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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

CITY OF POCA TELLO,

Plaintiff,

vs.

IDAHO WATER RESOURCES BOARD,
IDAHO DEPARTMENT OF WATER
RESOURCES, GARY SPACKMAN, in his
capacity as Director of the Idaho Department
of Water Resources, and TONY
OLENICHAK, in his capacity as Water
District 01 Watermaster,

Defendants.

Case No. CV42-23-1668

**DECLARATION OF TRAVIS L.
THOMPSON IN SUPPORT OF
INTERVENOR SPACEHOLDERS'
RESPONSE TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

I, Travis L. Thompson, hereby declare and state as follows:

1. I am over the age of 18 and make this declaration based upon my personal knowledge. I am one of the attorneys representing Burley Irrigation District (i.e. one of the Intervenor "Spaceholders") in this matter.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the *Joint Motion for Approval of Consent Decree, Entry of Partial Decrees, and Entry of Scheduling Order* filed in Consolidated Subcases: 03-10022 (Instream Flow Claims) and 67-13701 (Springs and Fountains Claims) (*In Re SRBA Case No. 39576*, Twin Falls County Dist. Ct., Fifth Jud. Dist., Apr. 11, 2005).
3. Attached hereto as **Exhibit 2** is a true and correct copy of Attachment 1 to the proposed consent decree that was filed with the *Joint Motion* identifying the list of parties. The list of signatory parties includes the City of Pocatello, the Plaintiff in this case.
4. Attached hereto as **Exhibit 3** is a true and correct copy of excerpts of the Mediator's Term Sheet, Attachment 2 to the proposed consent decree that was filed with the *Joint Motion*.
5. Attached hereto as **Exhibit 4** is a true and correct copy of the Idaho Water Resource Board's Water Supply Bank Rules (IDAPA 37.02.03 et seq.).
6. Attached hereto as **Exhibit 5** is a true and correct copy of excerpts of the current Idaho State Water Plan.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED this 16th day of November, 2023.

MARTEN LAW LLP



Travis L. Thompson

Attorneys for Burley Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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Travis L. Thompson

Exhibit

1

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

Consolidated Subcases: 03-10022 (Instream Flow
Claims) and 67-13701 (Springs and Fountains Claims)

**JOINT MOTION FOR APPROVAL OF CONSENT
DECREE, ENTRY OF FINAL PARTIAL DECREES, AND
ENTRY OF SCHEDULING ORDER**

**JOINT MOTION FOR APPROVAL OF CONSENT DECREE
AND ENTRY OF FINAL PARTIAL DECREES**

In settlement of all water rights claims filed by the Nez Perce Tribe and by the United States as trustee for the benefit of the Nez Perce Tribe, the undersigned parties have entered into the Snake River Water Rights Agreement of 2004 (“Settlement Agreement”). As previously reported to this Court, the undersigned parties have completed all steps necessary for implementation of the Settlement Agreement, and have memorialized their agreement in a proposed Consent Decree. Therefore, the parties move this Court to take the following actions: (1) commensurate with this Court’s jurisdiction, approve the Consent Decree and the Settlement Agreement; (2) in Consolidated Subcase 03-10022, dismiss, with prejudice, all instream flow claims of the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe; (3) in Consolidated Subcase 67-13701, dismiss all claims for springs or fountains on private land; (4) in Consolidated Subcase 67-13701, enter partial final decrees for all springs and fountains claims on federal public lands; (5) enter partial final decrees in the name of the United States as trustee for the Nez Perce Tribe for 50,000 acre feet of multiple-use federal reserved water rights for use on tribal lands; and (6) enter partial final decrees for 205 state minimum stream flows as recommended by the Director of the Department of Water Resources (IDWR).¹

The order sought by this Joint Motion is fully in accordance with Idaho Rule of Evidence 408, as well as the policy underlying that rule, and the policy of the State of Idaho favoring out-of-court settlement of federal reserved water right claims.

¹ The minimum stream flows were adopted by resolution of the Idaho Water Resource Board on February 8, 2005, and approved by the Idaho Legislature in Chapter 150, 2005 Idaho Session Laws. Two minimum stream flows were inadvertently omitted from the resolution; the Water Board has filed applications for the two omitted water rights. It is expected the applications will be approved by the 2006 Legislature, after which recommendations will be filed in the SRBA for the two omitted water rights.

**JOINT MOTION FOR ENTRY OF SCHEDULING ORDER
GOVERNING APPROVAL OF CONSENT DECREE AND
ENTRY OF FINAL PARTIAL DECREES**

The Consent Decree anticipates the following actions by this Court: Because of the unique nature of each action, the processes and schedules necessary for completion of the actions are discussed separately below.

1. Dismissal of all claims in Consolidated Subcase 03-10022.

The Consent Decree calls for the dismissal of all claims in Consolidated Subcase 03-10022. These claims will be dismissed with prejudice, with a provision prohibiting refiling of the claims in the SRBA or any other forum. Dismissal of these claims will resolve all outstanding objections filed in Consolidated Subcase 03-10022. *See, e.g., International Union of Operating Engineers v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) (dismissal with prejudice pursuant to settlement agreement acts as final judgment on the merits and precludes parties from reasserting the same claims in a subsequent action). Because the SRBA is a general adjudication, the Court's judgment that the claims should be dismissed with prejudice is binding not only on the parties to the Settlement Agreement, but is conclusive on all parties to the adjudication, as well as non-parties. *See Idaho Code § 42-1420* (“[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system”). Thus, dismissal of the claims with prejudice will resolve all outstanding objections in Consolidated Subcase 03-10022 in favor of the objectors, and the parties do not anticipate the need for any further proceedings in Consolidated Subcase 03-10022 aside from a hearing to determine whether to enter the Order of Dismissal.

