Motion to Participate Subcases 01-1J, et al. held:

The IGWA is not a party to the adjudication or a claimant and hence, may not participate in these subcases. Neither is the IGWA entitled to intervene of right or by permissive intervention because it has not asserted ownership of rights to the use of water nor has such ownership been asserted on its behalf. As noted before, the IGWA merely **represents** water right holders.

Order Denying IGWA's Motion for Reconsideration, Subcases 01-1J, et al., 1/3/08, p. 3.

(emphasis in original) (attached as Exhibit A). Special Master Dolan's holding in the 01-1J subcases is equally applicable in this action. IGWA cannot be a party in the SRBA because it is not a claimant in the SRBA, does not own water rights, and is not a named party to this action or a party to the Swan Falls Agreement. For these reasons, IGWA cannot be a party to these proceedings and should be excluded from further participation. Idaho Power requests the Court reconsider and clarify its Scheduling Order and determine IGWA is not a party to this action.

Counsel for Idaho Power telephoned counsel for the State regarding this motion prior to its filing, but was unable to establish contact. Counsel request a hearing on this matter, and a notice of hearing is filed concurrently herewith.

CONCLUSION

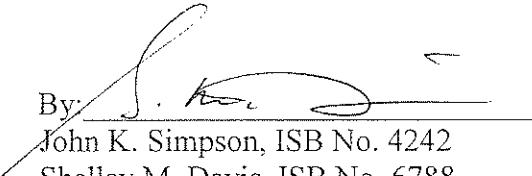
For the foregoing reasons, Idaho Power respectfully requests that this Court amend its December 18, 2007 Scheduling Order to adopt the alternative schedule regarding expert disclosures and reports proposed herein. Idaho Power also respectfully requests that the Court reconsider its Scheduling Order and confirm that IGWA is not a party to the proceedings in Consolidated Sub-Case 92-23.

Dated this 11th day of January, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January 2008, I caused to be served a true and correct copy of the foregoing **IDAHO POWER COMPANY'S MOTION TO AMEND AND RECONSIDER COURT'S SCHEDULING ORDER OF DECEMBER 20, 2007 AND MEMORANDUM IN SUPPORT THEREOF** by the method indicated below, and addressed to each of the following:

Notice of Service filed with the Court via Facsimile.

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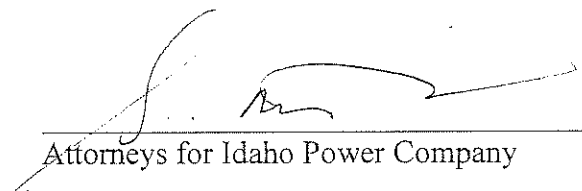
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