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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

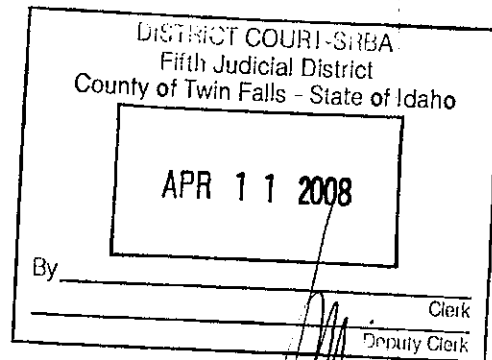
IDAHO POWER COMPANY,

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
REPLY IN SUPPORT OF
MOTION TO COMPEL**

Plaintiff Idaho Power Company ("Idaho Power") hereby files its Reply in Support of its Motion to Compel. It was necessary for Idaho Power to file the Motion to Compel in order to resolve this discovery dispute on a timely basis, given the State's filing of its Motion for Protective Order with no simultaneous supporting brief, and given the tight case schedule including the upcoming expert report deadline. As shown below, in responding to the Motion to Compel, the State has presented no legitimate basis on which to restrict discovery in this action, and accordingly should be compelled to fully respond to Idaho Power's discovery requests.

ARGUMENT

I. The State's Continued Attempts to Reargue Its Dispositive Motions Are Improper and Should be Disregarded by the Court.

This is a discovery dispute. This is not an opportunity for the State to reargue issues that have either been decided by this Court, or that are pending before the Court. It is certainly not an opportunity for the State to introduce *new* arguments and *new* evidence in an attempt to affect the Court's Summary Judgment analysis. The Court should ignore the State's not-so-thinly veiled attempts to reargue various points on the merits, and to limit the scope of available evidence, under the guise of withholding necessary discovery requested by Idaho Power.

The narrow issue before the Court is whether the State must produce the requested discovery under this State's broad discovery standard. The standard governing discovery disputes, as outlined by Idaho Power in both its Motion to Compel discovery and its Response to the State's Motion for a Protective Order, is that

"[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... [and] it is not grounds 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."

IRCP 26(b)(1). This standard, which is substantively identical to the Federal Rule, has been broadly interpreted by Courts in both Idaho and throughout the United States. See Idaho Power's Motion to Compel at 3-4. The ultimate admissibility of the requested information or documentation is not controlling. *Id.* Thus, Idaho Power's discovery requests are appropriate for this phase of the case.¹

With respect to reargument, in its Motion to Strike or Dismiss Idaho Power's Complaint filed in the early stages of this case, the State already argued that the SRBA Court does not have jurisdiction to address any issue raised in the declaratory relief claims in Idaho Power's Complaint other than legal title, including any issue related to availability of trust water and any issue implicating water rights administration. This Court found otherwise in its July 23, 2007 Order (the "Order"). Regardless, the State again makes the same arguments in considerable detail to justify its withholding of discovery. See State's Memorandum in Response to Idaho Power Company's Motion to Compel ("State's Response Brief") at 4-6 and 9-17.

Further, in conjunction with its Motion for Summary Judgment, the State already made its arguments that: 1) this Court is limited to considering the Swan Falls legislation and legislative record, and that the Swan Falls Agreement itself, its interpretation, and its negotiation, are irrelevant; 2) the State holds legal title to the Swan Falls water rights; and 3) the parties are precluded by past representations from arguing otherwise. Not only is the State incorrect in

¹ As argued extensively in Idaho Power's Motion to Compel and its Response in Opposition to the State's Motion for Protective Order, Idaho Power's discovery requests are reasonably calculated to lead to the discovery of admissible evidence in *this phase* of the proceeding, fully consistent with the scope and intent of the Court's July 23 Order. As further explained below, the information sought by Idaho Power – for instance, information concerning the amount of trust water that currently exists – is of significant importance to the work of counsel and to Idaho Power's experts who, as the Court is aware, are on a tight deadline for the production of expert reports. Further delay in the production of requested documentation and information simply cannot be allowed if the Court's schedule is to be met.

