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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

Subcase No.: 2-103

**RESPONSE TO COTTONWOOD'S
MOTION TO PARTICIPATE**

Black Mesa Farms LLC ("Black Mesa Farms" or "Black Mesa"), by and through its counsel Givens Pursley LLP, hereby responds to the January 6, 2011 *Motion to Participate* filed by Cottonwood Canal Company ("Cottonwood") in the above-captioned subcase. Black Mesa does not oppose Cottonwood's participation in this subcase because the Idaho Department of Water Resources ("IDWR") recently concluded an administrative proceeding amending the license upon which this claim is based. The original license was issued in Cottonwood's name, but Black Mesa owns the land to which the amended portion of the water right is and always has been appurtenant. IDWR declined to determine in whose name to issue the amended portion of the license because IDWR believed it was "without jurisdiction or authority to quiet title to Black Mesa." *Order Denying Petition for Reconsideration and Final Order Regarding*

Ownership (“Reconsideration Order”) at 5.¹ Cottonwood’s participation in this subcase will allow both parties to present their cases concerning ownership.

Black Mesa generally agrees with the timeline of background events set forth in Cottonwood’s *Memorandum in Support of Motion to Participate* (“Cottonwood Brief”), pages 1-5. However, Black Mesa wishes to clarify Cottonwood’s representation that IDWR’s current Director’s Report recommendation for water right 2-103 in the name of Black Mesa is “contrary to” IDWR’s decision in the recently completed administrative proceeding. Cottonwood Brief at 6. Cottonwood’s use of the term “contrary” is misplaced because it suggests that IDWR’s determination in the administrative proceeding decided the ownership issue and that such decision was in opposition to its Director’s Report recommendation for Black Mesa’s claim no. 2-103. This is not the case. IDWR did not determine ownership in the recent administrative proceeding.

IDWR’s Reconsideration Order concluded that “the corrected portion of the license should remain in Cottonwood’s name given that the original license was issued in Cottonwood’s name and because the Department is without jurisdiction or authority to quiet title to Black Mesa,” but also expressly stated that this result “should not be interpreted as suggesting that the Department agrees that Cottonwood would prevail in a quiet title action.” Honsinger Affidavit, Ex. K at 5.

¹ A copy of the Reconsideration Order is attached as Exhibit K to the January 6, 2011 *Affidavit of Charles L. Honsinger in Support of Motion to Participate* (“Honsinger Affidavit”) filed in this subcase.

DATED this 24th day of February, 2011.

Respectfully submitted,

GIVENS PURSLEY LLP

By:

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2011, the foregoing was filed, served, or copied as follows:

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