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DEPARTMENT OF
WATER RESOURCES

August 8, 2008

Alison Cameron
Paralegal
T 303.223.1331
F 303.223.0331
acameron@bhfs.com

Steven Olsen
Karl T. Klein
Michael C. Orr
Shasta Kilminster-Hadley
700 W. Jefferson, Room 210
Boise, ID 83711-4449

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

Clive Strong
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

IDWR Document Depository
P.O. 83720
Boise, ID 83720-0098

Jerry R. Rigby
Rigby Andrus & Moeller Chtd.
P.O. Box 250
Rexburg, ID 83440

Dana L. Hofstetter
Hofstetter Law Office LLC
608 West Franklin Street
Boise, ID 83702

John A. Rosholt
Travis L. Thompson
Barker Rosholt & Simpson LLP
113 Main Street, Suite 303
Twin Falls, ID 83303-0485

David W. Gehlert
Natural Resources Section
Environment and Natural Resource Division
United States Department of Justice
1961 Stout Street, 8th Floor
Denver, CO 90294

RE: *In Re SRBA*, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find Idaho Power Company's Motion to Consolidate in the above referenced matter that was fax filed today with the SRBA Court.

Please contact me if you have any questions. Thank you.

Counsel
August 8, 2008
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Sincerely,



Alison Cameron

Enclosures

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DEPARTMENT OF
WATER RESOURCES

James S. Lochhead
Michael A. Gheleta
Mark J. Mathews
Michelle C. Kales
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER RSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139
(208) 336-0700 – Telephone
(208) 344-6034 – Facsimile

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile

Attorneys for Plaintiff Idaho Power Company

IN THE DISTRICT COURT FOR 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

IDAHO POWER COMPANY,)

Plaintiff,)

**IDAHO POWER COMPANY'S
MOTION TO CONSOLIDATE**

v.)

STATE OF IDAHO; C.L. "BUTCH" OTTER,)
Governor of the State of Idaho; LAWRENCE G.)
WASDEN, Attorney General of the State of)
Idaho; IDAHO DEPARTMENT OF WATER)
RESOURCES; and DAVID TUTHILL, Director,)
Idaho Department of Water Resources,)

Defendants.)

INTRODUCTION

Idaho Power Company ("Idaho Power"), by and through its counsel, hereby files this Motion to Consolidate with this Consolidated Subcase No. 00-92093 the related SRBA Subcase Nos. 02-200 and 92-0002. The Court recently determined, in its August 6, 2008 Order Denying Idaho Power's Motion to Strike/in Limine and Granting State of Idaho's Motion to Compel ("Order on Motion to Strike/in Limine"), that issues concerning the state policy of maintaining a zero flow at Milner Dam, and state legislation concerning disparate administration of water rights above versus below Milner, may be raised by the State in this proceeding. Accordingly, Idaho Power moves to consolidate with this subcase the other two subcases addressing related issues concerning zero flow at Milner and water right administration under this policy.

As discussed below, taken together these subcases present common issues of law and fact, and resolution of the related issues presented in the subcases can be most expeditiously and effectively achieved through consolidation before the Presiding Judge handling Consolidated Subcase No. 00-92093. Moreover, now is the appropriate time to consolidate these related subcases, since the merits of the common issues have not yet been addressed in any of them.

PROCEDURAL BACKGROUND

A. State's Motion for Summary Judgment Regarding Subordination and Administration of Water Rights Above Versus Below Milner – Consolidated Subcase 00-92023

In the State's May 7, 2008 Motion for Summary Judgment ("State Motion") filed on May 7, 2008 in this Consolidated Subcase No. 00-92093, the State moved for summary judgment on several issues, the first two of which were stated as follows:

1. That the water rights at issue in this consolidated subcase are subordinate to *all water rights* diverting from sources *upstream from Milner Dam*, including ground water recharge water rights;

2. That the State of Idaho has the right to subordinate, to the extent authorized by state law, the water rights held in trust by the State under Idaho Code § 42-203B to *any water right* diverting from sources *downstream from Milner Dam* and upstream from the Murphy gauging station, including ground water recharge water rights.

State Motion at 2 (emphasis added). The State's motion thus alleges on its face and seeks a ruling that water rights above Milner may be administered differently than water rights below Milner.

The State further indicates that its motion is based upon, among other things, Idaho Code § 42-203B, which was amended in 1986 to include the following provision, which the State quotes in its motion:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries *downstream from Milner*, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river *upstream from Milner dam* shall be considered.

Id. at 2 (emphasis added). By its terms, this amendment relates to all water rights on the Snake River.

The IDWR Director's Report for various Idaho Power water rights includes the following recommended provision:

For purposes of administration of Water Rights Nos. [specified nos.] no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered. The required minimum daily flows at the Milner gauging station shall remain as zero CFS for purposes of administration.

The Director's recommendation thus includes both a recitation of the above-below Milner administration legislative provision, and also a statement that a minimum daily flow of zero at Milner is "required" and is "for purposes of administration."

