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Attorneys for City of Pocatello

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY**

In Re SRBA)	Subcase No. 92-00021
)	
Case No. 39576)	
)	
)	CITY OF POCATELLO'S NONOPPOSITION
)	RESPONSE TO STATE OF IDAHO'S
)	MOTION FOR INTERIM ADMINISTRATION

The City of Pocatello, by and through its counsel of record, Josephine P. Beeman and Dana H. Rose of the law firm of Beeman & Associates, P.C., files this response to the State of Idaho's Motion for Order of Interim Administration in basin 29, dated July 10, 2003. The City of Pocatello does not oppose the State's motion for interim administration pursuant to Idaho Code 42-1417.¹ The City of Pocatello does advise the Court and the State of its understanding regarding three matters which relate directly to interim administration.

First, the 42-1417 proceeding does not determine "injury" to senior priority water rights; rather, it is a preliminary step to allow the use of SRBA water right records before the water rights have a final decree from the SRBA court. Accordingly, the State's pleadings do not assert "injury" to senior water rights but do make the preliminary assertion that the current water supply is not adequate to "satisfy" some senior priority water rights in Water District 120. Based

¹ The City of Pocatello agreed, in the "Interim Stipulated Agreement for Processors and Municipalities within and near IDWR Administrative Basins 35 and 36" (effective October 11, 2001), paragraph 2.5, not to oppose the State of Idaho's motion for interim administration.

on this assertion, the 42-1417 order will allow the Idaho Department of Water Resources (IDWR) to proceed with "interim administration" of ground water rights which have not been decreed, because it is "reasonably necessary to protect senior water rights" in Water District 120. The purpose of IDWR's interim administration, using these SRBA records, will be to protect senior water rights in Water District 120 from "injury" in accordance with IDWR's obligations within chapter 6, title 42, Idaho Code.² This requires the Director of IDWR to make a finding of "injury" in an administrative proceeding which is consistent with the mandates of the prior appropriation doctrine in Idaho.

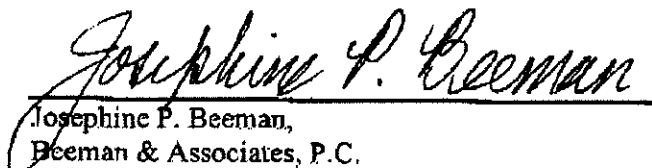
Second, since the motion is directed to administration of ground water rights and to their administration specifically within a water district, interim administration is limited to IDWR's authorities under chapter 6, title 42, Idaho Code. This precludes IDWR from using the SRBA records (Director's report and the partial decrees) pending the completion of the entry of a final decree in the SRBA in any manner to affect the distribution of water other than through the normal administrative mechanism provided by chapter 6, title 42, Idaho Code. IDWR's distribution includes the authority "to shut and fasten, or cause to be shut or fastened, ... the headgates of the ditches or other facilities for diversion of water from such stream, streams, or water supply, when it times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply." Idaho Code § 42-607.

Third, the administration within Water District 120 must accord with the legal force and effect of the October 25, 1984 Swan Falls Agreement, the October 25, 1984 Swan Falls Contract, and the Consent Judgments in *Idaho Power Co. v. State of Idaho*, Case No. 81375 (Fourth

² See also the Interim Stipulated Agreement for Areas within and near IDWR Administrative Basin 36, para. 2.10; Interim Stipulated Agreement for Processors and Municipalities within and near IDWR Administrative Basins 35 and 36, para. 2.5; IDWR Final Order Creating Water District 120, dated February 19, 2002, at 5; IDWR Final Order Creating Water District 130, dated February 19, 2002, at 5; and IDAPA 37.03.11 – Conjunctive Management of Surface and Ground Water Resources.

Judicial Dist. Feb. 16, 1990) and *Idaho Power Co. v. State of Idaho, Case No. 62237 (Fourth Judicial Dist. Mar. 9, 1990)* [collectively "Swan Falls Agreement"]. In SRBA consolidated subcase no. 37-02499 *et al.*, the Court is presently considering the appropriate mechanism to guarantee that the SRBA proceedings do not supercede, preempt, modify, terminate, extend or otherwise affect the legal force and effect of the "Swan Falls Agreement" in the Snake River basin drainage upstream from the Idaho Power Company plant at Swan Falls. The Court has not designated the consolidated basin 37 subcases a basin wide issue, although the Swan Falls drainage encompasses all of 21 basins³ and portions of three basins,⁴ including all of the existing and currently proposed geographic area in Water District 120.⁵ For these reasons, the City of Pocatello raises this issue at the same time as it has filed Swan Falls objections in basin 29, seeking, as is sought in basin 37, appropriate guarantees that the SRBA proceedings do not supercede, preempt, modify, terminate, extend or otherwise affect the legal force and effect of the "Swan Falls Agreement" throughout the Swan Falls drainage.

RESPECTFULLY SUBMITTED this 21st day of October 2003.


