

RECEIVED

APR 02 2008

DEPARTMENT OF
WATER RESOURCES

James S. Lochhead
Michael A. Gheleta
Mark J. 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
	)	MOTION TO COMPEL THE STATE
v.	)	DEFENDANTS' RESPONSES TO
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	PLAINTIFF'S SECOND SET OF
Governor of the State of Idaho; LAWRENCE G.	)	DISCOVERY REQUESTS AND
WASDEN, Attorney General of the State of	)	MEMORANDUM IN SUPPORT
Idaho; IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources,	)	
Defendants.	)	

Plaintiff Idaho Power Company ("Idaho Power"), pursuant to Idaho Rule of Civil Procedure ("IRCP") 37(a)(2), hereby files its Motion to Compel the State Defendants' Responses to Idaho Power's Second Set of Discovery Requests and Memorandum in Support ("Motion to Compel").

Certification of Compliance with IRCP 37(a)(2): In accordance with the requirements of IRCP 37(a)(2), counsel for Idaho Power certifies that they have conferred in good faith with counsel for the State Defendants and Defendants oppose this motion.¹

INTRODUCTION AND BACKGROUND

Idaho Power served the State Defendants (hereinafter collectively referred to as the "State") with its Second Set of Discovery Requests on February 22, 2008,² and the State's responses to these Discovery Requests were due on March 24, 2008. On March 19, 2008, only a few days before the State's responses were due to Idaho Power, the State's counsel informed Idaho Power's counsel in a telephone conversation that the State intended to object to Idaho Power's discovery requests on the basis that the requests were either over broad or sought information not relevant to the action.³ Counsel for the State also indicated that the State would file a motion for protective order with the Court in conjunction with its responses to Idaho Power's discovery requests.⁴

During this and subsequent conversations, Idaho Power's counsel attempted to confer with the State's counsel regarding the State's objections unrelated to the parties' fundamental differences about what is properly at issue in this litigation, including their concerns that certain

¹ See Affidavit of Michael Gheleta ("Gheleta Aff."), Ex. A (Plaintiff's March 25, 2008 letter to Michael Orr) and Ex. E (State's March 31, 2008 letter to James Lochhead).

² See Gheleta Aff., Ex. B (Idaho Power's Second Set of Discovery Requests).

³ See Gheleta Aff. at ¶ 9.

⁴ *Id.*

requests were overbroad. Rather than provide one example of its concerns, however, the State's counsel declined to engage in such discussion, indicating instead that Idaho Power should wait to see the State's objections and motion for protective order on March 24.⁵

As indicated, the State filed a Motion for Protective Order on March 24, and did not file its supporting brief at that time, leaving Idaho Power unable to address the State's specific arguments in a timely fashion. In its motion, the State asks for a sweeping protective order that no discovery be had concerning: (1) the issue of compliance with or enforcement of the water rights at issue in the case; (2) any action, order or administrative rule of the Director of the Idaho Department of Water Resources ("IDWR") or IDWR that is subject to judicial review or declaratory judgment under the provisions of chapter 52, Title 67 of the Idaho Code; (3) any action, order or administrative rule of the Director or IDWR that is subject to the requirement of exhaustion of remedies; or (4) any question of intent of the Idaho legislature regarding the enactment of the Swan Falls legislation and/or the contractual intent of the parties regarding the Swan Falls Agreement that goes beyond the "legislative record" from 1985 and 1986. *See* State's Motion for Protective Order at 1-3.

At the same time it filed its Motion, the State also served Idaho Power with its responses to the Second Set of Discovery Requests.⁶ As described more fully below, the State's objections to Idaho Power's Second Set of Discovery Requests lack merit, and the State's specific responses fall short of its obligations to respond to interrogatories and produce documents under the Idaho Rules of Civil Procedure. The State's position on discovery is particularly unreasonable because the State has consistently pushed for the most aggressive discovery schedule possible in this litigation. Accordingly, the case is on a very fast timeline, with trial scheduled for February 2,

⁵ *Id.*

⁶ *See* Gheleta Aff., Ex. C (State's Responses to Idaho Power's Second Set of Discovery Requests).

2009, and with expert reports due by June 16, 2008, less than three months from now. Due to this expedited schedule, Idaho Power needs to obtain full production now in order to determine and prepare for depositions of numerous fact witnesses, and prepare expert reports by the June 16 deadline. Yet rather than provide a full and fair response to Idaho Power's discovery requests, the State has instead chosen to rely upon inappropriate and irrelevant objections, as set forth below.

Idaho Power wrote to the State on March 25, again offering to meet and confer with the State to resolve the State's concerns and giving the State until March 31 to withdraw its objections and provide full and complete responses to the Second Set of Discovery Requests.⁷ The State did not provide any additional information or documents in response to Idaho Power's March 25 letter.⁸ Accordingly, in order to insure timely consideration of this discovery dispute, which is essential in light of the case schedule discussed above, Idaho Power has found it necessary to file the instant Motion to Compel.

ARGUMENT

I. Standards Governing Discovery.

Idaho's Rules of Civil Procedure require the State to produce any documents or information "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." IRCP 26(b)(1).⁹ IRCP 26(b)(1) and its substantively identical

⁷ See Gheleta Aff., Ex. A.

