

## MINUTES

### HOUSE RESOURCES & CONSERVATION COMMITTEE

**DATE:** April 13, 2009

**TIME:** 1:30 P.M.

**PLACE:** Room 148

**MEMBERS:** Chairman Stevenson, Vice Chairman Shepherd, Representatives Wood, Bell, Barrett, Moyle, Eskridge, Raybould, Bedke, Andrus, Wood (27), Boyle, Hagedorn, Harwood, Sayler, Chavez, King, Pence

**ABSENT/  
EXCUSED:** Rep. Harwood

**GUESTS:** Dr. Robert Digrazia, Wild Sheep Foundation; Alan Schroeder, Shirts attorney; Ron Shirts, sheepman; Kurt Houston, ID Dept. of Lands; Sharon Kiefer, ID Dept. of Fish and Game; Courtney Washburn, ID Conservation League; John Robinson, ID Conservation League; Lynn Tominaga, ID Ground Water Appropriators, Inc.; Norm Semanko, ID Water Users Assoc.; Candice McHugh, ID Ground Water Assoc.; Jim Unsworth, ID Dept. of Fish & Game; Zach Hauge, Capitol West; Jim Tucker, Idaho Power; Frank Shirts, sheepman; Colby Cameron, Sullivan & Reberger; Clive Strong, Attorney General's Office; Nate Helm, Sportsmen for Fish and Wildlife; Stan Boyd, ID Wool Growers Assoc.

Chairman Stevenson called the meeting to order at 1:30 P.M. and a silent roll was taken.

**MOTION:** Rep. Pence made a motion to approve the minutes from the April 9<sup>th</sup>, 2009 meeting as submitted. On a voice vote, the motion carried.

Chairman Stevenson announced that the committee will discuss the three water bills that were discussed in the joint meeting held on April 1<sup>st</sup>, 2009. He further announced that a vote will be held individually on each bill.

**S 1169:** **Mr. Lynn Tominaga**, representing the Idaho Ground Waters Appropriators, Inc. addressed the Committee. He explained that at the joint hearing held on April 1<sup>st</sup>, 2009, in which the water agreement between Idaho Power and the State was discussed. He further explained that the Idaho Ground Waters Appropriators have no problem with **S 1167** and **S 1185** but they do have concerns with **S 1169**. He explained that the group has a concern with the Memorandum of Agreement referenced in **S 1169**. He reported that the group is in the process of working with the Attorney General's Office and Idaho Power to resolve their concerns. He provided copies of a letter from IGWA to the Attorney General's Office and Idaho Power addressing these concerns. (See copy of letter). **Mr. Tominaga** explained that IGWA does not want to hold up this legislation and the potential issues of concern would be 5 to 15 years down the road.

**Candice McHugh**, attorney for the Idaho Ground Water Appropriators, Inc. addressed the Committee. She explained that IGWA will continue to enter into a dialogue with the State and Idaho Power to address their concerns. She further explained that IGWA does not oppose **S 1169**.

**Clive Strong**, representing the Attorney General's Office addressed the Committee. He explained that the proposed legislation does not modify or change original Swan Falls agreement. He further explained that the proposed 2009 Reaffirmation Settlement will resolve three issues of the original Swan Falls Settlement. These issues are 1) consistent with Idaho Code § 42-203B no portion of the waters of the Snake River of surface or ground water tributary to the Snake River upstream from Milner Dam are to be considered in the administration of hydropower water rights below Milner Dame, 2) it will reaffirm the Swan Falls Agreement by decreeing the hydropower water rights for Idaho Power's facilities between the Milner Dam and the Murphy Gage consistent with the Court's decision dated April 18<sup>th</sup>, 2008; and 3) it reaffirms that the original Swan Falls Settlement does not preclude use of water for aquifer recharge.

**Mr. Strong** discussed three aspects of the Memorandum of Agreement in the Reaffirmation Settlement. The first aspect is that the MOA acknowledges that through the original Swan Falls Settlement, the State and Idaho Power have a shared interest in ensuring that the Swan Falls minimum flows are maintained and recognizes that it is in their mutual interest to work cooperatively to explore and develop a managed recharge program that achieves, to the extent possible, benefits for all uses including hydropower. The second aspect is that the Memorandum acknowledges that the Idaho Water Resource Board adopted the Comprehensive Aquifer Management Plan (CAMP) and that the CAMP establishes a long term hydrologic target for managed recharge from 150,000 to 250,000 acre feed on an average annual basis and that any amendment of this long term hydrologic target shall constitute a change in the State Water Plan. The third aspect provides that the Governor and the Idaho Water Resource Board will cooperate with and inform the Public Utilities Commission of any direct effects of managed recharge on hydropower generation capacity. He explained that this provision does not divest the Public Utilities Commission of its authority to independently evaluate Idaho Power's request. He further explained that the Memorandum does not require the Governor or the Board to take any affirmative position on whether a specific request by Idaho Power is appropriate or necessary or on how any resulting rate impact should be allocated.

