

COPY

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN (ISB # 5156)
MICHAEL C. ORR (ISB # 6720)
SHASTA KILMINSTER-HADLEY (ISB # 7889)
Deputy Attorneys General

700 West State Street – 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400
Attorneys for The State of Idaho

**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	) Consolidated Subcase no. 00-92023
	)
	) STATE OF IDAHO'S AMENDED
	) MOTION FOR SUMMARY
Case No. 39576	) JUDGMENT ON ISSUE OF
	) RECHARGE SUBORDINATION
	)

COMES NOW the State of Idaho, by and through its counsel of record, and pursuant to Rule 56 of the Idaho Rules of Civil Procedure moves for summary judgment on the following three (3) issues:

1. That Idaho Power Company agreed and/or conceded that the water rights at issue in this consolidated subcase are defined to exclude the flows of the Snake

River or surface water or ground water tributary to the Snake River upstream from Milner Dam and carry no right or entitlement to seek curtailment or administration of rights to the use of the waters of the Snake River or surface or ground water tributary to the Snake River 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; and

3. That the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, as finally licensed.

This motion is based on the Swan Falls Agreement and the legislative, executive, administrative and judicial actions implementing the Agreement. These grounds are detailed in a supporting memorandum filed contemporaneously with this motion. In brief, Idaho Code § 42-203B(2) provides in relevant part as follows:

[A]pplication of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. 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 dam, 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 rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.

Paragraph 7(B) of the Swan Falls Agreement provides in relevant part that Idaho Power Company's entitlement to use the flow of the Snake River at company facilities between the Milner Dam and the Murphy gauging station to the extent of actual beneficial use within the amounts stated in the State water licenses for those facilities "shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law." Paragraph 7(C) of the Swan Falls Agreement provides that "[t]he Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons dismissed from Ada County Case No. 81375."

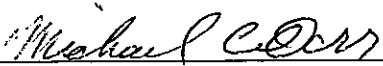
The State requests oral argument on this motion.

DATED this 17th day of October 2008.

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN
MICHAEL C. ORR
SHASTA KILMINTER-HADLEY
Deputy Attorneys General



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2008, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S AMENDED MOTION FOR SUMMARY JUDGMENT ON ISSUE OF RECHARGE SUBORDINATION to the following parties by the indicated methods:

Clerk of the SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208-736-2121

Idaho Power Company
Represented by:
James C. Tucker
P.O. Box 70
1221 W. Idaho
Boise, ID 83707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.388.6935
- ☒ E-mail: jtucker2@idahopower.com

Idaho Power Company
Represented by:
James S. Lochhead
Mark J. Mathews
Michael A. Gheleta
Michelle C. Kales
Brownstein Hyatt Farber Shreck
410 17th Street, Ste. 2200
Denver, CO 80202-4432

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 303.223.0904
- ☒ E-mail: mgheleta@bhfs.com
- ☒ E-mail: jlochhead@bhfs.com

Idaho Power Company
Represented by
John K. Simpson
Shelley M. Davis
1010 W. Jefferson, Suite 102
Boise, ID 83701-2139

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.344.6034
- ☒ E-mail: smd@idahowaters.com

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

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83720-4449

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Not Applicable

United States Department of Justice
Environment & Natural Resources
Division
550 West Fort Street
MSC 033
Boise, ID 83724

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey,
Chartered
P.O. Box 1391
Pocatello, Idaho 83204-1391

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: cmm@racinelaw.net

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, Idaho 83702

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: jo.beeman@beemanlaw.com

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

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: jrigby@rex-law.com

Michael C. Orr