In all of the above respects, the State raises the issues of zero flow at Milner, and

disparate administration of water rights above versus below Milner, in the SRBA and this Consolidated Subcase No. 00-92023.

The parties and participants in this Consolidated Subcase No. 00-92023 currently include Idaho Power, the State, the City of Pocatello, and various ground water districts, irrigation districts and canal companies. There are other entities and individuals, specified below, who have a stake and interest in resolution of the zero flow and above-below Milner administration issues, but who are not parties to this subcase as presently consolidated.

B. General Provision No. 4 Providing for Zero Flow at Milner for Purposes of Administration – Subcase No. 92-0002

The IDWR Director's Report for Basin 2 includes General Provision No. 4, which states in part: "The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second." Thus, issues associated with zero flow at Milner have also been raised outside of Consolidated Subcase No. 00-92023, in Subcase No. 92-0002.

Objections and Responses to General Provision No. 4 were filed by a number of parties participating in Consolidated Subcase No. 00-92023: Objections were filed by Idaho Power and by the Idaho Ground Water Appropriators ("IGWA"); and Responses were filed by the State, Ground Water Districts, and Pocatello. In addition, Responses were filed on Objections to General Provision No. 4 by entities who are not parties to Consolidated Subcase No. 00-92023, including: the United States acting through the Bureau of Reclamation; the Twin Falls Canal Company and North Side Canal Company; and Jeff C. and Jackie Harper of Basin and Range Resource Company, LLC.

C. Idaho Water Resource Board "Instream Flow" Water Right Claim for Zero Flow at Milner – Subcase No. 02-200

In Subcase 02-200, the Idaho Water Resource Board ("IWRB") filed a Notice of Claim in the SRBA claiming a year-round "minimum instream flow" at Milner of zero c.f.s. The IDWR

Director's Report recommended the claimed minimum stream flow water right in the amount of zero c.f.s. Thus, issues associated with zero flow at Milner have also been raised outside of Consolidated Subcase No. 00-92023 in Subcase No. 02-200.

Objections and Responses were filed to the Director's recommendation in Subcase No. 02-200 by parties participating in Consolidated Subcase No. 00-92023: Objections were filed by Idaho Power and by IGWA; and Responses were filed by Idaho Power, the State, and Pocatello. Objections and Responses were also filed by entities who are not parties to Consolidated Subcase No. 00-92023: Objections were filed by the United States acting through the Bureau of Reclamation; Responses were filed by the Twin Falls Canal Company and North Side Canal Company.

ARGUMENT

THE COURT SHOULD CONSOLIDATE THE THREE SETS OF SUBCASES FOR EXPEDITIOUS AND EFFECTIVE RESOLUTION OF COMMON ISSUES RELATED TO ZERO FLOW AT MILNER AND DISPARATE ADMINISTRATION ABOVE VERSUS BELOW MILNER

SRBA Administrative Order 1 ("AO1") provides in Section 11 that a motion to consolidate subcases is appropriate where "common issues of law or fact" are presented in more than one subcase and "resolution of those issues can be most expeditiously and effectively achieved" through consolidated proceedings. Under these criteria, Idaho Power respectfully requests that the Court consolidate Subcase Nos. Nos. 02-200 and 92-0002 with Consolidated Subcase No. 00-92093, as all of these subcases include issues pertaining to State policies, legislation and IDWR recommendations concerning zero flow at Milner and disparate administration of water rights above versus below Milner.¹

¹ Alternatively, the Court could frame and designate a Basin-Wide Issue concerning these issues.

Issues pertaining to the reach of the State's policy of maintaining a zero flow at Milner, and the State's current legislative directive providing for disparate administration of water rights above versus below Milner, are integrally intertwined – factually, legally, and as presented in the three consolidated subcases. The State's zero flow policy had its origins in State Water Plans which predated the Swan Falls Agreement. The zero flow policy was the basis of amendments to Idaho Code § 42-203B, legislation which provides for administration of water rights below Milner on different bases than water rights above Milner. While the provisions of § 42-203B regarding above-below Milner administration were enacted through 1986 amendments to the original 1985 legislation implementing the Swan Falls Agreement, they pertain not just to Idaho Power's water rights but to all water rights in the Snake River Basin.

In Consolidated Subcase No. 00-92093, the State's briefing confirms the tie between the pre-existing policy of maintaining a zero flow at Milner and the Legislature's 1986 amendment of §42-203B to provide for disparate administration of water rights above versus below Milner. *See* State of Idaho's Response to Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine re: Scope of State Motion for Summary Judgment ("State Response") at 40-45. The State also argues various ties between the historical development of the Swan Falls Agreement, the zero flow policy, and the above-below Milner administration provision. *Id.* at 33-40.

The State, in Consolidated Subcase No. 00-92093, even denominates the Milner zero flow policy an "element" of the hydropower rights that are the subject of the Swan Falls Agreement. *Id.* at 26. Similarly, in Subcase No. 02-200, the zero flow policy is also incorporated by the Director's recommendation as an element of the IWRB's claimed instream flow water right for zero c.f.s. at Milner. This instream flow water right presumably would be enforceable against all parties to the SRBA. Additionally, General Provision No. 4 providing for

a zero flow at Milner, which is the subject of Subcase No. 92-0002, presumably would have general applicability in the Snake River Basin.