Thus, the parties propose to proceed in Consolidated Subcase 03-10022 by filing, two weeks after entry of a scheduling order, a joint motion for entry of an order dismissing all claims with prejudice. A hearing would be scheduled on the proposed order, and notice provided to all

JOINT MOTION FOR APPROVAL OF CONSENT DECREE, ENTRY OF FINAL PARTIAL
DECREES, AND ENTRY OF SCHEDULING ORDER - 3

objectors in Consolidated Subcase 03-10022. The motion would include a request that the Court administratively stay the filing of the Order of Dismissal until such time as the Court approves the Consent Decree and enters it as a final judgment.²

2. Dismissal of All Claims to Springs or Fountains on Private Lands; and Entry of Partial Decrees for Springs or Fountains on Federal Public Lands.

The Consent Decree calls for the dismissal of all springs or fountains claims on private lands and state lands. These claims will be dismissed with prejudice, with a provision prohibiting refiling in the SRBA or any other forum. Dismissal of these claims will resolve all outstanding objections filed in Consolidated Subcase 67-13701 relating to springs on private lands and state lands, including objections filed by non-signatories to the Consent Decree.

The Consent Decree also calls for the Court to enter partial decrees for all spring or fountains claims with a point of diversion on federal public land. The only objectors to springs or fountains claims with points of diversion on federal public lands are the State of Idaho, Idaho Power Company, Agland, Inc., Burley Irrigation District, Twin Falls Canal Company, Wilder Irrigation District, and the City of Lewiston. Of these objectors, the only party who is not a signatory to the Consent Decree is the Idaho Power Company.

The parties suggest proceeding in Consolidated Subcase 67-13701 by having the parties file a joint motion for entry of an order dismissing the claims on private lands and decreeing the claims on federal public lands. The joint motion would be filed four weeks after entry of the scheduling order. Notice would be provided to all objectors in Consolidated Subcase 67-13701, and a hearing held on the joint motion. The motion would include a request that the Court

² Because the parties' agreement to dismiss the claims is contingent upon Court approval of the Consent Decree, the stay of the individual orders dismissing certain claims and decreeing others until such time as final decisions are rendered on all claims is central to the process described herein.

administratively stay the filing of the Order of Dismissal and the Entry of Partial Final Decrees until such time as the Court approves the Consent Decree and enters it as a final judgment.

3. Entry of Partial Decrees for State Minimum Stream Flows.

As part of the settlement agreement, the State agreed to establish state minimum stream flows on a number of streams. This action was accomplished in Chapter 150 of the 2005 Idaho Session Laws, which established the minimum stream flow water rights with the elements as defined in the resolution of the Idaho Water Resource Board dated February 8, 2005.

Unlike the other proposed partial decrees that accompany the Consent Decree, the state minimum stream flows are not based on claims before this Court, but are new water rights established by State statute in accordance with the terms of the Settlement Agreement. The parties have agreed that these water rights should be decreed as defined in the director's recommendations, drafts of which are attached to the Consent Decree. Upon the issuance of an order allowing the filing of late claims for the minimum stream flow water rights, the recommendations will be reported by the Department of Water Resources. If any objections are filed to the Director's recommendations by third parties, they will be resolved in accordance with the procedures of Idaho Code § 42-1411 and Administrative Order No. 1.

4. Decree of multiple use federal reserved water rights.

Pursuant to an order of this Court, the Nez Perce Tribe and the United States as trustee for the Tribe filed Notices of Claim for all federal reserved water rights claims with IDWR on March 24, 1993.³ For multiple uses on trust lands and tribal fee lands ("tribal lands"), the United States and the Tribe claimed a total of 223,698 acre feet per year (AFY) from surface water

³ At the time of filing, Idaho Code §§ 42-1409 and 42-1411 required federal agencies and Indian tribes to file their claims with the director of IDWR, who was responsible for abstracting and reporting the claims.

sources, and 14,629 AFY from groundwater sources. The stated purposes of use included domestic, commercial, municipal and industrial uses (DCMI), irrigation, livestock and wildlife watering, lake level maintenance, fish propagation facilities, and hydropower generation. The water right claims were based on the federal reserved water rights doctrine first enunciated in *Winters v. United States*, 207 U.S. 564 (1908), and had a claimed priority date of June 11, 1855.

The multiple use federal reserved water rights of the United States and the Tribe were scheduled to be reported in conjunction with the filing of the Director's Reports for Basins 81, 82, 83, 84, 85, and 86, all of which were filed between September 21, 2004, and January 20, 2005. Because of the ongoing effort to implement the Settlement Agreement, including negotiation of the elements of these claims, notices of claim for these water rights claims have not been served on other claimants, and the objection period required by Idaho Code § 42-1411A(7) has not been initiated.

Given that the State has now entered into settlement agreements with the United States and the Tribe addressing the multiple use water right claims, the parties, by this Joint Motion, move that the Court issue a stay on any further action on the original notices of claims, including the amending of such claims and the initiation of the notice and objection period for such claims, pending the outcome of the Court's determination whether to accept the negotiated settlements.

