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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

)
) Subcase Nos. 01-10485, 01-10486, 01-
) 10487, 01-2064 et al.
)
) IDAHO POWER COMPANY'S
) MOTION FOR PROTECTIVE ORDER
) AND SUPPORTING MEMORANDUM
)

Idaho Power Company ("Idaho Power"), by and through its undersigned counsel, hereby moves for a protective order concerning the State of Idaho's First Set of Discovery Requests Idaho Power in this proceeding. Idaho Power seeks a ruling that it not be required to respond to the State's discovery until after the pleadings have been closed and the relevant issues in these subcases thereby delineated, and until a scheduling order is entered governing discovery and other pretrial activities in these and related subcases. The State has filed a Motion to Amend Objection which is related to this motion and which is scheduled to be heard by the Court on

January 29, 2009. Idaho Power respectfully requests that the Court also take up this motion for protective order at that time.

PROCEDURAL BACKGROUND

State Motion to Amend Objection

On October 28, 2008, the State of Idaho moved to amend its Objection in subcase no. 01-2064, which the State had originally filed a year and half earlier on or about April 20, 2007. Subcase no. 01-2064 concerns the United States' claim for storage in American Falls Reservoir. That subcase is related to subcases nos. 01-10485, 10-10486 and 01-10487, which concern competing Idaho Power claims for storage in American Falls Reservoir. The Director's Report recommended that Idaho Power's water rights in subcases nos. 01-10485, 10-10486 and 01-10487 be "disallowed" and included a provision stating that they were "[r]ecommended as Right No. 1-2064."

The State's amended Objection, if approved by the Court, would significantly expand the scope of issues that would be addressed in this proceeding. Idaho Power intends to file its response to the State's Motion to Amend Objection prior to the January 29, 2009 hearing on that motion in accordance with the Idaho Rules of Civil Procedure. Until the State's Motion to Amend Objection has been resolved, however, the pleadings are not complete and is it not clear what issues are relevant and properly within the scope of these proceedings.

Scheduling Conference and Unresolved Scheduling Issues

In addition, on November 20, 2008 the Court held a scheduling conference at which the parties discussed their settlement conference which concerned scheduling in these and other subcases in Basin 1, and which resulted in competing proposals for scheduling and sequencing of the subcases. The proposal advanced by the United States, and supported by Idaho Power and

others, seeks to manage the various proceedings by sequencing the trials and pretrial activities, so that the parties are not required to contend with discovery, substantive motions, and other pretrial proceedings simultaneously in three sets of subcases – pertaining to claims at Minidoka Reservoir, Palisades Reservoir, and American Falls Reservoir. The scheduling proposal subsequently advanced by the State would sequence only the trials on these three sets of claims, and would proceed with all pretrial activities for all three sets of claims, including discovery and substantive motions, immediately. The parties to these proceedings are awaiting the Court's scheduling order which it is anticipated will govern the scope and timing of proceedings, including discovery and other pretrial proceedings.

State Discovery Requests While Scheduling Issues Pending

On November 19, 2008, on the eve of the scheduling conference, the State served its First Set of Discovery Requests to Idaho Power (attached as **Exhibit 1**) in these proceedings, despite the scheduling and sequencing issues being unresolved. The State also served discovery requests on the United States at that time. The State's discovery requests to Idaho Power include sixty-six Requests for Admission, nine Interrogatories with multiple subparts, and twelve Requests for Production. Because the Idaho Rules of Civil Procedure require Idaho Power to respond to those Discovery Requests by December 22, 2008, Idaho Power has filed this motion. Counsel for Idaho Power unsuccessfully attempted to contact counsel for the State prior to filing this motion, so does not know whether this motion will be opposed.

