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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	)	Consolidated Subcase no. 92-23
	)	
	)	STATE OF IDAHO'S
Case No. 39576	)	MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
_____	)	

COMES NOW the State of Idaho ("the State"), by and through its counsel of record, and moves for partial summary judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure and section 42-203B of the Idaho Code.

The State seeks summary judgment on the three points enumerated and described below. The State is entitled to summary judgment on these points because they are controlled by Idaho Code § 42-203B and there is no genuine dispute as to any material fact regarding the application of the statute in this consolidated subcase. Accordingly,

under Idaho Code § 42-203B and Rule 56, the State is entitled to judgment as a matter of law as follows:

1. That pursuant to Idaho Code § 42-203B, legal title to any portion of the water rights subject to the Swan Falls settlement for flows in excess of the minimum flows established at the Murphy Gage under the State Water Plan is held in trust by the State of Idaho, by and through the governor, for the benefit of Idaho Power Company and for the benefit of the People of the State of Idaho;
2. That pursuant to Idaho Code § 42-203B, the water rights for power purposes held in trust by the State under Idaho Code § 42-203B are subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to State law; and
3. That the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked or applied in a manner contrary to or inconsistent with Idaho Code § 42-203B.

The grounds for this motion will be fully explained in a supporting memorandum to be filed in accordance with the Court's scheduling determinations and orders.¹ In brief, this motion is based on Article XV § 3 and Idaho Code § 42-203B. Section 3 of Article XV of the Idaho Constitution specifically provides that the State has the authority "to regulate and limit the use of water for power purposes." The express language of Idaho Code § 42-203B is an implementation of this constitutional authority: "[t]he legislature finds and declares that it is in the public interest to specifically implement the

¹ A status and scheduling conference hearing is scheduled for 3:00 p.m. on Tuesday, December 18, 2007. *Corrected Notice of Scheduling and Status Conference* (July 25, 2007); see also *Notice of Status Conference* (July 31, 2007). Idaho Power Company has also requested that its *Motion for Continuance of Stay Pending Filing of Responses to Objections in Basin 2* be heard on December 18, 2007.

state's power to regulate and limit the use of water for power purposes." Idaho Code § 42-203B(1).

Idaho Code § 42-203B defines "the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow." Idaho Code § 42-203B(1). The statute establishes a trust, *see id.*, and provides that "[a]ny portion of the water rights for power purposes" in excess of a minimum flow established by the State "shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho." Idaho Code § 42-203B(2); *see also id.* § 42-203B(3) (similar). "The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law . . ." Idaho Code § 42-203B(2); *see also id.* § 42-203B(3) (similar).

The State requests oral argument on this motion.

DATED this 14th day of December, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December 2007, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT to the following parties by the indicated methods:

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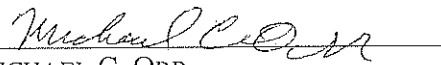
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