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DEC 19 2007
DEPARTMENT OF
WATER RESOURCES

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Attorneys for Plaintiff Idaho Power Company

**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	)	A. Subcase No. <u>3-7018</u>
	)	
Case No. 39576	)	MOTION TO STRIKE OR
	)	PRECLUDE APPROVAL OF DRAFT
	)	STANDARD FORM 5-
	)	STIPULATED ELEMENTS OF
	)	A WATER RIGHT

COMES NOW, Idaho Power Company ("Idaho Power"), Claimant/Objector
herein, and moves this court pursuant to I.R.C.P. 12(f) and Administrative Order #1,

Section 4.d(3), for an Order Striking or Precluding Approval of the Draft Standard Form-5 entered in the above-entitled subcase on November 20, 2007. This Motion is based upon the following grounds.

On November 13, 2007, counsel for Idaho Power, in good faith, and pursuant to this court's Order Setting Deadline to File Settlement Documents, executed a *Draft Standard Form-5 Stipulated Elements of A Water Right* (SF-5) in the above-entitled matter, in order to resolve the objection filed by Claimant. At the time of the execution of the Draft SF-5 by counsel for Idaho Power the underlying water right was in permit status, awaiting licensing by the Idaho Department of Water Resources ("IDWR"). One of the provisions in the recommendation attached to the Draft SF-5, agreed to by the parties to the Draft SF-5 as the proposed final recommendation to this court, stated as follows:

This right remains subject to all conditions set forth in the permit upon which this right is based, and will be subject to all conditions set forth in the license issued by IDWR upon completion of the statutory appropriation process.

On November 16, 2007, three days after filing of the Draft SF-5 with the Court, IDWR issued a water right license for water right #3-7018, which includes the following condition:

The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

The above-referenced condition was inserted into the license by IDWR with no advance notice to Idaho Power, and almost immediately after Idaho Power and the State had filed a Draft SF-5 with the Court which did not contain the condition. The license

condition was also noteworthy in that; it was not included in the permit; it was not included in IDWR's initial recommendation; the State of Idaho did not file an objection to the initial recommendation for failure to include the condition; and the State did not reference the condition in response to Idaho Power's objection as a claimant.

Idaho Power has sought relief from the disputed license condition from IDWR. Pursuant to the provisions of Idaho Code §42-1701A(3), Idaho Power Company has filed a Protest and Petition for Reconsideration in the licensing of #3-7018, a copy of which is attached hereto as Exhibit A. Also attached for the court's reference are a copy of the original permit issued for water right #3-7018 (Exhibit B) and a copy of the license issued November 16, 2007 (Exhibit C).

Idaho Power now seeks relief from the SRBA Court regarding the Draft SF-5, which does not represent an agreement of the parties on a contested water right recommendation within the meaning of Administrative Order #1. Idaho Power never agreed with the State or IDWR to settle its objections in the SRBA by giving IDWR the authority to unilaterally insert a condition in its water right license allowing IDWR to cancel Idaho Power's water right in the future -- which is the effect of the Draft SF-5 coupled with the license issued by IDWR immediately after the filing of the Draft SF-5 with the SRBA Court. Accordingly, Idaho Power respectfully requests that this Court strike the Draft SF-5, or alternatively, to refrain from approving it as a Final SF-5 and including it in a partial decree,

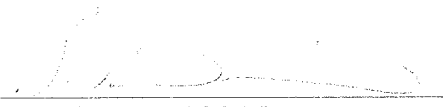
Oral argument on this Motion to Strike is hereby requested, which in the discretion of the Court may occur at the status conference set for January 10, 2008 at 2:00 p.m.

DATED this 18 day of December 2007.

IDAHO POWER COMPANY

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By: 
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Shelley M. Davis, ISB No. 6788
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Boise, ID 83701-2139
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December 2007, I caused to be served a true and correct copy of the foregoing **MOTION TO STRIKE OR PRECLUDE APPROVAL OF DRAFT STANDARD FORM 5 – STIPULATED ELEMENTS OF A WATER RIGHT** by the method indicated below, and addressed to each of the following:

Filed with the Court via Hand Delivery.

