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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION	)	
TO LEASE WATER FOR HYDROELECTRIC	)	
GENERATION IN THE NAME OF THE CITY	)	CLOSING BRIEF
OF POCATELLO	)	
_____	)	

The City of Pocatello ("Pocatello") hereby files its Closing Brief pursuant to Idaho Department of Water Resources, (IDWR) Rules of Procedure and the Order of the Hearing Officer in the above matter.

BACKGROUND

Petitioner, the City of Pocatello, is a municipal corporation duly organized under the laws of the State of Idaho located in the southeastern part of the State of Idaho.

Pocatello is Idaho's second largest treated water provider and its fourth largest city, with a population just under 55,000 residents.

Pocatello has water rights to surface water, ground water, and storage water. In 1960, the City entered into Contract Number 14-06-100-1825 with the United States of America to secure 50,000 acre feet of storage water in the Palisades Reservoir (City Palisades Contract).

Unlike most of the Palisades storage contracts, the City Palisades Contract provides for a number of uses for its storage water. These uses include mitigation, municipal use, and the right to lease the storage water, flood control, and irrigation. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "A".)

In June of 2008, the City of Pocatello and the Idaho Power Company entered into a Water Lease Agreement for one year whereby the City would lease 20,000 acre feet of its Palisades storage water to Idaho Power contingent upon the City acquiring all necessary approvals required by State or Federal law. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "B".)

On June 16, 2008, the City mailed an Application for Leasing of Water for Hydroelectric Generation pursuant to Idaho Code Sections 42-108A and 42-108B to the Director of the Idaho Department of Water Resources. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "C".)

Pursuant to Idaho Code Section 42-108B, the Director of the Idaho Department of Water Resources published Notice of Proposed Leasing of Water for Hydroelectric Generation on July 10 and July 17, 2008, in the Post Register, the Times News, and the Idaho Statesman. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "D".)

Five Protests to the Application were filed with IDWR by 5:00 p.m. on July 21, 2008. On July 24, 2008, the Director of IDWR sent out a Notice of Hearing scheduling a hearing on the Application and Protests for 9:00 o'clock a.m. on July 31, 2008, in Jerome, Idaho. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "E".)

On July 31, 2008, the Director of the Idaho Department of Water Resources, Mr. David Tuthill, presided over a hearing pursuant to Idaho Code Section 42-108B.

The Applicant, the City of Pocatello, presented its case requesting approval of the Water Lease in question. The City of Pocatello moved to have all five protests dismissed based upon the language of Idaho Code Section 42-108B. Mr. Tuthill ruled that he would take the Motion under advisement but that the hearing would continue. The City of Pocatello filed a Pre-Hearing Brief pursuant to the Notice of Hearing sent out by Mr. Tuthill. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "E".) The City of Pocatello then proceeded to call its witness. The five protestors, the Committee of Nine, the Idaho Irrigation District, and the New Sweden Irrigation District, all represented by Mr. Jerry R. Rigby of Rigby Andrus & Moeller, Chtd., the Idaho Ground Water Appropriators, Inc., represented by Mr. Randall C. Budge of Racine Olson Nye Budge & Bailey, and Palisades Water Users, Inc., represented by Mr. Robert L. Harris of Holden Kidwell Hahn & Crapo, all presented their own witnesses.

At the close of the testimony Mr. Tuthill directed that Closing Briefs be submitted by the parties to the Idaho Department of Water Resources in Boise, Idaho, by 5:00 p.m. on July 8, 2008.

ISSUES

1. Should all five (5) of the protests filed in this matter be dismissed and the testimony and information provided by said protestants be stricken and removed from any consideration by the Hearing Officer in this matter pursuant to the criteria for protests set out in Idaho Code Section 42-108B?
2. What is the applicability of the provisions of section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by sections 42-1763 and 42-1765, Idaho Code?
3. What are the contractual obligations of the City of Pocatello and the U.S. Bureau of Reclamation under the City's federal storage

contract and what is the effect, if any, of the contractual limitations on the City's proposed lease of water pursuant to state law?

4. If the lease is approved, could other water rights senior or junior to the leased water right be injured?

ARGUMENT

1. Should all five of the protests should be dismissed and removed from any consideration in this matter?

Idaho Code Section 42-108B clearly states "anyone who desires to protest the proposed leasing of water and who has a superior right to use the water and who may suffer pecuniary loss" can file notice or protest.

There are no punctuation marks between the word "and" in this Code Section nor is the word "or" used. Basic statutory construction analysis indicates the word "and" is used conjunctively, thus requiring a protestor to have a "superior right to use the water" plus be someone who "may suffer pecuniary loss" if the lease is approved. None of the five protestors has a "superior right to use" the City's storage water. Each Palisades storage right holder is annually notified it has been allotted a specific number of acre feet of fill for its use pursuant to its contract with the United States of America. No one has a superior right to use the City's storage allotment. None of the protestants' witnesses disagreed with the fact that no one had a superior right to use the City's storage water.

Idaho Code Section 42-108A further provides that the leasing of water pursuant to Sections 42-108A and 42-108B shall not constitute a change in the nature of use of such water nor shall the lease constitute an abandonment or forfeiture or any other diminution of such water right.

2. What is the applicability of the provisions of Section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by Sections 42-1763 and 42-1765, Idaho Code?

A. **Applicable Idaho Code Sections.** The applicable Idaho Code sections governing leasing procedures apply to two distinct leasing schemes. The first group of statutes governs private water leases from an owner to a public or private utility for the specific purpose of generating hydroelectric power. The second group governs an indirect leasing scheme under which owners pool their rights in a water supply bank and the bank leases rights to prospective customers. The following sections detail the applicable Idaho Code Sections.

1. Idaho Code Sections Governing Private Water Leases for

Hydroelectric Power. Idaho Code Section 42-108A governs the leasing of water for hydroelectric generation and states:

Any person having the right to the beneficial use of a water right may lease the water to a private or public utility doing business in the state of Idaho for hydroelectric generation purposes within the state of Idaho for a period not to exceed one (1) year on application to the department of water resources..."

Idaho Code Section 42-108A. In addition, Section 42-108B establishes the process by which a water rights owner may apply to the department of water resources for a lease permit, as well as the hearing and protest procedures available for potentially opposing entities. *Id. §42-108B*. The Idaho legislature enacted these sections in 1981, and it was under these statutes that the City of Pocatello filed an application to lease water rights to Idaho Power Company in July 2008. These statutes govern any water rights that remain with an individual

owner, but do not address the rights associated with collective water rights pools such as a water supply bank.

2. Idaho Code Sections Governing Cooperative Water Leases

Through a Water Supply Bank. The local committee in Water District 1, hereinafter referred to as the Committee of Nine ("CON"), opposes the lease, and relies on the regulations of the Water District 1 Rental Pool authorized under Idaho Code Sections 42-1761 to 1765. Under these regulations, the Water Resource Board "shall have the duty of operating a water supply bank." *Id.* §1761. While the statute directs the bank to "make use of and obtain the highest duty for beneficial use from the water," the water supply bank only includes water rights "obtained by the board or by a local committee appointed by the board." *Id.* §1764. Furthermore, Section 1764 indicates that a water rights owner may remove water rights from the bank even after the board or local committee incorporates the rights into the bank. *Id.*

In 1979, the Idaho legislature adopted the following sections to facilitate the management of collective water storage and water rights. Section 42-1765 states that:

The water resource board may appoint local committees, including water district advisory committees . . . to facilitate the rental of stored water. When so appointed, the committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the board."

Id. §42-1765. In addition, Section 42-1763 states that:

The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources. The director . . . may reject

and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under the existing water rights . . . [or] will adversely affect the local economy of the watershed . . .”

Id. §42-1763.

B. Protests and Arguments. The Committee of Nine bases their protest upon the grounds that Section 42-1765 empowers them to make decisions as to the “rental of stored water” because the Water District 1 Rental Pool should be the exclusive avenue for water rental within the district. *Id.* §42-1765; Letter of Protest from Idaho Irrigation District to the IDWR (July 21, 2008) at para. 2, [hereinafter “Letter of Protest”]. The CON notes that it would not receive financial benefits from a private lease between Pocatello and Idaho Power Company and is clearly motivated by financial interests. *Id.* In addition, it contends that the lease could adversely affect the water rights of entities such as the Idaho Irrigation District (“IID”) and deprive the water supply bank of up to 20,000 acre feet of water. Letter of Protest at para. 1. This contention would only be true if the water rights Pocatello seeks to lease were actually incorporated into the water supply bank, and in this case, they are not.

Based upon the statutory language the Idaho case law governing conflicting statutes concerning similar subject matter, the Department of Water Resources should approve the lease on the grounds that the statutes are not in conflict. In the alternative, the statutes can be interpreted in a harmonious manner and, therefore, Section 42-108A applies to the water lease in question. Furthermore, if the department finds that the statutes conflict, it should nevertheless approve the lease because the Idaho courts favor a more recent and specific statute and accordingly, Section 42-108A controls.

1. **The Plain Language of the Statutes at Issue Indicates That Section 42-1098A Applies.** IDWR should approve the Pocatello lease because the two statutory schemes governing water leasing do not conflict and Section 42-108A clearly controls in this situation. Idaho case law instructs courts to interpret statutory language in light of the plain, usual and ordinary meaning of the words, and observes that when a statute is not ambiguous, the court must follow the law as written. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 71 P.3d 1034, 1037 (Idaho 2003). While both statutory sections govern the ability of a water rights owner to effectuate a lease, the statutes apply to distinct and unique circumstances. One statute sets forth the method for an owner to lease water directly to a public or private utility, and the other indirectly through a collective water supply bank. Water rights sought to be leased by “[a]ny person having the right to the beneficial use of a water right” to a public or private utility for the purposes of hydroelectric energy generation are governed by Section 42-108A. Idaho Code Ann. Section 42-108A. However, when the owner of water rights chooses to incorporate those rights into a water supply bank, the provisions of Section 42-1763 govern the lease process and a committee, such as the CON has the authority to facilitate such rental. *Id.* §§42-1763, 1765. Neither party alleges that the statutory language is ambiguous, and therefore, the Department of Water Resources should apply Section 42-108A and approve the proposed water lease.

Section 42-108A clearly applies because Pocatello does not seek to lease water rights it dedicated to a water supply bank, nor does Idaho Power Company seek to rent water rights from the bank. Pocatello is operating as private owner

of the water rights and simply seeks to lease the rights to a private utility, Idaho Power Company, for the purpose of generating hydroelectric power. This is precisely the type of lease agreement anticipated by the Idaho legislature in Section 42-108A. While the CON requests that the Director of IDWR apply Section 42-1763 so that it may profit from the lease, this application would be erroneous and unfair. To date, the CON has not "obtained" the water rights at issue as prescribed in Section 42-1764. *Id.* §1764. Pocatello has not incorporated the water rights at issue into the water supply bank and therefore should not have decision-making authority taken away and given to the CON. The legislature adopted Section 42-108A to govern private water leases of the kind Pocatello seeks to effectuate and to apply Section 42-1763 would frustrate the legislative intent.

2. The Statutes can be Interpreted Harmoniously and Section 42-108A Applies. When two state statutes concerning the same subject matter conflict, Idaho courts must "construe statutes . . . together as one system to effect legislative intent." *Shay v. Cesler*, 977 P.2d 199, 202 (Idaho 1999) (adopting a "common sense" interpretation of a statute providing for attorney's fees when a contrary interpretation implied by a separate statute created a loophole, rendering the first statute meaningless). The Idaho Supreme Court noted that courts must "construe statutes under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statu[t]es were passed." *Id.* In addition, where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a

related subject is significant to show that a different intent existed. *Kopp v. State*, 595 P.2d 309 (1979) (holding that legislative intent was clear when one statute defined the word "census" and the other did not use similar language when stating the basis for establishing population).

While the CON contends that the statutory sections conflict, the Idaho Department of Water Resources should approve the Pocatello lease because a harmonious reading of the statutes is possible and reasonable. Each statutory section governs the ability of a water rights owner to effectuate a lease, but neither purports to be the sole method under which the owner may lease water rights. Rather, each governs water rights that an owner chooses to lease through different avenues, one directly from the water rights owner, and the other through a collective water supply bank. A harmonious interpretation preserves both statutes and recognizes that each governs a separate and distinct leasing scheme. Pocatello seeks to lease the rights to a private utility, Idaho Power Company, for the purpose of generating hydroelectric power and if the Idaho Department of Water Resources applies this section it will not affect the separate rights of the CON established under Section 42-1763. In following the rule that the legislature is presumed to "kn[o]w of all legal precedent and other statutes in existence at the time," the Department of Water Resources should approve the water lease between Pocatello and Idaho Power Company.

3. If the Statutes Conflict and a Harmonious Reading Is Not Possible, 42-108A Controls. In the event that the Idaho Department of Water Resources rules that the statutory schemes conflict, Idaho precedent indicates that the more

recent and more specific statute should control. Where two statutory provisions appear to apply, the specific statute controls over the general. *Shay v. Cesler*, 977 P.2d at 202; *see also Loftus v. Snake River Sch. Dist.*, 942 P.2d 550, 552 (Idaho 1997) (when a teacher suspended without pay for two days sued for wages under Idaho's general wage claim statute Idaho Code Section 45-609(1), specific language in Idaho Code Section 33-513 allowed the school board to suspend the teacher without pay). Moreover, to the extent that statutes conflict, the more recent expression of legislative intent prevails. *Mickelsen v. City of Rexburg*, 612 P.2d 542, 544 (Idaho 1980) (holding that a more recent statute with respect to the location of beer taverns prevailed over an older statute addressing the same issue).

In this case, the Idaho legislature adopted Section 42-108A, governing water leases by individual rights holders to public or private utilities for hydroelectric generation, two years after it adopted Sections 42-1763 and 1765. The legislature adopted Section 42-108A in 1981, whereas it adopted Sections 42-1763 and 42-1765 in 1979. Idaho Code Ann. §§42-108A, 1763, 1765. In addition, the water leases covered under Section 42-108A are specifically for the generation of hydroelectric power as opposed to the general leases for any purpose from the water supply banks governed by Sections 42-1763 and 42-1765. *Id.* §§42-108A, 1763, 1765. In summary, Section 42-108A is the more recent and more specific statute and the Idaho Department of Water Resources should approve Pocatello's water lease under 42-108A even if it determines that the statutes are in conflict.

The statutory schemes regulating water leases govern different types of leasing options. A plain reading of the statutes at issue indicates that the statutes do not conflict and Section 42-108A applies to the water lease at issue. If other parties argue that the statutes conflict, case law directs a decision maker such as the Idaho Department of Water Resources to attempt to harmonize statutes *in pari material* (of the same matter or subject) and Section 42-108A is still the applicable statute. If a harmonious reading is not possible, the more specific and recent expression of Section 42-108A governs.

3. What are the contractual obligations of the City of Pocatello and the U.S. Bureau of Reclamation under the City's federal storage contract and what is the effect, if any, of the contractual limitations on the City's proposed lease of water pursuant to state law?

None of the protestors, including the Committee of Nine, which is only an advisory body under this Contract, has the right to interfere with or interpret the language of a private contract to which they are not a party.