In settlement of the water right claims of the United States and the Tribe, the parties to the Settlement Agreement have agreed to quantify the Tribe's multiple use water right claims for tribal lands in the amount of 50,000 AF per year. Such water right could be used for irrigation, DCMI, or hatchery and cultural uses, at the discretion of the Tribe. Most of the water to fulfill the claims would come from the Clearwater River. Water can be diverted from tributary streams and from aquifers not hydraulically connected to the Clearwater River, but only in a manner that

ensures persons lawfully diverting water prior to April 20, 2004, will continue to receive their full legal entitlement under state law. The Tribe has also agreed to require that the Tribal Water Code be no less protective of groundwater resources than is state law governing the use of aquifers, including those state laws restricting the depletion of aquifers and the lowering of the pumping level of other groundwater users.

The issue before the Court is how to provide notice of the negotiated multiple use water rights to other claimants in the SRBA and allow such claimants to be heard on the issue of whether the negotiated settlements should be entered as partial final decrees. Idaho Code provisions allow for the filing of negotiated agreements in lieu of notices of claims. Idaho Code § 42-1401 sets forth the intent of the Legislature to “provide a statutory procedure for incorporating a negotiated agreement between a federal reserved water right claimant and the state of Idaho into an adjudication.” Idaho Code § 42-1407(4)(d) provides that the commencement order for a general adjudication shall include a “provision that requires all claimants to file a notice of claim or negotiated agreement for all water rights from the water system.” The Commencement Order for the SRBA provides that “[a]ny person claiming a right to use water pursuant to federal law shall file either a notice of claim or negotiated agreement as required by the notice of order commencing the adjudication or as otherwise ordered by the court.” Commencement Order (SRBA District Court Nov. 19, 1987).

The parties suggest proceeding by sending out notices of the negotiated agreements to claimants in Basins 81, 82, 83, 84, 85, and 86.⁴ The notices of negotiated agreements would include a narrative description of the Tribe’s and United States’ original notices of claim for

⁴ The multiple use water right claims of the United States as trustee for the benefit of the Nez Perce Tribe are all within Basins 81, 82, 83, 84, 85, and 86.

238,327 AFY of water rights for use on tribal lands, and explain that the negotiated agreements have been submitted to the Court as proposed settlements of those notices of claim. For purposes of convenience, the parties respectfully suggest that prior to sending the notices, the Court order that the negotiated agreements for the various water rights be consolidated into a single subcase. The United States and the Tribe have been working closely with IDWR to prepare the appropriate notices. Once the order of consolidation is issued, the notices could be sent out within a few days.

The notices of proposed settlement would include notification to claimants that if they desire to be heard on the question of whether the Court should accept the negotiated settlements, they should file motions to participate in the Consolidated Subcase within 60 days. All participants would file briefs 30 days after that defining their positions on the issue of whether the negotiated settlements represent a fair and equitable settlement of the federal reserved multiple use water rights claims of the United States as trustee for the benefit of the Nez Perce Tribe. Fifteen days later, responsive briefs would be due, followed shortly thereafter by a hearing.

If the Court accepts the negotiated settlements after completion of the hearings, then no further proceedings would be necessary. If, however, the Court rejects the negotiated settlements, then the terms of the Settlement Agreement would be unfulfilled, and resolution of the federal reserved multiple use water rights claims of the United States as trustee for the benefit of the Nez Perce Tribe would have to proceed on the normal litigation track described in Idaho Code § 42-1411A. Accordingly, the Court would lift the stay on the filing and litigation of the original claims and establish a timetable for amendment of the claims and the provision of notices of the claims to claimants in Basins 81, 82, 83, 84, 85, and 86.

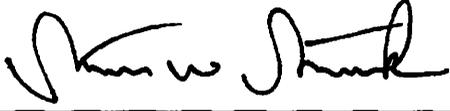
5. Approval and Entry of Consent Decree as Final Judgment.

The final step in disposing of all water rights claims of the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe will involve Court approval of the Consent Decree. Before determining whether to approve the Consent Decree, the Court will have determined the motions to dismiss all instream flow claims, the motion to dismiss certain springs or fountain claims and decree other springs or fountains claims, and the motion to approve the negotiated agreements for the tribal land water right claims. The Court will also have resolved any objections to the director's recommendations for decree of the state minimum stream flow water rights. Thus, very few specific issues should be left to resolve with regard to whether the Court should approve the overarching Consent Decree. The parties anticipate the only process necessary will be the process typically associated with approval of a consent decree; *i.e.*, a showing that the consent decree is fundamentally fair, adequate, and reasonable and conforms to applicable laws. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990); *see also S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved").

CONCLUSION

The parties believe that the schedule submitted herein will allow the water right claims of the Nez Perce Tribe and the United States to be completely resolved within the next six to twelve months. The parties are committed to working with the Court and with other claimants to resolve all issues and objections in the most efficient manner possible.

DATED this 11th day of April, 2005.



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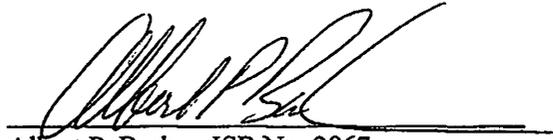
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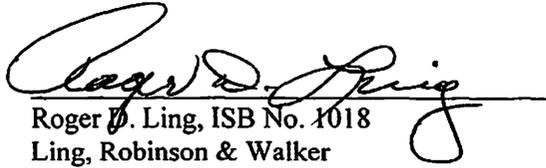
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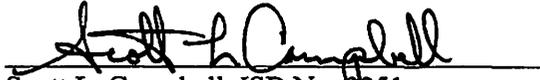
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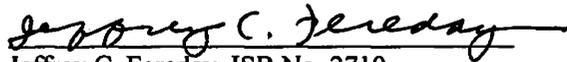
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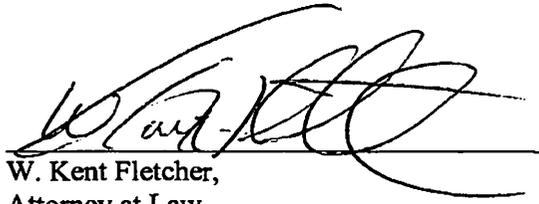
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April 13, 2005

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Attorney for Minidoka Irrigation District.

