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July 21, 2009

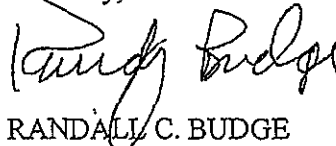
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Snake River Basin Adjudication
P.O. Box 2707
253 Third Avenue N.
Twin Falls, Idaho 83303
Fax: 208-736-2121

Re: SRBA Case No. 39576/Consolidated Subcase No. 00-92023

Dear Clerk:

Attached for filing please find *Upper Snake Water Users' Response to 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*. Please bring this to the attention of Judge Melanson as it relates directly to the status conference set for 2:30 p.m. today. Thank you.

Sincerely,


RANDALL C. BUDGE

RCB:rr
Enclosures

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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 00-92023

**UPPER SNAKE WATER USERS' RESPONSE
TO 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**

Aberdeen-American Falls Groundwater District, Bingham Groundwater District, Bonneville-Jefferson Groundwater District, Madison Groundwater District, Magic Valley Groundwater District, North Snake Groundwater District, Fremont Madison Irrigation District, Egan Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, United Canal Company, and Aberdeen Springfield Canal Company (collectively, the "Upper Snake Water Users") hereby respond to the *State of Idaho's and Idaho Power*

UPPER SNAKE WATER USERS' RESPONSE TO 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

Company's Joint Motion for Entry of Partial Decree Re: Water Rights in Basin 02 and Basin 37 filed June 25, 2009. As explained below, the Upper Snake Water Users support the *State of Idaho's and Idaho Power Company's Joint Motion for Entry of Partial Decree Re: Water Rights in Basin 02 and Basin 37*, but ask this Court to amend the language of Condition No. 1 in the proposed partial decrees as necessary to clarify the manner in which the minimum flows of 3,900 cfs and 5,600 cfs will be calculated. In addition, the Upper Snake Water Users submit for the record the *Summary of Swan Falls Reaffirmation Settlement* attached hereto as **Exhibit A**.

It is undisputed that the Swan Falls Agreement entitles Idaho Power Company to an unsubordinated water right of 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31 (the "minimum flows") measured at the Murphy Gauging Station. However, a question arose during the settlement of this Consolidated Subcase concerning the accounting for such flows.

Paragraph 7(b) of the Agreement states the minimum flows shall be based on "actual flow conditions," but also states that "operation of Idaho Power Company facilities shall not be considered in the calculation of such flows." (Emphasis added.) Further, paragraph 7(e) states: "water purchased, leased, owned or otherwise acquired by Idaho Power Company and delivered to and past its power plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company's facilities." These provisions create ambiguity and gave rise to questions concerning how the 3,900 cfs and 5,600 cfs minimum flows will be calculated, particularly which flows are deemed to constitute actual flows and which flows are not.

The State of Idaho, Idaho Power Company, and Upper Snake Water Users have agreed that all waters passing Murphy Gauge are considered actual flows, with the exception of fluctuations resulting from the operation of Idaho Power Company facilities and fluctuations resulting from water purchased, leased, owned or otherwise acquired by Idaho Power Company. Flows from water purchased, leased, owned or otherwise acquired by others do not constitute "actual flows." Therefore, the Upper Snake Water Users proposed that condition number one of the proposed Partial Decrees be revised as follows:

... 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 calculations of such actual flows. Fluctuations resulting from 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 not be considered actual flows. Fluctuations resulting from flows of water purchased, leased, owned or otherwise acquired by others shall be considered actual flows.

The foregoing revisions are necessary to avoid future dispute over the effect of water acquired by other entities, such as the Bureau of Reclamation, and delivered past Milner Dam. However, while that State and Idaho Power have assured the Upper Snake Water Users that flows of water acquired by persons or entities other than Idaho Power Company do in fact constitute actual flows, they have been reluctant to revise condition number one as provided above. This gives the Upper Snake Water Users concern that Idaho Power and/or the State desire to leave ambiguity in the decrees in order to preserve an opportunity for future debate.

If the minimum flows are to be calculated as Idaho Power and the State have represented, then condition number one of the Partial Decrees should be revised as provided above. By contrast, leaving such language out of the partial decrees creates a significant risk of future litigation concerning the Swan Falls Agreement, which the Upper Snake Water Users have no interest in.

Further, the water master or other person administering the subject water rights should not have to go back to the Court record to determine which flows constitute "actual flow." Therefore, the Upper Snake Water Users ask that this Court implement the above-identified revisions into condition number one of the proposed Partial Decrees.

In addition, the Upper Snake Water Users respectfully ask the Court to include in the Court record the *Summary of Swan Falls Reaffirmation Settlement* attached hereto as **Exhibit A**. This document was provided by the State and Idaho Power to the Upper Snake Water Users in response to certain concerns they raised with respect to the settlement of this Consolidated Subcase. This document has been submitted into the record of the Idaho Water Resource Board meeting in which the settlement of this case was approved, and also in the record before the Senate Natural Resource Environment

Committee hearings, which facilitated the enactment of Senate Bills 1167, 1168 and 1169 as part of the settlement. It should also properly be included in the Court record.

