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**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	)	
	)	MOTION TO DESIGNATE
	)	BASIN-WIDE ISSUE, OR
Case No. 39576	)	ALTERNATIVELY TO
	)	CONSOLIDATE SUBCASES ON
_____	)	COMMON ISSUE

COMES NOW the Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, and moves this Court for an order designating the issue described below as a Basin-Wide Issue, or alternatively for an order consolidating the subcases specified herein for the purpose of resolving this common issue.

1. **THE COURT SHOULD DESIGNATE THE PROPOSED ISSUE AS A BASIN-WIDE ISSUE**

a. **Proposed Basin-Wide Issue**

Idaho Power requests that the Court designate a new Basin-Wide Issue as follows:

Can historic practice regarding use or administration of a water right deny a party's right to enforce a senior priority?

b. **Why the Issue is Broadly Significant and is Better Resolved as a Basin-Wide Issue**

In numerous subcases in three SRBA subbasins, either the IDWR Director's recommendations or parties' objections have asserted that as a result of "historic practice" regarding use or administration of water rights, some parties making beneficial use of water under senior priorities cannot place a call upon certain upstream junior water right holders. These recommendations and objections suggesting that senior water rights can be legally subordinated through "historic practice," even where there is no finding of forfeiture or abandonment, thus pose the threshold legal issue sought for resolution through this Basin-Wide Issue: *Can historic practice regarding use or administration of a water right deny a party's right to enforce a senior priority?*

The issue has been presented in the context of both water rights for hydropower purposes and water rights for other purposes in certain geographic areas. With respect to water rights for hydropower purposes claimed by the U.S. Bureau of Reclamation ("Reclamation") in Basins 1 and 63,¹ the IDWR Director's Report includes the following remark:

The appropriator shall exercise this right in a manner that recognizes the **historic practice** that the use of water for power generation is incidental to the rights of others to use the water for other purposes. The appropriator **shall not make a**

¹ The Reclamation claims are water right numbers 01-217, 01-218, 01-2064, 01-2068, 01-4024, 01-4025, 01-4054, and 63-367.

delivery call for hydropower generation except as against hydropower rights.
(Emphasis added).

Reclamation filed objections to the Director's Report for these claims objecting to the historic practice subordination remark. Objections to the remark were also filed in six of the eight Reclamation subcases involved by A & B Irrigation District, Burley Irrigation District, Falls Irrigation District, and Minidoka Irrigation District.² This same remark was included in the Director's recommendations on water right claims filed in Basin 37 by Peter Bowler and Aldrich Bowler.³ Peter Bowler filed objections to claim 37-4007 in his own name and to claim 37-4147 as trustee for Aldrich Bowler.

With respect to water right claims for hydropower purposes filed by Idaho Power in Basin 1, these claims were not reported by IDWR with the "historic practice" remark. However, objections were filed on the Director's recommendation regarding these Idaho Power claims by the State of Idaho and by the Idaho Ground Water Appropriators ("IGWA") on the basis that the recommendations should have had an historic practice subordination remark.⁴

Other objections in Basin 37 broaden the alleged "historic practice" subordination to include water rights not only for hydropower but also for other purposes. Objections filed by Gary and Helen DeMoss to IDWR recommendations regarding most if not all water right claims in Basin 37⁵ seek "separate administration" of the water sources upon which the DeMoss claims are located, and in their "Reasons Supporting Objection" state:

² These irrigation districts filed objections to the historic use subordination remark in subcase nos. 01-217, 01-218, 01-2064, 01-2068, 01-4024 and 01-4025.

³ The claim filed by Peter Bowler is 37-04007, while the claim filed by Aldrich Bowler is 37-04147.

⁴ These Idaho Power claims are 01-2017, 01-2032, 01-2046, 01-10382, 01-10383, 01-10531, and 01-10532.

⁵ IDWR's Case Management Proposal For Basin 37, Part 1, Surface Water, filed in the SRBA on July 5, 2006, at pp. 13-17, lists DeMoss objections in the following subcases involving claimants other than Idaho Power: 37-7944, 37-11131, 37-856, 37-2778, 37-2780, 37-7754, 37-4112, 37-21595, 37-239D, 37-240D, 37-607D, 37-608D, 37-447C, 37-447D, 37-507, 37-4241, 37-859A, 37-238A, 37-239A, 37-240A, 37-7857, 37-7865, 37-7922, 37-1175A, 37-7108, and 37-7920. This same IDWR document lists at pp. 17-19 DeMoss objections in the following subcases involving Idaho Power rights: 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710.

