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DEPARTMENT OF
WATER RESOURCES

February 20, 2008

Brownstein Hyatt Farber Schreck, P.C.
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4437
T 303.223.1100 F 303.223.1111

Alison Cameron
Paralegal
T 303.223.1331
F 303.223.0331
acameron@bhfs.com

Lawrence Wasden
Steven Olsen
Karl T. Klein
Michael C. Orr
700 W. Jefferson, Room 210
Boise, ID 83711-4449

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Clive Strong
Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-1391

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702

IDWR Document Depository
P.O. 83720
Boise, ID 83720-0098

RE: In Re SRBA, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find Idaho Power Company's Response to State of Idaho's Motion to Strike Affidavit of Greg Panter in the above referenced matter that was fax filed today.

Sincerely,



Alison Cameron

Enclosures
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DEPARTMENT OF
WATER RESOURCES

James S. Lochhead
Michael A. Gheleta
Mark Mathews
Michelle C. Kales
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139
(208) 336-0700 – Telephone
(208) 344-6034 – Facsimile

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile

Attorneys for Plaintiff Idaho Power Company

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
	)	RESPONSE TO STATE OF IDAHO'S
v.	)	MOTION TO STRIKE AFFIDAVIT OF
	)	GREG PANTER
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	
Governor of the State of Idaho; LAWRENCE G.	)	
WASDEN, Attorney General of the State of	)	
Idaho; IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources,	)	
Defendants.	)	

INTRODUCTION

In conjunction with its Reply Brief in Support of the State's Motion for Summary Judgment (the "State's Reply"), the State filed a Motion to Strike the Affidavit of Greg Panter filed by Idaho Power Company ("Idaho Power") in support of Idaho Power's Response to the State's Motion for Summary Judgment. The State claims that Mr. Panter's Affidavit fails to conform to IRCP 56(e) because Mr. Panter's "after the fact" interpretation of the Swan Falls Legislation is irrelevant and is not based on his personal knowledge.

In fact, as with so much of the State's arguments in this litigation, the State's position hinges entirely on its belief that only Idaho Code § 42-203B of the Swan Falls Legislation need be analyzed by the Court in resolving this complex dispute. But as Idaho Power has demonstrated, this provision must be read in conjunction with the October 25, 1984 Agreement between the parties (the "Swan Falls Agreement"). In this light, Mr. Panter's testimony as to Idaho Power's unwavering position that it had retained ownership of its Swan Falls Agreement Water Rights – a position the Company maintained throughout the negotiation of the Agreement and before the legislature as it considered § 42-203B and other provisions of the Legislation – is highly relevant. For these reasons, the State's Motion to Strike should be denied.

ARGUMENT

I. MR. PANTER'S AFFIDAVIT PROVIDES RELEVANT AND ADMISSIBLE EVIDENCE IN SUPPORT OF IDAHO POWER'S RESPONSE TO THE STATE'S SUMMARY JUDGMENT MOTION AND IDAHO POWER'S CROSS MOTION FOR SUMMARY JUDGMENT.

The State claims that Mr. Panter's Affidavit is inadmissible because his testimony is irrelevant to interpreting the meaning of the Swan Falls Legislation. But Mr. Panter does not, as the State argues, recite his own account of the legislative history underlying the Legislation – in fact, he makes no reference to this history in his Affidavit. Instead, Mr. Panter explains Idaho

Power's understanding and position with respect to the requirements of the Swan Falls Agreement, the development of the legislative language attached to that Agreement, and the way in which Idaho Power presented the Agreement and its requirements to the legislature in 1985. *See generally* Affidavit of Gregory Panter ("Panter Aff."). In providing this testimony, Mr. Panter makes it clear in his Affidavit that Idaho Power understood only that the Agreement made certain portions of the Swan Falls Agreement Water Rights subject to future subordination by the State, and the Company specifically rejected the State's request to take ownership of those rights. *Id.* at ¶¶ 4, 6, 7. Mr. Panter also confirms that Idaho Power never received any request from the State in the nearly 23 years since execution of the Agreement to transfer title of its water rights to the State. *Id.* at 10. This testimony supports Idaho Power's position that it continues to maintain ownership of the Swan Falls Agreement Water Rights, and, as such, provides highly relevant information that rebuts the State's summary judgment argument.

