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OCT 06 2009

DEPARTMENT OF
WATER RESOURCES

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Basin and Range Resource Company, LLC
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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 39576

)
) Consolidated Subcase No. 00-92023
)

) RESPONSE TO STATE OF IDAHO AND
) IDAHO POWER COMPANY'S
) JOINT MOTIONS MEMORANDUM
)
)

COME NOW Jeff C. and Jackie Harper, Basin and Range Resource Company, LLC, and Interested Water Users, Respondents in Subcase Nos. 2-100, 2-2032A, 2-2032B, 2-4000A, 2-4000B, 2-4001A and 2-4001B *inter alia*, by and through their counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and pursuant to the SRBA Court's July 23, 2009, Scheduling Order in the above-captioned matter, respectfully submit the following Response Brief concerning the proposed Partial Decrees in the State of Idaho and Idaho Power's Joint Motions. This Response is supported by the Affidavit of Dana L. Hofstetter and the record. Specifically, this Response further discusses the four (4) issues identified in these parties' Statement of Issues filed on August 5, 2009.

Issue #1: The proposed language inappropriately suggests that water rights owned by Idaho Power are to be considered fluctuations resulting from operation of Company facilities.

In the process of converting the original Swan Falls Agreement language to the SRBA Partial Decree language, certain word tailoring apparently was undertaken to fit the new context. In particular, the wording changes in connection with the last sentence of the first “Other Provision” may have inadvertently altered the meaning of the provision. As originally stated in the Swan Falls Agreement, this provision, apparently was intended to apply to future acquisitions of water right interests, not the Company’s existing water rights:

Company’s ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

Swan Falls Agreement, paragraph 7E (*See Memorandum Decision and Order on Cross-Motions for Summary Judgment* (April 18, 2008), Exhibit 1 at 4).

On the other hand, as currently proposed, Other Provision No. 1, for example, for Water Right No. 2-4000A, including the pertinent last sentence, is not clearly applicable only to future acquisitions of water right interests:

1. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A collectively entitle Idaho Power Company to an unsubordinated water right, except as provided in paragraph nos. 3 and 4 below, to average daily flows of 3900 CFS from April 1 to October 31 and 5600 CFS from November 1 to March 31 as measured at the “Murphy Gaging Station” described below in paragraph no. 2. These flows are not subject to depletion, except for depletions caused by the lawful exercise of those water rights identified in paragraph nos. 3 and 4 below, and except for depletions resulting from any diversions or uses of the waters identified in paragraph 5 below. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A are satisfied when the average daily flows set forth herein are met or exceeded. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants

below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.

The proposed Partial Decree language suggests that any water rights owned by Idaho Power would be “considered fluctuations resulting from the operation of Idaho Power Company facilities,” which of course is not intended. On the other hand, paragraph 7E of the Swan Falls Agreement suggested that later acquisitions of water would be considered such fluctuations. Accordingly, it appears appropriate to replace the last sentence of the new proposed language in this regard with language more closely mirroring the original Swan Falls Agreement, paragraph 7E language, such as in the following form:

Idaho Power Company’s ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement hereinafter. Such flows shall be considered fluctuations resulting from operation of Idaho Power Company facilities.

This language more clearly states that the provision applies not to the subject decreed right but to other water right acquisitions, consistent with the intent of the original Swan Falls Agreement.

The State and Idaho Power confirm that this is the appropriate interpretation of the subject language. *Memorandum in Support of State of Idaho’s and Idaho Power Company’s Joint Motions to Enter and Modify Partial Decrees* (August 27, 2009) at 9-11. Thus, the language should be revised to more clearly state what is intended.

Issue #2: The meaning of “future” beneficial uses is unclear.

The first “Other Provision” proposed for the water rights to be held in trust by the State also contains an ambiguity in that it refers to “future” beneficial uses without an indication as to the operative date for which such future beneficial uses are determined:

1. Legal title to this water right is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company as the user of the water for power purposes and for the benefit of the people of the State of Idaho. In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by future beneficial uses under water

rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.

