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RE: In Re SRBA, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find the following pleadings that were filed today with the SRBA Court:

Idaho Power Company's Reply to State's Response to Idaho Power Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment with one Exhibit;

Idaho Power Company's Response in Opposition to the State of Idaho's Motion to Compel Discovery with Affidavits and Exhibits.

Please contact me if you have any questions. Thank you.

Counsel
July 28, 2008
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Sincerely,

A handwritten signature in black ink, appearing to read "Alison Cameron". The signature is fluid and cursive, with a large initial "A" and a long, sweeping underline.

Alison Cameron

Enclosures

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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. 00-92023
)
)
)

)
) IDAHO POWER COMPANY'S
) REPLY TO STATE'S RESPONSE
) TO IDAHO POWER MOTION TO
) STRIKE, OR ALTERNATIVELY,
) MOTION IN LIMINE RE: SCOPE
) OF STATE MOTION FOR
) SUMMARY JUDGMENT
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Idaho Power Company hereby submits this Reply to the State's Response memorandum ("State Response") to Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment ("Motion to Strike or in Limine").

INTRODUCTION

The State's Response fails to refute the arguments in Idaho Power's Motion to Strike or in Limine. The State's procedural arguments would effectively allow the State – without ever having filed a responsive pleading – to redefine the scope of the issues now pending before the Court, and would strip the Court of its inherent authority to manage this litigation in conformance with the terms of the Consolidation Order. On the authority of its own narrow and hypertechnical reading of I.R.C.P. 12(f) and one distinguishable case, the State argues that Idaho Power may not register its objection to the State's attempted expansion of the scope of this proceeding by means of a motion to strike. As argued herein, case law from Idaho and other jurisdictions actually confirms a much more flexible approach that encompasses the use of a motion to strike in order to notify the court of objections to filings such as the State's motion for summary judgment.

In the alternative, it is proper to utilize a motion in limine at this stage of the proceedings to excise from the State's motion for summary judgment those issues that are outside the scope of Idaho Power's Complaint and the court's Consolidation Order. As with its arguments against the motion to strike, the State advances a rigidly narrow use of motions in limine that finds no support in Idaho case law. The State's interpretation ignores authority detailing a much broader use of such motions to properly define the substantive legal questions and factual disputes that are at issue, and to ensure that further discovery, briefing, and arguments proceed in conformance with the scope of issues that are properly before the court.

Beyond its ineffective procedural arguments, the State also fails to demonstrate that the issues it has raised through discovery on the summary judgment motions regarding the C.J. Strike water rights, the 1923 and 1976 federal contracts for American Falls Reservoir, and the 1934 Federal Power Commission license for the Twin Falls facility, have any relation to interpretation or application of the Swan Falls Agreement – other than being part of the long history of water use and development on the Snake River generally. Consequently, the specific admissions and extensive document production requests sought by the State regarding these matters are not relevant to the issues properly in this consolidated subcase, and the State should be precluded from seeking rulings from the Court in this consolidated subcase regarding the legal effects of these irrelevant actions. The same result should occur regarding the State's apparent desire to litigate issues that the parties settled under the 2006 Stipulation concerning the two recharge water rights held by the State.

With respect to State's attempt to raise the new issues of the effect of the State's "zero flow" at Milner policy, and State legislation concerning administration of water rights above versus below Milner, Idaho Power continues to disagree with the State that the relevance of these issues must be demonstrated through a full briefing of arguments on the merits. Idaho Power has not attempted to undertake such briefing in the one week given it to complete its Reply brief on its Motion to Strike or in Limine, nor is it necessary to do so. Rather, the Court's Consolidation Order defines the issues properly in this consolidated subcase, which must relate to "interpretation or application of the Swan Falls Agreement," and neither the Complaint, the Director's Report, nor Objections or Responses filed by the parties lead to a different result. If such issues were allowed to be newly raised and litigated in this case, Idaho Power would be entitled to notice, sufficient time to develop its own evidence, and the opportunity to take discovery on the new issues. The Court would need to substantially extend the case and trial.

schedule in that event. However, Idaho Power does not believe that this is necessary, since its Motion to Strike or Limine should be granted and the issues in this consolidated subcase limited to interpretation or application of the Swan Falls Agreement.

ARGUMENT

I. BOTH IDAHO POWER'S MOTION TO STRIKE AND ITS MOTION IN LIMINE ARE COGNIZABLE UNDER WELL-ESTABLISHED LAW.

The thrust of the State's Response is that the court has no authority to stop it from substantially broadening the scope of the legal and factual issues in this litigation because a motion to strike may only be brought in response to a "pleading" under I.R.C.P. 12(f). Because the State has never filed an answer, a counterclaim, or any other responsive document that fits the definition of a "pleading" under I.R.C.P. 7(a), the State claims that Idaho Power's motion to strike is not "legally cognizable." Resp. at 4. The State also objects to Idaho Power's alternative motion in limine, arguing that a motion in limine cannot be used to "excise disputed issues" from summary judgment, but rather is appropriate only to determine the "admissibility of evidence in a case." Resp. at 9-10.

The State's efforts to tie the hands of the Court ignores well-established precedent relying upon the inherent power of the court to control the disposition of matters before it. A number of courts in Idaho and elsewhere have granted motions to strike and motions in limine rejecting belatedly-raised legal theories and factual issues.¹

Moreover, the State's claim largely rests upon a hypertechnical reading of I.R.C.P. 12(f). Idaho Power recognizes that under the procedural rules of the SRBA court, a pleading styled as an "answer" normally is not technically required. But surely if the State intended to introduce

¹ This broad authority is highlighted by I.C. § 1-1622, which grants Idaho courts broad latitude to adopt "any suitable process or mode of proceeding." Interpreting an identical statutory provision under the California code, the court of appeal of California has held that "courts have inherent equity, supervisory and administrative powers as well as inherent power to control litigation before them." *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1377 (Cl. App. 1992) (internal citations omitted).

complex legal and factual issues beyond the scope of Idaho Power's Complaint, it should have advanced those issues by means of either an answer or counterclaim. Having elected not to do so, the State should not be allowed to introduce these issues in its Summary Judgment Motion -- and thereby fundamentally change the scope and complexity of this litigation -- over a year after this litigation began. The State would deny Idaho Power its only means of registering its objections with the State's belated and impermissible expansion of issues in this litigation through a narrow and misguided application of Rule 12(f).

A. A Motion to Strike is an Appropriate Procedural Mechanism to Limit the Issues in this Action.

1. The State Misinterprets the *McPheters* and *Tolmie* Decisions.

The State first argues that the Idaho Supreme Court's decision in *McPheters v. Mailè*, 138 Idaho 391, 64 P.3d 317 (2003), clearly provides that Idaho Power's motion to strike is not cognizable. But this decision hardly stands for the black-letter proposition that the State advances. In *McPheters*, the *pro se* appellant appealed the granting of summary judgment against nearly all of his claims, as well as four other motions pertaining to summary judgment the court had either denied or failed to rule upon. *Id.* at 396, 64 P.3d at 322. The Court could not find any evidence in the record of *McPheters*' first three motions -- a "motion to disqualify," a "motion to reconsider denial of a motion to amend complaint," and a "motion to amend complaint" -- and dismissed them. *McPheters* characterized the last motion as a "motion in objection to summary judgment and motion to strike," apparently a combination of a previously-filed "objection to Respondents' motion for summary judgment" and a motion to strike summary judgment already rejected by the lower court. *Id.* Without citing any case law or offering any explanation, the Court stated only that the motion was properly denied because "there is no such cognizable motion." *Id.*

This statement cannot be read, as the State argues, as authority for the broad proposition that a "motion to strike is not cognizable under Idaho law." *See* State Resp. at 4. The *McPheters* court did not state that a "motion to strike" is not a cognizable motion, but only that a "motion in objection to summary judgment and motion to strike" is not. Certainly no rule of civil procedure sanctions, or even mentions, such a motion.

