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June 29, 2023

VIA U.S. MAIL AND EMAIL

Angela Hansen

Idaho Department of Water Resources

P.O. Box 83720

Boise, ID 83720-0098

rulesinfo@idwr.idaho.gov

**RE: Written Comment for Negotiated Rulemaking
Final Strawman Public Comments**

Dear Ms. Hansen:

Our office writes to provide final comments for the June 29, 2023 written comment deadline related to the negotiated rulemaking process for IDAPA 37.03.08. Again, we'd like to thank the Idaho Department of Water Resources ("IDWR") for opening the negotiated rulemaking to public input.

I. Section 001-02

The revised scope of IDAPA 37.03.08 as outlined in Section 001-02 of the rules is misleading and could be better clarified regarding the rules' general application to water appropriations. Our office would suggest switching the order of the statements currently drafted to first list the general application of the rules followed by the application as it specifically applies to Swan Falls trust water. As drafted, noting first the application to Swan Falls, the scope could be misinterpreted to only apply to Swan Falls trust water rather than to appropriations generally.

Alternatively, or additionally, our office suggests retention of or an equivalent to the previous language in subsection b stating the rules are applicable "to appropriations from all sources of unappropriated public water in the state of Idaho" including "rivers, streams, lakes, and groundwater."

II. Section 010-06

Regarding the definition section, we will simply echo our prior suggestion that the definition of "beneficial use" be retained at least to the extent it references the statutory provisions that already define it. We would suggest language such as "Beneficial Use as used in these rules shall have the meaning defined by statute in Idaho Code, Sections . . ." While our

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office understands that the term is already defined by statute, a road map to the applicable statutory definitions would assist in the determination of the meaning of “beneficial use”, especially for any lay persons attempting to review and understand the rules.

We would additionally recommend Section 010 include a definition of “Swan Falls trust area” to help determine the applicability of the rules specific to water from that area.

III. Section 045-01-c-i

In the evaluation criteria for applications to appropriate water, the proposed rule states in section 045-01-c-i that the applicant must have legal access to property necessary to construct and operate the proposed project. In determining access, this subsection notes that for water diverted from or conveyed across land in state or federal ownership “there must be evidence that the application is in the process of obtaining a right-of-way.” Our office would suggest IDWR expand the language as follows: “there must be evidence that applicant has or is in the process of obtaining a right-of-way pursuant to state or federal processes and law, including but not limited to a right-of-way application or the confirmation of an R.S. 2399 right-of-way by a court of competent jurisdiction.”

IV. Conclusion

Thank you again for the opportunity to participate in the rulemaking process and to provide comments regarding the proposed rule language. If you have any questions, please contact our office at (775)786-8800.

Very truly yours,
SCHROEDER LAW OFFICES, P.C.



Caitlin Skulan
Associate Attorney