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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

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) Subcase Nos. 02-10135, 36-02013,
) 36-02018, 36-02026
)
) **MEMORANDUM IN SUPPORT OF**
) **STATE OF IDAHO'S AND IDAHO**

_____) POWER COMPANY'S JOINT MOTION
_____) FOR RECONSIDERATION
_____) _____

The State of Idaho and Idaho Power Company ("Movants"), by and through their counsel of record, and pursuant to Rules 7(b)(3)(C) and (E) of the Idaho Rules of Civil Procedure, hereby jointly submit this memorandum in support of the *State Of Idaho's And Idaho Power Company's Joint Motion For Reconsideration*, filed in this consolidated subcase on January 15, 2009 ("*Joint Motion for Reconsideration*").

INTRODUCTION

In the *Order On Motion For Approval Of Settlement*, entered January 4, 2010 ("*Order*"), this Court ordered the word "future" to be stricken from, and the phrase "made after October 25, 1984" to be inserted into, Provision 1 of the proposed partial decrees for the water rights to be held in trust by the State of Idaho. *Order* at 20. The *Joint Motion* requested that the *Order* be modified to instead require the phrase "future beneficial uses under water rights" to be stricken from Provision 1, and replaced with the phrase "any other water right." The *Joint Motion* also requested three additional non-substantive changes to conform Provision 1 to this modification. Thus, the *Joint Motion* sought the following modifications to Provision 1 of the partial decrees for the water rights to be held in trust by the State (as compared to Provision 1 as originally proposed by the joint motions filed by the State and Idaho Power in this consolidated subcase on June 25, 2009):

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 to the water rights defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by any other water right ~~future beneficial~~

~~uses under water rights~~ acquired pursuant to applicable state law, unless ~~any such other~~ 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. Fluctuations resulting from Idaho Power Company's operations are the sole exclusion to the rule that all flows actually present at the Murphy Gaging Station constitute actual flow conditions. Flows of water purchased, leased, owned or otherwise acquired by other entities are not considered fluctuations.

This memorandum discusses the basis for the *Joint Motion*.

ARGUMENT

The Interested Water Users and the Upper Snake Water Users objected to the term "future beneficial uses" in Provision 1 of the proposed partial decrees as being ambiguous, and the State and Idaho Power agreed that there was a potential ambiguity. *Order* at 18-19. This Court resolved the question by ordering the term "future" to be replaced with the phrase "made after October 25, 1984"—the date the Swan Falls Agreement was executed. *Order* at 19-20.

The State and Idaho Power ("Movants") agree that the partial decrees should not be ambiguous, and that the *Order* resolves a potential ambiguity by replacing the term "future" with a date certain. The Movants' concern, rather, is that the use of the date October 25, 1984 may have the unintended effect of creating a new class of water rights that are not protected by subordination of the hydropower water rights that are the subject of the Swan Falls Agreement. As discussed below, this concern arises from the fact that

there would be a “gap” between the operative beneficial use dates specified in Provisions 1 and 5 of the proposed partial decrees for the water rights to be held in trust by the State.

The basic architecture of the Swan Falls Settlement provides for two types of subordination of the hydropower water rights that are the subject of the Swan Falls Agreement: subordination pursuant to the Paragraphs 7(C) and 7(D) of the Agreement, and subordination pursuant to Exhibit 7B, the proposed legislation enacted as Idaho Code § 42-203B. The two forms of subordination differ in how they are implemented and their relationship to the minimum flows established at the Murphy Gaging Station. Subordination under Paragraphs 7(C) and 7(D) is contractually implemented and is not limited by the Murphy minimum flows—i.e., this is “contractual” or “full” subordination. Subordination under Idaho Code § 42-203B, in contrast, is statutorily implemented and is limited to flows in excess of the Murphy minimum flows—this is “statutory” or “partial” subordination.

Further, the Agreement was structured so that all water rights nominally junior to the hydropower water rights would be protected either by “full” subordination or by “partial” subordination of the hydropower water rights. Any water rights that did not fall within the groups benefitting from “full” subordination under Paragraphs 7(C) and 7(D) would be protected by “partial” subordination pursuant to Idaho Code § 42-203B. In short, there were no “gaps” in the subordination protections provided by the Swan Falls Settlement: all nominally junior water rights would be protected by either “full” or “partial” subordination of the hydropower water rights.

The *Order* may interfere with this subordination structure by inadvertently creating a subordination “gap.” The operative beneficial use date for “full” subordination

under Paragraph 7(D) of the Swan Falls Agreement is October 1, 1984, is memorialized in Provision 5 of the proposed partial decrees for the hydropower water rights to be held in trust by the State, and in Provision 4 of the proposed partial decrees for the hydropower water rights to be held by Idaho Power.¹ Water rights for which beneficial use was made after October 1, 1984 are not protected by “full” subordination of the hydropower water rights.

The *Order* provides that the operative beneficial use date for water rights that are protected by “partial” subordination is October 25, 1984: “partial” subordination protection is available only to water rights for which beneficial use was made after October 25, 1984. Thus, water rights for which beneficial use was made after October 1, 1984 and before October 25, 1984 would be protected neither by “full” subordination nor by “partial” subordination. In short, the changes ordered to Provision 1 of the proposed partial decrees for the hydropower water rights to be held in trust by the State create a subordination “gap.” This unintended result is contrary to the structure and intent of the Swan Falls Settlement.

The Movants submit that the unintended subordination “gap” can be eliminated by amending the *Order* as requested by the *Joint Motion for Reconsideration*. The changes sought by the *Joint Motion for Reconsideration* would clarify that any water right that is nominally junior to the hydropower water rights and that does not qualify for the protection of “full” subordination would be protected by “partial” subordination.²

¹ *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37* (Jun. 25, 2009); *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018, And 36-02026* (Jun. 25, 2009).

² Thus, “partial” subordination protection would also extend to water rights that are the subject of the *Upper Snake Water Users' Motion For Reconsideration* (Jan. 19, 2010). That is, water rights for which

Moreover, the changes requested in the *Joint Motion for Reconsideration* would avoid the potential ambiguities associated with the phrase "future beneficial uses." Further, the Upper Snake Water Users have joined in and supported the *Joint Motion for Reconsideration. Upper Snake Water Users' Motion For Reconsideration* at 2 (Jan. 19, 2010).

CONCLUSION

For the reasons set forth herein, the Movants request that this Court grant the *Joint Motion for Reconsideration*.

Respectfully submitted this 29th day of January 2010.

STATE OF IDAHO

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beneficial use was made prior to October 1, 1984 but were first claimed in the SRBA, and therefore fall outside the "full" subordination language of Paragraph 7(D) of the Swan Falls Agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January 2010, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO AND IDAHO POWER COMPANY'S JOINT MOTION FOR RECONSIDERATION to be served on the following parties by the indicated methods:

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