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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 REPLY
v.	)	TO STATE'S RESPONSE ON
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	MOTION TO AMEND AND
Governor of the State of Idaho; LAWRENCE G.	)	RECONSIDER SCHEDULING
WASDEN, Attorney General of the State of	)	ORDER, AND RESPONSE TO
Idaho; IDAHO DEPARTMENT OF WATER	)	REQUEST FOR PRETRIAL
RESOURCES; and DAVID TUTHILL, Director,	)	CONFERENCE
Idaho Department of Water Resources	)	Hearing Date: February 21, 1:30 p.m.
Defendants.	)	Hon. Judge John M. Melanson
_____	)	

INTRODUCTION

The State has not demonstrated why Idaho Power's requested adjustment in the schedule regarding expert disclosures and reports would be contrary to fair and efficient resolution of this case. Rather, the State requests the Court hold a Pre-Trial Conference so that the State can understand the issues in this case. While Idaho Power concurs that a Pre-Trial Conference might be helpful in delineating the issues in this case, if a Pre-Trial Conference is held it should be scheduled following resolution of the motions for summary judgment filed by the parties. Pending the convening of such a conference, Idaho Power respectfully requests that the Court adjust the expert disclosure schedule, which would: (1) provide Idaho Power necessary additional time until July 29, 2008 in which to develop and submit its initial expert disclosures and reports; (2) adjust the dates for subsequent disclosures and reports concomitantly in a manner which affords the State the same response time as it has under the existing schedule; (3) enable discovery to proceed so that relevant facts can be discovered and considered by experts in their initial analyses; and (4) maintain the progress of the case toward the currently set trial date.

A. Good Cause Supports the Request to Adjust the Expert Disclosure Schedule

The State is wrong in its assertion that Idaho Power has not shown good cause for adjusting the Scheduling Order, and that no new circumstances exist beyond the earlier general discussions at the status conference which predated the Order. The Court's issuance of the Scheduling Order, which has enabled the parties to assess its impact upon necessary pretrial activities, is itself a significant new circumstance. With the Scheduling Order in place, Idaho Power now requests that the Court adjust the Order slightly to enable Idaho Power adequate time to prepare initial expert disclosures and reports, and to enable necessary discovery to occur in advance of submission of these disclosures and reports.

Idaho Power explained in its opening brief the two respects in which the current Scheduling Order was problematic with respect to expert disclosures, providing insufficient time up front and excessive time at the back end, and prejudicing Idaho Power while not promoting the most efficient resolution of this litigation. With respect to the first issue, that the April 22, 2008 date for Idaho Power's initial expert disclosures and reports is too soon in that it provides insufficient time for Idaho Power to develop them, just as Idaho Power predicted the State submitted an extensive brief in the aftermath of the short summary judgment motion it filed on the eve of the December 18, 2008 status conference. Idaho Power responded with a comprehensive brief of its own raising issues neglected by the State in its motion and brief, and filed a related cross motion for summary judgment regarding the effect of two Consent Decrees on the issue of ownership of Idaho Power's water rights. As might be expected, Idaho Power's counsel have been consumed by researching and drafting the arguments necessary to respond to the State's summary judgment motion, and consequently have had limited ability to focus on discovery, or to work with appropriate experts and progress with expert reports that can be filed by the existing deadline of April 22, 2008, just two months away.

With respect to the second issue, the Scheduling Order currently provides a nearly four month gap in between the State's responsive expert disclosures and reports and Idaho Power's rebuttal expert disclosures and reports. Under Idaho Power's proposed revised schedule, Idaho Power willingly shortens the time it has for its rebuttal reports, providing additional time up front for preparation of its initial reports. While shortening Idaho Power's time for rebuttal reports, the proposal allows the State the same amount of time it has under the existing order to respond to Idaho Power's initial reports, maintains the same discovery cutoff date and does not disturb the trial date set by the Court. Thus, the proposed schedule modification eliminates prejudice to

Idaho Power while not prejudicing the State or delaying resolution of this case.

Idaho Power is not required even under the current schedule to disclose its experts or areas of areas of testimony until at least April 22, 2008, and indeed still requires additional time to make determinations about the need for and scope of expert reports and testimony. Therefore, Idaho Power reserves its right to submit appropriate expert disclosures and reports at the designated time. However, solely for purposes of supporting its request to adjust the Scheduling Order, Idaho Power will discuss here some possible areas for expert testimony in this case for which the additional time is required.

The Court has already held that the SRBA Court has jurisdiction in this action over Idaho Power's causes of action for declaratory relief. July 24, 2007 Order ("Order"). The First Cause of Action in Idaho Power's Complaint seeks a declaration that when the Swan Falls Agreement was executed in 1984, there was no trust water available above Idaho Power's unsubordinated water rights of 3900 cfs and 5600 cfs under the Swan Falls Agreement, because the Snake River Basin tributary to the Murphy Gage, including the Eastern Snake Plain Aquifer (ESPA), was over appropriated. Accordingly, Idaho Power alleges there was no trust res and no valid trust established under the Swan Falls settlement. The Second Cause of Action in the Complaint seeks a declaration that to the extent the Snake River Basin above the Murphy Gage, including the ESPA, was over appropriated as to Idaho Power's unsubordinated water rights, the parties, who had assumed that some trust water was available for new appropriations pursuant to the Swan Falls Agreement subordination, were acting on the basis of a mutual mistake of fact regarding the existence of trust water.