Josephine P. Beeman,
Beeman & Associates, P.C.

³ See letter from David R. Tuthill, IDWR Adjudication Bureau Chief, dated February 12, 2003 (Exhibit 1). This letter was also provided to the Court and parties and discussed on the record during the February 18, 2003 Court "Hearing to Designate as Basin-wide Issue & Scheduling" in consolidated subcase no. 37-02499 *et al.*, in direct response to the November 25 SRBA Court Order asking for the scope of additional water rights to which the Swan Falls objection may be raised in the future (Exhibit 2: Reporter's Transcript, Subcase No. 37-02499, *et al.*, February 18, 2003, cover page and page 6). The February 12, 2003 letter lists the following 21 IDWR administrative basins fully within the Swan Falls drainage: 1, 21, 22, 23, 24, 25, 27, 29, 31, 32, 33, 34, 35, 36, 37, 41, 43, 45, 47, 51, and 61.

⁴ The February 12, 2003 letter lists the following 3 IDWR administrative basins partially with the Swan Falls drainage: 2, 57, and 63.


⁵ Water District 120 boundaries encompass a portion of IDWR administrative basin 35; the State's current Motion for Interim Administration will extend the boundaries to include a portion of IDWR administrative basin 29.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st of October 2003, I caused to be served copies of the foregoing **CITY OF POCA TELLO'S NONOPPOSITION RESPONSE TO STATE OF IDAHO'S MOTION FOR INTERIM ADMINISTRATION** upon the following, by the method indicated:

Idaho Department of Water Resources
Document Depository
P. O. Box 83720
Boise, Idaho 83720-0098
☐ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax (327-7866)

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449
☐ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax (334-2690)


Josephine P. Beeman

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State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
 Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

February 12, 2003

DIRK KEMPTHORNE
GovernorKARL J. DREHER
Director

Josephine P. Beeman
 Beeman & Associates, P.C.
 409 West Jefferson Street
 Boise, ID 83702-6049

Sent by U.S. Mail, and by FAX to 208-331-0954

RE: Request for Water Right Information in
 SRBA Consolidated Subcase No. 37-2499, et al.

Dear Jo:

In response to your request dated January 21, 2003, for water right information in SRBA Consolidated Subcase No. 37-2499, et al., I have prepared and enclosed a table entitled "Count of SRBA Claims Upstream from Swan Falls." I believe this table contains the information that you requested, based on your letter and our subsequent clarifying conversations.

As we discussed, I am planning to attend the hearing in this matter scheduled to be held on February 18, 2003. I would be happy to respond to questions regarding this document before, during or after the hearing.

Sincerely,

David R. Tuthill, Jr., Ph.D., P.E.
 Adjudication Bureau Chief

Enclosure

RECEIVED FEB 14 2003

Exhibit 1 to
 POCA TELLO'S NONOPPOSITION RESPONSE TO
 STATE'S MOTION FOR INTERIM ADMINISTRATION
 (92-00021)(10/21/03)

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OCT 21 2003

Count of SRBA Claims Upstream from Swan Falls Dam

Prepared by: D. Tuthill

12-Feb-03

Basins Located Fully Upstream from Swan Falls Dam

Basin No.	Count of Recommendations Submitted to the Court to Date*	Anticipated Count of Recommendations to be Submitted to the Court in Future Director's Reports
1	150	746
21	1,731	614
22	2,464	1,503
23	901	253
24	499	133
25	3,572	631
27	1,615	594
29	2,453	2,085
31	2,280	0
32	1,053	0
33	910	1
34	6,047	47
35	5,310	2
36	7,690	9
37	6,450	2,670
41	363	2
43	2,363	3
45	2,286	1,792
47	5,521	1,416
51	1,916	2
61	1,847	3
Totals	57,421	12,506

Basins Located Partially Upstream from Swan Falls Dam

Basin No.	Count of Recommendations Submitted to the Court to Date*	Anticipated Count of Recommendations to be Submitted to the Court in Future Director's Reports
2	44	695
57	2,758	2
63	14,328	3,417
Totals	17,130	4,114

* Note: The objection periods have expired for all Director's Reports submitted to date.

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OCT 21 2003

Hearing to Designate Basin-Wide Issue

Hon. Roger S. Burdick
District Judge

February 18, 2003

1 IN THE DISTRICT COURT OF THE
2 FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
3 IN AND FOR THE COUNTY OF TWIN FALLS
4 * * * * *
5

6 IN RE SRBA)

) REPORTER'S TRANSCRIPT

7 Case No. 39576)

) Subcase No. 37-2499, et al.
8)
9)
10)
11)
12)

13 HEARING TO DESIGNATE AS
14 BASIN-WIDE ISSUE & SCHEDULING
15

16 TAKEN BEFORE

17 HON. ROGER S. BURDICK

18 District Judge, Presiding
19

20 DATE: TUESDAY, FEBRUARY 18, 2003
21 TIME: 1:30 P.M.
22 PLACE: COURTROOM OF THE DISTRICT COURT
23 SNAKE RIVER BASIN ADJUDICATION
24 BUILDING - 253 3RD AVENUE NORTH
25 TWIN FALLS, IDAHO

Reported By:

Virginia M. Bailey, RPR, CSR No. 262
Official Court Reporter

Virginia M. Bailey, CSR, RPR

Exhibit 2 to
POCATELLO'S NONOPPOSITION RESPONSE TO
STATE'S MOTION FOR INTERIM ADMINISTRATION
(92-00021)(10/21/03)

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February 18, 2003

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1 been presented to the court.

