SeaPac of Idaho, Inc. (“SeaPac”), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby submits this Reply to Order Requiring SeaPac of Idaho, Inc. to Supplement Delivery Call.

I. INTRODUCTION

On July 12, 2011, SeaPac delivered a letter to the Idaho Department of Water Resources (the “Department”) demanding that the Director require the watermaster for Water
District 130 to administer water rights as required by Idaho Code section 42-607 and pursuant to the Department’s conjunctive management rules, IDAPA 37.03.11 in order to supply SeaPac with water under its senior rights. The delivery call claimed that junior ground water pumpers are causing material injury to SeaPac’s beneficial use of its water. On July 29, 2011, the Department submitted its Order Requiring SeaPac of Idaho, Inc. to Supplement Delivery Call, asserting that SeaPac must set forth specific information required under IDAPA 37.03.11.30.01.

II.
ANALYSIS

A. IDAPA 37.03.11.30.01 is Inapplicable to Seapac’s Delivery Call.

Idaho Code section 42-602 authorizes and compels the Director to control and distribute water in a water district in accordance with the prior appropriation doctrine. IDAHO CODE ANN. § 42-602. The Director and the Department have promulgated administrative rules which govern the administration of surface and ground water rights. These are known as the Conjunctive Management Rules, which are set forth in IDAPA 37.03.11.

Pursuant to Rule 20.01 of the Conjunctive Management Rules,

01. Distribution of Water Among The Holders of Senior and Junior-Priority Rights. Holders of Senior and Junior-Priority Rights. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

IDAPA 37.03.11.20.01. Furthermore, Rule 20.04 provides the general statement and policy for water calls relating to the conjunctive management of surface and ground water resources:

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the
distribution of water under these rules. Although a call may be
denied under the futile call doctrine, these rules may require
mitigation or staged or phased curtailment of a junior priority use if
diversion and use of water by the holder of the junior priority
water right causes material injury, even though not immediately
measurable, to the holder of a senior priority surface or ground
water right in instances where the hydrologic connection may be
remote, the resource is large and no direct immediate relief would
be achieved if the junior priority water use was discontinued.

IDAPA 37.03.11.20.04. Rule 20.07 then designates the particular rules that apply to each
particular type of delivery call:

07. Sequence of Actions for Responding to Delivery Calls. Rule
30 provides procedures for responding to delivery calls within
areas having a common ground water supply that have not been
incorporated into an existing or new water district or designated as
a ground water management area. Rule 40 provides procedures for
responding to delivery calls within water districts where areas
having a common ground water supply have been incorporated
into the district or a new district has been created. Rule 41 provides
procedures for responding to delivery calls within areas that have
been designated as ground water management areas. Rule 50
designates specific known areas having a common ground water
supply within the state.

IDAPA 37.03.11.20.07. As indicated in Rule 20.07, Rule 30 provides the procedures for
responding to delivery calls only when the common ground water supply has not been
incorporated into an existing or new water district or designated as a ground water management
area. Id. Rule 30 is thus inapplicable to delivery calls made in water districts where areas having
a common ground water supply have been incorporated into the district or a new district has been
created. Id. Indeed, Rule 30.09 specifically acknowledges that Rule 30 is inapplicable:

09. Administration Pursuant to Rule 40. Upon a finding of an
area of common ground water supply and upon the incorporation
of such area into an organized water district, or the creation of a
new water district, the use of water shall be administered in
accordance with the priorities of the various water rights as
provided in Rule 40.
IDAPA 37.03.11.20.09 (emphasis added).

In this case, as SeaPac is located within the boundaries of Water District No. 130, Rule 30 is inapplicable to the current delivery call.

B. SeaPac is Located Within the Boundaries of Water District No. 130, and Therefore, Rule 40 Governs the Procedures for SeaPac’s Delivery Call.

