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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	) MEMORANDUM IN SUPPORT OF
	) STATE OF IDAHO'S MOTION FOR
	) PROTECTIVE ORDER
_____	)

The State of Idaho hereby submits this Memorandum in Support of State of Idaho's Motion for Protective Order, filed on March 21, 2008. Idaho Power Company's discovery requests in this matter exceed the scope of this Court's Order of July 23, 2007 ("the Order")¹ and the statutory scope of the SRBA, contravene the doctrine of exhaustion of administrative

¹ The full title of the Order is "Order Granting in Part, Denying 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."

remedies, and improperly seek to expand on the legislative record and applicable legislation.² Additionally, the Company's discovery requests are overbroad, vague, unduly burdensome, and in excess of the 40-Interrogatory limit set forth in Rule 33(a)(3) of the Idaho Rules of Civil Procedure. The State therefore respectfully requests that this Court grant its Motion for Protective Order, pursuant to Rule 26(c) of the Idaho Rules of Civil Procedure.

BACKGROUND

On October 9, 2007, Idaho Power Company ("Idaho Power" or "the Company") served its First Set of Discovery Requests on State Defendants. (Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Protective Order ("Orr P.O. Aff."), Ex. 1 (Company's First Set of Discovery Requests).) These discovery requests primarily consisted of 54 Requests for Admissions accompanied by an Interrogatory that required a separate narrative response for each Request for Admission that the State did not admit without qualification.³ (*Id.*) The Company's requests sought discovery on essentially all of Idaho Power's claims and allegations, despite the fact that this Court's Order of July 23, 2007 expressly separated and stayed the Company's claims against the Idaho Department of Water Resources ("IDWR") and its Director, dismissed the Company's claim regarding Attorney General Opinion 06-2, and provided that the water rights at issue must be defined before the Company's claims regarding water rights administration and compliance and enforcement of the partial decrees can be addressed. The State objected to these discovery requests, but in the interest of moving the case forward did not

² The discovery requests to which the State objects are more specifically identified in its Motion for Protective Order, filed on March 21, 2008.

³ The Interrogatory stated: "For each of your responses to Requests for Admission nos. 1 through 54 above that is not an unqualified admission, state the number of the Request for Admission, state all facts upon which you base your response, identify each person who has knowledge of these facts, and identify all documents and other tangible things that support your response." (Orr P.O. Aff., Ex. 1.) The State continues to reserve its stated objection to this serial use of a single Interrogatory as effectively violating the 40-Interrogatory limit of Rule 33(a).

immediately move for a protective order, instead providing qualified responses while reserving its objections.⁴

Idaho Power's second set of discovery requests, served on February 19, 2008, continues to seek information regarding the Department's overall administration and permitting of water rights in the Snake River Basin. For example, Idaho Power has asked the State to "[i]dentify the lowest average daily minimum flow in the Snake River that has occurred at the Murphy Gage as calculated pursuant to the Swan Falls Agreement," and to "[d]escribe the basis and method used to measure, calculate, and determine the average daily flows at the Murphy Gage." (Orr P.O. Aff., Ex. 3 (Company's Second Set of Discovery Requests), p. 4.)

The Company's discovery requests even seek water rights administration information from non-parties such as IDWR and its Director. The Court expressly recognized that the Director and the Department are statutorily barred from being parties to this consolidated subcase. (Order, p. 13). Nonetheless, Idaho Power continues to identify the Department and the Director as "defendants," and continues to direct discovery inquiries to both. (*See* Orr P.O. Aff., Ex. 3, p. 2) (stating that "all State Defendants" must answer the discovery requests and defining "State Defendants" to include the Director and the Department).

In these requests, Idaho Power seeks descriptions of "the process used and the factors, analysis, and any assumptions employed by the IDWR Director in determining . . . whether 'the development and use of water pursuant to an application will have no effect on prior surface and ground water rights because of its location,'" and "of the basis for the IDWR Director's determination in the April 30, 1993 IDWR Amended Moratorium Order that ground water

⁴ The State responded to the Company's first set of discovery requests while expressly reserving objections that the requests exceeded the scope of the Order and the statutory scope of the SRBA, and were contrary to the doctrine of exhaustion of administrative remedies. (Orr P.O. Aff, Ex. 2 (Responses to Company's First Set of Discovery Requests).)

aquifers had, after six consecutive years of drought, become stressed by a reduction in natural recharge due to changes in the diversion and use of surface waters and by the increased volume of ground water pumping then occurring.” (*Id.* at 5.) The Company’s requests for production go even further, seeking all documents relating to **any** moratorium the Department or the Director has placed on applications for ground water appropriations. (*Id.* at 6.)

