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LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN (ISB # 5156)
MICHAEL C. ORR (ISB # 6720)
SHASTA KILMINSTER-HADLEY (ISB # 7889)
Deputy Attorneys General

700 West State Street, 2nd Floor
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-2400
Attorneys for The State of Idaho

**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. 92-00023
	)	
Case No. 39576	)	STATE OF IDAHO'S
	)	MEMORANDUM IN SUPPORT
	)	OF THE STATE'S MOTION TO
	)	COMPEL DISCOVERY
	)	

COMES NOW the State of Idaho, by and through its undersigned counsel of record, and hereby submits this Memorandum in Support of its Motion to Compel Discovery. The State respectfully requests that the Court issue an Order compelling Idaho Power Company to serve complete responses to the State's Third Set of Discovery Requests.

BACKGROUND AND INTRODUCTION

The State of Idaho ("State") served Idaho Power Company ("Company") with its Third Set of Discovery Requests ("Requests") on May 30th, 2008. On June 30th, 2008, pursuant to the Court's Scheduling Order, the Company served its Response to the State of Idaho's Third Set of Discovery Requests ("Response to Discovery"). On that day the State also served its responses to discovery requests propounded by Idaho Power, including thousands of pages of documents in digital format.

Idaho Power also responded to the State of Idaho's discovery requests on that date, however, those responses included a number of objections. Idaho Power stated that it would only make available the documents that it deemed relevant under its new, limited view of the issues before the Court. Idaho Power's limited responses to a number of the State's interrogatories and requests for production of documents are inadequate and do not fulfill its discovery obligations under the Idaho Rules of Civil Procedure.

Idaho Power's unwillingness to respond fully to the State's requests is particularly unreasonable given the fact that Idaho Power argued strongly for the need for discovery on the same matters in this proceeding. Idaho Power is attempting to evade the State's discovery requests.

Following receipt of Idaho Power's Response, the State conferred with opposing counsel twice by telephone to determine whether the parties could settle their differences regarding the State's discovery requests. Idaho Power has been unwilling to produce any additional documents and is continuing to assert the same objections stated in its original response. Idaho Power's actions have necessitated this motion.

ARGUMENT

1. Discovery standards.

The Idaho Rules of Civil Procedure define the scope of discovery as follows:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party....It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

I.R.C.P. 26(b). This Rule is nearly identical to the federal rule governing discovery, and both have been liberally construed to allow the broadest possible disclosure of non-privileged, relevant information. "The purpose of the discovery rules is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action can be ascertained in advance of trial." *Sanders v. Ayrhart*, 89 Idaho 302, 309, 404 P.2d 589, 592 (1965). "Interrogatories are exploratory, intended to ferret out facts, witnesses and documents to enable the searching party thereafter to prepare his case in an effective and orderly manner." *Theesen v. Continental Life & Accident Company*, 90 Idaho 58, 62, 408 P.2d 177, 179 (1965). The United States Supreme Court has said that "the deposition-discovery rules are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 504, 67 S.Ct. 385 (1947). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.*

2. Idaho Power Company's objections alleging irrelevance are erroneous and misstate the issue pending before the Court.

Idaho Power Company has objected to the following discovery requests on the grounds that they are "not relevant or material to the issue before the Court of whether

the Swan Falls Agreement subordinated Idaho Power's water rights to either existing or future recharge rights": Requests for Admission 1, 2, and 7-20; Interrogatories 4, 5, and 6; Requests for Production 10, 19, 20, 21, 31, 32, 33, 36-52, and 61. *See* Response to Discovery. Additionally, in those responses to the State's requests for production in which the Company *has* agreed to make documents available, it has limited the documents to those that the Company unilaterally determines are "relevant to the matters at issue in this litigation," as described in Idaho Power's Motion to Strike or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment ("Motion to Strike"). *See* Response to Discovery.

The State has lodged a "Response to Idaho Power Company's Motion to Strike or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment" ("Response to Motion to Strike") explaining why Idaho Power's position is untenable and why the issues on which the State seeks discovery are relevant and properly before the Court. Rather than repeat that argument within this memorandum, the State respectfully requests that the Court review the arguments in the State's Response to Motion to Strike. If the Court denies Idaho Power's Motion to Strike the issues set forth in the State's motion for summary judgment, it follows that Idaho Power should be required to provide complete responses to the State's third set of discovery requests.

