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DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

DAVID I. STANISH (ISB #7310)
MICHAEL C. ORR (ISB #6720)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

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 Nos. 01-00217, 01-00218, 01-02017, 01-02032,
	)	01-02046, 01-02064, 01-02068, 01-04024, 01-04025, 01-
	)	04054, 01-10382, 01-10383, 01-10531, 01-10532, 37-
	)	00238A, 37-00239A, 37-00239D, 37-00240A, 37-
Case No. 39576	)	00240D, 37-00447C, 37-00447D, 37-00507, 37-00607D,
	)	37-00608D, 37-00856, 37-00859A, 37-01175A, 37-02128,
	)	37-02471, 37-02472, 37-02778, 37-02780, 37-04007, 37-
	)	04112, 37-04147, 37-04241, 37-07108, 37-07754, 37-
	)	07857, 37-07865, 37-07920, 37-07922, 37-07944, 37-
	)	11131, 37-20709, 37-20710, 37-21595, and 63-00367.
	)	
	)	STATE OF IDAHO'S RESPONSE IN OPPOSITION TO
	)	THE IDAHO POWER COMPANY'S MOTION TO
	)	DESIGNATE BASIN-WIDE ISSUE, OR
	)	ALTERNATIVELY, TO CONSOLIDATE SUBCASES
	)	ON COMMON ISSUE

The State of Idaho, by and through the undersigned deputy attorney general, hereby files
its Response in Opposition to the Idaho Power Company's Motion to Designate Basin-Wide

STATE OF IDAHO'S RESPONSE IN OPPOSITION TO THE IDAHO POWER COMPANY'S MOTION TO
DESIGNATE BASIN-WIDE ISSUE, OR ALTERNATIVELY, TO CONSOLIDATE SUBCASES ON COMMON
ISSUE

Issue, or Alternatively, to Consolidate Subcases on Common Issue.

I. DISCUSSION

On August 28, 2007, the United States filed a motion to consolidate 17 subcases based upon the inclusion of, or potential inclusion of, an explanatory remark that requires affected hydropower rights to operate “in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes.”

On September 5, 2007, the Idaho Power Company filed its status conference report in subcase nos. 37-02128, 37-02471, 37-02472, 37-20709, and 37-20710; attached thereto, the Idaho Power Company filed a motion to designate a new basin-wide issue, or alternatively, to consolidate the above-entitled 48 subcases, including those involved in the United States’ August 28 motion. The Idaho Power Company asserted a broader, more general issue for consideration:

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

Both motions are now set to be heard on October 16, 2007. This *Response* addresses the Idaho Power Company’s motion only; the United States’ motion is addressed in a separate pleading.

A. THE COURT SHOULD NOT DESIGNATE THE PROPOSED ISSUE AS A BASIN-WIDE ISSUE

SRBA Administrative Order 1 sets forth the criteria to be considered in designating a basin-wide issue: (i) why the issue is broadly significant and is better resolved at a basin-wide level; (ii) the need for its early resolution; and (iii) the type of rights affected by the issue and how those rights will be affected. AO1 § 16(1)(b)–(e).

The proposed issue should not be designated as a basin-wide issue for the following

reasons: First, the proposed issue does not involve a common issue of law; it involves fact-specific legal and equitable determinations that are neither broadly significant nor better resolved at a basin-wide level. Second, designation of the proposed issue will only hinder resolution of the rights affected, some of which would have already been resolved to finality but for the imposition of the Idaho Power Company's motion.

i. The Proposed Issue Does Not Involve a Common Issue of Law, but Rather, It Involves Fact-Specific Determinations of Underlying Legal and Equitable Theories

The Idaho Power Company's characterization of the phrase "historic practice" as raising a common issue of law across these factually-unrelated subcases is misplaced. The only thing common to all of these subcases is the involvement of the historic practice language. The language itself, however, is merely a textual manifestation of independent legal and equitable theories satisfied by independent factual circumstances; it is not itself a term of art. Thus, while different recommendations and objections may invoke the use of this phrase, the legal and equitable foundations in support of its use may vary considerably depending upon the fact-specific circumstances surrounding each water right. The phrase may represent, for example, a finding or an assertion based upon adverse possession, estoppel, waiver, laches, etc.¹ The phrase itself, however, presents no definitive common issue of law.

