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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
	)
	) MEMORANDUM IN SUPPORT OF
	) STATE OF IDAHO'S SECOND MOTION
Case No. 39576	) FOR PROTECTIVE ORDER AND
	) REQUEST FOR EXPEDITED HEARING
_____	)

The State of Idaho submits this memorandum in support of the State of Idaho's Second Motion for Protective Order and Request for Expedited Hearing ("Motion"), filed herewith. The motion seeks an order prohibiting Idaho Power Company from deposing Tim Luke. Motion at 1.

The grounds for the Motion are set forth in the “Memorandum in Support of State of Idaho’s Motion for Protective Order,” filed April 1, 2008 (“Memorandum”), which is incorporated herein by this reference. The specific application of these grounds to the deposition of Tim Luke is explained below.

ARGUMENT

I. Mr. Luke’s Personal Knowledge Is Limited To Water Rights Permitting Activities Governed By State Law.

Mr. Luke’s full name is Timothy J. Luke. He is an employee of the Idaho Department of Water Resources (“the Department”) and is currently the Section Manager for the Department’s Water Distribution Section. Affidavit of Timothy J. Luke in Support of State of Idaho’s Second Motion for Protective Order (“Luke Aff.”) at 1-2. Mr. Luke was not hired until September 1988, Luke Aff. at 2, nearly four years after the execution of the Swan Falls Agreement in October 1984, and more than three years after the Legislature ratified the Agreement and enacted the legislation that resolved the Swan Falls controversy during the 1985 legislative session. Mr. Luke had no involvement of any kind in the Swan Falls controversy, the Swan Falls negotiations, the Swan Falls Agreement, the Swan Falls legislation. Luke Aff. at 3. Mr. Luke also had no role in the promulgation or amendment of the Department’s Water Appropriation Rules, IDAPA 37.03.08.000-.999. Luke Aff. at 3.

The only work Mr. Luke has done at the Department that pertains to any of Idaho Power’s claims in this consolidated subcase took place in September 1988 to September 1991, when his duties included the review and processing of appropriation applications seeking to “reallocate” water from hydropower uses under the water rights held in trust by the State pursuant to Section 42-203B to other uses under new water rights sought by the appropriation

applications. *See* Luke Aff. at 2 (“reallocate”); *see also* Idaho Code § 42-203C (“Criteria for reallocation”). Mr. Luke’s work in this regard was controlled by applicable state law (such as Section 42-203A and Section 42-203C), the Department’s administrative rules (such as the Water Appropriation Rules) and Departmental policies, not by the Swan Falls Agreement. Luke Aff. at 2.

In short, Mr. Luke has no personal or firsthand knowledge of the Swan Falls controversy or the Swan Falls settlement. His personal knowledge with respect to Idaho Power’s claims is limited to the permitting of water rights in accordance with State law. Idaho Power is well aware of this fact. Prior to the 1992 moratorium that essentially ended new ground water appropriations from the Eastern Snake Plain Aquifer, the Company closely followed the permitting of water rights under Section 42-203C and the Water Appropriation Rules, and even filed protests to some of the permit applications. Idaho Power’s attorneys—including Idaho Power’s current in-house counsel—also corresponded with Mr. Luke on such matters during that period of time.

Further, in this action Idaho Power has expressly challenged the Department’s permitting of water rights in the Snake River basin, and especially the Eastern Snake Plain Aquifer, and requested judicial relief on these claims. *See generally* Complaint at 13, 20, 25. The Company’s purpose in seeking to depose Mr. Luke is clear: Idaho Power is attempting to immediately develop the record on its broad claims against the Department’s permitting of water rights in the Snake River basin in the years since the Swan Falls settlement. This purpose is further demonstrated by the document requests in the subpoena and notice of deposition served on Mr. Luke, which expressly seek “trust water rights applications or processing . . . [and] permits and

applications.” Subpoena Duces Tecum to Tim Luke at 2; Notice of Deposition Duces Tecum of Tim Luke at 2.

The State is entitled to a protective order barring the deposition of Mr. Luke because, as discussed in the State’s Memorandum of April 1, 2008, the Court’s Order of July 23, 2007 separated and stayed Idaho Power’s claims against the Department and the Director, such claims exceed the statutory scope of the SRBA, and such claims contravene the requirement of exhaustion of administrative remedies.¹ The initial record on claims that are subject to the exhaustion requirement must be made before the Director, not in the reviewing court. *See Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”) (internal quotation marks and citation omitted).

II. The Document Requests For Mr. Luke’s Deposition Are Overly Broad And Unduly Burdensome And Encompass Matters That Exceed The Scope Of The Order Of July 23, 2007, The Statutory Scope Of the SRBA, And Contravene The Exhaustion Requirement.

Despite that fact that Mr. Luke’s personal knowledge with respect to the issues before the Court in this case is limited to the permitting of water rights in accordance with State law, Idaho Power has required him to produce at his deposition essentially all documents the Department has that are directly or indirectly related to all the major issues the Department has confronted in the Snake River basin in the past twenty years. Affidavit of David R. Tuthill, Jr. in Support of State of Idaho’s Second Motion for Protective Order (“Tuthill Aff.”) at 3.²

¹ The Department’s water rights permitting decisions, including the Department’s determinations as to the availability of water, are subject to the exhaustion requirement and the other judicial review provisions of the Idaho Administrative Procedures Act. *See generally* Idaho Code §§ 42-203A and 42-1701A.

² Most of these documents are not within Mr. Luke’s personal custody or control. Tuthill Aff. at 3.

The document requests go far beyond the scope of defining the ownership, nature and extent of the water rights at issue, seeking information on virtually all of the activities and actions the Department has undertaken in discharging its statutory duties in the Snake River basin since the time of the Swan Falls Agreement. Tuthill Aff. at 3. Many of these administrative activities are subject to the exhaustion requirement and may not be heard in the SRBA. *See* Tuthill Aff. at 2-3 (describing the activities and matters falling under the document requests). Idaho Power's even encompass the Department's filings in the SRBA. Tuthill Aff. at 2-3.

The document requests are facially overbroad and compliance with them would impose an unreasonable burden on the Department. Tuthill Aff. at 3. Further, it would be impossible for the Department to produce all the documents at the April 18th deposition. Tuthill Aff. at 3. Finally, many of the documents that Idaho Power seeks are already available to Idaho Power and the public at large through the Department's website. Tuthill Aff. at 3.

CONCLUSION

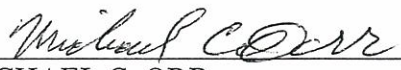
For the reasons discussed herein and in the State's Memorandum of April 1, the State therefore requests that the Court enter an order prohibiting Idaho Power from taking the deposition of Tim Luke on April 18.

Dated this 4th day of April, 2008.

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CERTIFICATE OF SERVICE

I certify that on this 4th 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 SECOND MOTION FOR PROTECTIVE ORDER AND REQUEST FOR EXPEDITED HEARING, to the following parties by the indicated methods:

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