Because the issue of standing is jurisdictional, it may be raised at any time. See *Tungsten Holdings Inc. v. Drake*, 143 Idaho 69, 137 P.3d 456 and *Beach Lateral Water Users Ass'n. v. Drake*, 142 Idaho 600, 130 P.3d 1138.

Ordinarily, the obligations and rights arising out of a contract are due only to those parties with whom the contract is made. A contract cannot be enforced by a person who is not a part to it or in privity with it, except under certain circumstances, by a third-party beneficiary. (See 17A Am. Jur 2d, Section 425.)

The Idaho Supreme Court has adopted the position that one has standing as a third-party beneficiary under a contract only when it is clear that the contract was made

for the third-party's direct benefit. The Court went on to say that incidental benefits to third persons resulting from a contract to which they are not parties are insufficient to permit such third parties to sue on the contract. *Dawson v. Eldredge*, 84 Idaho 331, 372 P2d 414 (1962). Also see Williston on Contracts, §37:19 (4th Ed.)

Storage water users have an interest that is stronger than a mere contractual expectancy.

The Idaho Constitution provides that when water is appropriated, such person shall not thereafter, without his consent, be deprived of the annual use of the same. *Idaho Constitution Art. XV §4.*

The City's Palisades Contract provides for the following uses of its storage water: mitigation (see Pocatello's Pre-Trial Brief, Pocatello Exhibit "A," Section 16, pgs. 23-24), municipal use (see Pocatello's Pre-Trial Brief, Pocatello Exhibit "A," Section 17, pg. 25), the right to rent (lease) stored water (see Pocatello's Pre-Trial Brief, Pocatello's Exhibit "A," Section 15, pg. 23), flood control and irrigation (see Pocatello's Pre-Trial Brief, Pocatello's Exhibit "A," Section 10(c), pg. 10).

As a matter of Idaho constitutional and statutory law, title to the use of the water under the City's Palisades Contract is held by the citizens of the City of Pocatello as the consumers or users of said storage water. *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600.

The City of Pocatello has made all required payments and complied with all its obligations to the U.S. government. (See Mayor Chase's testimony at July 31, 2008, hearing in Jerome, Idaho). According to the United States Supreme Court, the citizens of

the City of Pocatello have acquired a vested right to the perpetual use of this storage water. *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct 412, 81 L.Ed 525.

If you look at the contractual language of the Contract between the City of Pocatello and the United States Department of the Interior, you will see that it is the Secretary of the United States Department of the Interior who has the sole authority to make interpretations regarding the provisions of the City Palisades Contract (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "A", pages 37-38.)

The United States Department of the Interior and the Bureau of Reclamation provided a letter to the Idaho Department of Water Resources dated July 30, 2008, stating they do not believe that the Contract between the U.S. Department of the Interior and the City of Pocatello is germane to this hearing being held pursuant to Idaho Code Sections 42-108A and 42-108B. The letter goes on to state that the City and the Department of the Interior would work together to implement the Lease Agreement within the terms of the Contract. (See Pocatello Exhibit "F").

Finally, the City is making use of its storage water in compliance with its Contract with the United States of America. Pursuant to Section 15 of the City's Palisades Contract, the City may rent its stored water for one year at a time with certain restrictions as to the rates. (See Pocatello's Pre-Trial Brief, Pocatello Exhibit "A," pg. 23). Roger Chase, the Mayor of the City of Pocatello, testified the rates in the City's proposed Lease to the Idaho Power Company for hydroelectrical purposes did not exceed the City's costs and obligations regarding its storage water which were directly apportionable to said storage water. (See Mayor's testimony at July 31, 2008 hearing in Jerome, Idaho.)

4. If the lease is approved, could other water rights senior or junior to the leased water right be injured?

In regards to this Lease, Idaho Code Section 42-108B states "the director of the department of water resources shall examine all of the evidence and available information and shall approve, in whole or in part, or upon conditions, provided no other water rights senior or junior to the water to be leased are injured thereby."

None of the five protestants have proven their water rights are injured by this proposed Lease. In fact, the witnesses for the protestants stated their water rights could be affected if the reservoir system did not fill in 2009. All five (5) of the Notices of Protest filed with the Idaho Department of Water Resources indicate their water rights could be injured in the future if the reservoir system does not fill because of the 20,000 acre-feet of storage water leased to Idaho Power.

Speculative future injury claims certainly do not provide grounds to find that water rights "are injured" by approval of this Lease as required under the plain meaning of the applicable statute involved in this matter. (See Idaho Code Section 108B).

The concept of speculative future injury to fill space is one adopted by the Water District 1 Rental Pool Procedures, which governs those spaceholders that put their storage water into the Water District 1 Rental Pool Bank. (See Pocatello Exhibit "G."). The City of Pocatello did not place the water which is the subject of its Lease with Idaho Power into the Water District 1 Rental Pool Bank.

Additionally, this notion that other spaceholders would be injured by the Lease of a portion of the City's storage water would lead one to the logical conclusion that no spaceholder should be allowed to utilize their storage water for any reason because any

removal of storage water would make it more difficult for the reservoir to fill the next year than if no water was allowed to be removed. The very purposes for which the reservoirs were constructed would be considered as a cause of injury to the spaceholders.

There are no state statutes or rules nor any provisions in the City's Palisades Contract which require the City of Pocatello to place its storage water into the Water District 1 Rental Pool Bank. This concept of speculative future fill injury should be relegated to disputes involving Water District 1 Rental Pool Bank participants and not this matter.

The rest of the reasons to deny this Lease supplied by the protestants have nothing to do with any alleged water right injury. These irrelevant reasons are personal opinions such as: 1) the City should be made to participate in the Water District 1 Rental Pool Bank; 2) the Lease is counter to some of the State water policies; 3) the Lease will result in lost proceeds to Water District 1 Rental Pool Bank and the Committee of Nine, and 4) the Lease is not consistent with preservation of historical preferences for agricultural uses.

It should be noted that it appears the Water District 1 Rental Pool Bank Procedures make it very difficult for anyone other than another storage spaceholder to rent (lease) water through the Water District 1 Rental Pool Bank. (See Tim Deeg's testimony at the July 31, 2008, hearing in Jerome, Idaho). Also, the Watermaster for Water District 1 indicated one of the primary reasons the Rental Pool Procedures were enacted was to control the price of rental water. (See Lyle Swank's testimony at the July 31, 2008, hearing in Jerome, Idaho).

Electrical production was certainly a use contemplated in the plans to construct the system of dams and reservoirs within the State of Idaho. It is clearly mentioned in the City's Palisades Contract. (See Pocatello's Pre-Trial Hearing Brief, Pocatello Exhibit "A," Section 21, pgs. 28-29).

The State and the City of Pocatello believe hydroelectric power production to be a beneficial use. Power production is certainly important to the economy of the State of Idaho. (See Mayor Chase's testimony at July 31, 2008, hearing in Jerome, Idaho). The witness for the Idaho Groundwater Appropriators, Inc., stated the ground water users would "be in trouble" without sufficient electricity. (See Tim Deeg's testimony at the July 31, 2008, hearing in Jerome, Idaho).

CONCLUSIONS

1. All five (5) of the protests filed in this matter should be dismissed and the testimony and information provided by said protestants should be stricken and removed from the record nor considered by the Hearing Officer in this matter pursuant to the criteria for protests set out in Idaho Code Section 42-108B.

2. The statutory schemes regulating water leases govern different types of leasing options. A plain reading of the statutes at issue indicates that the statutes do not conflict and section 42-108A applies to the water least at issue. If other parties argue that the statutes conflict, case law directs a decision maker such as IDWR to attempt to harmonize statutes *in pari materia* (of the same matter or subject) and section 42-108A is still the applicable statute. If a harmonious reading is not possible, the more specific and recent expression of section 42-108A governs.

The City did not put this water into the Water District Rental Pool Bank and therefore the requirements of Idaho Code Sections 42-1763 and 42-1765 do not apply to this Lease.

3. The provisions of the City of Pocatello's federal storage Contract with the United States Department of the Interior are enforceable by the parties thereto. The testimony presented at the hearing on July 31, 2008, shows the City of Pocatello is making use of its storage water in compliance with the above-named Contract. The rental or lease of storage water for up to one year is provided for under the terms of said Contract. In addition, the United States Department of the Interior has stated said Contract is not germane to this matter being processed pursuant to Idaho Code Sections 42-108A and 42-108B.

4. There is insufficient evidence to prove that water rights senior or junior to the water to be leased are injured by this proposed Lease. Idaho Code Section 42-108B uses the words "are injured" not "could possibly be injured." This requires a showing of an immediate, distinct, palpable injury, not a speculative future one.

5. Based on the above facts and conclusions, the Director of the Idaho Department of Water Resources should approve the proposed water rental lease between the City of Pocatello and the Idaho Power Company pursuant to Idaho Code Sections 42-108A and 42-108B.

Respectfully submitted this 8th day of August, 2008.

CITY OF POCATELLO :


A. Dean Tranmer
City Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2008, the above and foregoing was delivered by regular U.S. Mail, postage prepaid, to each of the following parties at their respective addresses:

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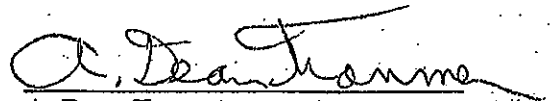
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A. Dean Tranmer
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Contract No.
14-06-100-1825

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation

Minidoka and Palisades Projects
Idaho

Contract With
CITY OF POCAHELLO
Concerning Storage Capacity in Palisades Reservoir,
and Related Matters

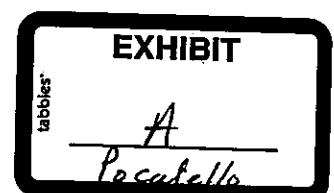
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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation

Minidoka and Palisades Projects
Idaho

Contract With
CITY OF POCA TELLO
Concerning Storage Capacity in Palisades Reservoir,
and Related Matters

THIS CONTRACT, made this 8th day of January 1960, pursuant to the Federal Reclamation Laws, between THE UNITED STATES OF AMERICA (hereinafter called the United States), acting through the Secretary of the Interior, and the CITY OF POCA TELLO (hereinafter referred to as the City unless otherwise indicated), a municipal corporation organized and existing under the laws of the State of Idaho,

WITNESSETH, That:

2. WHEREAS, the United States, under the Federal Reclamation Laws, has heretofore constructed and is now operating Jackson Lake, Island Park, American Falls, and Lake Walcott reservoirs, among others, and is now constructing Palisades Dam and Reservoir Project (herein called the Palisades Project);

3. WHEREAS, the City, desiring to cooperate with the United States and the various other water users organizations that enter into like contracts in the water conservation program that will be made possible with the construction of Palisades Reservoir and its operation in conjunction

With other Federal reservoirs on the Snake River, as herein proposed, has heretofore made application to contract for the use for its benefit of storage capacity in Palisades Reservoir; and

4. WHEREAS, the United States and the City have not heretofore entered into any contracts with respect to storage rights in reservoirs on the Snake River above Milner Dam, but the City, securing water for all municipal uses by pumping from underground and from surface flows that would, if not intercepted by the City, flow into the Snake River below Palisades Dam, desires to replace in the Snake River by means of storage at Palisades Reservoir water in volume approximately the equivalent of that removed by pumping from Snake River tributary underground and surface flows, and it having been determined that 50,000 acre-feet of active capacity in Palisades Reservoir will furnish such approximate equivalent volume;

NOW, THEREFORE, in consideration of the mutual and dependent stipulations and covenants hereinafter stated, it is hereby agreed by the parties hereto, as follows:

Definitions

5. The following terms, wherever used in this contract, shall have the following respective meanings:

"Secretary" shall mean the Secretary of the Interior or his duly authorized representative.

"Federal Reclamation Laws" shall mean the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplemental thereto, including the Act of September 30, 1950 (Public Law 864, 81st Congress, 2d Session).

"Advisory Committee" shall mean the committee defined by article 30 of this contract or its duly authorized representative.

"Irrigation season" shall mean a period of each year beginning April 1 and ending October 31 of that year.

"Storage season" shall mean, with respect to the reservoir involved, the period beginning October 1 of one year and ending during the next year when, as to the particular reservoir, no more water is available for storage.

"Reservoir system" shall mean the existing and authorized Federal reclamation reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

"Upper valley" shall mean the irrigated areas of the Snake River Basin that are served by canals diverting from the Snake River and its tributaries above American Falls Dam.

"Lower valley" shall mean the irrigated areas of the Snake River Basin that are served by canals diverting from the Snake River and its tributaries between American Falls Dam and Milner Dam.

"Watermaster" shall mean the officer of the State of Idaho charged by law with the distribution of Snake River water in the lower and upper valleys, or such other officer properly authorized by law and designated by mutual agreement of the Secretary and the Advisory Committee.

"Delivery" when used herein in relationship to stored water, shall mean direct delivery from the reservoir system and delivery accomplished in the manner provided in article 16.

Provisions Relating to Storage Capacity in
Palisades Reservoir
(Articles 6 through 11)

United States to Construct Works

6. (a) Within the limits of the authorization therefor, the United States is now constructing and will complete and operate and maintain Palisades Dam on the Snake River in the vicinity of Irwin, Idaho, to provide a reservoir of an active capacity of about 1,200,000 acre-feet, and related facilities, substantially in accordance with the plans set forth in House Document No. 720, 81st Congress.

(b) When the dam and reservoir are ready for the storage and delivery of water for irrigation purposes, the Secretary shall so announce, including a statement of the active capacity that will be available for irrigation storage.

Capacity to be Available to the City

7. The authorized dam will provide a reservoir with an estimated active storage capacity of 1,200,000 acre-feet and, based on that estimated capacity, the use and benefit of four and one thousand six hundred sixty-seven ten thousandths percent (4.1667%) of that capacity is allocated hereby to the City. Beginning with the first full irrigation season after the Secretary has announced that the reservoir is ready for storage and delivery of water for irrigation purposes, the United States will make available to the City the stored water accruing to that percentage of the active capacity of that reservoir, within the limits and on terms and conditions provided in this contract. That percentage shall, so long as the reservoir has an active capacity of 1,200,000 acre-feet, be treated as the equivalent of 50,000 acre-feet of active capacity. The latter figure may, however, be adjusted from time to time by agreement between the Secretary and the Advisory Committee whenever there are determinations that the active capacity is other than above stated.

Construction Charge Obligation

8. (a) The City shall pay to the United States for the use of space as provided in article 7, as the construction charge obligation, the sum of four hundred fifty thousand dollars (\$450,000), this being determined at the rate of nine dollars (\$9.00) per acre-foot of capacity and on the assumption that the reimbursable construction costs of the Palisades Project finally allocated to joint facilities equal or exceed the sum of twenty-three million two hundred one thousand one hundred dollars (\$23,201,100). If the reimbursable joint facility construction costs, as

finally determined, are less than twenty-three million two hundred one thousand one hundred dollars (\$23,201,100), and, as a result, the amount of joint facility costs allocated to irrigation is less than the amount expected so to be allocated according to the Secretary's report of July 1, 1949^{1/}, the amount of the reduction shall be proportioned between irrigation construction costs assigned to be repaid by the water users and those assigned for repayment from power revenues on the basis of the amounts of estimated irrigation construction costs so assigned in the Secretary's report of July 1, 1949. The amount of reduction, if any, when determined by the Secretary, shall be distributed equally as a credit against the construction charge obligation of all space the costs of which are allocated to irrigation. The total amount of credit and the portion thereof to which the City is entitled shall be announced in writing by the Secretary promptly after final construction costs are determined and the allocations thereof are made. In no event, however, shall the credit be such as to reduce the City's total construction charge obligation to less than three hundred eighty-seven thousand five hundred dollars (\$387,500), this being at the rate of seven dollars and seventy-five cents (\$7.75) per acre-foot of capacity as initially stated in article 7.