**Mr. Strong** explained that **S 1169** reconfirms that Idaho Power by reaffirming the 1984 Swan Falls Settlement is entitled to the same protection as contained in the uncodified provisions in Chapter 14 of the 1985 Idaho Session law. He further explained that the bill is not intended to create any new or additional benefits for Idaho Power that do not already exist in Idaho State law. The bill does not deprive the Public Utilities Commission of authority to independently determine the necessity or reasonableness of any rate request by Idaho Power.

**Mr. Strong** explained that the State and Idaho Power will work through the concerns raised by the Idaho Ground Water Appropriators Association. He further explained that the proposed settlement is fair and reasonable and is good sound water policy as referenced in the summary. (See attached summary)

**Mr. James Tucker**, representing Idaho Power addressed the Committee. He explained that Idaho Power collaborated with the State on the summary of the Swan Falls Reaffirmation Settlement. He further explained that he had not seen the letter from the Idaho Ground Water Appropriators Association. He reported that he concurred with **Mr. Strong** and stood behind the summary.

In response to a question regarding the effect of Paragraph 5 of the Memorandum of Agreement, **Mr. Strong** explained that Paragraph 5 of the Memorandum of Agreement provides that the Governor and the Idaho Water Resource Board will cooperate with and inform the Public Utilities Commission of any direct effects of managed recharge on hydropower generation capacity. This provision does not divest the Public Utilities Commission of its authority to independently evaluate Idaho Power's request. Rather, paragraph 5 is merely an extension of the recognition under the original Swan Falls Settlement and this Reaffirmation that the State should make informed decisions with regard to water management in an effort to enhance and manage the water supply in the Snake River for the benefit of agriculture, hydropower and other beneficial uses. Consistent with that recognition, Paragraph 5 provides that upon making such an informed decision with regard to the implementation of managed recharge, the Governor and the Board will so inform the Public Utilities Commission of any "direct impacts" they determine may arise from implementation of managed recharge and acknowledge that such impacts may have an effect on the Company's ability to provide electrical energy. Paragraph 5 of the Memorandum does not require the Governor or the Board to take any affirmative position on whether a specific request by the Company is appropriate or necessary or on how any resulting rate impact should be allocated.

Rep. Raybould discussed the rental pool in the water supply bank in District 1. He explained that irrigators in Water District 1 can put a portion or allotment of water in the rental pool for others to use. He further explained that the Water Resource Board has the authority to create the rental pool and has set up priorities as to who is eligible to rent water from this pool. Rules have been set up by the Rental Pool Committee of 9 members. He explained that the Water Resource Board has to put their stamp of approval on the rules. He explained that there are severe penalties for renting water below the Milner Dam. He explained the priorities and how they are set up. These priorities include; first priorities are rentals by participants whose storage was impacted by the prior year's rental; second are rentals by participants for agriculture and uses up to the amount of their space; third are rentals by participants for any use above the Milner Dam; fourth are rentals by non space owners above the Milner Dam; and fifth are rentals for proposed users below the Milner Dam up to 50,000 acre feet per year.

**MOTION:** Rep. Raybould made a **Motion to send S 1167 to the Floor with a DO PASS recommendation. On a voice vote, the motion carried. Rep. Pence will sponsor the bill on the House Floor.**

**MOTION:** Rep. Raybould made a **Motion to send S 1169 to the Floor with a DO PASS recommendation. On a voice vote, the motion carried. Rep. Raybould will sponsor the bill on the House Floor.**

**MOTION:** Rep. Raybould made a **Motion to send S 1185 to the Floor with a DO PASS recommendation. On a voice vote, the motion carried. Rep. Wood (27) will sponsor the bill on the House Floor.**

**S 1175a:** **Senator Siddoway** presented this bill to the Committee. He explained that the purpose of this legislation is to make three changes in Idaho Code to clarify actions that shall take place before the transplant or relocation may take place. It provides for certain agreements provides that domestic sheep and livestock operators will be held harmless from adverse impacts by the State of Idaho, provides for control of certain bighorn by the Director of the Idaho Fish and Game and that the shared veterinarian program between the Idaho Department of Agriculture and the Idaho Department of Fish and Game be dissolved.

**Sen. Siddoway** explained that the proposed legislation is trying to shield private industries and trying to protect people by guaranteeing a separation.

He discussed the new language in the bill which states that "It is the policy of the State of Idaho that existing sheep or livestock operations in the area of any bighorn sheep transplanted or relocated are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted."

**Sen. Siddoway** also explained that the proposed legislation states that should any bighorn sheep come in contact with domestic sheep the director of the Idaho Fish and Game shall relocate or control the bighorn sheep to ensure that appropriate separation is maintained.

The proposed legislation also deletes language regarding the dual veterinarian for the Department of Agriculture and the Department of Fish and Game. **Sen. Siddoway** explained that each Department has their own veterinarian and has asked for this deletion.

**Sen. Siddoway** provided copies of a pamphlet with various facts about the bighorn sheep in the State. He explained that there were 87 strains of diseases in the bighorn population in Hell's Canyon from 1988-2006. The pamphlet also outlined the distribution of bighorn sheep and public land grazing by domestic sheep in the state. Also included in the pamphlet was a letter which clarified that the bighorn die off in Hell's Canyon was not from domesticated sheep.

