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DEPARTMENT OF
WATER RESOURCES



Scott N. Pugrud
Senior Counsel
SPugrud2@idahopower.com

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Submitted Electronically at rulesinfo@idwr.idaho.gov

Angie Hansen, Water Rights Section Manager
Idaho Department of Water Resources
322 E. Front Street, Ste. 648
Boise, Idaho 83702-7371

RE: IDAPA 37.03.08 – Water Appropriation Rules
Idaho Power Company’s Comments on Negotiated Rulemaking

Dear Ms. Hansen:

Idaho Power Company (“Idaho Power”) appreciates the opportunity to submit comments to this negotiated rulemaking. Idaho Power owns and operates 17 hydroelectric dams across the Snake River and its tributaries and holds several other water rights for its fish hatcheries, parks, properties, and other uses. Importantly, in 1984 the State of Idaho and Idaho Power entered into the Swan Falls Settlement to resolve an ongoing controversy over how to balance water needs for hydropower generation, new development and agriculture.

In 1988 the Idaho Department of Water Resources (“IDWR”) issued a policy statement that indicated in part that “[w]hen the existing hydropower rights are considered, the Upper Snake River Basin is essentially fully appropriated.” IDWR, Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area, at page 6 (Nov. 3, 1988). At that time, Idaho Power’s water rights in the mid-Snake River were placed in trust and held by the State. This gave rise to the State’s responsibility to determine whether these water rights and the reallocation of the water appropriated (Trust Water) provide a greater benefit to the people of Idaho as a source of flow for hydropower and other instream uses, or for upstream consumptive development.

In 2009 Idaho Power and the State entered into a Framework Reaffirming the Swan Falls Settlement (“2009 Framework”). The 2009 Framework reconfirmed the conditions of the 1984 Swan Falls Settlement. *See* 2009 Framework at 7. Article III of the 2009 Framework references the mutual long-term interests to cooperate regarding management of the water resources of the Snake River basin, including the development of appropriate means to enable the State to meet its obligation under the Swan Falls Settlement to take reasonable steps to insure that the average daily flows established at the Murphy Gaging Station are maintained; and developing procedures for re-evaluating term permits approved under the provisions of Idaho Code § 42-203C.

With respect to these factors and others, Idaho Power hereby submits the following comments:

General Comments:

IDWR assumes, by this rulemaking, that there is still water available for appropriation. Idaho Power believes that IDWR should first determine if and how much water is available for appropriation in the Trust Water Area. This can be accomplished through a Trust Water Review (as referenced in Article III of the 2009 Framework) to determine availability, and the public interest criteria. As noted above, in 1988 IDWR determined that the Snake River, and ground and surface water tributaries between Milner and the Murphy Gage were fully appropriated. Trust Water is not unappropriated water, and the State holds Idaho Power's water rights in trust. Likewise, the Director issued an Amended Moratorium Order on new appropriations of water on October 21, 2022 for the entire Snake River Basin, including the Trust Water Area. Because there may not be water to appropriate, this negotiated rulemaking may be unnecessary.

In the event that there is water available for appropriation, the State must abide by the terms of the Swan Falls Settlement and the 2009 Framework. In those agreements, Idaho Power agreed to place its water rights in trust. The State's obligation is to serve as the trustee and manage that trust for the beneficiaries. The Swan Falls Settlement lists the beneficiaries of the Trust as Idaho Power and the citizens of the State of Idaho. To the extent that IDWR seeks to define how to appropriate Trust Water, Idaho Power believes that the State and IDWR should use the lens that the parties agreed to in 1984.

Specific Comments:

37.03.08.10.09 – IDWR deleted the word unappropriated from the definition of permit. The reference to unappropriated should be reinserted to the definition.

37.03.08.25.1 – IDWR should reference the Amended Snake River Basin Moratorium Order issued by the Director on October 21, 2022 in this Section.

37.03.08.025.02 – Appropriations within the Trust Water Area or which appropriate Trust Water, should be evaluated under these procedures. Such proposed applications would reduce the property held in trust.

37.03.08.25.2.b – In evaluating an application, IDWR should define “significant reduction”.

37.03.08.25.2.c – The language provided by IDWR significantly limits the review of an application for the appropriation of Trust Water to the “local public interest”. This limitation fails to recognize the beneficiaries of the Trust as Idaho Power and the citizens of the State. Applicants should be required to show that the appropriation of Trust Water benefits the state economy, minimizes impacts on water available for hydropower generation, and the promotion of full economic and multiple use development of water resources. Further, the public interest evaluation needs to be consistent with Section 42-203C(2), Idaho Code.

37.03.08.030 – Why remove “Location and nature of Trust Water (Rule 30)? The historical context of Rule 30 provides a potential applicant with an understanding of a proposed Trust Water application, what sources of water are considered Trust Water or what is not considered Trust Water by rule.

37.03.08.036 – In adding this rule the rule should define what is meant by the phrase “the delay will injure others.” Who are the intended protected parties?

37.03.08.040.02.b.i – Has this notice and re-advertising been completed? If so, then Idaho Power supports removal.

37.03.08.05.c – What does the phrase “unless the Director determines otherwise” mean and how is it applied and under what authority?

37.03.08.05.e – It appears that the scope of applications evaluated under this rule was modified. What is the intent of the modifications.

37.03.08.045.02 – The criteria of a significant reduction should apply to applications in the Trust Water Area or divert Trust Water.

37.03.08.050.01 – Under this rule, the language “in compliance with the intent of agreements entered into by and between the State and holders of water rights for power purposes and the State’s obligation to continual review the reallocation of Trust Water consistent with Section 42-203, Idaho Code,” should be inserted following the phrase “other statutory duties.”

37.03.08.055. – The Director should cease approvals in areas where a moratorium order, groundwater management area order or a critical ground water management area order has been entered as well as a – c identified.

If you have any questions about Idaho Power’s comments, please contact me at spugrud2@idahopower.com or via telephone at (208)388-6454.

Sincerely,



Scott N. Pugrud
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