This language appears to be based on certain language in paragraph 7B in the original Swan Falls Agreement, which in pertinent part reads as follows:

The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water 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, 03-2001B, 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), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A)....

In the original Swan Falls Agreement, the term "subsequent" was used instead of "future." In the context of the original Swan Falls Agreement, the term "subsequent" appears to refer to beneficial uses occurring at some point in time after the Swan Falls Agreement. However, the use of the word "future" in the proposed Partial Decree Other Provision suggests that the covered beneficial uses would be those subsequent to the issue date of the respective Partial Decree in the SRBA which is likely to be some time later this year, in 2009. At a minimum, the use of the word "future" in the Partial Decrees creates an ambiguity as to the operative date for determining which rights are protected by this subordination.

The State and Idaho Power apparently misunderstand the import of this issue to be one of supplanting the word "future" with "subsequent." *Memorandum in Support of State of Idaho's*

and Idaho Power Company's Joint Motions to Enter and Modify Partial Decrees (August 27, 2009) at 11-13. However, such a wording change in the proposed Partial Decrees would suffer from the same ambiguity as to the reference date for determining either “subsequent” or “future.” In the context of the Swan Falls Agreement the operative date would have most likely been interpreted to be October 1, 1984, the date the Swan Falls Agreement recognizes as the cutoff for existing vs. future beneficial uses. However, in the context of a Partial Decree the word “subsequent” or “future” could refer to a number of dates – including without limitation, the Partial Decree date, the water right priority date, *etc.* The import of this issue is that the operative date should be inserted in the Partial Decrees in place of an ambiguous term like “subsequent” or “future.”

It is noted that the State and Idaho Power do not oppose a similar clarifying revision to the Partial Decrees. *Memorandum in Support of State of Idaho's and Idaho Power Company's Joint Motions to Enter and Modify Partial Decrees* (August 27, 2009) at 13, n. 3 (“Should the Court determine that ‘the operative date’ of October 25, 1984 should also be recited in remark no. 1 of the partial decrees for the water rights to be held in trust by the State, the State and Idaho Power would not object to the following modification to the remark: ‘... shall be subject to subordination to and depletion by future beneficial uses made after October 25, 1984 under water rights acquired pursuant to applicable state law...’.”

Issue #3: Submit into the record a list of the water rights dismissed from Case No. 81375 to avoid potential ambiguity as to which rights are covered by this subordination.

Other Provision paragraph 3 of the proposed decrees for Idaho Power’s rights (and paragraph 4 of the proposed Other Provision for the trust water rights) subordinates the respective rights to those water rights of persons dismissed from Case No. 81375 of the Fourth Judicial District (Ada County), consistent with Paragraph 7(C) of the Swan Falls Agreement:

This water right is subordinate to the lawful exercise of water rights of those persons dismissed from *Idaho Power Co. v. State of Idaho*, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990).

There were at least seven (7) Notices of Dismissal of Certain Defendants in Ada County Case No. 81375. *Affidavit of Dana L. Hofstetter*, Exhibits A-1 to A-7.¹ None of these seven Notices of Dismissal were dated February 16, 1990 and it is not clear why this date is referenced in the proposed Partial Decree language. *See id.* In any event, all the actual Ada County Case No. 81375 dismissal notices listing the subject water rights should be included in the record in SRBA Consolidated Subcase No. 00-92023 to ensure that there is no future confusion over the water rights covered by this provision.

While acknowledging that “it is important there be no confusion over which water rights benefit” from this provision, the State and Idaho Power object to the inclusion in the record of these Notices of Dismissal on the basis that due to transfers or “splits” and subsequent renumbering of the original water rights, the Notices of Dismissal may not accurately reflect “all the water rights that benefit from subordination under Paragraph 7(C)....” *Memorandum in Support of State of Idaho’s and Idaho Power Company’s Joint Motions to Enter and Modify Partial Decrees* (August 27, 2009) at 13-14. This concern would be a basis for noting on the record that the Notices of Dismissal may not reflect subsequent renumbering of the water rights. However, inclusion in the SRBA record of the Notices of Dismissal would at least provide an identified starting point for determining the “pedigree” of a given right and whether this pedigree confers Paragraph 7(C) protection.

