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DEPARTMENT OF
WATER RESOURCES

Attorney for Jeff C. and Jackie Harper
Basin and Range Resource Company, LLC
and Interested Water Users

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	)	
	)	
	)	Subcase Nos. 2-200, 2-201, 2-223, 2-224
	)	and 00-92002GP
	)	
Case 39576	)	RESPONSE TO MOTION
	)	REQUESTING SPECIAL MASTER'S
	)	RECOMMENDATION TO
	)	PRESIDING JUDGE
	)	

COME NOW Jeff C. and Jackie Harper, Basin and Range Resource Company, LLC, and
Interested Water Users, by and through their counsel of record, Dana L. Hofstetter of Hofstetter
Law Office, LLC, and hereby respond to the Ground Water District's *Motion Requesting Special
Master's Recommendation to Presiding Judge ("Motion")*.

**I. The proposed *Special Master's Recommendation and Order*, attached as Exhibits A and B
to the *Motion*, should be modified to clarify that the Presiding Judge also retains jurisdiction
to decide matters relating to Subcase Nos. 2-200, 2-201, 2-223 and 2-224 in Subcase
No. 00-91013.**

The Ground Water District's Motion requests that the Special Master retain jurisdiction
over Subcase Nos. 2-200, 2-201, 2-223 and 2-224, the minimum flow right subcases at Milner and
Murphy. However, in the Court's November 9, 2010, *Second Scheduling Order* in Subcase

No. 00-91013 (copy attached hereto as Exhibit A), the Court identified the following issue relating to Subcase Nos. 2-200, 2-201, 2-223 and 2-224 as pending in Subcase No. 00-91013:

Issue No. 4: Subordination consistency between the minimum flow rights and the Idaho Power Rights under the Swan Falls Agreement.

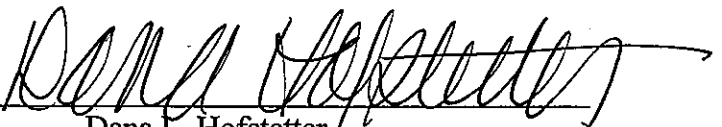
Since the Presiding Judge may be deciding issues relating to Subcase Nos. 2-200, 2-201, 2-223 and 2-224 in Subcase No. 00-91013, the proposed *Special Master's Recommendation* and the proposed *Order* should be revised to clarify that the Presiding Judge shall also retain jurisdiction to decide matters relating to minimum flow right nos. 2-200, 2-201, 2-223 and 2-224 in Subcase No. 00-91013.

II. Conclusion

For the foregoing reasons, the proposed *Special Master's Recommendation to Presiding Judge* and the proposed *Order Combining 00-92002GP Issue Relating to Swan Falls Settlement with 91-13 and Supplemental Order of Reference Appointing Terrance A. Dolan* should be modified to clarify that the Presiding Judge also retains jurisdiction to decide issues involving Subcase Nos. 2-200, 2-201, 2-223 and 2-224 in Subcase No. 00-91013 (91-13).

RESPECTFULLY SUBMITTED this 2nd day of December, 2010.

HOFSTETTER LAW OFFICE, L.L.C.

By 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document (with any attachments) this 2nd day of December 2010, by U.S. Mail postage pre-paid to:

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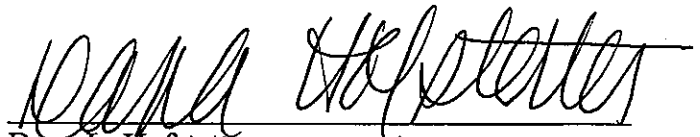
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NOV - 9 2010

By _____ Clerk
_____ Deputy Clerk

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

) Subcase No: 00-91013
) (Basin-Wide Issue 13)

)
) SECOND SCHEDULING ORDER
)
)
)

I.

BACKGROUND

On May 26, 2010, this Court issued its *Initial Scheduling Order* in the above-captioned subcase identifying the following five issues that are currently pending unresolved in this matter:

Issue No. 1: The rebound call issue.

Issue No. 2: Identifying and preserving protections for third-party beneficiaries to the Swan Falls Agreement.

Issue No. 3: Identifying water rights that benefit from Paragraphs 7C and 7D of the Swan Falls Agreement.

Issue No. 4: Subordination consistency between the minimum flow rights and the Idaho Power rights under the Swan Falls Agreement.

Issue No. 5: General provision in IDWR Basin 2 regarding the comprehensive management plan for administration of water rights above Murphy Gage and below Milner Dam as reflected in the State Water Plan.

In that *Order*, the Court also set the deadline for filing of summary judgment motions as November 1, 2010.

