

July 16, 2007

To: Shelley Keen
IDWR

From: Cindy Robertson
IDFG

7 pages (including cover sheet)

Shelley:

I have faxed you several pages from the drift Agreement for Georgetown Irr. Co water right 11-7219. The relevant pages for you to look at are I.B.; II.1.; II.2.

Feel free to call me back if you have further questions. I will be out of my office after 2:30 today, but will be back in tomorrow morning.

Cindy

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**..... AGREEMENT BY AND BETWEEN
GEORGETOWN IRRIGATION COMPANY, INC., AND
THE STATE OF IDAHO, DEPARTMENT OF FISH AND GAME, GOVERNING
TERMS AND CONDITIONS FOR GEORGETOWN IRRIGATION COMPANY'S
APPLICATION FOR WATER RIGHT LICENSE ON GEORGETOWN CREEK TO
BE SUBMITTED TO THE IDAHO DEPARTMENT OF WATER RESOURCES**

THIS AGREEMENT ("Agreement") is made and entered into effective the day of May 2007, between Georgetown Irrigation Company ("GIC") and the Idaho Department of Fish and Game ("IDFG"), referred to hereinafter as the "Party" or "Parties," as the case may be. This Agreement provides the basis for the Idaho Department of Water Resources ("IDWR") to issue a water right license to GIC for operation of the Georgetown Creek Hydroelectric Facility ("Facility") based on water right permit no. 11-7219.

I. RECITALS

A. The Facility became operational in 1986. The Facility relies on diverted flow from Georgetown Creek for its operation and is currently operating under water right permit no. 11-7219. Water is also diverted at the same location from Georgetown Creek for irrigation use under decreed right no. 11-290, decreed in the District Court of the United States for the District of Idaho, Eastern Division, in the case of Utah Power and Light Company, Plaintiff v. The Last Chance Canal Company, Limited, et al., Defendants, In Equity No. 203, filed July 14, 1920. (Appendix A.)

B. The diversion structure for delivery of water for irrigation and production of hydropower is located on lands owned by the United States. On June 4, 1973, the United States issued a right-of-way grant (IDI-6483) for the GIC diversion authorizing GIC's use and occupancy of lands under the management and control of the U.S. Bureau of Land Management ("BLM"). The original point of diversion was located approximately 7000 feet downstream of the current diversion structure ("original point of diversion"). GIC relocated the point of diversion for beneficial use of water right no. 11-290 to install a diversion dam and pressurized irrigation system. Right-of-way grant (IDI-6483) requires that a minimum of five (5) cfs be allowed to bypass the diversion structure and remain in the natural stream channel below the diversion structure for the purpose of sustaining fish and other aquatic and riparian life in Georgetown Creek. The grant also requires installation and operation of a continuous measurement device to determine the amount of water that bypasses the diversion. (Appendix B.)

C. On October 18, 1982, the Federal Energy Regulatory Commission ("FERC") issued an Order Approving Request For Waiver and Granting Exemption From Licensing For the Georgetown Irrigation Conduit Hydroelectric Project (FERC Order). Article 2 of

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the FERC Order requires compliance with the terms and conditions that federal or state fish and wildlife agencies determined were appropriate to prevent loss of, or damage to, fish and wildlife resources. (Appendix C.) Article 2. terms and conditions for the project were submitted by IDFG in a letter dated September 16, 1982. The IDFG required flow-monitoring equipment capable of recording instantaneous flow data at the diversion and a bypass flow of 5 cfs in Georgetown Creek for the benefit of aquatic resources. (Appendix D.)

D. On October 3, 1985, IDWR issued water right permit no. 11-7219 to GIC for the diversion and use of water from Georgetown Creek at the GIC Facility. GIC has submitted proof of beneficial use and a field examination has been conducted. GIC has requested that a water right license be issued based on water right permit no. 11-7219.

E. The IDFG has documented the presence of Bonneville cutthroat trout in Georgetown Creek both upstream and downstream of the GIC diversion structure. Preservation and enhancement of native populations of Bonneville cutthroat trout is a priority of the State of Idaho. The IDFG is working with other state and federal agencies, PacifiCorp, and private parties to preserve, restore, and enhance Bonneville cutthroat trout and other aquatic resources in the Bear River Basin.