3. Idaho Power Company's responses to State's Interrogatories 4 and 5 and Requests for Productions 10, 38, and 61 demonstrate the Company's unwillingness to respond adequately to the State's discovery requests.

State's Interrogatory No. 4 asks whether Idaho Power's position on whether recharge rights diverting from water sources upstream from Milner Dam is consistent with the following statutory directive in Idaho Code § 42-203B(2):

provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Requests at 6.

Idaho Power objects to this interrogatory on the basis that it is "not relevant or material to the issue before the Court of whether the Swan Falls Agreement subordinated Idaho Power's water rights to either existing or future recharge rights." Response to Discovery at 19-20. However, Idaho Power Company itself propounded a request for production on the same statutory language from Idaho Code § 42-203B in the discovery requests it served on the State on May 23rd, 2008. The Company's Request for Production No. 14 asks for all materials not yet provided by the State that,

relate to the proposal and legislative adoption of the following provision in Idaho Code § 42-203B(2): For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Power Company's Third Set of Discovery Requests to State Defendants at 10. In fact, the provisions in Idaho Code § 42-203B are highly relevant to whether the hydropower rights at issue are subordinate to uses of water for recharge, particularly as most existing and future recharge rights divert surface waters above Milner Dam.

Similarly, State's Interrogatory No. 5 asks whether Idaho Power's position on recharge is consistent with Article 21 of the 1923 American Falls Contract. Request at 6.

The Company repeats the relevance objection referenced above, and then continues to say that

[t]he issue of whether Idaho Power's water rights are secondary, subordinate, or limited in the manner in which they may be enforced or administered by virtue of conditions imposed by other agreements or regulatory proceedings is irrelevant to the issue pending before the Court.

Response to Discovery at 20. This is a mischaracterization of the issue as pled by Idaho Power which, as noted above, sought a declaration that water for ground water recharge is subordinate to the hydropower water rights that are the subject of this proceeding "through the Swan Falls Settlement or otherwise."

In Request for Production No. 10, the State asks for all documents provided by Idaho Power Company to the Idaho Legislature, Governor or any agency, that pertain to the formulation, adoption, enactment, amendment or implementation of Idaho Code §§ 42-234, 42-4201 and 42-4201A. See Requests at 8. In its Request for Production No. 6, Idaho Power similarly requested "all materials...pertaining to the formulation, adoption and implementation of" Idaho Code §§ 42-234, 42-4201, and 42-4201A. Idaho Power Company's Third Set of Discovery Requests to State Defendants at 9. Despite having propounded a nearly identical request, Idaho Power objected to the State's request on the basis that it is not relevant to the issue before the Court, and limited its production of responsive documents to those "relevant to the matters at issue in this litigation." Response to Discovery at 27.

Similarly, in response to State's Request for Production 38, which asks for "all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to water right permits numbers 01-7054 and 37-7842," Requests at 14, Idaho Power again objected on the basis that the request was not relevant. This despite the

Company's own Request for Production No. 16, which asks for "all materials in the State's possession relating to the application for, issuance of and exercise of water right permit nos. 01-7054 and 37-7842 for ground water recharge." Idaho Power Company's Third Set of Discovery Requests to State Defendants at 11.

The State's Request for Production No. 61¹ mirrors, almost verbatim, Idaho Power's Request for Production No. 15, which asks for all materials "relating to the initial adoption, and the continuation, of the State policy concerning a flow of zero c.f.s. at Milner as described in various versions of the Idaho State Water Plan." Idaho Power Company's Third Set of Discovery Requests to State Defendants at 10. Nonetheless, the Company also responded to this request by objecting that it was not relevant to the issues at hand and refusing to produce any responsive documents. See Response to Discovery at 58. Idaho Power's objection, on the same basis, to many of the other requests made by the State are similarly incongruous when read in light of the Company's own requests.

Idaho Power's responses to the State's Requests for Admission Nos. 1-2 and 7-20 also raise the same objection discussed above. The Court should not allow those objections based on relevance to stand in the Company's Response to Discovery.