**Sen. Siddoway** also explained that according to Marie Bulgin, a University of Idaho veterinarian, no scientist has found a single instance of pasteurella moving from domestic sheep to bighorn in 19 years of research.

**Sen. Siddoway** also provided copies of a letter to the Idaho Wool Growers Association dated January 16, 1997 from the U.S. Forest Service. He explained that the intent of the letter was to hold domestic sheep operations harmless from any risk associated with the introduction of bighorn sheep into the Hell's Canyon complex. **Sen. Siddoway** further explained that one of the signers of the letter, Robert M. Richmond of the U.S. Forest Service explained that he was authorized to sign the letter on behalf of the Nez Perce and Payette National forest and did so knowing that the letter and its "hold harmless" language was intended to apply to those national forests.

In response to a question regarding "appropriate separation", **Sen. Siddoway** explained that the Idaho Department of Fish and Game and the U.S. Forest Service have come together as to how to keep the animals separated. He further explained that there are many strategies to use. He also explained that the Governor has set up a task force to deal with this issue.

In response to a question regarding the possible fiscal impact on the Department of Fish and Game to separate the bighorns, **Sen. Siddoway** explained that this is unknown and he did not know of any instance of domestic and bighorn sheep mixing.

**Sen. Siddoway** explained that there have not been any bighorn sheep seen on the east side of the Snake River in the last 9 years. He also explained that with the passage of the legislation, it is hoped that the U.S. Forest Service will try separation strategies.

**Sen. Siddoway** explained that there was opposition to bill in the Senate. He stated that the bill passed on a party line vote and those opposed felt that the federal government has supremacy over the state. He also reported that the sportsmen organizations were not involved in putting this legislation together.

**Dr. Robert Digrazia**, a dentist in Boise and past national president of the Sheep Foundation, **spoke in opposition to SB 1175a**. He recommended that this issue should be discussed in the Governor's Task Force. He reported that nationally there has been a separation and an increase in the number of wild sheep. He explained that the wild sheep in Hells Canyon provides an economic boost to city of Lewiston and the economic impact is immense to the state. He also reported that a sheep tag for a nonresident costs \$1,500. He also explained that the 1997 National Forest Service agreement was never signed by the Forest Service Chief. He reported that he would like to see this issue solved in a cooperative way and the Governor's process is a valid means of addressing this issue.

In response to a question as to what part of the proposed legislation he objects to, **Dr. Digrazia** explained that he is against the disease transmission part of the bill.

**Sharon Kiefer**, assistant director of the Idaho Department of Fish and Game **spoke in opposition to S 1175a**. She explained that IDFG has not contributed to **S 1175a**. She further explained that the Fish and Game Commission adopted an "Interim Strategy for Management Separation Between Bighorn Sheep and Domestic Sheep in Idaho." The interim strategy directs the Department to implement management protocols creating temporal and spatial separation of bighorn and domestic sheep to manage and reduce risk to each. She explained that it is the Department's view is that neither the interim strategy, **S 1175a**, or the Governor's task force will prevent current federal litigation and potential difficult outcomes. She explained that the mandate contained in the bill regarding modifying the duties and powers of the Director regarding bighorn sheep management is more rigid than the current interim separation strategy. She further explained that close proximity is not defined and a timeline for reporting the close proximity is also not defined. She explained that a separation strategy can only be "managed" and not "guaranteed" as outlined in the proposed legislation. She concluded that the Department will look to their interim strategy, law, and the work of the Governor's Advisory group to continue to address the difficult management issues and the future framework to ensure the viability of both bighorn sheep and domestic sheep in Idaho.

**Ms. Kiefer** explained that by making it a law requiring the Director to make a finding without scientific information would be open for challenge.

**Ron Shirts**, a sheep man from Weiser **spoke in support of S 1175a**. He explained that he had trust in government agencies. He also explained that he has herded sheep from young age and is proud of the business that he and his family have built. He further explained that he is in danger of losing his business. He reported that he put his trust in the 1997 agreement and has not been offered an alternative allotment.

When asked if he could wait for recommendations from the Governor's advisory committee, **Mr. Shirts** explained that he is treading water now and his life line is about to be cut.

**John Robinson**, public lands director of the Idaho Conservation League **spoke in opposition to S 1175a**. He explained that his organization does not oppose the veterinarian issue in the proposed legislation. He further explained that the future of Idaho depends on the viability of the bighorn and domestic sheep. He explained that the ICL is concerned that this bill would hamper IDFG to manage the sheep population. He further explained that by focusing on this issue, the state is missing the big picture. He reported that this is only part of the story and there is a need to look at the whole measure. He explained that if bighorns continue to decline they could become endangered. He further explained that the Governor's Task Force will give the guidelines needed to avoid this situation. He reported that the task force is having their third meeting this week. He explained that the bill is a step back to address this issue.

**Mr. Robinson** explained that he does not speak for the Forest Service but does offer a technical report. He explained that the risk of potential disease must be addressed in the policy of separation. He further explained that the Forest Service looked at areas of conflict and the best ways to provide for bighorn sheep is to separate them.

