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DEPARTMENT OF
WATER RESOURCES

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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

Case No. 39576

Consolidated Subcase No. 00-92023

**GROUND WATER DISTRICTS'
RESPONSE TO IDAHO POWER'S
MOTION TO STRIKE / MOTION
IN LIMINE**

Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, and Clark Jefferson Ground Water District¹, by and through counsel, respectfully submit this memorandum pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure in response to *Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment*. The Ground Water Districts oppose Idaho Power's Motion which fundamentally seeks to handicap

¹ The Ground Water Districts were substituted as parties to this proceeding in place of Idaho Ground Water Appropriators, Inc. (IGWA) by the Court's *Order Granting Substitution* dated February 12, 2008.

the Court's interpretation of the Swan Falls Agreement as it pertains to the subordination of Idaho Power's water rights to ground water recharge. The Motion should be denied.

BRIEF PROCEDURAL HISTORY

This subcase is a consolidation of common issues pertaining to the meaning and effect of the Swan Falls Agreement² as applied to twenty-six water right claims filed by Idaho Power Company ("Idaho Power"). On May 20, 2007, Idaho Power filed a *Complaint and Petition for Declaratory and Injunctive Relief* raising issues of interpretation of the Swan Falls Agreement. On July 24, 2007, the Court consolidated common issues pertaining to the Swan Falls Agreement into this subcase.³ *Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference* (the "Consolidation Order"). The Consolidation Order held that the Swan Falls Agreement "in part defines the ownership, nature and extent of the subject hydropower rights and how they are to be administered relative to other rights on the same or connected sources." *Consolidation Order* at 10. Therefore, the Court instructed that "[f]uture pleadings addressed to the issues of ownership and interpretation and/or application of the *Swan Falls Agreement* should be filed in said consolidated subcase." *Id.* at 16.

On April 18, 2008, the Court issued an order disposing of certain issues in this consolidated subcase while leaving to be decided the request by Idaho Power for a "declaration that Idaho Power's water rights are not subordinate to the use of water for ground water recharge." *Memorandum Decision and Order on Cross-Motions for Summary Judgment* at 48.

² The term "Swan Falls Agreement" refers the settlement agreement entered into between Idaho Power and the State of Idaho in settlement of Ada County Case Nos. 62237 and 81375. The settlement produced an Agreement, a Contract to Implement (a/k/a "1180 Contract"), amendments to the Idaho State Water Plan, and legislation, which collectively form the "Swan Falls Agreement."

³ This subcase was initially designated as subcase 92-23 but later changed by the Court to 00-92023.

Idaho Power then filed its *Motion to Strike, or Alternatively, Motion in Limine Regarding Scope of State Motion for Summary Judgment* on June 30, 2008, seeking to suppress from the Court's consideration legal issues and evidence relating to the division of the Snake River at Milner Dam, alleging that such information is "outside the scope of pleadings and matters properly before the Court in this consolidated subcase." (Motion at 1.) The Ground Water Districts strongly disagree, and provide the following argument in opposition to Idaho Power's Motion.

ARGUMENT

Integral to the determination of whether Idaho Power's water rights are subordinate to ground water recharge is the requirement of the Swan Falls Agreement that "minimum daily flow at the Milner gauging station shall remain at zero c.f.s." (Agreement at 7, ¶13.A.i., Exhibit 6 ¶2.) Idaho Power's Motion to Strike/Motion in Limine aims to impair the Court's interpretation of that important provision.

The "zero flow provision" ensures that all water arising upstream from Milner Dam can be diverted and beneficially used without risk of curtailment by Idaho Power's downstream hydropower water rights so long as the minimum flows at the Murphy U.S.G.S. gauging station are met. (See Agreement at 3-4, ¶¶ 7.A-7.B.) The provision ensured that water rights upstream from Milner are administered independent of Idaho Power's hydropower water rights below Milner.⁴ The zero flow provision did not create a new administrative paradigm; rather, it simply reconfirmed long-standing prior agreements and water administration practices that precluded Idaho Power's downstream hydropower rights from making a delivery call against water use upstream from Milner. Idaho Power sought to turn history on its head by bringing suit to curtail thousands of water rights upstream from Milner. A critical purpose of the Swan Falls Agreement was to ensure that did not happen. Therefore, as part of the settlement Idaho Power agreed to the

