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Re: **SRBA Case No. 39576**
Subcase No. 63-03618

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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

Subcase No: **63-03618**

**PARTICIPANTS' RESPONSE TO
PIONEER AND SETTLERS IRRIGATION
DISTRICTS' NOTICE OF ADDITIONAL
AUTHORITY**

Participants City of Boise and Ada County ("Participants"), by and through their counsel of record, Perkins Coie LLP, submit this Response to Pioneer and Settlers Irrigation Districts' ("Districts") Notice of Additional Authority ("Notice") filed with this Court July 21, 2008. The Notice should not be considered by this Court for the following reasons:

1. The Districts filed the Notice with this Court on July 21, 2008, over one month after oral argument was heard on cross-motions for summary judgment.
2. Idaho Code § 39-104(4) is inapplicable to the facts of the instant case, and if applicable, in fact supportive of Participants' and Bureau of Reclamation's ("BOR") legal arguments.

3. Idaho Code § 39-104 is statutory authorization for the creation of the Idaho Department of Environmental Quality ("IDEQ") located in Title 39, Idaho Code entitled "Health and Safety." Accordingly, Idaho Code § 39-104 not applicable to the instant facts because it applies exclusively to action taken by the IDEQ. IDEQ is not a party to this case and there is no IDEQ action at issue.

4. The additional authority cited by the Districts, Idaho Code § 39-104(4), provides:

No provision of this title shall be interpreted as to supersede, abrogate, injure or create rights to divert or store water and apply water to beneficial uses established under section 3, article XV of the constitution of the state of Idaho and title 42, Idaho Code. Nothing in this title shall be construed to allow the department to establish a water right for minimum stream flows or a water right for minimum water levels in any lakes, reservoirs or impoundments. Minimum stream flows and minimum water levels may only be established pursuant to chapter 15, title 42, Idaho Code.

5. The Idaho state legislature added the provisions in Idaho Code § 39-104(4) that pertain to minimum stream flows in 2000, well after permit issuance, amendment, and beneficial use was established for the BOR license at issue in this case. Accordingly, application of Idaho Code § 39-104(4) is improper.

6. Even if the provisions contained in Idaho Code § 39-104(4) would otherwise apply, the Minimum Stream Flow statute, Idaho Code §§ 42-1501 to 42-1505, 42-1736B, is not applicable for the many reasons previously articulated in Participants' and BOR briefs. *See Participants' Memorandum in Support of Summary Judgment* at 14-17, *Participants' Response to Objectors' Motions for Summary Judgment* at 2-3, *Reply Memorandum in Support of Participants' Motion for Summary Judgment* at 3-7, *Response Brief in Support of*

United States' Motion for Summary Judgment at 15-18, Reply Brief in Support of United States' Motion for Summary Judgment at 6-9.

Finally, if applicable, Idaho Code § 39-104(4) in fact supports Participants' and BOR's legal arguments in this case. The first sentence in Idaho Code § 39-104(4) states that "[n]o provision of this title shall be interpreted to supersede, abrogate, injure or create rights to divert or store water and apply water to beneficial uses established under section 3, article XV of the constitution of the state of Idaho and title 42, Idaho Code." Accordingly, Idaho Code § 39-104(4) may not be interpreted to abrogate or injure the BOR's established right to divert, store, and apply water to beneficial use.

For all of the reasons articulated above, this Court should decline to consider the Districts' untimely Notice. In the alternative, this Court should afford no weight to the additional authority cited by the Districts because it is inapplicable and repetitive of the arguments made previously by the Districts'. If this Court considers the Districts' untimely Notice, a proper interpretation of the statutory provision cited therein supports Participants' and BOR's legal position in this case.

DATED: July 30, 2008

PERKINS COIE LLP

By: 
Robert A. Maynard, Of the Firm
Erika E. Malmen, Of the Firm
Attorneys for City of Boise and
Ada County

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that, on this 30 day of July, 2008, he/she/they caused to be served on the person(s) listed below in the manner shown:

PARTICIPANTS' RESPONSE TO PIONEER AND SETTLERS IRRIGATION DISTRICTS' NOTICE OF ADDITIONAL AUTHORITY

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