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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	)	Consolidated Subcase No. 00-92023
	)	(Basin-Wide Issue 92-23)
	)	
Case No. 39576	)	CITY OF POCA TELLO'S RESPONSE TO THE
	)	STATE OF IDAHO'S, UPPER SNAKE WATER
	)	USERS', AND IDAHO POWER COMPANY'S
	)	SEPARATE MOTIONS FOR PARTIAL SUMMARY
	)	JUDGMENT

The State of Idaho, Upper Snake Water Users, and Idaho Power Company filed separate motions for partial summary judgment as indicated below:

The State of Idaho's October 17, 2008 Amended Motion for Summary Judgment on Issue of Recharge Subordination states, in pertinent part:

[T]he State of Idaho . . . moves for summary judgment on the following three (3) issues:

1. That Idaho Power Company agreed and/or conceded that the water rights at issue in this consolidated subcase are defined to exclude the flows of the Snake River or surface water or ground water tributary to the Snake River upstream from Milner Dam and carry no right or entitlement to seek curtailment or administration of rights to the use of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam, including ground water recharge water rights;

2. That the State of Idaho has the right to subordinate, to the extent authorized by state law, the water rights held in trust by the State under Idaho Code § 42-203B to any water right diverting from sources downstream from Milner Dam and upstream from the Murphy gauging station, including ground water recharge water rights; and

3. That the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, as finally licensed.

The Upper Snake Water Users' October 17, 2008 Motion for Summary Judgment states, in pertinent part:

[The USWU] move the Court . . . for an order granting summary judgment on the following three issues:

1. The Swan Falls Settlement precludes Idaho Power Company from seeking delivery of water tributary to the Snake River above Milner Dam to supply the Company's hydropower water right under the Settlement.
2. Idaho Power is precluded under principles of equitable estoppel and quasi-estoppel from claiming a right to water above Milner Dam to supply the Company's hydropower water rights below Milner.
3. The Upper Snake Water Users should be awarded their reasonable attorney fees and costs pursuant to Idaho Code §§ 12-120(3) and/or 12-121 because Idaho Power's claim to dominion over water use for groundwater recharge above Milner Dam is in violation and breach of the Swan Falls settlement and is without reasonable basis in law or fact.

Idaho Power Company's October 17, 2008 Motion for Partial Summary Judgment on Recharge Subordination states, in pertinent part:

1. Pursuant to the 1984 Swan Falls Agreement, Idaho Power Company did not subordinate its hydropower water rights to the diversion or management of water for aquifer recharge;
2. In Paragraph 7 of the Swan Falls Agreement, Idaho Power agreed to make its specified water rights subject to subordination only to subsequent beneficial consumptive upstream uses defined by the law in effect at the time of the Agreement;
3. Under the Framework for Final Resolution of Snake River Water Rights Controversy, the 11 80 Contract and the Swan Falls Agreement, the State and Idaho Power considered recharge a non-depletionary water management tool that could adversely affect hydropower generation and that should be studied further, not a consumptive beneficial use to which Idaho Power's water rights would be subordinated;
4. At the time of the Swan Falls Agreement, water rights acquired for recharge uses pursuant to I.C. § 42-4201 (1978), and Idaho Code § 42-4201A (1982), were legislatively deemed subordinate and secondary to all prior perfected water rights, including for power purposes;
5. Pursuant to the current law under IC. § 42-4201A(2) (1994), water rights obtained for recharge are subordinate and secondary to all prior perfected water rights, explicitly including water rights for power purposes that may otherwise be subject to subordination under the 1984 Swan Falls Agreement.

Pocatello supports the State's and USWA Motions for Partial Summary Judgment relating to subordination to ground water recharge.

