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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' BRIEF IN
RESPONSE TO STATE OF IDAHO'S AND IDAHO
POWER COMPANY'S JOINT MOTIONS TO
ENTER AND MODIFY PARTIAL DECREES**

Aberdeen-American Falls Groundwater District, Bingham Groundwater District, Bonneville-Jefferson Groundwater District, Madison Groundwater District, Magic Valley Groundwater District, North Snake Groundwater District, Aberdeen Springfield Canal Company, Fremont Madison Irrigation District, Egan Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, and United Canal Company (collectively, the "Upper Snake Water Users") respectfully submit this brief, pursuant to the Court's scheduling order dated July 23, 2009, in response to the State of Idaho's ("State") and Idaho Power Company's ("Idaho Power")

Memorandum in Support of State of Idaho's and Idaho Power Company's Joint Motions to Enter and Modify Partial Decrees ("State's and Idaho Power's Memo") dated August 27, 2009.

ARGUMENT

The Upper Snake Water Users generally support the joint motions filed by the State and Idaho Power on June 25, 2009, but ask this court to amend certain language in the proposed partial decrees in order to clarify the meaning and effect of the conditions and minimize the risk of future litigation concerning the water rights.¹ First, condition number one should be amended to confirm that all water actually present at the Murphy Gauge constitute "actual flow conditions," with the only two exceptions: a) fluctuations resulting from the operation of Idaho Power's facilities below Milner Dam, and b) fluctuations resulting from water purchased, leased, owned, or otherwise acquired by Idaho Power. Second, condition number one should be revised to confirm that "future beneficial uses" refers to all beneficial uses made after October 25, 1984. Third, proposed partial decrees should be revised to subordinate the water rights to beneficial uses made prior to October 1, 1984, and claimed either by June 30, 1985, or in the Snake River Basin Adjudication (SRBA).

I. THE COURT CAN AND SHOULD CLARIFY THE MANNER IN WHICH THE MINIMUM FLOWS OF 3,900 CFS AND 5,600 CFS ARE CALCULATED.

The Upper Snake Water Users have asked 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." (*USWU's Amended Response* at 2.) This request is intended to resolve ambiguity in the Swan Falls Agreement ("Agreement") concerning which water flows make up "actual flow conditions" and which water flows do not.

Section 7.A of the Agreement provides that the minimum flows of 3,900 cfs and 5,600 cfs are to be based on the "average daily flow." Section 7.B provides that the average daily flow "shall be based on actual flow conditions." Thus, for the purpose of determining whether the

¹ The State and Idaho Power filed four joint motions on July 25, 2009:

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;
2. 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;
3. State of Idaho's and Idaho Power Company's Joint Motion to Consolidate Water Right 02-10135 into Consolidated Subcase 00-92023; and
4. State of Idaho's and Idaho Power Company's Stipulation and Motion to Dismiss Complaint and Declaratory and Injunctive Relief.

minimum flows are met, the Agreement requires an averaging of the flows actually present at the Murphy Gauge.

Yet averaging is not the only calculation contemplated by the Agreement. Section 7.B additionally provides that “any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein.” This statement is subject to multiple reasonable interpretations, and has been the subject of much debate between the parties.

First, it could be read to mean there is no separate calculation of fluctuations resulting from the operation of Company facilities, in which case “actual flow conditions” would be determined solely by averaging the observed flows at the Murphy Gauge. This is plausible given the use of the term “thus” in section 7.B to connect the statement that fluctuations from Company operations shall not be considered with the preceding statement that the average be based on actual flow conditions:

Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily flows set forth herein.

This interpretation is supported by the testimony of Idaho Water Resource Board representative Frank Sherman stating that one of the reasons for averaging daily flows was to account for fluctuations resulting from “discharges from dams” and “Idaho Power’s (unintelligible) operations.” (*State and Idaho Power’s Memo* at 7-8, n.1, quoting *Third Aff. of Michael C. Orr*, Ex. 27 at 21-22 and Ex. 28 at 5.)

Alternatively, the statement could be read to mean that fluctuations from the operation of Company facilities are to be measured and accounted for separately from the averaging of daily flows, in which case there would be an adjustment to the average daily flow for the purpose of determining “actual flow conditions.” This interpretation also has support in the record. Frank Sherman also stated in a Water Resource Board meeting that fluctuations resulting from water acquired by Idaho Power from upstream sources (which under section 7.E. of the Agreement are treated as fluctuations resulting from the operation of Company facilities) “will not count toward the flow going past the gauge,” but would instead be “added to the flow going past the Milner gauge so it balances out in terms of (inaudible).” (*Third Orr. Aff.*, Ex. 26 at 54.) Under this interpretation of section 7.B, two calculations are required. First, the average daily flow must be

calculated based on observed flows at the Murphy Gauge. Second, fluctuations resulting from the operation of Company facilities (including water purchased or leased by Idaho Power) must be measured and added to or subtracted from the daily average to determine “actual flow conditions.”