2 I wanted to -- I wanted to make reference
3 to three documents quickly. Volume 28 of the Idaho
4 Law Review contains an article called, "Swan Falls
5 in 3D," authored by Jeff Fereday and Mike Creamer,
6 and I'd like to just read a little bit of what they
7 describe about the area that we're talking about, in
8 terms of understanding the immensity of the number
9 of water rights and the water in the watershed above
10 Swan Falls. "The aquifer beneath the Snake River
11 Plain, comprised of successive basalt flows,
12 interbedded with sedimentary rock in a layer cake
13 effect, holds between 200 and 300 million acre feet
14 of water within its upper 200 to 500 feet. The
15 aquifer discharges approximately 10 million acre
16 feet annually through the spring flows into the
17 Snake River, underflows, groundwater pumpage and
18 evapotranspiration. The Snake River in turn
19 ultimately contributes nearly 37 million acre feet
20 to Columbia River flows annually. The Snake River
21 is the largest tributary to the Columbia River
22 system." Thanks, Mike, this is your good work, Mike
23 Creamer.

24 The second document which I've already
25 made reference to was provision 5A of the existing

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1 Idaho state water plan and its comment about the
2 Swan Falls agreement.

3 The third document is in the packet of
4 materials that are accompanying the Swan Falls
5 agreement and contract. It's a February 12, 2003
6 letter from Dave Tuthill.

7 THE COURT: What was that, Madame?

8 MS. BEEMAN: It is a February 12, 2003
9 letter to Josephine Beeman from David Tuthill and
10 regarding requests for water right information in
11 SRBA consolidated subcase number 37-2499.

12 THE COURT: Correct.

13 MS. BEEMAN: By letter of January 21,
14 2003, after filing a more definite statement on
15 January 3rd, North Snake Groundwater District
16 requested Mr. Tuthill to prepare information about
17 the number of water rights that would be affected
18 above the Swan Falls drainage. This is in direct
19 response to the court's November 25th order asking
20 North Snake today to indicate the scope of
21 additional water rights to which the objection may
22 be raised in the future. Mr. Tuthill's information
23 lists both those basins that are entirely in the
24 watershed above the Swan Falls drainage and then
25 those that are in and out.

1 For the record, the SRBA court, the
2 recommendations submitted to the SRBA court in the
3 area completely within the watershed above Swan
4 Falls, comprises 57,421 water rights. Perhaps in
5 his remarks, Mr. Tuthill can indicate how many of
6 those might be groundwater. Part of the reason to
7 look at these numbers is to appreciate the enormity
8 of the task, to identify the groups of users, just
9 some that I earlier pointed the court's attention to
10 in my selected quotes from the contract and the
11 agreement. In those same basins, the director will
12 be filing an additional 12,506 water rights. So we
13 have potentially 57,000 water rights that are in the
14 area and have already had reports made to the court.
15 All objection periods have expired, and some may
16 already have partial decrees. And again, I think
17 Mr. Tuthill can clarify questions the court may
18 have, because for the basins that may be partially
19 in the Swan Falls drainage, there have been 17,000
20 reports of individual water rights made to the SRBA
21 court already and another 4,000 remain. So with
22 Mr. Tuthill's report alone, we have over 100,000
23 water rights either already reported or that would
24 be reported that are in the area that I would
25 describe as the Swan Falls watershed.

1 When the court issued orders to North
2 Snake on November 25th and again on December 11th,
3 we took the liberty of obtaining transcripts of
4 those proceedings, because we wanted to understand
5 what the court's direction was; and in terms of this
6 issue about how many water rights are affected, how
7 many have already had partial decrees or have been
8 reported and the objection period is past, I think
9 if I need to, I can make further comment, but I
10 would say that the court's record of comment on
11 December 11th regarding savings provisions, and my
12 comment would be every partial decree is issued with
13 a Rule 54(b) certificate, that under that provision
14 alone it only determines those issues and does not
15 determine other issues that remain to be determined,
16 and there are many, we have huge federal and tribal
17 claims that are still outstanding, we have other
18 basins downstream that have not been fully
19 recommended to the court; but I want the court to be
20 aware that North Snake is supportive of this
21 becoming a basin-wide issue, and the general
22 provision that was drafted is not the final word.
23 In fact, I will at this point read -- I have invited
24 everyone, I know, to offer comments and to say this
25 is why, you know, mediation is appropriate. But in

6 (Pages 18 to 21)

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