

RECEIVED

APR 17 2009

DEPARTMENT OF
WATER RESOURCES

Josephine P. Beeman (#1806)
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
Fax – (208) 331-0954

Attorney for the City of Pocatello

**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 POCATELLO'S NOTICE REGARDING
	)	MARCH 27, 2009 ORDER
	)	

The City of Pocatello (Pocatello or City) respectfully makes the following record as a party to Consolidated Subcase No. 00-92023 and to preserve the City's rights under the Court's March 27, 2009 Order in this proceeding.

On March 27, 2009, this Court entered an *Order Re: Rulings on Pending Summary Judgment Motions* (March 27 Order) wherein it was recognized that the State of Idaho (State) and Idaho Power Company (Idaho Power) had drafted a proposed settlement of Consolidated Subcase No. 00-92023 that was not agreed to by all of the parties to the subcase ("the State and Idaho Power and not yet other parties have finalized a proposed settlement"). The March 27 Order recognized that proposed legislation was part of the agreement between Idaho Power and the State ("the proposed settlement contemplates the passage of certain legislation"), but made explicitly clear that only the State and Idaho Power had agreed upon the form of the proposed legislation, and that the other parties to the litigation had not yet agreed to the settlement terms

("the State of Idaho and Idaho Power, but not yet [the] other parties have agreed upon and finalized the form of the proposed legislation").¹

The same day the March 27 Order was issued, Senate Bills 1168, 1169, and 1167 were introduced in the Idaho State Legislature as part of the proposed settlement agreement between the State and Idaho Power.² Pocatello had no involvement in the introduction of this legislation.

Language in Senate Bill 1169 is directly contrary to the March 27 Order. Senate Bill 1169 states, in pertinent part, that:

The Governor, Attorney General and Idaho Power Company have executed a Framework... that resolves pending litigation regarding the intent of the parties with respect to certain aspects of the settlement. The Legislature finds that Article II of said Framework and the exhibits thereto are in the public interest for all purposes including, but not limited to, all purposes under the public utilities law, as amended. Implementation of the Framework will resolve continuing controversy and litigation over electric utility water rights in the Snake River Basin above the Murphy U.S.G.S. gaging station and reaffirm the terms and original purposes of the Swan Falls settlement and further the implementation thereof.

S.B. 1169, 60th Leg., Reg. Sess. (Idaho 2009), Section 1, Lines 19-28 (emphasis added).

Pocatello has not signed or agreed to the Framework that was filed with this Court on March 26, 2009. The language of Senate Bill 1169 materially misrepresents the nature and status of the settlement Framework as it was described in the March 27 Order. The Framework and its exhibits do not and cannot resolve the pending litigation unless and until all of the parties agree to its terms.

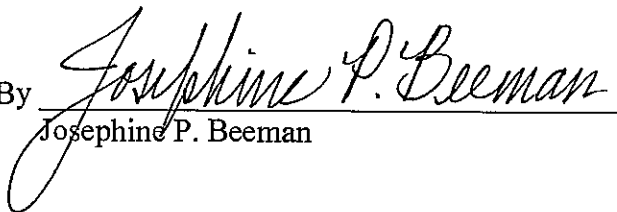
¹ The proposed settlement was Exhibit A (in paper format) and Exhibit B (in electronic format) to the State of Idaho's and Idaho Power Company's March 26 Joint Motion to Enter Order Temporarily Withholding Rulings on Pending Summary Judgment. The proposed legislation is Exhibits 3, 4, and 5 to the proposed settlement.

² These bills correspond to Exhibits 3, 4, and 5 of the proposed settlement. S.B. 1168 has gone forward as S.B. 1185.

Were Senate Bill 1169 to become law as currently written, it would adversely affect Pocatello's property rights, the property rights of the other non-signatory parties in this proceeding, and the property rights of any other third party beneficiaries of the Swan Falls Agreement³ in contravention of the Idaho Constitution which prohibits legislation that impairs vested property rights.⁴

DATED this 15th day of April 2009.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By 
Josephine P. Beeman

³ See City of Pocatello's Opening Brief in Support of Motion to Designate Basin-Wide Issue and Stay Proceedings at 2 nn.2-8, *In re SRBA Case No. 39576*, Subcase No. 92-00037 (SRBA Basin Wide Issue 91-13)(July 9, 2004)(identifying the third party beneficiaries of the Swan Falls Agreement as set out in the 1984 Swan Falls Contract, the 1983 enabling legislation for the Swan Falls Contract, the State Water Plan, amendments to the State Water Plan, and the Swan Falls consent decrees).

⁴ The Idaho Constitution provides that "the legislature shall pass no law. . . retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past." Idaho Const. art. XI, § 12. If a statute retroactively impairs water rights, the statute may constitute the taking of a vested right without the due process of law and violate article I, section 13 of the Idaho Constitution. *Boyer*, 73 Idaho 152, 154-55 (1952); Idaho Const. art. I, § 13 ("No person shall be... deprived of life, liberty or property without due process of law."). New legislation may not create, enlarge, diminish, or destroy contractual or vested rights. *Gailey v. Jerome County*, 113 Idaho 430, 433, 745 P.2d 1051 (1987). See also, *Lawrence v. Defenbach*, 23 Idaho 78, 83, 128 P. 81 (1912) ("[r]etropective legislation is not favored, and is prohibited by the constitution of some of the states, as being highly injurious, oppressive, and unjust..."); *Butler v. City of Blackfoot*, 98 Idaho 854, 574 P.2d 542 (1978). A retroactive or retrospective law is that which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past." *Ohlinger v. United States*, 135 F. Supp. 40, 42 (D. Idaho 1955)(citing 82 C.J.S., Statutes, § 412); see also, *City of Garden City v. City of Boise*, 104 Idaho 512, 660 P.2d 1355 (1983).

CERTIFICATE OF SERVICE

I certify that on this 15th day of April 2009, I caused to be served a true and correct copy of the foregoing document to the following parties by U.S. Mail:

James Tucker
Idaho Power Company
P.O. Box 70
Boise, ID 83701

James S. Lochhead
Adam Devoe
Brownstein Hyatt Farber Shreck, P.C.
410 17th Street, Suite 2200
Denver, CO 80202

John Simpson
Barker Rosholt and Simpson
P.O. Box 2139
Boise, ID 83701-2139

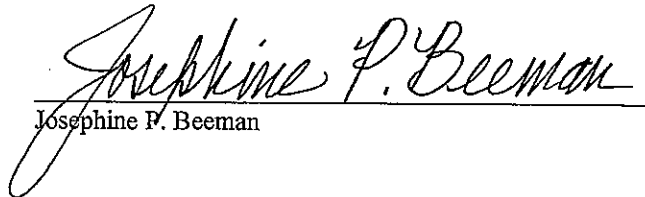
Randall C. Budge
P. O. Box 1391
Pocatello, ID 83204-1391

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment and Natural Resource Div
550 W. Fort Street, MSC 033
Boise, ID 83724

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

Jerry R. Rigby
25 N 2nd E
Po Box 250
Rexburg, ID 83440-0250



Josephine P. Beeman