When asked who serves on the Governor's Advisory group, **Mr. Robinson** explained that others in the group include the Shirts brothers, the Woolgrowers Association, U.S. Department of Agriculture, Department of Fish and Game, the tribes, representatives from the Forest Service, the Bureau of Land Management, river guides, hunting guides and representatives from sportsmen groups. He explained that it is a comprehensive group and efforts do take time.

**Mr. Robinson** explained that the League would like to work with the ranchers to work out concerns. He also explained that the bill would remove some of the options down the road and create a false sense of security. He explained that the bill will not have the affect on the ground that is desired.

In response to a question regarding why the federal government is reneging on the agreement, **Mr. Robinson** explained that the League represents 9,000 members who care about Idaho's landscape and wildlife and he was present to recommend that this policy will not accomplish these goals.

It was commented that government agencies are looking out for themselves and they should be a representation of other people at the table who have their livelihood in danger. **Mr. Robinson** explained that there is a need to look at the big picture and sportsmen, outfitters and guides are trying to find a way for everyone to co-exist.

**Mr. Robinson** reported that the Forest Service is going through all of the comments on the Payette National Forest and some type of significant changes are going to happen.

In response to a question regarding the 1997 agreement and why it should be voided, **Mr. Robinson** explained that the ICL was not a party to that agreement and the agreement never went through a public process. He explained that there is an effort underway to try and avoid this in the future. He further explained that the goal is to try to set up a framework with sheep men and the government to try to address these issues before they come up. He also explained that this bill would not affect the Forest Service agreement and also would not affect the Shirt's problem.

Rep. Bedke commented that the domestic sheep issue is a surrogate issue for a larger agenda. He further commented that the Forest Service is doing nothing to other transmitters of disease, just the domestic sheep.

He also suggested that the Legislature do something to keep domestic sheep herders in business. **Mr. Robinson** responded that there should be careful discussions with all stakeholders. He further commented that the best thing to do to is to bring all the stakeholders together with the goal to preserve domestic sheep and bighorn sheep together.

**Mr. Robinson** reported that the League supports the full suite of native animals in Idaho.

In response to a question regarding if there is language in the bill that would preclude the successful collaboration of the Governor's Task Force, **Mr. Robinson** explained that with the amended bill, he is concerned that the Department of Fish and Game will have fewer tools available to them and not focus on better proactive measures.

**Nate Helm**, representing the Sportsmen for Fish and Wildlife addressed the Committee. He explained that his organization has no interest in seeing harm to Shirt family or to the 1997 agreement. He further explained that his organization has the same concerns as the IDFG. He also explained that his organization has not taken an official position on this bill. He expressed his concern that passage of this legislation would create a false sense of hope.

**Stan Boyd**, representing the Idaho Woolgrowers Association **spoke in support of S 1175a**. He explained that this legislation puts in place a separation policy for the state.

In response to a question regarding what kind of separation, **Mr. Boyd** explained that it would be worked out on a case by case basis. He also explained that domestic sheep allotments are governed by annual instruction and are grazed in a rotation fashion.

In response to a question regarding bighorn sheep in the Salmon River area, **Jim Unsworth** from the Department of Fish and Game explained that these sheep have always been there, but they do have some disease issues.

**Mr. Boyd** explained that all parties involved will work together, but the problem is the U.S. Forest Service refusing to listen to what the state has to say. He reported that the state has 9% of sheep that was here 20 years ago and he did not know what is causing the die off. In response to concerns raised by the Department of Fish and Game, **Mr. Boyd** explained that the cost is going to be there and there should be a policy in place to show federal government that the state has separation.

**Mr. Boyd** explained that proposed legislation just puts into code what is in the 1997 agreement.

**Alan Schroeder**, attorney for Shirts brothers, **spoke in support of S 1175a**. He explained that other domestic sheep owners are at risk in addition to Shirts brothers. He further explained that it is the present intent of the Forest Service to close these allotments and eliminate the domestic sheep livestock in Payette National Forest. He also explained that there is a need to reinforce the 1997 agreement.

**Senator Siddoway** concluded that the domestic sheep industry brings more money into the state than any of the tags sold by the Department of Fish and Game and environmental groups have shut down many industries in this state.

Rep. Chavez commented that there are bighorn sheep in her area and they are important to her area economically. She further commented that she is not unsympathetic to Shirts brothers but has concerns about what it is going to cost the Department of Fish and Game.

**MOTION:**

Rep. JoAn Wood made a **Motion to send SB 1175a to the Floor with a DO PASS recommendation**. In speaking to her Motion, Rep. Wood (35) explained that the state cannot afford to lose another industry.

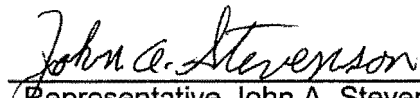
In the discussion on the Motion, the following comments were made; sheep herders have to adjust as others have done elsewhere, the real issue is about private property rights, this legislation is designed for the state of Idaho to support a private contract with the citizens and the 1997 was a good faith agreement and it should be honored.

