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Clark Jefferson GWD
Goose Creek ID
Fremont Madison ID

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City of American Falls
City of Blackfoot
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City of Paul

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Re: Proposed settlement of SRBA Subcase 00-92023 (92-23)

Dear Jim & Clive:

As counsel for Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, North Snake Ground Water District, Magic Valley Ground Water District, Aberdeen-Springfield Canal Company, City of Pocatello, Gary and Helen Demoss, Egin Bench Canals, Fremont-Madison Irrigation District, Idaho Irrigation District, New Sweden Irrigation District, and The United Canal Company—all of whom are parties to SRBA Subcase 00-92023 (a/k/a the "92-23 case")—we are writing to express our clients' concerns with the settlement proposed by Idaho Power and the State of Idaho.

As you know, Idaho Power and the State entered into the "Framework Reaffirming the Swan Falls Settlement" without seeking input from the rest of the parties to the 92-23 case. In that regard, Presiding Judge Melanson's March 27, 2009, order regarding pending rulings on summary judgment motions specifically recognizes and confirms that the proposed settlement is currently between the State of Idaho and Idaho Power, but not yet the other parties to the 92-23 case. While our clients are understandably disappointed that they were not given an opportunity to provide meaningful and timely input, they appreciate your efforts

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to reach a settlement of this case, and are hopeful that their concerns can be adequately addressed and further litigation avoided through revision of the Framework, Memorandum of Agreement and Partial Decrees.

Initially, the Legislature appears to have been given a false impression that the 92-23 settlement is complete, contrary to Judge Melanson's order. While we hope to reach an accord, we are troubled by the proposed acceptance of the Framework and its exhibits in Senate Bill 1169 before the settlement has been finalized. Senate Bill 1169 should not be passed until our clients concerns are resolved.

As to the merits of the 92-23 settlement, we have a general concern that the settlement documents do not provide adequate clarity to certain issues, creating a significant risk that the Swan Falls Settlement will again be the subject of litigation in the future. Our clients have no interest in settling the 92-23 case without confidence that the matters being settled will no longer be disputed. Therefore, we propose the following solutions to clarify matters of concern to our clients.

1. **Water marketing system.** The 1984 settlement provides for the establishment of a water marketing system for the express purpose of enabling DCMI users to avoid the costs associated with condemnation proceedings. (1984 Framework § 4.) In contrast, the 2009 settlement states that the purpose of developing a water marketing system is "to accommodate the purchase, lease or conveyance of water for use at Idaho Power's hydroelectric facilities, including below Milner Dam" (Framework, Art. 3, ¶ 5.) To our knowledge, none of the 1984 settlement documents indicate that the purpose of developing a water marketing system was to enhance the ability of Idaho Power to acquire water for hydropower. Thus, on this point the 2009 settlement misrepresents the 1984 settlement.

SOLUTION: Either remove the water marketing language from the 2009 Framework or revise the Framework to correctly state the purpose of developing a water marketing system as represented in the 1984 Framework.

2. **Management of Snake River watershed to meet minimum flows.** While the 2009 settlement recognizes that the 1984 settlement established a comprehensive plan for the management of the Snake River watershed, the 2009 settlement in our view does not adequately adhere to the central tenet of that plan, which was that the Snake River watershed would be managed based on the minimum flows established at Milner Dam and Murphy Gauge. At the heart of the 1984 settlement was the compromise agreement to increase the minimum flow at Murphy Gauge from 3,300 cfs to 3,900 cfs. The increased minimum flow of 3,900 cfs effectively cut in half the amount of consumptive water development of the East Snake Plain Aquifer (ESPA) that could take place, since the actual minimum flow was approximately 4,500 cfs at that time. It was a classic "split the baby" settlement, with Idaho Power receiving an additional 600 cfs for hydropower generation in return for the State receiving 600 cfs for additional development of the ESPA.

However, it seems the 2009 settlement aims to disrupt that balance by failing to mention the comprehensive plan to manage the ESPA based on minimum stream flows, and by enhancing Idaho Power's ability to acquire water above Milner and effectively increase the amount of water available for hydropower generation below Milner at the expense of irrigators, municipalities, and other depletionary water users.