Beyond this obvious distinction, the State's assertion that *McPheters* is "plainly adverse" to Idaho Power vastly overstates the holding because it is simply not clear what the court meant. Apart from the statement that the *McPheters* hybrid motion was properly denied, the court offered no explanation or precedent. Taking the ruling at its face value, as we must, the Court was simply stating the obvious – no rule permits a "motion in objection to summary judgment and motion to strike," and such a motion should therefore be rejected.

Additionally, the State insists that Idaho case law does not support Idaho Power's Motion. In particular, the State claims that *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 862 P.2d 299 (1993), demonstrates "only that a motion to strike is proper as to an affidavit that fails to comply with Rule 56(e)." Resp. at 8.

The State reads this decision too narrowly. While *Tolmie Farms* did concern a motion to strike an affidavit, nothing in that holding can be construed as limiting the use of a motion to strike to that particular purpose. Idaho Power cited the case in its Motion to make clear that motions to strike are not only permissible in the context of a summary judgment proceeding, but in some instances may be necessary in order to bring a particular objection to the attention of the court, lest such objection be waived. As the *Tolmie Farms* court stated:

This Court follows *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Cl.App.1984), where it was held that if noncompliance with Rule 56(e) is not brought to the trial court's attention by proper objection and motion to strike, it is waived.

Tolmie Farms, 124 Idaho at 610, 862 P.2d at 302. The lesson from *Tolmie Farms* is the basic rule that objections not timely raised are waived, and that such objections may properly be raised in a summary judgment proceeding by a motion to strike.

2. Case Law from Other Jurisdictions Supports the Use of a Motion to Strike Here.

Relying upon two federal decisions, the State claims that courts "have consistently rejected attempts to use motions to strike to respond to motions for summary judgment." Resp. at 7. But neither decision supports the State's claim, and the State assiduously ignores several decisions holding to the contrary.

The State points first to *Pilgrim v. Trustees of Tufts College*, 118 F.3d 864 (1st Cir. 1997), where the district court granted the College's motion to strike 18 of 19 documents submitted in support of plaintiff's motion for summary judgment. *Id.* at 868. *Pilgrim* asserted that the motion to strike was untimely, since it was not filed within the 20 days allowed by Rule 12(f). *Id.* In response, the College argued that Rule 12(f) "applies only to pleadings and has no applicability to motions made in pursuit of or in opposition to summary judgment." *Id.* While the State parenthetically quotes this passage in isolation, the *Pilgrim* court actually adopted the defendant's rationale in order to *allow* the motion to strike – which was otherwise filed out of time under Rule 12(f) – and affirmed the trial court's decision with respect to 12 of the 18 documents so challenged. Instead of supporting the State's rigid adherence to Rule 12(f), *Pilgrim* illustrates the discretion that a trial court is afforded in ruling on a motion to strike filed in response to a motion for summary judgment.

The State also cites to a sentence from *Burlington N. & Santa Fe Ry. Corp. v. Dakota Missouri Valley & W. R.R., Inc.*, 347 F. Supp. 2d 708 (D.S.D. 2004) ("*BNSF*"), that "[c]ourts have consistently held that the various papers submitted in support of or in opposition to

summary judgment are not pleadings as contemplated by Rule 12(f)." *Id.* at 727. In making this statement, the *BNSF* court cites to *Int'l Longshoreman's Ass'n Steamship Clerks Local 1624 v. Virginia Int'l Terminals*, 904 F. Supp. 500 (E.D. Va. 1995) ("*Local 1624*"), where plaintiffs filed a motion to strike in response to the employer's summary judgment reply brief and accompanying affidavits. *Id.* at 504. After denying the motion to strike, the *Local 1624* Court stated that its decision on the motion to strike was immaterial, since "[a]s long as a party opposing a motion or filing registers its objections to the movant's materials by way of submitting material in opposition, the Court will implicitly, if not explicitly rule on these objections in deciding the motion." *Id.* On this ground, the court considered and ruled upon the arguments in the motion to strike notwithstanding its rejection of the motion itself. *Id.* at 505.

The flexible and practical approach by trial courts in managing litigation exhibited in the *Pilgrim* and *Local 1624* decisions is evident in numerous cases that the State has ignored. In *Superior Beverage Co. v. Ohio*, 324 F. Supp. 564 (N.D. Ohio 1971), for example, the plaintiff filed an amended motion for summary judgment and defendant responded by filing a motion to strike. The court stated that the motion to strike was technically inappropriate under the express provisions of Rule 12(f), and instead treated it as a motion for summary judgment since matters outside the pleadings had been introduced. *Id.* at 564-65. The court held that "[t]reated as a motion of the Government for summary judgment . . . , the Government's motion to strike the plaintiff's motion for summary judgment will be granted." *Id.* at 567.

The court in *Pigford v. Veneman*, 225 F.R.D. 54 (D.D.C. 2005), took a similarly flexible approach to strike a notice of alleged unprofessional conduct filed against an opposing attorney. Although the court observed that the notice was neither a motion requesting relief from the court nor a "pleading" within the meaning of federal Rule 7(a), the court nevertheless proceeded under Rule 12(f) to strike material in the notice that it deemed to be "scandalous." *Id.* at 58. In doing

so, the court observed that "courts occasionally have applied the Rule to filings other than those enumerated in Rule 7(a)." *Id.* at 58, n.8. Citing its "liberal discretion to strike such filings as it deems appropriate under Rule 12(f)," the *Pigford* court *sua sponte* struck those allegations that it deemed to be "superfluous and inappropriate." *Id.* at 58.

And in *Izzo Golf v. King Par Golf Inc.*, 2008 U.S. Dist. LEXIS 46654 (W.D.N.Y. June 16, 2008), the court granted a motion to strike filed in response to a motion for summary judgment to prohibit the use of certain evidence not timely disclosed. The *Izzo* defendant filed a motion for summary judgment in response to a patent infringement action. Plaintiff patentee responded with a motion to strike references to materials submitted in support of defendant's motion, arguing that defendant had not timely disclosed the materials. *Id.* at *28-29. Defendant argued that the references became relevant only after discovery had closed, when the U.S. Supreme Court issued a decision that altered the law governing the issue of obviousness in patent matters. *Id.* The court held that the intervening decision did not substantially change the law, and granted plaintiff's motion to strike on the grounds that defendant was not otherwise justified in asserting the previously undisclosed materials in support of the legal defense being presented. *Id.*

As these decisions demonstrate, courts have approved of efforts to use motions to strike to respond to motions for summary judgment. Courts have ample flexibility and authority to manage their docket, and have frequently used this authority to strike legal and factual issues presented as part of a summary judgment motion.

3. A Motion to Strike is Appropriate to Limit the Scope of Issues in Litigation.

The State next advances a hodgepodge of claims with respect to Rule 12(f) that are premised upon a misunderstanding of the relief Idaho Power seeks here. The State first points

out that a Rule 12(f) motion to strike "is not intended to address the substance or merits of a claim or defense," and that "a motion to strike may not be used to secure dismissal of a cause of action." Resp. at 11-12. Yet, as stated earlier, the State has not filed a responsive answer in this proceeding and has not otherwise asserted an affirmative defense or filed a counterclaim against Idaho Power. Therefore, there is no "claim or defense" or "cause of action" for Idaho Power to respond to, much less target by the pending Motion. The State's argument in this regard is similar to language used elsewhere in its brief, which characterizes the Idaho Power Motion as "a motion to strike a summary judgment motion." Resp. at 6, 8 (asserting that *Tolmie Farms* does not authorize "a motion to strike a motion for summary judgment"). As is evident on the face of the Idaho Power Motion and in this reply, Idaho Power challenges only the scope of certain issues advanced by the State's Motion, and is not seeking to strike the State's Motion in its entirety.