Exhibit

2

Attachment 1 to Consent Decree
In re SRBA Case No. 39576

The Idaho Water Users who are Parties to this Consent Decree include the following:

A & B Irrigation District	City of New Plymouth
Aberdeen-Springfield Canal Company	City of Oakley
Agland, Inc.	City of Parma
Agwild, Inc.	City of Paul
Bar-U-Inc.	City of Payette
Basic American Foods, Inc.	City of Pocatello
Big Bend Irrigation District	City of Rigby
Boise-Kuna Irrigation District	City of Ririe
Buck Creek Ranch, Inc.	City of Roberts
Burgess Canal & Irrigation Company	City of Rupert
Burley Irrigation District	City of Salmon
City of Ashton	City of St. Anthony
City of Bliss	City of Sugar City
City of Buhl	City of Ucon
City of Burley	City of Weiser
City of Cascade	ConAgra/Lamb-Weston, Inc.
City of Challis	Egin Bench Canal, Inc.
City of Chubbuck	Enterprise Irrigation District
City of Council	Falls Irrigation District
City of Declo	Glen Dale Farms, Inc.
City of Donnelly	Harrison Canal & Irrigation Company
City of Eden	Idaho Irrigation District
City of Emmett	J.R. Simplot Company
City of Fairfield	Lewiston Orchards Irrigation District
City of Fruitland	Little Salmon River Water Users
City of Garden City	Association
City of Glens Ferry	M.L. Investment Company
City of Grand View	Milner Irrigation District
City of Heyburn	Minidoka Irrigation District
City of Inkom	New York Irrigation District
City of Ketchum	Newfoundland Partners
City of Kuna	North Freemont Canal Systems
City of Lewiston	North Side Canal Company
City of Mackay	Payette River Water Users Association,
City of Meridian	Inc.
City of Middleton	Peoples Canal & Irrigation District
City of Minidoka	Pioneer Irrigation District
City of Mountain Home	Port of Lewiston
City of Mud Lake	Potato Storage, Inc.
City of Nampa	Potlatch Corporation

Progressive Irrigation District
Settlers Irrigation District
Simplot Cattle Company
Simplot Dairy Products, Inc.
Simplot Livestock Company
Simplot Meat Products, Inc.
Sinclair Oil Corporation d/b/a Sun
Valley Company
Snake River Valley Irrigation District
SSI Food Services, Inc.
SSI Foods, Inc.
Sunnyslope Orchards Partnership
Thompson Creek Mining Company
Thousand Springs Ranch
TM Ranch Company
Twin Falls Canal Company
Wilder Irrigation District

Exhibit

3

MEDIATOR'S TERM SHEET

- I. **Nez Perce Tribal Component.**
- A. The Tribe's on-reservation, consumptive use reserved water right will be quantified in the amount of 50,000 AF per year, with a priority date of 1855. This water right will be established so as to allow for irrigation, DCMI, hatchery and cultural uses, at the discretion of the Tribe. The parties expect the source of most of this water right will be the Clearwater River; however, the source of some this water right may be from tributary streams adjacent to tribal lands to the extent unappropriated water is available and no injury to existing water rights will occur. The Tribe will administer the on-reservation use of this water right pursuant to the tribal water code. The Tribe may rent this water within the State of Idaho through the state water bank or water banks.
 - B. The United States will establish a \$50 million multiple-use water and fisheries resource trust fund for the Tribe to use in acquiring lands and water rights, restoring/improving fish habitat, fish production, agricultural development, cultural preservation, and water resource development or fisheries-related projects.
 - C. Subject to authority, the United States will enter into an agreement with the Tribe as to the use of 200 KAF in Dworshak Reservoir, which will include an operational MOA between the Tribe, Corps of Engineers (COE), National Marine Fisheries Service (NOAA Fisheries), the Bonneville Power Administration (BPA), and the State of Idaho implementing a flow augmentation plan beneficial to fish. Prior to the agreement implementing this term sheet,¹ the Tribe and the US will mutually agree that the power revenue effect of implementing this term will be either neutral or positive, or in the absence of such agreement, will revise this term so that such effect will be neutral or positive.
 - D. The United States will fund the design and construction of domestic water supply and sewer systems for tribal communities on the reservation, including a water quality testing laboratory, in the total amount of \$23 million.
 - E. The United States will enter into a long-term contract with the Tribe at the time of settlement, transferring management control of the federal hatchery at Kooskia to the Tribe. The United States and the Tribe will enter into an agreement for joint management of hatchery programs at the Dworshak National Hatchery.
 - F. Prior to the completion of the agreement, the United States and the Tribe will agree to a quantity of BLM lands within the reservation to be transferred from the United States to the Tribe, to be selected by the Tribe from within the 11,000 acres identified as available for selection by the BLM, up to a total value of \$7 million as determined by mutual agreement or, in the absence of mutual agreement, by an independent appraisal report based upon the fair market value that is prepared in accordance with the *Uniform Standards of Professional Appraisal Practice (USPAP)* and the *Uniform Appraisal Standards for Federal Land Acquisitions*. The BLM and the Tribe, under the authority of the Federal Land Policy and

¹Implementation of this Term Sheet will involve drafting of a number of implementation documents including federal and state legislation, a consent decree, biological assessments and opinions in accordance with the Endangered Species Act, and other documents. References in this Term Sheet to "agreements" refer to those implementation documents.