These two plausible yet differing interpretations of section 7.B of the Agreement have spawned much discussion and debate among the parties to this proceeding. It is not the result, as alleged by the State and Idaho Power, of some “false dichotomy” between actual flows and calculated flows. (*State and Idaho Power’s Memo* at 8.) The Upper Snake Water Users agree that a calculation is required to determine average daily flows. The Upper Snake Water Users’ concern, as stated in the *USWU’s Amended Response*, is “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 do not.” *Id.* at 2 (emphasis added).

The State, Idaho Power, and the Upper Snake Water Users have fortunately come to a consensus that section 7.B of the Agreement should be interpreted to provide that fluctuations from Idaho Power’s operations are measured and accounted for, in addition to the averaging of daily flows, to determine “actual flow conditions.” These parties further agree that fluctuations from Idaho Power’s operations (which by definition include water purchased, leased, owned or otherwise acquired by Idaho Power) are the only fluctuations that are separately calculated. As stated in the *State’s and Idaho Power’s Memo*, fluctuations resulting from Company operations are the “sole exclusion” to the rule that all flows actually present at the Murphy Gauging Station constitute actual flow conditions. (*State and Idaho Power’s Memo* at 7-8.)² Flows of water purchased, leased, owned or otherwise acquired by other entities such as the Bureau of Reclamation are not separately calculated, *i.e.* they do not cause any adjustment to the average daily flow at Murphy Gauge for the purpose of determining “actual flow conditions.”

² The *State and Idaho Power’s Memo* states:

all flows actually present at the Murphy Gaging Station are to be included in “the calculation” of the “average daily flows,” with the sole exclusion of “fluctuations resulting from the operation of Company facilities,” which the Agreement defines to include flows purchased, leased, owned or otherwise acquired by Idaho Power from sources upstream and conveyed to and past its power plants below Milner Dam for power production.”

(underlined emphasis in original; bold emphasis added.)

During the discussion of this issue between the parties, Idaho Power attempted to stretch the Agreement by stating that water purchased, leased, owned or otherwise acquired by entities other than Idaho Power (such as the Bureau of Reclamation) should also be measured and accounted for and cause an adjustment to the average daily flow for the purpose of determining whether Idaho Power's water right is satisfied. Idaho Power has since retreated from that position, as evidenced by the statement quoted above. Still, given the arguable ambiguity in section 7.B. of the Agreement, and Idaho Power's stated interest in construing the Agreement to require a separate calculation of other flows, the Upper Snake Water Users deem it necessary to clarify in the partial decrees that all flows actually present at the Murphy Gauge constitute actual flow conditions, the sole exception being fluctuations from the operation of Idaho Power's facilities (including water purchased, leased, owned or otherwise acquired by Idaho Power). Without clarifying language, Idaho Power could foreseeable make the claim in the future that flows of water acquired by other entities must also be measured and accounted for.

Accordingly, 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.

(USWU's Amended Response at 3.) As an alternative, the condition number one could be revised in this way:

... Average daily flow, as used herein, shall be based upon actual flow conditions; ~~thus, any~~ with two exceptions: 1) fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculations of such constitute actual flows conditions; and 2) 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 constitute actual flow conditions. All other fluctuations shall constitute actual flow conditions.

The State and Idaho Power argued that these proposals “create the very ambiguity they seek to avoid,” asserting that they “would raise questions as to whether the partial decrees call for administration on the basis of ‘actual flows’ or ‘calculated flows.’” (*State and Idaho Power’s Memo* at 8.) That argument holds no merit. The above proposals not only confirm that “actual flow conditions” are based on “average daily flow,” they clarify that there are only two exceptions that may result in an adjustment for the purpose of calculating actual flow conditions.