**ROLL CALL  
VOTE:**

A roll call was requested on the Motion to send **S 1175a** to the Floor with a DO PASS recommendation. **The motion passed, 14-3-1. Voting in favor** of the Motion were Representatives Shepherd, Wood (35), Bell, Barrett, Moyle, Eskridge, Raybould, Bedke, Andrus, Wood (27), Boyle, Hagedorn, Saylor and Chairman Stevenson. **Voting in opposition** were Representatives Chavez, King and Pence. Rep. Hardwood was absent. **Rep. Boyle will sponsor the bill on the House Floor.**

**ADJOURN:**

There being no further business to be brought before the Committee, Chairman Stevenson adjourned the meeting at 4:30 P.M.

  
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Representative John A. Stevenson  
Chairman

  
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Claudia Howell  
Secretary

**SUMMARY  
OF  
SWAN FALLS REAFFIRMATION SETTLEMENT**

**Prepared by State of Idaho and Idaho Power Company**

The 2009 Framework Reaffirming the Swan Falls Settlement (2009 Framework) sets forth the conditions for settling the current litigation. The terms "Framework" and "Reaffirming" are used intentionally to connote two key points. First, the 2009 Framework is a road map for reaching settlement rather than a final settlement document. Article II of the 2009 Framework describes the executive, legislative and judicial actions that collectively will constitute the settlement of the pending litigation and lays the foundation for cooperative resolution of other important issues. Second, the parties intend the proposed 2009 Reaffirmation Settlement to reconfirm rather than change any of the terms and conditions of the 1984 Swan Falls Settlement. This intent is reflected in the following language from the Framework:

The parties through this Framework and its Exhibits reaffirm all aspects of the Swan Falls Settlement. This Framework and its Exhibits are consistent with the Swan Falls Settlement and clarify the original intent of the Swan Falls Settlement. Nothing in this Framework or its Exhibits changes, modifies, amends or alters any aspect of the Swan Falls Settlement.

2009 Framework Reaffirming the Swan Falls Settlement at 7. Thus, the parties intend that the 2009 Framework and its Exhibits will be interpreted in harmony with the 1984 Swan Falls Settlement.

The proposed 2009 Reaffirmation Settlement will resolve three issues regarding the interpretation of the 1984 Swan Falls Settlement. First, consistent with I.C. 42-203B, it will reaffirm that for the purposes of the determination and administration of rights to the use of the waters of the Snake River or its tributaries downstream from Milner dam, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam are to be considered. As such, the hydropower water rights for the Idaho Power Company facilities located on the reach of the Snake River between Milner Dam and the Murphy Gage carry no entitlement to demand the release of natural flow past Milner Dam or to seek administration of the water rights diverting the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam. Second, it will reaffirm the Swan Falls Agreement by decreeing the hydropower water rights for Idaho Power Company's facilities between the Milner Dam and the Murphy Gage consistent with the SRBA District Court's Memorandum Decision and Order on Cross-Motions for Summary Judgment in Consolidated Subcase 00-92023(92-(23) dated April 18, 2008. Finally, it will reaffirm that the 1984 Swan Falls Settlement does not preclude use of water for aquifer recharge.

There are four Articles in the 2009 Framework Reaffirming the Swan Falls Settlement – each has a separate purpose.

Article I provides general background principles from the 1984 Swan Fall Settlement drawn from the 1984 Swan Falls Agreement, the 1984 Swan Falls Framework and the 1985 Idaho Water Resource Board resolution approving amendments to the Idaho State Water Plan that are relevant to the issues being resolved through the 2009 Reaffirmation Settlement. The fact that the 2009 Framework does not recite all of the provisions of the 1984 Swan Falls Settlement does not diminish the continuing importance or effect of other provisions of the 1984 Settlement. Rather, the 2009 Framework expressly reaffirms all aspects of the 1984 Swan Falls Settlement and does not alter or revise in any way the statutory provisions adopted as part of that Settlement, including but not limited to those provisions applicable to agriculture and the family farming tradition in Idaho.

Article II, as noted above, is the road map for resolving the current litigation. It provides for entry of partial decrees for the hydropower water rights at issue and for entry of an order dismissing Idaho Power Company's complaint, but only if the proposed legislation and Memorandum of Agreement are completed to the satisfaction of the State and Idaho Power Company. Assuming these actions are taken and the SRBA District Court enters partial decrees and a dismissal order acceptable to the State, Idaho Power Company and the other parties to Subcase 00-92023, the current litigation will be resolved. Otherwise, either the State or Idaho Power Company has the option of voiding the Framework and the proposed settlement and continuing the litigation.

Article III identifies certain issues that will be the subject of future discussions between the State, Idaho Power Company and other affected interests. The parties intend such discussions to be inclusive rather than exclusive. Moreover, nothing in Article III is intended to define the rights or obligations of any person, reinterpret the Swan Falls Settlement, or prejudice any party affected by such issues. For example, the reference to discussions regarding the establishment of an effective marketing system does not require any action by, or impose any obligations on, any person or entity. It is a commitment to have a good faith discussion of the issues associated with the water marketing issue and does not presuppose any particular outcome from such discussions. Likewise, the discussions regarding an acceptable program to monitor and measure flows at the Murphy Gage and procedures for re-evaluating term permits approved under Idaho Code § 42-203C do not contemplate any changes to the Swan Falls Settlement. Rather, these two issues, like the others identified in Article III, are illustrative of issues that warrant further discussion to determine whether an accord can be reached. Again, they do not presuppose any particular outcome from such discussions.