⁸ See Gheleta Aff., Ex. E (State's March 31, 2008 letter to James S. Lochhead). The State's counsel did contact Idaho Power's counsel by telephone at the end of the day on March 31, indicating that the State would now (a week after filing its motion for protective order) be willing to discuss the State's objections related to specific requests being overbroad or vague, and suggested that we discuss this matter later in the week. See Gheleta Aff. at ¶ 10.

⁹ The full text of the relevant portion of the Rule states "[u]nless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence,

federal counterpart have been interpreted very broadly by both state and federal courts so as to encourage the full disclosure of relevant, non-privileged information. *See Herbert v. Lando*, 441 U.S. 153, 177 (1979) (noting “the discovery-deposition rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials.”); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 306 (Idaho, 1977) (Bakes, J., dissenting) (“IRCP 26(b)(1) has consistently been interpreted to allow the broadest possible discovery.... The only limitation on discovery of unprivileged material is that it be relevant to the subject matter of the litigation, which is such a broad standard that at the discovery stage a party may in fact engage in a fishing expedition.”).¹⁰

Accordingly, Idaho Power has the right under Rule 26(b)(1) to obtain discovery regarding any matter, not privileged, that is relevant. Inadequate or incomplete answers to interrogatories or document requests, such as those included in the State's recent responses, as well as objections based on issues of admissibility, should not be permitted. “The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose.” *Edmunds v. Kraner*, 142 Idaho 867, 873 (2006). If the State has withheld relevant information, it must be compelled to produce that information.

description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of person having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Idaho R. Civ. P. 26(b)(1). This rule is substantively identical to the federal rule.

¹⁰ Further, the fact that the requested documents or information may not ultimately be admissible at trial is irrelevant so long as the requested document or information is reasonably calculated to lead to the discovery of admissible evidence. *Lester v. Salvino*, 141 Idaho 937, 941 (Idaho Ct. App., 2005) (“Rule 26(b)(1) expressly provides that ‘it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.’ The discovery rules require a defendant’s answer to be responsive, full complete and unequivocal, ... [and to] provide all the facts available to him upon reasonable inquiry even those inadmissible at trial or those the plaintiff bears the burden to prove.”) (internal citations omitted.)

II. The State's General Objections Do Not Justify the State's Decision to Withhold Otherwise Relevant and Responsive Information.

The State propounds six general objections to Idaho Power's Second Set of Discovery, none of which justify the State's apparent decision to withhold information otherwise relevant and responsive to Idaho Power's interrogatories and requests for production.

State's Objection No. 1:

The State's first objection is based on the State's inaccurate characterization of Idaho Power's discovery requests as seeking information solely related to administration of Idaho Power's water rights as defined in the Swan Falls Agreement. Idaho Power recognizes that the Court in its July 23, 2007 Order (the "Order") stayed Idaho Power's claims against the Director of IDWR and IDWR. The Court also made clear, however, that it had exclusive jurisdiction to determine the ownership, validity and scope of the disputed water rights in this litigation and, accordingly, refused to dismiss Idaho Power's Complaint. Order at 9. In making its ruling, the Court recognized that "[t]here can be significant amount of overlap between an administrative provision and the definition of a water right," and stated that the Swan Falls Agreement "in part defines the ownership, nature and extent of the subject hydropower rights and how they are to be administered relative to the rights on the same or connected sources." Order at 10. The Court concluded that "upon review of Idaho Power's allegations, it is clear that the dispute goes beyond the administration or enforcement of the Swan Falls Agreement. Issues exist over fundamental terms, which define the nature, scope and extent of Idaho Power's hydropower rights and should be decided in the SRBA." Order at 12.

Accordingly, the Court has already rejected the State's efforts to withhold otherwise relevant information by characterizing it as solely pertaining to administrative or enforcement matters. In fact, as shown below, each of Idaho Power's interrogatories and document requests

to which the State objects on this ground pertains to the nature, extent and validity of the water rights at issue in this litigation.

State's Objections Nos. 2-3:

The State's second and third objections also misconstrue the purpose of Idaho Power's discovery requests as improperly seeking information from the Director and IDWR "to develop or support claims involving judicial review" of the administrative actions of these entities. As discussed above, the Court has already ruled that overlap between administrative provisions and definitions of a water right is inevitable and not a proper basis for the State's withholding otherwise relevant information. Moreover, as discussed more specifically below, Idaho Power is not seeking information from the files of the Director or IDWR for the purpose of pursuing or developing claims against these non-parties related to their administrative actions. Idaho Power instead seeks this information as it pertains to the nature, scope and extent of Idaho Power's water rights at issue in this action.

State's Objection No. 4:

The State's fourth objection that Idaho Power improperly seeks discovery from non-parties is similarly without merit. All of Idaho Power's discovery requests were propounded to the "State Defendants," including the State of Idaho. Although the Director and IDWR are no longer parties to this action, they are agents of the State, and the State has control over and possession of documents within the files of the Director and IDWR. I.C. § 42-170(1). If the State's argument was a viable one, virtually any substantive request to the State of Idaho would be deemed objectionable if the agency that was the expert in the issue at the root of the request was not a party to the case. As such, the State is obligated to produce documents from the files of these entities that are responsive to Idaho Power's discovery requests.