The State also argues that a motion to strike tests only "the facial adequacy of a pleading, and is not intended to address the substance or merits of a claim or defense." Resp. at 11. Again, Idaho Power's Motion seeks merely to limit the scope of the issues considered on summary judgment. Idaho Power claims only that certain issues recently raised by the State in its summary judgment motion are outside, and unnecessarily expand and complicate, the scope of the litigation. Idaho Power plainly does not seek to resolve the merits of these issues in its Motion.

Finally, the State states that motions to strike are disfavored. But, as set forth in the Motion, the newly-raised issues should be struck as "immaterial" and "impertinent" under Rule 12(f) because they are outside the appropriate scope of this action. Courts have repeatedly held that "immaterial" matters under the Rule are not related to matters raised in the pleadings. *See, e.g., Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2004) (holding that under F.R.C.P.

12(f), "[a]n 'immaterial' matter has no essential or important relationship to the claim for relief or defenses pleaded"); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (same), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). And as the State admits, "impertinent" means "[s]tatements which do not pertain and are not necessary to the issues in question." Resp. at 12. Under these definitions, there should be no dispute that the issues raised for the first time by the State in its summary judgment motion should be stricken as "immaterial" and "impertinent" to the issues properly before this Court.

B. A Motion in Limine is Also an Appropriate Procedural Mechanism to Limit the Issues in this Action.

The State also objects to Idaho Power's alternative Motion in Limine to limit the legal issues and evidence the State presents in support of its summary judgment motion. In its response, the State acknowledges that a trial court is vested with broad discretion in ruling on a motion in limine, but still argues that Idaho Power cannot use a motion in limine to "excise disputed issues from a pending summary judgment motion." Resp. at 4, 9.

The State's argument is misleading, as it suggests that the "disputed issues" are properly before the Court and ripe for resolution on summary judgment. In fact, the issues newly-raised by the State in its summary judgment motion are not properly before the Court, as discussed in Idaho Power's opening brief and further below. A motion in limine is an appropriate mechanism for Idaho Power to raise this concern and to allow the Court to ensure that this subcase is efficiently and fairly litigated.

The State argues that the two Idaho cases cited by Idaho Power in support of its Motion in Limine — *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007) and *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (2004) — do not address whether a motion in limine is appropriate to limit the issues before a court on summary judgment. But the State makes a very narrow and

constrained reading of these cases, which misses the larger purpose of Idaho Power's motion in limine. The State correctly notes that the *Ramos* court found that a motion in limine was an appropriate vehicle to exclude evidence in a summary judgment motion, but claims that this ruling does not sanction the use of a motion in limine to exclude entire issues from a summary judgment motion. Resp. at 9. Nothing in the *Ramos* decision makes this distinction. Just as *Talmie Farms* does not limit the use of a motion to strike solely to strike an affidavit, *Ramos* does not limit the use of a motion in limine only to exclude testimony from a particular witness. And in fact, Idaho Power does seek in its motion in limine, like the Defendants in *Ramos*, to exclude evidence from the proceeding that is irrelevant to and also presumably inadmissible in this consolidated subcase, rather than to exclude entire claims or defenses.

The State's attempt to render *Galloway* inapplicable also fails. The *Galloway* court held that the trial court properly granted a motion in limine to strike a non-cognizable cause of action. *Galloway*, 140 Idaho at 675, 99 P.3d at 628. *Galloway*, therefore, upheld a broader scope of relief than Idaho Power seeks here. Rather than seeking dismissal of a cause of action, Idaho Power's motion in limine attempts only to reaffirm the scope of the "pleadings" in this litigation, a remedy *Galloway* certainly supports.

The State cites to *Kirk v. Ford Motor Co.*, 141 Idaho 697, 701-02, 116 P.3d 27, 31-32 (2005), for the proposition that motions in limine are intended to determine the admissibility of evidence based on an "alleged or anticipated factual scenario," and not to be vehicles for attacking summary judgment motions. Resp. at 10. The *Kirk* court was reviewing a trial court's decision on a motion in limine that sought to preclude the presentation of all evidence related to seatbelt use in a products liability case. The language referenced above was used to highlight that a trial court maintains the option to wait until trial to determine whether evidence should be excluded, as doing so would allow the court to take other evidence into account in making an

informed decision on the admissibility of the evidence at issue. Nothing in *Kirk* limits a motion in limine to only the narrow purpose of determining the admissibility of certain evidence, and, as discussed below, motions in limine serve to limit issues and evidence in any number of ways. Even so, limiting the admissibility of evidence based on "alleged factual scenarios" is precisely what Idaho Power seeks to do in this Motion in Limine – to prevent the State from presenting arguments and evidence in support of "alleged factual scenarios" that fall completely outside of the scope of this proceeding.

Additionally, other Idaho decisions support a trial court's broad discretion to determine the proper scope of the evidence and issues in cases before them and in ruling on motions in limine. *See, e.g., Puckett v. Verska*, 144 Idaho 161, 167, 158 P.3d 937, 943 (2007) (trial court did not abuse discretion in granting motion in limine to limit cross-examination of plaintiff in medical malpractice action to issue of informed consent); *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000) (trial court acted within its discretion in hearing and granting home purchasers' motion in limine on eve of trial to bar vendors from introducing evidence of consequential damages, as vendors were not prejudiced and already aware of the evidence they would present at trial). In fact, one purpose of a motion in limine is to allow a party to seek an advance ruling from the court on the appropriateness of evidence, which also allows parties and the court to avoid spending time addressing irrelevant or inappropriate issues in the case. *See Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003). Other state courts have also noted that a motion in limine serves a variety of purposes, such as shortening trial time, simplifying the issues, and reducing the possibility of a mistrial. *See Goldman v. Healthcare Management Systems, Inc.*, __ F. Supp.2d ___, 2008 WL 2345934 at *1 (W.D. Mich. 2008) (noting that motions in limine serve important gatekeeping functions by allowing the court to eliminate from consideration evidence that would not be admissible for any purpose); *Uptain v. Huntington*

Labs, Inc., 723 P.2d 1322, 1330 (Colo. 1986) (citing *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977)). In submitting its Motion in Limine, Idaho Power simply seeks to eliminate the consideration of evidence and issues that would not be admissible for any purpose. Granting Idaho Power's motion will allow the Court to maintain its discretion in determining the scope of evidence and issues in this subcase.

Finally, the United States Supreme Court has noted that "in limine" means "[o]n or at the threshold; at the very beginning; preliminarily," and that the Court uses the term "in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered" *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (quoting Black's Law Dictionary 708 (5th ed. 1979)). The practice of using in limine motions developed "pursuant to the . . . court's inherent authority to manage the course of trials." *Id.* at 41 n.4.

This is all that Idaho Power seeks here. It has filed its Motion for the sole purpose of excluding anticipated prejudicial evidence that is outside the scope of the pleadings. The case law could not be clearer that courts maintain broad discretion in determining the proper scope of the proceeding, and have the authority to strike improper legal and factual issues in response to either a motion to strike or a motion in limine.