STANDARD OF REVIEW

Rule 26(c) of the Idaho Rules of Civil Procedure provides that upon a motion by a party from whom discovery is sought and for good cause, a court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including “that the discovery not be had . . . [or] that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.” I.R.C.P. 26(c). The question of whether to issue a protective order is committed to the Court’s discretion. *Bailey v. Sanford*, 139 Idaho 744, 749, 86 P.3d 458, 463 (2004).

ARGUMENT

A Protective Order with respect to Idaho Power Company’s discovery requests is warranted for the following reasons, which are set forth in detail below. First, the discovery requests exceed the scope of this Court’s Order of July 23, 2007 and the statutory scope of the SRBA. In addition, the discovery requests contravene the doctrine of exhaustion of administrative remedies. Finally, the requests seek irrelevant information in an impermissible attempt to expand upon the applicable statute – Idaho Code § 42-203B – and the legislative record.

Significantly, the scope of discovery sought by Idaho Power through its discovery requests is particularly broad at this juncture, as this Court has not yet ruled upon the parties’

dispositive motions. Various courts have held that staying certain discovery is proper until pending dispositive motions to dismiss have been decided. *In re Constitution Shareholders Litigation*, 145 F.R.D. 291, 294 (D. Conn. 1991). When a particular issue may determine the direction of the case, the Court has discretion to stay discovery on other issues until the critical issue is decided. *See Panola Land Buyers Assoc. v. Shuman*, 762 F.2d 1550 (11th Cir. 1985); 8 Wright & Miller, *Federal Practice and Procedure* § 2040 at 521.

I. Idaho Power's Discovery Requests Exceed the Scope of the Order Of July 23, 2007

This Court's Order of July 23, 2007 carefully drew distinctions between issues and claims that are within the purview of the SRBA and those that are not, but which nonetheless may relate to the SRBA's "preliminary determination of the validity or elements of a water right." (Order, pp. 7-9.) This Court recognized, in the Order, that the exclusive authority to make such preliminary determinations lies in the SRBA, "which then transfers those remaining portions of the case to a district court of appropriate jurisdiction." (*Id.* at 7.) The Order clarified that this consolidated subcase will proceed under a staged or sequenced development of the issues and claims. "[T]he Court will parse out the issues over which it has jurisdiction and consolidate and hear them in conjunction with the issues raised on Idaho Power's objections. Following resolution of the scope of Idaho Power's water rights any remaining issues over which the Court concludes it does not have jurisdiction can be dealt with accordingly." (*Id.* at 9.)

The Court does, however, have jurisdiction to decide the preliminary issues involving the meaning of the *Swan Falls Agreement* which defines the scope and administration of Idaho Power's hydropower rights. These issues must first be resolved before any determination on the issues of compliance and enforcement of the decree can be made by this Court or any other administrative body. . . . Following the determination of the preliminary issues regarding the scope of Idaho Power's water rights, **this Court will transfer the issues of compliance and enforcement to an administrative body or a court of appropriate jurisdiction.**

(*Id.* at 13) (emphasis added). This Court determined that because the issues within the jurisdiction of the SRBA can be resolved in conjunction with the objection and response resolution process, “a special proceeding on the [“Complaint”]⁵ is unnecessary because the *Director’s Reports* have been filed for all of the subject hydropower claims.” (*Id.* at 15.) This Court further ordered that Idaho Power Company’s claims against IDWR and its Director 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.” (*Id.* at 14.)