State's Objection No. 5:

The State also makes a procedural objection that Idaho Power's Second Set of Interrogatories exceeds the limitation of 40 interrogatories established by IRCP 33(a)(3). The State claims that Idaho Power's only interrogatory in its First Set of Discovery,¹¹ asking the State to explain its grounds for denying any of Idaho Power's 54 requests for admissions, constitutes a separate interrogatory for each request for admission requiring an explanation. On this basis alone, the State claims that Idaho Power exceeded the 40-interrogatory limit.

No Idaho court decision supports the State's claim. Although IRCP 33 limits the number of interrogatories a party can serve to 40, IRCP 36(a)(1) sets no such limit on the number of requests for admission and further requires, as Idaho Power requested, that a party denying a request for admission provide the reasons for such denial. Thus, IRCP 36(a)(1) requires that the State provide the information requested by Idaho Power in its First Set of Discovery Requests, even without Idaho Power needing to propound an interrogatory seeking this information. Accordingly, the State has no legitimate basis on which to claim that Idaho Power has exceeded the number of interrogatories allowed under Rule 33.

State's Objection No. 6:

The State's final objection is that Idaho Power's discovery seeks to supplement the legislative record for the Legislature's ratification of the Swan Falls Agreement and passage of the Swan Falls Legislation. By making this objection, the State impermissibly seeks to repeat the argument in its summary judgment briefing that, when attempting to ascertain the legislature's intent when crafting the Swan Falls legislation, the only "relevant" legislative history is limited to the legislative record of the 1985 and 1986 legislative session. This notion is without legal support. As an initial matter, the Court has not yet ruled on the State's Motion for

¹¹ See Gheleta Affid. at Ex. D (Idaho Power's First Set of Discovery Requests).

Summary Judgment, and the State therefore has no basis upon which to limit discovery on this ground. Absent such a ruling, the State is not entitled to determine what is and is not at issue in the action. Rather, it is obligated to respond with information and documents on any matter that may lead to the discovery of admissible evidence.¹²

Second, this is a contract dispute as to the interpretation of the Swan Falls Agreement. The State's objection ignores this fact by focusing exclusively upon what it contends is the relevant legislative history. Until such time as the Court rules that the Agreement is completely irrelevant to this proceeding, the State must produce relevant evidence as to the intent of the parties to the Agreement and with respect to any subsequent act that informs the interpretation of the Agreement. Under Idaho law, when a court is attempting to ascertain the intent of the parties to an agreement it will consider *all* relevant evidence and circumstances. This includes a wide variety of extrinsic evidence, including any information that would shed light on the circumstances at the time the agreement is made, as well as any and all post-agreement oral and written comments or testimony regarding the agreement that would assist the court in understanding the agreement. *See Cool v. Mountainview Landowners*, 139 Idaho 770, 773 (Idaho, 2004); *Hall v. Hall*, 116 Idaho 483, 484 (Idaho, 1989) (noting that extrinsic "oral or written statements" may be considered by the court when attempting to ascertain the drafters' intent); *DeBaca v. McAfee*, 109 Idaho 800, 802 (Idaho, 1985) (noting that the trial court's decision to hear, and consider, testimony regarding the intent of the parties as to the drafters' intent was acceptable and upholding the judge's discretion to believe one side over the other.); *Gardner v. Fliegel*, 92 Idaho 767, 771 (Idaho, 1969). By attempting to limit the scope of

¹² As noted in Idaho Power's Response to the State's Summary Judgment Motion, this Court has the discretion to consider a variety of information when attempting to ascertain legislative intent, and Idaho Power has the right to seek and obtain any documents that may be relevant in this regard. The State's attempt to limit Idaho Power's, and this Court's, access to relevant documents is inconsistent with the body of Idaho caselaw concerning this issue. *See Idaho Power's Summary Judgment Response* at 13-14.

"relevant" documents to a specific period of legislative history, the state is impermissibly refusing to provide Idaho Power with information that is relevant to the intent of the parties when the Swan Falls Agreement was entered.

Finally, contrary to the State's position, there is no "official" legislative history or record for this agreement or legislation, and, even if there was, it would not be limited to the record of the 1985 and 1986 legislative sessions. See *Bruderer v. PacifiCorp*, 2007 US Dist. LEXIS 42907, * 27 (D. Idaho 2007) (defining the scope of information relevant to interpreting the meaning of a statute more broadly than just the official legislative record); *Knight v. Employment Sec. Agency*, 88 Idaho 262, 266 (Idaho, 1965) ("In construing a statute not only must the literal wording of the statute be examined, but also account must be taken of other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction and the like.") (internal citations omitted).¹³ In fact, the State's current position that only documents in the "official legislative record" of 1985 and 1986 is inconsistent with its own responses to

