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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)

Case No. 39576)

IDAHO POWER COMPANY,)

Plaintiff,)

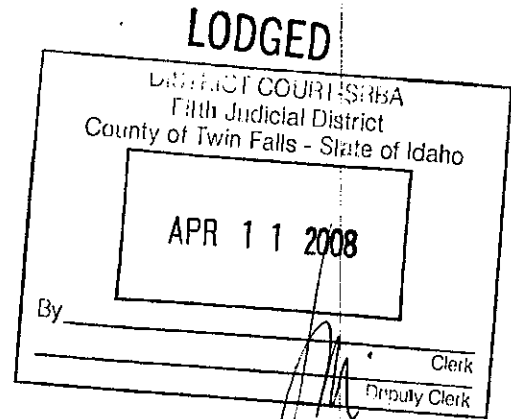
v.)

STATE OF IDAHO; C.L. "BUTCH" OTTER,)
Governor of the State of Idaho; LAWRENCE G.)
WASDEN, Attorney General of the State of)
Idaho; IDAHO DEPARTMENT OF WATER)
RESOURCES; and DAVID TUTHILL, Director,)
Idaho Department of Water Resources,)

Defendants.)

Consolidated Subcase No. 92-00023

**IDAHO POWER COMPANY'S
RESPONSE MEMORANDUM IN
OPPOSITION TO THE STATE'S
SECOND MOTION FOR
PROTECTIVE ORDER**



Plaintiff Idaho Power Company ("Idaho Power"), by and through its counsel, submits this Memorandum in Opposition to the State of Idaho's Second Motion for Protective Order.

INTRODUCTION

In its Second Motion for Protective Order, the State seeks an order prohibiting Idaho Power Company from deposing Timothy Luke, a State employee. The State's newest attempt to evade its obligation to respond to discovery in this action is based on the State's continued improper narrowing of the issues in this case and its disregard of this Court's July 24, 2007 Order on the State's Motion to Strike or Dismiss. This Court has already determined that issues beyond water right ownership are ripe in this action, and Idaho Power is entitled to undertake discovery on those issues. While Idaho Power's grounds for opposition to this specific Motion are argued below, we also refer the Court to our arguments in response to the State's general grounds for a protective order that are set forth in Idaho Power's April 8, 2008 Response in Opposition to the State's Motion for Protective Order. This Court must put an end to the State's reliance upon litigation gamesmanship – pushing for expedited discovery and trial then delaying that discovery by unreasonably resisting it, and including individuals like Mr. Luke in lists of persons with knowledge of relevant facts then asserting that all facts within his knowledge are irrelevant – and deny this baseless Second Motion for Protective Order.

ARGUMENT

A. The State Identified Mr. Luke As a Person with Knowledge of the Facts Underlying this Lawsuit, and His Affidavit Testimony Demonstrates that Idaho Power is Entitled to Depose Him.

As argued in Idaho Power's Motion to Compel, as well as in its opposition to the State's first Motion for Protective Order, Idaho Rule of Civil Procedure 26(b)(1) provides that a party may have discovery on any matter that is relevant and reasonably calculated to lead to the

discovery of admissible evidence. This rule is to be interpreted broadly in order to allow a litigant to fully develop its claims and defenses during the proceedings. *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.”).

The State has already conceded that Mr. Luke has knowledge of the facts underlying this action, including knowledge relating to the State’s claim of ownership of Idaho Power’s water rights, and available water for use by Idaho Power in light of issues of subordination and depletion by future upstream users.¹ The State’s inclusion alone of Mr. Luke in its list of potential witnesses should be enough to enable Idaho Power to depose him and for the Court to deny the State’s motion. It is entirely disingenuous for the State to now reverse its position and assert that Mr. Luke “had no involvement of any kind in the Swan Falls controversy, the Swan Falls negotiations, the Swan Falls Agreement, [sic] the Swan Falls legislation.” *See* Memorandum in Support of State of Idaho’s Second Motion Protective Order (“State Mem.” at 2, *citing* the Affidavit of Tim Luke (“Luke Aff.”) at 3. The State should not be allowed to hold Mr. Luke out as a potential witness in its case and then seek to preclude Idaho Power from taking his deposition to explore the extent of Mr. Luke’s knowledge.