As previously discussed, Idaho Power’s discovery requests explicitly seek discovery on claims regarding IDWR’s permitting and administration of water rights. Idaho Power’s discovery requests thus violate the Order by seeking to develop issues and claims that the Court expressly separated and stayed.⁶ Idaho Power’s requests are also premature as a practical matter, because it makes little sense to engage in discovery on challenges to IDWR’s administration and permitting of water rights before this Court has defined the water rights in question. The water rights must be defined before claims of improper administration can be meaningfully addressed or developed. The purpose behind discovery is “preparation for trial.” *Hickman v. Taylor*, 29 U.S. 495, 500-01 (1947). As agreed to in 8 Wright, Miller & Cane, *Federal Practice and Procedure* § 201, pp. 40, 41, the discovery procedures of Rules 26 to 37 are to prepare for trial, are designed to narrow the issues at trial, and to obtain evidence for use at trial. In the case at

⁵ “Complaint and Petition for Declaratory and Injunctive Relief,” filed May 10, 2007. (*See* Order, 7/23/07, p. 3.)

⁶ Idaho Power’s first set of discovery requests even sought discovery on the Company’s claim for “repeal” of Attorney General Opinion 06-2, which the Court had already dismissed for failure to state a claim under Rule 12(b)(6). (Order, p. 15.) The Company’s first set of discovery requests included a Request for Admission and Interrogatory regarding whether Attorney General Opinion 06-2 responded to a letter from former House Speaker Bruce Newcomb and whether the Attorney General or members of his staff had discussed the preparation of an opinion regarding the subordination of Idaho Power’s hydropower water rights under the Swan Falls Agreement with Speaker Newcomb or other members of the Legislature prior to receiving the letter. (Orr P.O. Aff, Ex. 1, RFA No. 48.)

hand, Idaho Power is seeking information outside the scope of matters that will potentially be addressed at trial within the SRBA.

Even then, the Order provides that such claims will **not** be resolved in the SRBA: “Following the determination of the preliminary issues regarding the scope of Idaho Power’s water rights, this Court will transfer the issues of compliance and enforcement to an administrative body or a court of appropriate jurisdiction.” (*Id.* at 13.) Idaho Power’s requests thus exceed the scope of the Order by seeking discovery on questions that the Court has separated and stayed and will ultimately transfer to a different forum.

II. Idaho Power’s Discovery Requests Exceed the Statutory Scope of the SRBA

For similar reasons, many of Idaho Power’s discovery requests (and the claims the requests seek to develop) exceed the statutory scope of the SRBA. The SRBA is a water rights adjudication proceeding commenced under chapter 14 of the Idaho Code. *See* I.C. § 42-1406A. In contrast, IDWR’s rules and its Director’s orders are subject to judicial review under the applicable provisions of the Idaho Administrative Procedure Act. *See, e.g.*, I.C. § 67-5270. Challenges to IDWR’s rules and procedures or to its Director’s orders must be pursued outside the SRBA, pursuant to the applicable provisions of the Idaho Administrative Procedure Act. The Idaho Code explicitly addresses this issue, providing that “[r]eview of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, **shall not be heard in any water rights adjudication proceeding commenced under this chapter.**” I.C. § 42-1401D (emphasis added). Thus, Idaho Power is statutorily barred from attempting to utilize the SRBA as a forum for asserting or developing challenges to IDWR’s administrative rules, permitting and administration of water rights, or the Director’s orders.

In addition, the Idaho Rules of Civil Procedure provide that Interrogatories and Requests for Production of Documents are available only as to a “party” to a case. *See* I.R.C.P. 33(a), 34(a), 36(a). IDWR and its Director are not and cannot be parties to the SRBA. I.C. § 42-1401B(3) (“The Director shall not be a party to an adjudication”); I.C. § 42-1401A(3) (“‘Director’ means collectively the director of the Idaho department of water resources and the Idaho department of water resources”); *Twin Falls Canal Co. v. Idaho Dep’t of Water Res.*, 127 Idaho 688, 689, 905 P.2d 89, 90 (1995) (“IDWR is not and may not be a party to the SRBA”). Idaho Power cannot use SRBA discovery procedures for purposes of developing claims against IDWR and the Director, who are statutorily excluded from this type of litigation. *See Crown v. State, Dep’t of Agric.*, 127 Idaho 175, 182, 898 P.2d 1086, 1093 (1995) (holding that it is improper to direct discovery requests towards a non-party, even if that individual is an employee of a named party.)