II. THE STATE DOES NOT AND CANNOT DEMONSTRATE THAT ITS C.J. STRIKE, AMERICAN FALLS CONTRACT, AND TWIN FALLS FPC PERMIT ISSUES RELATE TO INTERPRETATION OR APPLICATION OF THE SWAN FALLS AGREEMENT

Conspicuously absent from the State's Response brief is any meaningful explanation of how "interpretation or application of the Swan Falls Agreement" is implicated with respect to several newly raised issues on which Idaho Power has requested guidance from the Court, as well as an order limiting evidence and issues not properly before the Court in this consolidated

subcase through its motion to strike or in limine. These newly raised issues include: (1) a subordination condition in Idaho Power's water rights for the C.J. Strike facility; (2) Idaho Power's rights under the 1923 Contract and 1976 Contracts between Idaho Power and the United States concerning storage in American Falls Reservoir; and (3) the effect of a 1934 Federal Power Commission license for Idaho Power's Twin Falls Power Plant. As discussed in Idaho Power's opening brief, these issues are not properly before the Court in this consolidated subcase since they have no relation to interpretation or application of the Swan Falls Agreement. *See* Idaho Power's Brief in Support of its Motion to Strike or In Limine at 11-18.

First, the State makes no mention concerning the claimed subordination condition in Idaho Power's water rights for the C.J. Strike facility. As Idaho Power explained in its Motion, the water rights for C.J. Strike are simply not among those listed in the Swan Falls Agreement or included in this consolidated subcase, a point the State has not even attempted to rebut. *Id.* at 14-16. Accordingly, the Court should issue an order or guidance providing that issues associated with the C.J. Strike facility are not properly in this consolidated subcase, and that Idaho Power need not respond to discovery requests concerning this facility.

The State also fails to show how the 1923 American Falls Contract and the 1934 Federal Power Commission License for Idaho Power's Twin Falls facility are related to the 1984 Swan Falls Agreement. The State's blanket argument that the Swan Falls Agreement followed historical developments on the Snake River "reaching back to the earliest days of the State" does not make a 1923 federal water storage contract or a 1934 federal hydropower license relevant to interpretation of the settlement reflected in the 1984 Swan Falls Agreement. The State's response brief instead simply weaves these events into its discussion of the general history of water development on the Snake River.

For example, the State tries to backdate its "zero flow" policy to the 1920s by asserting that the policy "had deep roots in the history of the tension" between development of federal reclamation projects above Milner and hydropower facilities below Milner. Resp. at 27-28. Yet the zero flow policy was not included in Idaho's State Water Plan until well over a half century later. Moreover, as demonstrated in the federal court litigation between Idaho Power and the United States, the 1923 Contract between the United States and Idaho Power provides for quantified flow releases – not a "zero flow" – from American Falls Reservoir for use by Idaho Power hydropower facilities downstream of Milner. The State similarly tries to argue that a federal power license at Idaho Power's Twin Falls facility "recognized the[] eventualities" of a zero flow policy, when the State Water Plan referencing such a policy did not even exist. *Id.* at 28. These general historical references certainly do not establish the relevance of these federal actions to the Swan Falls Agreement, which Idaho Power and the State executed more than 60 years later.

Moreover, the State's extensive discovery requests on these irrelevant issues go well beyond such general historical discussion, as the State seeks: (1) admissions and interrogatory responses from Idaho Power regarding the legal effect of specific provisions in the American Falls contracts and the Twin Falls FPC license, (2) essentially every document related to the 1934 Twin Falls FPC license; and (3) virtually every document related the 1923 American Falls Contract, the rebuilding of American Falls Dam during the 1970s, several 1976 American Falls Contracts, and Idaho Power's water rights, water use and contract rights to the storage capacity of American Falls Reservoir. *Id.* at 12.

These discovery requests are improper since they are based on issues that are irrelevant or immaterial to the issues properly in this consolidated subcase. Searching for and compiling all of the documents the State has requested on these irrelevant issues would be a monumental task

significantly delaying resolution of the remaining issue in this case. The Court should not require Idaho Power to respond to these discovery requests on these irrelevant issues, and thus should deny the State's motion to compel as to them. Moreover, the Court should issue an order providing that issues associated with Idaho Power's rights under contracts with the United States for storage at American Falls Reservoir, the 1934 FPC license for the Twin Falls facility, and the C.J. Strike facility are not properly encompassed by the upcoming cross-motions for summary judgment or this consolidated subcase.

III. THE STATE'S SUMMARY JUDGMENT MOTION SEEKING RULINGS THAT IDAHO POWER'S WATER RIGHTS ARE SUBORDINATE TO ALL USES ABOVE OR BELOW MILNER IS BEYOND THE SCOPE OF THE CONSOLIDATION ORDER, PLEADINGS IN THIS CASE, AND THE RECHARGE SUBORDINATION ISSUE

The State argues that the issues presented for resolution in its motion for summary judgment are within the scope of the pleadings and orders in this consolidated subcase. As shown below, the State is wrong that the pleadings and orders in this case enable it to obtain a ruling: (1) on its first ground "[t]hat the water rights at issue in this consolidated subcase are subordinate to *all water rights diverting from sources upstream of Milner Dam*, including ground water recharge rights," and (2) on its second ground that the State "has the right to subordinate ... the water rights held in trust by the State ... *to any water right diverting from sources downstream of Milner Dam* and upstream from the Murphy gauging station, including ground water recharge water rights."² Most notably, the State is wrong with respect to the scope of the order which delineates the issues properly in this consolidated subcase, as opposed to issues which may be resolved elsewhere in the SRBA – the Consolidation Order.

² While Idaho Power does not fully understand the State's second ground for summary judgment, in seeking a ruling that Idaho Power's water rights are subject to subordination to "any water right" downstream of Milner, as opposed to water rights for recharge, this ground clearly extends beyond the issue of subordination to recharge, and thus would be appropriately limited by an order from the Court providing guidance as to the issues properly before it in this consolidated subcase and the upcoming summary judgment motions.

The State agrees that the Consolidation Order provides that this proceeding encompasses "issues pertaining to ownership and/or application of the *Swan Falls Agreement*." Resp. at 21, citing Consolidation Order at 16. Accordingly, the Court and the parties agreed that the next step in this case was to proceed with scheduling, discovery, briefing and resolution of "recharge subordination summary judgment motions." See May 28, 2008 Corrected Order Amending Scheduling Order for Consolidated Subcase 00-92023. By no means can issues concerning subordination to recharge be interpreted as encompassing determinations that Idaho Power subordinated to "all water rights" above or below Milner, as contended by the State. Rather, the proper understanding of the recharge subordination issue is that it encompasses whether Idaho Power's water rights subject to subordination under the *Swan Falls Agreement* are subordinate to use of water for aquifer recharge pursuant to the *Agreement*. The Court should thus issue an order providing guidance so that the parties confine themselves in the upcoming summary judgment proceedings to the issue that was agreed upon and that is within the scope of this consolidated subcase.

The State's arguments concerning language in the Directors reports, and the parties' Objections and Responses, ignores the limitations of the Consolidation Order. It is the Consolidation Order which delineates the issues encompassed by this consolidated subcase, limiting them to "issues pertaining to ownership and/or application of the *Swan Falls Agreement*." Simply put, if an issue is not within this description, it is not properly in this consolidated subcase. To the extent that Directors Reports or pleadings concerning water rights for which issues of ownership and application of the *Swan Falls Agreement* are included in this case also include other unrelated provisions, those provisions are not automatically encompassed within the consolidated subcase.

Thus, the simple fact that the Directors reports for Basin 2 claims whose Swan Falls issues are included in this case may recite various "Other Provisions" does not mean that interpretation of such provisions are automatically in this case, as the State suggests. So inclusion in certain Directors reports of an "Other Provision" providing that "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" for purposes of administration, and that "[t]he required minimum daily flows at the Milner gauging station shall remain as zero CFS for purposes of administration," does not by itself mean that these state legislative and policy pronouncements relate to interpretation or application of the Swan Falls Agreement.

