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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

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**IDAHO POWER COMPANY'S
SCHEDULING CONFERENCE
REPORT**

Subcase Nos. 01-02017, 01-02032,
01-02046, 01-10382, 01-10383,
01-10531, 01-10532, and 01-10384

October 2, 2008 at 10:00 a.m.

Subcase Nos. 01-2064, 01-10485,
01-10486, 01-10487 et al.

October 2, 2008 at 11:30 a.m.

The Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, respectfully submits this Scheduling Conference Report in advance of the above-captioned scheduling conferences on October 2, 2008.

INTRODUCTION

Idaho Power has submitted this Scheduling Conference Report because communications between and filings by the parties have made it apparent that the Court and parties may not all be "on the same page" regarding which issues in which subcases are subject to which current scheduling orders and upcoming trial proceedings. In orders from the Court, various subcases have been grouped together, including the two groupings of subcases involved in the two subject scheduling conferences. One of the Court orders appears to limit Subcase Nos. 01-2064 et al to an "Ownership Issue" at this stage, without describing what parties or specific subcases are encompassed, and sets a trial for January 7, 2009, leaving the parties unclear as to who should be preparing for that trial and on what specific questions.¹

Moreover, the State recently filed a unilateral Motion to Consolidate certain subcases and a proposed schedule for those subcases that was not discussed with the affected parties, apparently seeking to restructure the Court's grouping of subcases in the midst of the prevailing procedural uncertainty. Idaho Power has filed an opposition to the State's request for expedited treatment of that Motion to Consolidate, as has the United States. The discussion in this Scheduling Conference Report further demonstrates why requiring expedited responses from parties and determinations by the Court on case management concerning complex interrelated issues, as sought by the State's motion, would be ill-advised and inappropriate.

¹ Idaho Power has been assuming that the "Ownership Issue" means the application of the Idaho Supreme Court's decision in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007) to various types of water uses. See also United States' Response to Motion for Expedited Hearing at 2.

Idaho Power maintains that in order for all of these matters to proceed forward in an efficient manner, and to avoid prejudice to the parties, the Court should enter a comprehensive scheduling order after the issues in the different subcases have been delineated and the parties have determined how much time is necessary for pretrial and trial proceedings on the various issues. That delineation of issues could occur through the parties meeting to develop a common understanding of what issues are involved in various subcases, by IDWR's preparation of 706 Reports in the subcases, or through a combination of both. The affected parties could then meet to determine schedules for resolution of the various subcases and issues within them.

Idaho Power discusses below the two groupings of subcases involved in the subject scheduling conferences. The discussion summarizes the nature of the claims and the Director's recommendations, identifies the parties filing objections and responses, and provides illustrations of some of the substantive issues concerned.² It should be emphasized that the discussion encompasses only some of the subcases which are the subject of scheduling conferences on October 2, 2008, with the subcases discussed of particular importance to Idaho Power. Other subcases involving the parties in these Basin 1 proceedings should be integrated into the overall consideration and structuring of the comprehensive process suggested.

² Idaho Power, in an effort to assist the Court and parties in advance of the October 2, 2008 scheduling conferences, has compiled this information through a relatively quick review of voluminous files on these claims, involving notices of claims, Director's recommendations, objections, responses and other materials. In compiling the information, Idaho Power has not had the benefit of 706 Reports describing the claims and the bases for the Director's recommendations. Idaho Power therefore reserves the right to supplement, clarify or correct the descriptions contained herein as these proceedings move forward.

DISCUSSION

1. *October 2, 2008 Scheduling Conference at 10:00 a.m. - Subcases: 01-2017, 01-2032, 01-2046, 01-10382, 01-10383, 01-10531, 01-10532 and 01-10384.*

a. Nature of Claims and Recommendations – These eight subcases involve claims by Idaho Power for direct flow water rights for hydropower use at American Falls Power Plant. The claims seek flows ranging from 1,400 cfs to 6,000 cfs, with priority dates from 1901 to 1926. The Director's report recommended some claims at reduced quantities, limited seasons of use, disallowed some claims, created new claims, and recommended various conditions and limitations.

b. Parties Filing Objections and Responses – Objections and responses regarding the recommendations on these claims were filed by Idaho Power, the State, the Idaho Ground Water Appropriators ("IGWA"), and the Bureau of Reclamation ("BOR").

c. Illustration of Issues

1. What were the bases for the Director limiting the total quantity of water, providing for smaller quantities during specified time periods, and limiting the seasons of use to shorter time periods than those claimed?

2. What were the bases for the Director claiming the existence of an accomplished transfer, and for accordingly recommending project operational restrictions in favor of certain future upstream uses?

3. What impact, if any, does the 1923 federal contract between Idaho Power and the United States, and other contracts between these parties, have on the Court's determination of these state law water rights, most of which involve priorities predating the 1923 federal contract and the 1927 federal construction of American Falls Dam?