Article IV of the 2009 Framework contains general provisions relating to the intent and effect of the Settlement. This Article begins with the

confirmation recited above that the Framework and its Exhibits reaffirm the Swan Falls Settlement and neither modify, amend or alter any aspect of the Swan Falls Settlement. The remaining provisions of the Article are generally recitations of provisions of the Swan Falls Settlement, including the recognition that "upon implementation of the conditions contained in Article II of this Framework, any subsequent order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of the Framework or the Swan Falls Settlement."

*Id.* at 8; and that "the Framework does not confer or create any additional vested, compensable or enforceable rights or interest of any kind whatsoever in any legislative enactments passed pursuant to this Framework beyond those rights otherwise available under applicable law." *Id.* at 8.

The proposed Memorandum of Agreement between the Idaho Water Resource Board, the Governor and Idaho Power Company sets forth an understanding between the parties regarding certain protocols for implementation of managed recharge. Like the 2009 Framework, the preamble language in the Memorandum is drawn primarily from the 1984 Swan Falls Agreement, the 1984 Swan Falls Framework and the 1985 State Water Plan amendments. Again, the recitation of some but not all of the provisions of these documents is not intended to diminish or alter in any way the importance, or effect, of other provisions of the 1984 Swan Falls Settlement. Rather, the provisions cited are intended to provide context for the substantive aspects of the Memorandum of Agreement and relating that Agreement to the provisions of the 1984 Swan Falls Settlement that are being clarified by the 2009 Settlement.

Three aspects of the Memorandum of Agreement warrant discussion. First, the Memorandum acknowledges that through the 1984 Swan Falls Settlement the State and the Company have a shared interest in ensuring that the Swan Falls minimum flows are maintained and recognizes that it is in their mutual interest to work cooperatively to explore and develop a managed recharge program that achieves to the extent possible benefits for all uses including hydropower. In this context, the Memorandum of Agreement memorializes Idaho Power Company's right to participate in the public process before the Board for evaluating and approving managed recharge as provided by state law and present information relative to any issues associated with a managed recharged proposal.

Second, the Memorandum acknowledges that the Idaho Water Resource Board adopted the Comprehensive Aquifer Management Plan (CAMP) and that the CAMP establishes a long-term hydrologic target for managed recharge from 150,000 to 250,000 acre-feet on an average annual basis and that any amendment of this long-term hydrologic target shall constitute a change in the State Water Plan. The Memorandum memorializes the Board's intent to implement managed recharge in phases and sets forth a protocol for phasing in managed recharge consistent with the adaptive management provisions of the CAMP. It further recognizes that the Board has discretion on how to implement the components of CAMP but provides the Board will seek legislative approval if it seeks to increase the CAMP Phase I recharge target of 100,000 acre-feet by

more than 75,000 acre-feet prior to January 1, 2019. Nothing in the Memorandum of Agreement, however, precludes the Board or the Legislature from changing how managed recharge is to be implemented provided they do so in accordance with state law.

Third, paragraph 5 of the Memorandum of Agreement provides that the Governor and the Idaho Water Resource Board will cooperate with and inform the Public Utilities Commission of any direct effects of managed recharge on hydropower generation capacity. This provision does not divest the Public Utilities Commission of its authority to independently evaluate Idaho Power's request. Rather, paragraph 5 is merely an extension of the recognition under the original Swan Falls Settlement and this Reaffirmation that the State should make informed decisions with regard to water management in an effort to enhance and manage the water supply in the Snake River for the benefit of agriculture, hydropower and other beneficial uses. Consistent with that recognition, Paragraph 5 provides that upon making such an informed decision with regard to the implementation of managed recharge, the Governor and the Board will so inform the Public Utilities Commission of any "direct impacts" they determine may arise from implementation of managed recharge and acknowledge that such impacts may have an effect on the Company's ability to provide electrical energy. Paragraph 5 of the Memorandum does not require the Governor or the Board to take any affirmative position on whether a specific request by the Company is appropriate or necessary or on how any resulting rate impact should be allocated.

Senate Bill 1167 proposes that managed recharge projects be subject to the same review process applicable to storage reservoirs under Idaho Code § 42-1737 because managed recharge may have effects on surface flows similar to those of a storage reservoir. The bill does not apply to incidental recharge.

Senate Bill 1185 clarifies that the Swan Falls Agreement does not preclude use of water for recharge by removing the reference to the Agreement in Idaho Code § 42-234 and repealing Idaho Code § 42-4201A. In addition, this bill would consolidate state recharge policy in Idaho Code § 42-234. The parties anticipate amending this bill or submitting a substitute bill that will clarify the intent of subsection 3 of Senate Bill 1168.

