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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 AND IDAHO POWER
	)	COMPANY'S JOINT MOTIONS DATED JUNE
	)	25, 2009

Pocatello files this response to the June 25, 2009 Joint Motions¹ and the August 27, 2009 Joint Memorandum of the State and Idaho Power regarding entry of partial decrees for certain Swan Falls affected hydropower rights.

Specifically, because the Joint Motions (as clarified by the Joint Memorandum) include a formula for administration of flows under the Swan Falls Agreement, Pocatello provides its

¹ On June 25, 2008, the State of Idaho and Idaho Power Company filed the following joint motions:

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 Consolidate Water Right 02-10135 With Consolidated Subcase 92-23;*
3. *State of Idaho's and Idaho Power Company's Stipulation and Joint Motion to Dismiss Complaint and Petition for Declaratory and Injunctive Relief; and*
4. *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.*

expert's response to historic data relevant to past administration of the Swan Falls Agreement.²

The historic data is a reference from which to identify the nature and accuracy of data necessary to support the administration proposed by the State and Idaho Power.³

I. THE STATE AND IDAHO POWER JOINT MEMORANDUM CLARIFIES A PROPOSED FORMULA FOR ADMINISTRATION OF SWAN FALLS FLOWS

The formula for administration of Swan Falls flows that is proposed by the State and Idaho Power begins with common language in the "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT" proposed for Idaho Power water rights 02-00100, 02-02032A, 02-04000A, and 02-04001A⁴, and for the State's trust water rights 02-40008, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135,

² The historic data was made available at a May 14, 2009 Idaho Department of Water Resources (IDWR) workshop on Swan Falls Flow Measurement and is available in the public domain on the IDWR website, under the link for the Swan Falls Agreement. http://www.idwr.idaho.gov/News/Issues/SwanFalls/swan_falls_agreement.htm. The data on the website is also labeled "subject to IRE 408". For this reason, reference to the historic data is made only for purposes of clarifying and identifying the nature and accuracy of data necessary to support the formula for administration proposed by the State and Idaho Power.

³ Pocatello's response also addresses the nature of the proceedings at this point, based on the absence of a settlement among the parties, the status of the record before the Court, and the standing of the third party beneficiaries of the Swan Falls Agreement.

⁴ The State and Idaho Power Joint Motions propose the following language as part of the "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT" for Idaho Power water rights 02-00100, 02-02032A, 02-04000A, and 02-04001A:

1. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A collectively entitle Idaho Power Company to an unsubordinated water right, except as provided in paragraph nos. 3 and 4 below, to average daily flows of 3900 CFS from April 1 to October 31 and 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging station" described below in paragraph no. 2. These flows are not subject to depletion, except for depletions caused by the lawful exercise of those water rights identified in paragraph nos. 3 and 4 below, and except for depletions resulting from any diversions or uses of the waters identified in paragraph 5 below. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A are satisfied when the average daily flows set forth herein are met or exceeded. 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 calculation of such flows. 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.

02-02060, 02-02059, 02-020018, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, and 37-20709:⁵

“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 calculation of such flows. 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.” (underlining added)

The measurement of average daily flow based on actual flow conditions is explained at pages 7 and 8 of the joint **MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S AND IDAHO POWER COMPANY'S JOINT MOTIONS TO ENTER AND MODIFY PARTIAL DECREES (August 27, 2009):**

"actual flow conditions" ... simply means that 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. (underlining added)

⁵ The State and Idaho Power Joint Motions propose the following language as part of the “OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT” for the State’s trust water rights 02-40008, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-020018, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, and 37-20709:

1. Legal title to this water right is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company as the user of the water for power purposes and for the benefit of the people of the State of Idaho. In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by future beneficial uses under water rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. 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 calculation of such flows. 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.