^{1/} Of the estimated joint facility construction costs, \$21,724,400 were allocated to irrigation under the report approved and adopted by the Secretary on July 1, 1949 (H. Doc. No. 720, 81st Cong.).

(b) The construction charge obligation under this article shall be repaid by the City to the United States in forty (40) successive annual instalments to be as nearly equal as is practicable. The due date of the initial instalment, established in relation to the date announced by the Secretary as the date that the dam is substantially complete and ready for storage, will be as follows: (i) if, on the announced date, the provisions of (d) of article 21 are still in effect, the first instalment shall be payable on or before December 31 of the third full calendar year after that date, the project for repayment purposes being treated as incomplete during the first two years; and (ii) if, on the announced date, the provisions of (d) of article 21 are no longer in effect, the first instalment shall be payable on or before December 31 of the first full calendar year after that date. In the event there is, under the operation of (a) of this article, a reduction in the City's total obligation after the payment of instalments has started, the amount of credit available shall be distributed evenly over the remaining unaccrued instalments as of the time the amount of the credit is announced.

Operation and Maintenance Obligation - Palisades

9. (a) The City, beginning as provided in (b) of this article and continuing during the period of operation and maintenance of the Palisades Dam and Reservoir by the United States, shall pay to the United States in advance four and seventeen hundredths percent (4.17%) of the costs of operating and maintaining that dam and reservoir, including whatever costs may be incurred in the delivery of water therefrom, which are apportionable

to the irrigation storage rights therein. There shall be determined from time to time by the Secretary, after consultation with the Advisory Committee, the basis for distributing among the various purposes which by law are to be served by the dam and reservoir the costs of operation and maintenance thereof and the basis for assigning those costs for repayment. In determining the total costs annually apportioned to the irrigation storage rights there shall be deducted from the total annual cost of operation and maintenance of the dam and reservoir, those costs which are determined to be properly chargeable to other purposes served by the reservoir and for which other provision for repayment, in whole or in part, is made pursuant to law. The costs apportionable to the irrigation storage rights shall be distributed annually to all storage space that is made available for irrigation purposes.

(b) Beginning with January 1 of the year in which the use and benefit of Palisades space is first available to the City as provided in article 7, payment of the City's share of Palisades Dam and Reservoir operation and maintenance costs shall be made for each calendar year on the basis of annual estimates by the Secretary. The notice of these annual estimates, hereinafter referred to as the operation and maintenance charge notice, shall contain a statement of the estimated cost of operation and maintenance of the dam and reservoir to be incurred in the calendar year involved and the amount of the City's share of those estimated costs. The operation and maintenance charge notice shall be furnished to the City on or before February 1 of the calendar year for which the notice is issued,

but, when requested by the City, a preliminary estimate shall be given at such earlier date as is agreed on in writing. The City shall pay the amount stated in the notice on or before April 1 of the year for which it is issued or such other date as may be agreed on in writing.

(c) Whenever, in the opinion of the Secretary, funds so advanced will be inadequate to meet the City's share of the costs of operating and maintaining the dam and reservoir, he may give a supplemental operation and maintenance charge notice, stating therein the amount of the City's share of the additional funds required, and the City shall advance that additional amount on or before the date specified in the supplemental notice. If funds advanced by the City under this article exceed the City's share of the actual costs of operation and maintenance of the dam and reservoir for the year for which advanced, the surplus shall be credited on the operation and maintenance charge to become due for succeeding years.

Nature and Extent of Palisades Storage Right

10. (a) Beginning with the storage season indicated in article 7, the City shall be entitled to have the following storage rights in Palisades Reservoir:

- (1) The right to have stored to its credit during each storage season, four and one thousand six hundred sixty-seven ten thousandths percent (4.1667%) of all water stored in Palisades Reservoir during that season under the Palisades storage right.
- (2) The right to have held over from one irrigation season to the next, stored water to which it is entitled.

The total amount of stored water to the City's credit at any time shall not, however, exceed the total amount of space in the reservoir available to the City under this contract, and the City's storage rights in Palisades Reservoir are hereby made subject to the provisions of (c) of this article.

(b) Stored water available under the rights in Palisades Reservoir created by this contract shall be available for delivery to the City during any irrigation season within these limitations:

- (1) Deliveries shall be limited at any time to the amount which can be delivered by means of the City's proportionate share of the outlet capacity, taking into account the requirement of passing through the reservoir water belonging to prior rights and the physical limitations of the existing outlet works.

(c) Under the provisions of the Act of September 30, 1950, the active capacity of Palisades Reservoir will be used jointly for irrigation and flood control storage in accordance with the operating plan set forth in House Document No. 720, 81st Congress, and attached hereto as Exhibit A, as that plan is implemented by rules and regulations issued pursuant to section 7 of the Act of December 22, 1944 (58 Stat. 890). All the City's storage rights are subject to the operation of the reservoir in accordance with this subarticle. In the event Palisades Reservoir fails to fill during any storage season by reason of such flood control operations, the amount of shortage so attributable shall be prorated equally over all space allocated to storage of water for irrigation, municipal, or other miscellaneous purposes and shall be charged against all stored water including that, if any, carried over from prior irrigation seasons.

Saving of Winter Water; Special Storage Right

11. (a) Beginning with the date announced by the Secretary as the time when Palisades Reservoir will be ready for operation as provided in article 6, certain water users organizations have contracted with the United States to make, for a period of 150 consecutive days during the period from November 1 through April 30 of each storage season, no diversion of water from the Snake River or any of its tributaries by means of its existing diversion works or by any other means.

(b) The total savings of water during each storage season as the result of curtailment of winter diversions by the water users organizations diverting from the Snake River who have contracted with the United States to curtail or cease diversions is agreed to be 143,000 acre-feet, of which 135,000 acre-feet are attributable to curtailments by those diverting above American Falls Dam and 8,000 acre-feet below that point. The City, not partaking in the winter water savings program, shall be entitled to no storage in Palisades Reservoir by reason of the program set out in this article.

(c) The right to store water pursuant to this article shall be prior in time over the storage rights held by the United States for American Falls Reservoir (the latter having a priority dated March 30, 1921), or any storage rights held by the United States or the City that are junior to the American Falls rights. The City hereby consents to the granting of special storage rights with a like priority to all water users organizations and all water users who, directly or indirectly, contract

to curtail storage season diversions substantially as provided in (a) of this article within these maxima, as to total special storage rights:

- (1) For water users organizations and water users diverting above American Falls Dam — 135,000 acre-feet.
- (2) For water users organizations and water users diverting between American Falls Dam and Milner Dam — 8,000 acre-feet, exclusive of the special storage rights described in (d) of this article.

(d) The City also hereby consents to permitting the North Side Canal Company and the Twin Falls Canal Company to store, in either American Falls or Palisades Reservoir, during the months of November through March of any storage season under a priority like that provided in (c) above, water that would otherwise accrue to them within these rights:

The rights of the North Side Canal Company and of the Twin Falls Canal Company, respectively, to divert at Milner Dam for domestic and livestock uses during those months as follows:

North Side Canal Company 126,000 acre-feet

Twin Falls Canal Company 150,000 acre-feet

within this limitations:

If, taking account of all storable water whether stored or not, Palisades and American Falls reservoirs fail to fill during any storage season, any water diverted during that storage

season by the North Side Canal Company in excess of 126,000 acre-feet (but not to exceed the amount of deficiency in fill), and by the Twin Falls Canal Company in excess of 150,000 acre-feet (but not to exceed the amount of deficiency in fill), will be charged as of the end of that storage season against the allotment of American Falls storage to these respective companies.

This limitation in the case of the North Side Canal Company shall become operative from the date Palisades Reservoir is ready for operation, but in the case of the Twin Falls Canal Company need not be made operative until the first year in which that company exercises the special storage provision to which consent is here given.

Provisions Relating to Exchange and Redefinition of
Existing American Falls and Jackson Lake Storage
Rights; Winter Power Operations at the Minidoka
Powerplant
(Articles 12 through 13)

Consent to American Falls-Jackson Lake Exchange and
Redefinition of Storage Rights

12. Certain upper valley water users organizations owning storage rights in American Falls Reservoir have agreed or will agree in connection with the acquisition of Palisades Reservoir rights to accept in exchange for a portion of their American Falls rights certain storage rights in Jackson Lake Reservoir below elevation 6752 feet above sea level (U.S.G.S. datum); the provisions for such exchange being substantially as set out in the revised document entitled "Basic Provisions Incorporated

or to be Incorporated in Contracts With Upper Valley and Lower Valley Water Users Organizations to Govern the Permanent Exchange of Certain American Falls and Jackson Lake Storage Rights", attached hereto as Exhibit B, and these and other water users organizations have agreed or will agree to permit the United States to operate all space in Jackson Lake Reservoir on a holdover basis. The City hereby consents to such exchange and to such holdover operating arrangements.

Winter Power Operation; Minidoka Powerplant

13. (a) The United States, in its operation of American Falls and Minidoka dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of river down to and including Milner Dam and certain power rights below Milner Dam, and has the privilege under an existing decree to use at Minidoka Dam 2,700 cubic feet per second of water for the development of power. While the United States must operate the American Falls and Minidoka dams so as not to interfere with these third-party rights, it will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever operation of those powerplants to the full extent of their respective water rights for power production would result in loss of irrigation water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through American Falls and Minidoka dams without the

loss of water that could be stored for irrigation in the reservoir system, the United States will, during each storage season beginning October 1, 1952, and continuing so long as the provisions of (c) of this article remain operative, limit the release of water through those dams as follows:

To the amount of water required to provide flows below Minidoka Dam sufficient to meet existing diversion rights in the reach of the river through Milner Dam and the power rights required to be recognized under the provisions of the contract of June 15, 1923, between the United States and the Idaho Power Company (Symbol and No. Ilr-733), as those diversion and power rights may be modified from time to time.

To the extent that it is practicable to do so, the Advisory Committee will be informed in advance of any plans for the release of water in excess of the foregoing limitations; and that Committee will be furnished written reports as of the close of the storage season of each year showing, among other things, the releases actually made and the minimum releases required to be made.

(b) Curtailment of releases as provided in (a) of this article will result in there being, in some years, additional water available for storage for irrigation purposes in American Falls, Island Park, and Palisades reservoirs. In any storage season when these reservoirs fail to fill, the saved water attributable to such curtailment shall be credited, first, to Island Park Reservoir to the extent of 45,000 acre-feet without regard

to the priority of the storage permits held for that reservoir, and thereafter to American Falls, Island Park, and Palisades reservoirs in the order of priority of their respective storage permits, the crediting to Island Park Reservoir and to any storage right in any other reservoir (except the lower valley exchanged space in American Falls Reservoir) being contingent on the owners of these rights obligating themselves for their share of the annual payments for power replacement in keeping with the provisions of (e) of this article.

(c) For the purposes of this contract and without relinquishment of any part of the power rights herein described, it is assumed that but for curtailment of operations as provided in (a) of this article, units 1 through 6 of the Minidoka powerplant would be operated during the storage season of each year to the maximum extent practicable within the limits of the power rights therefor (2,700 second-feet as decreed by the District Court of the Fourth Judicial District of Idaho on June 20, 1913, in the case of Twin Falls Canal Company v. Charles N. Foster et al.) and that in consequence of operations under this article there may be losses in the production of power and energy at that plant. To offset such losses, the United States will, as nearly concurrently as practicable, make replacement by the delivery of power and energy into the Minidoka power system at the Minidoka powerplant from other interconnected Federal powerplants being operated under the Federal Reclamation Laws. Payment for such replacement power and energy shall be made by the City and all other contractors having

reservoir rights benefiting from the water savings resulting from operations under the provisions of (a) of this article in annual amounts determined as follows:

- (i) Prior to the date when either the American Falls powerplant or Palisades dam powerplant is first in service, the payment for any year shall be the product, in dollars, of the then controlling average annual replacement requirement, in kilowatt-hours, times four mills (\$0.004).
- (ii) Beginning with the date when either the American Falls powerplant or Palisades dam powerplant is first in service, the payment for any year shall be the product, in dollars, of the then controlling average annual replacement requirement, in kilowatt-hours, times the price per kilowatt-hour, figured at 100 percent load factor, under the then existing rate schedule for the sale of firm power and energy from the plant or plants involved.

In determining replacement requirements under this article, no account is intended to be taken, by way of offset or otherwise, of the effect of any reservoir system storage operations on the seventh unit of the Minidoka powerplant.

(d) The replacement requirements for the year ending September 30, 1953, shall be 5,699,000 kilowatt-hours, being the average annual replacement requirement for the period beginning October 1, 1931, and ending

September 30, 1951. The average annual replacement requirement under either (i) or (ii) of (c) above for the year ending September 30, 1954, shall be the average of the annual replacement requirements for each year of the 20-year period ending September 30, 1953, and for each 12-month period after September 30, 1954, shall be the average of the annual replacement requirements of each year of the 20-year period ending on September 30 of the prior year. In deriving this average there shall be used, as annual net power production losses for each year, the annual figures for the years through September 30, 1951, as shown in Table 1 of the document entitled "Criteria and Method for Determination of Certain Minidoka Powerplant Production Losses From Restrictions on Use of Water Rights^{2/}", and for each year thereafter, a net power production loss calculated on the basis of the comparison of (1) the total energy that could have been produced by units 1 through 6 of the Minidoka powerplant based on the water flows actually recorded at the U.S.G.S. Minidoka gaging station (hereinafter called the Minidoka gage), corrected as hereinafter provided, and (2) the energy which theoretically could have been generated at those units with the flows at the Minidoka gage without a curtailment in winter power operation as provided in this article and exclusive of irrigation storage releases. Using conclusions reached as to flows and heads, the power loss calculations will be made by utilizing the power production curves shown in drawing No. 17-100-139 incorporated by reference in the document identified above, but increases in energy in any year by reason of taking American Falls

^{2/} Duplicate originals of this document shall be filed with the water-master of District No. 36; the officer of the United States in charge of the Minidoka Project; and the Burley Irrigation District.

storage into account as provided in subparagraph (iii) of this subarticle (d) shall be accounted for as compensating offset up to but not exceeding energy losses accruing in that year by reason of curtailment in power operations under this article.