Service upon the following via U.S. Mail:

Lawrence Wasden
Steven Olsen
Karl T. Klein
Michael C. Orr
700 W. Jefferson, Room 210
P.O. Box 44449
Boise, ID 83711-4449
Attorneys for Defendant, State of Idaho

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-1391

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702



Attorneys for Plaintiff, Idaho Power Company

EXHIBIT A

11/07

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

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WATER RESOURCES
WESTERN REGION

NOTICE OF PROTEST

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, 42-222 and 42-224, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

1. Matter being protested License Number 03-7018; new condition inserted
2. Name of protestant Idaho Power Company
3. Protestant's Representative for service (If different than protestant)
John K. Simpson, Shelley M. Davis, of Barker Rosholt & Simpson llp
4. Service mailing address 1010 W. Jefferson St., P.O. Box 2139, Boise, ID 83701-2139
5. Service telephone no. 208-336-0700 Email Address: smd@idahowaters.com
6. Basis of protest (including statement of facts and law upon which the protest is based)
Please see attached pleading
(additional pages may be attached to describe nature of the protest)
7. What would resolve your protest? Hearing requested

I hereby, acknowledge that if I, or my designated representative, fails to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 30th day of December, 2007

Protestant

John K. Simpson
Protestant's Representative

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NOTE:

A protestant is required to timely file a protest with the department together with a \$25.00 protest fee. Each application being protested in order for the protestant to be considered a full party by the department. In addition, the department's Rule of Procedure, IDAPA 37.01.01203, requires a protestant to send a copy of a protest to the applicant.

INSTRUCTIONS

1. The matter being protested must be clearly identified. A typical matter is identified by the application number such as "Application for Permit No. _____ in the name of _____" or "Application for Transfer No. _____ in the name of _____".
2. Show the name of the protestant. Only one (1) protestant may be shown per protest form. If this protest form is signed by more than one person, the hearing officer will consider the first signer as the official protestant and the representative for service of documents.
3. If the protestant is represented by an attorney or other authorized representative, show the representative's name. The department then will serve documents on the representative and upon the protestant if specifically requested.
4. Show the address where the department is to serve the documents. This should be the address of the authorized representative unless the protestant does not designate a representative.
5. Show the telephone number of the authorized representative unless the protestant does not designate a service representative.
6. Specifically describe the nature of the protest.
7. Describe the relief being sought by the protestant.

FOR DEPARTMENT USE ONLY

Received by _____ Date _____ Time _____

\$25.00 fee Receipted by _____ # _____ Date _____

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WATER RESOURCES
WESTERN REGION

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Attorneys for Idaho Power Company

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF	)	
APPLICATION FOR PERMIT & LICENSE	)	PROTEST AND PETITION FOR
NO. 3-7018	)	HEARING
	)	
APPLICANT:	)	
IDAHO POWER COMPANY	)	
	)	
	)	

The Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys,
hereby files this Protest and Petition for Hearing regarding the Idaho Department of Water
Resources' ("IDWR") issuance on or about November 16, 2007 of water right License No. 3-

DEC 03 2007

WATER RESOURCES
WESTERN REGION

7018 for Brownlee Dam, an Idaho Power facility on the Snake River. The basis for Petitioners' protest and petition is as follows:

1. The license includes the following condition which purports to allow the Director to review the diversion and use of water for hydropower purposes under the license after the date of expiration of the Federal Energy Regulatory Commission ("FERC") license for Brownlee Dam, to cancel all or any part of the authorized use, and to revise, delete or add conditions under which the right may be exercised:

The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

2. This condition was not included in the water right permit approved and issued by IDWR in 1976 for the facility in question. After issuance of that water right permit, and in reliance thereon, Idaho Power constructed an additional generating facility at Brownlee Dam, provided proof of beneficial use of the water right established by the permit, and has been operating said facility for approximately 30 years without the new condition.

3. The new condition is not included in the Director's recommendation and the parties' draft stipulation in the Snake River Basin Adjudication ("SRBA") proceedings.

4. The new condition is otherwise unlawful for such other and further reasons as may be set forth at the hearing on this matter.

5. Idaho Power hereby requests a hearing before the Director to contest this matter pursuant to Idaho Code 42-1701A(3). In requesting a hearing to preserve its rights in this matter, Idaho Power expressly reserves the right to proceed in other forums as appropriate.