Senate Bill 1169 reconfirms that the Company by reaffirming the 1984 Swan Falls Settlement is entitled to the same protection as contained in the uncodified provisions set forth in Chapter 14 of the 1985 Idaho Session Law at page 20-21. Because this Reaffirmation Settlement is an extension of the original Swan Falls Settlement, this bill is not intended to create any new or additional benefits for Idaho Power Company that do not already exist as a result of Chapter 14 of the 1985 Idaho Session Laws, it merely clarifies that the same protections afforded to Idaho Power by the 1985 legislation are extended to this reaffirmation settlement. This bill does not deprive the Public Utilities Commission of authority to independently determine the necessity or reasonableness of any of any rate request by Idaho Power Company.

The form of the partial decrees of the hydropower water rights are attached as Exhibit 6 to the 2009 Framework. The language of these decrees is consistent with the resolution of the three issues discussed above. In addition, the decrees recognized the

subordination provisions contained in the 1984 Swan Falls Agreement and the 1180 Contract executed as part of the 1984 Swan Falls Settlement.

In summary, the State and Idaho Power Company believe the terms of the proposed 2009 Reaffirmation Settlement are entirely consistent with the 1984 Swan Falls Settlement and provide an opportunity for the parties to set aside their differences and work in a cooperative manner to resolve other Snake River water management issues.

# IDAHO GROUND WATER APPROPRIATORS, INC.

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Lynn Tominaga  
Executive Director,  
P.O. Box 2624  
Boise, Idaho 83701-2624  
Phone: 208.381-0294

**GWD Members:**

Aberdeen American Falls GWD  
Bingham GWD  
Bonneville-Jefferson GWD  
Madison GWD  
Magic Valley GWD  
North Snake GWD  
South West ID  
Clark Jefferson GWD  
Goose Creek ID  
Fremont Madison ID

**City Members:**

City of American Falls  
City of Blackfoot  
City of Chubbuck  
City of Heyburn  
City of Jerome  
City of Paul

City of Rupert

**Business Members:**

Busch Agricultural  
Jerome Cheese  
United Water of Idaho

Jim Tucker  
Idaho Power Company  
P.O. Box 70  
Boise, Idaho 83707

Clive Strong  
Office of the Attorney General  
P.O. Box 44449  
Boise, Idaho 83720-4449

Re: Proposed settlement of SRBA Subcase 00-92023 (92-23)

Dear Jim & Clive:

As counsel for Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, North Snake Ground Water District, Magic Valley Ground Water District, Aberdeen-Springfield Canal Company, City of Pocatello, Gary and Helen Demoss, Egin Bench Canals, Fremont-Madison Irrigation District, Idaho Irrigation District, New Sweden Irrigation District, and The United Canal Company—all of whom are parties to SRBA Subcase 00-92023 (a/k/a the "92-23 case")—we are writing to express our clients' concerns with the settlement proposed by Idaho Power and the State of Idaho.

As you know, Idaho Power and the State entered into the "Framework Reaffirming the Swan Falls Settlement" without seeking input from the rest of the parties to the 92-23 case. In that regard, Presiding Judge Melanson's March 27, 2009, order regarding pending rulings on summary judgment motions specifically recognizes and confirms that the proposed settlement is currently between the State of Idaho and Idaho Power, but not yet the other parties to the 92-23 case. While our clients are understandably disappointed that they were not given an opportunity to provide meaningful and timely input, they appreciate your efforts

Privileged and Confidential Client Work Product

This is apparent in the proposed Partial Decrees which create an entitlement in Idaho Power to acquire water above Milner for hydropower use below Milner, which did not exist in the 1984 settlement:

*1984 Agreement, ¶7E: Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of the Company facilities.*

*2009 Partial Decrees, ¶ 1: Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.*

While our clients are not opposed to Idaho Power's use of water in amounts that exceed the minimum flows at Milner and Murphy, the comprehensive plan established in 1984 inherently requires that the use of water for hydropower, in excess of the minimum flows, is inferior to the use of water for depletionary purposes until such time as the minimum flows are reached.

SOLUTIONS: (1) Add the following language to the Partial Decrees: "Idaho Power Company's right to purchase, lease, own or otherwise acquire water upstream from its power plants under this condition shall be inferior to the right of other water users to purchase, lease, own or otherwise acquire water for non-hydropower purposes." Alternatively, the Partial Decrees could recite the priorities provided for in the Water District 1 rental rules. (2) Add language to the Memorandum of Agreement stating that the comprehensive plan established in 1984 was that the Snake River Watershed would be managed based upon the minimum flows at Milner and Murphy. (3) By stipulation, Idaho Power and the State agree not to participate in SRBA Subcase Numbers 92-2GP and 02-200.

3. **Lack of Preference for Ag Water Use.** The 1984 settlement provides that agricultural water use will be given priority in the allocation of undeveloped water supplies. In contrast, the 92-23 settlement infers that all water uses will be treated equal.

SOLUTION. In addition to reciting the central purpose of the 92-23 to secure water for further consumptive development of the ESPA, the 92-23 settlement should reaffirm that agricultural water use will be given priority.