III. Idaho Power’s Discovery Requests Contravene the Doctrine of Exhaustion of Administrative Remedies

For related reasons, Idaho Power’s discovery requests contravene the statutory and judicial requirement that administrative remedies be exhausted before seeking judicial review of an agency action. I.C. § 67-5271. The Idaho Supreme Court has emphasized that this requirement applies to challenges to water rights administration even when such a challenge is pleaded as something other than a request for judicial review under the Idaho Administrative Procedure Act. *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 871, 154 P.3d 433, 442 (2007) (“[R]aising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record”). This requirement is not simply a technicality, as it serves crucial objectives emphasized by the Idaho Supreme Court:

Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

Id. at 872, 154 P.3d at 443.

Rather than satisfying the requirement “of establishing a complete administrative record” before invoking judicial processes, *id.* at 871, 154 P.3d at 442, Idaho Power is attempting to use the discovery process to develop in **this** Court the initial record on the Company’s challenges to IDWR’s administrative rules, its permitting, and its administration of water rights. This is impermissible under the doctrine of exhaustion of administrative remedies, as the courts have explicitly held that “the focal point for judicial review should be the administrative record already in existence, **not some new record made initially in the reviewing court.**” *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004)) (internal quotation marks and citation omitted) (emphasis added). Significantly, even when an administrative record has been fully developed, judicial review thereof “shall not be heard” in the SRBA. I.C. § 42-1401D.

An additional exhaustion consideration that is particularly relevant in this case is the requirement that administrative challenges identify the “final agency action” being appealed. I.C. §§ 67-5270, 67-5271. This requirement promotes administrative and judicial economy by focusing the issues and proceedings on the specific agency orders or actions at issue, thus guarding against overbroad administrative challenges and discovery “fishing expeditions.”

Idaho Power has not made a delivery call or appealed a specific Departmental action or order. Rather, Idaho Power has challenged **all** of the Department’s water rights, permitting and administration procedures, and actions in the Snake River basin for the past twenty years. (*See, e.g., Complaint and Petition for Declaratory and Injunctive Relief*, pp. 2-3, 13, 19-20, 23-25.)

Judicial review is intended to provide a means to resolve **specific** grievances arising from final agency actions, not to remove the Director from his role as the primary administrator of the Snake River Basin. *See Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (“The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state”).

Idaho Power’s failure to exhaust its administrative remedies warrants the entry of a protective order under Rule 26(c), as the Company’s discovery requests constitute an improper attempt to develop a “new record made initially in the reviewing court,” prior to the requisite development of an administrative record. *Regan*, 140 Idaho at 725, 100 P.3d at 619.

IV. Idaho Power’s Discovery Requests Impermissibly Seek to Develop a Record That is Contrary to Statutory Language and the Undisputed Legislative Record

Idaho Power has structured its claims in this litigation as allegations regarding the contractual intent of the parties to the Swan Falls Agreement. The Company therefore appears to be seeking information, through its discovery requests, that allegedly pertains to the intent of the parties at the time of the settlement. However, the legislation incorporated into the Swan Falls Agreement and the applicable legislative record are the only materials relevant to Idaho Power’s claims. Idaho Power’s attempt to engage in a burdensome “fishing expedition” for irrelevant information beyond the legislation and legislative record should be precluded by this Court. *See Sanders v. Ayrhart*, 89 Idaho 302, 308, 404 P.2d 589, 592 (1965) (“[A]lthough the discovery rules have liberalized the scope of examination before trial, we follow the rule that relevancy is the test, whether a party may be required to answer questions propounded by an opposing party.”)

Given the legal irrelevance of the requested discovery, Idaho Power lacks reasons sufficient to justify the discovery. What constitutes good cause to prevent harassment and

oppression pursuant to Rule 26 of the Idaho Rules of Civil Procedure is determined on a case-by-case basis. As stated in conjunction with Rule 26(c) of the Federal Rules of Civil Procedure, which is identical to I.R.C.P. 26(c):

[T]he harassment and oppression should be unreasonable to justify restricting discovery, but “discovery has limits and ... these limits grow more formidable as the showing of need decreases.” **Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it.**

8 Wright & Miller, *Federal Practice & Procedure*, § 2036 at 490-92 (emphasis added) (*quoting United Airlines, Inc. v. United States*, 26 F.R.D. 213, 219 n.6 (D.C. Del. 1960)). In the case at hand, Idaho Power cannot demonstrate that materials beyond the legislation and legislative history are relevant or can benefit their claims in any way, as discussed in more detail below. *See Cosgrove by & through Winfree v. Merrell Dow Pharms., Inc.*, 117 Idaho 470, 474, 788 P.2d 1293, 1297 (1990) (precluding the plaintiff from taking a deposition where the plaintiff failed to show a need for the information.)