To correct flows under (1) above, all storage releases except American Falls shall be excluded and the measure of American Falls storage passing the Minidoka gage shall be the increase in storage at that gage over that computed at the Blackfoot gaging station as shown in the annual report entitled "Water Distribution and Hydrometric Work, District 36, Snake River, Idaho", the latter further corrected for any American Falls storage that may have been present by reason of having been stored temporarily upstream and that portion of Palisades storage which was diverted above the Minidoka gage. In measuring American Falls storage, it shall be assumed that storage is released from downstream reservoirs first. The flow at the Minidoka gage without storage shall be taken to be the normal flow at that gage as shown by that same report. In determining water flows, with and without curtailment of power operations as provided by this article, these assumptions shall be used with respect to units 1 through 6 of the Minidoka powerplant:

- (i) There is a right for power production to maintain a flow of 2,700 second-feet at Minidoka Dam during the storage season of each year in accordance with the decree entered June 20, 1913, supra, if that flow, disregarding the storage of saved water in the reservoir system under the provisions of this article, would be available at Minidoka Dam.

(ii) There is a right to use, within the hydraulic capacity of these units, whatever natural flow passes Minidoka Dam during each irrigation season.

(iii) Although there is no right to have water stored under American Falls Reservoir rights released for power production, during the period that such storage is being released for irrigation there will be more energy produced by these units than is attributable to the natural flow rights therefor, which shall be taken into account as a compensating offset as provided above in this subarticle (d).

To determine controlling power heads, the effective power head for any period shall be derived on the basis of recorded forebay and tailwater elevations for that period.

The foregoing criteria for determinations of annual net power production losses may be changed from time to time but only if the changes are made in writing with the approval of the Secretary, the Advisory Committee, and the boards of directors of both the Burley and Minidoka irrigation districts. Determinations as to net power production losses for each year and the average annual replacement requirement under this article shall be made by a committee of three comprising the state water-master of District No. 36, a representative to be selected jointly by the Burley and Minidoka irrigation districts and the North Side Canal Company, Ltd., and the officer of the United States in charge of the Minidoka

project, but, should that committee fail to make a determination for any year by January 1 of the year for which the determination is required, it may be made by the Secretary.

(e) The annual payment determined as provided in this article shall be apportioned among the benefiting reservoirs as follows: (i) prior to the first full storage season during which Palisades Reservoir is in operation, eighty-eight percent (88%) to American Falls Reservoir and twelve percent (12%) to Island Park Reservoir; and (ii) beginning with the first full storage season of Palisades operation, seventy-eight percent (78%) to American Falls, twelve percent (12%) to Island Park, and ten percent (10%) to Palisades. The amount apportioned to each reservoir shall be accounted for as part of the operation and maintenance costs for which provisions for payment for the City's share is made elsewhere in this contract. The amount apportioned to American Falls Reservoir shall be distributed equally over all space available for irrigation storage, excluding the lower valley exchanged space but including in lieu thereof the upper valley exchanged space in Jackson Lake Reservoir.

(f) If the owners of any storage rights to benefit from the operation of this article fail to obligate themselves for their share of the annual payments for power replacement hereunder, the saved water creditable to such rights and the power replacement costs chargeable thereto shall be redistributed according to a formula to be agreed on in writing between the Advisory Committee and the Secretary. Such formula shall, however, be as nearly consistent as practicable with the formula that would control but for such redistribution.

Provisions of General Application to All
Rights Established or Defined by This
Contract

(Articles 14 through 37)

Temporary Storage and Exchange of Water; Release of Jackson
Lake and Palisades Water for Power Production

14. (a) It is the purpose of the United States and the water users having storage rights in the reservoir system (including the City) to have the reservoir system so operated as to effect the greatest practicable conservation of water. In keeping with this purpose, the endeavor will be to hold stored water in reservoir system space that is farthest upstream. Water in storage in any of the reservoirs of the system may, however, when the watermaster and the Advisory Committee determine this to be in the interest of water conservation, be held temporarily in unoccupied space in any other reservoir in the system. And the City hereby consents to the making, with the approval of the watermaster, of annual exchanges of stored water among the various reservoirs of the system. No such temporary holding of water or such annual exchanges shall, however, deprive any entity of water accruing to space held for its benefit.

(b) During any storage season, the United States, after consultation with the Advisory Committee may release stored water from Palisades Reservoir for the maintenance of power production at Palisades dam power-plant and may store such water in American Falls Reservoir. The release of such water will be confined, however, in storage seasons when it appears that American Falls, Palisades, and Jackson Lake reservoirs will fail to fill, to water required for the maintenance of a minimum firm power production (estimated to be about 11,000,000 kilowatt-hours per

month at an average production of 15,000 kilowatts) and which can be stored in American Falls Reservoir; and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto.

Rental of Water; Sale of Space

15. (a) The City may rent stored water which has accrued to its credit in any reservoir of the system, but such rentals shall be for only one year at a time and at rates to be approved in advance by the Secretary and the Advisory Committee. Rates shall not exceed the annual costs under the City's obligations to the United States which are properly apportionable to such water, plus an amount sufficient to cover other annual costs of the City which are properly apportionable thereto.

(b) No sale of storage rights in the reservoir system, created or defined by this contract, shall be made except on terms and conditions approved by the Secretary.

Delivery of Water; Measurement and Losses

16. (a) To the extent that water is pumped from wells and from surface streams that flow into American Falls Reservoir, actual measurements at the well heads and at the discharge lines of other pumping plants delivering water for the City shall be made during each irrigation season. One-half of all water provided through the City's system for the use of its water users from any and all sources in any irrigation season shall be accounted for as water stored for the City as provided in article 10 and charged thereto, except an amount of 7,000 acre-feet of water in

each irrigation season until the first irrigation season beginning after a consolidation or merger has been made by the City with the water system of the City of Alameda when the amount shall be increased to 10,000 acre-feet of water to reflect prior uses of that city and other nearby communities. Delivery of water to the City that as above provided in this article is chargeable to stored water for any irrigation season, shall be limited, however, to the quantities of stored waters available as provided in article 10.

(b) The water chargeable to City stored water as provided in this article shall be determined during the irrigation season of each year. Corresponding credits shall be given by the watermaster to the water rights, whether natural flow or storage rights, that have been infringed on by pumping for the City. The amounts represented by such infringements, to whomsoever they shall accrue, shall be made up out of stored water available to the City under this agreement as necessary. The determination of the charges and the credits hereunder shall be under a formula to be devised by the watermaster, after consultation with the Advisory Committee, taking account as one factor the so-called Newell formula with respect to the inflow into American Falls Reservoir, as this formula is affected in the judgment of the watermaster, by the operation of this contract and by other factors that affect the formula. Departures from that formula shall be called to the attention of the Advisory Committee from time to time.

(c) In addition to other specific provisions as to the distribution of losses chargeable to stored water, there shall be charged against stored water held under this contract to the credit of the City in any reservoir of the system at the end of any irrigation season one and one-half percent (1½%) to offset evaporation losses. Such charge shall be made as of not later than the end of the ensuing storage season.

Ordering of Water

17. Under the plan of water use of the City, there will normally be no direct delivery from the Snake River of stored water. Therefore, the provisions of article 16 will govern as to the rights to water, whether charges therefor shall be against natural flow or stored water, matters of replacement of water from storage, and related problems. If the City should, however, construct facilities which would permit the direct delivery of stored water to it from the Snake River, such delivery shall be effected by the City giving notification to the watermaster, a reasonable period in advance, of the amount of water within its entitlements as stated in this agreement to be delivered for diversion by the City.

Complaints Regarding Water Supply

18. The United States and its officers, agents and employees in charge of reservoirs in the reservoir system and the watermaster will use their best efforts and best judgment to deliver to the City its proportionate share of the water to which it is entitled under this contract. Should the City feel aggrieved because of an alleged mistake or inaccuracy in the delivery of water or in the division of stored water among the parties

entitled to such water from the reservoir system, the City shall immediately report such alleged mistake or inaccuracy to the watermaster and to the official of the United States in charge of the reservoir involved. If the watermaster finds that the City's proportionate share of stored water is not being delivered, he will correct the error as early as possible. No liability, however, shall accrue against the United States, its officers, agents or employees, or the watermaster for damage, direct or indirect, arising by reason of shortages in the quantity of water available through the reservoir system by reason of drought, inaccuracy in distribution, hostile diversions by third parties, prior or superior claims, accident to or failure of the facilities comprising the reservoir system, whether or not attributable to negligence of officers, agents or employees of the United States, or other similar causes of whatsoever kind. Nor shall the City's obligations to the United States under this contract be reduced by reason of such shortages or interruptions.

Payment of Costs in Delivery and Distribution of Stored Water

19. (a) The City shall pay, in addition to its proportionate share of the costs of operation and maintenance of the Palisades Reservoir as provided under article 9 of this contract, its proportionate share of all costs of the delivery and distribution of water beyond the outlet works of the delivering reservoirs. These costs shall include, with respect to costs incurred by the United States, all costs and expense of whatsoever nature or kind in connection with, growing out of, or resulting from the distribution of stored water, the protection of stored water between the reservoir and the points of diversion from the river including the prevention of diversion of such water by parties not entitled thereto. Whatever costs of this

character are incurred by the United States shall be distributed among the City and all others on whose behalf such costs have been incurred on the basis that the operation and maintenance costs of the reservoir from which the water was delivered are distributed among the various rights. Unless otherwise agreed in writing by the Secretary and the Advisory Committee, such costs shall be paid annually and for billing purposes shall be included as part of the operation and maintenance costs under article 9 of this contract.

(b) The City shall also pay its proportionate share of the costs incurred by the watermaster in the delivery and distribution of water in accordance with the provisions of article 17 to the extent that those represent costs incurred other than by the activities of the United States in the delivery and distribution of water. The costs will be apportioned and paid in accordance with the provisions of the laws of the State of Idaho.

Computation of Costs

20. The costs which enter into the cost of operation and maintenance of the various reservoirs and the costs of delivery and distribution of water, portions of which costs are to be paid by the City, shall embrace all expenditures of whatsoever kind in relation to the function for which the charge is made, including, but without limitation by reason of this enumeration, cost of surveys and investigations, labor, property, material and equipment, engineering, legal, superintendence, administration, overhead, general expenses, inspection, special services, and damage claims of all

kinds whether or not involving the negligence of officers, agents or employees of the United States, but shall be exclusive of amounts which the law does not require to be repaid and which the Secretary determines as a matter of policy are to be treated as nonreimbursable.

Title to and Operation of Powerplant; Power Revenues

21. (a) Title to Palisades dam powerplant and all works incidental and appurtenant thereto, built or to be built by the United States, shall remain in the United States until otherwise provided by the Congress.

(b) All revenues derived from the sale or other use or disposal of power and energy developed at the Palisades dam powerplant shall be and remain the property of the United States.

(c) The United States, in its operations of the Palisades dam powerplant, will be governed by the provisions of article 14 and these criteria, among others: That the plant shall be operated so as to hold to a practicable minimum the loss of water that would otherwise be available for storage in the reservoir system for irrigation purposes; and that, until such time as a reregulating reservoir has been put into operation, wide fluctuations in the release of water to meet peak power loads will, during irrigation seasons, be confined to periods when this can be done without substantial variation from the flows that would otherwise be present in the river below the dam.

(d) Notwithstanding provisions to the contrary in this contract, the City consents to the operation of the Palisades dam powerplant, during a five-year period (but not beyond the end of the national defense emergency

as declared by Proclamation of the President No. 2914 dated December 16, 1950, 3 CFR 1950 Supp., p. 271), beginning with the date when the first unit of that plant is first placed in service, in the following manner:

In addition to normal operation at other times within the limits provided by this contract, the plant may be operated to produce an average of 60,000 kilowatts (217,440,000 kilowatt-hours) during the period October through February of each storage season when the flow of the river at the dam is equal to or greater than that for those months of the median year during the period 1928 through 1947 whenever such operation is required in the judgment of the Defense Electric Power Administrator, or his successors in functions, to help meet certified defense loads served from power systems with which the plant is interconnected, directly or indirectly.

Title to Storage Works; Miscellaneous Revenues

22. (a) Title to Palisades Dam and Reservoir and all works incidental and appurtenant thereto, built or to be built by the United States, shall remain in the United States until otherwise provided by the Congress.

(b) Having regard for the allocations of investment and repayment responsibilities, miscellaneous revenues realized in connection with the operation and maintenance of Palisades Dam and Reservoir and related costs shall be distributed annually as follows:

Twenty percent (20%) to be distributed among the City and other parties having storage rights in the reservoir on the same basis that operation and maintenance costs are distributed.

Eighty percent (80%) to remain the property of the United States.

Priority of Certain Existing and Future Water Rights

23. (a) In connection with Island Park Reservoir, located on the North Fork (Henrys Fork) of Snake River, the United States holds water license No. R-590, with a priority date of March 14, 1935, and license No. R-686, with a priority date of June 12, 1940. Notwithstanding the later priority of license No. R-686, the City hereby agrees that all storage rights held by the United States in connection with Island Park Reservoir may be treated as having the same priority as rights under license No. R-590.

(b) In connection with Idaho Permit No. 15134, a direct diversion permit with a priority date of March 30, 1921, held in connection with American Falls Reservoir, the United States may contract with American Falls Reservoir District No. 2 to recognize the right of that district to have water license No. 15134 exercised substantially as follows:

American Falls Reservoir District No. 2 to have the right to divert as natural flow during each irrigation season under water license No. 15134, having a March 30, 1921 priority, as follows: From May 1 of each irrigation season continuing during that season so long as there is natural flow

available for that priority, the first 1,700 cubic feet per second of flow to be available one-half (1/2) to American Falls Reservoir District No. 2 and one-half (1/2) to American Falls Reservoir, except that in any year in which American Falls Reservoir is full to capacity on April 30 or fills after that date, taking into account any water that may be temporarily stored to its credit in upstream reservoirs, all water diverted by American Falls Reservoir District No. 2 within the maximum of 1,700 cubic feet per second during the year prior to the initial storage draft on American Falls Reservoir after the reservoir finally fills in that year shall be considered as natural flow under water license No. 15134. Nothing herein shall prevent American Falls Reservoir District No. 2 from diverting water under said license prior to May 1 of a given irrigation season but all such diversions shall be charged as storage in the event the reservoir is not full on April 30 of that season or does not fill after April 30 of that season.

Water available at American Falls Reservoir for the March 30, 1921 priority under water license No. 15134, other than that to be available to American Falls Reservoir District No. 2 as above provided, to be available for storage in American Falls Reservoir.

And the City agrees that it will not oppose an adjudication of a natural flow right of the waters of the Snake River for the benefit of American Falls Reservoir District No. 2 consistent with the foregoing criteria.

The contract by the United States with American Falls Reservoir District No. 2 shall be on the condition, however, that that district assume its proportionate share of the obligation for the cost of replacement power under the provisions of article 13. When such contract has become operative, the United States shall make application to the State of Idaho for amendment of water permit No. 15134 and the issuance thereunder with a priority date of March 30, 1921, requiring that the remainder of the right under the permit, 6,300 second-feet, to the extent such right remains outstanding, be used for storage in American Falls Reservoir, such right, however, if issued to the United States not to carry voting privileges in water users meetings under the laws of the State of Idaho. Such application shall, however, leave unaffected water license No. R-269 having a priority dated March 30, 1921.