4. **Accounting for Minimum Flow at Murphy Gauge.** Neither the 1984 settlement nor the 2009 settlement clearly state the effect of Bureau of Reclamation flows, unused spill past Milner, or other water acquired by Idaho Power upon the accounting of minimum flows at Murphy Gauge.

SOLUTION. Consistent with water delivery practices since 1984, the 2009 settlement needs to explain that Bureau of Reclamation flows, unused spill past Milner, or water otherwise acquired by Idaho Power has no effect on accounting for the minimum flow at Murphy Gauge.

April 13, 2009

*Attorneys for the Ground Water  
Districts and Aberdeen-Springfield  
Canal Company*

**BEEMAN & ASSOCIATES**

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Jo Beeman  
*Attorneys for the City of Pocatello and  
Gary and Helen Demoss*

**RIGBY, THATCHER, ANDRUS &  
RIGBY**

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Jerry Rigby  
*Attorneys for Egin Bench Canals,  
Fremont-Madison Irrigation District,  
Idaho Irrigation District, New Sweden  
Irrigation District, and The United  
Canal Company*

Date: April 13, 2009Bill #: 51175 a

## RESOURCES &amp; CONSERVATION COMMITTEE

## ROLL CALL VOTE

ORIGINAL MOTION				SUBSTITUTE MOTION				AMENDED SUBSTITUTE MOTION			
MOTION: <u>DO PASS</u>				MOTION: _____				MOTION: _____			
MOVED: <u>Rep Wood (35)</u>				MOVED: _____				MOVED: _____			
	AYE	NAY	A/E		AYE	NAY	A/E		AYE	NAY	A/E
Vice Chair Paul Shepherd	✓			Vice Chair Paul Shepherd				Vice Chair Paul Shepherd			
Rep JoAn Wood	✓			Rep JoAn Wood				Rep JoAn Wood			
Rep Maxine Bell	✓			Rep Maxine Bell				Rep Maxine Bell			
Rep Lenore Barrett	✓			Rep Lenore Barrett				Rep Lenore Barrett			
Rep Mike Moyle	✓			Rep Mike Moyle				Rep Mike Moyle			
Rep George Eskridge	✓			Rep George Eskridge				Rep George Eskridge			
Rep Dell Raybould	✓			Rep Dell Raybould				Rep Dell Raybould			
Rep Scott Bedke	✓			Rep Scott Bedke				Rep Scott Bedke			
Rep Ken Andrus	✓			Rep Ken Andrus				Rep Ken Andrus			
Rep Fred Wood	✓			Rep Fred Wood				Rep Fred Wood			
Rep Judy Boyle	✓			Rep Judy Boyle				Rep Judy Boyle			
Rep Marv Hagedorn	✓			Rep Marv Hagedorn				Rep Marv Hagedorn			
Rep Dick Harwood			✓	Rep Dick Harwood				Rep Dick Harwood			
Rep George Sayler	✓			Rep George Sayler				Rep George Sayler			
Rep Liz Chavez		✓		Rep Liz Chavez				Rep Liz Chavez			
Rep Phylis King		✓		Rep Phylis King				Rep Phylis King			
Rep Donna Pence		✓		Rep Donna Pence				Rep Donna Pence			
Chair John A. Stevenson	✓			Chair John A. Stevenson				Chair John A. Stevenson			
TOTALS	14	3	1	TOTALS				TOTALS			

MOTION PASSED ✓

MOTION FAILED \_\_\_\_\_

MOTION PASSED \_\_\_\_\_

MOTION FAILED \_\_\_\_\_

MOTION PASSED \_\_\_\_\_

MOTION FAILED \_\_\_\_\_

PLEASE PRINT Name	Phone	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify	Pro	Con
Dr Robert D. Grazia	284-9060	Dentist	Wild Sheep Fnd.	1175	X		X
ALAN SCHROEDER	384-1627	LAWYER	SHIRTS	1175a	X	X	
Ron Shirts	549-0391	Sheepman	Self	1175a	X	X	
Kurt Houston	334-0252	OPS CHIEF SOUTH	IDL	A11			
Sharon Kiefer	334-3771	Asst Dir	IDFG	S1175aa	X		X
Courtney Washburn		Lobbyist	ICL	S1175aa			
John Robinson		Public Lands	Idaho Conservation League	S1175a	X		X
Lynn Tomonage	890-4014	Ex Dir	IGWA	SB1169	X	X	
NORM SEMANKO	344-6690	Exec Dir.	Idaho Wild Users Assoc.	Swan Falls	X	X	
Candice Myer	395-0011	Atty	IGWA GWD	" "			
Jim Musworth		Bibliogist	IDFG	1175			
Zach Harger		Lobbyist	Capitol West				
Jim Tucker	841-2113	Atty	Idaho River	Swan Falls	X	X	
Frank Shind	880-2607	Rancher	Shirts sheep	Big Horn			
Colby Cameron		Legis. Adv.	Sullivan & Berger		X		
Clive Strong	850-7792	Idaho H.	State of Idaho	Swan Falls	X		
Nate Helms					X		✓
Stan Boyd		Leg. Adv.	IWGA/ICA	1175	Y	✓	