ARGUMENT

Idaho Rule of Civil Procedure 26(c) allows the Court, "upon motion by a party or person from whom discovery is sought, and for good cause shown," to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue

burden or expense." *Bailey v. Sanford*, 139 Idaho 744, 748, 86 P.3d 458, 462 (2004); *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 104, 996 P.2d 798, 804 (2000). In order to establish "good cause," the moving party must show that specific prejudice or harm will result if no protective order is granted. *See General Dynamics Corp. v. Selb Manufacturing*, 481 F.2d 1204, 1212 (8th Cir. 1972).¹ The Court will also consider the relative hardship to the non-moving party should the protective order be granted. *Id.*

Idaho Power's Motion for Protective Order meets the relevant standards. Requiring a party to respond to requests for admission, interrogatories, and document production requests prior to the issues properly before the Court being established through the closing of pleadings is unjust and would impose an undue burden on Idaho Power. Until the Court rules on the State's Motion to Amend its Objection, and the pleadings are closed, it is not clear to Idaho Power what issues will be relevant in this case. Without knowing what issues are relevant and properly before the Court, it is simply impossible to respond to the State's discovery requests with all relevant documents, and it is impossible to know which requests for admission or interrogatories may be objectionable as beyond the scope of this matter.² Forcing Idaho Power to prematurely

¹ Note that Federal Rule of Civil Procedure 26(c) and Idaho Rule of Civil Procedure 26(c) are substantively identical and thus state courts often look to federal case law for guidance on discovery issues.

² The State of Idaho's Motion to Amend its Objection in this case would expand the grounds on which the State objects in Subcase 01-2064 to include numerous issues concerning federal law and federal contracts. Additional objections are raised based on:

- *Quantity.* The State argues that the "total quantity of a reservoir's storage right(s) is limited to reservoir capacity. The Quantity of storage in American Falls Reservoir that may be scheduled for release for hydropower production is limited by Pub L. 93-206 ... and has otherwise been further limited, waived or abandoned by federal and state law, federal contracts, federal licenses, and equitable doctrines including but not limited to the following: adverse possession, estoppel, waiver, laches, etc."
- *Priority Date.* The State claims that "use of storage in American Falls Reservoir for hydropower production, except for the 2.6471% of capacity provided for in federal contract no. Ilr.733S, is subordinated by Pub. L. 93-206 ... and has otherwise been further limited, waived, or abandoned by federal and state law, federal contracts, federal licenses, and equitable doctrines including but not

produce documents, or respond to requests for admission or interrogatories, that may ultimately be irrelevant would be unduly burdensome and unjust.

Similarly, it would impose an undue burden on Idaho Power to have to respond to the State's discovery requests before the Court enters a scheduling order governing the timing of discovery and other pretrial proceedings. The Court's scheduling order may provide for phased discovery, in accordance with the proposed scheduling order submitted by the United States and supported by Idaho Power, with respect to the three sets of subcases concerning water right claims for Minidoka Reservoir, Palisades Reservoir, and American Falls Reservoir. In that event, the parties would not be required to respond to discovery concerning American Falls Reservoir until that phase of the proceedings has been reached.

Conversely, Idaho Power can conceive of no significant hardship which the State would suffer if Idaho Power's Motion for Protective Order is granted, and discovery responses are not required until after the State's Motion to Amend its Objection has been resolved and a scheduling order has been issued. Once these two matters are resolved, then the parties and Court can revisit the proper scope and appropriate timing of discovery, including the State's discovery requests to Idaho Power. Accordingly, it is reasonable and just for the Court to not require Idaho Power to respond to the State's discovery requests until the pleadings in this case have closed and the issues properly before the Court have been fixed, and until a scheduling order has been issued governing discovery, other pretrial proceedings, and trials in the three sets of subcases.

limited to the following: adverse possession, estoppels, waiver, laches, etc."

- *Other Provisions Necessary.* The State has added to its existing objection under this heading to include ownership language that allegedly is "expressly provided in federal spaceholder contracts."

CONCLUSION

For the foregoing reasons, Idaho Power respectfully requests that the Court grant its Motion for Protective Order. The Court should issue a ruling that Idaho Power is not required to respond to the State's pending discovery requests until after the pleadings have closed and the relevant issues in these subcases thereby delineated, and until after a scheduling order has been entered governing discovery and other pretrial activities in the above-captioned and related subcases. Once these two matters are resolved, the parties and the Court should revisit the proper scope and appropriate timing of discovery, including the State's discovery requests to Idaho Power.

DATED: December 19, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S MOTION FOR PROTECTIVE ORDER AND SUPPORTING MEMORANDUM** addressed to and delivered per the method indicated below:

1. Original to:

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A handwritten signature in black ink, appearing to read "Tony O'Brien", is written over a horizontal line.

EXHIBIT 1