A. The Interpretation of Idaho Code § 42-203B is a Purely Legal Question, and the Full Legislative History of the Statute Has Been Produced

Idaho Power’s discovery requests exceed the permissible scope of discovery in this matter because the “trust” is a statutory arrangement, and the full legislative history regarding the applicable legislation has already been produced. As explained in the briefing in support of the State’s Motion for Partial Summary Judgment, Idaho Code § 42-203B established and defined the trust.⁷ Section 42-203B also controls the subordination of the water rights held in trust, by providing that they are subordinated to any use approved pursuant to State law, including

⁷ See Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment, pp. 27-32; Reply in Support of State of Idaho’s Motion for Partial Summary Judgment, pp. 5-14.

compliance with the “public interest” analysis of Idaho Code § 42-203C.⁸ Idaho Power’s claims and defenses with respect to the trust are controlled by legislative intent, not contractual intent. Thus, much of the information Idaho Power now seeks in its over-broad discovery requests is irrelevant to this litigation.

The legislation at issue, Idaho Code § 42-203B, is unambiguous in its establishment and definition of the trust and its *res*. Therefore, there is no need to look beyond the statutory language. Regardless, however, the only “record” beyond the statute itself that is arguably relevant to the purely legal question of interpreting § 42-203B is the pre-enactment legislative history. *See, e.g., Webb v. Webb*, 143 Idaho 521, 525, 148 P.3d 1267, 1271 (2006) (“the Court may seek edification from the statute’s legislative history”). Supplementation of the legislative record with post-enactment evidence is improper. The Idaho Supreme Court clarified this point in *Gillihan v. Gump*, 140 Idaho 264, 268-69, 92 P.3d 514, 518-19 (2004), in which the Court refused to consider the affidavit of an individual legislator’s representations of the Legislature’s intent in enacting certain legislation. In so holding, the Court emphasized that “**post-enactment** statements of legislators are not part of the record of the Legislative Assembly that are considered the contemporaneous ‘history’ that is appropriate for courts to consult.” *Id.* at 268, 92 P.3d at 518 (emphasis added.) As a matter of law, Idaho Power’s discovery requests pertaining to the parties’ contractual intent, insofar as they seek information beyond the established legislative record, are outside the permissible scope of discovery under Rule 26(b)(1) of the Idaho Rules of Civil Procedure.

⁸ *See* Memorandum in Support of State of Idaho’s motion for Partial Summary Judgment, pp. 32-34; Reply in Support of State of Idaho’s Motion for Partial Summary Judgment, pp. 37-42.

B. The Parties' Contractual Intent With Respect to the Trust Was Fully Developed and Explained in the 1985 Legislative Proceedings

The impropriety of going outside the legislative record for purposes of determining the parties' intent with respect to the trust at issue is underscored by the extensive legislative record for Idaho Code § 42-203B and the other statutory elements of the Swan Falls settlement—a record that includes the parties' detailed explanations of the trust concept and the overall settlement. The record reveals that the Legislature already asked, at the time of the Swan Falls settlement, the same questions of contractual and legislative intent that have now been raised in this litigation. Significantly, the answers Idaho Power provided to the Legislature in 1985 are irreconcilably at odds with its current allegations and claims for relief.

For example, Idaho Power's Complaint in this matter alleges that "the *res* of any created trust is the Trust Water." (Complaint, p. 16.) In contrast, the Statement of Legislative Intent for Idaho Code § 42-203B unequivocally states that "certain specified **water rights** will be held" in the trust. (Statement of Legislative Intent – S 1008, at 60 (emphases added).) That same Statement of Legislative Intent was drafted and revised with Idaho Power's assistance and was based in large part on the parties' explanations of the settlement in multiple meetings of the Senate Resource and Environment Committee. Idaho Power's Complaint also alleges that, under the trust, "the State of Idaho does not hold legal title to Idaho Power's water rights." (Complaint, p. 22.) The Statement of Legislative Intent, however, explicitly provides that "**this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power** above the agreed minimum stream flows." (Statement of Legislative Intent – S 1008, at 60 (emphasis added).)⁹

⁹ Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("Orr MSJ Aff.," Ex. 28, pp. 4, 5.)

