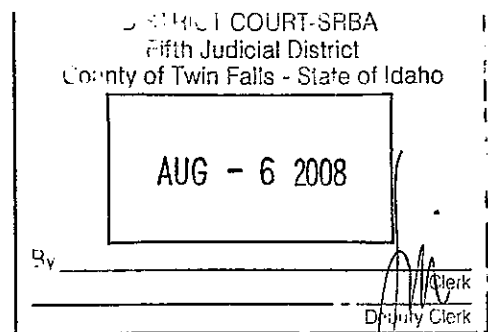




**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA) **Subcase No. 00-92023**
)
Case No. 39576) **ORDER DENYING IDAHO POWER'S**
) **MOTION TO STRIKE/IN LIMINE AND**
) **GRANTING STATE OF IDAHO'S**
) **MOTION TO COMPEL**
)
)
)

PROCEDURAL BACKGROUND

This matter came before the Court pursuant to *Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment* filed on June 30, 2008, and the State of Idaho's *Motion to Compel Discovery* filed July 21, 2008. Oral argument on both *Motions* was held July 29, 2008.

On May 7, 2008, the State of Idaho filed *State of Idaho's Motion for Summary Judgment on Subordination to Ground Water Recharge* on the following issues:

1. That the water rights at issue in this consolidated subcase are subordinate to all water rights diverting from sources upstream from Milner Dam, including ground water recharge water rights;
2. That the State of Idaho has the right to subordinate, to the extent authorized by state law, the water rights held in trust by the State under Idaho Code § 42-203B to any water right diverting from sources downstream from Milner Dam and upstream from the Murphy gauging station, including ground water recharge water rights; and
3. That 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.

**ORDER DENYING IDAHO POWER'S MOTION TO STRIKE/IN LIMINE AND GRANTING
STATE OF IDAHO'S MOTION TO COMPEL**

Thereafter on May 30, 2008, the State served *State of Idaho's Third Set of Discovery Requests to Idaho Power Company*. As a result, Idaho Power filed the *Motion to Strike, or Alternatively, Motion in Limine* asserting that that the issues raised by the State in the *Motion for Summary Judgment* and the discovery request extend beyond the scope of this consolidated subcase and the issue of whether the rights that are subject to the Swan Falls Agreement are subordinate to recharge. Specifically, Idaho Power asserts that the following issues are beyond the scope of this consolidated subcase:

- The State's administration of the Snake River as a separate source above versus below Milner – a matter of State policy and water rights administration.
- The nature and enforcement of Idaho Power's rights under a 1923 Contract and 1976 Contracts between Idaho Power and the United States concerning American Falls Power Plant.
- The effect of a subordination condition in Idaho Power's water rights for its C. J. Strike facility, when this facility and these water rights are not among those listed in the Swan Falls Agreement or included in this consolidated subcase.
- The terms of subordination of Idaho Power's water rights to two specific water rights for ground water recharge, which have yet to be licensed, and which the parties agreed not to litigate pursuant to a 2006 Stipulation between the State and Idaho Power.

The State of Idaho filed the *Motion to Compel* in response.

DISCUSSION AND ORDER

The State of Idaho argues that Idaho Power's *Motion to Strike/In Limine* and reliance on I.R.C.P. 12(f) is not a legally cognizable motion in response to a motion for

summary judgment and/or request for discovery and cites the case of *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003).

The Court declines to decide this matter on procedural grounds. In the context of the SRBA, the Court can envision a circumstance where such a motion to strike and/or in limine may be appropriate. The SRBA has over 100,000 parties and over 150,000 claims. The SRBA Court procedures recognize this as complex multi-party litigation with thousands of claims to water. Thus, the SRBA has its own set of procedural rules and issues are routinely separated and consolidated for purposes of judicial economy.

SRBA Administrative Order 1 § 11. The circumstance could arise where the issues raised on summary judgment and/or through discovery requests exceed the scope of the narrow focus of the consolidated subcase. The Idaho Supreme Court has acknowledged that established rules of procedure do not always fit water right adjudications. *State of Idaho v. United States*, 128 Idaho 246, 254, 912 P.2d 614, 622 (1995) (“Court has long accepted that water right adjudications present unique circumstances, often requiring a departure from established rules of procedure”). The converse is that the Court does not want to be put in the position of addressing and having to decide the substantive merits of a motion for summary judgment or the merits of a particular legal theory in the context of a motion to strike or motion in limine in order to determine whether the issues raised are outside the scope of the consolidated subcase. For example, Idaho Power’s arguments in opposition to the third issue raised by the State of Idaho regarding permit nos. 01-7054 and 37-7842 should be addressed in the context of the summary judgment proceedings and not through a motion to strike.

In addressing the issues raised by Idaho Power on substantive grounds, the Court finds that the issues raised by the State of Idaho in its motion for summary judgment fall within the scope of the consolidated subcase which includes the interpretation and/or application of the Swan Falls Agreement and the issue of whether the subject hydropower rights are subordinated to recharge. To the extent there also remains an issue distinguishing between recharge rights located above Milner Dam and recharge rights located below Milner Dam, the issue is within the scope of these proceedings. Although

the issue of the minimum flows at Milner Dam is at issue in a different subcase, arguments relative to the subject hydropower rights which implicate the terms of the Swan Falls Agreement need to be raised and addressed in this proceeding. It is not the intent of the Court to have such issues addressed in a separate proceeding before a special master. Ultimately this Court will have to issue partial decrees for each of the subject hydropower rights. As such, any issues regarding the scope of subordination relative to recharge need to be addressed in the context of the SRBA in order to fully define the scope of the hydropower rights. To the extent Idaho Power believes that this expands the issues beyond that which was originally contemplated the Court will allow for additional time. Idaho Power's *Motion to Strike and/or In Limine* is **Denied**.

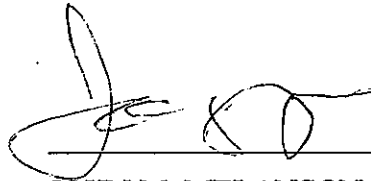
In turning to the related issue of the *Motion to Compel Discovery*, the standard defining the scope of discovery is broad. I.R.C.P.26(b)(1) provides:

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.

The Snake River is administered as a coordinated system. Releases at one facility impact water availability at another facility. The historical circumstances surrounding the development and administration of hydropower rights at one particular hydropower facility may have relevance on what was intended or agreed to with respect to hydropower rights at other facilities. The Court cannot limit discovery where it appears that the discovery could "lead to the discovery of admissible evidence." This same reasoning applies to the State of Idaho's requests for admissions. Accordingly, the Court cannot make the finding that the discovery requests made by the State of Idaho would be irrelevant or superfluous. The State of Idaho's *Motion to Compel* is **Granted**. The Court will provide additional time to allow Idaho Power to respond accordingly.

IT IS SO ORDERED

Dated August 6, 2008

A handwritten signature in black ink, appearing to read 'J. Melanson', is written over a horizontal line.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER DENYING IDAHO POWER'S MOTION TO STRIKE/IN LIMINE AND GRANTING STATE OF IDAHO'S MOTION TO COMPEL** were mailed on August 6, 2008, by first-class mail to the following:

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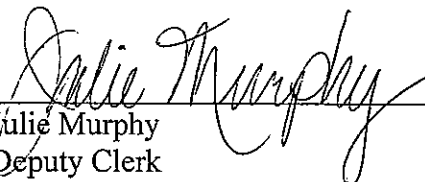
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Julie Murphy
Deputy Clerk