

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

RECEIVED

OCT 03 2008

DEPARTMENT OF
WATER RESOURCES

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
(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 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

Case No. 39576

) Subcase Nos. 01-02017, 01-02032,
) 01-02046, 01-02064, 01-04052,
) 01-10042, 01-10382, 01-10383,
) 01-10384, 01-10485, 01-10486,
) 01-10487, 01-10531, and 01-10532
)

**IDAHO POWER COMPANY'S
OPPOSITION TO STATE OF
IDAHO'S MOTION FOR
EXPEDITED HEARING**

The Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys,
hereby opposes the State of Idaho's *Motion for Expedited Hearing* on the State's *Motion to
Consolidate* on the following grounds:

1. The State's *Motion for Expedited Hearing*, its *Motion to Consolidate*, and its *[Proposed] Scheduling Order* were filed and served by the State after the close of business yesterday without any advance notice discussion of pertinent issues or proposed dates with Idaho Power, and with notice the day of filing.

2. The above-captioned subcases proposed for consolidation by the State have been pending before the Special Master for a considerable period of time, and have been handled by the Special Master and parties in a grouping configuration which differs from that now proposed by the State. If the State seeks to reconfigure the grouping of the subcases, or to have the Special Master focus on some but not all of the issues, in some but not all of the subcases under the current grouping, the matter should be presented through a properly noticed motion which gives all affected parties a full and fair opportunity to respond.

3. Pursuant to the Special Master's May 7, 2008 *Trial Scheduling Order*, a 706 *Report* was due from IDWR on September 2, 2008 regarding Director's Report recommendations on some of the claims sought for consolidation (Idaho Power's direct flow claims for American Falls Power Plant). Counsel for IDWR contacted counsel for Idaho Power several weeks ago and indicated that the report would be delayed, but has never specified when it would be prepared or sought an extension for relief from this Court-ordered deadline for its preparation.

4. In order for Idaho Power to respond to the State's *Motion to Consolidate*, including the central points of whether the above-captioned subcases have common issues of fact or law, Idaho Power requires the 706 *Report* explaining the bases for the Director's recommendations on Idaho Power's claims. Idaho Power will be prejudiced if it must respond to the merits of the *Motion to Consolidate* prior to receiving the 706 *Report*.

2

5. IDWR should be ordered to complete by a date certain the Court-ordered 706 *Report* on the Idaho Power direct flow claims for American Falls Power Plant. In addition, the Court should order IDWR to prepare a 706 Report on the claims at issue in the other subcases which are included in the State's *Motion to Consolidate*, including the claims of Idaho Power and the United States for storage in American Falls Reservoir, so that the Court and parties can properly evaluate whether the subcases contain common issues of fact or law making them appropriate for consolidation.

6. One of the grounds on which the State seeks consolidation is the inclusion in the Director's Report on certain United States claims, and inclusion in objections on certain Idaho Power claims, of the so-called "historic practice subordination remark," which provides in part: "The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes." In Consolidated Subcase No. 00-92026, Presiding SRBA Judge Melanson consolidated numerous subcases involving the historic practice subordination remark and issue. The State vigorously objected to the consolidation, and after the subcases had been consolidated for over six months, renewed its objections and succeeded in getting the subcases "de-consolidated" after IDWR prepared 706 Reports and the State argued that each subcase involves unique facts -- contrary to its argument now that the subcases should be consolidated on the basis of common facts. Given the State's apparent attempt to "re-consolidate" some subcases based on the historic practice subordination remark, Idaho Power requires time to examine the earlier proceedings and determine whether it would be appropriate to seek costs and fees from the State for Idaho Power's expenses associated with having to respond to the State's filings and

participate in hearings in the protracted proceedings regarding consolidation, de-consolidation, and re-consolidation.