Nor do Idaho Power's Objections claiming that the Director's proposed "Other Provisions Necessary for Definition or Administration of this Water Right should not be included in this decree," or State Responses checking boxes on such objections, mean that Idaho Power has somehow put all "Other Provisions" listed by the Director at issue in this case concerning application of the Swan Falls Agreement – regardless of whether the Other Provisions in fact relate to application of the Agreement. Indeed, Idaho Power's objections to a number of the Other Provisions, including the provision regarding administration of water rights above versus below Milner and the State's "zero flow" policy, were made for the very reason that they do not concern application of the Swan Falls Agreement.³

Moreover, the fact that this requirement is by virtue of a legislative amendment suggests that some further legislative modification occur in the future. The SRBA Decree, by contrast, is

³ As a further example, the Directors reports concerning the Basin 2 water rights in this consolidated subcase also state the Director's opinion that the 1923 Contract between Idaho Power and the United States also limited Idaho Power's water rights. However, this does not mean that issues concerning the 1923 Contract relate to ownership or application of the Swan Falls Agreement, and should thus be included in this consolidated subcase. Instead, issues concerning the 1923 Contract are being dealt with in other SRBA subcase proceedings in Basin 1 encompassing rights in American Falls Reservoir and in federal court litigation between Idaho Power and the United States.

a permanent decree which must memorialize judicial pronouncements which will endure over time and are not subject to modification by legislative vote. Given its applicability to all water rights, as opposed to only water rights subject to subordination under the Swan Falls Agreement, the issue of whether the above-below Milner administration statute should be included in the SRBA Decree as may well be suitable for designation as a separate Basin-wide issue.⁴ However, it is not specific to application of the Swan Falls Agreement, and consequently is not properly included in this case under the Court's Consolidation Order.

The State also incorrectly argues that Idaho Power's Complaint raised the issue of "two sources" or "two rivers" administration above versus below Milner. While the State attempts to diminish the legal significance of the Complaint initiating this consolidated subcase by elevating SRBA Director's Reports and SRBA form Objections and Responses to higher procedural status, under Idaho law all of these pleadings are cognizable and significant. The State ignores the Court's ruling early on in this case rejecting the State's request that the Court dismiss the Complaint as an "unauthorized" pleading, even as it found that no special proceeding was necessary on the Complaint enabling it to be considered along with Objections and Responses in the SRBA. *See* Consolidation Order at 9. Administrative Order No. 1, Sec. 2.r, describes "pleadings" as including "[a]ll documents defined as pleadings by the I.R.C.P." Pursuant to I.R.C.P. 7(a), pleadings include complaints, answers and counterclaims. Despite the fact that the Court did not dismiss Idaho Power's Complaint, the State has never filed an Answer or a Counterclaim. If the State seeks to include new issues or claims in this case, it must file an appropriate pleading providing Idaho Power and other parties with adequate notice. Otherwise,

⁴ Idaho Power reserves the right to move for designation of this or other Basin-wide issues at the appropriate time pursuant to its rights as a party to the SRBA.

Idaho Power is significantly prejudiced by the State's inclusion of such far reaching issues in this case.

The Complaint does not seek a "global declaration" as to recharge subordination, as suggested by the State, but even if it did, the scope of this consolidated subcase is now governed by the Court's Consolidation Order consolidating the separate subcases for resolution of issues of ownership and/or application of the Swan Falls Agreement. While the State had wanted to confine this litigation to only the question of ownership, the Complaint broadened the issues to include other issues concerning application of the Swan Falls Agreement. In seeking a declaration that Idaho Power's water rights are not subordinate to recharge "through the Swan Falls Agreement or otherwise," Idaho Power did not intend to expand this case to issues outside of application of the Swan Falls Agreement, but merely intended to preserve the opportunity to argue that the intent of the parties to the Swan Falls Agreement must be interpreted in accordance with the law existing at the time of the Agreement. This is important because Attorney General Opinion 06-2 erroneously opines that the existing law, which included state statutes making recharge uses secondary to vested rights for hydropower uses, can be "trumped" by the State holding legal title to the water rights held in trust. State law in existence when the parties executed the Swan Falls Agreement provides otherwise.

In any event, the State is wrong in concluding that even if its summary judgment motion extends beyond issues application of the Swan Falls Agreement as limited by the Consolidation Order, the State can raise whatever issues it chooses under an expansive view of Idaho Power's Complaint. The Court can, and has, exercised its authority to consolidate subcases based on issues which it deems appropriate. In this consolidated subcase, the Court has ruled in its Consolidation Order that issues must pertain to "ownership and/or application of the Swan Falls Agreement." The issues raised by the State concerning administration of water rights above

versus below Milner, under state legislation which relates not to the Swan Falls water rights but to all water rights on the Snake River, like the State's pre-existing "zero flow" policy, does not fit within that category and thus is not properly in this consolidated subcase. The "recharge subordination" issue properly before the Court is whether Idaho Power subordinated its water rights to recharge under the Swan Falls Agreement.

VI. THE PARTIES RESOLVED SUBORDINATION OF THE TWO RECHARGE PERMITS NOW HELD BY THE STATE VIA STIPULATION RATHER THAN THROUGH LITIGATION AS NOW SOUGHT BY THE STATE

The State's argument concerning the two recharge permits it now holds is characterized by numerous inconsistencies between what the State said previously and what it is saying now. For example, the State's third issue in its summary judgment motion on its face seeks a ruling "[t]hat the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, *as finally licensed*." (Emphasis added). Upon Idaho Power demonstrating in its Motion to Strike or in Limine that these water rights in fact are not licensed, and will not be at least until proof of beneficial use is submitted in June 2009, the State backtracks and now says that it "does not seek to determine the terms of the licenses." Resp. at 49. Yet that is exactly what the State seeks to do, as the language of its motion makes clear.

Any pronouncement regarding subordination of the two ground water permits "as finally licensed" would be an impermissible advisory opinion on a non-justiciable question, as discussed in Idaho Power's opening brief. See Motion to Strike or in Limine at 16-17. Moreover, the State's position that it should be able to litigate the terms of this unlicensed water right runs squarely counter to the Court's ruling and the State's position regarding ripeness and exhaustion in the Milner permit case. As the Court observed in its capacity as district court judge for Jerome County in *North Side Canal Co. v. Tuthill*, Case No. CV 2007-1093, concerning an

unlicensed permit for hydropower generation at Milner, *the Director and IDWR argued*, and the Court found, that the Canal Companies must wait until the license is issued and then pursue administrative remedies before seeking judicial relief. See Exhibit 1 hereto, Order Granting Motion to Dismiss Petition for Writ of Mandate at 5, 13. Similarly, the State cannot obtain immediate judicial relief regarding the license terms of the unlicensed recharge permits that it holds.

The State, in its apparent desire to litigate these issues evident from its response brief, also appears to be retreating from earlier commitments made under the 2006 Stipulation signed by Idaho Power and the Idaho Attorney General. Under that Stipulation, the parties agreed to resolve the question of subordination of the two recharge rights through the agreement embodied in that Stipulation in order to avoid litigation. Now, the State apparently seeks to resolve the issue of subordination of these two recharge permits through litigation, or to obtain some advantage by pressing to litigate a matter which the parties agreed to through compromise negotiations. Thus, it is not surprising that Idaho Power would not admit earlier in this case, as the State observes, that it subordinated its water rights to the two recharge permits "pursuant to the terms of the Swan Falls Agreement," but rather responded by referring to the terms of the 2006 Stipulation which represents the parties' negotiated agreement on the issue.