As indicated above, Rule 40 “provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created.” IDAPA 37.03.11.20.07. As SeaPac is located within the boundaries of Water District No. 130, Rule 40 of the conjunctive management rules governs the procedures for SeaPac’s delivery call. Rule 40 provides in relevant part:

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or
b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.40.01. Notably, the rules relating to delivery calls against the holders of junior-priority ground water rights within a water district do not contain similar provisions to Rule 30 requiring supplementation of, among other things, “[t]he names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of the public records.” IDAPA 37.03.11.30.01.b. Indeed, such a regulatory scheme makes logical sense, as the creation of the water district provides the information called for by Rule 30 in instances where no water district exists. Furthermore, in the Department’s Order Granting IGWA’s Petition to Intervene, the Department itself recognizes that “IGWA’s members are all owners of water rights that divert from the Eastern Snake Plain Aquifer that have hydraulic connections with the source for Water Right Nos. 36-7072 and 36-8356 and many of its members are junior ground water users that SeaPac alleges have caused material injury to Water Right Nos. 36-7072 and 36-8356.” Consequently, there is no question that SeaPac is within the boundaries of Water District 130 and that Rule 40 governs the delivery call.

III. CONCLUSION

In SeaPac’s July 12, 2011, delivery call, SeaPac alleged that by reason of diversion by junior-priority ground water users from an area within Water District No. 130, SeaPac is suffering material injury. Therefore, SeaPac has fulfilled its delivery call requirements under Rule 40, has otherwise provided the information required by IDAPA 37.01.01, Rule 230, and is thus entitled to the prompt administration of its water rights within Water District 130 in
accordance with SeaPac’s rights. It is disconcerting that the Department would attempt to impose regulations upon SeaPac that are clearly not relevant or applicable to its claim.

IV. SUPPLEMENTATION

Nonetheless, in the interest of reaching a just and prompt adjudication of SeaPac’s prior appropriation rights, SeaPac hereby submits Exhibits A through J demonstrating the material injury to SeaPac’s beneficial use of its water rights.

DATED THIS 5th day of August, 2011.

By

Geoff M. Wardle, ISB No. 5604
Attorney for SeaPac of Idaho, Inc.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2011, I caused to be served a true copy of the foregoing REPLY TO ORDER REQUIRING SEAPAC OF IDAHO, INC. TO SUPPLEMENT DELIVERY CALL by the method indicated below, and addressed to each of the following:

Victoria Wigle
Idaho Department of Water Resources.
PO Box 83720
Boise, ID 83720-0098
Victoria.wigle@idwr.idaho.gov
Garrick.baxter@idwr.idaho.gov
Chris.bromley@idwr.idaho.gov

Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY, CHARTERED
101 S. Capitol Blvd., Ste. 300
Boise, ID 83702
cmm@racinelaw.net

Mike Creamer
GIVENS PURSLEY LLP
PO Box 2720
Boise, ID 83702
mcc@givenspursley.com

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
E-mail
Telecopy

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
E-mail
Telecopy

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
E-mail
Telecopy

Geoff M. Wardle
EXHIBIT A
### MAGIC SPRINGS WATER FLOWS

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EXHIBIT C
EXHIBIT D
EXHIBIT E
EXHIBIT F
MAGIC SPRINGS WATER FLOWS
EXHIBIT G
EXHIBIT H
EXHIBIT I
EXHIBIT J
State of Idaho  
Department of Water Resources  

WATER RIGHT LICENSE  
(Late Proof)  
September 5, 1969  

License of Water Right No. 36-7072  
Priority September 5, 1969  
Amount 148.2 cfs

THIS IS TO CERTIFY, that Pisces Investments, Inc. of Twin Falls, Idaho, has complied with the terms and conditions of Permit No. 36-7072 issued pursuant to Application for Permit dated July 17, 1969, and has submitted proof to the Department of Water Resources on May 31, 1984, that he has applied water to a beneficial use; an examination by the Department indicates that the works have a capacity for the diversion of 148.2 cfs of water from Thousand Springs tributary to Snake River, and that the permit holder has applied to a beneficial use and established a right to use water as follows:

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Subject, however, to the condition that no more than 148.2 cfs of water be diverted at any one time, and that the amount of water so diverted and to which such right is entitled and confirmed is for the purpose aforementioned and is limited to the amount which can actually be beneficially used and shall not exceed N/A acre feet per year, said waters to be diverted within the 2 points)-Lot 8 (SE SE NE NE)

Section 6, Twp BS, Rge 14E* in the County of Gooding

Description and location of place of use:

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*(2 points)-Lot 1 (NW1/4NW1/4);  
Lot 1 (NE1/4NW1/4);  
(4 points)-Lot 1 (SE1/4NW1/4); Sec. 8, Twp BS, Rge 14E  
Facility Volume = 602,600 cubic feet.