Issue #4: Senior beneficial use water rights first claimed in the SRBA apparently would not be protected by subordination while certain junior rights would be.

This issue presents a looming constitutional, statutory, judicial and administrative crisis. Other Provision No. 4 for the proposed Partial Decrees for Idaho Power’s water rights (and Other Provision No. 5 for the trust water rights) subordinates the respective rights to “water rights of

¹ It should be confirmed that all such rights of persons dismissed from Ada County Case No. 81375 are included in the seven (7) Notices of Dismissal attached as Exhibits A-1 to A-7 to the *Affidavit of Dana L. Hofstetter*. Alternatively, the record should reflect that *at a minimum* such rights listed in these seven Notices of Dismissal are covered by this provision.

those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985.” The problem with this language is that it apparently will not cover the numerous senior beneficial use rights that were first legally claimed in the SRBA after 1985. Thus, this subordination provision may not cover certain very senior beneficial use water rights at the same time it protects certain rights first used, for example, in the early 1980s.

This preference for delivery of junior rights over senior rights violates fundamental Idaho constitutional provisions concerning priority of water rights. This provision also violates statutory provisions that have been enacted since 1984 to allow valid senior beneficial use rights to be claimed for the first time in the SRBA. It also would contradict valid SRBA Partial Decrees that have been issued for senior beneficial use rights. Further, this provision, if left intact, also would create the potential for a rebound call nightmare where senior rights unprotected by this subordination potentially would be in a position to place a call against junior rights that would be protected by subordination.

a. The Intent of the Swan Falls Agreement was to Protect Existing Valid Beneficial Uses under this Provision; Modifying the Proposed Partial Decree Language to Include Validly Claimed Water Rights in the SRBA Would Effectuate this Intent.

A review of the Swan Falls Agreement reveals that the intent of that Agreement was to protect valid existing uses, while allowing a limited number of future uses to be developed. Consistent with this intent, Paragraph 7(D) of the Swan Falls Agreement provided for Idaho Power Company’s water rights to be subordinate to water uses in existence as of October 1, 1984 and that would be claimed by the then statutory deadline of June 30, 1985:

The Company’s rights listed in 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

Swan Falls Agreement, paragraph 7D (*See Memorandum Decision and Order on Cross-Motions for Summary Judgment* (April 18, 2008), Exhibit 1 at 4). Thus, the Swan Falls Agreement, as

originally drafted, intended to protect existing (as of October 1, 1984) beneficial uses that would be claimed consistent with State law.

Under Idaho statutes, the original deadline for claiming historic beneficial use water rights was June 30, 1983. *Affidavit of Dana L. Hofstetter*, Exhibit B-1 at 888. In 1983, the Idaho Legislature extended this deadline to June 30, 1985, the operative statutory deadline at the time of the Swan Falls Agreement and the same date referenced in that Agreement. *Id.*, Exhibit C-1 at 142. However, the statutory deadline continued to be extended after the Swan Falls Agreement was executed. In March 1985, the Legislature extended the deadline to June 30, 1988; in 1988, the deadline was extended to June 30, 1990; and, then, in 1994 the statutory deadline was extended to the current deadline of being claimed in the SRBA under Idaho Code § 42-245. *Affidavit of Dana L. Hofstetter*, Exhibit C-2 at 543, Exhibit B-2 at 272, and Exhibit B-3 at 121. In any event, at the time of the Swan Falls Agreement, it is important to note that the Agreement incorporated the statutory deadline in effect at the time, a deadline that already had been extended once. This incorporation of the effective statutory claim deadline reflected an intention to cover existing senior beneficial use rights that were claimed pursuant to State law.

As the Court has noted, the Swan Falls Agreement generally intended to protect existing rights, while providing for future appropriations:

Pursuant to the Agreement, Idaho Power subordinated its water rights to then existing rights. The trust established a mechanism for reallocating, as opposed to transferring, portions of its water rights to future appropriations.