Idaho Power's Complaint further alleges that the expected availability of water for new uses above the level of the minimum flows was "[f]undamental to the establishment of the purported trust arrangement." (Complaint, p. 10.) In direct contrast, the Statement of Legislative Intent clearly states that the trust is keyed to the minimum flows, **"rather than any estimates of how much water may be available above such minimum flows."** (Statement of Legislative Intent – S 1008, p. 59.) Idaho Power's attorney, Tom Nelson, explicitly told the Senate Resources and Environment Committee that **"the agreement isn't written around 600 c.f.s. being available for development. It's written around the minimum flow. So if there's more than 600 c.f.s. available for development, it's available. And the contrary, likewise, is true."** (Orr MSJ Aff., Ex. 35, (recording of committee hearing of Jan. 25, 1985), Track 2, 5:04-6:14; Ex. 10 (minutes of same hearing), p.7; Ex. 39 (transcript), pp. 31-32.)

Idaho Power made these representations to the Legislature in order to obtain various benefits flowing from the legislation that was consequently enacted. Specifically, Idaho Power sought to secure: passage of legislation establishing the "public interest criteria" analysis for new water appropriations and protecting Idaho Power from liability for failing to protect its water rights (1985 Session Laws ch. 14; I.C. § 42-203C); legislative endorsement of the overall settlement (1985 Session Laws ch. 14); ratification of the Agreement (section 42-203B); and approval of the new seasonal minimum flows at the Murphy Gage under the State Water Plan Amendments. (1985 Session Laws ch. 204.)

When passing the legislation requested by Idaho Power and the State, the Legislature relied upon Idaho Power's representations and explanations of the trust and the settlement, which are preserved in the extensive and thorough legislative record. Had Idaho Power instead made the assertions to the 1985 Legislature that it is now making in this litigation, it cannot be

assumed that the Legislature would have passed the proposed legislation. The contractual intent theories Idaho Power has raised in this case must be answered on the basis of the existing legislative record, and not through an alternative and contrary record Idaho Power is now seeking to create over 20 years after the fact.

Additionally, it would violate separation of power principles to allow the Company to use the judicial discovery process to develop a record in this Court regarding the nature and purpose of the trust that is fundamentally at odds with the undisputed legislative record on the same points. This is particularly true when the Company's goal is to obtain judicial reformation of the Swan Falls settlement such that the Company would not only retain the legislatively-conferred benefits of the settlement, but would also recover legal ownership of the water rights, despite the fact that the Company originally represented to the Legislature that the State would hold title in trust to those water rights. A comparison of Idaho Power's current contentions to its representations to the Legislature in 1985 demonstrates that the Company now seeks to attempt to completely re-write a clear, extensive, and undisputed legislative record while simultaneously retaining the legislative benefits obtained as a result of the Company's original representations.

C. Idaho Law Forecloses Idaho Power's Contractual Intent Claims Because They Irreconcilably Conflict With the Statute That Authorized and Ratified the Swan Falls Agreement

Even if the trust at issue is analyzed from a purely "contractual" standpoint, the legislation and legislative history still mark the appropriate boundaries for discovery in this case, as the provisions of Idaho Code § 42-203B are specifically incorporated into the Swan Falls Agreement. The Idaho Supreme Court has held that "[e]xisting law becomes part of a contract, just as though the contract contains an express provision to that effect, unless a contrary intent is disclosed." *Primary Health Network, Inc. v. State, Dep't. of Admin.*, 137 Idaho 663, 666, 52 P.3d

307, 310 (2002). This principle should be applied to law that is brought into existence **because** of a contract, particularly where, as here, the proposed legislation is specifically referenced in the contract and the subsequently enacted legislation specifically references the particular contract. *See State ex rel. Bldg. Owners & Managers Ass'n of Milwaukee, Inc. v. Adamany*, 219 N.W.2d 274, 284 (Wis. 1974) (“[A]n equivocal legislative declaration of public policy, made either before or after the execution of a contract, becomes a part of that contract **if the legislature makes it clear that such is its intention**”) (emphasis added).