The amount of individual fact-finding required to analyze the underlying legal and equitable theories of each subcase demonstrates that these matters are better resolved

¹ To the extent that the Idaho Power Company's *Motion* implicitly challenges such affirmative defenses as adverse possession, estoppel, laches, waiver, waste, forfeiture and abandonment, the courts have already upheld their application in water right disputes. See *Idaho Power Co. v. Idaho Dep't of Water Res.*, 104 Idaho 575, 661 P.2d 741 (1983) (remanding for further determination on claims of adverse possession, estoppel, laches, waiver, forfeiture and abandonment); *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* at 14 n.4, In re SRBA Case No. 39576 (July 31, 1998) ("There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste."), *adopted, Order on Challenge (Consolidated Issue) of "Facility Volume" Issue and "Additional Evidence" Issue*, In re SRBA Case No. 39576 (37-02078 et al.) (Dec. 29, 1999).

individually by the Special Masters via standard SRBA procedure. *See Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases* at 3 (Jan. 3, 2001). Again, the only thing common to all of these subcases is the involvement of the historic practice language. The foundations for the historic practice language can only be determined after the parties litigate, and the Court decides, the fact-specific legal and equitable theories asserted in support thereof. Such analysis would only be hindered by basin-wide designation.

Historic practice is referenced in recommendations where it is deemed necessary to do so in order to properly and efficiently define, clarify, and/or administer a certain water right. Idaho Code section 42-1411(2) describes the basic elements of a water right: the claimant's name and address, the source of water, the quantity of water, the priority date, the legal description of the point of diversion or the place of use, the annual volume of consumptive use, any conditions placed on the use, and "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2). The Director is required by law to determine these elements, including determination of remarks necessary to define, clarify or administer the elements. *Id.* References to historic practices in explanatory remarks is a result of that process; it is a result of detailed factual and legal analysis of each water right's fact-specific circumstances; it is a result of a determination that it was necessary for the proper and efficient definition, clarification, and/or administration of each specific water right. It is not the result of the creation of either a new basin-wide policy or a new substantive rule of law.

ii. There Is No Need for Early Resolution of this Issue Because It Does Not Involve a Common Issue of Law

Because the issue presented is fact-specific rather than a common issue of law, there is little, if any, threat of inconsistent rulings. Moreover, the Idaho Power Company has failed to show any factual commonality among these subcases.

iii. Because of Its Fact-Specific Nature, the Proposed Issue Would Only Hinder Timely Resolution of these Subcases

Again, the proposed basin-wide issue requires fact-specific determinations of the underlying legal and equitable theories unique to each separate subcase. Asking the Court to try essentially 48 separate factual scenarios under one consolidated basin-wide issue is impractical and inappropriate.

The burden that this proposed basin-wide issue could place on the affected water-users has already been demonstrated. Eight of the above-entitled subcases (37-00859A, 37-01175A, 37-07108, 37-07857, 37-07865, 37-07920, 37-07922, and 37-07944) were objected to by Gary and Helen DeMoss. The DeMosses were the only objectors in those subcases and have since moved to withdraw their objections. On September 26, 2007, Special Master Bilyeu granted the DeMosses' motions to withdraw but suspended issuance of the Special Master Reports and Recommendations because of the Idaho Power Company's motion. As a result, this matter has already hindered timely resolution of some subcases.

B. THESE SUBCASES SHOULD NOT BE CONSOLIDATED

As an alternative to designating a new basin-wide issue, Idaho Power moves the Court for an order consolidating the above-entitled subcases for the purpose of addressing the same purported common issue.

Again, Idaho Power's attempt to characterize the use of the phrase "historic practice" as a

common issue is misplaced. Any reference to historic practice is a finding based on independent factual details that satisfy independent legal and equitable theories; it is not an effort to create an independent term of art. As a result, consolidating these subcases raises the same issues of judicial economy and efficiency as discussed above in Part I.A of this *Response* and in the *State of Idaho's Response in Opposition to the United State's Motion to Consolidate Subcases*.