In any event, the State can obtain no advantage on the question of whether the Swan Falls Agreement made Idaho Power's water rights subject to subordination to future water rights for recharge. Idaho Power signed the Stipulation stating that the two recharge permits are subject to the Swan Falls Agreement because the original holders of those existing permits were among those parties dismissed from Ada County Case No. 81375 (the "7500 Case"). The Complaint in this case does not put such existing uses at issue. As recited in Paragraph 25 of the Complaint, Idaho Power subordinated the water rights subject to the Swan Falls Agreement to the uses of

those persons dismissed from Ada County Case No. 81375, and "does not challenge here this subordination to existing uses set forth more fully in Paragraphs 7(C) and 7(D) of the Agreement, the 1180 Contract, or the consent judgment in Case No. 81375."

Similarly, the Director's reports for the water rights at issue simply contain a recital of the Agreement's subordination to specified existing uses. It is ludicrous for the State to now suggest that the inclusion of these recitals in the Complaint and the Director's reports somehow put the subordination to such existing uses at issue in this case, or replaced the terms of the 2006 Stipulation resolving the subordination issue as a matter of compromise. Idaho Power intends to adhere to the terms of the 2006 Stipulation under which the parties agreed to a negotiated resolution regarding subordination of the State's two recharge water rights, and is hopeful that the State will do the same rather than proceeding to litigate what the parties previously negotiated. Accordingly, the Court should strike or limit the State's third ground for summary judgment concerning the two recharge permits whose subordination was resolved by Stipulation.

V. DISCOVERY ISSUES

The State also challenges Idaho Power's objection to the scope of the State's discovery requests. *See Resp.*, Section IV. The State contends that the issues on which the State has sought discovery "are entirely germane to the State's theory of the recharge issue." *Id.* at 52. The State's articulated theories, however, are not limited to the issue of recharge subordination. For the reasons discussed above, and in Idaho Power's Response in Opposition to the State's Motion to Compel, information and documents related to the issues raised in Idaho Power's Motion to Strike are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this action. Similarly, the State contends it is trying to anticipate Idaho Power's cross-motion for summary judgment. As Idaho Power has argued at length, however, the issues raised by the State are beyond the scope of the current litigation. The State has no

basis or authority to propound speculative discovery requests in anticipation of a motion that has not yet been filed.

The State further maintains that Idaho Power should have filed a motion pursuant to I.R.C.P. 56(f) if it needs additional discovery on the issues raised in the State's Motion for Summary Judgment. Resp. at 52-54. The State's argument that Idaho Power can allow summary judgment briefing to proceed given the parties' sharp disagreement about the issues properly before the Court, and then simply file a Rule 56(f) motion – arguing after the fact what issues are in this case and properly subject to summary judgment briefing, and further justifying why additional discovery may be needed – is disingenuous. Idaho Power followed, and the State ignored, the Court's express direction and reliance on the parties' "representations that the discovery would be limited to the recharge issue." See Transcript from May 20, 2008 Status and Scheduling Conference, at p. 1, lines 21-22 (attached as Ex. 1 to Motion to Strike or in Limine). The State included a limited number of discovery requests relating to the recharge subordination issues, and Idaho Power has responded to those requests. However, the State also included numerous requests having nothing to do with recharge, the Swan Falls Agreement, or the water rights at issue in this consolidated subcase. See Idaho Power Motion to Strike or in Limine at 7 n. 4; 12-13 n. 8 & 9; 14-15 n. 10.

If the State is allowed to include in the summary judgment proceedings the expansive issues it has not pled in this case, Idaho Power, aside from needing substantial time to locate, review and produce non-Swan Falls Agreement documents, will need to undertake extensive discovery on these issues as well. The result will inevitably be that the time necessary for such discovery, as well as factual disputes likely on the expanded issues, will require substantial modification of the case and trial schedule. However, Idaho Power believes that this case may proceed under a time frame similar to the original schedule if the Court grants the Motion to

Strike or in Limine, or otherwise provides guidance that the issue subject to the upcoming cross-motions for summary judgment is whether the Swan Falls Agreement made Idaho Power's water rights subject to subordination to use of water for recharge.

Moreover, the State's argument regarding Rule 56(f) misses the point of Idaho Power's Motion to Strike or in Limine. As the State itself points out, Rule 56(f) motions are appropriate in response to a motion for summary judgment. In its Motion to Strike or in Limine, Idaho Power is not, as the State implies, asking the Court for time to take additional discovery on the issues in question, but rather is asking the Court to limit summary judgment only to the issue of recharge subordination so that no further discovery will be necessary. Idaho Power raised the scheduling issue only to demonstrate to the Court that if the Court allowed the State to expand the case substantially to add the new issues related to administration of the Snake River at Milner, the American Falls, Twin Falls, and C.J. Strike facilities, and the two recharge permits, the discovery and trial schedule in this case would be substantially delayed. Should the Court deny Idaho Power's Motion to Strike or in Limine, Idaho Power will need to determine whether a Rule 56(f) Motion is warranted after the State files its new motion for summary judgment.

CONCLUSION

For all of the reasons above and those set forth in Idaho Power's Motion to Strike or in Limine, the Court should grant the Motion. The Court should issue an order providing guidance or confirming that the issue properly before the Court in the upcoming summary judgment motions is whether Idaho Power subordinated, under the Swan Falls Agreement, its hydropower water rights which are subject to subordination under the Agreement to the use of water for aquifer recharge.

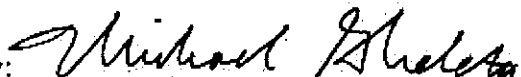
Respectfully submitted,

Dated this 28th day of July, 2008 IDAHO POWER COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S REPLY TO STATE'S RESPONSE TO IDAHO POWER MOTION TO STRIKE, OR ALTERNATIVELY, MOTION IN LIMINE RE: SCOPE OF STATE MOTION FOR SUMMARY JUDGMENT** via the method indicated below, and addressed to each of the following:

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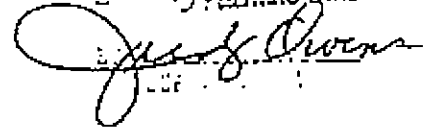
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DEPARTMENT OF
WATER RESOURCES

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Michelle Emerson



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

NORTH SIDE CANAL COMPANY and)
TWIN FALLS CANAL COMPANY,)

Petitioners,)

vs.)

Case No.: CV 2007-1093

David R. Tuthill, Jr., in his official)
Capacity as Director of the Idaho)
Department of Water Resources, and)
THE IDAHO DEPARTMENT OF)
WATER RESOURCES,)

Respondents.)

ORDER GRANTING MOTION TO
DISMISS PETITION FOR WRIT OF
MANDATE

I. PROCEDURAL HISTORY

On September 26, 2007, the North Side Canal Company and Twin Falls Canal Company (collectively as "Petitioners"), through counsel of record Barker Rosholt & Simpson LLP, filed a *Petition for Peremptory Writ of Mandate* ("Petition") petitioning the Court to issue a writ of mandate compelling the Idaho Department of Water Resources ("IDWR" or "Department") and its Director David R. Tuthill Jr. (collectively as "Respondents") to void the Director's September 5, 2007, Order; to close any protest or comment period; and to issue a license to the Petitioners in accordance with Respondents' statutory duties as defined by Idaho Code § 42-219. Also on September 26, 2007, the Petitioners filed an *Application for Alternative Writ of Mandate*.

On the same date, the Honorable John K. Butler filed an *Order of Disqualification*. The case was assigned to the undersigned judge on October 1, 2007, in his capacity as District Judge for the Fifth Judicial District and not in his capacity as Presiding Judge of the Snake River Basin Adjudication.

On October 10, 2007, this Court issued an *Order Denying Petition for Alternative Writ of Mandate*.

On November 6, 2007, the Respondent's filed a *Motion to Dismiss* pursuant to I.R.C.P. 12(b)(1) and (6), together with a *Memorandum and Affidavit in Support*.

On December 14, 2007, the Petitioners filed a *Response to Respondents' Motion to Dismiss*.