¹³ The State cites *Gillihan v. Gump*, 140 Idaho 264 (2004), in support of its objection on the apparent assumption that *Gillihan* prevents the Court from considering any post-passage statement by a legislator or regulator when the Court is attempting to ascertain the meaning and purpose of a statute or statutory term. While the Court in *Gillihan* did find that post-enactment statements by a legislator concerning legislative intent may not be considered "legislative history," and should be looked at with skepticism when interpreting a statute, it was not stating that *any* statement made by a legislator or regulator after a law is passed is irrelevant to the interpretation of legislative intent. If that were the case, then the Court would be establishing a precedent that once legislation is finalized, the legislature has no further role in overseeing the implementation of that law by a regulator. This can simply not be the case. For instance, when an agency promulgates a regulation that is, in the view of the legislature, inconsistent with legislative intent or the language of a statute, legislators may call that inconsistency to the attention of the regulator during an oversight hearing. To imply that the statement of a legislator during an oversight hearing is somehow invalid for purposes of interpreting a statute, would mean that once legislation is passed, the legislature has no additional say in how that legislation is interpreted or carried out. In fact, other Courts in the United States have considered post-enactment statements when seeking to understand legislative intent. See, e.g. *Humane Soc. v. Lujan*, 1992 U.S. Dist. Lexis 16140, *15 (D.D.C. 1992) (assessing congressional intent of amendments to the Endangered Species Act by reviewing the statements of congressmen during an oversight hearing). The fact is, this Court has great discretion when seeking to understand the legislative intent behind an ambiguous statutory term. See *Gillihan*, 140 Idaho at 266 (noting that when a statutory term is ambiguous, the Court "exercises free review" to determine the meaning of the term, and may consider "the language used, the reasonableness of the proposed interpretations, and the policy behind the statute.")

Idaho Power's First Set of Discovery Requests. In responding to Idaho Power's Request for Admission No. 4, the State lists numerous documents that it deems relevant to its position in this lawsuit that are outside the 1985-1986 timeframe, including documents both pre and post enactment of the Swan Falls Legislation.¹⁴

The State should be compelled to provide all information relevant to both the intent of the legislation and the intent of the parties to the Agreement.

III. The State Has Refused to Provide All Relevant Information in Response to Idaho Power's Second Set of Interrogatories Under IRCP 26(b)(1) and 33.

The State has improperly refused to answer a majority of Idaho Power's interrogatories as more fully described below. For the reasons discussed herein, each of these interrogatories is reasonably calculated to lead to the discovery of admissible evidence, and the State is obligated pursuant to IRCP 26(b)(1) and 33 to produce all responsive documents.

Interrogatories Nos. 3 and 4:

Idaho Power's Interrogatory No. 3 asks the State to identify the lowest average daily minimum flow into the Snake River that has occurred at the Murphy Gage as calculated pursuant to the Swan Falls Agreement, and Interrogatory No. 4 asks the State to describe its basis and methodology for measuring and calculating flows at the Murphy Gage. The State makes a blanket objection to these Interrogatories by referencing the reasons set forth in its general objections 1-6 (discussed above), and fails to provide any further explanation as to how these general objections specifically apply to Interrogatories Nos. 3 and 4. Despite its objections, the State then goes on to answer these Interrogatories by providing that "Idaho Power has been operating and monitoring the Murphy Gage since April 2004."

¹⁴ See Gheleta Aff., Ex. G (State's Response to Idaho Power's First Set of Discovery Requests) at pp. 5-15.

As an initial matter, this response is meaningless. As the State well knows, the determination of flow numbers at the Murphy Gage under the Swan Falls Agreement requires a calculation by the State based on factors including flow regulation in the Snake River, releases of water from upstream reservoirs, and other upstream water withdrawals, and is not determined simply by taking a measurement at the Gage.¹⁵ Both Interrogatories Nos. 3 and 4 seek information regarding how the *State* identifies and calculates these flows, and the State has failed entirely to provide any meaningful answer to Interrogatories Nos. 3 and 4.¹⁶

Moreover, contrary to the State's general Objections, the information requested by these Interrogatories does not relate solely to issues of administration or issues directed to the development of claims involving judicial review of administrative actions of the Director or IDWR. The State's calculation of low flows at the Murphy Gage and how the State makes flow calculations is directly relevant to the question raised in the Complaint as to how much water exists, if any, above the Swan Falls minimum flows and Idaho Power's unsubordinated rights that is available for appropriation.¹⁷ Similarly, it is relevant to whether the parties operated under a mutual mistake of fact regarding Trust Water availability at the time the parties entered into the Agreement, as also alleged in the Complaint.¹⁸ How the State calculates average daily minimum flows would further shed light on the State's contention in response to Idaho Power's Request for Admission No. 22 that flows in the Snake River at the Murphy Gage did not drop

¹⁵ See Gheleta Aff. at Ex. F (Swan Falls Agreement at ¶ 7E).

¹⁶ See Gheleta Aff., Ex. G (State's Responses to Idaho Power's First Set of Discovery Requests) at pp. 19-20 (The State admits in its Response to Idaho Power's Request for Admissions Nos. 8 and 9 that it "calculates" the flow numbers at the Murphy Gage pursuant to the terms of the Swan Falls Agreement. Idaho Power's Interrogatories Nos. 3 and 4 simply ask the State to explain how it makes this calculation.)

¹⁷ See Complaint at ¶¶ 29-34 and 60-63.