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such owners or operators are employing timber management practices that meet or exceed mandatory best management practices (BMPs) set forth in the Idaho Forest Practices Act (IFPA), Idaho Code §§ 38-1301 et seq. and are implementing the program.

- iii. A Biological Opinion(s) on any Section 6 Agreement(s) also will provide incidental take authorization for those who participate in the habitat program when they implement measures (including some of those found in section II.B.3) in accordance with the findings that derive from an analysis in the biological opinion(s) on a Section 6 Cooperative Agreement(s).
 - b. National Environmental Policy Act. The Services will prepare appropriate environmental documents and comply with the procedural requirements of the National Environmental Policy Act associated with the review and approval of a Cooperative Agreement(s).
 - c. In issuing biological opinions on a Section 6 Cooperative Agreement(s), the federal agencies shall allow the State and the parties to this Agreement to participate in the consultation and comment on the draft biological opinion.
 - d. Reinitiation of consultation on the NOAA Fisheries or the FWS FCRPS or the other component biological opinions shall not automatically trigger reinitiation of consultation on any Section 6 Cooperative Agreement(s) biological opinion.
 - e. Consultation on a Section 6 Cooperative Agreement(s) biological opinion may be reinitiated only under the following circumstances:
 - i. The State or the participants fail to comply with the terms and conditions of this agreement;
 - ii. To reduce the obligations of the parties in the event the measures in the agreement are determined to no longer be necessary; or
 - iii. Pursuant to 50 C.F.R. § 402.16.
 - f. Nothing in this section is intended to limit the use of habitat conservation plans, landowner incentives, or other habitat protection and restoration programs under the Endangered Species Act, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act, or other federal or State laws.
 - g. The federal agencies may only seek additional Endangered Species Act measures in the Salmon and Clearwater Basins for the covered activities and covered species if:
 - i. The federal agencies have implemented relevant RPA actions set forth in all other biological opinions intended to benefit Snake River Basin listed species; and
 - ii. All other discretionary measures, including but not limited to, reinitiation of consultation on other relevant BiOps and the component biological opinions, that provide the reasonable potential for achieving necessary reductions in the mortality of the Snake River listed species have been implemented, to the maximum extent practicable.
- E. **Termination.** If the United States reinitiates consultation on or revokes incidental take authorization, the State may terminate the Cooperative Agreement.

III. Snake River Flow Component.

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- A. **General Principle:** Biological Opinions will be issued for the term of this agreement which will provide incidental take coverage, if necessary, for all federal actions and related private actions including: (1) all BOR actions in the upper Snake River basin, (2) all private depletionary effects in the Snake River basin above the Hells Canyon Complex² to the extent they affect listed anadromous fish, and (3) all private depletionary effects above the Hells Canyon Complex to the extent that they are related to the federal action and affect listed resident species. These Biological Opinions shall be separate from any Federal Columbia River Power System (FCRPS) Biological Opinion. Separate biological opinions will be prepared for other components as necessary. Additionally, the parties will use their best efforts to seek enactment of state and federal legislation consistent with the terms of the general conditions to provide the necessary ESA and CWA protection for this component of the agreement and to provide statutory authority necessary to implement the agreement. The flows provided in this agreement set forth the flow contribution from the upper Snake above the Hells Canyon Complex for the benefit of listed species covered by this agreement as they travel throughout the Columbia River system, including through the FCRPS. The biological opinion on this component to be prepared by NOAA Fisheries will directly address and evaluate the expected effects of BOR's proposed operations in the Upper Snake, including any beneficial effects on anadromous fish from the flow augmentation program established in this component.
- B. **Tier 1–Minimum Flow.** The minimum instream flows established by the Swan Falls Agreement shall be decreed in the SRBA to the Idaho Water Resource Board (IWRB). If the Idaho Department of Water Resources fails to regulate these minimum instream flows in accordance with the Swan Falls Agreement, then any party to this agreement shall be entitled to seek injunctive relief through the state district court responsible for the SRBA.
- C. **Tier 2–Flow Augmentation.** The parties will establish a term-of-the-agreement flow augmentation program containing the following elements:
1. All flow augmentation from waters of the State of Idaho pursuant to Idaho Code § 42-1763B shall be done in compliance with Idaho state law and regulations, existing water bank rules and existing local rental pool procedures of the appropriate local committee, including but not limited to last to fill rule and the procedures for priorities among renters and lessors, unless changes are agreed to by the spaceholders within the water district(s) in which the reservoirs are located, the State of Idaho, and BOR. Unless otherwise agreed by the parties to give effect to sections III.D and III.E, all parties agree that they will refrain from exercising the procedures for priorities among renters and lessors the specific uncontracted storage space now held by BOR assigned for flow augmentation and powerhead available for flow augmentation as shown on Appendix III as long as this agreement has not been terminated or has not expired. Except as otherwise provided, nothing in this component shall be construed or interpreted as affecting or in any way interfering with the laws of the State of Idaho relating to the control, appropriation, use, or distribution of water or any vested rights created thereunder, or as conferring new authority to, or modifying existing authority of the

² "Above the Hells Canyon Complex," when used in this term sheet, means the Snake River basin above the Complex, including any tributaries which drain into the Complex.