DATED: December 3, 2007

IDAHO POWER COMPANY

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WATER RESOURCES
WESTERN REGION

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By: 
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Boise, ID 83701-2139

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2007, I served a copy of the foregoing
NOTICE OF PROTEST, with the required protestant fee, by hand delivery to the following:

Idaho Department of Water Resources
Western Region
2735 Airport Way
Boise, ID 83705-5082


Shelley M. Davis

EXHIBIT B

Identification No. _____
 Application No. 73-1218

STATE OF IDAHO
 DEPARTMENT OF WATER ADMINISTRATION

APPLICATION FOR PERMIT

APPROVED

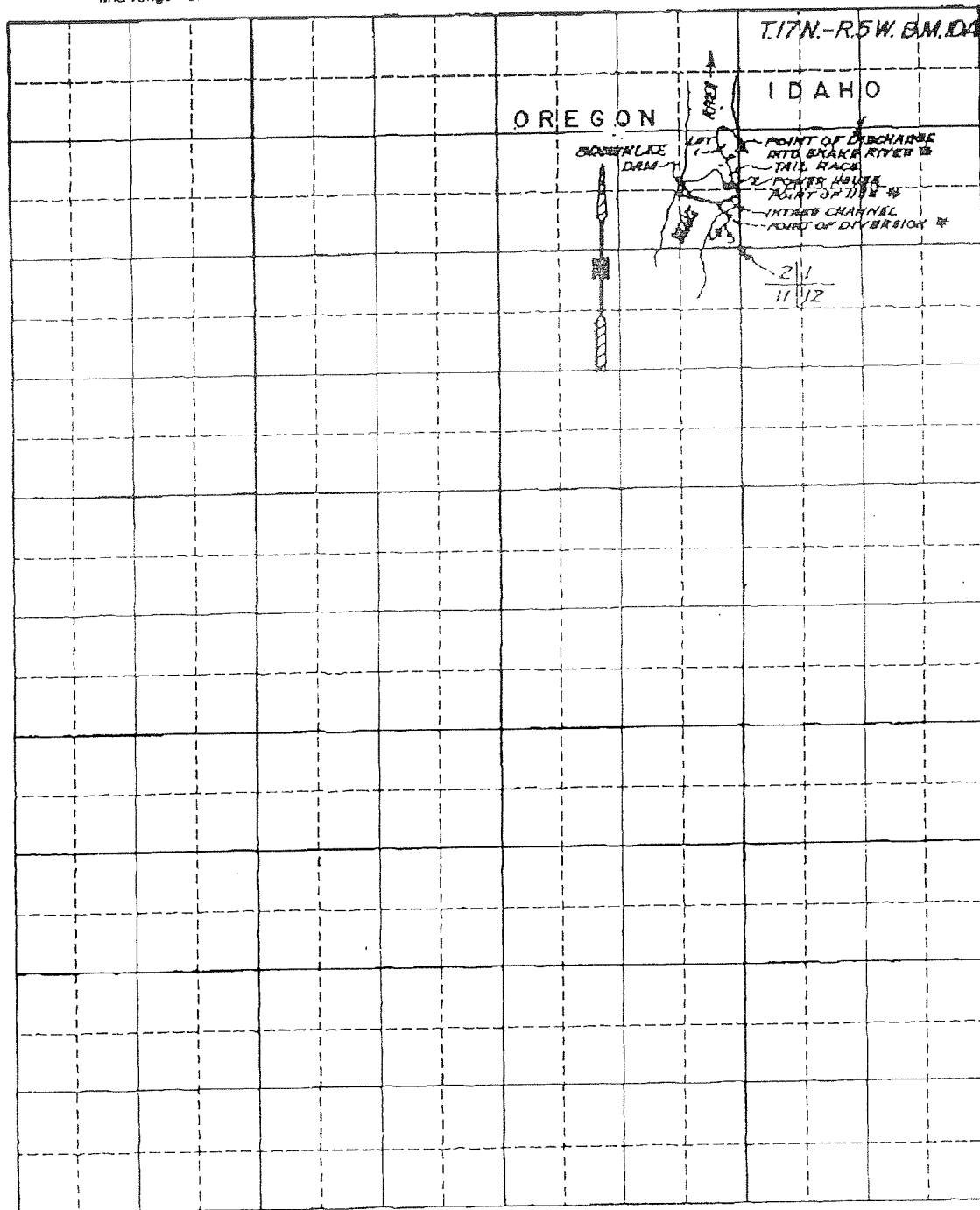
To appropriate the Public Waters of the State of Idaho
 (TYPE OR PRINT IN INK)

