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May 2, 2003

Mr. Don Dixon  
Senator Michael Crapo's Office  
490 Memorial Drive, Suite 102  
Idaho Falls, Idaho 83402

**Re: Idaho Power Company's Pahsimeroi Water Right Application**

Dear Don:

Thank you again for arranging the public meeting in May, Idaho and the opportunity for Idaho Power Company (IPC) to explain the purpose for the new water rights application. At the conclusion of the meeting, the participants requested that IPC respond to a number of questions posed at the meeting. Jerry Hawkins provided a list of questions developed by a group of Pahsimeroi residents. IPC will attempt to address those questions in this letter along with a number of other issues it believes are pertinent to the pending application and process before the Idaho Department of Water Resources (IDWR).

Initially, it is important to understand the distinction between the IPC Pahsimeroi Hatchery and the Idaho Department of Fish and Game (IDFG) Sawtooth Hatchery located near Stanley, Idaho. Ownership, funding and production goals between the two facilities are completely unrelated and not interchangeable. The Pahsimeroi Hatchery is owned by IPC and operated by the Idaho Department of Fish and Game (IDFG) to satisfy IPC's obligations under its Hells Canyon license. IDFG and IPC through the operation of the hatchery identified the pathogen known to cause "whirling disease" in the Pahsimeroi River. In response to the pathogen's impact on hatchery operations and in an effort to control the spread of the disease, IPC filed the pending application for 14 cfs of groundwater for fish rearing at the facility. It is this application which is the subject of the IDWR proceeding.

At the recent meeting, a number of questions were raised regarding the appropriation of groundwater and the administration of water rights in Idaho. While these questions may be more appropriate for the IDWR, IPC offers the following general overview of Idaho law with regard to water appropriation and use. The right to appropriate Idaho waters for beneficial use is

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recognized by the Idaho Constitution. See Constitution, Article XV, § 3. ("the right to divert water and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. . .") The title to all waters of the state is vested in the state for "the use and benefit of the citizens of the state." *Walbridge v. Robinson*, 22 Idaho 236, 241-242, 125 P. 812, 814 (1912). The ownership interest in the state to all state water is "not title in the proprietary sense" but "for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit" of state waters. *Id.*

The Idaho Groundwater Act ("Act") provides that all groundwater in Idaho is also "property of the state" and is subject to appropriation. I.C. §42-226. The Act implements the constitutional right to appropriate waters of the state by articulating that the fundamental policy underlying groundwater appropriation in Idaho is that water resources of the state shall "be devoted to beneficial use in reasonable amounts through appropriation." I.C. § 42-226. The "full economic development" of groundwater is specifically recognized under Idaho law. *Id.* See also, *Baker v. Ore Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1977) ("The Groundwater Act seeks to promote full economic development of our groundwater resources. Full economic development of Idaho's groundwater resources can and will benefit all our citizens.") Indeed the concept of "first in time is first in right...shall not block full economic development of underground water resources" and senior appropriators are only "protected in the maintenance of reasonable groundwater pumping levels." I.C. § 42-226; *Baker*, 95 Idaho at 582-83, 513 P.2d at 634-35.

Water right applications are processed under Idaho Code § 42-203A, which provides in part:

(5) The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the application has not sufficient financial resources with which to complete the work therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed generating plant.

The Applicant bears the initial burden of coming forward with evidence for the evaluation of criteria of I.C. § 42-203A(5)(a) through (d). IDAPA 37.03.08.04(i); *Cantlin v.*

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*Carter*, 88 Idaho 179, 187 (1964). The Applicant and Protestant share the burden of proof regarding I.C. § 42-203(A)(5)(e). *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P. 2d, 441, 450 (1985). The Applicant and the Protestant bear the initial burden of coming forward with evidence for those factors relevant to the local public interest, I.C. § 42-203A(5)(e), of which that party can reasonably be expected to be more knowledgeable. *Id.* "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resource's sound discretion." *Id.*

IDWR has an independent duty to assess the criteria for issuance of water right permits. All ground waters of the State are the property of the State. IC § 42-226. As the agency delegated responsibility to supervise allocation of the state's water resources, IDWR must ensure that water resources are managed in a manner that comports with statutory requirements. *Id.*

The Idaho Groundwater Act, at I.C. § 42-232, provides that:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of groundwater resources contrary to the public policy expressed in this act.