(c) If the United States, under the Federal Reclamation Laws, hereafter constructs storage facilities on the Snake River or its tributaries above Milner Dam in addition to those now constructed or authorized to be constructed to provide water for irrigation purposes, the City hereby agrees that, notwithstanding the establishment of a storage right for such additional facilities with a priority subsequent to that assigned to Palisades Dam and Reservoir, the United States may hereafter contract with water users organizations which then have storage rights in Palisades Reservoir, to

operate not to exceed 300,000 acre-feet of such capacity for the storage of water for irrigation for the benefit of such organizations as though that capacity had a storage right of identical priority with that held for Palisades Dam and Reservoir.

Protection of Water Rights

24. In case any dispute arises as to the character, extent, priority or validity of any of the storage rights held in the name of the United States for the benefit of the City in connection with its rights under this contract, the United States may, independently of the City, bring and prosecute judicial proceedings for the determination of such dispute and take all other measures necessary toward the defense and protection of its water rights, and such proceedings may be brought and prosecuted by the City.

Refusal to Deliver Water in Case of Default

25. No water available to the City under this contract shall be delivered to or for the City if the City is in arrears in the advance payment of operation and maintenance charges owed to the United States, if any, or more than twelve (12) months in arrears in the payment of construction charge obligation instalments, or more than twelve (12) months in arrears in the payment of any other amount owed to the United States under this contract. The City shall refuse to deliver water to lands or parties who are in arrears in the advance payment of operation and maintenance charges due from such lands or parties to the United States or to the City, or to lands or parties who are in arrears more than twelve (12) months in the payment of amounts due from such lands or parties to the United States or

the City to the United States under this contract. The provisions of this article are not exclusive and shall not in any manner prevent the United States from exercising any other remedy given by this contract or by law to enforce the collection of any payments due under the terms of this contract.

Levies and Assessments by City; All Benefits
Conditioned Upon Payment; Lien to Secure Obligations

26. (a) The City shall cause to be levied and collected all necessary assessments and charges against water users and will use all the authority and resources of the City (including, without limitation by reason of this enumeration, its power to create liens and to withhold the delivery of water) to meet the obligations of the City to the United States under this contract.

(b) Should the City fail to levy the assessments and other charges against any land or the owners thereof as required by this contract, or, having levied, should the City be prevented from collecting such assessments or other charges by any judicial proceedings or otherwise fail to collect them, such land and owners shall not be entitled to receive water made available under this contract and the City, except as otherwise ordered by a court of competent jurisdiction, shall not deliver such water to such lands or the owners thereof unless and until arrangements for its delivery satisfactory to the Secretary have been made.

(c) All construction charge obligations to the United States assumed by the City under this contract shall be and remain a lien on the City's storage rights in the reservoir system as defined in this contract

until paid or otherwise satisfied. Whenever the City is in default in the payment of any instalment of such charges, the Secretary may declare the entire construction obligation due and the lien therefor may be foreclosed in the manner provided by law for the foreclosure of a mortgage.

Lands for Which Water is Furnished;
Limitations on Area

27. Pursuant to the provisions of the Federal Reclamation Laws, water made available to the City from space in the reservoir system for which the City is obligated to the United States for construction charges under the terms of this contract shall not be delivered to more than one hundred sixty (160) irrigable acres in the ownership of any one person or other entity nor more than three hundred twenty (320) irrigable acres held by a husband and wife as community property, except that delivery may be made to lands held in excess of this limitation pursuant to the provisions of section 46 of the act of May 25, 1926 (44 Stat. 649), as amended by the act of July 11, 1956 (70 Stat. 524). These limitations shall cease to operate when the construction charge obligation under this contract has been paid in full.

Termination or Modification of Excess
Land Provisions

28. In the event there is a repeal of the so-called excess land provisions of the Federal Reclamation Laws, article 27 of this contract will no longer be of any force or effect, and, in the event these provisions are amended in material respects, the United States will, at the request of the City, negotiate amendments of these articles in order to conform them to the excess land provisions of the law as so amended.

Penalty for Delinquency in Payment

29. Every instalment or charge required to be paid to the United States under this contract which shall remain unpaid after it has become due and payable shall bear interest at the rate of one-half percent (1/2%) per month from the date of delinquency. The City shall impose, on delinquencies in the payment of assessments, other charges levied by it to meet its obligations under this contract, such penalties as it is authorized to impose under the laws of the State of Idaho.

Advisory Committee

30. (a) In its operation and maintenance of the various dams and reservoirs of the reservoir system, the United States, acting through the Regional Director of the Bureau of Reclamation or his designee or such other officer as may be designated in writing by the Secretary, shall consult from time to time with the Advisory Committee on the various matters specifically requiring consultation under the terms of this contract and on such other matters as will have a substantial bearing on the determination of the amount of stored water to be available in the various

reservoirs and on the costs of operation and maintenance of those reservoirs which are required to be borne by the space allocated to irrigation storage. The representative of the United States will meet with the Advisory Committee from time to time, but not less often than two times each year beginning with the calendar year 1953, at such dates and places as may be fixed by the Advisory Committee.

(b) Informal memoranda concerning working arrangements for the carrying out of the provisions of this article may be entered into from time to time between the Regional Director or other designated representative of the Secretary and the Advisory Committee.

(c) Beginning January 1, 1953, the Advisory Committee is agreed to be the Committee of Nine, as that committee may be constituted from time to time. The Committee of Nine shall continue to function as the Advisory Committee under this contract until a different representative body has been designated by a vote of the majority of the water users voting at any regular annual meeting of the water users of District No. 36 held as provided by law. Further designations of bodies to serve as the Advisory Committee may be made from time to time by this same election process.

Rules and Regulations

31. The Secretary reserves the right, after consultation with the Advisory Committee, to make such rules and regulations consistent with the provisions of this contract, as are proper and necessary to carry out its true intent and meaning, and as are proper and necessary to cover any

details of the administration or interpretation of the contract which are not covered by its express provisions. The City shall observe such rules and regulations.

Representative of the Secretary

32. Where this contract uses the term "Secretary", this shall be deemed to include in all cases the Under Secretary or any Assistant Secretary or other officer of the Department of the Interior of equal authority. Where this contract authorizes action by the Secretary, such action may also be taken for or on behalf of the Secretary by any representative duly authorized therefor in writing.

Notices

33. Any notice, demand or request required or authorized by this contract shall be deemed properly given, except where otherwise herein specifically provided, if mailed, postage prepaid, to the Project Superintendent (the present "project officer"), Bureau of Reclamation, Burley, Idaho, on behalf of the United States, and to the City Manager, City of Pocatello, Municipal Building, 220 East Center, Pocatello, Idaho, on behalf of the City. The designation of the person to be notified or the address of such person may be changed at any time by similar notice.

Discrimination Against Employees or Applicants
For Employment Prohibited

34. (a) In connection with the performance of work under this contract, the City agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following:

employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The City agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Secretary setting forth the provisions of the nondiscrimination clause. The City further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

(b) In the performance of any part of the work contemplated by this contract, the City shall not employ any person undergoing sentence of imprisonment at hard labor.

Contingent on Appropriations or Allotment of Funds

35. The expenditure of any money or the performance of any work by the United States herein provided for, which may require appropriations of money by the Congress or the allotment of Federal funds, shall be contingent on such appropriations or allotments being made. The failure of the Congress to appropriate funds, or the failure of any allotment of funds, shall not, however, relieve the City from any obligations theretofore accrued under this contract, nor give the City the right to terminate this contract as to any of its executory features pending the appropriation or allotment of such funds. No liability shall accrue against the United States in case such funds are not so appropriated or allotted.

Assignments Prohibited;
Successors and Assigns Obligated

36. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract, or any part thereof, or interest therein, shall be valid until approved by the Secretary.

Officials Not to Benefit

37. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

IN WITNESS WHEREOF, the parties hereto have signed their names the day and year first above written.

THE UNITED STATES OF AMERICA

By /s/ H. T. Nelson
Regional Director, Region I
Bureau of Reclamation
P. O. Box 937, Boise, Idaho

CITY OF POCA TELLO

BY ITS BOARD OF COMMISSIONERS

/s/ H. B. Yearsley
Commissioner

/s/ F. A. Burton
Commissioner

/s/ W. R. Hearne
Commissioner

/s/ Luvern C. Johnson
Commissioner

/s/ Arilla Blackhurst
Commissioner

/s/ J. Oren Clark, Jr.
Commissioner

/s/ Margaret F. Paulsen
Commissioner

(SEAL)

Attest:

/s/ Josephone Ball
Clerk of the City of
Pocatello

STATE OF IDAHO)
 : ss.
County of Bannock)

On this 9th day of June 1959, before me personally appeared
H. B. Yearsley, F. A. Burton, W. R. Hearne, Luvern C. Johnson,
Arilla Blackhurst, J. Oren Clark, Jr., and Margaret F. Paulsen, to me
known to be the members of the Board of Commissioners of the City of
Pocatello, the corporation that executed the within and foregoing instru-
ment. They acknowledged said instrument to be the free and voluntary act
and deed of said corporation, for the uses and purposes therein mentioned;
and on oath stated that they were authorized to execute said instrument
and that the seal affixed is the seal of said corporation.

IN WITNESS WHEREOF, I set my hand and affix my official seal
the day and year first above written.

(SEAL)

/s/ B. D. Reese
Notary Public in and for the
State of Idaho
Residing at Pocatello, Idaho

My commission expires July 21, 1960

STATE OF IDAHO)
) ss.
County of Ada)

On this 8th day of January 1960, personally appeared before me H. T. Nelson, to me known to be the official of The United States of America that executed the within and foregoing instrument and acknowledged said instrument to be the free and voluntary act of said United States, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(SEAL)

/s/ R. H. Harris
Notary Public for Idaho
Residing at Boise.
My commission expires: 6/18/61

WATER LEASE

This WATER LEASE ("Lease Agreement") is made and entered into by and between the CITY OF POCA TELLO, a Municipal Corporation of Idaho, (the "Lessor") and IDAHO POWER COMPANY ("Idaho Power"), an Idaho Corporation, and is effective on the date executed by both parties hereto.

RECITALS

A. Lessor, under a valid Spaceholder Contract with the United States of America, currently holds storage rights entitling storage water above Milner Dam in U.S. Bureau of Reclamation storage projects and desires to lease twenty thousand (20,000) acre-feet of stored water to Idaho Power on a one time basis, pursuant to I.C. §42-108A, to be used for hydroelectric generation purposes.

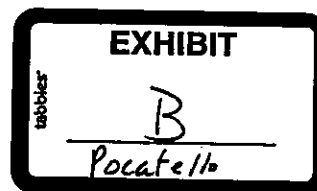
B. Idaho Power owns and operates hydroelectric generation facilities on the Snake River above and below Milner Dam, holds storage rights in American Falls Reservoir, holds valid water rights for hydropower purposes at each of those facilities, and can beneficially use water at such facilities for the benefit of its customers over and above the supply currently available to it from the Snake River. As a result, Idaho Power desires to lease storage water from the Lessor on the terms hereof for use for hydroelectric generation purposes at each of its facilities on the Snake River.

C. Pursuant to the Agreement by and between Idaho Power and the State of Idaho dated October 25, 1984 ("Swan Falls Agreement"), and the Consent Judgments entered in Case Nos. 62237 and 81375 in the District Court in and for the County of Ada, Idaho Power retains the right 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. The water thus acquired by Idaho Power is considered as "fluctuations from the operation of Company facilities" and is thus available to Idaho Power over and above the unsubordinated minimum average daily flows referenced in the Swan Falls Agreement. This issue is currently being litigated.

D. Pursuant to the Lessor's Spaceholder Contract with the United States of America and I.C. §42-108A, the Lessor has the right to lease its stored water to Idaho Power to be beneficially used for hydroelectric purposes within the State of Idaho for a period not to exceed one year.

Now, therefore, and in consideration of covenants, obligations and other valuable consideration referred to herein, the Lessor and Idaho Power agree as follows:

1. Quantity of Leased Water. The water that is the subject of this Lease Agreement is referred to herein as the "Leased Water". The quantity of Leased Water shall be twenty thousand (20,000) acre-feet.



COPY

2. Legal/Administrative Approvals and Water Delivery and Administration. The Lessor and Idaho Power shall cooperate in obtaining all necessary approvals from the Idaho Department of Water Resources, or other appropriate authorities which may be required for the rental, release, delivery of the Leased Water to Idaho Power and/or crediting of the Leased Water to the Company's storage account in American Falls Reservoir, and the appropriate administration of such water through the Snake River system.

3. Delivery Contingencies. Lessor's obligation to deliver the Leased Water shall be subject to payment by Idaho Power pursuant to Paragraph 6 below, and the "water shortage" provisions of Paragraph 8 below.

4. Lease Contingencies. This Lease Agreement, and Idaho Power's obligations hereunder, are expressly contingent upon:

a. Acquiring all approvals by the Idaho Department of Water Resources and/or other authorities that may be required by state or federal law, rule or regulation for the rental, release, delivery and use of the Leased Water for hydroelectric purposes by Idaho Power; and

b. Administration of the Leased Water within the Snake River that ensures delivery of the Leased Water to Idaho Power at its designated places of use on terms and conditions satisfactory to Idaho Power. Such terms and conditions shall include, but shall not be limited to, the ability of Idaho Power to place the Leased Water to beneficial use for power purposes at all of its facilities on the Snake River downstream from Palisades Reservoir and Milner Dam, to and including Hells Canyon Dam, subject only to reasonable carriage loss between the point of delivery and the places of use. Additionally, the Leased Water shall be expressly accounted for as "fluctuations from the operation of Company facilities" and, as such, shall be available to Idaho Power over and above the unsubordinated minimum average daily flows referenced in the Swan Falls Agreement and the Consent Judgments in Case Nos. 62237 and 81375 in the district Court in and for the County of Ada. This issue is currently being litigated.

5. Scheduling of Releases and Use. The scheduling of releases of the Leased Water shall be at the sole discretion of Idaho Power, subject to such reasonable notice that the Lessor and the U.S. Bureau of Reclamation may require to implement any necessary storage release requests.

6. Lease Payments. Upon delivery of the Leased Water, Idaho Power shall pay to the Lessor Thirty-Five Dollars (\$35.00) for each acre-foot of Leased Water, up to twenty thousand (20,000) acre-feet, credited to the Company's American Falls Reservoir storage account or used at any of the Company's hydroelectric facilities. Lessor shall be responsible for all administrative costs or expenses

imposed by federal or state law, rule or regulation associated with the lease of Leased Water.

7. Term. Subject to the provisions of Paragraph 8 below, and consistent with Lessor's Spaceholder Contract with the United States of America and with I.C. §42-108A, this Lease Agreement shall be a one time transfer in the year 2008 of the Leased Water. Neither this Lease Agreement nor any provision herein shall operate as a precedent for further lease arrangements.

8. Water Shortage. In the event that the Lessor is unable, because of legal or physical reasons or because of the unavailability of water under its Spaceholder Contract, to deliver any or all of the full quantity of Leased Water, the Lessor's obligation to deliver Leased Water, and Idaho Power's obligation to pay for Leased Water, shall be reduced accordingly.