The explanation identifies “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” as the “sole exclusion” from “actual flow conditions” measured at the Murphy Gage for Swan Falls. This formula is assurance to the Upper Snake Water Users who want certainty that “flows of water acquired by persons or entities other than Idaho Power Company do in fact constitute actual flows.” Upper Snake Water Users’ Response to 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, at 3 (July 21, 2009).

Pocatello’s reservation regarding the formula is based in the absence of comprehensive and accurate data to confirm that administration in conformance with the formula has occurred in the past and will occur in the future.

II. THE ENTRY OF PARTIAL DECREES WITH AN “ACTUAL FLOW CONDITIONS” FORMULA WOULD ADDRESS THE RECORD NECESSARY FOR ADMINISTRATION OF SWAN FALLS FLOWS

A. The parties have a common understanding of the “ACTUAL FLOW CONDITIONS” language in the Swan Falls Agreement.

Pocatello understands that the parties agree on the following three points regarding a formula for administration of Swan Falls flows based on “actual flow conditions”:

1. Average daily flow is based on actual flow conditions meaning all flows actually present at the Murphy Gaging Station.
2. The term “fluctuations from the operation of Company facilities” refers to two different physical realities: “operational fluctuations” AND “flows” from “the 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.”
3. With reference to “operational fluctuations”, the parties are agreed that Idaho Power’s “operational fluctuations” are AVERAGED WITH, but not subtracted from actual flow conditions, for purposes of calculating average daily flow.

These three points provide the basis for administration of Swan Falls flows while a record of the data necessary to verify “actual flow conditions” is developed.

Based on the August 27 memorandum cited above, the only area of disagreement among the parties regarding a formula for administration relates to whether “flows from water that Idaho Power purchases, leases, or otherwise acquires upstream of its power plants and conveys below Milner Dam” are to be SUBTRACTED from “actual flow conditions”.⁶

The historic record discussed below and in the attached affidavit of Gregory K. Sullivan provides the foundation for Pocatello’s position that administration based on the three accepted points for “actual flow conditions” is appropriate at this time, and that entry of remarks in the partial decrees can also provide for development of the necessary data to confirm (1) “actual flow conditions” and (2) whether flows from water that Idaho Power purchases, leases, or otherwise acquires are to be subtracted from “actual flow conditions.”

B. The data necessary to verify “actual flows conditions” can be identified but has either not been developed or not included (or included only partially) in past administration. The same is true of the remainder of the formula proposed by the State and Idaho Power – where the “actual flow conditions” at Swan Falls are reduced by the amount of Idaho Power storage, rentals, and purchases.

The affidavit of Gregory K. Sullivan in support of Pocatello’s Response provides for the Court and parties a response to data proved regarding past administration of the Swan Falls Agreement and a reference from which to identify the nature and accuracy of data necessary to support the administration proposed by the State and Idaho Power.

⁶ Prior to the August 27 memorandum and based on the written and oral record before the Court, Pocatello understood that the parties disagreed on two points regarding what is SUBTRACTED from “actual flow conditions” at the Murphy Gage for purposes of calculating average daily flows under the Swan Falls Agreement:

1. Flows from water that Idaho Power purchases, leases, or otherwise upstream of its power plants and conveys below Milner Dam. [The State, Idaho Power, and the Upper Snake Water Users agree that these may be subtracted from “actual flow conditions”. Pocatello has not.]
2. Flows from water acquired by persons or entities other than Idaho Power Company. [Pocatello and the Upper Snake Water Users agree these flows are not to be subtracted from “actual flow conditions”. The State and Idaho Power have agreed in concept but not in writing until the explanation in the August 27 joint memorandum cited above.]

In his affidavit, Mr. Sullivan points out that the available data results in a rudimentary analysis because it does not include factors that are necessary to account for “actual flow conditions” and any adjustments to the Murphy gage flows for the “fluctuations resulting from the operation of the Company facilities. There are many factors that would need to be considered including the following:

- a. Measured flow at the Murphy gage.
- b. Idaho Power releases of stored water and rentals of water that are present at the Murphy gage.
- c. Fluctuations in the flow at the Murphy gage caused by the operations of the reservoirs of Idaho Power located between Milner Dam and the Murphy gage.