The State and Idaho Power additionally argue that any deviation from the plain language of the Agreement “could raise questions in the future as to whether the partial decrees were intended to be consistent with the Agreement.” *Id.* This argument is debunked by the decrees themselves, each of which states: “This partial decree is consistent with the Swan Falls Agreement dated October 25, 1984”

Moreover, the State’s and Idaho Power’s professed aversion to clarifying the meaning of the Agreement appears to be a one-way street, given that the decree language they propose already deviates from the plain language in the Agreement. Paragraph 7.E. of the Agreement reads, in pertinent part: “Company’s ability to purchase, lease own, or otherwise acquire water from sources upstream of its power plans and convey it to and past its power plants below Milner Dam shall not be limited by this agreement.” This provision is incorporated into the proposed partial decrees, but has been modified as follows: “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 power plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.” (Emphasis added.) This revision was obviously inserted at the request of Idaho Power, presumably in an effort to bolster its claimed right to acquire water above Milner Dam (as contrasted with the language of the Agreement which merely states that any rights Idaho Power then had “shall not be limited by this Agreement”). The Upper Snake Water Users have acquiesced to this revision because they do not believe it creates an entitlement to acquire water above Milner, and because the State and Idaho Power have represented that it does not. Still, it is clearly a deliberate revision, undermining the State and Idaho Power’s argument that any change to the language is problematic.

If the partial decrees can be clarified in a manner that will aid administration by the Watermaster and will minimize the risk of future dispute and litigation, they should be. In this

case, condition number one can and should be clarified to avoid future dispute over the effect of water acquired by other entities, such as the Bureau of Reclamation, and delivered past Milner Dam. While that State and Idaho Power have assured the Upper Snake Water Users that such flows do in fact constitute actual flow conditions, they have been reluctant to revise condition number one, giving 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.

It would undermine an important purpose of the Snake River Basin Adjudication to fail to clarify ambiguities in the definition of Idaho Power's water rights under the Agreement. Further, such failure would be a disservice to water users who would undoubtedly be forced to re-litigate the history, meaning, and intent of the Agreement in the future, at no small cost. It is also important that the Watermaster administering Idaho Power's water rights not have to go back to the Court record to determine which flows constitute "actual flow conditions" and which do not.

The foundation is laid to clarify the definition of Idaho Power's water rights under the Agreement in this proceeding, and it should be done. Therefore, the Upper Snake Water Users ask the Court to adopt either of their above proposals for clarifying condition number one (preferably, the second proposal) or craft its own revision of condition number one as the Court sees fit. The State and Idaho Power are welcome to propose alternative language that clearly confirms that fluctuations resulting from Company operations are the sole exception to the rule that all flows actually present at the Murphy Gauging Station constitute actual flow conditions.

II. CONDITION NUMBER ONE SHOULD BE REVISED TO CLARIFY THAT "FUTURE BENEFICIAL USES" MEANS ALL BENEFICIAL USES MADE AFTER OCTOBER 25, 1984.

The Upper Snake Water Users' support the request made by Jeff C. and Jackie Harper, Basin and Range Resource Company, LLC, and Interested Water Users (collectively, "Interested Water Users") that condition number one of the proposed partial decrees be revised to clarify that the term "future beneficial uses" in the second sentence refers to beneficial uses made after October 25, 1984. (*Statement of Issues* at 3-4.) The State and Idaho Power agreed to revision of the second sentence of condition number one as follows: "... shall be subject to subordination and depletion by future beneficial uses made after October 25, 1984, under water rights acquired pursuant to applicable state law." (*State and Idaho Power Memo* at 13, n. 5.) The Upper Snake Water Users agree that the term "future" lends itself to potential dispute over the operative date of that provision, and further agree that the language proposed by the State and Idaho Power

clarifies the intent of the Agreement. Therefore, they ask that condition number one be so revised.

III. THE PARTIAL DECREES SHOULD BE REVISED TO SUBORDINATE THE WATER RIGHT TO QUALIFYING BENEFICIAL USE WATER RIGHTS CLAIMS IN THE SRBA.

The Upper Snake Water Users also support the Interested Water Users' request that the proposed partial decrees be amended to subordinate the water rights to beneficial uses made prior to October 1, 1984, and claimed either by June 30, 1985, *or in the SRBA*.³ (*Statement of Issues* at 5.) The State and Idaho Power dismiss this request on the basis that it "broaden[s] the scope of subordination beyond that agreed by the parties." (*State and Idaho Power's Memo* at 15.) The truth is, neither the State nor Idaho Power nor any third party beneficiary of the Agreement ever imagined or intended that the Agreement would protect some pre-October 1, 1984, beneficial use claims and not others, which is what is being proposed by Idaho Power and the State.