The questions related to interpretation and application of the Swan Falls Agreement, the State's policy of maintaining a zero flow at Milner, and the State's legislative directive concerning disparate administration of water rights above versus below Milner, as presented in these three subcases, undoubtedly present common factual and legal issues. These issues would be most expeditiously and effectively resolved in consolidated proceedings before the Presiding Judge, rather than in separate proceedings before special masters. In this respect, consolidation would avoid the risk of inconsistent rulings on the same or similar issues. The precise issues for determination, given the summary format of SRBA Objection and Response forms, have yet to be developed in all three subcases, which makes this an opportune time for consolidation.

Parties affected by the Court's determinations regarding these interrelated issues are entitled to notice of relevant proceedings, which could be provided through a consolidated proceeding. As discussed in the procedural summary at the outset of this brief, there are parties to Subcase Nos. 02-200 and 92-0002 concerning zero flow issues who are not already parties to Consolidated Subcase No. 00-92093, including the United States acting through the Bureau of Reclamation, the Twin Falls Canal Company and North Side Canal Company, and Jeff C. and Jackie Harper of Basin and Range Resource Company, LLC. Just like other participants recently entering this case and claiming a "vital interest in protecting the integrity of the 'two rivers doctrine,'" Joint Motion to Participate and Memorandum in Support at 6, these objectors and respondents in the zero flow subcases have no less an interest in having notice and an opportunity to participate on these interrelated issues. Thus, not only would consolidation promote judicial economy and avoid the risk of inconsistent rulings, it would promote fair resolution of these important issues by enabling participation by interested parties.

CONCLUSION

For all of the foregoing reasons, the Court should consolidate with this Consolidated Subcase No. 00-92093 the related SRBA Subcase Nos. 02-200 and 92-0002.

Respectfully submitted,

Dated this 8th day of August, 2008

IDAHO POWER COMPANY

James C. Tucker, Esq.
Senior Attorney, Idaho Power Company
1221 West Idaho Street
Boise, ID 83702-5627

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139

By: Michael Gheleta

James S. Lochhead, Esq.
Michael A. Gheleta, Esq.
Mark J. Mathews, Esq.
Michelle C. Kales, Esq.
Brownstein Hyatt Farber Schreck, P.C.
410 17th Street, Twenty-Second Floor
Denver, CO 80202

Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S MOTION TO CONSOLIDATE** via the method indicated below, and addressed to each of the following:

Steven L. Olsen
Karl T. Klein
Michael C. Orr
Shasta Kilminster-Hadley
Office of Attorney General
700 W. Jefferson, Room 210
Boise, ID 83711-4449
michael.orr@ag.idaho.gov
steven.olsen@ag.idaho.gov
shasta.k-hadley@ag.idaho.gov
Served via E-mail and U.S. Mail, Postage Prepaid

United States Department of Justice
Environment & Nat'l Resources Division
550 W Fort Street, MSC 033
Boise, ID 83724
Served via U.S. Mail, Postage Prepaid

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702
jo.beeman@beemanlaw.com
Served via E-mail and U.S. Mail, Postage Prepaid

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098
Served via U.S. Mail, Postage Prepaid

John A. Rosholt
Travis L. Thompson
Barker Rosholt & Simpson LLP
113 Main Street, Suite 303
Twin Falls, ID 83303-0485
Fax: (208) 735-2444
Attorneys for Twin Falls Canal Company and
North Side Canal Company
Served via Fax and U.S. Mail, Postage Prepaid

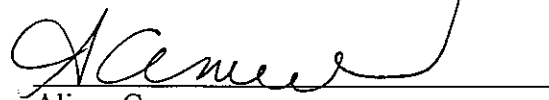
Randall C. Budge
Candice M. McHugh
Thomas J. Budge
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-139
cmm@racinelaw.net
Served via E-mail and U.S. Mail, Postage Prepaid

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449
Served via U.S. Mail, Postage Prepaid

Jerry R. Rigby
Rigby Andrus & Moeller Chtd
P.O. Box 250
Rexburg, ID 83440
Fax: (208) 356-0768
Served via Fax and U.S. Mail, Postage Prepaid

Dana L. Hofstetter
Hofstetter Law Office LLC
608 West Franklin Street
Boise, ID 83702
Fax: (208) 424-8774
Attorneys for Jeff C. and Jackie Harper
Served via Fax and U.S. Mail, Postage Prepaid

David W. Gehlert
Natural Resources Section
Environment and Natural Resource Division
United States Department of Justice
1961 Stout Street, 8th Floor
Denver, CO 90294
Fax: (303) 844-1350
Attorneys for U.S. Bureau of Reclamation
Served via Fax and U.S. Mail, Postage Prepaid


Alison Cameron