¹⁸ *Id.*

below 3900 cfs in 2003.¹⁹ Accordingly, Interrogatories Nos. 3 and 4 are reasonably calculated to lead to the discovery of admissible evidence, and the State is obligated pursuant to IRCP 26(b)(1) and 33 to respond to these Interrogatories. *See supra* Section I.

Interrogatories Nos. 5 and 6:

Idaho Power's Interrogatory No. 5 asks the State to describe the process and bases it used for defining the area described as the "Geographic Area from Which Groundwater Is Determined to Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach" (the "Tributary Area"), as depicted in Appendix A of the IDWR Water Appropriation Rules, IDAPA 37.03.08 (July 1, 1993). And Interrogatory No. 6 asks the State to further identify all persons employed or consulted by the State involved with or having knowledge concerning the definition of the Tributary Area.²⁰ The State makes a blanket objection to these Interrogatories by referencing the reasons explained in its general objections 1-6.

For the same reasons set forth above with respect to Interrogatories Nos. 3 and 4, none of the State's general objections support the State's decision to withhold all information in response to Interrogatories Nos. 5 and 6. These Interrogatories seek information regarding how the State developed the Tributary Area. This information is directly relevant to how much water exists, if any, above the Swan Falls minimum flows and is similarly relevant to whether the parties operated under a mutual mistake of fact regarding Trust Water availability at the time they entered into the Agreement.²¹ As such, these Interrogatories are reasonably calculated to lead to

¹⁹ *See Gheleta Aff., Ex. D* (Idaho Power's First Set of Discovery Requests).

²⁰ In responding to these Interrogatories, the State noted that Idaho Power did not include Appendix A as described in Interrogatory No. 5. The State, however, cannot seriously contend that it does not have access to Appendix A, as this document is attached to the State's own rules and regulations. Nevertheless, Idaho Power included a copy of Appendix A with its March 26 letter to the State for the State's reference.

²¹ *See Complaint at* ¶¶ 29-34 and 60-63.

the discovery of admissible evidence, and the State is obligated pursuant to IRCP 26(b)(1) and 33 to respond to these Interrogatories.

Interrogatory No. 7:

Idaho Power's Interrogatory No. 7 asks the State to describe the basis for the regulatory definition of "trust water flows" as set forth in the IDWR Water Appropriation Rules, IDAPA 37.0, Rule 1,5,1,3 (adopted Oct. 8, 1996), and unchanged in IDAPA 37.03.08, rule 030.01.c. The State again responds with a blanket objection by referring only to the reasons explained in its general objections 1-6. None of these general objections support the State's decision to withhold all information in response to this Interrogatory.

Interrogatory No. 7 seeks information directly relevant to the issue of whether the res of the trust established by the Swan Falls Agreement constitutes water, as Idaho Power contends, or water rights, as the State contends. The State's regulatory definition of "trust water flows" appears to support Idaho Power's position, and Idaho Power has requested that the State explain the basis for this regulatory definition. Accordingly, Interrogatory No. 7 is reasonably calculated to lead to the discovery of admissible evidence, and the State is obligated pursuant to IRCP 26(b)(1) and 33 to respond to this Interrogatory.

Interrogatories Nos. 8 and 9:

Idaho Power's Interrogatories Nos. 8 and 9 ask the State to describe information related to assumptions and determinations made by the Director in its April 30, 1993 IDWR Amended Moratorium Order regarding the effect of future water use on existing water rights and the impact of historic water use on ground water aquifers. As with every other Interrogatory proffered by Idaho Power, the State again responds to Interrogatories Nos. 8 and 9 by referring

only to its general objections 1-6. None of these general objections supports the State's decision to withhold all information in response to these Interrogatories.

Contrary to the State's Objections, these Interrogatories do not seek information solely regarding administration issues or issues directed to the development of claims involving judicial review of administrative actions of the Director or IDWR. These Interrogatories seek technical information directly relevant to the issue of how much water exists, if any, above the Swan Falls minimum flows and whether the parties operated under a mutual mistake of fact regarding Trust Water availability at the time the parties entered into the Agreement.²² As such, these Interrogatories are reasonably calculated to lead to the discovery of admissible evidence, and the State is obligated pursuant to IRCP 26(b)(1) and 33 to respond to these Interrogatories.

IV. The State Has Refused to Produce All Relevant Documents in Response to Idaho Power's Second Set of Requests for Production Under IRCP 26(b)(1) and 34.

The State's responses to Idaho Power's second set of document requests are also entirely inadequate. Although the State issued objections and responses to these requests and produced a nominal number of documents,²³ the State unilaterally limited its responses based on the State's own theory of this case. The State's interpretation is significantly narrower than either the Complaint or Idaho Power's discovery requests.

²² See Complaint at ¶¶ 29-34 and 60-63.

²³ The State produced approximately 400 pages of documents in response to Idaho Power's second set of document requests. In addition to documents the State has already produced, this brings the State's total production to date to under 4000 pages. In contrast, Idaho Power has approximately 45,000 pages of documents in its personal Swan Falls files, and has offered to make all documents not subject to attorney client or work product privilege available to the State for inspection (although the State has not yet done so). Based on the number of documents in Idaho Power's files alone, it seems highly unlikely that the State has produced all relevant documents responsive to Idaho Power's discovery requests.