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- federal government.
2. The flow augmentation program above the Hells Canyon Complex is designed to assist fish survival downstream of Hells Canyon Dam. The parties understand that the flow augmentation program provides maximum amounts of flow augmentation delivered from the upper Snake and that no guarantee can be provided, beyond the terms of this agreement, that any particular amount of water will be provided in any particular water year.
 3. Sources shall include, but are not limited to contracted and uncontracted storage, powerhead, Oregon natural flow water, Sho-Ban water bank water, rentals pursuant to the IWRB Water Bank, and natural flow acquisitions herein provided.
 4. Idaho Code § 42-1763B will be reenacted to authorize the rental of up to 427,000 acre-feet (AF) of water annually for flow augmentation for the term of the agreement. Reauthorization shall also provide for the rental of water from storage or natural flow sources from the Snake River and its tributaries at or above Lewiston.
 5. If necessary to implement the flow augmentation program of this section III, the BOR will negotiate a lease with Idaho Power pursuant to Idaho Code § 42-108A to rent uncontracted and powerhead space in the Boise Project, Arrowrock Division, for power production. In the event powerhead water is released pursuant to this section, it shall be the last of the last space to refill.
 6. The United States may also acquire on a permanent basis or rent up to 60,000 acre-feet of consumptive natural flow water rights diverted and consumed below Milner and above Swan Falls from the mainstem of the Snake River. The United States may rent said rights for flow augmentation through the IWRB Water Bank pursuant to the Board's water bank rules and I.C. Sec. 42-1763B as amended (to include up to 60,000 acre-feet of consumptive natural flow acquisition and to allow its use pursuant to this section). The 60,000 acre-feet may be rented through the water bank as long as the total rentals in III.C.4, III.C.5 and this III.C.6 do not exceed 487,000 acre-feet.
 7. Powerhead water in BOR storage facilities may be used only to increase the reliability of 427,000 acre-feet for flow augmentation and is subject to the following limitations:
 - a. After utilization by the United States of all water described in sections III.C.4 through 6, above, if the total amount of water released for flow augmentation is less than the 427,000 acre-feet, the Palisades Reservoir powerhead water may be utilized by the United States to attain 427,000 acre-feet for flow augmentation;
 - b. Use of powerhead shall not at any time interfere with the currently established minimum conservation pools or hereinafter established minimum conservation pools;
 - c. Powerhead space used for flow augmentation shall be the last space to refill after all other space in reservoirs in that water district, including other space used to provide flow augmentation, in the basin has filled;
 - d. Use of water from powerhead space shall be in compliance with state law;
 - e. Use of powerhead space shall not interfere at any time with the operating levels required for diversions of water by spaceholders in the reservoir pool, with the ability of spaceholders to refill and use active storage of the reservoir, or with the diversion of natural flow.
 8. Rental charges for stored water.

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- a. A uniform rate will apply to all stored water released for flow augmentation:
 - i. \$14 per acre-foot through 2012,
 - ii. \$17 per acre-foot from 2013-2017,
 - iii. \$20 per acre-foot from 2018-2022,
 - iv. \$23 per acre-foot from 2023-2030.
 - b. The above rates are comprehensive. They include administrative fees and all other charges.
 - c. The administrative fee on BOR storage will equal the administrative fee applicable to other rentals within the basin in question.
9. All water released from BOR projects in the irrigation season after April 10 shall be treated as releases for flow augmentation except for releases (1) for delivery to or use by spaceholders, contract holders, or rentals from the water bank for purposes other than flow augmentation; (2) pursuant to established water rights; (3) in accordance with existing project operation criteria or other subsequent project operation criteria agreed to by the spaceholders and contract holders within the water district in which the reservoirs are located, the State of Idaho, and BOR; or (4) pursuant to duly adopted flood control rule curves.
10. Regulation of the delivery of rental water shall be the responsibility of the IDWR and appointed state watermasters. The timing of the release of water shall be determined by a process involving the State, the spaceholders, contract holders, and the United States.
- D. Water District 01 Rental Pool. The State of Idaho, BOR, and the spaceholder contractors in Water District 01 agree, to consider changes to rental pool procedures in Water District 01 as part of the flow augmentation program outlined in section III.C above. The State and the spaceholder contractors acknowledge that BOR, in negotiating a final agreement, will require that any rental pool provide BOR with an acceptable opportunity, as determined by it, to rent water for flow augmentation.
- E. The United States shall make its Upper Snake basin uncontracted space available to irrigation delivery entities, if the United States or irrigation delivery entities obtain the rights to an equivalent amount of replacement water from subbasins within the Upper Snake to be used for flow augmentation. Details regarding the exchanges anticipated in this section will be defined in the final settlement agreement.
- F. Reclamation will make available for irrigation, subject to the triggers and conditions in this section III.F, 30,000 acre-feet of water from the Boise Project, Payette Division. This water will be from sources exclusive of the 95,000 acre-feet of storage currently used for flow augmentation.
1. Triggers. Water under this section will be made available only under the following water year conditions, based on the April 1 forecast used by Reclamation of April through July runoff for the Payette River at Horseshoe Bend and the Boise River at Lucky Peak. For the Payette basin, this provision will be triggered when the April 1 forecast at Horseshoe Bend is less than 700,000 acre-feet. For the Boise basin, this provision will be triggered when the April 1 forecast at Lucky Peak is less than 570,000 acre-feet.
 2. Conditions of use.
 - a. The maximum volume of water to be provided by Reclamation under this provision in any given water year will be 30,000 acre-feet.