¹ See April 1, 2008 Affidavit of Michael Gheleta (“Gheleta Aff.”), Ex.D (State’s Responses to Idaho Power’s First Set of Discovery Requests) at 5, 15, 18.

The State's description of Mr. Luke's job responsibilities, as well as Mr. Luke's own affidavit testimony, further demonstrate that Mr. Luke has knowledge relevant to Idaho Power Company's claims that are presently being litigated. In its Memorandum in Support of this Motion the State admits "[t]he 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..." See State Mem. at 2, *citing* Luke Aff. at 2. Mr. Luke confirms this role in his Affidavit, stating that his duties included "the review, analysis, recommendation and processing of water right transfers, and the review and processing of applications to reallocate water held in trust under the Swan Falls Agreement." See Luke Aff. at 2, ¶ 5.

The availability of trust water for "reallocation" is a critical issue in this litigation that has the potential to affect the scope, extent and ownership and Idaho Power Company's water rights. Mr. Luke's responsibilities with IDWR during the years 1988 through 1991, relating to the "reallocation" of trust water, coupled with the State's admission that he is a person with knowledge of relevant facts, lead to the plain conclusion that Idaho Power is entitled to depose him, and that the deposition is likely to lead to the discovery of admissible evidence. ID. R. CIV. P. 26(b)(1). No legitimate reason exists to allow the State to shield Mr. Luke from deposition.

Furthermore, the State's continuing mantra that Idaho Power is impermissibly trying to use the deposition of Mr. Luke to develop an unspecified water rights administration claim in some other court against IDWR, addressed in Idaho Power's Response to the State's first Motion for Protective Order, is also belied by the State's own discovery responses admitting that Mr. Luke possesses relevant factual knowledge pertaining to relevant issues including the State's

claim of ownership to Idaho Power's water rights. A deposition of Mr. Luke inquiring into his responsibilities with the Department, and his knowledge of relevant facts and documents, could undoubtedly lead to the discovery of admissible evidence relating to the existence of trust water at the time of the Swan Falls Agreement, implementation of IDWR's allocation rule changes, and the State's actions in implementing the Swan Falls Agreement. All of this information is relevant to Idaho Power's water right and related contract claims presently being litigated before this Court, which this Court has ruled are within the scope and jurisdiction of the SRBA Court. See July 24, 2007 Order.

Moreover, at issue in this litigation, even in the State's narrow view of the case, are actions taken by the State to claim legal title to water rights originally recommended by IDWR as belonging to Idaho Power. Idaho Power is entitled to depose IDWR employees to discover the individuals and bases involved in IDWR's recommendations to the Court purporting to divest Idaho Power of title to its water rights.

"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). The State has no legitimate basis to preclude the deposition of Mr. Luke, whom the State has listed as a person with knowledge of relevant facts, which Idaho Power is entitled to explore through discovery. Accordingly, Idaho Power seeks an order of this Court denying the State's request that the Court prohibit the Luke deposition.

B. The Documents Requested in the Subpoena Duces Tecum to Mr. Luke Do Not Constitute an Undue Burden and are Properly Discoverable in this Action.

Idaho Power has been trying since February to obtain discovery of materials relevant to its claims regarding the nature and extent of its Swan Falls Agreement water rights, as well as

trust water availability. The materials sought from the State include information related to IDWR calculation and measurement of flows in the Snake River, spring flows, recharge, Eastern Snake Plain Aquifer ground water levels and hydrology, related Snake River surface flow hydrology, and trust water applications and processing. Idaho Power has also requested from the State indexes of the documents/files maintained by or under the control or custody of IDWR related to the Swan Falls negotiations, the Swan Falls Agreement, trust water availability, Snake River flow calculations and measurements at the Murphy Gage, and issuance of permits to appropriate any available trust water. *See generally* Idaho Power's Motion to Compel. The State has refused to fully produce this information in response to Idaho Power's written discovery requests. Consequently, Idaho Power has been forced to also seek this information in conjunction with the deposition of Mr. Luke, an IDWR employee listed by the State as a person with knowledge of relevant facts. (A copy of the subpoena *duces tecum* issued to Mr. Luke is attached hereto as Exhibit A.)