⁴ This division of the Snake River at Milner Dam results is sometimes referred to as the "two rivers" concept.

zero flow provision which sustained the historic division of the Snake River at Milner and, in concert with the subordination provisions of section seven of the Swan Falls Agreement, clearly establishes that Idaho Power's water rights are subordinate to water use for aquifer recharge purposes upstream from Milner Dam. *Id.*

It cannot reasonably be argued that the zero flow provision, an express term of the Swan Falls Agreement, is beyond the scope of this proceeding. Instead, Idaho Power seeks to preclude the Court from considering the application of the zero flow provision, arguing that division of the Snake River at Milner Dam is "neither related to the interpretation or application of the Swan Falls Agreement or the specific water rights that are subject thereto nor to the issue of those water rights are subordinate to recharge." (Motion at 1.) That argument could not be further from the truth. The division of the Snake River at Milner Dam is at the core of the zero flow provision. They are one and the same.

Moreover, Idaho Power's effort to prevent the Court from considering the division of the Snake River at Milner runs contrary to the purpose of this consolidated subcase which is to address "issues of ownership and interpretation and/or application of the *Swan Falls Agreement*." (Consolidation Order at 16, underline emphasis added). The division at Milner is tied to both interpretation and application of the zero flow provision—issues that have been properly before the Court since the origination of this consolidated subcase—rendering hollow Idaho Power's belated assertion that the administrative effect of the zero flow provision is "an entirely new issue of sweeping scope." (Motion at 9.) In fact, Idaho Power explicitly acknowledged that "separate source administration above and below Milner is the related issue of zero flow at Milner." (Motion at 9.) Without question, the administrative division of the Snake River at

Milner is relevant to, and within the scope of, this Court's interpretation of the zero flow provision.

Idaho Power's claim that it is somehow prejudiced by consideration of the division of the Snake River at Milner is likewise unconvincing. (Motion at 3.) The Swan Falls Agreement has been in effect for nearly a quarter-century, with Idaho Power intimately aware of the zero flow provision and its protection of upstream water use via an administrative division of the Snake River at Milner Dam. Moreover, the Milner division existed for decades prior to the Swan Falls Agreement which simply reconfirmed the division. It is not news.

Particularly innovative is Idaho Power's contention that the State has overstepped its bounds by seeking to prove "that Idaho Power has subordinated its water rights to 'all water rights diverting from sources upstream from Milner Dam,' and not simply the use of water for recharge." (Motion at 6.) One would think that proof of subordination to all upstream water use, without distinction, would be conclusive as to the question of subordinate to upstream recharge.

Ultimately Idaho Power asks the Court to ignore the zero flow provision altogether on the basis that the provision may bear on other SRBA subcases. The Ground Water Districts certainly agree that the zero flow provision is of monumental importance and far-reaching application. Yet the precise issue of this consolidated subcase—whether the Swan Falls Agreement subordinates Idaho Power's hydropower rights to aquifer recharge—is not the focus of subcases 2-200 or 92-2GP. This consolidated subcase provides the necessary context to properly address Idaho Power's unique rights and obligations under the Swan Falls Agreement. Accordingly, this is the proper forum for the Court to determine whether Idaho Power voluntarily subordinated its hydropower rights to water use for aquifer recharge purposes. In making that determination, evidence and argument pertaining to the division of the Snake River at Milner is inseparable

from evidence and argument pertaining to the zero flow provision itself. Both are within the scope of, and essential to, this proceeding.

CONCLUSION

Idaho Power's Motion to Strike/ Motion in Limine should be dismissed. The Motion seeks to handicap the Court's interpretation and application of the important zero flow provision of the Swan Falls Agreement. The Motion is predicated upon a fabricated distinction between the zero flow provision and the division of the Snake River at Milner Dam. Evidence and argument pertaining to the division at Milner are inextricably linked to the zero flow provision and are well within the scope of this proceeding. Idaho Power's Motion should be dismissed.

DATED this 19 Day of July, 2008.

**RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED**

By: Thomas J. Budge
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of July, 2008, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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