In addition, data needed in order to properly and accurately adjust the Murphy gage flows would include the following:

- d. Daily Snake River flows at the Murphy gage, the Milner gage and at other gages
- e. Releases from the Idaho Power storage account, and releases of water rented by Idaho Power.
- f. The amounts of the Idaho Power storage releases and rentals that are present in the Snake River at Milner gage flows.
- g. Data that could be used to determine the time delay, attenuation of flows, and transit loss that would affect the delivery of Idaho Power storage releases and rentals from Milner Dam to the Murphy gage.
- h. Data to determine the measured inflows, outflows, change in storage, and losses from Idaho Power’s reservoirs between Milner and the Murphy gage.

Mr. Sullivan’s work identifies “breach days” in the historical data and other occasions when the adjusted flows approached the minimums on several occasions. He states that, “Had a more sophisticated procedure been utilized to determine the effect of the Idaho Power operations on the Murphy Gage flows, it is possible that a violation of the Swan Falls minimum flow could have been determined during the historical period between 1981 and 2008.” And, further, “These

approaches to the minimums coupled with the absence of transparent, comprehensive, and accurate data and procedures in the past create problems for consistent administration of the Idaho Power water rights and Swan Falls minimum flows.” Specifically:

- i. Had there been more comprehensive and accurate data through 2008 it is possible the Swan Falls minimum flows could have been violated in the past.
- j. The use of comprehensive and accurate data going forward could result in violations of the Swan Falls minimum flows in the future for flow conditions that resulted in no violations through 2008.
- k. In addition to these data regarding determination of “actual flow conditions,” it is possible the Swan Falls minimum flows could be violated in the future based on (a) the occurrence of more severe drought conditions (b) continued changes in water use practices across the Eastern Snake Plain.

The absence of this data historically and the absence of Swan Falls-based curtailments creates a presumption in favor of the third party beneficiaries of the Swan Falls Agreement and places a burden on anyone seeking to curtail ground water users (and other third party beneficiaries) based on measurements that subtract Idaho power rentals, purchases, and leases from the actual flow conditions at Swan Falls.

Partial decrees can be entered that provide for administration based on actual flow conditions at Swan Falls until such time as (1) transparent, comprehensive, and accurate data and procedures for actual flow conditions and (2) transparent, comprehensive, and accurate data and procedures for Idaho power rentals, purchases, and leases developed in the administrative process would overcome the presumption that Idaho power rentals, purchases, and leases are part of the “actual flow conditions” at Swan Falls.

III. IN THE ABSENCE OF A SETTLEMENT AMONG THE PARTIES, THE RECORD BEFORE THE COURT DOES NOT SUPPORT THE FORMULA PROPOSED BY THE STATE AND IDAHO POWER

A. The ground water user parties in this proceeding have standing as third party beneficiaries of the Swan Falls Agreement.

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”).⁷

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.⁸ Pocatello had no involvement in the introduction of this legislation.

Language in Senate Bill 1169 (subsequently signed into law on April 25, 2009 with an effective date of July 1, 2009) is directly contrary to the March 27 Order. Senate Bill 1169 states, in pertinent part, that:

⁷ 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 was Exhibits 3, 4, and 5 to the proposed settlement.

⁸ These bills correspond to Exhibits 3, 4, and 5 of the proposed settlement. S.B. 1168 has gone forward as S.B. 1185.

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 did not sign or agree 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, and the joint Motions subsequently filed by the State of Idaho and Idaho Power Company based on the Framework, do not and cannot resolve the pending litigation unless and until all of the parties agree to the terms.

The provisions of Senate Bill 1169 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 Agreement⁹ in contravention of the Idaho Constitution which prohibits legislation that impairs vested property rights.¹⁰

⁹ 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).