The State argues that Mr. Luke is not subject to deposition because he allegedly has no personal or firsthand knowledge of the Swan Falls settlement, and because he did not commence employment with the State until 1988, after the Swan Falls Agreement had been executed and the implementing legislation enacted and amended. In making this argument, while simultaneously refusing to produce documents requested in conjunction with Mr. Luke's deposition, the State appears to be arguing in the deposition context as well that nothing outside of the "official" legislative record for the years 1985 and 1986 is relevant to this action or subject to discovery.

Idaho Power has claimed in this action that the validity of the Swan Falls trust arrangement is impacted by whether in fact there was any trust water available for appropriation

at the time of the 1984 Swan Falls Agreement. Idaho Power has further alleged accordingly that the parties to the Swan Falls Agreement were operating under a mutual mistake of fact regarding the availability and extent of trust water for reallocation, and has sought the remedy of reformation of the Agreement. As explained in Idaho Power's Reply brief on its Motion to Compel filed simultaneously with this brief, hydrologic conditions in years subsequent to 1984, including currently, are relevant to modeling attempting to be accomplished by experts retained by Idaho Power, and determination of whether there was any trust water available for appropriation at the time of the Swan Falls Agreement.

Idaho Power is entitled to have discovery on all of the categories of materials it has requested because these matters are directly relevant to the issue of the availability of trust water in 1984. Indeed, this Court has held that issues concerning the ownership, nature *and extent* of the Swan Falls Agreement water rights are properly before the Court. *See* July 24, 2007 Order at 10. The documents sought in conjunction with the deposition of Mr. Luke are relevant to the extent of the Swan Falls water rights, and in this respect as well are relevant and reasonably calculated to lead to the discovery of admissible evidence at the trial of this action.

In his affidavit, IDWR Director David Tuthill mistakenly states that the subpoena *duces tecum*:

Encompass[es] documents that are related in any way to the Department's permitting of water rights, its administration of water rights, its creation and management of entities or management units such as water districts and ground water management areas, its promulgation of administrative rules such as the Water Appropriation Rules and the Conjunctive Management Rules, its water resource planning activities, its water supply analyses and forecasting, its responses to water delivery calls, and its water resource measurement, modeling and characterization activities, including but not limited to analyses or measurements of the flows in the Snake River, the ground water in the Eastern Snake Plain Aquifer and the spring flows in the canyon.

See Affidavit of David R. Tuthill, Jr. in Support of the State of Idaho's Second Motion for Protective Order ("Tuthill Aff.") at 2, ¶ 4. A review of the subpoena itself reveals that Idaho Power did not make such broad and sweeping requests. The subpoena requests six categories of documents. The first requests production of the Swan Falls documents and records, Swan Falls implementation records including documents related to Trust Water applications and processing, as well as Eastern Snake Plain Aquifer materials, and Snake River measurement materials "created or retained by or under the direction of A. Kenneth Dunn." *See* Ex. A attached hereto. The second category requests the same materials prepared by or at the direction of, or maintained by Keith Higginson. *Id.* The third category requests specifically research and report data related to groundwater levels in the Eastern Snake Plain Aquifer. *Id.* The fourth seeks data regarding testing and analysis of flows in the Snake River from 1975 to the present. *Id.* The fifth seeks data prepared at the direction of Governor Evans or Attorney General Jim Jones relating to the Swan Falls Agreement and negotiations. *Id.* The last category seeks the indexes of documents and/or files maintained by, or within the custody and control of IDWR related to the documents and data discussed above. *Id.* While responses to these requests will likely amount to a lot of relevant production materials, the requests are not as overly broad as represented by Director Tuthill in his affidavit, and all are tailored to lead to the discovery of relevant, admissible evidence. *See* Tuthill Aff.