In the case at hand, the parties clearly intended the legislation to be incorporated into the contract, because the Agreement was expressly conditioned on the enactment of § 42-203B in order to become fully effective and binding. In fact, the Agreement would have terminated automatically in its entirety had section 42-203B not been enacted. (Orr MSJ Aff., Ex. 30 (Swan Falls Agreement), ¶¶ 1, 10, 13, 16.)¹⁰ Section 42-203B was the statutory source of the Governor’s authority to enter into the Swan Falls Agreement and was the means by which the Legislature ratified the Agreement. It specifically explains how the Agreement fits into the statutory trust framework. *See, e.g.*, I.C. § 42-203B(5). Thus, the Agreement **must** be interpreted consistently with the statute, both as a matter of law and by the plain terms of the Agreement itself.

A contract authorized and governed by a statutory regulatory regime is precluded from achieving a result contrary to the statute and the underlying legislative intent, even if the parties intend otherwise. In *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 94, 73 P.3d 102, 107 (2003), the Idaho Supreme Court refused to enforce an insurance contract’s unambiguous exclusion of coverage because exclusion would have been contrary to the amount of coverage

¹⁰ Section 42-203B originated as Exhibit 7B to the Agreement, which was part of the “subordination legislation” proposed under the Agreement. (Orr MSJ Aff., Ex. 30, ¶ 13(a)(vii) and Exhibit 7B to Agreement.); *see also* Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment, pp. 15-22.

required by Idaho Code § 41-2401. Similarly, in the case at hand, an Idaho statute specifically governs the terms of the Swan Falls Agreement, and the parties are precluded from acting in contravention of those statutory provisions, regardless of the parties' "contractual intent." This is particularly true given that the parties even contractually agreed to the implementation of the governing legislation. *See also Saffore v. Atlantic Cas. Ins. Co.*, 121 A.2d 543, 548 (N.J. 1956) ("A specific provision integrated into the contract by force of a statute, as a matter of public policy, must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it.") (internal quotation marks and citation omitted) (emphasis added). Similarly, a statutorily-governed contract may not re-define statutory terms so as to conflict with the statute or the underlying legislative intent. *Calio v. The Equitable Life Assurance Soc'y of the United States*, 169 So.2d 502, 505 (Fla. Ct. App. 1964) ("The unclear terms of a statute may be agreed upon between contracting parties, but only to the extent necessary to avoid ambiguity. The definitions provided may not be such as to violate or obstruct or restrict the spirit, meaning and clear intention of the Legislature.")

These principles foreclose Idaho Power's assertions that in the Agreement the parties intended that the trust would be something different than what the Legislature intended and provided in Idaho Code § 42-203B. Even assuming, *arguendo*, that the parties intended the trust to consist of "water" rather than "water rights," or intended to base the trust on an estimate of the water that would be available in the future, rather than on the State's establishment of the seasonal minimum flows at the Murphy Gage,¹¹ any such alleged intent could not be given legal effect. Doing so would improperly contravene the controlling statute.

Idaho Power's theories regarding the contractual intent of the parties and their alleged mutual mistake of fact would require the Agreement to be interpreted in direct conflict with the

¹¹ In fact, this is not what the parties intended, as the legislative record makes unmistakably clear.

statutory regime that authorized and governs the Agreement, the provisions of which are incorporated into the Agreement as an “express provision.” *Primary Health Network, Inc.*, 137 Idaho at 666, 52 P.3d at 310. These theories are therefore foreclosed as a matter of law, and discovery requests pertaining to such theories or claims are beyond the permissible scope of discovery under Rule 26(b)(1).

V. The State Objects to Idaho Power’s Discovery Requests on the Grounds that They are Overbroad, Vague, Unduly Burdensome, and in Excess of the 40-Interrogatory Limit, and to the Extent They Seek Privileged Information

In addition to the arguments discussed above, the State objects to Idaho Power’s discovery requests to the extent they are vague and ambiguous, overbroad, unduly burdensome, and in excess of the 40-Interrogatory limit set forth in Rule 33(a)(3) of the Idaho Rules of Civil Procedure. “Whenever use of [] discovery procedures become unreasonably oppressive and onerous it becomes the duty of the court and counsel immediately to activate the safeguards to avoid unjust results.” *R.E.W. Constr. Co. v. Dist. Court of Third Judicial Dist.*, 88 Idaho 426, 443, 400 P.2d 390, 401 (1965). As discussed previously, Idaho Power’s discovery requests are overbroad and unduly burdensome, due to the fact they seek the production and disclosure of irrelevant information beyond the scope of this Court’s July 23, 2007 Order and beyond the scope of the SRBA.