RESPECTFULLY SUBMITTED.

DATED this 21st day of July, 2009

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED



RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2008, the above and foregoing document(s), was served by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

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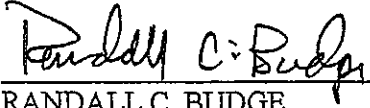
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RANDALL C. BUDGE

SUMMARY
OF
SWAN FALLS REAFFIRMATION SETTLEMENT

The State of Idaho and Idaho Power Company seek legislative approval of three bills that are part of the 2009 Swan Falls Reaffirmation Settlement, which proposes to resolve three questions regarding the interpretation of the 1984 Swan Falls Settlement approved by the Idaho Legislature in 1985 by Idaho Code § 42-203B. The 2009 Framework Reaffirming the Swan Falls Settlement (2009 Framework) sets forth the conditions for settling the current litigation. The terms "Framework" and "Reaffirming" are used intentionally to connote two key points. First, the 2009 Framework is a road map for reaching settlement rather than an actual settlement document. Article II of the 2009 Framework describes the executive, legislative and judicial actions that collectively will constitute the settlement of the pending litigation. Second, the parties intend the proposed 2009 Reaffirmation Settlement to merely reconfirm rather than change any of the terms and conditions of the 1984 Swan Falls Settlement. This fact is reflected in the following language from the Framework:

The parties through this Framework and its Exhibits reaffirm all aspects of the Swan Falls Settlement. This Framework and its Exhibits are consistent with the Swan Falls Settlement and clarify the original intent of the Swan Falls Settlement. Nothing in this Framework or its Exhibits changes, modifies, amends or alters any aspect of the Swan Falls Settlement.

2009 Framework Reaffirming the Swan Falls Settlement at 7. Thus, the parties intend that the 2009 Framework and its Exhibits will be interpreted in harmony with the 1984 Swan Falls Settlement.

The proposed 2009 Reaffirmation Settlement will resolve three issues regarding the interpretation of the 1984 Swan Falls Settlement. First, it will reaffirm that the hydropower water rights for the Idaho Power Company facilities located on the reach of the Snake River between Milner Dam and the Murphy Gage carry no entitlement to demand the release of natural flow past Milner Dam or to seek administration of the water rights diverting the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam. Second, it will reaffirm the Swan Falls Agreement by decreeing the hydropower water rights for Idaho Power Company's facilities between the Milner Dam and the Murphy Gage consistent with the SRBA District Court's Memorandum Decision and Order on Cross-Motions for Summary Judgment in Consolidated Subcase 00-92023(92-(23) dated April 18, 2008. Finally, it will reaffirm that the 1984 Swan Falls Settlement does not preclude use of water for aquifer recharge.

There are four Articles in the 2009 Framework Reaffirming the Swan Falls Settlement — each has a separate purpose.

Article I provides general background principles from the 1984 Swan Fall Settlement drawn from the 1984 Swan Falls Agreement, the 1984 Swan

Falls Framework and the 1985 Idaho Water Resource Board resolution approving amendments to the Idaho State Water Plan that are relevant to the issues being resolved through the 2009 Reaffirmation Settlement. The fact that not all of the provisions of the 1984 Swan Falls Settlement are recited does not diminish the importance of other provisions of the 1984 Settlement. Rather, the 2009 Framework expressly reaffirms all aspects of the 1984 Swan Falls Settlement and does not alter any way the statutory provisions adopted as part of that Settlement, including but not limited to those provisions applicable to agriculture.

Article II, as noted above, is the road map for resolving the current litigation. If the proposed legislation and Memorandum of Agreement are completed to the satisfaction of the State and Idaho Power Company and the SRBA District Court enters partial decrees acceptable to the State, Idaho Power Company and the other parties to Subcase 00-92023, then these actions will collectively resolve the pending litigation. If not, then either party has the option of voiding the Framework and the proposed settlement.

Article III identifies certain existing issues that will be the subject of future discussions between the State, Idaho Power Company and other affected interests. The parties intend such discussions to be inclusive rather than exclusive. Moreover, nothing in Article III is intended to define the rights or obligations of any person or to reinterpret the Swan Falls Settlement. For example, the reference to discussions regarding the establishment of an effective marketing system does not require any action by any person. The only commitment is to have a good faith discussion of the issues. The statement of the water marketing issue is not intended to nor should it be construed as presupposing any particular outcome from such discussions. Likewise, the discussions regarding an acceptable program to monitor and measure flows at the Murphy Gage and procedures for re-evaluating term permits approved under Idaho Code § 42-203C do not contemplate any changes to the Swan Falls Settlement. Rather, these two issues are identified for the purposes of discussing their potential resolution through discussion.