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- b. Water may be used directly by Payette River water users and through exchange by Boise River water users within irrigation entities signatory to this agreement. The Boise exchange will be effected by Reclamation making water available to Boise River water users from the Boise Project in lieu of releasing that water for flow augmentation. An equivalent amount of water from the Payette storage identified above would then be released for flow augmentation.
 - c. When the Payette trigger is met, Reclamation will consign 30,000 acre-feet of Payette Division water to the Water District 65 Rental Pool, for one-year rental by irrigation water users in the Payette basin. The price for Payette rentals will be 50% of the price applicable to flow augmentation rentals or the price applicable to irrigation rentals in the basin, whichever is greater.
 - d. When the Boise trigger is met, Reclamation will consign 30,000 acre-feet of Arrowrock Division water to the Water District 63 Rental Pool, for one-year rental by irrigation water users in the Boise basin. Reclamation will then deliver a like amount of water from the Payette Division for flow augmentation, over and above the volume otherwise available from Reclamation-held storage. The price for Boise basin rentals will be the price applicable to flow augmentation rentals or the price applicable to irrigation rentals in the basin, whichever is greater.
 - e. When both triggers are met, Reclamation will consign a total of 30,000 acre-feet to be divided between Water Districts 63 and 65. Water Districts 63 and 65 will meet within 30 days of the publication of the April 1 forecasts at Lucky Peak and Horseshoe Bend, and determine how much water will be made available in each basin, with the understanding that irrigation entities in Water District 65 have the first right to rent the water consigned, up to the full amount consigned. As divided, the water rentals will be subject to the exchange conditions and prices applicable to that basin, as defined in sections c and d above. The water users will negotiate a process for implementation of this provision.
 - f. Once water is consigned to a rental pool, water users will have until July 15 to rent the water. Water not rented by July 15 will return to Reclamation.
- G. The United States will mitigate local impacts identified by the State of Idaho that may result from the rental of water for flow augmentation. The scope and amount of mitigation will be negotiated. Mitigation shall be based on the following understandings:
- 1. Powerhead: In setting rates for power and energy provided by BOR for project purposes entitled to the use of reserved power, BOR will insure that reserved power rates are neither increased nor decreased as a result of the leasing and release of water from powerhead space under the terms and conditions set forth in this agreement.
 - 2. 60,000 acre-feet: The federal legislation drafted to authorize the agreement will include a provision to authorize and seek appropriations for a one-time payment of \$2 million to the local governments in which the water rights accruing up to 60,000 acre-feet are currently used to mitigate for the change in use of the acquired water.
- H. The minimum evacuation reservoir levels for flood control shall not be altered for reasons other than flood control purposes.
- I. The Milner Agreement shall be renewed for the term of this agreement. The parties agree, however, to modify the flow limitation contained in the agreement to the extent practical to facilitate the water rental program, while still protecting the interests of the parties.

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- J. To the maximum extent practicable, the United States shall be responsible for managing water acquired or rented pursuant to this agreement to meet needs of all species covered by this agreement. To the maximum extent practicable, all water acquired or rented by the United States under this agreement shall be delivered and managed: (1) in a manner that will not result in the violation of any permit, applicable water quality rule and regulation or other requirements of the Clean Water Act; (2) in a manner that will not cause jeopardy to other species in the State of Idaho; and (3) in a manner that will not result in significant adverse impacts to recreational uses of the waters of the Snake River and its tributaries within the State of Idaho. During the development of the Biological Assessment by BOR, the parties, to ensure that all water acquired or rented by the United States under this agreement does not result in the type of impacts listed above, will address the concerns that can be identified and analyzed and will develop a mutually acceptable process to address the type of impacts listed above that arise after implementation of the agreement. The State agrees that it will not require any restriction, modification, or condition on the diversion, storage, use, discharge of water, or land use to remedy or address violations of water quality standards or other Clean Water Act requirements to the extent the use of water acquired or rented by the United States pursuant to this agreement causes the violations.
- K. The term of this component of the agreement shall be for a period of thirty (30) years with opportunity for renewal upon mutual agreement.
- L. The proposed federal action for consultation will describe the agreement, including the minimum instream flows, the water rental program, and BOR operations as of the date of the agreement and during the term of the agreement, subject to the general principle contained in the agreement. In the event that the BOR fails to describe the proposed federal action consistent with this component, or it fails to issue a Biological Assessment based upon the proposed federal action which concludes that the action is not likely to jeopardize the continued existence of any listed species addressed by this consultation nor will it result in destruction or adverse modification of the critical habitat of the species, this component of this agreement shall be terminated upon written notice by the State or private parties to this component of the agreement.
- M. Consistent with the Snake River Flow Component general principle (section III.A), the Services will evaluate this component as a proposed federal action under section 7 of the Endangered Species Act. 16 U.S.C. § 1536. In the event that the Services fail to issue no jeopardy biological opinions and provide incidental take coverages as described in section III.A, or if the Services require terms or conditions inconsistent with or not contained in this Upper Snake component of the agreement, this component of the agreement shall be terminated upon written notice by the State or private parties to this agreement.
- N. Reinitiation of Consultation
 - 1. If the United States is unable to rent flow augmentation water under the terms of this agreement because of a change to state law, regulations or water bank rules, or because of an arbitrary or capricious decision by the Director of IDWR or IDEQ, the United States may reinitiate consultation on this component of the agreement. If the United States reinitiates consultation, this component of the agreement may be terminated, including any necessary statutory components, at the option of the State of Idaho or the private parties to this component of the agreement.
 - 2. Reinitiation of consultation on any NOAA Fisheries or FWS FCRPS biological

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opinions (hereinafter "FCRPS BiOps"), or on the biological opinions on other components of this agreement shall not automatically trigger reinitiation of consultation on the Upper Snake BOR biological opinion. Rather, consultation on the Upper Snake BOR biological opinion may be reinitiated only a) if the State or the water users fail to comply with the terms and conditions of this agreement or the United States is unable to rent flow augmentation water under the terms of the agreement because of a change to state law, regulations, or water bank rules; b) to reduce the obligations of the parties in the event the measures in the agreement are determined to no longer be necessary for any reason, including, but not limited to, the delisting of the species; or c) pursuant to 50 C.F.R. § 402.16.