Specifically, every one of the State's responses to Idaho Power's requests for production, which the exception Request for Production No. 5, contains the following objection and response:

Without waiving [the State's additional] objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control **that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement**, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.²⁴

The State has no legitimate basis for limiting its document production to documents concerning the parties' intent (and based on the State's own narrow view of what is relevant to intent). The State is required to provide all non-privileged information responsive to Idaho Power's requests and is not entitled to unilaterally limit its document production as the State sees fit. It is clear that the State has limited the scope of its document production in some fashion, but Idaho Power has yet to receive any response to its request for clarification from the State as to whether and to what extent the State is withholding responsive documents.²⁵

Additionally, as a general matter, the State's responses to Idaho Power's second set of document requests universally invoke some combination of the State's general objections 1-6, without explaining why each objection is applicable to the relevant request. As discussed above, the State's general objections do not constitute a reasonable or adequate basis for refusing to produce responsive documents. At a minimum, the State must specify why its general objections entitle the State to withhold relevant documents specific to each of Idaho Power's requests. In

²⁴ See Gheleta Aff., Ex. C (State's Responses to Idaho Power's Second Set of Discovery Requests), pp. 7-14 (emphasis added).

²⁵ Gheleta Aff., Ex. A at 5-6.

addition, the State has registered specific objections to several of Idaho Power's document requests – *e.g.*, vagueness and undue burden – regarding which Idaho Power has offered to meet and confer, but the State has been unwilling to discuss these matters in any detail before Idaho Power found it necessary to file this motion.²⁶

For the reasons discussed herein, each of Idaho Power's requests for production is reasonably calculated to lead to the discovery of admissible evidence, and the State is obligated pursuant to IRCP 26(b)(1) and 34 to produce all responsive documents.

Requests for Production Nos. 1-3:

Idaho Power's Requests for Production Nos. 1-3 request the production of certain indexes from the State, including (a) indexes created by or on behalf of IDWR that reflect documents maintained in IDWR's files from 1970-1989; (b) indexes created by or on behalf of the Idaho Public Utilities Commission that reflect documents maintained in IPUC's files from 1970-1989; and (c) indexes created by or on behalf of the Idaho Attorney General's office that reflect documents maintained in the Attorney General's files from 1970-1989. The State objects to these requests on essentially the same grounds, primarily that the term "index(ices)" is vague and ambiguous and that the request is overbroad and unreasonably burdensome. Ultimately, the State responds, as set forth above, that it has produced all responsive documents that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement. The State also indicates that it has produced additional responsive documents that are not relevant to the question of intent, but does not specify what this includes.

²⁶ See Gheleta Aff., Ex. E.

First, as discussed in Section IV.A, *supra*, the State's apparent decision to limit its production based on what it believes is relevant to the parties' intent and withhold other relevant documents on this basis is improper.

Second, regarding the State's overbreadth and burdensomeness objections, Idaho Power is seeking indexes from these State agencies specifically so that Idaho Power may review the documents in the agencies' possession and identify the documents that may be relevant to this case. In other words, Idaho Power has specifically narrowed this request to take the burden off the State. Without knowing how the agencies maintain their files, however, Idaho Power is unable to narrow this request further.

Finally, the State's vagueness objection is meritless. Idaho Power is seeking all lists, files, or catalogues that reflect documents in the possession of relevant agencies during the relevant time period. For example, Idaho Power is aware that IDWR, and possibly the PUC and the Attorney General's office, sent numerous boxes of documents related to the Swan Falls controversy to the Idaho State Historical Society Public Archives, but these documents are not indexed. Thus, Idaho Power seeks an index of the documents sent to archives, and any similar indexes in the State's possession.

Request for Production No. 4:

Idaho Power's Request for Production No. 4 requests all documents relating to the Swan Falls Agreement or the Swan Falls Legislation. The State seeks a protective order for this discovery to the extent the request seeks documents relevant to the intent of the Legislature or the parties to the Swan Falls Agreement other than documents in the legislative record of the 1985 and 1986 legislative sessions. Notwithstanding these objections, the State responds that it has produced all responsive documents that it unilaterally deems relevant to determining the

intent of the Legislature and the parties, as well as produced additional responsive documents that are not relevant to the question of intent.

Idaho Power incorporates its response to the State's general Objection No. 6 (Section II, *supra*), which attempts to limit the relevant documents in this case to documents in the legislative record from the 1985 and 1986 legislative sessions. Again, the discovery rules require the State to produce all non-privileged information which is responsive to Idaho Power's request and is reasonably calculated to lead to the discovery of admissible evidence. The State may not unilaterally determine what is and is not at issue in this case or limit its production based on what it believes is relevant to the legislature's or the parties' intent.

Requests for Production Nos. 6, 9, 10 and 11:

Idaho Power's Request for Production Nos. 6, 9, 10 and 11 seek technical information related to (i) the effect of ground water development in the Eastern Snake Plain Aquifer ("ESPA") upon surface flows in the Milner to Murphy reach of the Snake River as of October 1984; (ii) the determination of the geographic location and nature of waters that are hydrologically connected to the surface flows of the Snake River between Milner and Murphy Gauge; (iii) the determination or agreement by the State of an irrigation season low flow of 4500 cfs at the Murphy Gauge on an average daily basis, as referenced in the Framework; and (iv) the determination of the basis for all IDWR moratoriums placed on the processing of applications for permits for the appropriation of ground water. The State objects to these Requests on grounds of overbreadth and undue burden, but again makes the representation that it has produced all responsive documents that are relevant to determining the intent of the Legislature and the contractual intent of the parties, as well as produced additional responsive documents that are not relevant to the question of intent.