Article IV contains general provisions to confirm the understandings of the State and Idaho Power Company. In particular, this Article provides that "upon implementation of the conditions contained in Article II of this Framework, any subsequent order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of the Framework or the Swan Falls Settlement." *Id.* at 8. Article II also provides that "the Framework does not confer or create any additional vested, compensable or enforceable rights or interest of any kind whatsoever in any legislative enactments passed pursuant to this Framework beyond those rights otherwise available under applicable law." *Id.* at 8. Collectively, these provisions recognize the Company has no

right to assert that the Idaho Legislature is precluded by the 1984 Swan Falls Agreement or the 2009 Reaffirmation Settlement from in the future amending provisions of state law enacted as part of the Swan Falls Settlement except with respect to those water rights decreed to the Company.

The proposed Memorandum of Agreement between the Idaho Water Resource Board, the Governor and Idaho Power Company sets forth an understanding between the parties regarding certain protocols for implementation of managed recharge. Like the 2009 Framework, the preamble language in the Memorandum is drawn primarily from the 1984 Swan Falls Agreement, the 1984 Swan Falls Framework and the 1985 Idaho Water Resource State Water Plan Amendments. Again, the recitation of some but not all of the provisions of these documents is not intended to diminish or alter any way the importance of other provisions of these provision to the 1984 Swan Falls Settlement. Rather, the provisions cited are intended solely for purposes of relating the substantive aspects of the Memorandum of Agreement to those provision of the 1984 Swan Falls Settlement that are being clarified by the 2009 Settlement.

Three aspects of the Memorandum of Agreement warrant discussion. First, the Memorandum is not intended to create any new or greater right for Idaho Power Company with regard to the implementation of managed recharge. Rather, the Memorandum simply acknowledges that through the 1984 Swan Falls Settlement the State and the Company have a shared interest in ensuring that the Swan Falls minimum flows are maintained and memorializes Idaho Power Company's right to discuss its interests with the Board and participate in the public process for approving managed recharge as provided by state law like any other person.

Second, the Memorandum acknowledges that the Idaho Water Resource Board adopted the Comprehensive Aquifer Management Plan (CAMP) and intends to implement managed recharge in accordance with that Plan. The Memorandum memorializes the Board's intent to implement managed recharge in phases and sets forth a protocol for phasing in managed recharge consistent with the Plan. The provision related to legislative approval of recharge in excess of 175,000 acre-feet on an average annual basis sunsets on January 1, 2019. Nothing in the Memorandum, however, precludes the Board or the Legislature from changing how managed recharge is to be implemented.

Third, concern has been expressed that paragraph 5 of the Memorandum of Agreement binds the Governor and the Idaho Water Resource Board to support any position advocated by Idaho Power Company before the Public Utilities Commission. The State and Idaho Power want to clarify that this was not the intent of paragraph 5. The purpose of paragraph 5 is for the Governor and the Board to advise the Public Utilities Commission of any "direct impacts" they independently determine arise from implementation of managed recharge and to acknowledge the role that such impacts may have on the Company's petition before the Public Utilities Commission. Paragraph 5 of the Memorandum does not require the Governor or the Board to take any affirmative

position on whether the Company's specific request is appropriate or necessary or on how any rate impact should be allocated.

Senate Bill 1167 proposes that managed recharge projects be subject to the same review process applicable to storage reservoirs under Idaho Code § 42-1737 because managed recharge may have effects on surface flows similar to those of a storage reservoir. The bill does not apply to incidental recharge.

Senate Bill 1168 clarifies that the Swan Falls Agreement does not preclude use of water for recharge by removing the reference to the Agreement in Idaho Code § 42-234 and repealing Idaho Code § 42-4201A. In addition, this bill would consolidate state recharge policy in Idaho Code § 42-234. The parties anticipate amending this bill or submitting a substitute bill that will clarify the intent of subsection 3 of Senate Bill 1168.

Senate Bill 1169 reconfirms that the Company by reaffirming the 1984 Swan Falls Settlement is entitled to the same protection as contained in the uncodified provisions set forth in Chapter 14 of the 1985 Idaho Session Law at page 20-21. This bill is not intended to create any new or additional benefits for Idaho Power Company that do not already exist as a result of Chapter 14 of the 1985 Idaho Session Laws, nor would this bill deprive the Public Utilities Commission of authority to independently determine the necessity or reasonableness of any of any rate request by Idaho Power Company.

The form of the partial decrees of the hydropower water rights are attached as Exhibit 6 to the 2009 Framework. The language of these decrees is consistent with the resolution of the three issues discussed above. In addition, the decrees recognized the subordination provisions contained in the 1984 Swan Falls Agreement and the 1180 Contract executed as part of the 1984 Swan Falls Settlement.

In summary, the State and Idaho Power Company believe the terms of the proposed 2009 Reaffirmation Settlement are entirely consistent with the 1984 Swan Falls Settlement and provide an opportunity for the parties to set aside their differences and work in a cooperative manner to resolve other Snake River water management issues.