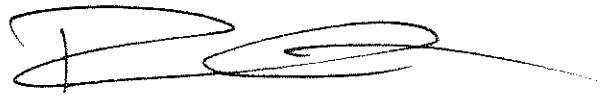
II. CONCLUSION

The proposed basin-wide issue is neither broadly significant nor better resolved at a basin-wide level. Furthermore, it does not raise a common issue of law. As a result, the Idaho Power Company's motions to designate a basin-wide issue, or alternatively, to consolidate these subcases should be denied.

RESPECTFULLY SUBMITTED this October 4, 2007.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on the October 4, 2007, I caused to be served the original and/or copy of this STATE OF IDAHO'S RESPONSE IN OPPOSITION TO THE IDAHO POWER COMPANY'S MOTION TO DESIGNATE BASIN-WIDE ISSUE, OR ALTERNATIVELY, TO CONSOLIDATE SUBCASES ON COMMON ISSUE on each of the following persons by the indicated method:

1. Original via Federal Express to:
Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707
2. One copy via U.S. Mail to:
Idaho Power Company
c/o Brownstein Hyatt Farber Schreck, P.C.
410 Seventeenth Street, Suite 2200
Denver, CO 80202
3. Copies via U.S. mail to the Certificate of Mailing for Expedited Hearings list:



Signature of Objector or attorney
Mailing on Objector's behalf

Certificate of Mailing for Expedited Hearings

C THOMAS ARKOOSH
DAVID HEIDA
ARKOOSH LAW OFFICES
301 MAIN ST
PO BOX 32
GOODING, ID 83330

ALBERT P BARKER
JOHN K SIMPSON
SHELLEY M DAVIS
BARKER ROSHOLT & SIMPSON LLP
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139

PAUL L ARRINGTON
TRAVIS L THOMPSON
BARKER, ROSHOLT & SIMPSON LLP
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485

JOSEPHINE P BEEMAN
BEEMAN & ASSOCIATES, PC
409 W JEFFERSON ST
BOISE, ID 83702

RON KERL
COOPER & LARSEN
151 N 3RD AVE, 2ND FL
PO BOX 4229
POCATELLO, ID 83205-4229

UNITED STATES DEPT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCE
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

W KENT FLETCHER
FLETCHER LAW OFFICE
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318

C TIMOTHY HOPKINS
JOHN D HANSEN
HOPKINS RODEN CROCKETT HANSEN
& HOOPES PLLC

CHRISTOPHER H MEYER
JEFFREY C FEREDAY
JOHN M MARSHALL
MICHAEL C CREAMER
ROY L EIGUREN
GIVENS PURSLEY LLP
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720

BLAIR J GROVER
GROVER LAW OFFICE PA
392 FARNSWORTH WY
PO BOX 36
RIGBY, ID 83442-0036

RICHARD F GOODSON
HAWLEY TROXELL ENNIS &
HAWLEY LLP
877 W MAIN ST, STE 1000
PO BOX 1617
BOISE, ID 83701-1617

MICHAEL B. WHITE
HECLA MINING COMPANY
6500 N MINERAL DR, STE 200
COEUR D ALENE, ID 83814-8788

TERRY G HOGUE
HOGUE & DUNLAP
PO BOX 460
HAILEY, ID 83333

KENT W FOSTER
ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO
1000 RIVERWALK DR, STE 200
PO BOX 50130
IDAHO FALLS, ID 83405

WILLIAM G MYERS III
HOLLAND & HART LLP
101 S CAPITOL BLVD, STE 1400
PO BOX 2527
BOISE, ID 83701-2527

ELIZABETH P EWENS
MCQUAID BEDFORD & VAN ZANDT
221 MAIN ST, 16TH FLOOR
SAN FRANCISCO, CA 94105

<http://www.srba.state.id.us/MAIL12.HTM>

10/2/2007

428 PARK AVE
PO BOX 51219
IDAHO FALLS, ID 83405-1219

PATRICK D BROWN
HUTCHINSON & BROWN LLP
104 LINCOLN ST
PO BOX 207
TWIN FALLS, ID 83303-0207

NORMAN M SEMANKO
IDAHO WATER USERS ASSOCIATION
1010 W JEFFERSON ST, STE 101
BOISE, ID 83702

GRAY A YOUNG
TERRY T UHLING
JR SIMPLOT COMPANY
999 MAIN ST, 13TH FL
PO BOX 27
BOISE, ID 83707-0027

ROGER D LING
LING ROBINSON & WALKER
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