Similarly, the Idaho Supreme Court has held that IDWR bears "the affirmative duty to assess and protect the public interest." *Shokal v. Dunn*, 109 Idaho 330, 337 (1985).

IPC believes that that the record before the IDWR demonstrates that there is unappropriated water available in the aquifer and that the use of the water that IPC seeks to appropriate will not impair existing water rights. The series of pump tests and the corresponding report filed with the IDWR support this conclusion. IPC has offered to provide the test results report to anyone that was interested. Further, the results were addressed in detail at the public meeting.

From a hydrologic standpoint, the procedures and methods utilized by IPC were of the type typically relied upon in the profession. The duration and conditions of the test were sufficient to determine the aquifer characteristics. These aquifer characteristics were then utilized to forecast the aquifer response to the proposed 14 cfs withdrawal. Not only did IPC seek comments from IDWR on the test parameters, but it also encouraged the IDWR to review the results. IDWR used the test data collected by IPC to complete its own independent analysis. (See Attached IDWR Report) The IDWR analysis corroborated IPC's findings.

The question was posed at the recent meeting as to whether IPC had considered moving the Pahsimeroi Hatchery. IPC had not undertaken an analysis of such an action. In responding to the state and federal agencies requests to modify existing operations by rearing juvenile anadromous fish in groundwater rather than surface water, IPC has attempted to undertake reasonable steps to reduce the exposure of the juveniles to the whirling disease pathogen. Initial cost estimates on the hatchery expansion necessary to accomplish this are in the neighborhood of \$6,000,000-8,000,000. Costs associated with moving the hatchery would many times that figure.

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Moreover, IPC cannot justify moving the facility when the pump test results and IDWR analysis show no impact on other water rights. No one has come forward and disputed the test results; nor, presented evidence of impact on existing water rights.

Another concern with moving the hatchery would be the impact to the local economy and structure. The hatchery adds to the local tax base while providing services to the community. The hatchery program has provided a sport fishery to the area, thereby resurrecting a resource once thought in decline. Moving the hatchery would impact each of these benefits.

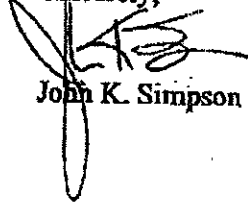
If IPC is granted a water right license for the groundwater expansion of the Pahsimeroi Hatchery, it will be the holder of the license. IDFG will continue to operate the facility owned by IPC. IPC expects that this right would be administered similar to other junior water rights. If a senior water right holder believes that it is being injured, it can request IDWR action. The specific actions and obligations of the parties are enumerated in the IDWR rules. Further questions regarding the scope of IDWR enforcement, are more properly addressed by the IDWR.

While IPC firmly believes that the data supports the granting of the water right application, IPC has informed the Protestant that it was willing to discuss the concept of mitigation specific to any impacts stemming from IPC's water withdrawal. IPC has not however, indicated that it was willing to buy anyone's property. Such action is not necessary to mitigate for the remote possibility of impacting an existing water right.

IPC continues to be interested in all relevant concerns with respect to the Pahsimeroi application. To that end IPC will not oppose anyone who desiring to intervene or provide testimony in front of the IDWR hearing officer on issues related to the approval of the application. It is our understanding that IDWR is in the process of setting a hearing date. All data or reports, which IPC has gathered relative to the Application has been provided either at the public hearing or as an attachment to this letter. Hopefully, this information will aid those individuals with on-going concerns in resolving pending issues.

IPC will forward this letter to those individuals for which we have addresses who attended the public meeting. If for some reason your office is contacted regarding the contents of the letter, please forward that communication to me. Thank you again for your efforts and please call, if you have further questions.

Sincerely,



John K. Simpson