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DEPARTMENT OF
WATER RESOURCES

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**THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 00-92002GP, 02-00200, 02-00201,
	)	02-00203 and 02-00224
	)	
Case No. 39576	)	IDAHO POWER COMPANY'S
	)	MEMORANDUM IN OPPOSITION TO
	)	STATE OF IDAHO'S MOTION FOR
	)	PARTIAL SUMMARY JUDGMENT RE:
	)	MILNER ZERO MINIMUM FLOW
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Idaho Power Company ("Idaho Power") by and through counsel of record and pursuant to I.R.C.P. 56, hereby submits this *Memorandum in Opposition to State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow*.

INTRODUCTION

In subcases 02-0200 and 00-92002GP, the State, through the Idaho Water Resource Board ("IWRB"), filed a Motion for Partial Summary Judgment asking the Court to adopt a

general provision for Basin 2 as a replacement for General Provision 4 recommended by the Director of the Idaho Department of Water Resources (“Director”). The IWRB also asks the Court to include the same language as a remark in water right 02-0200, a claim by the IWRB for a minimum instream flow at the Milner gauging station of zero.

Subject to the entry of decrees and dismissal of the complaint filed in Consolidated Subcase 00-92003 pursuant to the joint motions filed by the State of Idaho and Idaho Power in conformance with the “Framework Reaffirming the Swan Falls Settlement,” Idaho Power does not oppose the adoption of an appropriately worded general provision that recognizes the legislative directive in I.C. § 42-203B(2) relating to the administration of the waters above and below Milner Dam. However, Idaho Power submits that the inclusion of language as a remark in any water right, including the water right claimed in subcase 02-0200, is premature and should not be considered until the court determines whether the water right claimed in a particular subcase is a valid water right. Only when the elements of a water right are defined can the Court determine whether a particular remark is necessary “for the definition, clarification, and/or administration” of the water right. I.C. § 42-1411(2)(j). Idaho Power submits that the question of whether the proposed remark should be included in a water right that is the subject of subcase 02-200 should be reserved by the Court and should be addressed after the water right claim in subcase 02-0200, which is not at issue on the State’s Motion for Partial Summary Judgment, is adjudicated by the Court.

This Memorandum is submitted under the assumption that the SRBA Court will approve the joint motions filed by the State of Idaho and Idaho Power, currently pending in Consolidated Subcase 00-92003. As discussed below, the motions in Consolidated Subcase 00-92003 ask the SRBA Court to enter decrees for certain Idaho Power water rights in Basin 02, which contain a

provision relating to the administration of Idaho Power's water rights with respect to water rights above Milner Dam. Such provision is interrelated to and may be affected by the General Provision and remark language that is the subject of the IWRB's motion here.

As such, Idaho Power suggests that it may be in the interest of judicial economy for this Court to withhold ruling on the IWRB motion until the SRBA Court has issued its ruling on the motions pending before it in Consolidated Subcase 00-92003.

FACTUAL BACKGROUND

Director's Recommendation

The Director, as part of his Director's Report for Basin 02, recommended four general provisions. Recommended General Provision No. 4 is as follows ("Director's Recommendation"):

The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude 42°31'41", Longitude 114°01'06" (revised), (NAD83), in the SW1/4NE1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

Part I – Director's Report – Irrigation & Other Uses – Reporting Area Basin 02 (Dec. 29, 2006).

The Director also made the following recommendation regarding the rate of flow of the IWRB claim in subcase 02-0200: "The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner Dam gaging station at river mile 638.7 downstream." *Id.* Idaho Power objected to the Recommendation in subcase 02-0200, asserting that the right should not exist, and objected that General Provision No. 4 should not be included in the Director's Report or in any decree.

IWRB Proposal

In its Motion for Partial Summary Judgment, the IWRB moves that General Provision No. 4 be revised to read as follows, and that the first sentence of this revised remark also be included in the “Other Provisions Necessary for Definition/Administration of this Water Right” section of the partial decree for water right 02-0200 in lieu of the Director’s recommendation in that subcase (“IWRB’s Proposal”):

The flow of the Snake River at Milner Dam may be reduced to zero, and water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam. The Milner gauging station is located at Latitude 42°31'41", Longitude 114°01'06" (revised), (NAD83), in the SW1/4NE1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

State of Idaho’s Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow at 2.

Swan Falls Language

In addition to the Director’s Recommendation and IWRB’s Proposal, as part of the Framework Reaffirming the Swan Falls Settlement, the State of Idaho and Idaho Power agreed to the inclusion of language in Idaho Power’s water rights that are subject to the Swan Falls Agreement. This language is currently before the SRBA Court in Consolidated Subcase 00-92023 on a joint motion by the State and Idaho Power to enter partial decrees for those Swan Falls water rights in Basins 02 and 37. The language proposed by the State and Idaho Power reads as follows (“Swan Falls Language”):

For the purposes of the determination and administration of this water right, 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. This water right may not be administered or enforced against any diversions or uses of the waters identified in this paragraph.

Orr Aff., Ex. 9 at 3, 5.

State Water Plan and 203B

For comparison, the current version of the State Water Plan provides as follows (“State Water Plan Language”): “The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” *Idaho State Water Plan* at 17.

For further comparison, I.C. § 42-203B(2) provides as follows (“203B Language”): “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.”

STANDARD OF REVIEW

Summary judgment is appropriate if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow’s Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982). However, if the facts are such that reasonable persons could reach differing results, summary judgment is improper. *Sirius LC v. Erickson*, 156 P.3d 539, 542 (Idaho 2007).