Each of these Requests properly seeks all documents relating to the determination by the State of the amount and availability of Trust Water, seeks documents directly related to the nature and validity of the water rights at issue in this litigation, as well as the issue of mutual mistake over the existence of Trust Water at the time the Swan Falls Agreement was formed. These documents are not only directly relevant to the issues in the case but are necessary for Idaho Power preparation of its expert disclosures, which are due on June 16, 2008. The State's decision to limit its production based on what it unilaterally believes is relevant to the parties' intent and withhold other relevant documents on this basis is improper.

Request for Production No. 7:

Idaho Power's Request for Production No. 7 requests all documents used, considered, consulted, or relating to the determination by the State Defendants of the amount and availability of Trust Water. For the purposes of its requests, Idaho Power defines "Trust Water" as "the amount of water in the Snake River Basin, including ground water in the ESPA, over and above the Swan Falls Daily Minimum Flows, available for use by new appropriations subsequent to October 1, 1984." The State seeks a protective order for this discovery to the extent the request seeks documents concerning actions, orders, or administrative rules of IDWR that are subject to judicial review or declaratory judgment or actions or orders of IDWR that are subject to the exhaustion of administrative remedies. The State also objects on burdensomeness grounds and on the grounds that Idaho Power's definition of "Trust Water" is ambiguous and does not define "Trust Water" in accordance with Idaho law.

Request No. 7, which seeks all documents relating to the determination by the State of the amount and availability of Trust Water, seeks documents directly related to the nature and validity of the water rights at issue in this litigation, as well as the issue of mutual mistake over

the existence of Trust Water at the time the Swan Falls Agreement was formed. These documents are also necessary for Idaho Power's preparation of its expert disclosures, which are due on June 16, 2008. Idaho Power incorporates its objections to the State's basis for its protective order and the State's general Objections 1 and 2 (Section II, *supra*). As discussed above, the State has improperly characterized the purpose of Idaho Power's discovery requests as seeking information solely related to administration of the Swan Falls Agreement and the Swan Falls Legislation. With regard to the State's objection to Idaho Power's definition of "Trust Water," Trust Water is clearly defined in Idaho Power's discovery requests, and Idaho Power is not obligated to adopt the State's definitions or theory of the case for purposes of its discovery requests. Thus, the State's decision to limit its production based on what it unilaterally believes is relevant to the parties' intent and withhold other relevant documents on this basis is improper.

Request for Production No. 8:

Idaho Power's Request for Production No. 8 seeks all documents relating to or supporting the proposition that a "600 cfs block of water," as measured at the Murphy Gage, was available as of October 1984 for future appropriations without reducing the Snake River flows below the Swan Falls Daily Minimum Flows. The State objects on burdensomeness grounds and claims the request is vague and ambiguous because it mischaracterizes "600 cfs block of water" as a term in the Swan Falls Settlement, citing to IDAPA 37.03.08.010.

With regard to the State's objection to Idaho Power's definition of "600 cfs block of water," again, Idaho Power is not obligated to adopt the State's definition or theory of the case for purposes of its discovery requests. The State is well aware that at the time of the negotiation of the Swan Falls Agreement, there was discussion before the Legislature and elsewhere of the difference between the then-apparent low flow in the river of 4500 cfs and the Company's

unsubordinated right of 3900 cfs, and of the characterization of this difference as the "600 cfs block of water." The fact that the term is not codified does not render the request for production objectionable. Request No. 8 is directly relevant to the question raised in the Complaint as to how much water exists, if any, above the Swan Falls minimum flows and therefore relevant to the issue of – at a minimum – mutual mistake over the existence of trust water at the time of formation of the Swan Falls Agreement. Thus, the State's decision to limit its production based on what it unilaterally believes is relevant to the parties' intent and withhold other relevant documents on this basis is improper.

Request for Production Nos. 12 and 13:

Idaho Power's Request for Production No. 12 requests all documents that reflect the total surface and groundwater flows proposed to be diverted by those persons who were dismissed from Ada County Civil No. 81375 pursuant to the Swan Falls Contract to Implement, by virtue of having previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, as defined and provided in paragraphs 2(a) and 2(b) of the Contract. Request for Production 13 seeks all documents that reflect the total surface and groundwater flows proposed to be diverted by those persons who had beneficially used water prior to October 1, 1984 and filed an application or claim for such use after October 25, 1985 but prior to June 30, 1985, pursuant to paragraph 7.D of the Swan Falls Agreement. The State objects to these requests on the grounds that the requests are vague and ambiguous, overly burdensome, and that these records are in Idaho Power's possession or otherwise available from the Fourth Judicial District Court.