As shown above, Idaho Power's own discovery refutes the Company's current position. The State presumes that Idaho Power had a good faith basis for propounding its discovery and it cannot now, in good faith, deny the State the same information the Company itself sought. It is untenable for Idaho Power to object to the State's requests as irrelevant when it propounded the same or similar discovery requests on the same

¹ Request for Production No. 61: Produce all documents in your possession relating to the initial adoption, and the continuation, of the State policy concerning a flow of zero cfs minimum flow at Milner as described in various versions of the Idaho State Water Plan. Requests at 17.

issues. Idaho Power's attempt to hinder the State's legitimate right to discovery on issues the Company brought before the Court violates both the letter and spirit of Rule 26.²

4. The State is entitled to an award of attorneys' fees and costs associated with this motion.

Rule 37(a) and (d), Idaho Rules of Civil Procedure, expressly provides that if the Court grants a motion to compel it shall also award reasonable expenses, including attorney's fees, to the prevailing party, unless the Court finds that the party opposing the motion was substantially justified in doing so. Whether the non-complying party has sufficiently shown adequate justification for failing to respond is left to the sound discretion of the court.

There is no justification for Idaho Power Company's evasive and incomplete responses to the State's discovery requests in this instance. Notwithstanding attempts to resolve the issue amicably, the State has unnecessarily been forced to file this motion to compel. Therefore, the Court should award the State attorney fees and costs incurred in connection with bringing this motion.

CONCLUSION

All of the State's requests are relevant and reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth in the State's Response to Motion to Strike. The Company has improperly limited the production of documents to

² The State of Idaho has limited this motion to compel to Idaho Power's refusal to respond based upon its relevance objection. Because of Idaho Power's evasive and limited response to the Third Set of Discovery, it is unclear to the State, at this time, whether any of the Company's other objections are well founded. Therefore, the State of Idaho reserves the right to bring any and all remaining objections to Idaho Power's responses to the Third Set of Discovery at a later time.

the issues that Idaho Power deems relevant, and should be compelled to produce all additional documents responsive to the State's discovery requests.

The State additionally requests that the Court award to the State costs and fees associated with the preparation of this Motion to Compel Discovery, pursuant to Rule 37(a)(4) and Rule 37(d) of the Idaho Rules of Civil Procedure.

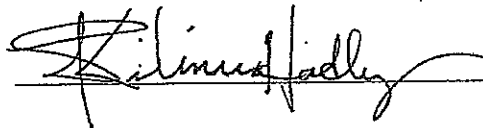
DATED this 21st day of July, 2008.

THE STATE OF IDAHO

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN
MICHAEL C. ORR
SHASTA KILMINSTER-HADLEY
Deputy Attorneys General

A handwritten signature in black ink, appearing to read "Shasta Kilminster-Hadley", written over a horizontal line.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2008, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN SUPPORT OF THE STATE'S MOTION TO COMPEL DISCOVERY to the following parties by the indicated methods:

Clerk of the SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208-736-2121

Idaho Power Company
Represented by:
James C. Tucker
P.O. Box 70
1221 W. Idaho
Boise, ID 83707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.388.6935
- ☒ E-mail: jtucker2@idahopower.com

Idaho Power Company
Represented by:
James S. Lochhead
Mark J. Mathews
Michael A. Gheleta
Michelle C. Kales
Brownstein Hyatt Farber Shreck
410 17th Street, Ste. 2200
Denver, CO 80202-4432

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 303.223.0904
- ☒ E-mail: mgheleta@bhfs.com
- ☒ E-mail: jlochhead@bhfs.com

Idaho Power Company
Represented by
John K. Simpson
Shelley M. Davis
1010 W. Jefferson, Suite 102
Boise, ID 83701-2139

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.344.6034
- ☒ E-mail: smd@idahowaters.com

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83720-4449

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Not Applicable

United States Department of Justice
Environment & Natural Resources
Division
550 West Fort Street
MSC 033
Boise, ID 83724

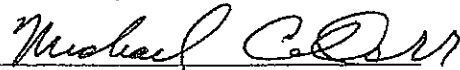
- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

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

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: cmm@racinelaw.net

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

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: : jo.beeman@beemanlaw.com


MICHAEL C. ORR
Deputy Attorney General