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RE: In Re SRBA, Case No. 39576 - Consolidated Subcase No. 00-92023

Dear Counsel:

Enclosed please find Idaho Power's Reply to State's and Upper Snake Water Users' Response to Motion to Consolidate in the above referenced matter.

Via First Class Mail
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Please contact me if you have any questions. Thank you.

Sincerely,



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Enclosures

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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

IDAHO POWER COMPANY,

Plaintiff,

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.

)
)
) Consolidated Subcase No. 00-92023
)
)
)

)
) **IDAHO POWER'S REPLY TO**
) **STATE'S AND UPPER SNAKE**
) **WATER USERS' RESPONSES TO**
) **MOTION TO CONSOLIDATE**
)
)
)

Idaho Power Company submits this reply to the two briefs in response to Idaho Power's motion to consolidate, filed by the State and Upper Snake Water Users ("Upper Snake"). Idaho Power filed its motion to consolidate this subcase with two other SRBA subcases involving zero flow issues after the Court found that this subcase includes issues raised by the State in its motion for summary judgment concerning the State's "zero flow" policy and differential administration of water rights above versus below Milner. Idaho Power interpreted filings by the State and Upper Snake as raising broad issues concerning the scope of these policies.

In response to Idaho Power's motion to consolidate, however, the State and Upper Snake represent that their upcoming summary judgment motions on remaining issues in this case are limited solely to issues of party intent and contractual interpretation under the Swan Falls Agreement. Assuming that this subcase is so limited, and that Idaho Power will have the opportunity to fully pursue the objections it has filed in the other two subcases, Idaho Power concurs that the Court need not consolidate all three subcases. However, if this subcase were to encompass issues concerning the scope and legal validity of the State's policies regarding zero flow and above-below Milner administration, or if any party maintains that Idaho Power cannot fully pursue its objections in the other subcases, then all issues concerning the scope of these policies should be dealt with in an integrated proceeding and consolidation would be appropriate.

A. Consolidation Would Be Appropriate to the Extent that the Three Subcases All Encompass Common Issues Regarding the Scope and Legal Validity of State Policies on "Zero Flow" and Differential Administration at Milner

Idaho Power's Complaint for Declaratory and Injunctive Relief ("Complaint") raises a number of specific issues concerning interpretation and application of the Swan Falls Agreement. One of those issues is Idaho Power's contention that the water rights encompassed by the Swan Falls Agreement are not subordinate to the use of water for ground water recharge. Complaint at ¶ 69. The Complaint did not plead any causes of action related to the State's

policies regarding zero flow and above-below Milner administration, and the State did not respond to the Complaint with a Counterclaim or any other pleading raising such issues.

Therefore, issues concerning the scope or legal validity of the zero flow and above-below Milner administration policies are not encompassed by the pleadings in this case.¹

Nevertheless, when the State filed its motion for summary judgment, it described one of the issues on which it seeks summary judgment broadly, asserting "[t]hat 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." State of Idaho's Motion for Summary Judgment on Subordination to Ground Water Recharge at 2 (emphasis added). Upper Snake, which has now been granted permission to participate in this case, appeared to take an even broader view of the issues in the case, claiming that it needed to intervene because of its "interests in the interpretation and the implementation of the '*two source issue*' and the '*subordination to recharge issue*,'" and claiming a "vital interest in protecting the integrity of the '*two rivers doctrine*.'" Joint Motion to Participate & Memorandum in Support at 6 (emphasis added).

In light of these seemingly broad allegations, Idaho Power filed its motion to consolidate as a protective matter in order to insure that, to the extent this subcase involves issues concerning the scope and legal validity of the State's zero flow and above-below Milner administration policies, common factual and legal issues would be heard in consolidated proceedings involving related issues in the two other subcases concerning zero flow. Subcase No. 00-92002GP

¹ Idaho Power did include allegations in the Complaint regarding Paragraph 7(E) of the Swan Falls Agreement, which as quoted in the State's Response at pp. 21-22 provides that Idaho Power's "ability to purchase, lease, own or otherwise acquire water from sources upstream of its power plants and convey it past its power plants below Milner Dam shall not be limited by this agreement." The State confirms in its Response that this provision enables Idaho Power Company "to acquire water upstream from Milner Dam via other means, and to convey such water past Milner Dam for the benefit of the Company's downstream power plants," irrespective of the State's zero flow and Milner administration policies and provisions. State Response at 22.

concerns General Provision No. 4 recommended in the IDWR Director's Report for Basin 2, which states: "The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second." Subcase No. 02-200 involves the Director's recommendation of a "minimum instream flow" water right of zero c.f.s. claimed by the Idaho Water Resource Board ("IWRB").