9. Termination. Either Lessor or Idaho Power may terminate this Lease Agreement:

a. For any reason by providing notice of such termination in writing, provided such notice is received by the other party at least 10 days in advance of the delivery of the Leased Water;

b. For any violation or breach of the terms of this Lease Agreement; or

c. If any of the terms and conditions of any approval of the lease arrangement, under I.C. §42-108A or other applicable state or federal law, rule or regulation, or the administration of the Leased Water, are inconsistent with the terms of this Lease Agreement.

10. Miscellaneous/Standard provisions.

a. Amendments. No amendment or modification of this Lease Agreement or its provisions shall be effective unless documented in writing and approved and executed by both parties with the same formality as this Lease Agreement.

b. Notices. All notices and other communications under this Lease Agreement shall be in writing. Notices shall be deemed as duly received on the date of service, if served personally on the party to whom notice is to be given. Notices shall also be deemed as duly received three (3) days from the date said notice is mailed to the party to whom notice is to be given, either by first class mail, registered or certified, postage prepaid or by express delivery with handling prepaid, and properly addressed as follows:

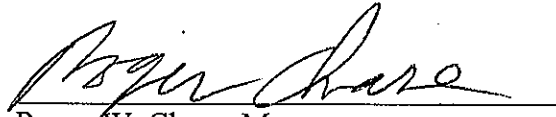
If to the Lessor: Roger W. Chase, Mayor
City of Pocatello
P.O. Box 4169
Pocatello, ID 83205

If to Idaho Power: James C. Miller
Senior Vice President – Power Supply
Idaho Power Company
P.O. Box 70
Boise, ID 83707

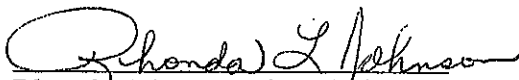
This Lease Agreement shall be signed in duplicate and shall be effective when signed by both the Lessor and Idaho Power.

CITY OF POCATELLO

Date: 6-5-2008

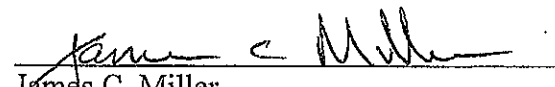

Roger W. Chase, Mayor

ATTEST:


Rhonda Johnson, City Clerk

IDAHO POWER COMPANY

Date: 6/12/2008


James C. Miller
Sr. Vice-President – Power Supply



LEGAL DEPARTMENT
911 North 7th Avenue
P.O. Box 4169
Pocatello, Idaho 83205

(208) 234-6148
Fax: (208) 239-6986

A. DEAN TRANMER • City Attorney
JANICE A. FERRIS • Chief Deputy Attorney
KIRK BYBEE • Chief Civil Deputy
RICHARD A. DIEHL, JR. • Deputy City Attorney
STEPHEN F. HERZOG • Deputy City Attorney
DARCY L. TAYLOR • Assistant to City Attorney
CARA LEWIS • Prosecution Coordinator
SHEILA GUSTAVESON • Prosecution Assistant

June 16, 2008

Mr. David R. Tuthill
IDWR Director
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Application For Leasing of Water For Hydroelectric Generation
Pursuant to Idaho Code Sections 42-108A and 42-108B

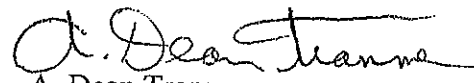
Dear Mr. Tuthill:

Enclosed please find an Application For Leasing of Water For Hydroelectric Generation from the City of Pocatello. Pursuant to the City of Pocatello's Spaceholder Contract with the United States of America for water in Palisades Reservoir and Idaho Code Sections 42-108A and 42-108B, the City of Pocatello believes it has the right to lease a portion of its stored water to the Idaho Power Company to be beneficially used for hydroelectric purposes within the State of Idaho for the 2008 water year.

Also enclosed please find a copy of an executed Lease Agreement between the City of Pocatello and the Idaho Power Company to lease 20,000 acre-feet of the City's storage water and a check from the City in the amount of \$80.00 for the fees required to process this request as per Idaho Code Section 42-108B.

Please send me a copy of the Notice of Hearing your prepare to be published in the newspaper. If you have any questions, please contact me at the above address or telephone number.

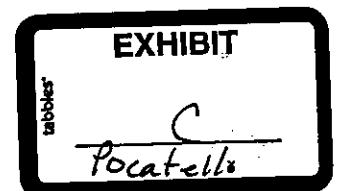
Sincerely,


A. Dean Tranmer
City Attorney

ADT/dt
Enc.

cc: Roger W. Chase, Mayor
Jonathon C. Bowling, Idaho Power

AN EQUAL OPPORTUNITY / AFFIRMATIVE ACTION EMPLOYER



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR LEASING OF WATER
FOR HYDROELECTIC GENERATION

United States of America
Bureau of Reclamation Contr
with the City of Pocatello,
Contract No. 14-06-100-1825
and Water Right No. 01-2068
Lease Ident No. _____

1. Name of applicant City of Pocatello Phone (208) 234-6149
Post Office Address P.O. Box 4169, Pocatello, ID 83205
2. Identify the No. of the Right to be Leased BOR Contract # 14-06-100-1825 and Water Right # 01-2068
Basis of Right XX License Claim XX Decree (Aberdeen Springfield Canal
Co., et al v. Henry Eagle, 7th
Jud. District, 3/12/69)
3. Right as Recorded
a. Amount 50,000 AF Use Municipal from Year Round to
(cfs or ac-ft per annum) (both dates inclusive)
Current Point of Diversion is 1/4 of 1/4 of 1/4, Govt. Lot
Sec. Township Range B.M. County, additional.
points of diversion, if any:
- b. Current Place of Use: Palisades Reservoir (Stored Water)

TWP.	RANGE	SEC.	NE1/4				NW1/4				SW1/4				SE1/4				TOTALS
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	

4. Change Resulting from Lease
a. Amount Leased Up to 20,000 AF from 2008 Water Year to
(cfs or ac-ft per annum) (both dates inclusive)
Point of Diversion under Lease is 1/4 of 1/4 of 1/4, Govt. Lot
Sec. Township Range B.M. County, additional.
points of diversion, if any: Palisades Reservoir
- b. Place of Use Under Lease: The leased water will be placed to beneficial use for power purpose at all of Lessee's facilities on the Snake River downstream from Palisades Reservoir and*

TWP.	RANGE	SEC.	NE1/4				NW1/4				SW1/4				SE1/4				TOTALS
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	

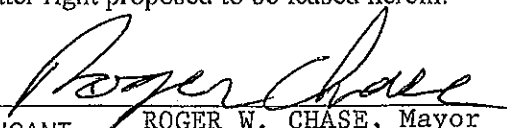
* (4.b. con't.) Milner Dam, including the American Falls, Twin Falls, Shoshone, Upper and Lower Salmon, Bliss, C.J. Strike, Swan Falls and Hells Canyon hydroelectric projects.

COPY

5. Who owns land to which right is appurtenant? City of Pocatello, See Attachment A
6. If applicant is not owner, please provide lease agreement signed by Owner. If applicant is owner, please provide copy of lease.
7. Name of Lessor City of Pocatello Phone (208) 234-6149
Post Office Address P.O. Box 4169, Pocatello, ID 83205
8. Name of Lessee Idaho Power Company Phone (208) 388-2200
Post Office Address P.O. Box 70, Boise, ID 83707
9. Is Lessee a private or public utility? Lessee is an investor-owned utility, incorporated under the laws of the State of Idaho and regulated by the Idaho Public Utilities Commission.
10. Describe any other water rights used for hydroelectric generation at the same site that the leased water will be used:
A list of the water rights is attached as Attachment B
11. Period of Lease Water Year 2008 (not to exceed one year).
12. Describe the frequency of water use under the right, or portion thereof, during the past 5 years. Attach watermaster records, pumping power bills, or other evidence to demonstrate that the right has not been lost through abandonment or forfeiture: The water right is for storage water and the owner is a municipal corporation. Over the last five years ownershas placed the majority of this water right in the State Water Rental Pool except a small portion reserved for mitigation purposes and leased to
13. Describe the relative availability of water to fill the right, or portion thereof. IGWA in 2007. See State Rental Pool Bank records. Attach evidence to support this description. Owner has been informed by IDWR and the Bureau of Reclamation that approximately 100% of its 50,000 AF water right probably will be deemed allocated for owner's use in 2008. See IDWR/BOR Records.
14. Describe any other water rights with the same purpose and place of use as the right, or portion thereof being leased. Will the present place of use receive water from any source?
Owner is also leasing 20,000 AF to the Idaho Groundwater Appropriators, Inc. There is no designated place of use for owner's storage water rights.
15. Describe the anticipated effect of this sale or lease upon other water users.
No effect upon other water users is anticipated as a result of this lease.
16. Remarks:

I certify that the information contained herein is true and correct and that the lease proposed will not injure any other water rights senior or junior to the water right proposed to be leased herein.

APPLICANT


ROGER W. CHASE, Mayor
City of Pocatello

FOR DEPARTMENT USE ONLY

Received by _____ Date _____ Time _____ Fee \$ _____ Receipted by _____

Receipt No. _____ Receipt Date _____ Publication Prepared by _____

Date _____ Published in _____

Publication approved _____ Date _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application to Lease Water for Hydropower Generation
No. _____ and said application is hereby _____.

1. Approval of said application is subject to the following limitations and conditions:

- a. Approval is limited to the lesser of the term of the lease or one year.
- b. The use of leased water by the lessee in no way creates a water right for hydropower generation.
- c. The quantity of right _____ used for _____
purposed shall be limited to _____.
- d. Other: _____

DIRECTOR

Attachment "A"

The City of Pocatello has equitable title and contractual rights under the contract it entered into with the U.S. Bureau of Reclamation under Contract No. 14-06-100-1825 dated January 8, 1960 (hereinafter "Contract") and later confirmed by decree in *Aberdeen-Springfield Canal Co., et al v. Henry Eagle* (7th Jud. Dist. 03-12-1969). Under the Contract, the City of Pocatello is entitled to 4.1667% of the reservoir capacity of Palisades Reservoir, which is 50,000 acre feet at the estimated active capacity of 1,200,000 acre feet.

The U.S. Bureau of Reclamation holds IDWR water right license 01-2068 for Palisades Reservoir and IDWR has recommended 01-2068 for decree in the SRBA, which has a priority date of July 28, 1939.

The City of Pocatello filed and is pursuing SRBA Claim 01-2068Y based on its contractual and equitable rights to 4.1667% of the reservoir capacity of Palisades Reservoir.

On March 9, 2007, the Idaho Supreme Court in the United States of America v. Pioneer Irrigation District, et al., 144 ID 106, 157 P.3d 600, affirmed that equitable or beneficial title to the right is held in trust by the contract holder organization in the quantities or percentages specified in the contract between the Bureau of Reclamation and the holder organization (Pocatello).

Therefore, the City of Pocatello is the true and lawful owner of the equitable title and contractual rights represented by SRBA Claim 01-2068Y. It is the true and lawful owner of the equitable title and contractual rights of the portion of water right 01-2068 represented by Contract No. 14-06-100-1825 dated January 8, 1960. Neither of these water rights have lapsed, been abandoned, or forfeited, either in whole or in part.

The City of Pocatello acquired this storage water in part to mitigate and replace to the Snake River, in accordance with applicable law, depletions attributable to the city's diversion of ground water and surface water for municipal uses within the City's service area, and which are proven to cause injury to senior water right holders.

Subject to this primary mitigation and replacement purpose, and to the extent Lessor's fill for its Palisades Reservoir storage water right is in excess of the amount necessary to meet this primary mitigation and replacement purpose, the Lessor rents its Palisades Reservoir water to other users for irrigation, power, domestic, municipal, industrial, commercial, mitigation, and recharge purposes.

Lessee desires to lease storage water from Lessor for the sole purpose of hydroelectric generation pursuant to Idaho Code §42-108A.

ATTACHMENT "B"

American Falls Power Rights:	01-02017
	01-02032
	01-02046
	01-07128
	01-10382
	01-10383
	01-10384
 Twin Falls Power Rights:	 02-02056
	02-07375
 Shoshone Falls Power Rights:	 02-02036
 Upper Salmon Falls Power Rights:	 02-02057
 Lower Salmon Falls Power Rights:	 02-02001A
	02-02001B
	02-02059
	02-02060
 Bliss Power Rights:	 02-02064
	02-02065
	02-10135
 C.J. Strike Power Rights:	 02-02080
 Swan Falls Power Rights:	 02-00100
	02-02032
	02-04000
	02-04001
	02-07379
 Hells Canyon Power Rights:	 03-02017
	03-02020

INVOICE DATE

INVOICE NO.

INVOICE AMOUNT

INVOICE DATE

INVOICE NO.

INVOICE AMOUNT

06/16/2008 LEASE APP

*****80.00

VENDORS NAME

PAYMENT DATE

CHECK NO.

REMITTANCE TOTAL

IDAHO DEPARTMENT OF WATER RESOURCES

06/16/2008

7034906

*****80.00

7034906

WARNING: THE ORIGINAL DOCUMENT CONTAINS A VISIBLE ARTIFICIAL WATERMARK SECURITY FEATURE.

92-579 / 1241

WELLS FARGO BANK NORTHWEST, N.A.

333 S. MAIN ST.
POCATELLO, ID 83204CITY OF POCATELLO
TREASURER'S OFFICE
911 North 7th • P.O. Box 4169
Pocatello, ID 83205-4169

PAY TO THE ORDER OF

DATE

CHECK NO.

PAY AMOUNT

*****80
EIGHTY AND 00/100 DOLLARS

00

06/16/2008 7034906 *****80.00

TO:

IDAHO DEPARTMENT OF WATER RESOURCES
WATER DISTRICT 120
900 NORTH SKYLINE DRIVE STE A
IDAHO FALLS ID 83402

VOID AFTER 90 DAYS

TWO SIGNATURES REQUIRED

⑈7034906⑈ ⑆124103799⑆8950073232⑈

NOTICE OF PROPOSED LEASING OF WATER FOR HYDROELECTRIC GENERATION

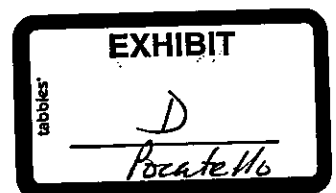
Notice is hereby given pursuant to section 42-108B, Idaho Code, that the **City of Pocatello**, PO BOX 4169, Pocatello, ID 83205, filed an application on June 19, 2008 to lease water for hydroelectric generation to **Idaho Power Company**, PO BOX 70, Boise, ID 83707, under water right no. 01-2068, for a period through September 30, 2008. The proposed lease of storage water in Palisades Reservoir would provide a maximum of 20,000 acre-feet of water from the Snake River, tributary to the Columbia River, for hydroelectric generation at Idaho Power Company hydroelectric facilities on the Snake River downstream of Palisades Reservoir and Milner Dam.

Protests may be submitted based on the criteria of Section 42-108B, Idaho Code. Additional issues that must be addressed as part of the hearing are: (1) The applicability of the provisions of section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by sections 42-1763 and 42-1765, Idaho Code; and (2) The effect, if any, of the contractual limitations in the City of Pocatello's federal storage contract on the City's proposed lease of water pursuant to state law.