Without committing to or limiting its areas of expert testimony in this case, Idaho Power maintains that the above described issues will require expert factual analysis and opinion

testimony in a number of areas, at the very least including: explanation and analysis of the complex geohydrology of the ESPA and Snake River surface flows; complex modeling relating pre-1984 ground water withdrawals to subsequent declines in the level of the ESPA and surface flows in the Snake River; and analysis and opinions as to whether in fact the overall system was over appropriated at the time of the Swan Falls Agreement's execution in 1984. The complexity of the required analyses, and the schedules of qualified experts in these areas, simply do not lend themselves to, in a manner of months, performing the necessary research and analysis, and then drafting a report with the results, in a focused manner, to assist the trier of fact in resolving these central issues. While expert reports can presumably be amended as necessary, particularly to reflect documents produced and depositions of fact witnesses, it is more efficient to allow sufficient time for preparation of more complete expert reports on the front end of the process, which Idaho Power maintains would be provided if the Court extends the current April 22, 2008 deadline for initial expert disclosures and reports to July 29, 2008.¹

B. The Court Should Conduct a Pre-Trial Conference After the Issues Have Been Narrowed By Resolution of the Pending Summary Judgment Motions

The State spends the bulk of its response arguing that the Court and parties should engage in a Pre-Trial Conference to narrow the issues in the case. However, as the State itself emphasizes, "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." State Response at 6-7. Idaho Power agrees that a Pre-Trial Conference might be productive, but maintains that it would premature to conduct such a conference until after the Court has issued its opinion resolving the parties' motions for summary judgment. Before that time, the Court

¹ Idaho Power has just served upon the State an additional set of discovery requests which address, among other subjects, many of the hydrologic and related technical issues upon which Idaho Power may deem it necessary to submit expert disclosures, reports and testimony.

and parties could delineate issues in the case which may not even exist once the summary judgment motions have been resolved, which would be counterproductive.

Much of the State's remaining argument consists of the State's characterization of the issues in this case at the present time, upon which there should not be any dispute in light of the Court's July 24, 2007 Order. Idaho Power concurs that the Court has found that its jurisdiction and this case properly encompass issues concerning the nature and extent of the subject water rights. While the State would like to believe that these issues can be boiled down into water right elements corresponding to boxes on standard forms, or even the single issue of title based on a single statutory provision, as demonstrated by the summary judgment briefing, the nature and extent of Idaho Power's water rights under the Swan Falls Agreement involves a number of complex issues, including the nature and extent of the Swan Falls Settlement's trust and subordination arrangements. Fundamental to full resolution of such issues, as set forth in Idaho Power's Complaint, is the availability of trust water and whether the system was over appropriated in 1984 in light of improved hydrologic knowledge today.

These issues, and the evidence and expert analysis that Idaho Power is developing and intends to present in this case, all concern the nature and extent of the subject water rights. As the Court recognized in its jurisdictional order, it also has jurisdiction over broader water rights matters within the Snake River Basin.² Issues concerning compliance with and enforcement of the Agreement, and of the decree rendered in this case, will proceed in the staged manner provided for under the July 24, 2007 Order. Idaho Power believes that the Order has provided sufficient guidance to the parties, and that there is no need to revisit the issues in that Order

² As an aside, Idaho Power would also note that the State also argues in its Response to Idaho Power's Cross Motion for Summary Judgment that this Court's subject matter jurisdiction is quite broad, contrary to its previous positions in this case and its position in its Response to Idaho Power's Motion to Amend the Scheduling Order. The State argues in its Response to Idaho Power's Cross Motion for Summary Judgment that this Court's jurisdiction was broad enough to divest other courts of jurisdiction to hear pending water matters.

through an immediate Pre-Trial Conference, which could be scheduled instead after the Court resolves the pending summary judgment motions.

CONCLUSION

The modifications proposed by Idaho Power to the Scheduling Order's deadlines for expert disclosures and reports will avoid prejudice to Idaho Power, provide for efficient case development, and not delay the overall pretrial and trial schedule set by the Court. Accordingly, Idaho Power respectfully requests that the Court grant its motion, and adjust the deadlines so that: (a) Idaho Power's/Participants' expert disclosures and reports are due July 29, 2008; (b) the State's/Participants' expert disclosures and reports are due September 29, 2008; and (c) Idaho Power's/Participants' rebuttal expert disclosures are due October 27, 2008.

Dated this 19th day of February 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of February 2008, I caused to be served a true and correct copy of the foregoing **Idaho Power Company's Reply To State's Response On Motion To Amend And Reconsider Scheduling Order, And Response To Request For Pretrial Conference** 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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