The City of Pocatello respectfully points out that the State's, USWU's and IPCO's Motions for Partial Summary Judgment in 92-23 should not be understood to address the objections consolidated in Basin-Wide Issue 91-13. Consolidated Subcase 92-23 and BWI 91-13 may be overlapping and related, but only to the limited extent that Idaho Power's hydropower rights address only part of the protections that the Swan Falls Agreement accords to junior priority ground and surface water rights upstream in the drainage above Swan Falls Dam.

Statements in the July 23, 2007, and the April 18, 2008 Memorandum Decision & Order on cross-motions for summary judgment for Consolidated Subcase 92-23, focus on these differences:

- "Simply incorporating by reference the *Swan Falls Agreement* into the partial decrees for the affected water rights or through a general provision as contemplated by Basin-Wide Issue 13, would leave unresolved a number of issues pertaining to the nature and extent of the subject hydropower claims." [P. 10, July 23, 2007 Order]
- "Issues exist over fundamental terms, which define the nature, scope and extent of Idaho Power's hydropower rights and should be decided in the SRBA." [P. 12, July 23, 2007 Order]¹
- In the context of proceedings such as Basin-Wide Issue 13 where the Court has to determine what action, if any, is required to memorialize the "Swan Falls Agreement," the Court must consider all the various actions that were made conditions of the Swan Falls Agreement in addition to the Agreement itself.² [P. 26, April 18, 2008 Memorandum Decision and Order.]

¹ This statement follows Judge Melanson's discussion regarding BWI 91-13 and Consolidated Subcase 92-23. Specifically, Judge Melanson distinguishes administration or enforcement of the Swan Falls Agreement (addressed in BWI 91-13) and fundamental terms of the Swan Falls Agreement which "define the nature, scope and extent of Idaho Power's hydropower rights" [Con. Subcase 92-23].

² See Order Designating Basin-Wide Issue Re: To What Extent, If Any Should the Swan Falls Agreement be Addressed In the SRBA or Memorialized in a Decree.

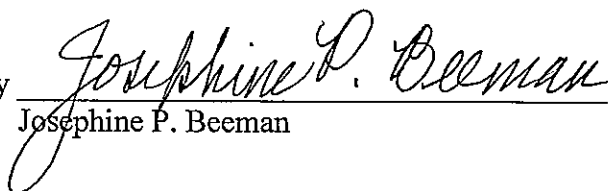
The City of Pocatello advised the SRBA court [in the City's motion for designation of what became BWI 91-13] that the Swan Falls issues include both a "general reference" issue (to ensure that no water right in the watershed above the Idaho Power Swan Falls Plant inadvertently loses the benefit of the Swan Falls Agreement because of the omission of appropriate reference to the Swan Falls Agreement in the SRBA court judgment or decrees) and the "discrete provision" issue (the possible need to incorporate discrete provisions of the Swan Falls Agreement into the decrees for Idaho Power's hydropower water rights within the Swan Falls drainage).

The general provision issue identified in BWI 91-13 applies to certain classes of water users who are third-party beneficiaries of the Swan Falls Agreement. These third-party beneficiaries are more specifically described in Pocatello's Opening Brief in Support of Motion to Designate Basin-Wide Issue and Stay Proceedings, at pp. 2-7 (July 9, 2004).

BWI 91-13 addresses the protection to third-party beneficiaries under the Swan Falls Agreement. This is an issue separate from the definition of Idaho Power's hydropower rights under the Swan Falls Agreement, now being addressed in 92-23.

DATED this 7th day of November 2008.

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By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I certify that on this 7th day of November 2008, I caused to be served a true and correct copy of the foregoing document to the following parties by U.S. Mail:

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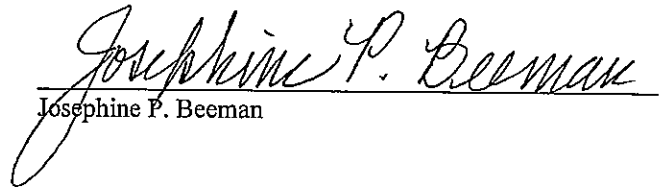
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