In 1978, the Idaho legislature amended Idaho Code § 42-243 and enacted Idaho Code § 42-245 to require that all beneficial use claims be filed with the Idaho Department of Water Resources by June 30, 1983, or be conclusively relinquished. 1978 Idaho Sess. Laws, ch. 345, §§ 6 & 8, p. 884. In 1983 Idaho Code § 42-243 was amended to allow for late claims to be filed by June 30, 1985. 1983 Idaho Sess. Laws, ch. 61, § 1, p.141. Thus the law in effect at the time of the Agreement required that all beneficial use claims be filed by June 30, 1985, or be relinquished. This was the legal context in which the Agreement was crafted.

Even though Idaho law allowed beneficial use claims to be filed by June 30, 1985, the Agreement further protected Idaho Power by providing that its water rights would not be subordinate to persons who beneficially used water *after* October 1, 1984. Agreement ¶7.D at 4. While the Agreement also cited the law that all beneficial use claims had to be filed by June 30, 1985, that is all it did—confirm that the Agreement caused no deviation from the requirement that beneficial use claims had to be filed on to be protected. The protection to Idaho Power was in the deadline that required actual beneficial use of water by October 1, 1984 (a deadline that had passed at the time the Agreement was signed). If there was any protection derived from the filing deadline (which would not occur for the better part of a year after the Agreement was signed), it was simply that the extent of beneficial use claims with priority dates before October

³ This request relates to condition number 4 in the proposed partial decrees for Idaho Power and the identical condition number 5 in the proposed partial decrees for the State.

1, 1984, would be finalized. The State's subsequent extension of the filing deadline to include SRBA claims had no bearing on the number of beneficial water uses actually made by October 1, 1984; the extension affected only the time period in which such rights would be finalized. 1994 Idaho Sess. Laws, ch. 63, § 1, p. 121.

The State and Idaho Power have surprisingly refused to acknowledge this practicality, instead arguing that the Agreement intended to protect some beneficial uses made by October 1, 1984, but not others. Their proposal creates an extraordinary administrative conundrum sometimes referred to as a "rebound call" which undermines the very purpose of the subordination that was secured by paragraph 7D of the Agreement. If the partial decrees are not amended to incorporate SRBA claims, then the Agreement will hypothetically protect a beneficial water use made on September 30, 1984, while not protecting a beneficial water use made decades earlier, just because one water right filed by June 30, 1985, while the other didn't. Idaho Power could then make a call on the senior beneficial use right who may turn around and make a call on the junior right that is supposed to be protected by paragraph 7D of the Agreement.

Moreover, there were certainly many beneficial use claims that could have been filed by June 30, 1985, but which were not because the Legislature extended that filing deadline before June 30, 1985. The 1985 amendment of Idaho Code § 42-243, which extended the filing deadline, was passed on March 21, 1985—more than three months prior to the June 30, 1985, deadline. 1985 Idaho Sess. Laws, ch. 226, § 2, p.540. If, as the State and Idaho Power infer, there was no intent of including within the purview of paragraph 7D of the Agreement water rights that were filed within the legal deadline, but after 1985, then such water users were hoodwinked by the legislation extending the deadline.

The State and Idaho Power's proposal that some pre-October 1, 1985, water rights be protected while others are not, is totally contrary to the purpose and intent of the Agreement, contrary to the constitutional principle that "first in time is first in right," and leads to an absurd result. Such a result was never imagined or intended by the Agreement. Therefore, the Upper Snake Water Users ask this Court to amend the proposed partial decrees to provide that the water rights are subordinate to all beneficial uses made prior to October 1, 1985, and claimed either by June 30, 1985, or in the SRBA.

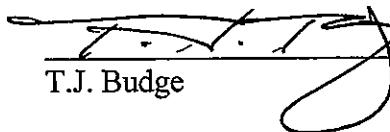
CONCLUSION

For the foregoing reasons, the Upper Snake Water Users ask that this Court respectfully ask the Court to 1) adopt either of their above proposals for revising condition number one (preferably, the second proposal) to clarify that fluctuations resulting from Company operations are the sole exception to the rule that all flows actually present at the Murphy Gauging Station constitute actual flow conditions; 2) revision condition number one to clarify that the term "future beneficial uses" in the second sentence refers to beneficial uses made after October 25, 1984; and 3) revise the partial decrees to provide Idaho Power's water rights are subordinate to all beneficial uses made prior to October 1, 1985, and claimed by June 30, 1985, or in the SRBA.

RESPECTFULLY SUBMITTED.

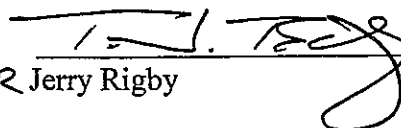
DATED this 5th day of October, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2009, the above document was served upon the following parties in the manner(s) specified.

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