Judgment motion. In the context of the current dispute, Idaho Power is not seeking documentation and information to create a "revisionist record," but rather is seeking relevant information concerning the Agreement that it has the right to seek pursuant to IRCP 26(b)(1).

The State's final argument appended to the end of its Response Brief is also reargument, in that it uses a new legal concept ("judicial estoppel") to reargue the same point the State raised in its Motion for Summary Judgment – that Idaho Power is making arguments now that are contrary to previous representations to the legislature, other parties, and other courts. See State's Response Brief at 23. This time the State supplements earlier argument by contending that Idaho Power is not only precluded from raising certain issues, but is precluded from seeking otherwise permissible discovery. While Idaho Power disagrees with the State's substantive allegation that it is taking inconsistent positions, the question before this Court is not whether Idaho Power is somehow seeking to create a "revisionist record" as the State argues, but instead whether documentation or information sought by Idaho Power fits within the broad scope of IRCP 26(b)(1). As shown in Idaho Power's Motion to Compel, the requested information is fully consistent with the broad 26(b)(1) standard.

Finally, this Court has broad discretion to control discovery. *Jen-Rath Co. Inc. v. Kit Mfg. Co.*, 137 Idaho 330, 336 (2002); *Jacobson v. State Farm Mut. Auto. Ins. Co.*, 136 Idaho 171, 173 (2001). The Court should exercise its discretion to allow broad discovery to proceed while the State's partial Summary Judgment motion is pending. Moreover, the Court should resist the State's renewed invitation to have the Court prematurely opine on issues remaining in the case before it has fully considered and ruled on the cross motions for summary judgment. There is no reason why, given the expedited schedule pushed by the State, discovery should be

delayed or stayed.² Idaho Power is attempting to undertake the discovery necessary to meet the State's preferred expedited schedule, but that schedule leaves no "wiggle room." If the Court effectively stays discovery until it resolves the many legal issues before it, by ruling in favor of the State's discovery motion, the overall case schedule will have to be extended. Should discovery proceed with no further delay, it is likely that schedule can be met.

II. Idaho Power's Discovery Requests Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

In its Response Brief, the State once again raises its blanket objection to Idaho Power's discovery requests that the requests are designed primarily to develop legal challenges to unspecified administrative decisions by the Director and IDWR, and do not go to issues currently before this Court. But Idaho Power has told the State repeatedly, in discussions and written correspondence with State's counsel, and in its prior briefings on this issue, that this simply is not the case. Idaho Power acknowledges the Court's ruling that its claims for injunctive relief against the Director and IDWR cannot be heard by this Court in its capacity as SRBA Court, and it has made no assertions to the contrary in the course of this discovery dispute.

Neither Idaho Power's claims at issue in this case nor its discovery requests relate, as the State repeatedly asserts, to past and future water right permitting or administration decisions of the Director. Indeed, Idaho Power questions what water right administration decisions would be

² In its *Memorandum in Support of Protective Order*, the State cites a District of Connecticut case and an 11th Circuit case in support of its suggestion that discovery could be stayed on certain issues pending the resolution of the parties' dispositive motions. However, such a decision would require the Court to also consider the effect on Idaho Power. *Dependable Highway Exp. Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) ("[I]f there is even a fair possibility that the stay . . . will work damage to someone else, the stay may be inappropriate absent a showing by the moving party of hardship or inequity," quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936).) Such a stay would make it virtually impossible for Idaho Power to meet the remaining court-ordered deadlines.

Ironically, in the 11th Circuit case cited by the State to support its stay suggestion, *Panola Land Buyers Assoc. v. Shuman*, 762 F.2d 1550 (11th Cir. 1985), the Circuit denied a motion for a protective order because it determined that the movant's claims that certain discovery requests were "unnecessary, too long, too broad, require too much time, are expensive to complete, are irrelevant, are improperly timed, and entail unreasonable geographic compliance" were "merely conclusory" and, therefore, did not satisfy the standard of Rule 26(b). 762 F.2d at 1559.

subject to challenge at this point. As this Court has already determined, Idaho Power has properly presented for this Court's determination issues related to the ownership, nature and scope of its Swan Falls water rights. Order at 9-12. As discussed below, Idaho Power's discovery requests seek information and documents relevant or potentially relevant to these claims.