7. Orders issued regarding the Court's grouping configuration of subcases 01-02064 et al have included in the caption "Ownership Issue" (*see, e.g.*, May 8, 2008 Order Setting Mandatory Settlement Conference and Trial Scheduling Order). The State's *Motion to Consolidate* may seek to override this common issue designated by the Court and included in order captions to date. Additionally, it has never been clear to Idaho Power what this so-called "Ownership Issue" encompasses and how Idaho Power's interests may be affected. The issue may encompass competing claims or interests claimed by the United States and various objector irrigation districts who have spaceholder contracts with BOR for storage in American Falls Reservoir. However, Idaho Power is also a spaceholder in American Falls Reservoir and has competing claims or interests vis-a-vis those of BOR related to storage in American Falls. Idaho Power believes that clarification of this matter affects the consolidation question and is suitable for discussion at the October 2, 2008 scheduling conference.

8. Adoption of a scheduling order such as the State's *[Proposed] Scheduling Order*, or even submittal of proposed scheduling orders by the parties, is premature until the parties and Court have determined what cases and issues are to be grouped together or consolidated, at which point they can assess the necessary time requirements given the scope of issues and subcases concerned.

CONCLUSION

The Court should deny the State's *Motion for Expedited Hearing* of its hastily filed *Motion to Consolidate*. The State's proposed consolidation, involving a reconfiguration of subcase groupings that have applied to date in proceedings before this Court, is sufficiently

complex that it should not be handled on an expedited basis, an extraordinary measure for which the State has shown no compelling justification. Rather, in order to avoid prejudice to the parties, and to enable an informed and considered decision by the Court, the State's *Motion to Consolidate* should be heard on a normal motion schedule.

Once the Court has ruled on the *Motion to Consolidate*, and the parties know what subcases and issues are being grouped together, then the Court should conduct a scheduling conference and provide the opportunity for parties to submit proposed scheduling orders (or a single coordinated proposed scheduling order, which the State declined to pursue with other parties here). This opposition brief by Idaho Power's addresses only the State's *Motion for Expedited Hearing*. Idaho Power reserves the right to further respond to the merits of the State's *Motion to Consolidate* and the State's *[Proposed] Scheduling Order* as appropriate.

Respectfully submitted,

DATED: September 25, 2008

IDAHO POWER COMPANY

James C. Tucker, ISB No. 2038
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 Street, Suite 520
P.O. Box 2139
Boise, ID 83701-2139

By: Michael A. Gheleta
James S. Lochhead, Esq.
Michael A. Gheleta, Esq.
BROWNSTEIN HYATT FARBER
SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202

CERTIFICATE OF MAILING

I certify that on September 25 2008, I fax-filed the original and served copies of this, **IDAHO POWER COMPANY'S OPPOSITION TO STATE OF IDAHO'S MOTION FOR EXPEDITED HEARING** on each of the following persons via facsimile and U.S. regular mail:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
P.O. BOX 2707
TWIN FALLS, ID 83303-2707
FACSIMILE: 208.736.2121

SPECIAL MASTER DOLAN
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707
FACSIMILE: 208.736.2121

TRAVIS L. THOMPSON
BARKER, ROSHOLT & SIMPSON LLP
113 MAIN AVENUE W., SUITE 303
PO BOX 485
TWIN FALLS, ID 83301-6167
FACSIMILE: 208.733.0700

LAWRENCE G. WASDEN
CLIVE J. STRONG
DAVID I. STANISH
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 44449
BOISE, ID 83711-4449
FACSIMILE: 208.854.8072

RANDALL C. BUDGE
RACINE, OLSON, NYE, COOPER, BUDGE
201 E. CENTER, SUITE A2
PO BOX 1391
POCATELLO, ID 83204-1391
FACSIMILE: 208.232.6109

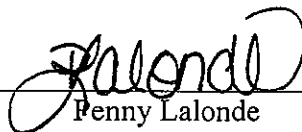
ROGER D. LING
LING, ROBINSON & WALKER
615 H STREET
PO BOX 396
RUPERT, ID 83350-0396
FACSIMILE: 208.436.6804

ENVIRONMENT & NATURAL
RESOURCES
U.S. DEPARTMENT OF JUSTICE
550 WEST FORT STREET, MSC 033
BOISE, ID 83724
FACSIMILE: 208.334.9375

W. KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY, ID 83318
FACSIMILE: 208.878.2548

UNITED STATES OF AMERICA
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION PN-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234
(By Mail Only)

IDWR REPOSITORY
PO BOX 83720
BOISE, ID 83720-0098
(By Mail Only)


Penny Lalonde