SECOND SCHEDULING ORDER

EXHIBIT

A

On October 25, 2010, the State of Idaho, by and through its counsel of record, filed a *Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Agreement* ("State's Motion") in the above-captioned subcase. The State's *Motion* raises the following issue: "Whether it is necessary to replace the current subordination remarks in the hydropower decrees with new language describing which water rights benefit from the contractual subordination of Idaho Power's water rights."¹

The State's *Motion* proposes to, among other things, insert a provision on the decrees of the hydropower water rights that are the subject of the Swan Falls Agreement that would replace provision 4 of the Idaho Power water right decrees and provision 5 of the State of Idaho water rights decrees ("Replacement Provision"). The Replacement Provision would set forth a general statement that hydropower rights that are the subject of the Swan Falls Agreement are subordinated to all water rights diverting from the Snake River and sources tributary to the Snake River below Milner Dam, with a priority date senior to October 25, 1984, unless otherwise indicated on individual water right decrees. The State's *Motion* identifies two groups of water rights, set forth in Attachments A and B to its *Motion* which would be considered exceptions to the general statement set forth in the proposed Replacement Provision, and which would need their decrees modified as a result under its proposal. By its terms, the State's *Motion* professes to address only Issue No. 3 identified above. On November 8, 2010, a status conference was held for the purpose of allowing the parties to comment on and/or discuss the State's *Motion* and how the Court should proceed with that *Motion*.

On October 27, 2010, the Ground Water Districts² filed a *Motion to Adjust Summary Judgment Schedule* ("Ground Water Districts' Motion") in the above-captioned subcase. The Ground Water Districts *Motion* requests that this Court continue the

¹ On March 25, 2010, the SRBA Court decreed all of the elements of Idaho Power's subject hydropower rights with the exception of provision 4 and all of the elements of the subject trust rights except for provision 5. See *Order on Motions for Reconsideration; Order Consolidation issue with Basin-Wide Issue 13; Order Dismissing Complaint and Petition for Declaratory and Injunctive Relief*. Consolidated Subcase No. 00-92023, Subcase Nos. 02-10135, 36-02013, 36-02018, 36-02026 and 00-91013 (Basin-Wide Issue 13) (March 25, 2010).

² The Ground Water Districts consist of the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

summary judgment scheduled for Issues Nos. 1 and 2 pending the resolution of Issue No. 3. On November 8, 2010, a hearing on the Ground Water Districts' *Motion* was held before this Court.

II.

NOVEMBER 8, 2010 HEARING

At the November 8, 2010 hearing, the Court first took up the status conference on the State's *Motion*. The State presented its proposal for moving forward on its *Motion*. In particular the State set forth its proposal for identifying (1) those water rights entitled to "Unqualified Subordination" provided for in paragraphs 7(C) and 7(D) of the Swan Falls Agreement and by provisions 2(A) and 2(D) of the 1180 Contract, and (2) those water rights entitled to "Qualified Subordination" provided for by Idaho Code § 42-203B. The State presented a draft *Order*, a copy of which is attached hereto, which if entered would effectuate the State's proposal for moving forward on its *Motion*. At the hearing, all parties reserved the right to review the draft *Order* and present comments and/or objections to the Court regarding the particulars of the State's proposal. The Court determined that it would allow the parties time to file responses to the State's *Motion*.

The Court subsequently took up the Ground Water Districts' *Motion*. At issue was whether Issues No. 1 and 2 should be stayed pending the resolution of Issue No. 3, or whether the issues could proceed simultaneously. The parties discussed what connections, if any, exist between Issue No. 1 and Issues No. 2 and 3. At the hearing, the Court determined that it would allow the parties time to file responses to the Ground Water Districts' *Motion*.

III.

ORDER

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. The deadline for the filing of any and all responses to the State's *Motion* shall be November 23, 2010.
2. The deadline for the filing of any and all responses to the Ground Water Districts' *Motion* shall be November 23, 2010.

3. In addition to the issues that will be raised by the parties in their responses, the Court requests that all parties address the following issues in response to this *Order*:

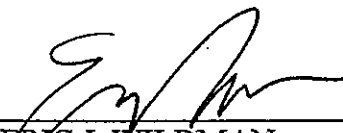
(a) Whether the State's *Motion* potentially affects or is interrelated with the other issues (i.e., Issues Nos. 1, 2, 4 or 5) presently pending unresolved in this matter, or can dispositive motions on some or all of these issues proceed on a separate track.

(b) Whether the State's proposal as set forth in its *Motion* and the draft *Order* attached hereto may be affected in any way by a determination by this Court on the following unresolved issue pertaining to the rebound call: Whether the Swan Falls Agreement provides unqualified subordination to those water users who beneficially used water prior to October 25, 1984, but who filed a claim in the SRBA subsequent to June 30, 1985.³

(c) Whether there are any other potential categories of water users besides those identified in Attachments A and B to the State's *Motion* that may be considered "exceptions" to the general statement set forth in the State's proposed Replacement Provision. For example, depending on the outcome of the rebound call issue, would a third category arise requiring the amendment of additional decrees. If so, are estimates available on the number of water users that would be affected?⁴

(d) The parties should also respond to the modification to footnote 1 in the draft *Order* proposed by the City of Pocatello at the November 8, 2010 hearing; namely, inserting the phrase "at or" between the words "rights" and "below."

Dated November 9, 2010.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

³ The Court raises this issue because the State's *Motion* is in part to give effect to the unqualified subordination provision of paragraph 7(D) of the Swan Falls Agreement. However, paragraph 7(D) is the genesis of the rebound call issue.

⁴ The Court makes this inquiry because the purpose of the State's *Motion* is to effectuate the provisions of the Swan Falls Agreement in a manner that minimizes the necessity of amending decrees that have already been issued. Therefore, before committing to a particular mechanism, it would be helpful to be apprised of the potential for amending additional decrees depending on the outcome of the remaining issues.