With **historical practice** pursuant to decree and water master delivery, diversions to storage under water rights 37-856, 37-2780, 37-7754, and 37-2778 have not been subject to curtailment as a result of priority calls from downstream senior direct flow irrigation rights before April 1 or by downstream senior direct flow stockwater rights at any time of the year, or by downstream senior direct flow hydropower water rights, recreation or aesthetics water rights, or instream flow water rights at any time of the year. In accordance with the **historical practice**, these four water rights **should not be subject to curtailment as a result of priority calls from downstream senior direct flow water rights**. (Emphasis added).

The issue of whether "historic practice" regarding use or administration of a water right can deny a party the right to enforce a senior priority thus has been raised regarding numerous water rights, based on hydropower as well as other purposes of use, and located in several subbasins. Accordingly, this threshold issue presented is broadly significant, and is better resolved as a Basin-Wide Issue than through piecemeal determinations by individual special masters in separate subbasin proceedings.

c. The Need For Early Resolution of the Issue

In all of the subcases in which the "historic practice" subordination issue has arisen -- including Basins 1, 37 and 63 -- IDWR's recommendations, objections, and responses have all been filed. None of the subcases have proceeded, however, to address the merits of this issue. Consequently, early resolution of this matter through designation as a Basin-Wide Issue will serve the purpose of judicial economy by ensuring an early and unified legal determination in the SRBA which then can be applied in individual subcases.

d. The Type of Rights Affected by the Issue

As discussed in section 1.b above, a variety of different types of rights are affected by the issue, including water rights for purposes of irrigation, hydropower, stockwater, recreation/aesthetics, and instream flows.

e. A Description of How Water Right Claims May Be Affected

If the proposed "historic practice" subordination remark is incorporated into the SRBA decree, holders of water rights with senior priorities will be denied their right to enforce their priorities against junior priority rights under Idaho's constitutional prior appropriation doctrine. If the Court resolves this issue as a Basin-Wide Issue, greater certainty and predictability regarding water use and water right administration will result.

2. ALTERNATIVELY, THE COURT SHOULD CONSOLIDATE THE RELEVANT SUBCASES FOR PURPOSES OF ADDRESSING THE COMMON ISSUE

Idaho Power maintains that the described issue should be designated a Basin-Wide Issue by the SRBA Court. However, in light of the United States' recently filed motion to consolidate some of the subcases that are the subject of Idaho Power's motion, which is described below, Idaho Power moves in the alternative for an order consolidating all of the subcases encompassed within Idaho Power's motion, including all those in Basin 37, for the purpose of addressing the common issue of whether historic practice regarding use or administration of a water right can deny a party's right to enforce a senior priority.

On or about August 28, 2007, the United States filed a "Motion to Consolidate Subcases and Memorandum in Support" in 17 subcases in Basins 1, 37 and 63. The United States' motion seeks to consolidate the common issue of including the "historic practice" remark with respect to water rights for hydropower purposes. While Idaho Power does not oppose the United States' motion, as demonstrated above subordination based on "historic practice" has been asserted in the SRBA in a broader context beyond hydropower rights. The United States has indicated through its counsel that it does not oppose Idaho Power's motion, which seeks to resolve the issue in this broader context. Accordingly, to the extent that the Court does not designate this

broader issue as a Basin-Wide Issue, the Court should consolidate the subcases involving the broader issue for purposes of addressing the common issue presented.⁶

CONCLUSION

For all of the foregoing reasons, Idaho Power respectfully requests an order designating as a Basin-Wide Issue the issue of whether historic practice regarding use or administration of a water right can deny a party's right to enforce a senior priority. Alternatively, Idaho Power requests an order consolidating the subcases specified herein for the purpose of addressing this common issue within them.

DATED: September 4, 2007

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⁶ On August 31, 2007, the SRBA Court issued a Notice Setting Hearing on United States' Motion to Consolidate Subcases, which sets a hearing on the United States' motion on October 16, 2007, at 1:30 p.m.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 4th day of September, 2007, a true and correct copy of the **MOTION TO DESIGNATE BASIN-WIDE ISSUE, OR ALTERNATIVELY TO CONSOLIDATE SUBCASES ON COMMON ISSUE** was delivered by the method indicated to the following:

1. Original via facsimile filing (208) 736-2121 to:

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2. Copies via regular mail to the expedited hearing service list and parties:

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