The State also claims that the Legislation is clear on its face and no other evidence is necessary to discern its meaning and effect. As an initial matter, this argument fails because, as Idaho Power establishes in its Response to the State's Motion for Summary Judgment ("Idaho Power's Summary Judgment Response"), the Legislation is ambiguous and certainly does not conclusively determine the issue of ownership as the State contends. *See* Idaho Power's Summary Judgment Response at 10-13. As such, the Legislation cannot be viewed in isolation from the Agreement as the State would have this Court believe. Indeed, the language of the Agreement mandates that the two documents be read together, providing specifically that "[t]he parties agree to propose and support the following legislation *to implement this Agreement*," and then lists the legislative program that includes the Legislation. *Id.* at 15-18. Accordingly, Idaho Power's understanding and intent with respect to how the Agreement affected, or did not affect,

its ownership of the Swan Falls Agreement Water Rights is directly relevant to the meaning and purpose of the Legislation. *See Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003) (In construing a contract, Idaho courts seek to give effect to the intention of the parties).¹

Finally, Mr. Panter's Affidavit is relevant to counter the State's unfounded assertions throughout its summary judgment briefings that Idaho Power knowingly and willingly conveyed its Swan Falls Agreement Water Rights to the State or allowed those rights to be conveyed by operation of law. *See e.g.*, State's Memorandum in Support of Summary Judgment at 48 (claiming incorrectly that Idaho Power acquiesced to the State's request to take control of its water rights). On more than one occasion in both its Summary Judgment Motion and its Response to Idaho Power's Cross Motion, the State takes statements of Idaho Power representatives out of context and uses those statements to draw inaccurate conclusions as to the Company's past stance regarding ownership of the Swan Falls Agreement Water Rights. *Id.* *See also* State's Response to Cross Motion at 16-17 (misstating the intent of statements by Idaho Counsel, Tom Nelson, to the legislature regarding the effect of the Agreement on Idaho Power's water rights) and Idaho Power's Reply in Support of Cross Motion at 22, n. 40 (correcting the State's mischaracterization of Tom Nelson's position before the Legislature). Obviously, Idaho Power does not agree with the State's characterization of the Company's position during the Swan Falls settlement process, and it has submitted Mr. Panter's Affidavit, in part, to provide a

¹ The State cites the case of *Gillihan v. Gump*, 140 Idaho 264, 92 P.3d 514 (2004), for the proposition that post-enactment statements of legislators are not relevant to understanding a statute's legislative history. In *Gillihan*, the appellants had submitted an affidavit from a member of the state legislature to support their interpretation of a statute that provided for the award of attorney fees. The court acknowledged that the "accepted rule in most jurisdictions is that the beliefs of one legislator do not establish that the legislature intended something other than its express declaration." *Id.* at 268, 92 P.3d at 518. But as discussed above, the Panter Affidavit has been offered not to show the legislature's intent in enacting Swan Falls Legislation, but instead to demonstrate the Company's understanding of the meaning of the Agreement that formed the basis of the Legislation.

more complete and balanced account of the Company's understanding of the Agreement and the Agreement's effect on its water rights. Indeed, by telling only part of the story in its briefings, the State has opened the door to Mr. Panter's testimony to clarify the Company's position and its attempt to strike Mr. Panter's Affidavit is disingenuous.

Accordingly, for all of the above-stated reasons, the State's attempt to strike Mr. Panter's Affidavit as irrelevant should be denied.

II. MR. PANTER'S AFFIDAVIT IS BASED ON HIS OWN PERSONAL KNOWLEDGE.

The State also makes the blanket assertion that Mr. Panter's Affidavit "is not made based on personal knowledge." *See* State's Motion to Strike at 2. The State provides no further explanation or support for this assertion. In fact, this claim is refuted by the plain language of the Affidavit.