As set forth in Idaho Power's motion to consolidate, common issues regarding the scope and legal validity of the State policies of zero flow and above-below Milner administration would be most expeditiously and effectively resolved in consolidated proceedings, which would also avoid the risk of inconsistent rulings on the same or similar issues. To the extent that the State, Upper Snake, or other participants seek to raise broad issues concerning the scope and legal validity of the zero flow policy and above-below Milner administration, the Court should consolidate the three related subcases for purposes of addressing the common issues in a single integrated proceeding. As discussed below, however, this may not be necessary if this case is confined to interpretation and application of the Swan Falls Agreement to the water rights enumerated in the Agreement.

B. Consolidation Need Not Occur if the Court Confines the Issues to Party Intent and Contractual Obligations Under the Swan Falls Agreement, and Idaho Power May Pursue its Objections in Subcases 02-200 and 00-92002GP

In responding to the motion to consolidate, both the State and Upper Snake now clarify that the upcoming summary judgment proceedings do not involve the broad issues perceived by Idaho Power. The State clarifies that its motion for summary judgment in this subcase presents only questions of "party intent" which should not be consolidated with questions concerning the "scope or validity" of state water policy and regulatory authority underlying the State's zero flow and above-below Milner administration policies. State Response at 5. The State indicates that it seeks only a determination that Idaho Power "voluntarily consented" to limit the hydropower water rights encompassed by the Swan Falls Agreement to be consistent with the State's "two

ivers" policy. *Id.* at 6-7. Upper Snake concurs that it does not intend to raise issues beyond questions of "contract interpretation" including the "contractually-created limits of Idaho Power's water right." Upper Snake Response at 2-3.

The remaining issue in this case is whether Idaho Power subordinated to recharge the water rights which are subject to the Swan Falls Agreement.² As stated by the Court in its August 6, 2008 Order:

[T]he Court finds that the issues raised by the State of Idaho in its motion for summary judgment fall within the scope of the consolidated subcase which includes the interpretation and/or application of the Swan Falls Agreement and the issue of whether the subject hydropower rights are subordinated to recharge. To the extent there also remains an issue distinguishing between recharge rights located above Milner Dam and recharge rights located below Milner Dam, the issue is within the scope of these proceedings.

Order Denying Idaho Power's Motion to Strike/in Limine and Granting State of Idaho's Motion to Compel at 3.³ The Upper Snake Water Users agree that "[t]he contested issues have been significantly narrowed ... to whether Idaho Power contractually subordinated its water right held in trust to groundwater recharge upstream of Milner Dam." Upper Snake Water Users Response at 9. The State also includes the issue of whether Idaho Power's water rights are subordinate to recharge "downstream from Milner Dam and upstream from the Murphy gauging station." State Motion for Summary Judgment on Subordination to Ground Water Recharge at 2. Thus, the parties apparently agree that this subcase encompasses interpretation or application of the Swan

² The Idaho Power water rights listed in Paragraph 7 of the Swan Falls Agreement (with facilities in parentheses) include State Water Right License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001 and Decree Number 02-0100 (Swan Falls).

³ The "subject hydropower rights" are those listed in the Court's Consolidation Order, which include: 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, 37-20710, 02-02057, 02-02001A, 02-2001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032 A & B, 02-04000 A & B, 02-04001 A & B and 02-00100. See July 23, 2007 Consolidation Order at 16.

Falls Agreement and the issue of whether the water rights subject to the Swan Falls Agreement are subordinate to the use of water for recharge.

By contrast, Subcase Nos. 02-200 and 00-92002GP involve other issues. The summary nature of SRBA recommendations, objections and responses makes it difficult to ascertain at this point the precise issues encompassed by these other subcases. However, objections and responses filed by the parties raise various issues which do not pertain to the Swan Falls Agreement. In Subcase No. 00-92002GP (General Provision providing for zero flow at Milner), objections and responses⁴ raise issues including but not limited to the following: that the General Provision should not be included in the Director's Report or in any decree; that inclusion of the General Provision in the Director's Report or SRBA is contrary to proper procedure or established law; that the General Provision is necessary and should be clarified to state that maximum daily flow shall be zero (0) cfs at Milner Dam; and that the water right should be decreed as a Basin 1 water right and administered as part of Water District 01. In Subcase No. 02-200 (IWRB claim for a zero flow minimum instream flow right), objections and responses⁵ raised issues including but not limited to the following: that the water right should not exist at all; that the claimant did not follow statutory requirements to obtain a minimum instream flow water right; that additional language may be necessary to clarify place of use; and that the water right should be decreed as a Basin 1 water right and administered as part of Water District 01. As discussed in Idaho Power's motion to consolidate, some of these objections and responses were made by other parties in the two zero flow subcases who are not parties to this subcase.