2. *October 2, 2008 Scheduling Conference at 11:30 a.m. – Subcases 01-2064 et al, including "Ownership Issue"*

a. Nature of Claims and Recommendations – There are over 40 subcases included in this grouping. Idaho Power does not have files on all of these subcases since it has not filed claims, objections or responses in all of them. Therefore, the discussion below pertains to subcases in which Idaho Power is a party, including claims for storage at American Falls Reservoir and Palisades Reservoir.

1. *BOR American Falls Reservoir Storage* - Subcase No. 01-2064 involves a claim by BOR for 1.7 million acre-feet of storage in American Falls Reservoir for irrigation and power purposes with priorities of March 29 and 30, 1921, including the right to refill under the priority of the water right to satisfy the United States' storage contracts. The Director's report recommended the water right for a total quantity of 1,672,590 acre-feet, with smaller amounts recommended for specific purposes of use, did not include a refill right, and included various conditions and limitations on the right.

2. *Idaho Power American Falls Reservoir Storage* - This subcase grouping also includes claims by Idaho Power for 300,000 acre-feet of storage in American Falls Reservoir with a priority of March 17, 1921 for hydropower use at American Falls and other downstream facilities. The subcases include alternative Idaho Power claims based on license (01-10485), permit (01-10486), and decree (01-10487). The Director's report recommended that the Idaho Power claims be disallowed on the basis of IDWR recommending water right no. 01-2064.

3. *BOR Palisades Reservoir Storage* - Subcase No. 01-2068 involves a claim by BOR for 1.2 million acre-feet of storage in Palisades Reservoir for irrigation and

power purposes with a 1939 priority. The Director's report recommended the claim, did not include a refill right, and included various conditions and limitations on the right.

Once again, there are other subcases involved in this grouping which are not summarized here.

b. Parties Filing Objections and Responses - Objections and responses regarding the recommendations on these claims were filed by numerous parties, including: (a) in 01-2064, by BOR, Idaho Power, the State, and various irrigation districts and canal companies; (b) in 01-10485, 01-10486 and 01-10487, by Idaho Power, BOR, the State, and IGWA; and (c) in 01-2068, by BOR, Idaho Power, the State, Pocatello, and various irrigation districts and canal companies.

c. Illustration of Issues

1. Is the scope of the "Ownership Issue" included in the captions of orders in Subcase Nos. 01-2064 et al limited to the application of the Idaho Supreme Court's decision in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007) to various types of water uses, and which claims and parties are encompassed by this issue?

2. In light of the Idaho Supreme Court's ruling in Pioneer, how should the respective water right interests of the United States and the users or consumers of the water be described in the SRBA decree, and is there any difference in this regard between users or consumers of water making irrigation uses, hydropower uses, or other non-irrigation uses?

3. Should the United States be decreed a water right to refill the federal reservoirs under the priority of the water right in order to satisfy the United States' storage contracts?

4. What is the relationship between the 1.7 million acre-feet of storage claimed by the United States in American Falls Reservoir and the 300,000 acre-feet of storage claimed by Idaho Power in American Falls Reservoir for hydropower use at American Falls Dam and downstream hydropower facilities?

5. Does Idaho Power have a water right to 300,000 acre-feet of storage in American Falls Reservoir, or does the United States hold that right in trust by virtue of the 1923 contract between Idaho Power and the United States?

6. Should the hydropower water rights claimed be subordinated to upstream non-hydropower uses, and be unable to call out such upstream water rights even where those rights are junior, based upon an alleged "historic practice" of hydropower being "incidental" to the rights of others for other purposes?

CONCLUSION

As the discussion above illustrates, there are many independent and interrelated issues in the subcases grouped together by the Court for purposes of case management to date. Yet the issues illustrated constitute only a partial list of all of the issues in the grouped subcases. And even issues identified to date, i.e., the "Ownership Issue," are not entirely clear as to scope and the specific subcases and parties involved. The Court has grouped the subcases in a particular manner. The State's Motion to Consolidate seeks to reshuffle them based on a partial consideration of the issues concerned. Idaho Power maintains that the most efficient and least prejudicial grouping and manner of proceeding in these subcases can only be determined by a comprehensive identification of the interrelated issues and parties impacted by them.

Accordingly, in order to promote efficient case management and to avoid prejudice, the Court should enter a comprehensive scheduling order only after the issues in the various

subcases have been delineated, and the parties have determined the necessary time for pretrial and trial proceedings. That delineation of issues should occur through the parties meeting to develop a common understanding of what issues are involved in various subcases, by IDWR's preparation of 706 Reports in the subcases, or through a combination of both. At that point, the affected parties can confer and attempt to determine schedules for resolution of the various subcases and the issues encompassed by them.

Respectfully submitted,

DATED: October 1, 2008

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CERTIFICATE OF MAILING

I certify that on October 1, 2008, I fax-filed the original and served copies of this, **IDAHO POWER COMPANY'S SCHEDULING CONFERENCE REPORT** on each of the following persons via facsimile and U.S. regular mail:

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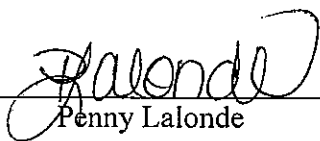
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