Protests against approval must be filed with the Idaho Department of Water Resources, PO BOX 83720, Boise, ID 83720-0098, on or before July 22, 2008. The hearing on any protests is scheduled for July 31, 2008 at the hour of 9:00 a.m., at Idaho Fish & Game Magic Valley Region office, 319 South 417 East, Jerome, ID 83338.

DAVID R. TUTHILL, JR., Director

Published in the Post Register, Times News, Idaho Statesman on July 10 and 17, 2008.



BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
TO LEASE WATER FOR
HYDROELECTRIC GENERATION IN THE
NAME OF THE CITY OF POCA TELLO

NOTICE OF HEARING

PLEASE TAKE NOTICE that the Director of the Department of Water Resources has scheduled a hearing on the City of Pocatello's Application to Lease Water for Hydroelectric Generation in accordance with the legal notice published by the Department on July 10 and 17, 2008. The contested case hearing is scheduled as follows:

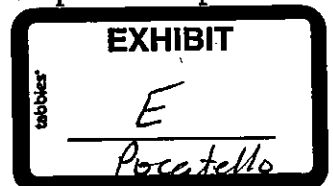
Date: July 31, 2008
Time: 9:00 am
Place: Idaho Department of Fish and Game Magic Valley Region Office
324 S 417 E, Suite #1 (Highway 93), Jerome, ID

Timely protests in response to the published notice of the Application to Lease were filed by the following entities: Palisades Water Users, Inc., represented by attorney Robert L. Harris; New Sweden Irrigation District by Paul A. Berggren, Chairman; Idaho Irrigation District by Alan Kelsch, Board Member; Committee of Nine, represented by attorney Jerry R. Rigby; and Idaho Ground Water Appropriators, Inc., represented by attorneys Randall C. Budge and Candice M. McHugh.

Among the issues to be addressed at the hearing are the criteria identified in section 42-108B, Idaho Code, and other issues identified in the notice of the Application to Lease published by the Department. The issues include:

1. What is the applicability of the provisions of section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by sections 42-1763 and 42-1765, Idaho Code?
2. What are the contractual obligations of the City of Pocatello and the U. S. Bureau of Reclamation under the City's federal storage contract and what is the effect, if any, of the contractual limitations on the City's proposed lease of water pursuant to state law?
3. If the lease is approved, could other water rights senior or junior to the leased water right be injured?

The hearing will be held pursuant to section 42-108B, Idaho Code, and in accordance with the provisions of Chapter 52, Title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. A copy of the rules may be obtained from the Department upon



request, or are available at the Department's Web site, <www.idwr.idaho.gov>. In order to expedite final consideration of this matter, the presiding officer at the hearing will be David R. Tuthill, Jr., Director of the Department of Water Resources.

The hearing will be conducted on the record. All parties to the matter must be represented at the hearing in person. The applicant shall bear the burden of proof for all factual issues at the hearing, and shall present evidence first at the hearing. Following presentation of evidence by the applicant, the protestants shall present evidence. The parties may file pre-hearing briefs with the Director at the hearing. Time permitting, the Director will grant an opportunity for closing arguments following presentation of the evidence.

The hearing will be conducted in accordance with the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within three (3) days prior to the hearing. Inquires for special accommodations should be directed to Victoria Wigle, Administrative Assistant to the Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4803, fax: (208) 287-6700.

Dated this 24th day of July, 2008.



David R. Tuthill, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205
dtranmer@pocatello.us

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

JERRY R. RIGBY
RIGBY ANDRUS & MOELLER
PO BOX 250
REXBURG ID 83440-0250
jrigby@rigby-thatcher.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

ROBERT L. HARRIS
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405-0130
rharris@holdenlegal.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

PAUL A. BERGGREN, CHAIRMAN
NEW SWEDEN IRRIGATION DISTRICT
2350 W. 17TH ST.
IDAHO FALLS ID 83402
kail@snid.myrf.net

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

ALAN KELSCH, BOARD MEMBER
IDAHO IRRIGATION DISTRICT
7466 S 15TH W
IDAHO FALLS ID 83402
akelsch@bdhsi.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

RANDY BUDGE
CANDICE MCHUGH
RACINE OLSON
PO BOX 1391
POCATELLO ID 83201-1391
rcb@racinelaw.net
cmm@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

MATT HOWARD
US BUREAU OF RECLAMATION
1150 N CURTIS ROAD
BOISE ID 83706-1234
(208) 378-5003
mhoward@pn.usbr.gov

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

LYLE SWANK
IDWR
900 N SKYLINE DR
IDAHO FALLS ID 83402-6105
(208) 525-7177
lyle.swank@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

Karen Wood
Karen Wood
Administrative Assistant
Idaho Department of Water Resources



IN REPLY REFER TO:

PN-1080

WTR-1.10

United States Department of the Interior

BUREAU OF RECLAMATION

Pacific Northwest Region
1150 North Curtis Road, Suite 100
Boise, Idaho 83706-1234



JUL 30 2008

Mr. Dave Tuthill
Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
dave.tuthill@idwr.id.gov

Subject: Notice of Hearing Regarding the City of Pocatello's Request to Lease Water for Hydroelectric Generation

Dear Mr. Tuthill:

Thank you for providing the Bureau of Reclamation a notice of hearing regarding the City of Pocatello's request to lease water for hydropower production under Idaho Code § 42-108A. The hearing notice identified the City's Reclamation storage contract among the issues to be addressed.

Reclamation believes that the threshold legal determination is the application of State law, including whether Idaho Code § 42-108A is applicable and whether, after factual evidence is presented by the protestants, the lease would injure other water rights including the contract entitlements of reservoir spaceholders. We do not believe that Reclamation's contract with Pocatello is germane to these determinations. Accordingly, Reclamation does not plan to attend the hearing.

If the state law questions are resolved favorably to the City of Pocatello and the lease is approved, then it would be incumbent upon the City of Pocatello to work with Reclamation as the Contracting Officer to implement the lease consistent with the contract with Reclamation.

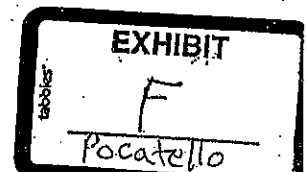
If you have any questions about this matter, you may address them to Mr. Richard Rigby at 208-378-5092.

Sincerely,

Acting for

J. William McDonald
Regional Director

cc: See next page.



cc: Continued from previous page.

Mr. A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83205
dtranmer@pocatello.us

Mr. Robert, L. Harris
Holden Kidwell Hahn & Crapo
P.O. Box 50130
Idaho Falls, ID 83405-0130
rharris@holdenlegal.com

Mr. Alan Kelsch, Board Member
Idaho Irrigation District
7466 S 15th W
Idaho Falls, ID 83402
akelsch@bdhsi.com

Mr. Jerry R. Rigby
Rigby Andrus & Moeller
P.O. Box 250
Rexburg, ID 83440-0250
jrigby@rigby-thatcher.com

Mr. Paul A. Berggren, Chairman
New Sweden Irrigation District
2350 W. 17th Street
Idaho Falls, ID 83402
kail@snid.myrf.net

Mr. Randy Budge
Ms. Candice McHugh
Racine Olson
P. O. Box 1391
Pocatello, ID 83201-1391
rob@racinelaw.net
cmm@racinelaw.net

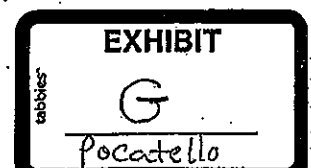
2007

WATER DISTRICT 1

RENTAL POOL PROCEDURES

RULE 1. AUTHORITY AND STATEMENT OF PURPOSE.

- 1.1. These procedures have been adopted by the Committee of Nine of Water District 1 pursuant to Section 42-1765, Idaho Code, to assure the orderly operation of the Water District 1 Rental Pool. Under no circumstances shall these procedures be interpreted or construed to limit the authority of the director of the Department of Water Resources, the Water Resource Board, or the Snake River Watermaster in discharging their duties as set forth in the statutes of the state of Idaho and rules and the regulations promulgated thereto.
- 1.2. The purpose of these procedures is to provide:
- A. The rules by which the Committee of Nine, acting under the authority of the appointment of the Committee of Nine by the Water Resource Board, as a local operating committee, will make stored water available through the Rental Pool.
 - B. A process, which complies with the Idaho Code and the Water Bank Rules of the Idaho Water Resource Board, by which stored water supplies will be made available by spaceholders for rental through the Water District 1 Rental Pool.
 - C. Incentives to storage space holders to participate in three after-the-fact rental processes established by these procedures: (1) The allocation of storage defined in these procedures as "late season fill" as the water supply made available for certain storage rentals made previously by the Committee during the irrigation season; (2) making spaceholder's space and water accruing thereto available to the rental pool for other users and uses through private leases and (3) making spaceholder's space and water accruing thereto available to the rental pool for other users and uses through specific assignments of water to the rental pool.
 - D. Expanded opportunities for all spaceholders to participate in and benefit from the proceeds of the Rental Pool.



- E. Priorities for selecting between competing rental applications during times of water scarcity.
- F. Funding for the Committee of Nine on behalf of spaceholders to defray costs in the operation of its rental pool, for making improvements in distribution facilities and improving efficiency in the distribution of water within Water District 1, for defending attacks from third parties on spaceholder's water rights, and in defending against challenges that might reduce state and private control and use of water resources in Idaho.
- G. Controls, priorities and safeguards to insure that existing water rights are not injured and that an adequate supply of stored water may be obtained on a voluntary basis from available supplies for the stated needs set forth in these procedures.

1.3. All spaceholders will have an opportunity to participate in the monetary benefits of the Rental Pool. These procedures are designed to assure that spaceholders will have first priority in acquiring storage from the rental pool while making provisions which will provide the BOR an opportunity to provide water for flow augmentation.

1.4. All spaceholders who agree to participate in the Rental Pool will be considered to be suppliers to the Water District 1 Rental Pool of the Committee of Nine for the rental of water (to the extent the spaceholder has storage) for flow augmentation; will be a supplier of late-season fill water available to the Rental Pool; and will be able to be full participants in all benefits of the Rental Pool described in these Procedures. Spaceholders who choose to participate in the Rental Pool are deemed to be a voluntary participant of the Rental Pool for each and every year thereafter unless a spaceholder advises the Watermaster prior to February 1 of any given year that he wishes to "opt out". Spaceholders who opt out are not participants (either as suppliers or renters) unless they subsequently decide to participate by opting into the rental pool. Any non-participating spaceholder may "opt in" as a Rental Pool participant if he does so prior to February 1 of any year. Anyone opting in will not be eligible to receive a monetary payment for rentals or impacts that took place the previous year. Anyone who opts in will be eligible for all of the participation benefits of the Rental Pool beginning the year he opts in. If after February 1 of any year, less than seventy-five percent (75%) of the contracted storage space is committed to the rental pool by participating spaceholders, the Committee of Nine will revise the rental pool procedures as determined to be necessary prior to April 1.

- 1.5. All participating spaceholders will receive payment for water rented from the rental pool from the late season fill using an after the fact process during the current irrigation year based upon the amount of space they own in a water storage reservoir or reservoirs and distributed within Water District 1. These procedures anticipate that those spaceholders who choose to participate in the Rental Pool will generally be paid for water rented during the previous irrigation season according to the following payment distribution formula:

$$P = \left(\frac{R \times SP}{TSP} + \frac{R \times ST}{TST} \right)$$

Where: P = Payment to Participating Spaceholder.

R = 70% of Net Proceeds from rental of late season fill

SP = Space of Participating Spaceholder

ST = Storage water of Participating Spaceholder

TSP = Total Participating Space in System

TST = Total Participating Storage in System

Payments to participating spaceholders will be made in two installments:

- 1) The first installment will be the initial distribution of net rental proceeds collected during the irrigation season based on space. This first payment shall be made to participating spaceholders immediately following the end of the irrigation season in which the proceeds were collected.
- 2) The second installment will be the distribution of remaining net rental proceeds, based on the preliminary fill and storage allocation using the second half of the payment distribution formula within two weeks of issuing the preliminary storage allocation for the following irrigation season. For example, the second and last payment for 2006 rental proceeds will be made within two weeks after the preliminary storage allocation has been issued in the Spring or early-Summer of 2007.

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If a specific reservoir's allocation has been reduced as a result of flood-control operations, the ST and TST values in the payment distribution formula for those reservoir spaceholders will reflect the values that otherwise would have occurred without any reductions for flood-control.

Payments made to impacted spaceholders will initially be based on preliminary data. Adjustments to impacted payments will be made after the final accounting has been completed at the end of the irrigation season.

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- 1.6. If the reservoirs do not fill, each participating spaceholder will be paid for water leased through the rental pool the previous year based upon the extent to

which the spaceholder's storage is found to have been impacted in the current year from the past year's rental activities. Those participating spaceholders found to have been impacted shall be paid from the remaining 30% of the proceeds from the net rentals, as described in rule 3.6 & 7.2 below. It is understood there are no impacts resulting from the previous year's rentals for a specific reservoir when that reservoir's storage is released as a result of flood-control operations and water is spilled past Milner Dam in the current year.

- 1.7. In any year when the water rights for the surface water storage facilities distributed by Water District 1 do not fill, excepting those years in which flood-control operations result in spilling excess storage past Milner Dam, the Watermaster will determine, using a procedure developed by Water District 01, unless disapproved by the Director: (1) what the each reservoir fill would have been had the previous year's rentals not taken place, (2) the storage space from which rental water was actually supplied for the previous year's rentals and (3) the amount of water each spaceholder's current allocation was reduced by the previous year's rental activities. Impacted spaceholders (who's space actually ended up suppling the water) will be paid, at the rate established in rule 3.6 below.
- 1.8. In addition to the late season fill using an after-the-fact method of leasing described herein, a spaceholder may assign additional water for agricultural rentals or recharge which may be rented after the storage in the rental pool provided in rule 1.4 has been rented. If refill of the storage system does not occur the following year and the additional rentals caused impacts as determined by the procedures developed by Water District 01, unless disapproved by the Director, then the assigning spaceholder's subsequent year's storage allocation shall be reduced by an amount equal to such impacts and that portion of his accrual will be reallocated to mitigate the impacts to both participating and non-participating spaceholders' storage allocation. One hundred percent (100%) of the rental price shall be paid to the assignor, less all established administrative fees and Board surcharges.
- 1.9. Spaceholders may also enter into private leases, either within a system or between systems, for agricultural purposes above Milner. The lease price may be different from the current rental price. One hundred percent (100%) of the lease price shall be paid to the Lessors less all established administration fees and Board surcharges. If refill of the storage system does not occur the following year and private leases caused impacts determined by the procedures developed by Water District 01, unless disapproved by the Director, then the lessor's subsequent year's storage allocation shall be reduced by an amount equal to such impacts.

1.10 The Watermaster of Water District 1 is hereby designated the Manager of the Water District 1 Rental Pool of the Committee of Nine.

Deleted: 9

RULE 2. DEFINITIONS.