¹⁰ 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

The 1984 Swan Falls Contract identifies certain classes of water users as third-party beneficiaries.¹¹ The 1983 enabling legislation for the Swan Falls Contract also identifies certain mandatory third party beneficiaries.¹² In general, the third-party beneficiaries are (1) any consumptive water users prior to November 19, 1982, (2) all domestic water users, and (3) any

favorable, 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).

¹¹ Swan Falls Contract paragraph 4. **Third Party Beneficiaries** – "Persons coming within the class of users identified in paragraphs 2(a), 2(d), or 2(e) above are third party beneficiaries of this contract who may seek enforcement of applicable provisions, except as to paragraph 3, in accordance with the laws of the State of Idaho. By executing this contract, the Company agrees that its claimed water rights are subordinate to the rights coming within the provisions of paragraphs 2(a), 2(d), and 2(e)."

The third-party beneficiaries are defined as follows:

(1) "consumptive water uses for domestic uses" means water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of said households where total use, other than water for irrigation of the residential lot, does not exceed thirteen thousand (13,000) gallons per day. The above definition applies whether such uses are direct or from a municipal water supply. The term "residential lot" means either a lot in an approved subdivision or a lot created by metes and bounds description, which lot had been platted or described prior to November 19, 1982, or meets the minimum residential lot size requirement in effect on November 19, 1982, of the local government agency having jurisdiction. The minimum lot size may be changed by the government agency, but shall not exceed two or one-half acres. The term "consumptive water for domestic uses" shall include, in addition to the uses listed above, use of water for livestock." *Swan Falls Contract*, paragraph 1. Definitions – (a).

(2) "Nonconsumptive, Commercial, Nonconsumptive Municipal, Nonconsumptive Industrial Use" means any CMI use which does not deplete the water of the Snake River system above Swan Falls more than two acre-feet per day." *Swan Falls Contract*, paragraph 1. Definitions – (b).

(3) [relevant text]... "All consumptive water users who have beneficially used water prior to November 19, 1982, pursuant to a valid permit, license or decreed right existing prior to November 19, 1982, or valid beneficial use claim. ..." *Swan Falls Contract*, paragraph 2. Mutual Covenants – (a).

(4) [relevant text] ... "Any persons who have previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, even though such irrigation wells or irrigation equipment were not in operation prior to November 19, 1982...." Note: The phrase "substantial investment in irrigation wells and irrigation equipment" is defined in paragraph 1.(c) of the Swan Falls Contract. *Swan Falls Contract*, paragraph 2. Mutual Covenants – (a).

¹² Idaho Code § 61-540: "Each contract shall provide ... that (1) all consumptive water users who have beneficially used water for any consumptive purpose prior to November 19, 1982, or any person or persons who have previously made substantial investments in irrigation wells and irrigation equipment and have pending a water permit or application, even though such irrigation wells and irrigation equipment were not in operation prior to November 19, 1982, may continue the water licensing process, (2) persons included within the provisions of (1) above are third party beneficiaries of said contract...."

Key provisions of this 1983 legislation were only in full force and effect after the signing of the contract in 1984 (see 1983 Idaho Sess. Law 259, S.B. 1180 (1983)).

commercial, municipal, and industrial water users with limited depletions (two acre-feet or less per day) to the Snake River system above Swan Falls.

The State Water Plan has also identified these general classes of water users since 1976.¹³ In 1985, both the Idaho Water Resource Board and the Idaho Legislature specifically protected these water users in State Water Plan amendments that were mandatory for the Swan Falls Agreement to be effective and binding.¹⁴ These protections have been maintained in subsequent State Water Plans, all of which were legislatively approved.¹⁵

The 1990 Swan Falls consent decrees recognize water users benefited by the Swan Falls Contract¹⁶ as well as confirming protections to "those persons who have beneficially used water prior to October 1, 1984."¹⁷

¹³ See 1976 State Water Plan, Snake River Basin Policy 32; 1982 State Water Plan, Snake River Basin Policy 32; 1985 Amendment to the State Water Plan, Snake River Basin Policy 32A, 32B, 32C; 1986 State Water Plan, Snake River Basin Policy 5A, 5B, 5C, and 5D; 1992 State Water Plan, Snake River Basin Policy 5A, 5B, 5C, and 5D; and 1996 State Water Plan, Snake River Basin Policy 5A, 5B, 5C, 5D and 5E. (All address irrigation rights and domestic, commercial, municipal, and industrial rights.)