A. Questions regarding water availability in the Snake River Basin and how the State calculates stream flows relate to whether trust water existed at the time of the Swan Falls Agreement and are thus relevant to the issue of the validity of the Swan Falls trust arrangement.

Idaho Power has asked this Court to determine whether any water existed above the minimum flow levels established in the Swan Falls Agreement that could be placed in trust (hereinafter referred to as "trust water") at the time the parties entered into the 1984 Agreement, or whether the parties operated under a mutual mistake of fact as to the existence of trust water. See Idaho Power's Complaint at ¶¶ 60-63. To develop these claims, Idaho Power has propounded several discovery requests relating to the issues of the availability of water above the Swan Falls Agreement minimum flows at the Murphy Gage, and how the State calculates these flows at the Murphy Gage in light of interrelated water accounting, storage and use considerations in the Snake River Basin. See Motion to Compel at 11.³ The State argues that Idaho Power has no legitimate basis on which to seek information regarding water availability after 1984, claiming that this information must necessarily relate solely to Idaho Power's currently stayed claims against the Director and IDWR. See State's Response Brief at 4-6. The State's argument reflects a misunderstanding of Idaho Power's allegations regarding the availability of trust water and the technical basis of such allegations requiring the discovery.

³ See also State Responses to Idaho Power Company's First Set of Discovery Requests (Exhibit 2 to Olsen Affidavit in Support of State's Motion for Protective Order) at 20 ("the Department allocates the flow at the Murphy Gage to satisfy the separate obligations under the Swan Falls settlement and the Bureau of Reclamation flow augmentation water"); and ("The Department calculates the combined quantities of these separate obligations only for purposes of administrative convenience").

Idaho Power has retained technical experts to conduct modeling designed to analyze water availability in 1984 at the time the parties entered into the Swan Falls Agreement. To fully analyze this issue, these experts need, and thus Idaho Power seeks through discovery, information from the State regarding the availability of water at the Murphy Gage above the Swan Falls minimum flows, and how the State calculates the Swan Falls minimum flows for purposes of determining such availability. This need exists because, as a matter of hydrology, the effects of groundwater withdrawals in the Snake River system are not fully realized as stream depletions until much later – a scientific fact which the State conveniently ignores in arguing not to produce this information.⁴ Thus, information pertaining to water availability at the Murphy Gage now is directly relevant to or could lead to the discovery of information relevant to water availability in 1984, and indeed is necessary in order for Idaho Power to develop and submit the expert reports required in this case by June 16. To the extent such information may also pertain to some aspect of State water rights administration, the Court has already ruled that overlap between administrative provisions and definition of a water right is inevitable, rendering the State's arguments an illegitimate basis to withhold this information.

B. The State misunderstands the relationship between Idaho Power's discovery requests for post-Agreement information and its mutual mistake of fact claim.

The State makes the further argument that only information available in 1984 at the time of contracting can form the basis for Idaho Power's mutual mistake of fact claim. This argument not only misstates the law on this issue, but also highlights the State's failure to understand the purpose of Idaho Power's discovery requests. Whether a mutual mistake of fact occurred generally must be determined based on facts existing at the time the parties entered into the

⁴ See Complaint at ¶ 31. In fact, the State has acknowledged in discovery to date that the effects of groundwater pumping in the Snake River basin are delayed. See State Responses to Idaho Power Company's First Set of Discovery Requests (Exhibit 2 to Olsen Affidavit in Support of State's Motion for Protective Order) at 26 ("the State admits that the depletive effects of ground water withdrawals from the ESPA on Snake River flows can be delayed to varying degrees depending on a number of factors ...").

contract at issue. Indeed, Idaho Power bases its mutual mistake of fact claim on its contention that no trust water, and thus no trust res, actually existed in 1984 when the parties signed the Swan Falls Agreement -- not, as the State implies, that trust water availability declined in the years following the Agreement.⁵

Nevertheless, this does not mean, and nothing in the case law cited by the State stands for the proposition, that post-contract information can have no relevance, and thus is not a proper subject of discovery, on the issue of whether contracting parties operated under a mutual mistake of fact at the time of contracting. In fact, as discussed in the section immediately above, Idaho Power must look to post-Agreement hydrological impacts in the Snake River at the Murphy Gage and the Basin to determine what conditions actually existed in 1984 at the time the parties entered into the Agreement. Again, this is a scientific fact unique to this case that the State cannot dispute, and it should produce the requested discovery accordingly.

