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DEPARTMENT OF
WATER RESOURCES

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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' AMENDED
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 submit this amended response to 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 filed June 25, 2009. This amended response supersedes and replaces the *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* filed July 21, 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; specifically, 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 constitute "actual flows." Therefore, the Upper Snake Water Users proposed that condition number one of the 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.

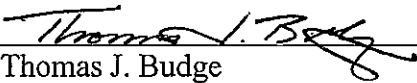
In addition, the Upper Snake Water Users ask the Court to include in the Court record the *Summary of Swan Falls Reaffirmation Settlement* attached hereto as **Exhibit A**. This document was provided by the State and Idaho Power to the Upper Snake Water Users in response to certain concerns they raised 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 23rd day of July, 2009

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


Thomas J. Budge

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2009, the above document was served upon the following in the manner specified:

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