⁴ Idaho Power filed a timely objection regarding the Director's recommendation in Subcase No. 00-92002GP.

⁵ In conjunction with its timely objection to the General Provision, Idaho Power filed a motion for late objection in Subcase No. 02-200, which was not opposed by the State or IGWA and the various parties associated with it, and which was granted by Special Master Dolan in a February 20, 2008 order.

Thus, Subcase Nos. 02-200 and 00-92002GP involve different claims, issues and parties than this consolidated subcase concerning interpretation and application of the Swan Falls Agreement. Idaho Power maintains that, so long as this subcase is limited to issues of party intent and contract interpretation, as represented in the response briefs of the State and Upper Snake, and so long as Idaho Power and other objectors may pursue their objections in the other two subcases without the concern of preclusion, all three of the subcases need not be consolidated.⁶ However, to the extent any party asserts that Idaho Power must raise in this subcase all issues concerning the State policies of zero flow and above-below Milner administration, the three subcases should be consolidated so that all issues can be addressed in a single integrated proceeding.

C. The Court Should Address the Merits of this Subcase, Including Those Raised by the Parties in Responding to Idaho Power's Procedural Motion, When the Cross-Motions for Summary Judgment Have Been Fully Briefed

Idaho Power's motion to consolidate raises a discrete procedural question: should the three subcases be consolidated or not? In the course of their response briefs, the State and Upper Snake either suggest or directly raise a number of arguments and use terminology going well beyond the question of consolidation and touching on the merits of issues which the parties will be briefing through the upcoming cross-motions for summary judgment. These arguments and terminology include the State's references to the parties' alleged agreement regarding the "source element," "terms" of the Agreement, "definition" and "limitation" of the water right, and "consenting" versus "non-consenting" parties, among others.

⁶ Indeed, in arguing that denial of the motion to consolidate will not prejudice Idaho Power, the State concedes that "[t]he Company will still have ample opportunity to raise and litigate any constitutional challenges to the State's regulatory authority in subcases 02-0200 and 00-92002GP with respect to any other water rights it may hold." State Response at 14. As the State suggests, Idaho Power may pursue its objections and responses filed in subcases 02-0200 and 00-92002GP irrespective of the outcome of this consolidated subcase, since those objections and responses do not pertain to specific Idaho Power water rights encompassed by the Swan Falls Agreement, and Idaho Power has other rights on the Snake River at issue in the SRBA which are not listed in or subject to the Agreement.

The State attempts to draw a distinction in particular between the Legislature's authority to impose a zero flow or two rivers policy on "non-consenting appropriators" versus others. State Response at 4. The Court should refrain from making any pronouncements based on the State's one-sided presentation on this and other merits issues. While this argument may be addressed in conjunction with the summary judgment proceedings, Idaho Power would note here that resolution of any question of "consent" depends on the precise subject of the alleged consent. In this case, distinct issues arise with regard to the State's general zero flow and above-below Milner administration policies, and with regard to potential subordination of hydropower water rights to recharge in light of other statutes directly addressing the relationship between water rights for hydropower and recharge. Idaho Power has not responded to these arguments in the context of its procedural motion, but will do so if and when these issues are raised again in conjunction with the cross-motions for summary judgment.

CONCLUSION

To the extent that this subcase includes broad issues concerning the scope and legal validity of the State's policies on zero flow and above-below Milner administration, the Court should consolidate with this Consolidated Subcase No. 00-92093 the related SRBA Subcase Nos. 02-200 and 00-92002GP. Assuming, as the State and Upper Snake represent, that this subcase is limited solely to issues of party intent and contractual interpretation under the Swan Falls Agreement, and assuming that Idaho Power will have the opportunity to fully pursue the objections it filed in the other two "zero flow" subcases, as it should, Idaho Power concurs that the Court need not consolidate all three subcases. In such case, the parties may proceed to complete discovery, and then undertaking briefing on cross-motions for summary judgment concerning the issue of whether Idaho Power's water rights subject to the Swan Falls Agreement are subordinated to the use of water for aquifer recharge.

Respectfully submitted,

Dated this 2nd day of September, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER'S REPLY TO STATE'S AND UPPER SNAKE WATER USERS' RESPONSES TO MOTION TO CONSOLIDATE** via the method indicated below, and addressed to each of the following:

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