Additionally, many of the Company’s discovery requests are not tailored in a sufficiently narrow manner, rendering them ambiguous, overbroad, and unduly burdensome. As an example, Idaho Power’s Request for Production No. 3 seeks “index(ices) created by or on behalf of the Attorney General’s office that reflects documents maintained in the files of the Attorney General’s office during the period of 1970-1989,” without even limiting these indices to documents pertaining to the Swan Falls litigation. (Orr P.O. Aff., Ex. 3, p. 6.) Request for

Production No. 4 seeks production of the overbroad category of “any and all documents relating **in any way** to the Swan Falls Agreement and/or the Swan Falls Legislation,” while Request for Production No. 6 seeks production of a similarly overbroad category of documents: “any and all reports, studies, memoranda, or any and all similar documents quantifying, discussing, projecting, or otherwise analyzing and/or interpreting the effect of ground water development in the [Eastern Snake Plain Aquifer] upon surface flows in the Milner to Murphy reach of the Snake River as of October, 1984 . . .” (*Id.*) (emphasis added.) The above-quoted Requests broadly encompass thousands of documents, many of which are irrelevant to the claims at issue in this litigation. Idaho Power’s unreasonably broad requests impose an undue burden on the State.

Idaho Power Company’s discovery requests also exceed the Rule 33(a)(3) limitation of 40 Interrogatories. Idaho Power Company’s first set of discovery requests include a single Interrogatory requesting that “for each of your responses to Requests for Admission 1 through 54 that is not an unqualified admission, state the number of the Request for Admission, state all facts upon which you base your response, identify each person who has knowledge of these facts, and identify all documents and other tangible things that support your response.” (Orr P.O. Aff., Ex. 1.)

Combining multiple Requests for Admission with a single interrogatory in this manner transforms each Request for Admission into a separate interrogatory

Allowing service of an interrogatory which requests disclosure of all of the information on which the denials of each of 50 requests for admissions were based, however, essentially transforms each request for admission into an interrogatory. This is not the purpose requests for admissions were intended to serve, and because Rule 36 imposes no numerical limit on the number of requests for admissions that may be served, condoning such a practice would circumvent the numerical limit contained in Rule 33(a).

Safeco of America v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998). While this holding is not controlling in Idaho, its reasoning is consistent with Idaho decisions. See *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 923, 500 P.2d 218, 224 (1972) (stating that “the purpose of interrogatories is discovery of facts, while the request for admission goes to the question of proof of those facts at trial and the elimination of the necessity of appellant’s calling the employees of respondent in order to introduce testimony and documents to prove those facts,” and that Idaho Rule 33 “is patterned after Federal Rule 33”); I.R.C.P. 33(a)(3) (providing that each subsection of an Interrogatory must be treated as a separate Interrogatory for purposes of the 40-Interrogatory limit. Applying this reasoning to Idaho Power Company’s First Set of Discovery Requests, it is evident that requiring separate response for each of the 54 Requests for Admissions constitutes a violation of the of the 40-Interrogatory limit established by Rule 33(a).

The State further objects to Idaho Power’s discovery requests to the extent they seek disclosure of material protected by the attorney-client privilege or the attorney work product doctrine. See I.R.E. 502. An example of such a request can again be found in Idaho Power’s Request for Production No. 3, which seeks the production of “index(ices) created by or on behalf of the Attorney General’s office that reflects documents maintained in the files of the Attorney General’s office during the period of 1970-1989.” The majority – if not all – such documents fall under the protection of the attorney work product doctrine.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court issue a protective order, pursuant to Rule 26(c) of the Idaho Rules of Civil Procedure, as set forth in the State’s Motion, filed on March 21, 2008.

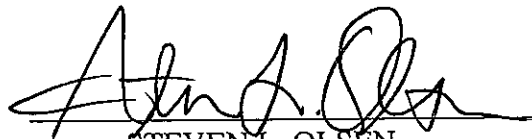
DATED this 1st day of April, 2008.

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CERTIFICATE OF SERVICE

I certify that on this 1st day of April, 2008, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER, to the following parties by the indicated methods:

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