1. Name of applicant Idaho Power Company
 post office address P O Box 70, Boise, Idaho 83721
2. Source of water supply Snake River which is a tributary of Columbia River
3. a. Location of point of diversion is Lot 3 ~~xxx~~ xxx Section 2 Township 17N
 Range SW B.M. Washington County; additional points of diversion if any: _____

 b. If water is not consumed, it will be discharged into Snake River at a point in Lot 1 ~~xxx~~
xxx Section 2 Township 17N Range SW B.M. Adams County
4. Water will be used for the following purposes:
 Amount 5000 cfs hydroelectric for generation purpose from Jan 1 to Dec 31 (both dates inclusive)
 Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
 Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
5. Total quantity to be appropriated:
 a. 5000 cubic feet per second and/or
 b. _____ acre feet per annum.
6. Proposed diverting works:
 a. Description of ditches, flumes, pumps, headgates, etc. Existing gated intake
structure located in Brownlee Dam into a 24-foot diameter
penstock to be constructed
 b. Height of storage dam 395 feet, active reservoir capacity 480,250 acre feet; total reservoir capacity 1,426,700 acre feet, materials used in storage dam: Rock fill with clay core
 Period of year during which storage will occur _____ to _____ inclusive.
 c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is 3 to 4 years.
 b. Estimated construction cost is \$ 32,418,000 (power plant including penstock)
8. Description of proposed uses:
 a. If water is not for irrigation:
 (1) Give the place of use of water: NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 2 Township 17N
 Range SW B.M. _____
 (2) Amount of power to be generated: 225 MW ~~x~~ Kunder 260 feet of head.
 (3) List number of each kind of livestock to be watered: _____

 (4) Name of municipality to be served: _____, or number of families to be supplied with domestic water: _____
 (5) If water is to be used for other purposes describe: _____

11. Map of proposed project show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile

* Approximate

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

IDAHO POWER COMPANY

By W. J. Anna
(Applicant) Vice President

Proposed Priority 12-24-1975

Received by PLH Date 12-24-75 Time 11:00 AM
 Preliminary check by PLH Fee \$ 1465.00
 Receipted by PLH Date 12-24-75 # 2663
 Publication prepared by PLH Date 12-21-75
 Published in Lippell County News Review
 Publication dates Jan. 8 & 15
 Publication approved OK Date 1-16-76
 Priority reduced to _____ Reason _____

Protests filed by: _____

Copies of protests forwarded by: _____

Hearing held by _____ Date _____

Recommended for Approval denial by PLH

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 03-7018, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before February 1, 1980.
- c. Other: 1. The rights for the use of the waters under this permit shall be subordinate to and not prevent or interfere with any future upstream diversion and use of the waters of the Snake River and its tributaries for the irrigation of lands or other consumptive beneficial uses in the Snake River watershed.
2. This permit has been issued subject to Section 42-207, Idaho Code. In the event of its sale, transfer, assignment, or its being mortgaged, without a compliance with the provisions of this section, it shall be cancelled and revoked by the Director of the Department of Water Resources.

Witness my hand this 29 day of January, 1976.

[Signature]
 Director

EXHIBIT C

State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 3-07018

Priority: December 24, 1975

Maximum Diversion Rate: 5,000 CFS
Maximum Diversion Volume: 93,400 AF

It is hereby certified that IDAHO POWER CO
PO BOX 70
BOISE ID 83707 has complied with the terms and conditions of the permit, issued
pursuant to Application for Permit dated December 24, 1975; and has submitted Proof of Beneficial Use on
August 7, 1980. An examination indicates that the works have a diversion capacity of 35,000 cfs of water from:

SOURCE

SNAKE RIVER Tributary: COLUMBIA RIVER

and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL DIVERSION VOLUME</u>
POWER	01/01 to 12/31	5,000 CFS	93,400 AF

LOCATION OF POINT(S) OF DIVERSION:

SNAKE RIVER L3 (NE¼SE¼SE¼) Sec 2, Twp 17N, Rge 05W, B M WASHINGTON County

PLACE OF USE: POWER

Twp Rge Sec	NE				NW				SW				SE				
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
17N 05W 2													X				L 1

CONDITIONS OF APPROVAL

1. The rights for the use of the waters under this right shall be subordinate to and not prevent or interfere with any future upstream diversion and use of the waters of the Snake River and its tributaries above the backwater created by said dam for the irrigation of lands or other consumptive beneficial uses in the Snake River watershed
2. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required
3. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised
4. Use of water under this right shall be non-consumptive.
5. Power generation is at the Brownlee Dam Power Plant.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 16th day of November, 2007


DAVID R. JUTHILL, JR.
Director