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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	) Consolidated Subcase no. 92-23
	)
	)
Case No. 39576	) STATE OF IDAHO'S
	) MEMORANDUM IN RESPONSE
	) TO IDAHO POWER COMPANY'S
	) MOTION TO AMEND
	) SCHEDULING ORDER AND
	) REQUEST FOR PRETRIAL
	) CONFERENCE
	)
	)

INTRODUCTION

Idaho Power Company ("Idaho Power" or "the Company") filed a Motion to Amend the Court's Scheduling Order of December 20, 2007 ("Motion") in which it asked

the Court to extend the deadline for expert witness disclosures and reports. The Scheduling Order requires completion of Idaho Power's expert disclosures and reports by April 22, 2008, completion of the State's expert disclosures and reports by June 23, 2008, and production of expert rebuttal reports by October 7, 2008. Idaho Power argues that the initial date of April 22, 2008 is prejudicial to the company and requests that the Order be amended to extend the deadline for their initial reports to July 29, 2008. The rest of the schedule would be amended to reflect a State disclosure date of September 29, 2008 and a rebuttal expert report deadline of October 27, 2008.

This Court's Order of July 23, 2007¹ limited the current proceeding to defining the elements of the water rights at issue in this consolidated subcase. It is clear from both pleadings and phone communications with Idaho Power's Counsel that the parties do not have a common understanding of the issues currently before the Court, and consequently, the scope of permissible discovery. Until the parties and the Court have identified the issues that are properly within the scope of the present proceeding, it is premature to modify the present Scheduling Order. For these reasons, the State requests that the Court deny Idaho Power's Motion and instead set a Pre-Trial Conference to clarify the scope of issues to be litigated in this proceeding and the scope of appropriate discovery.

ARGUMENT

I. IDAHO POWER HAS NOT SHOWN GOOD CAUSE WHY THIS COURT SHOULD AMEND THE SCHEDULING ORDER.

¹ *In re SRBA Case No. 39578, Order Granting in Part Motion to Dismiss; Consolidating Common Issues into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference* (July 2007).

I.R.C.P. 16(b) provides that after a scheduling order has been issued, “[a] schedule shall not be modified except by leave of the judge or a magistrate upon showing of good cause.” Idaho Power states in its Motion that preparing for this case will require the analysis of “tens of thousands of pages of documents,” numerous depositions and the development of expert testimony, and that “considerable discovery remains to be undertaken, including the taking of numerous depositions.” Motion at 3-4. These arguments are identical to those made by opposing counsel in briefing and in oral argument at the status hearing on December 18, 2007. Idaho Power has shown no new circumstances or change in position since the status hearing, and indeed has simply repeated the arguments made before the Court in December. Because the parties disagree as to the nature and scope of the issues pending before the court and the discovery required for the effective litigation of these issues, it is impossible for the State or the Court to know whether there is good cause to modify the current Scheduling Order.

II. A PRE-TRIAL CONFERENCE WOULD BE APPROPRIATE IN THIS CASE BECAUSE THE PARTIES DISAGREE AS TO THE SCOPE OF THE ISSUES TO BE TRIED.

a. Scope of the present proceeding.

The Court’s Order of July 23, 2007 (“Order”) distinguished between claims that are properly before the SRBA and claims that, although not within the purview of this Court, hinge on the SRBA’s “preliminary determination of the validity of the elements of a water right.” Order at 7. The Court stated that,

The SRBA Court’s practice, consistent with existing case law, has been to determine the issues that require definition of the elements of a water right. The SRBA Court has exclusive jurisdiction of these issues. Other issues that do not involve the elements of a water

right but nonetheless turn on the outcome of the SRBA proceedings are also determined by the SRBA Court which then transfers those remaining portions of the case to a district court of appropriate jurisdiction.” Order at 8.

The Court also ordered that Idaho Power’s claims against the Director and the Department are to be “separated from the remaining causes of action and stayed pending resolution of the remaining issues or until further order of the Court.” Order at 14.

Additionally, this Court clarified what matters are properly resolved in the SRBA in its Order on Basin-Wide Issue 5, stating that,

the scope of these proceedings should not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights. Legally, the Court does not need to adjudicate the specific interrelationships between water rights. IDWR makes this determination based on its knowledge and data regarding how water rights are physically interrelated. Mechanisms are available for water right holders in disagreement with IDWR’s administrative actions to challenge and seek review of the same.²

Finally, in *American Falls Res. Dist. No. 2 v. IDWR*, the Idaho Supreme Court held that issues of conjunctive administration are to be developed in the first instance by the Director under the Conjunctive Management Rules, and that parties must exhaust administrative remedies before seeking judicial review of the Director’s administrative decisions. 143 Idaho 862, 154 P.3d 433 (2007).