In the Affidavit, Mr. Panter states that he has represented Idaho Power in various government relations positions for nearly 32 years, and that during the "Swan Falls controversy," he served both as Director of Governmental Relations and as a lobbyist for Idaho Power. *See* Panter Aff. at ¶ 1. In these roles, Mr. Panter worked closely with company management and legal counsel representing Idaho Power in the negotiations leading up to the Agreement. *Id.* at ¶¶ 2-5. He was also privy to significant discussions with the Company relating to the negotiations and the Company's strategy with regard to resolution of the Swan Falls controversy. *Id.* at ¶ 5. Mr. Panter further worked with legal counsel and company management in the development of the proposed legislation language appended to the final Swan Falls Agreement. *Id.* After the execution of the Agreement, Mr. Panter represented Idaho Power during the 1985 legislative session by meeting with legislators to explain the Swan Falls Agreement and to discuss Idaho Power's position in relation to the Agreement and the requirements of the

Agreement. *Id.* at ¶ 8. He attended most if not all the meetings of the Resource and Environment Committees of the House and Senate where the Swan Falls Legislation was being discussed. *Id.* Through his work for Idaho Power, Mr. Panter gained an intimate understanding of the Agreement, the implementing legislation and the Company's understanding of these two documents.

As outlined above, Mr. Panter testifies specifically regarding his role in the Swan Falls negotiations and his representation of the Company before the legislature – facts about which not even the State can dispute he has personal knowledge. He then testifies based on his extensive involvement in this process regarding the position the Company took both during the negotiations and before the legislature regarding ownership of the Swan Falls Agreement Water Rights. He further testifies that “to his knowledge,” during the 23 years he has worked for Idaho Power since the parties executed the Agreement, the State has never taken any affirmative action to transfer title to these rights from Idaho Power to the State. Certainly, Mr. Panter's experience with Idaho Power to develop the Agreement at issue in this action, including the legislation attached to the Agreement, gives him sufficient personal knowledge to testify regarding the Company's understanding with respect to the requirements of this Agreement.

The State provides no explanation whatsoever in support of its assertion that Mr. Panter's direct and extensive involvement in the Swan Falls settlement process fails to constitute sufficient personal knowledge under IRCP 56(e). Accordingly, the State's Motion on this ground should also be denied.

CONCLUSION

For the reasons set forth above, the State's Motion to Strike Mr. Panter's Affidavit should be denied.

Dated this 20th day of February, 2008.

IDAHO POWER COMPANY

James C. Tucker, Esq.
Senior Attorney, Idaho Power Company
1221 West Idaho Street
Boise, ID 83702-5627

James S. Lochhead, Esq.
Michael A. Gheleta, Esq.
Mark J. Mathews, Esq.
Michelle C. Kales, Esq.
Brownstein Hyatt Farber Schreck, P.C.
410 17th Street, Twenty-Second Floor
Denver, CO 80202

By: Michelle Kales

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139

Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February 2008, I caused to be served a true and correct copy of the foregoing **IDAHO POWER COMPANY'S RESPONSE TO STATE OF IDAHO'S MOTION TO STRIKE AFFIDAVIT OF GREG PANTER** the method indicated below, and addressed to each of the following:

Filed with the Court via Facsimile and overnight FedEx.

Lawrence Wasden	<u> X </u> U.S. Mail, Postage Prepaid
Steven Olsen	<u> X </u> Electronic Mail
Karl T. Klein	<u> </u> Facsimile
Michael C. Orr	
700 W. Jefferson, Room 210	
P.O. Box 44449	
Boise, ID 83711-4449	
Attorneys for Defendant, State of Idaho	

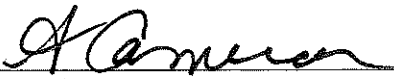
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	<u> </u> Facsimile

United States Department of Justice	<u> X </u> U.S. Mail, Postage Prepaid
Environment & Nat'l Resources Div	<u> </u> Hand Delivered
550 W Fort Street, MSC 033	<u> </u> Overnight Mail
Boise, ID 83724	<u> </u> Facsimile

Chief, Natural Resources Division	<u> X </u> U.S. Mail, Postage Prepaid
Office of Attorney General	<u> </u> Hand Delivered
PO Box 44449	<u> </u> Overnight Mail
Boise, ID 83711-4449	<u> </u> Facsimile

Randall C. Budge	<u> X </u> U.S. Mail
Candice M. McHugh	<u> </u> Hand Delivered
Racine Olson Nye Budge & Bailey, Chtd.	<u> </u> Overnight Mail
P.O. Box 1391	<u> </u> Facsimile
Pocatello, ID 83204-1391	

Josephine Beeman	<u> X </u> U.S. Mail
Beeman & Associates, P.C.	<u> </u> Hand Delivered
409 W. Jefferson Street	<u> </u> Overnight Mail
Boise, ID 83702	<u> </u> Facsimile



Alison Cameron

86075\1125959.2