- 2.1 ACRE-FOOT - a volume of water sufficient to cover one acre of land one foot deep and is equal to 43,560 cubic feet.
- 2.2 ALLOCATION - the amount of stored water of a spaceholder, including carryover, that has accrued to a spaceholder's storage space on the date of allocation of stored water and will be available for the spaceholder's use during the year of allocation.
- 2.3 ANNUAL - refers to the Water District 1 accounting year. The period starting November 1 and ending October 31 of the succeeding calendar year.
- 2.4 APPLICANT - any person who seeks to rent storage water from the Rental Pool by submitting a written request to rent storage water, accompanied by the required cash deposit.
- 2.5 ASSIGNOR - a spaceholder who has assigned storage to the Rental Pool pursuant to these procedures.
- 2.6 BOARD - the Idaho Water Resource Board.
- 2.7 BUREAU - the Bureau of Reclamation, Department of the Interior, United States of America, or USBR.
- 2.8 COMMITTEE - the Committee of Nine, the advisory committee selected by Water District 1 at their annual meeting, and appointed as the local committee by the Board pursuant to I.C. §42-1765.
- 2.9 DEPARTMENT - the Idaho Department of Water Resources or IDWR.
- 2.10 DIRECTOR - the director of the IDWR.
- 2.11 DISTRICT - Snake River Water District 1 of the State of Idaho.
- 2.12 IMPACT FUND - The fund created by these procedures from a portion of certain rental receipts described in rule 1.6 above, held by the district for the benefit of the Committee for payment to spaceholders who have been impacted by past rentals of water.

- 2.13. **LATE SEASON FILL** -Additional storage that accrues after the date of allocation of storage in the year water is to be rented, and before the date of allocation of storage in the following year.
- 2.14. **LEASE** - a written agreement through which the watermaster is authorized to deliver storage rented from the Rental Pool to a point of diversion located in Water District 1.
- 2.15. **LESSEE** - person who leases from Committee or spaceholder.
- 2.16. **LESSOR** - Committee or Spaceholder who leases stored water to a Lessee.
- 2.17. **MILNER** - Milner Dam on the Snake River.
- 2.18. **NET PROCEEDS** - Rental Price per acre foot times the number of acre feet rented from late season fill.
- 2.19. **PERSON** - any individual, corporation, partnership, irrigation district, canal company, political subdivision or governmental agency.
- 2.20. **RENT or RENTAL** - act of leasing water from the Rental Pool.
- 2.21. **RENTAL POOL** - either the rental process established through actions of the Committee of Nine, the Board and these procedures or, the water supply that has been made available for lease or rental to other water users through a signed rental agreement that has been approved by the Watermaster pursuant to these procedures.
- 2.22. **RENTAL POOL COMMITTEE** - A sub-committee composed of the Water District 1 Watermaster, a designated representative from the Bureau of Reclamation and three or more members or alternates of the Committee of Nine who have been appointed by the Chairman of the Committee of Nine to serve on the Rental Pool Committee.
- 2.23. **RENTAL PRICE** - The price for each acre-foot of water rented as established by the Committee and approved by the Board for the current year, excluding the District's \$.80 administrative fees and the Board's 10% surcharge.
- 2.24. **RENTER** - lessee of stored water.
- 2.25. **RESERVOIR SYSTEM CAPACITY** - Useable reservoir system capacity for the reservoirs delivering water to the Water District 1 area, which has been determined to currently be 4,172,708 acre-feet.

2.26. SPACE - all or any portion of the active impoundment volume of a reservoir measured in acre-feet.

2.27. SPACEHOLDER - the person who holds the contractual right to the water stored in the space of a storage facility allocated to that person and distributed by the Watermaster of Water District 1.

Deleted: reservoir that is

Deleted: for that person's use

Deleted: is

Deleted: , but does not include landowners in or stockholders of the spaceholder.

2.28. STORAGE - the portion of the available space that contains stored water.

2.29. WATERMASTER - the watermaster of Water District 1.

2.30. WATER SUPPLY FORECAST - A forecasted unregulated runoff for the April 1 to September 30th time period at the Heise USGS gaging station.

RULE 3. GENERAL PROCEDURES.

3.1. It is the policy of the water users of Water District 1 and the Committee to operate the rental pool to achieve the maximum beneficial use of available surplus stored water.

3.2. The primary purpose in the operation of the rental pool will be to provide irrigation water to Spaceholders within Water District 1. These procedures are designed to assure that stored water made available through these procedures will not impact the allocation of any spaceholder without his consent or without his being made whole as far as possible. These procedures were developed to assure that an impacted spaceholder will be compensated to the extent the actual impact can be determined by the procedures developed by Water District 01, unless disapproved by the Director. It is the intent of the Committee that these procedures provide an adequate mechanisms to assure that additional storage is made available to renters while assuring that the storage water rights and water allocations of others are not adversely impacted by these procedures.

3.3. The operation of the rental pool shall in no way recognize any obligation to maintain flows below Milner Dam or to assure the minimum stream flows established at the USGS gaging station on the Snake River near Murphy.

3.4. The operation of the rental pool shall be consistent with the statutes creating the Water Supply Bank, the rules and regulations of the Board, and the relevant provisions of the spaceholder's contracts with the United States.

3.5. Storage water available to the rental pool will be from those spaceholders who choose to participate and have submitted written notice of participation to the Watermaster's office in Idaho Falls. Unless specified otherwise an agreement

to participate will be assumed to be effective until rescinded by the spaceholder. Any monies disbursed pursuant to these procedures will be limited to those who were participating spaceholders when the rental occurred.

- 3.6. Payments to participating spaceholders whose allocation was found to have been impacted in the current year by the rental of storage the previous year, will be made on or before July 15 of the current year. Payments shall be made from the impact fund created by these procedures. The amount of the payment shall be the current rental price for water used for agricultural purposes that would apply to any renter seeking water in the current year up to the number of acre feet impacted. However, impact payments in any one year shall not be greater than the participating spaceholder's pro-rata share of up to fifty percent (50%) of the impact fund, as determined by the formula set forth in Rule 7.2 below.
- 3.7. Should a non-participating spaceholder be impacted by the previous year's water rentals, sufficient water will be provided by increasing his allocation of storage in an amount equal to the impact through after-the-fact (end-of-the-year) accounting by adding the impacts of non-participating spaceholders proportionately to the impacts of participating spaceholders to eliminate the computed impact.
- 3.8. The Rental Pool Committee shall meet prior to July 1 of each year, evaluate the water supply situation and recommend to the Committee the amount of storage that will be made available through the rental pool for that year in excess of the amount established by Table 1 plus 55,000 acre-feet. The Committee of Nine will consider the Rental Pool Committee's recommendation in determining the amount of water that will be available to renters located above Milner. The amount of water for flow Augmentation shall be the amount of storage determined through the use of Figure 1 of Rule 3.10, unless it is determined by the Committee of Nine on or before July 1 of any year that extraordinary precipitation has occurred since the April 1 forecast which was not anticipated and which would substantially increase the storage in Water District 1 and would justify a determination by the Committee of Nine that a specific amount of storage will be available through the rental pool for flow augmentation for that year, notwithstanding Table 1 of Rule 3.10. The amount available for uses above Milner shall not be more than 55,000 acre-feet unless the rental requests made by those spaceholders impacted from the previous year's rentals exceed 50,000 acre-feet, such requests have been approved and no water has been assigned to the Rental Pool to meet such additional requests. In this case the minimum amount of water that will be available through the Rental Pool will be which ever is greater, the 50,000 acre-feet reserved for irrigation above Milner, or the amount of storage necessary to meet the demand of those shown to have been impacted by the previous year's

rentals. Should impacted spaceholders request water after the 50,000 acre feet of storage reserved for irrigation has been leased, the Committee of Nine will meet and determine the amount of additional water that will be necessary to meet the requests of impacted spaceholders. Should additional water be deemed to be necessary, any participating spaceholder may elect to not participate in providing such additional water.

- 3.9 Two-party stored water leases within Water District 1, shall be transacted through the Water District 1 Rental Pool and shall be approved as to form by the Watermaster. Leases of storage by a spaceholder entity shall not count against the storage rental volume set by these procedures but shall be used in computing impacts the following year. Two-party leases shall not apply to deliveries for power generation or flow augmentation. Impacts will be provided with water as provided by Rule 1.9.
- 3.10 SEE TABLE 1 ATTACHED

RULE 4. MANAGEMENT.

- 4.1 The Rental Pool shall be operated pursuant to Idaho Code, Section 42-1761 through 42-1766, in accordance with these procedures.
- 4.2. A sub-committee of the Committee of Nine, known as the Rental Pool Committee, shall have the following general responsibilities:
- A. To recommend needed changes in the general procedures regarding annual storage rentals.
 - B. To review these procedures and make recommendations to the Committee for necessary changes.
 - C. To advise the Committee of Nine on storage rental activities.
 - D. To develop recommendations for the annual Rental Pool supplies and rental rates.
 - E. To review monthly reports from the Watermaster as to applications, approvals and other similar rental pool items.
 - F. To assist the Watermaster in resolving disputes that may arise from the diversion of storage in excess of a storage lease or other storage entitlement.

- 4.3. The Watermaster shall manage the rental pool. The determination of impacts and those entitled to payment shall be based solely upon these procedures. The manager's authority shall include accepting water into the rental pool, executing rental agreements on behalf of the Committee of Nine, disbursing and investing funds generated through the rental of stored water with the advice and consent of the Rental Pool Committee, and distribution of water supplies from the rental pool. All funds invested shall be considered public funds for investment purposes and subject to the Public Depository Law, Chapter 1, Title 57, Idaho Code. The Committee of Nine, by resolution may assign specific responsibilities not covered in these procedures to the Rental Pool Committee.

RULE 5. PRIORITIES FOR RENTING WATER.

- 5.1 These procedures are intended to assure that spaceholders have the first priority in acquiring supplemental storage supplies from the Rental Pool. Priorities for renting water, other than for flow augmentation described in Rule 3.7 above, shall be as follows: (1) First priority: Spaceholders, who are rental pool participants and whose storage was found to have been impacted by rentals¹ from the previous year shall have the highest priority in acquiring rental water², up to the annual impact to that spaceholder³. Existing long term leases with the Committee shall be supplied first from any balance of the 5,000 acre feet reserved for small users, then from any assigned water and then finally from the 50,000 acre feet described in rule 3.8 above. (2) Second priority: Spaceholders, for agricultural purposes up to the amount of their unfilled storage space. (3) Third priority: Rental by non-spaceholders for agricultural purposes above Milner or other uses above Milner. (4) Fourth priority: Rental for uses below Milner.

However, the priority does not guarantee that irrigators will always receive stored water ahead of others seeking water from the rental pool. During times when storage supplies appear to be relatively abundant it is anticipated that water will be supplied in the order in which it is requested. Therefore, those desiring to rent water and preserve his priority in a limited supply must make application within fifteen (15) days following final storage allocation of the system during the year in which he desires to rent water.

¹ Impacts other than from additional supply for agricultural/recharge rentals and private leases.

² Nevertheless, this priority shall not apply for the rental of water for the 2005 irrigation season.

³ Nevertheless, this priority shall not apply for the rental of water for the 2005 irrigation season.

Rental supplies for augmentation will be determined through the process provided in Figure 1 or the exception provided by Rule 3.8. Rental Pool supplies for uses above Milner Dam may be limited to 50,000 acre-feet.

- 5.2 Because of the number of small users and the attendant regulation costs, those seeking to rent less than 100 acre-feet of storage per point of diversion, unless additional rental of storage water at that point of diversion under this Rule is approved by the Committee, will be approved in the same order in which their rental applications are received by the Watermaster so long as the total amount of these requests do not exceed 5,000 acre-feet of storage. Rental supplies for the 5,000 acre-feet will also be determined through the late season fill and after the fact accounting process described herein.

RULE 6. LEASE APPLICATIONS, PAYMENTS AND WATER COSTS.

- 6.1. The price for the storage rented from the rental pool:

- A. If the storage system fills, the Rental Price, excluding the Rental Price for flow augmentation, shall be \$5.00 per acre foot plus the District's administrative fee (\$.80) and the Board surcharge (10%). If the storage system does not fill but water is provided for flow augmentation, the Rental Price, excluding the Rental Price for flow augmentation, shall be \$12.00 per acre foot plus the District's administrative fee (\$.80) and the Board surcharge (10%). If the storage system does not fill and no flow augmentation water is provided pursuant to Rule 3.8 and Rule 3.10 above and Rule 6.1B, the Rental Price shall be \$18.00 per acre foot plus the District's administrative fee (\$.80) and the Board surcharge (10%).
- B. The Rental Price for water provided pursuant to Rule 3.10 and any other water for below Milner shall be \$12.00 per acre foot plus the District's administrative fee (\$.80) and the Board surcharge (10%), or as further approved by the Committee.

- 6.2 All lease monies held by the District for and on behalf of the Committee will be held in a separate interest-bearing account. Accrued interest will be first used to maintain the fund that is used by the Committee to pay impacted Spacelholders. Excess funds generated will be available to the Committee for authorized uses including funds generated by the Impact Fund set up pursuant to Rule 7.2 below.

6.3. Applications to lease storage shall be initiated upon forms provided by the Watermaster and shall include the following information:

- A. The legal description of the point of diversion and the place of use.
- B. The amount of water being leased.
- C. The common name of the point of diversion. (e.g. Milner Dam, Harrison Canal, Covington pump etc.)
- D. The beneficial use to be achieved through the delivery of water from the rented space. (e.g. irrigation, power production, recreation)

6.4. Applications must be received with the appropriate rental fee determined to be due in Rule 6.1. No applications will be accepted before April 5 of the year in which the rented water will be used.

RULE 7 SUPPLIER PAYMENTS

7.1 All monies submitted by applicants as provided in Rule 6 shall be deposited in an interest-bearing Rental Pool account established by the Committee for the potential rental of water. Monies in this account used to rent water shall represent Rental Pool funds that can be paid out to participating spaceholders, District administrative fees and Board surcharges at the end of the irrigation year. Money in this account will be disbursed as set forth below:

- A. 70% of the Net Proceeds shall be paid pursuant to the formula set forth in Rule 1.5 above.
- B. 30% of the Net Proceeds shall be paid to the Impact Fund as set forth in Rule 7.2 below.
- C. 10% of the Rental Price of rented water shall be paid to the Board.
- D. \$.80 per acre foot of rented water shall be paid to the District.
- E. All accrued interest shall be paid to the Impact Fund.
- F. Balances of the account that are not used to rent water shall be refunded to applicants.

7.2 An Impact Fund shall be created pursuant to these procedures by the District on behalf of the Committee to hold 30% of the Net Proceeds for the benefit of impacted participating spaceholders. Proceeds from the Impact Fund shall be

paid to participating spaceholders who, by these procedures, have been determined to have provided water for the previous years rentals, pursuant to the provisions set forth in Rule 3.6 above using the following formula:

$Sp = (Isp * RP) \text{ or } \frac{1}{2} IF * (Isp / Ispt)$ (whichever sum is less)

Where:

Sp = Impacted Spaceholder payment per Acre Foot

Isp = Spaceholder's impacted space in acre feet

RP = Rental Price

IF = Impact Fund

$Ispt$ = Total of all Spaceholder's impacted space in acre feet