Idaho Power characterizes the current scheduling order as prejudicial, inefficient, and “inappropriate for litigation as complex as this case.” Motion at 3. The Company ignores the fact that the Court has simplified this litigation by providing for the staged development of the issues. “Following the determination of the preliminary issues regarding the scope of Idaho Power’s water rights, this Court will transfer the issues of

² *In re SRBA, Subcase No. 91-00005 (Basin-Wide Issue 5)*, Order on Cross-Motions for Summary Judgment; Order on Motion to Strike Affidavits (5th Jud. Dist., July 2, 2001) at 19.

compliance and enforcement to an administrative body or a court of appropriate jurisdiction.” Order at 13.

This consolidated subcase is currently proceeding in the common sense, staged and sequenced manner set forth in the Order. It is the State’s understanding that the only issues being litigated in this case concern the elements of the subject water rights and any general provisions necessary for the administration of those rights. The discovery required under the Order therefore should likewise be limited to the nature and extent of the disputed water rights.

b. The parties are in clear disagreement about the issues currently before the Court and the corresponding scope of discovery.

On more than one occasion, the State has asked opposing counsel to identify the need for extensive discovery, however, no explanation has been provided other than a general assertion that more time is needed. Idaho Power’s pleadings and communication with the State, however, suggest that the Company views the scope of this proceeding much more broadly than does the State. Indeed, Idaho Power’s pleadings suggest that this current litigation includes its objections to water rights administration by the State.

Idaho Power states that the current litigation “implicates the administration of interconnected ground and surface water in the [Snake River] Basin.” Motion at 3. In its responses to the State’s First Set of Interrogatories, Idaho Power addresses questions about title issues with references to hydrologic studies about the lag effects of groundwater pumping. Among the documents cited by Idaho Power as relevant to discovery in this proceeding are the “Curtailment Scenario” (November 2004) and presentations made to the Idaho Water Resource Board in July, 2006. These documents

are not relevant to questions relating to the elements of the water rights, and their inclusion in Idaho Power's discovery illustrates the marked difference between the State and Idaho Power Company regarding the scope of issues falling within this stage of the litigation, pursuant to the Court's Order of July, 2007.

Idaho Power states in its Motion that it will need to analyze "tens of thousands of documents" to properly prepare for its case. In other pleadings, it states that it has compiled over 50,000 pages of documents. The sheer number of documents repeatedly cited by Idaho Power further demonstrates that the Company has a vastly different view of the scope of the issues in this case.

I.R.C.P.16(a) provides that the Court may direct parties' counsel to appear in a pre-trial conference in order to "expedite the disposition of the action", "discourage wasteful pre-trial activities" or "improve the quality of the trial through more thorough preparation." In order to properly consider whether and to what extent the Scheduling Order should be modified, it is essential that all parties and the Court have a common understanding of the scope of the issues to be tried. Given the parties' conflicting views of the scope of the issues to be tried, the State respectfully requests that a pre-trial conference be ordered and that the parties meet prior to the conference and submit to this Court a joint list of issues, or in the event of a disagreement, a proposed list of issues. The parties should also be required to identify the scope of discovery.

CONCLUSION

The parties to this litigation clearly have different understandings of the scope of the issues to be tried and the scope of appropriate discovery to effectively litigate the issues. Presently, both parties have motions pending that could substantially reduce the

number of issues to be decided in this case, and consequently narrow the scope of discovery. In the interests of judicial economy and efficiency, therefore, the State requests that the Court deny the Company's Motion to Amend the Scheduling Order and set a Pre-Trial Conference which will enable the Court to clarify the relevant issues, the appropriate scope of discovery, and, if necessary, amend the discovery schedule.

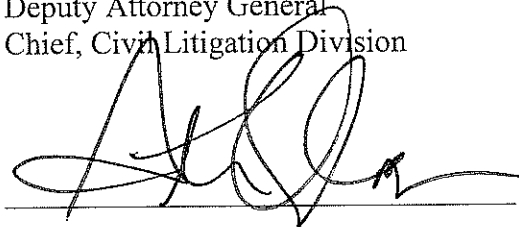
DATED this 8th day of February, 2008.

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A handwritten signature in black ink, appearing to read 'S. Olsen', is written over a horizontal line.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February 2008, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN RESPONSE TO IDAHO POWER COMPANY'S MOTION TO AMEND SCHEDULING ORDER to the following parties by the indicated methods:

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