F. The Parties believe it to be in their mutual interest to cooperate and facilitate the issuance of a water right license to GIC that includes the following conditions for the restoration and protection of Bonneville cutthroat trout and other aquatic resources in Georgetown Creek:

II. AGREEMENT

In consideration of the recitals above, which are an integral part of this Agreement and are expressly incorporated herein, and the mutual covenants and agreements hereinafter set forth, the parties covenant and agree as follows:

A. ACCEPTANCE OF THIS AGREEMENT.

The GIC will request acceptance of this agreement by IDWR and issuance of a water right license for hydropower production at the GIC Facility that includes the conditions outlined in this Agreement. No party shall file or pursue any objection, petition, or suit challenging the issuance of a water right license based on permit no. 11-7219 for hydropower production at the GIC Facility if the draft and final license issued by IDWR contain the following conditions and are not inconsistent with the following conditions:

1. Bypass flow. Use of water under license 11-7219 shall require a year-round flow of 5 cfs bypassing GIC's intake pipe for the benefit of aquatic species in Georgetown Creek in accordance with the BLM right of way grant. For purposes of this Agreement, the parties contemplate,

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intend, and agree that the terms and conditions of this Section A.1. shall also apply to water right no. 11-290 as long as the diversion structure for water right no. 11-290 is located on lands owned by BLM and the right-of-way grant (IDI-6483) issued by the United States is in effect and requires the 5 cfs bypass flow.

Until such time as a fish passage facility is installed at the point of diversion, the bypass flow shall be released at the drainage head gate of GIC's diversion. Until such time as a fish passage facility is installed at the point of diversion, the 5 cfs bypass flow shall be measured at the crested weir located approximately 150 to 200 feet downstream from the drainage head gate, or at a point as close as possible to the location of the crested weir if the weir is removed or damaged, or at the location of the replacement measuring device if the crested weir is replaced.

The Parties acknowledge that there is disagreement as to the historic use of Right Hand Fork Creek flow to meet the 5 cfs bypass flow requirement. However, for purposes of this Agreement, during the time period in which the bypass flow is released at the drainage head gate of GIC's diversion, IDFG will not oppose the use of flow from Right Hand Fork Creek to fulfill the 5 cfs bypass flow requirement, providing that use of flow from Right Hand Fork Creek to meet the 5 cfs bypass requirement is accomplished pursuant to the laws of the State of Idaho and the United States of America and is consistent with the right-of-way grant (IDI-6483) for the GIC diversion authorizing GIC's use and occupancy of lands under the management and control of BLM.

In the event the point of diversion is relocated to any point upstream of the original point of diversion described in section I.B. of this agreement, it is understood that IDFG will participate in any transfer proceedings for water rights nos. 11-290 and 11-7219 conducted pursuant to Idaho Code § 42-222 and request that IDWR include any and all measures, including a bypass flow, IDFG concludes are necessary to protect aquatic resources affected by the relocation of the point of diversion as conditions of any amendment to water right nos. 11-290 and 11-7219. It is also understood that IDFG will participate in any proceedings before FERC required by the relocation of the point of diversion and request any and all mitigation measures, including a bypass flow, IDFG concludes are necessary to protect fish and wildlife resources from any project-related impacts.

The Parties acknowledge and agree that IDWR may not enforce the terms and conditions of this Section A.1. relative to water right no. 11-290 when GIC is not diverting water under water right no. 11-7219 for

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hydropower production. However, the parties contemplate, intend, and agree that the terms and conditions of this Section A.1. shall apply to water right no. 11-290 as well as water right no. 11-7219 and that the Parties are entitled to enforce the terms and conditions of this Section A.1. as it applies to water right no. 11-290 in any state or federal court with jurisdiction.

2. Monitoring, Monitoring Device Operation, Maintenance, and Replacement. The GIC, in consultation with IDWR, IDFG, and BLM, will install and maintain a continuous flow monitoring device, approved by IDWR, and approved and calibrated by a professional engineer, at the crested weir located downstream from the drainage head gate, or at the replacement measuring device if the crested weir is replaced. The device and configuration of the weir must be capable of measuring flows up to 5 cfs. For purposes of this Agreement, the irrigation season is defined as May 1 through September 30. Each year, prior to May 1, GIC will inspect the monitoring device to ensure that the device is operational and if not, will ensure that the device is operational by May 1. On or before May 1, GIC will provide confirmation that the monitoring device is operational in a report to the watermaster of Water District 11, BLM, and IDFG. During the irrigation season, GIC will visit the measuring site at least once per day to confirm that the monitoring device is operational and that a flow of 5 cfs is provided in the bypass channel. If the water stage recorder is not operating properly, daily staff gage readings will be obtained to ensure that the 5 cfs bypass flow is provided and readings submitted as part of a monthly report. Failure of the water stage recorder will be reported to the watermaster of Water District 11, BLM, and IDFG within 24 hours. During the irrigation season, GIC will collect monthly readings, and submit monthly reports to the watermaster of Water District 11, BLM, and IDFG.