A hearing was held on the *Motion to Dismiss* on December 21, 2007. At the conclusion of the hearing, the Court took the matter under advisement. Also on December 21, 2007, the Respondents filed an *Answer*. Following the hearing, the Court received an *Amicus Brief*, together with a supporting affidavit, filed on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevieu Canal Company, Producers Canal Company, Fremont-Madison Irrigation District and Eastern Idaho Water Rights Coalition (collectively as "Amici").

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on December 21, 2007. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or December 24, 2007.

III. FACTS

On March 30, 1977, the Petitioners filed an *Application for Permit* with IDWR to appropriate water from the Snake River for year-round hydropower production at the Milner power plant at a rate of diversion up to 12,000 cfs. Notice was published in accordance with

Idaho Code § 42-201. As no protests were filed a permit was issued to the Petitioners on June 29, 1977 ("Milner Permit").

The deadline for filing proof of beneficial use under the permit was originally June 1, 1982. As a result of delays, the Petitioners sought and received deadline extensions in 1982, 1987, 1990, and 1992. Prior to seeking an extension of the 1987 deadline, the Swan Falls Agreement was executed and the Legislature passed Idaho Code § 42-203B, which among other things authorized IDWR to subordinate hydropower rights to future upstream consumptive uses. As a result, in 1987 when the Petitioners sought the second extension, the Chief of Operations Bureau for IDWR, L. Glen Saxton, notified the Petitioners that the granting of the extension would be conditioned on the Petitioners acceptance of the following subordination provision:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

Attachment G to Petition.

In a letter dated May 8, 1987, counsel for Petitioners raised the following concern with the proposed condition:

At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with the return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

Attachment H to Petition. Counsel for Petitioners then proposed the following amendments to the condition:

The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the

consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho initiated late-in-time than the priority of this permit.

Id. (emphasis added).

In a letter dated November 18, 1987, the Respondents notified the Petitioners that they would use the amended language proposed by counsel for Petitioners as a condition of approval on the extension request. This is the condition that appears in the Milner Permit.

On October 29, 1993, the Petitioners submitted proof of beneficial use for 5,714.7 cfs, of the 12,000 cfs for which application was originally made. Since that time the Petitioners have relied on the Milner Permit and have been beneficially using water under the permit.

In 2006 and the spring of 2007, the Petitioners verbally requested that the Respondents issue a license for the Milner Permit. On September 5, 2007, in response to the Petitioners' request, the Respondents issued a *Notice of Intent to Issue License*. Attachment P to *Petition*. The *Notice of Intent* set forth the background and status of the Milner Permit and then provided, in relevant part:

Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for Permit Holders have orally requested that the Respondent issue a license for the water right.

The Department received written requests for notice of an opportunity to be heard on the form of the subordination condition to be included in the license for Water Right No. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Montevlew Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden Kidwell, Hahn & Crapo, P.L.L.C.

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011. Any Comments submitted should be addressed to Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098 and received by the Department or post marked on or before October 10, 2007.

In response, the Petitioners initiated this action seeking a writ of mandate to compel the Respondents to issue a license for the Milner Permit in accordance with Idaho Code 42-219 and to prohibit the actions the Respondents were taking as provided by the September 5, 2007, *Notice of Intent to Issue License*. The Petitioners did not submit written comments to IDWR as provided by the *Notice* nor did they request a hearing before the Director.

IV. DISCUSSION

A. Arguments

The Respondents have now moved to dismiss the Petition alleging that the Petitioners have failed to exhaust available administrative remedies. The Respondents argue that Petitioners must wait until the license is issued and then pursue these remedies through the administrative process and the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq.*

The Petitioners argue that there are no more administrative remedies available because Idaho Code § 42-219 requires that the Petitioners perform the ministerial function of issuing the license after proof of beneficial use has been submitted. The Petitioners argue that Respondents are acting outside the scope of their authority by reopening the administrative record to comments after the protest period has closed, the permit issued, diversion works completed, and beneficial use proven. The Petitioners argue that the considerable investment in the diversion (hydropower) project was made in reliance on the issuance of the permit and the conditions ultimately negotiated and agreed upon. By permitting the record to be reopened to comments at this stage allows for protests to cloud an administrative record that was previously free of protests when the *Application for Permit* was approved and the diversion works completed in reliance on said approval.

B. Standards of Review

1. Motion to Dismiss, LR.C.P 12(b)(1) and (6).

The Respondents' *Motion to Dismiss* is brought pursuant to I.R.C.P. 12(b)(1) "lack of jurisdiction over subject matter" and I.R.C.P. 12(b)(6) "failure to state a claim upon which relief can be granted." The failure to exhaust administrative remedies can implicate subject matter jurisdiction because a "district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (citing *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)). The failure to exhaust administrative remedies can also be brought under I.R.C.P. 12(b)(1). *Id.* If a claimant fails to exhaust administrative remedies, then dismissal of the claim is warranted. *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (string citations omitted). On a motion to dismiss, "the Court looks only at the pleadings and all inferences are viewed in favor of the non-moving party." *Id.* at 133, 106 P.2d at 459 (citing *Young v. City of Ketchum*, 137 Idaho 102, 1094, 44 P.3d 1157, 1159 (2002)).

The Idaho Administrative Procedures Act provides that "[a] person is not entitled to judicial review of an agency decision until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). However, "[a] preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not permit an adequate remedy." I.C. § 67-5271(2). There are two recognized exceptions to the exhaustion requirement: (1) When the interests of justice so require and (2) when an agency has acted outside its authority. *American Falls Reservoir Dist #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (March 15, 2007). In *American Falls Reservoir Dist #2*, the Idaho Supreme Court recently held:

Important policy considerations underlie the requirement for exhaustion of administrative procedures, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to 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 (citing *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003)).

2. Writ of Mandate.

Idaho Code § 7-302 provides that a writ of mandate "may be issued . . . to compel the performance of an act which the law especially enjoins as a duty resulting from the office, trust or station" Idaho Code § 7-303 provides that the "writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." In *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 794 P.2d 632 (1990), the Idaho Supreme Court stated "[m]andamus will lie if the officer against whom the suit is brought has a 'clear legal duty to perform the desired act and if the act sought to be compelled is ministerial or executive in nature.'" *Id.* at 44, 794 P.2d 633 (quoting *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985)). A ministerial act is:

That which is done under the authority of a superior, opposed to *judicial*. That which involves obedience to instructions, but demands no special discretion, judgment or skill. Official's duty is 'ministerial' when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

Ausman v. State, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993).

Further, the "[e]xistence of an adequate remedy in the ordinary course of law, whether legal or equitable in nature will prevent issuance of a writ . . . and the party seeking the writ must prove that such remedy exists. . . . [M]andamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. *Id.* (citations omitted).

3. Discretion of Court.

A court acts within its discretion when it: 1) correctly perceives the issue as one of discretion; 2) acts within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) reaches its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993 1000 (1991).

C. Analysis

1. The Petitioners have failed to exhaust all available administrative remedies.

The Court holds that the Petitioners may not use a writ of mandate as a substitute for following the grievance process set forth in Idaho Code § 42-219(8) and Idaho Code § 42-1701A(3). Idaho Code §§ 42-219(8) and 42-1701A(3) set forth the administrative procedure for contesting IDWR's action with respect to issuing a license or failing to issue a license based on a permit. Idaho Code § 42-219(8) states:

In the event that the department shall find applicant has not fully complied with the law and the conditions of the permit, it may issue a license for a portion of the use which is in accordance with the permit, may refuse issuance of the license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail.

I.C. § 42-219(8). The statute then provides: "The applicant may contest such action by the department pursuant to section 42-1701A." *Id.*

Idaho Code § 42-1701A(3) provides:

Unless the right to a hearing before the director or the water resources board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director within fifteen (15) days after receipt of written notice . . . a written petition stating the grounds for contesting the action by the director and requesting a hearing.