Idaho Power fully expects that its requests will amount to a substantial number of documents, likely in excess of several thousand pages, but that does not mean that it is not entitled to their discovery. Idaho Power has made available to the State thousands of pages of documents relevant to the Swan Falls Agreement and related issues, although the State has not seen fit to undertake any review of such documents. The State is obligated in turn to make the

documents within its possession available to Idaho Power for its review, even if they are voluminous and there is a burden involved.

The State has not demonstrated good cause to prevent Idaho Power from discovering the relevant material that it has requested in the subpoena *duces tecum* of Mr. Luke. In order to establish "good cause," the moving party must show that *specific prejudice or harm* will result if no protective order is granted. *General Dynamics Corp. v. Selb Manufacturing*, 481 F.2d 1204, 1212 (8th Cir., 1972) ("the burden is therefore upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. Such determination must also include a consideration of the *relative hardship to the non-moving party* should the protective order be granted.") (Emphasis added).² Idaho Power will be significantly prejudiced in its development of evidence supporting its claims in this litigation without the requested deposition or documents. The showing of "good cause" for a protective order under Rule 26(c) is a "heavy burden." *Rivera v. Nibco, Inc.*, 384 F.3d 822, 827 (9th Cir. 2004) (Bea, J., dissent). This burden will not be satisfied by "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," and the fact that a party may be inconvenienced by the amount of relevant material it must produce is irrelevant. *Asarco v. Americas Mining Corp.*, 2007 U.S. Dist. LEXIS 84604, *18 (D. Idaho, 2007). The State's arguments fail to reach beyond such impermissible broad allegations of harm and inconvenience, including general complaints that Mr. Luke will be unable to assemble the requested documents in time for his deposition, without making any attempt to explain why not or what documents Mr. Luke can assemble.

² Note that Federal Rule of Civil Procedure 26(c) and Idaho Rule of Civil Procedure 26(c) are substantively identical and thus state courts often look to federal case law for guidance on discovery issues.

This is a complex lawsuit, with allegations beyond the narrow ownership issue that the State has continued to argue to the Court is the only relevant matter presently being litigated in this case. The State has not articulated any legitimate reason why it should be excused from complying with the requested deposition and written discovery except to complain that Idaho Power has requested too much information. Idaho Power is entitled to have discovery of all information that is reasonably calculated to lead to the discovery of admissible evidence. ID. R. Civ. P. 26(b)(1). Accordingly, Idaho Power requests that the Court deny the State's Second Motion for Protective Order, and require the State to produce Mr. Luke for deposition, and to provide or make available for inspection the materials requested in the subpoena *duces tecum*.

CONCLUSION

The State has failed to establish good cause warranting the protective order it seeks through its Motion. In the State's prior discovery responses, it has already admitted that Mr. Luke is a person with knowledge related to the State's claim to ownership of Idaho Power Company's water rights among other issues. Mr. Luke's affidavit testimony demonstrates that he will likely have knowledge related to the Company's allegations regarding the amount and availability of trust water at the time of the Swan Falls Agreement, and Idaho Power's related mutual mistake of fact claim. Accordingly, for the foregoing reasons, Idaho Power requests that the Court deny the State of Idaho Second Motion for Protective Order, allowing the deposition of Mr. Luke to proceed, including the production of documents associated with this deposition.

DATED: April 11, 2008.

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Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S RESPONSE MEMORANDUM IN OPPOSITION TO THE STATE'S SECOND MOTION FOR PROTECTIVE ORDER** via the method indicated below, and addressed to each of the following:

Filed with the Court via Hand Delivery.