¹⁴ 1985 Amendment to the 1982 State Water Plan: Passed and approved by Idaho Water Resource Board on March 1, 1985; 1985 Sess. Laws 204, S.B. 1205 (1985). See also, State Water Plan hearings on Policy 32, January 28, 1985, Idaho Falls; January 29, 1985, Pocatello; January 30, 1985, Burley; January 31, 1985, Twin Falls; February 5, 1985, Boise; and February 6, Lewiston. *Swan Falls Agreement (Oct. 1, 1984)*, paragraph 13. **Conditions on Effectiveness.** (The Idaho Power Company water rights, damages waiver, and status of the State Water Plan provisions required amendment of the State Water Plan in order for those provisions to be binding.)

¹⁵ 1987 Idaho Sess. Laws 818, S.C.R. 108 (1987); in 1992, the Legislature did not amend or reject the 1992 State Water Plan adopted by the Idaho Water Resource Board within the constitutionally allotted 60 days and thus the 1992 State Water Plan became effective without legislative enactment; and 1997 Idaho Sess. Laws 38, S.B. 1137 (1997).

¹⁶ "The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of *Idaho Code* §§61-539 and 61-540." March 9, 1990 Consent Judgment, Ada County Case No. 62237, para. 1.C. "The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to the uses of those persons dismissed from this case pursuant to the contract executed between the State and Company implementing the terms of *Idaho Code* §§61-539 and 61-540." February 16, 1990 Consent Judgment, Ada County Case No. 81375, para. 1.C.

¹⁷ "The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985." March 9, 1990 Consent Judgment, Ada County Case No. 62237, para. 1.D. and February 16, 1990 Consent Judgment, Ada County Case No. 81375, para. 1.D.

Third party beneficiaries who may seek enforcement of applicable provisions of the Swan Falls agreement, in accordance with the laws of the State of Idaho, are party to this proceeding.

B. The record before the court does not support the formula proposed by the State and Idaho Power, absent a settlement among all the parties.

1. The summary judgment proceedings to date do not address the issue of a formula for administration of Swan Falls flows.

A review of the April 18, 2008 Memorandum Decision and Order on Cross-Motions for Summary Judgment shows that:

- “Swan Falls Daily Minimum Flows” are mentioned twice: page 17 and page 49. Pocatello would conclude that the determination of “Swan Falls Daily Minimum Flows” is an undecided allegation in the Idaho Power Complaint
- The court was asked to rule who owned the water rights not how the water rights were administered¹⁸
- The court found, at p. 26, that, “the Swan Falls Agreement is not ambiguous as to the ownership of Idaho Power’s claims or as concerns the *res* of the trust.” The court was not asked whether the Swan Falls Agreement is ambiguous regarding administrations of the Swan Falls flows
- The term “a minimum flow established by state action” appears repeatedly without determining whether state action is a reference to the State Water Plan or the Swan Falls Agreement. *See, e.g.*, Memorandum Decision, pp. 12, 30, 36.
- The court affirms that, “the purpose of the SRBA is to accurately describe Idaho Power’s water rights in a partial decree or decrees in a manner that allows the rights to be administered by IDWR and that avoids future ambiguity or uncertainty. Memorandum Decision, p. 44. This was accomplished with respect to the State’s regulatory authority that put the Idaho Power rights in trust, an essential component of the court’s determination of the ownership issue. The issue of the measurement of the minimum flows was not raised or addressed in the summary judgment proceeding.