Idaho Power fails to understand the State's vagueness objection and, as with the State's other objections of this nature, has offered to meet and confer.²⁷ The State declined to address Idaho Power's offer in a timely manner.²⁸ With respect to the State's burdensomeness objection and the representation that these documents are available through other sources, Idaho Power offered to limit this request to documents that are not otherwise available from the Fourth Judicial District Court.²⁹ Idaho Power does, however, seek responsive documents in the State's possession that are not publicly available in the judicial record, which the State has no legitimate basis for withholding.

Request for Production No. 14:

Idaho Power's Request for Production 14 requests all documents related to discussions between the State Defendants and Idaho Power involving any assertion by the State Defendants of legal title to a portion of Idaho Power's water rights. The State objects to this request on the grounds that it is unduly burdensome and, *inter alia*, to the extent it seeks disclosure of information regarding settlement negotiations.

With respect to the State's objection to the production of information regarding settlement negotiations, the State has no legitimate grounds for withholding these documents. Again, the relevant discovery standard is not whether the documents themselves would be admissible in trial; rather, it is whether these documents are reasonably calculated to lead to the discovery of admissible evidence. To the extent these documents are responsive, they must be produced. And again, the State has apparently limited its production based on what it believes is relevant to the parties' intent and is improperly withholding other relevant documents on this basis.

²⁷ See Gheleta Aff., Ex. A at 9.

²⁸ See Gheleta Aff., Ex. E.

²⁹ See Gheleta Aff., Ex. A at 8-9.

Request for Production No. 15:

Idaho Power's Request for Production 15 seeks all documents relating to or supporting IDWR's independent review and investigation of the water rights at issue in the Notices of Change in Water Right Ownership filed with IDWR by the Attorney General on December 22, 2006. The State objects to this request on the grounds that it is vague and ambiguous and unduly burdensome.

Request No. 15 seeks documents directly related to the State's review and investigation of the water rights at issue in this case, as set forth in Attorney General's December 22, 2006 Notice of Change in Water Rights Ownership. This request is narrowly tailored and Idaho Power fails to understand the State's vagueness and undue burden objections. Again, however, the State declined Idaho Power's offer to meet and confer on this issue in a timely manner.³⁰ And again, the State has apparently limited its production based on what it believes is relevant to the parties' intent and is improperly withholding other relevant documents on this basis.

Request for Production No. 16:

Idaho Power's Request for Production 16 seeks all documents consulted, reviewed or otherwise considered in compiling the State's responses to Idaho Power's interrogatories. The State objects to this request on the grounds that it is unduly burdensome and, *inter alia*, to the extent it seeks disclosure of information regarding settlement negotiations.

With respect to the State's objection regarding the production of information regarding settlement negotiations, the State has no legitimate grounds for withholding these documents, unless it can demonstrate a recognized privilege applicable to specific documents. Again, the relevant discovery standard is not whether the documents themselves would be admissible in

³⁰ Gheleta Aff., Ex. A at 9 and Ex. E.

trial, but whether these documents are reasonably calculated to lead to the discovery of admissible evidence. To the extent these documents are responsive, they must be produced. The State has also apparently limited its production based on what it believes is relevant to the parties' intent and is improperly withholding other relevant documents on this basis.

CONCLUSION

In summary, all of Idaho Power's interrogatories and requests for production in its Second Set of Discovery Requests seek information and documents relevant to the ownership, validity and scope of Idaho Power's water rights at issue in this litigation. To the extent that any of these requests may also happen to relate to administration of Idaho Power's water rights, this Court has already recognized that overlap between administrative provisions and definitions of a water right is inevitable and not a proper basis for the State's withholding otherwise relevant information. Moreover, to the extent that the State believes any of these requests are vague or overbroad, Idaho Power has offered on two separate occasions to confer with the State to address its concerns, but the State has refused Idaho Power's offer in a timely fashion, requiring Idaho Power to file the instant motion. Accordingly, Idaho Power respectfully requests that the Court grant its Motion to Compel the State's responses to Idaho Power's Second Set of Discovery Requests.

Idaho Power further requests, pursuant to IRCP 37(a)(4), that the Court order the State to pay Idaho Power's costs and attorneys' fees associated with this Motion. The State was not substantially justified in either its objections to Idaho Power's discovery requests or its refusal to work with Idaho Power in a timely manner to resolve its concerns so that the parties could proceed with discovery. Idaho Power is prepared to support the quantum of costs and fees it has

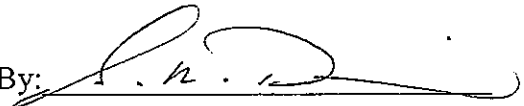
incurred by providing detailed billing records and testimony supporting their attorneys' fees and costs in a separate evidentiary proceeding before this Court as provided for by IRCP 37(a)(4).

Dated this 1st day of April 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: 

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 1st day of April 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S MOTION TO COMPEL THE STATE DEFENDANTS' RESPONSES TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS AND MEMORANDUM IN SUPPORT** via the method indicated below, and addressed to each of the following:

Filed with the Court via Hand Delivery.

Lawrence Wasden
Steven Olsen
Karl T. Klein
Michael C. Orr
700 W. Jefferson, Room 210
P.O. Box 44449
Boise, ID 83711-4449
Attorneys for Defendant, State of Idaho

☒ U.S. Mail, Postage Prepaid
☒ Electronic Mail
☐ Facsimile

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