J JUSTIN MAY
MAY SUDWEEKS & BROWNING LLP
1419 W WASHINGTON
BOISE, ID 83702

CHARLES F MC DEVITT
MC DEVITT & MILLER
420 W BANNOCK ST
PO BOX 2564
BOISE, ID 83701

KENDAL A. MC DEVITT
MC DEVITT LAW OFFICE
405 S 8TH ST, STE 202
BOISE, ID 83702

CHIEF, NATURAL RESOURCES DIV.
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 44449
BOISE, ID 83711-4449

DAVID F. SHIRLEY
WILLIAM A. PARSONS
PARSONS, SMITH & STONE
137 W 13TH ST
PO BOX 910
BURLEY, ID 83318

RICHARD A. CUMMINGS
PO BOX 1545
BOISE, ID 83701

CRAIG A. PRIDGEN
MCQUAID BEDFORD & VAN ZANDT
2800 5TH STREET, SUITE 130
DAVIS, CA 95618

MICHAEL MIRANDE
MILLER BATEMAN LLP
1426 ALASKAN WAY, STE 301
SEATTLE, WA 98101

SCOTT L CAMPBELL
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE
950 W BANNOCK STE 520
BOISE, ID 83702

RON LEYDET
MOUNTAIN HOME GROUND WATER
ADVISORY COMMITTEE
PO BOX 521
MOUNTAIN HOME, ID 83647

DON B. MILLER
STEVEN C. MOORE
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302

DAVID J. CUMMINGS
K. HEIDI GUDGELL
NEZ PERCE TRIBAL EXEC COMM
100 AGENCY ROAD
PO BOX 305
LAPWAI, ID 83540

CHARLES J OLSON
RT 1 BOX 777E
MOUNTAIN HOME, ID 83647

BRANDELLE WHITWORTH
SHOSHONE-BANNOCK TRIBES
TRIBAL COUNSEL OFFICE
PO BOX 306
FORT HALL, ID 83203

DOUGLAS B.L. ENDRESON
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLC
1425 K STREET, NW STE 600
WASHINGTON, DC 20005

B J DRISCOLL
PO BOX 50731
IDAHO FALLS, ID 83405

IDWR DOCUMENT DEPOSITORY
PO BOX 83720
BOISE, ID 83720-0098

RANDALL C BUDGE
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391

GREGORY W. MOELLER
JERRY R. RIGBY
RAY W. RIGBY
RIGBY, THATCHER, ANDRUS, RIGBY
KAM & MOELLER, CHTD
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

CHARLES L. HONSINGER
DANIEL V. STEENSON
RINGERT, CLARK CHTD.
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773

JAMES W GIVENS
1026 F ST
PO BOX 875
LEWISTON, ID 83501

BRADLEY V. SNEED
1099 S WELLS ST, STE 120
MERIDIAN, ID 83467

CRAIG D. HOBDEY
125 5TH AVE
PO BOX 176
GOODING, ID 83330

JAMES ANNEST
1742 OVERLAND AVE
PO BOX 686
BURLEY, ID 83318

BERT L. OSBORN
26 S 9TH ST
PO BOX 158
PAYETTE, ID 83661

LARRY A. SULLIVAN
280 A STREET EAST
VALE, OR 97918

JAMES P. SPECK
SPECK & AANESTAD
120 EAST AVENUE
PO BOX 987
KETCHUM, ID 83340

MARK POTTER
SUSAN POTTER
220 WILLOW LANE
HAGERMAN, ID 83332

LARY C WALKER
WALKER LAW OFFICE
232 E MAIN ST
PO BOX 828
WEISER, ID 83672

CLIFF S. BENTZ
YTURRI, ROSE, BURNHAM, EBERT &
BENTZ
PO BOX 450
FRUITLAND, ID 83619

RICHARD L. HARRIS
1023 ARTHUR ST
PO BOX 1438
CALDWELL, ID 83606

PENDLEBURY, JAMES A
482 CONSTITUTION WAY SUITE 316
IDAHO FALLS, ID 83402

DANA L. HOFSTETTER
608 WEST FRANKLIN STREET
BOISE, ID 83702

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