During the non-irrigation season, which for purposes of this Agreement is defined as October 1 through April 30, the forebay of the facility will be operated at maximum pool for the entire season. The bypass opening will be set to provide a discharge of 5 cfs or more at the measuring weir and locked. Staff gage readings on the weir will be obtained at least weekly by GIC personnel. Reports, including the weekly staff gage readings, will be provided monthly to the watermaster of Water District 11, BLM, and IDFG. In the event the staff gage readings indicate a decrease in discharge below 5.0 cfs, GIC will promptly examine the outlet gate for obstructions, clean as necessary, and adjust the gate opening to ensure that a 5 cfs bypass flow is restored. GIC agrees to provide IDFG and BLM reasonable access to lands and facilities to take readings off the monitoring device and evaluate the effectiveness of the

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monitoring device and the aquatic resources affected by the bypass flow. The GIC agrees to maintain, repair and replace any portion of the monitoring device promptly and as necessary to ensure the monitoring device's continued operation. In the event that replacement is required, GIC will promptly install a device approved by IDWR, IDFG, and BLM.

The Parties acknowledge and agree that IDWR may not enforce the terms and conditions of this Section A.2. relative to water right no. 11-290 when GIC is not diverting water under water right no. 11-7219 for hydropower production. However, the parties contemplate, intend, and agree that the terms and conditions of this Section A.2. shall apply to water right no. 11-290 as well as water right no. 11-7219 and that the Parties are entitled to enforce the terms and conditions of this Section A.2. as they apply to water right no. 11-290 in any state or federal court with jurisdiction.

3. Mitigation for Reduced Flows Resulting From Circumstances Beyond GIC's Control. Irrigation Season: If, based on the recorder chart and due to circumstances beyond GIC's control, the discharge has been less than 5 cfs for any period prior to the daily visit by GIC personnel, the bypass discharge will be increased to an amount equal to 5 cfs plus the previous deficiency for a period at least equal to the prior deficiency period. Non-Irrigation Season: If, based on the staff gauge recorder chart and due to circumstances beyond GIC's control, the discharge has been less than 5 cfs for any period prior to the weekly visit by GIC personnel, the bypass discharge will be increased to an amount equal to 5 cfs plus the previous deficiency for a period at least equal to the prior deficiency period. Intention of the Parties: The Parties intend and agree that this Section A.3. shall in no way be construed so as to permit GIC to intentionally reduce flows below the 5 cfs bypass flow requirement, nor is it intended to affect in any way the requirements for daily and weekly measurements and adjustments. The Parties intend and agree that this Section A.3. shall in no way be construed to affect or limit in any way the obligations of GIC specified in Sections A.1., A.2., A.4., and A.5. of this Agreement.

The Parties acknowledge and agree that IDWR may not enforce the terms and conditions of this Section A.3. relative to water right no. 11-290 when GIC is not diverting water under water right no. 11-7219 for hydropower production. However, the parties contemplate, intend, and agree that the terms and conditions of this Section A.3. shall apply to water right no. 11-290 as well as water right no. 11-7219 and that the Parties are entitled to enforce the terms and conditions of this Section A.3.

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as it applies to water right no. 11-290 in any state or federal court with jurisdiction.

4. Fish Passage: In the event funds become available to install fish passage facilities for Bonneville cutthroat trout at the point of diversion and IDFG determines that fish passage facilities at the point of diversion are necessary for the restoration and protection of Bonneville cutthroat trout in the Bear River basin, GIC will permit such installation and will permit the relocation of the continuous monitoring device so that the bypass flow is measured at GIC's point of diversion. Unless otherwise agreed, GIC will not be responsible for the relocation of the continuous monitoring device if such relocation is a result of the installation of fish passage facilities.

The Parties acknowledge and agree that IDWR may not enforce the terms and conditions of this Section A.4. relative to water right no. 11-290 when GIC is not diverting water under water right no. 11-7219 for hydropower production. The parties contemplate, intend, and agree that the terms and conditions of this Section A.4. shall apply to water right no. 11-290 as well as water right no. 11-7219 and that the Parties are entitled to enforce the terms and conditions of this Section A.4. as they apply to water right no. 11-290 in any state or federal court with jurisdiction.

5. Permits and Approvals. GIC shall obtain a stream channel alteration permit from IDWR in connection with any work in the channel of Georgetown Creek to install, operate, or maintain a monitoring device or any other equipment not a part of the diversions works for water right no. 11-7219.

B. GENERAL.

1. Binding Effect. This agreement shall bind and inure to the benefit of the respective successors and assigns of the Parties.

2. Other Existing Agreements. This Agreement does not alter or supersede any rights or obligations in any other existing agreement between two or more Parties, as between those Parties.

3. No Obligation to Expend Public Funds. This Agreement shall not be construed to obligate the expenditure of funds by any public agency.

4. Modification of the Agreement. This Agreement may be terminated or modified, but only by means of a written agreement signed by each of the Parties hereto.