Memorandum Decision and Order on Cross-Motions for Summary Judgment (April 18, 2008) at 42.

Testimony regarding the Swan Falls Agreement also confirms that the Agreement was intended to recognize existing actual uses:

Q. If my calculations are correct, then that means there were 600 c.f.s. of water that was not being currently used by existing water development?

A. That's correct.

Q. How does the agreement address that 600 c.f.s.?

A. The agreement basically says in shorthand that the water rights up to 3,900 and 5,600 are un subordinate and un subordinate. That the Company can defend it, and the state will recognize those rights in administering the river. Above 3,900 and 5,600, the company's water rights remain intact, but they are subject to subordination to later approved uses which meet the criteria....

1990 Deposition Testimony of Tom Nelson, quoted in *Memorandum Decision and Order on Cross-Motions for Summary Judgment* (April 18, 2008) at 39.

In summary, the Swan Falls Agreement intended to recognize valid existing historic beneficial use rights and applicable statutory claim deadlines under Idaho Law. The June 30, 1985 statutory deadline referenced in the Swan Falls Agreement is no longer effective. In order to incorporate subsequent statutory revisions to that deadline, the proposed Partial Decree language should be revised as follows:

This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984, and who filed an application ~~or claim~~ for said use by June 30, 1985 or claimed said use in the SRBA.

b. This Proposed Provision's Preference for Delivery of Junior Rights over Senior Rights Violates Fundamental Idaho Constitutional Provisions.

Idaho's Constitution recognizes the priority system for administering water rights: "Priority of appropriations shall give the better right as between those using the water" *Idaho Constitution, Article XV, § 3*. Since the proposed provision appears to give a preference to delivery of certain junior rights over senior valid beneficial use rights, it is unconstitutional as currently drafted. Under the proposed provision, only those beneficial use rights claimed prior to June 30, 1985 would be considered protected existing uses. However, there are a number of valid senior beneficial use rights claimed for the first time in the SRBA. Thus, the current provision could provide, for instance, for the delivery of a 1982 water right and curtailment of a valid 1930 beneficial use right decreed in the SRBA. A provision that would result in such an unconstitutional result is invalid as a matter of law.

c. This Proposed Provision Contradicts Statutory Provisions that Recognize Senior Valid Beneficial Use Rights First Claimed in the SRBA and, also, Valid SRBA Partial Decrees Issued on the Basis of these Statutes.

As noted above, current law allows for beneficial use rights to be first claimed in the SRBA. *See Idaho Code § 42-245.* Thus, there are many valid historic beneficial use rights first claimed in the SRBA. Indeed, the SRBA Court already has decreed innumerable such rights. If the SRBA Court also decrees the proposed provision, as currently drafted, the Partial Decrees issued in this Consolidated Subcase would conflict with many already validly decreed senior beneficial rights in that the proposed provision does not recognize existing SRBA law. The SRBA Court should avoid a result that conflicts with its authorizing statutes and its own Partial Decrees in other subcases.

d. This Proposed Provision Raises the Specter of a Rebound Call Nightmare where Senior Unprotected Rights Could Place a Call Against Junior Protected Rights, Thereby Vitiating the Intent of the Provision.

The proposed provision creates the potential for a undesirable rebound call situation. The potential for a rebound call is best illustrated by an example. Under the proposed language, a 1982 priority right could be considered a protected existing use, while a 1930 beneficial use right first claimed in the SRBA, although valid, would not similarly be protected. The 1982 right would not be subject to an Idaho Power call, but the 1930 right could be. In lieu of being curtailed, the 1930 right holder likely would, in turn, attempt to call out the 1982 right holder, thereby vitiating the intent to protect the 1982 right holder from the Idaho Power call. The language revisions suggested above would avoid the potential for such a rebound call.

RESPECTFULLY SUBMITTED this 5th day of October, 2009.


Dana L. Hofstetter