¹⁸ “Therefore, the two motions plainly deal with the same subject matter. The parties rely upon closely related issues, and while their legal theories are different, they both ask the court to rule that they own the water rights.” Memorandum Decision, p. 19.

A proposed formula for administration of Swan Falls flows was not part of the proceedings that led to the April 18, 2008 Memorandum Decision. The current pleadings before the court establish the parties' disagreement regarding, and thus the inherent ambiguities in, the Swan Falls Agreement regarding a formula for administration of the Swan Falls flows.

2. The record before the court, except for the affidavit of Mr. Sullivan, does not include data regarding administration of Swan Falls flows.

Mr. Sullivan points out that, "the other provisions" language in the proposed partial decrees for Idaho Power's hydropower water rights does not provide sufficient guidance on how the adjustments to the "actual" flows at the Murphy Gage will be made to remove "fluctuations resulting from the operation of company facilities." Sullivan Affidavit, para. 7, p. 3.

In the ensuing discussion of the many factors that would need to be considered, Mr. Sullivan identifies data that is not otherwise present in the records of this proceeding:

- The time delay, attenuation of flows, and transit loss that would affect the delivery of Idaho Power storage releases and rentals from Milner Dam to the Murphy Gage.
- The effect of the operation of Idaho Power's reservoirs between Milner and the Murphy Gage, including reservoir inflows and outflows, changes in reservoir storage, and reservoir evaporation.
- Daily Snake River flows at the Murphy Gage, the Milner Gage, and at other gages.
- The amounts of the Idaho Power's storage releases and rentals that are present in the Snake River at Milner Gage flows.

Absent an agreement among the parties, the record in these proceedings does not support entry of a formula for administration of Swan Falls flows. Mr. Sullivan's affidavit does provide a framework for the administrative development of the necessary data. As discussed above, based on the parties' agreement regarding "actual flow conditions," partial decrees could be entered that allow for administration based on "actual flow conditions" while development of the

necessary data proceeds and guides any change to the “actual flow conditions” regarding Idaho Power leases, rentals, or acquisitions.

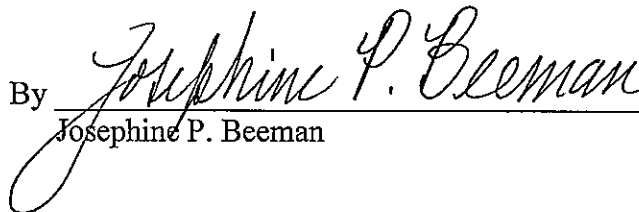
IV. CONCLUSION

Pocatello appreciates the court’s accommodation of the City’s expert’s necessary time to prepare the affidavit submitted with this Response Brief. In accordance with the City’s concern that the historic data for Swan Falls administration through 2008 is not based on transparent, comprehensive, and accurate data and procedures, it respectfully requests that the court consider the entry of partial decrees with administration based on “actual flow conditions” while also providing for the development of an administrative record that is based on transparent, comprehensive, and accurate data and procedures.

In accordance with the current briefing schedule, Pocatello will provide suggested remark language in its Reply Brief to the Response Briefs.

DATED this 5th day of October 2009.

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

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I certify that on this 5th day of October 2009, I caused to be served a true and correct copy of the foregoing Response and the Affidavit of Gregory K. Sullivan, on the following parties by U.S. Mail:

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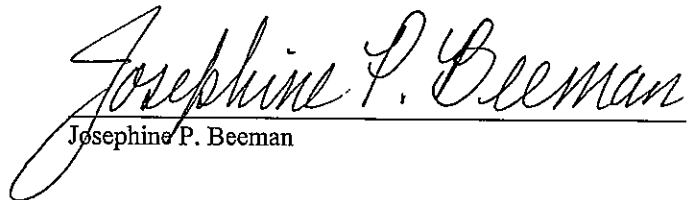
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