I.C. § 42-1701A(3). Idaho Code § 42-1701A(4) then provides:

Any person who is aggrieved by a final decision or order of the director is enabled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in Chapter 52, title 67, Idaho Code.

The Petitioners filed proof of beneficial use on October 29, 1993. On July 27, 2006, Director Dreher indicated in a letter that "the issuance of a license for the water right is pending." Petitioners then verbally requested that Respondents issue a license in 2006 and again in 2007. In response Director Tutbill, who succeeded Director Dreher issued the *Notice of Intent to Issue*

License. The *Notice* referred to the communications received from other water users regarding the subordination provision and stated that the Department would receive comments on the issuance of the license on or before October 10, 2007. The *Notice* did not reopen a protest period nor did it give those submitting comments party status. The Petitioners did not respond to the *Notice*, nor otherwise object to the Director's reopening of the record to comments, nor did they ask for a hearing before the Director on the issue. The Petitioners also could have waited until the license was issued and then request a hearing. The Petitioners argue that continuing with the administrative process will result in the administrative record becoming improperly clouded with additional facts after the protest period has already closed resulting in prejudice and ultimately precluding any adequate remedy. The Petitioners also argue that after the beneficial use examination for the permit the issuance of the license is ministerial and because IDWR is acting outside the scope of its authority all administrative remedies have been exhausted. This Court disagrees.

The Petitioners had the opportunity to raise with the Director the issue of receiving comments by submitting their own comment or by specifically requesting a hearing on the alleged irregularities in the process in accordance with Idaho Code § 42-1701A(3). The Petitioners also still have the opportunity to raise and be heard on the issue once the license is issued. Ultimately, if the Director issues the license according to the subordination condition now included in the permit, the Petitioners have no grievance. If the Director modifies the condition the petitioners can raise the issue with Director and ultimately seek judicial review in accordance with Idaho Code § 42-1701A(4). Because the issue of whether the Director can appropriately consider additional comments after the beneficial use examination presents a threshold question of law a reviewing Court would not be bound by the Director's determination on this issue as would be the case with the Director's factual determinations. Were it ultimately determined that the Director could not appropriately consider the comments there would be no prejudice to the Petitioners as the comments would be excluded from consideration. Accordingly, the Court finds no prejudice to the petitioners by continuing with the administrative process and exhausting their administrative remedies.

2. The issuance of the license following the beneficial use examination is not a ministerial duty.

The Petitioners raise the argument that following the proof of beneficial use examination the issuance of the license is simply a ministerial act. Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with "carefully examining the same, *and if the department is satisfied that the law has been fully complied with . . .* the department shall issue . . . a license confirming such use." I.C. § 42-219(1)(emphasis added). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit "it *may* issue a license for that portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit." I.C. § 42-219(8) (emphasis added). Because IDWR has some level of "discretion" in conjunction with making the compliance determination prior to issuing the license the duty of issuing the license is not a simple ministerial act. At this stage, IDWR has not made such a determination with respect to the form of the subordination language that should be included in the license despite the November 18, 1987, agreement between the Petitioner and IDWR. Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

In *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964), the state engineer approved the applicant's permit application. Eighteen months later the applicant completed the diversion works and submitted proof of completion. The applicant then sought to file proof of application of water to beneficial use. In the meantime, the state engineer received protests regarding the issuance of the license for the water right. As a result, the state engineer issued an order denying the proof submitted by the applicant and cancelled the permit on the basis that there was no available water for appropriation. *Id.* at 182, 397 P.2d at 764. The action of the state engineer was upheld by the Idaho Supreme Court. *Id.* at 187, 397 P.2d at 769.

A similar issue also arose in the context of the SRBA. In *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge (Subcase 36-08099, River Grove Farms)* (Jan 11, 2009)(*River Grove Farms*), an applicant filed a permit application for a hydropower right in 1982. The permit application was approved in 1983. The permit did not include a subordination remark for hydropower.

Construction of the diversion works, the application of the water to beneficial use and the beneficial use examination were completed in 1985. The applicant received a letter from IDWR indicating that the licensing examination had been completed but that it would be awhile before the license was issued because of the pending Swan Falls dispute. Approximately six years elapsed before the license was ultimately issued in 1992. In the meantime the Idaho legislature enacted Idaho Code § 42-203B (6) authorizing IDWR to subordinate hydropower rights to future upstream consumptive uses. When the license was issued it included a subordination remark. The applicant failed to contest the inclusion of the remark after the license was issued but objected to the remark in the SRBA proceedings. One of the many arguments raised was that the water right vested at the time the water was applied to beneficial use and not upon the issuance of the license. Therefore I.C. § 42-203B (6) could not be retroactively applied to diminish the scope of the vested hydropower right. In essence the issuance of the license is more of a formality.

The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. The Court relied on the holding in *Canthin v. Carter*, the statutory scheme itself and various other cases holding that a water right is inchoate until the license is issued.¹ Judge Wood ruled:

River Grove's assertion that a water right vests upon application to beneficial use, and not upon the issuance of the license by IDWR, may well be a correct statement of the law as to water rights made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of the cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that water right was acquired solely under the permit system . . . [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.

¹ The following cases were cited for the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Alford*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate right, not a complete appropriation).

...
 In 1971 the legislature amended I.C. §§ 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as the source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f) the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id.* Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, IDWR may refuse to issue the license. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . ." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- including issuance of the license -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

River Grove Farms at 24-25. Although the decision was never appealed from, this Court finds it to be on point and persuasive.

This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license the statute does not provide for a time limit.

3. Mandamus is not an appropriate remedy.

Having determined that the act of issuing the license is not a ministerial act and having determined that the Petitioner's still have administrative remedies available in the ordinary course of law, this Court in the exercise of its discretion concludes that mandamus is not an appropriate remedy.

D. Conclusion.

The Court holds that Petitioners have failed to exhaust their available administrative remedies. For the reasons previously discussed the Petitioners are not giving up any rights by waiting until IDWR issues a license and then if necessary requesting a hearing before the Director and seeking judicial review. Aside from the issue of clouding the record with additional facts, which this Court addressed, the Petitioner's concern is further delay in the issuance of the license. Counsel for the Respondents stated that the license would have been issued by now but for this intervening action. Ultimately, depending on the form of the subordination remark included in the license further proceedings may not be necessary. Recent experience has shown that by issuing a writ at this stage significant delay would result while the parties litigated the propriety of the writ. For the above-stated reasons the Respondent's *Motion to Dismiss* is granted.

V. ORDER ON AMICUS PARTICIPATION

The decision on whether to limit participation to amicus curiae is discretionary with the trial court. *State v. United States (In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge)*, 134 Idaho 106, 111, 996 P.2d 806 (2000); 4 Am. Jur. 2d *Amicus Curiae* § 8. The principle role of amicus curiae is to aid the court on questions of law. 4 Am. Jur. 2d at § 6. Among other things, a court may evaluate whether the proffered information is timely, useful, or otherwise necessary to the administration of justice. Additionally, a court should look to whether the parties to the lawsuit will adequately present all relevant legal arguments. *Id.* § 8.

In the instant case, the Court's decision turns on a question of law. The Amicus brief does not raise any new issues. The legal issue has broader reaching application than just the instant case. In cases such as this a certain degree of liberality in allowing a brief to be filed is

warranted. While the Court has some concerns regarding the timeliness of the brief, on balance the Court grants the amicus participation and has considered the brief.

IT IS SO ORDERED

DATED: January 25, 2008


John M. Melanson
District Judge

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 28 day of May, 2008 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid in the following persons.

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CERTIFICATE OF MAILING/DELIVERY