The director’s report shall constitute *prima face* evidence of the nature and extent of the water rights acquired under state law. I.C. § 42-1411(4). Claimants of a water right have the ultimate burden of persuasion for each element of a water right and have the burden of going

forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report. An objector has the burden of going forward with the evidence to rebut the Director's report as to all issues raised by the objection. Any other party may submit evidence in opposition to the objector's position and in support of the Director's report. I.C. § 42-1411(5).

Even if the Court denies the State's and Reclamation's Motions for Summary Judgment for not being supported by the facts or the law, the Court may *sua sponte* grant summary judgment to opposing parties on the proper legal basis. See *Peterson v. Shore*, 146 Idaho 476, 197 P.3d 789 (Idaho App. 2008).

ARGUMENT

I. THE DISCREPANCY IN REMARKS RAISES MATERIAL ISSUES OF FACT.

Idaho Power submits that the discrepancies in the language of the Director's Recommendation, the IWRB Proposal and the Swan Falls Language, create the potential for uncertainty in the applicability of the IWRB Proposal to Basin 02 water rights and the overall administration of those water rights, and as such create material issues of fact. Summary judgment is inappropriate where it is not clear from a factual standpoint how water rights would be administered under the IWRB Proposal.

For example, the Director's Recommendation states that the minimum daily flows at the Milner gauging station shall remain as zero, with no direction as to how this statement affects the administration of water rights above or below that point. The effect of this remark on administration in Basin 2 is not only uncertain, but arguably of no effect at all. In contrast, the IWRB Proposal does address the administration of water rights above versus below Milner Dam. But the IWRB Proposal would retain the reference to the location of the Milner gauging station

which, as set forth in the legal description, is approximately a quarter of a mile below Milner Dam. The Swan Falls Language the State and Idaho Power are supporting in Consolidated Subcase 00-92003 also refers to administration of water rights above versus below Milner Dam, but does not reference the Milner gauging station. The IWRB Proposal and the Swan Falls Language share basic consistencies, but the differences in the provisions may raise later questions as to whether Idaho Power's water rights should be administered differently than other rights in Basin 2. Idaho Power submits that such discrepancies will create uncertainty in the administration of Basin 2 water rights which the Court can avoid by reconciling the language.

Given the factual inconsistencies, the lack of evidentiary support for the IWRB Proposal, the IWRB's burden of sustaining its Motion, and the IWRB's burden of overcoming the *prima facie* presumption in favor of the Director's Recommendation, Idaho Power submits that the Court should deny the Motion and allow the parties sufficient opportunity to either meet and resolve the inconsistencies or provide argument and briefing to the Court so it can determine what provisions are necessary "for the definition, clarification, and/or administration" of the water rights in Basin 2.

II. PROPOSED ALTERNATIVE REMARK

Idaho Power does not oppose the adoption of a general provision for Basin 2 that relates to the administration of water rights above and below Milner. The IWRB Proposal opens with the phrase "[t]he flow of the Snake River at Milner Dam may be reduced to zero...." This is a statement of fact reflecting the recognition in the State Water Plan that "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." *Idaho State Water Plan* at 17. Idaho Power does not dispute this statement or its inclusion in the State Water Plan. Idaho Power also agrees with the IWRB that "nothing in the statutes or the State Water Plan requires the flow at Milner to be maintained at 'zero.'" IWRB Mem. at 12. Due to leakage at

the Dam, storage water deliveries, flood releases and periodic weather events, flows in the Snake River at Milner Dam are often more than zero.

The State Water Plan is a well-grounded public policy document that is important to the future development of Idaho's water resources. In contrast, I.C. § 42-203B, which forms the basis for the Swan Falls Language relates to the legal rights, duties, and relationships of persons who appropriate water from the Snake River, by providing specific direction for the administration of water rights. Given this legislative directive, it would be appropriate for the Court to incorporate this administrative direction into a general provision, as necessary for the administration of water rights in Basin 2. I.C. § 42-1411(2)(j).

Idaho Power submits that any general provision approved by the Court should also be consistent with the Swan Falls Language agreed to by the State and Idaho Power. Idaho Power suggests that such a general provision could provide as follows:

For the purposes of the determination and administration of water rights in Basin 02, 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. No water right in Basin 02 may be administered or enforced against any diversions or uses of the waters identified in this paragraph.

The above provision clarifies and affirms the administration provisions of I.C. § 42-203B, is derived from the Swan Falls Language, and will provide for consistent administration of the water rights in Basin 2. If the Court determines that it should recommend a provision in this matter on summary judgment *sua sponte*, Idaho Power submits that the provision set forth above is the only provision supported by the facts and law.

CONCLUSION

The Court should deny the IWRB's motion for partial summary judgment, for the reasons set forth herein. If the Court determines that a general provision is appropriate based on the

record presently before it, Idaho Power supports the general provision language set forth in Section II above, subject to the entry of decrees and dismissal of the complaint filed in Consolidated Subcase 00-92003 pursuant to the joint motions filed by the State of Idaho and Idaho Power in conformance with the "Framework Reaffirming the Swan Falls Settlement." The Court should not consider any remark in subcase 02-0200, or any other water right claim, until the elements of the water right have been defined and the right has been adjudicated by the Court.

DATED this 5th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2009, I served a true and correct copy of the foregoing **IDAHO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW** on the following by the method indicated:

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