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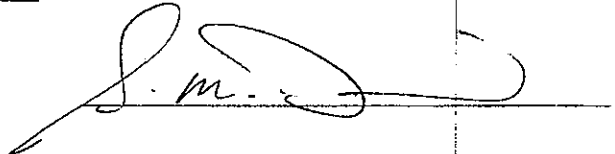


EXHIBIT A

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
Case No. 39576	)	
_____	)	Consolidated Subcase No. 92-00023
IDAHO POWER COMPANY,	)	
Plaintiff,	)	
v.	)	SUBPOENA DUCES TECUM TO
	)	TIM LUKE
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	
Governor of the State of Idaho; LAWRENCE G.	)	
WASDEN, Attorney General of the State of	)	
Idaho; IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources	)	
Defendants.	)	
_____	)	

THE STATE OF IDAHO TO: TIM LUKE

PLEASE TAKE NOTICE that, pursuant to Idaho Rules of Civil Procedure 30 and 45, the above named parties will take the deposition upon oral examination of **Tim Luke**, on the date and at the time and location set forth below.

The deposition will begin at 9:00 a.m. on April 18, 2008, and shall continue from day to day until concluded. The deposition will be held at the offices of Barker Rosholt & Simpson LLP, 1010 W. Jefferson Street, Suite 102, Boise, Idaho, 83702 (208) 336-0700. The deposition will be recorded by a certified court reporter authorized to administer oaths in the State of Idaho.

Pursuant to Idaho Rules of Civil Procedure 45(b), the deponent is required to bring to the deposition the following materials:

1. Records, files, notes, memoranda, calendars and documents created or retained by or under the direction of A. Kenneth Dunn, past Director of the Department of Water Resources or department employees under his supervision, maintained in the files of, or within the custody and control of the Idaho Department of Water Resources directly or indirectly related to Snake River flows, the Eastern Snake Plain Aquifer, spring flows, recharge, the Swan Falls negotiations, Swan Falls Agreement, Swan Falls legislative history, Swan Falls legislation; Swan Falls implementation, including but not limited to trust water rights applications or processing, State Water Plans, Snake River and tributaries hydropower rights, permits and applications, including but not limited to Swan Falls, Milner and Hells Canyon, or subordination;
2. Records, files, notes, memoranda, calendars and documents created or retained by or under the direction of Keith Higginson, past Director of the Department of Water Resources or department employees under his supervision, maintained in the files of, or within the custody and control of the Idaho Department of Water Resources directly or indirectly related to Snake River flows, the Eastern Snake Plain Aquifer, spring flows, artificial or natural recharge, the Swan Falls negotiations, Swan Falls Agreement, Swan Falls legislative history, Swan Falls legislation; Swan Falls implementation, including but not limited to trust water rights applications or processing, State Water Plans, Snake River and tributaries hydropower rights, permits and applications, including but not limited to Swan Falls, Milner and Hells Canyon, or subordination;
3. Reports, drafts of reports, and information gathered in the process of researching issues contained in reports, relating to groundwater levels of Eastern Snake Plain Aquifer;

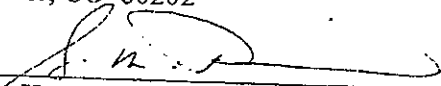
4. All documents, notes, reports, correspondence and memoranda documenting all testing and analysis conducted relating to the flows of the Snake River for the years 1975 through the present;
5. All documents, reports, notes, memoranda, correspondence and pleadings prepared at the direction of the Attorney General, Jim Jones, or his staff or the Governor of the State of Idaho, John Evans, or his staff, during 1984 relating in any way to the Swan Falls negotiations and Agreement;
6. All indexes of the documents and/or files maintained by, or under the custody and control of, the Idaho Department of Water Resources located at any of the Idaho Department of Water Resources offices, or in any archive of the State of Idaho, related in any way to the Swan Falls negotiations, Swan Falls Agreement, Trust Water, Snake River measurements at the Murphy Gage, and issuance of permits to appropriate Trust Water.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with the subpoena.

DATED THIS 28th day of March, 2008.

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