

**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.