III. The State Asserts No Legitimate Basis to Limit Discovery to the Legislative Record.

As a final justification for its decision not to produce information and documentation responsive to Idaho Power's Second Set of Discovery Requests, the State claims that the parties' contractual intent is fully developed in and must be limited to the 1985-86 legislative record, and thus any discovery in this action should not go beyond that record. Idaho Power has already fully briefed the flaws in the State's position and why the Swan Falls Agreement and a broad

⁵ The State attempts to debate the merits of Idaho Power's mutual mistake of fact claim, asserting that "any expectation that the parties may have had regarding the availability of water supplies above seasonal minimum flows can no more form the basis for mutual mistake than can expectations that market or financial conditions will remain unchanged." See State's Response Brief at 8. The State then spends several pages of its Response Brief trying to justify this misguided analogy. As an initial matter, whether Idaho Power will ultimately succeed on its mutual mistake claim is irrelevant to whether the State should be required to produce information related to that claim, so the State's arguments regarding the merits of this claim should be disregarded. Moreover, the State's financial market analogy is absurd and bears no relation to the basis for Idaho Power's mutual mistake claim. In forming the Swan Falls trust, the parties did not assume that flow levels in the Snake River at Murphy Gage would remain constant, and Idaho Power makes no such assertion here. But the parties did assume that some level of trust water existed for reallocation at that time and this mutual belief was a basic and vital factor in their agreement to form a trust to hold that water. Whether this mutual belief was erroneous at that time has yet to be determined by this Court and is therefore an appropriate subject for discovery in this action.

array of information beyond the legislative record pertaining to the Agreement are relevant to the claims in this action. See Idaho Power's Response in Opposition to the State's Motion for Protective Order at 8-10 and Idaho Power's Response in Opposition to the State's Motion for Summary Judgment at 15-17 and 19-22.

It is worth noting again, however, that the State takes great liberties with the allegedly official legislative record that it claims controls this action, rearguing points that are the subject of the pending summary judgment motions based on the *State's interpretation* of the meaning of certain statements made by representatives of the negotiating parties. See *supra* Section I. Nothing in the legislative record precludes Idaho Power from seeking discovery regarding any information in the State's possession that pertains to the Swan Falls Agreement and the parties' intent with respect to the salient terms of that Agreement. If anything, the parties' widely disparate views as to the meaning of these and other statements in the record demonstrate that disputed factual issues remain as to the meaning of the terms of the Swan Falls Agreement that must be resolved by the Court, and thus discovery related to these issues remains appropriate.

CONCLUSION

For the reasons discussed above and in Idaho Power's Motion to Compel, the State's attempt to curtail discovery in this action should be denied, and the State should be compelled to produce all information and documentation responsive to Idaho Power's Second Set of Discovery Requests. Idaho Power needs the information requested from the State in order to meet the expedited discovery schedule in this action and, in particular, to prepare its expert reports by June 16. Despite the State's attempt to distract the Court by rearguing the merits of Idaho Power's claims, the only issue for the Court to decide here is whether Idaho Power's discovery requests seek information relevant or potentially relevant to its claims in this action. Idaho

Power has established that its discovery requests fall within this broad standard for permissible discovery under IRCP 26(a)(1), and its Motion to Compel therefore should be granted.

Idaho Power also respectfully reiterates its request that the Court award it costs and fees incurred as a result of the State's failure to fulfill its clear and unequivocal discovery obligations under IRCP 26(a)(1), 33 and 34. The State's failure to work with Idaho Power in a timely fashion to resolve the discovery requests, and its blatant attempt to reopen or reargue legal issues either already resolved or currently being considered by the Court, have unnecessarily expanded the scope of this discovery dispute, and thus the State should bear related costs and fees.

Dated this 11th day of April 2008.

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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 REPLY IN SUPPORT OF MOTION TO COMPEL** via the method indicated below, and addressed to each of the following:

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