This is apparent in the proposed Partial Decrees which create an entitlement in Idaho Power to acquire water above Milner for hydropower use below Milner, which did not exist in the 1984 settlement:

1984 Agreement, ¶7E: Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of the Company facilities.

2009 Partial Decrees, ¶ 1: 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 be considered fluctuations resulting from the operation of Idaho Power Company facilities.

While our clients are not opposed to Idaho Power's use of water in amounts that exceed the minimum flows at Milner and Murphy, the comprehensive plan established in 1984 inherently requires that the use of water for hydropower, in excess of the minimum flows, is inferior to the use of water for depletionary purposes until such time as the minimum flows are reached.

SOLUTIONS: (1) Add the following language to the Partial Decrees: "Idaho Power Company's right to purchase, lease, own or otherwise acquire water upstream from its power plants under this condition shall be inferior to the right of other water users to purchase, lease, own or otherwise acquire water for non-hydropower purposes." Alternatively, the Partial Decrees could recite the priorities provided for in the Water District 1 rental rules. (2) Add language to the Memorandum of Agreement stating that the comprehensive plan established in 1984 was that the Snake River Watershed would be managed based upon the minimum flows at Milner and Murphy. (3) By stipulation, Idaho Power and the State agree not to participate in SRBA Subcase Numbers 92-2GP and 02-200.

3. **Lack of Preference for Ag Water Use.** The 1984 settlement provides that agricultural water use will be given priority in the allocation of undeveloped water supplies. In contrast, the 92-23 settlement infers that all water uses will be treated equal.

SOLUTION. In addition to reciting the central purpose of the 92-23 to secure water for further consumptive development of the ESPA, the 92-23 settlement should reaffirm that agricultural water use will be given priority.

4. **Accounting for Minimum Flow at Murphy Gauge.** Neither the 1984 settlement nor the 2009 settlement clearly state the effect of Bureau of Reclamation flows, unused spill past Milner, or other water acquired by Idaho Power upon the accounting of minimum flows at Murphy Gauge.

SOLUTION. Consistent with water delivery practices since 1984, the 2009 settlement needs to explain that Bureau of Reclamation flows, unused spill past Milner, or water otherwise acquired by Idaho Power has no effect on accounting for the minimum flow at Murphy Gauge.

5. **Effect of Trust Water Line.** The 2009 settlement leaves to future discussion "issues associated with the 'trust' and 'non-trust' water areas." We do not know all that is encompassed therein, but are convinced that the effect of the trust water line must by law be resolved in the SRBA and cannot be left for future discussion.

SOLUTION. (1) Add a condition to the Partial Decrees stating that no water right located outside of the trust water area as defined in 1984 will be subject to curtailment to curtailment to satisfy Idaho Power's right at Swan Falls regardless of whether the ESPA Model shows external water rights to be tributary to the Snake River below Milner.

6. **State Support of Idaho Power before the Idaho Public Utilities Commission.** The 92-23 settlement currently provides that the State will support Idaho Power before the IPUC commission to address any rate or other impacts directly attributable to the implementation of managed recharge. This is problematic for two reasons. First, the State should never be "supporting" Idaho Power before another State agency. Second, this provision adds weight to Idaho Power's inevitable requests to increase rates for irrigators, even if the minimum flows at Milner and Murphy are satisfied.

SOLUTION. Revise the Memorandum of Agreement to (1) provide that the State "will not object to" rather than "support" Idaho Power before the IPUC, and (2) clarify that Swan Falls Settlement does not require the IPUC to increase rates charged to irrigators as a result of impacts upon hydropower generation that are directly attributable to managed recharge.

7. **Discussion of additional issues.** We appreciate the representation that Idaho Power and the State intend that all interested parties participate in the discussion items identified in Article III of the 2009 Framework. Notwithstanding, the settlement documents themselves provide no such assurance.

SOLUTION. Revise Article III of the Framework to state that all parties to SRBA Subcase 00-92023 will be given a timely and meaningful opportunity to participate in discussion of solutions to the items identified therein.

Thanks for your attention to these concerns of our clients. Given the short time frame we are under, we anticipate that the State and Idaho Power will provide a prompt response, preferably in the form of proposed revisions to the 92-23 settlement documents. If you would prefer, we will propose revisions for your review, in which case we would ask for an editable copy of the settlement documents for that purpose. If needed, we would be happy to arrange a teleconference to discuss these issues further.

Sincerely,

**RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED**

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