3. The federal agencies which are parties to this agreement may only seek additional Endangered Species Act flow measures from the Snake River basin above the Hells Canyon Complex for the benefit of anadromous fish if: a) a jeopardy biological opinion is issued on the Upper Snake River BOR projects after utilization of all of the measures in this agreement; b) the relevant actions set forth in all other biological opinions intended to benefit Snake River basin listed species have been implemented; c) substantially all water made available under the terms and conditions of this agreement has been rented; and d) all other discretionary measures, including reinitiation of consultation on other relevant BiOps, that provide the reasonable potential for achieving necessary reductions in the mortality of the Snake River listed species have been or are being implemented, to the maximum extent practicable. In issuing any future biological opinions on Upper Snake River BOR projects, the federal agencies shall provide all parties to this agreement an opportunity to comment on the draft biological opinion. The provisions concerning reinitiation of consultation for the Upper Snake BOR projects shall remain effective so long as this component is effective.
 4. Nothing in this agreement shall be used or construed to determine or interpret in any manner what obligations, if any, the federal agencies charged with operating the FCRPS may have under the 2000 FCRPS BiOps, or other biological opinions addressing FCRPS operations or the Endangered Species Act or its implementing regulations as applied to the FCRPS, provided that no additional flows shall be required from the upper Snake above the Hells Canyon Complex except as provided for in this agreement.
- O. Subject to section IV.G of this agreement, if any party fails to implement any provision of this component, this component may be terminated at the option of any other party to this component of the agreement. By entering into this agreement, neither the State of Idaho nor the private parties to this component concede that the flows identified under section III.C benefit the listed species; that BOR operations require ESA consultations; that BOR operations are subject to modification to meet ESA requirements or concerns; or that the diversion, storage, or use of water in the State of Idaho is subject to modification to meet ESA requirements or concerns.

IV. General conditions applicable to the entire agreement and to all parties. Unless otherwise specified, each of the following general conditions applies jointly and severally to each component of this agreement.

- A. Implementation and enforcement – There will be enactment of necessary laws by federal,

Exhibit

4

IDAPA 37 – DEPARTMENT OF WATER RESOURCES

Planning and Projects Bureau

37.02.03 – Water Supply Bank Rules

Who does this rule apply to?

General public.

What is the purpose of this rule?

These rules govern the operation and management of the water supply bank authorized by statute. The purpose of the water supply bank is to encourage the highest beneficial use of water; provide a source of adequate water supplies to benefit new and supplemental water users; and provide a source of funding for improving water user facilities and efficiencies. It also establishes lease and rental fees that are used to carry out the program.

What is the legal authority for the agency to promulgate this rule?

This rule implements the following statutes passed by the Idaho Legislature:

Water Resource Board:

- Section 42-1761, Idaho Code – Water Supply Bank Created
- Section 42-1762, Idaho Code – Rules and Regulations – Acquisition of Water Rights
- Section 42-1763, Idaho Code – Rentals from Bank – Approval by Director
- Section 42-1764, Idaho Code – Substitution for Transfer Proceeding
- Section 42-1765, Idaho Code – Local Committees – Rental of Stored Water – Apportionment of Rental Proceeds
- Section 42-1765A, Idaho Code – Lemhi River Basin – Local Rental Committee
- Section 42-1766, Idaho Code – Appeals Procedure for Water Right Holders

Who do I contact for more information on this rule?

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720
Phone: (208) 287-4800
Email: mathew.weaver@idwr.idaho.gov
idwr.idaho.gov

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37.02.03 – WATER SUPPLY BANK RULES

000. LEGAL AUTHORITY (RULE 0).

This chapter is adopted under the legal authority of Section 42-1762, Idaho Code. (3-18-22)

001. TITLE AND SCOPE (RULE 1).

01. **Title.** The title of this chapter is IDAPA 37.02.03, “Water Supply Bank Rules.” (3-18-22)

02. **Scope.** These rules were first adopted by the Water Resource Board in October 1980 as mandated by Section 42-1762, Idaho Code enacted in 1979. The rules govern the Board’s operation and management of a Water Supply Bank provided for in Sections 42-1761 to 42-1766, Idaho Code. The purposes of the Water Supply Bank, as defined by statute, are to encourage the highest beneficial use of water; provide a source of adequate water supplies to benefit new and supplemental water uses; and provide a source of funding for improving water user facilities and efficiencies. These rules are to be used by the Water Resource Board in considering the purchase, sale, lease or rental of natural flow or stored water, the use of any funds generated therefrom, and the appointment of local committees to facilitate the lease and rental of stored water. The purchase, sale, lease or rental of water shall be in compliance with state and federal law. The adoption of these rules is not intended to prevent any person from directly selling or leasing water by transactions outside the purview of the Water Supply Bank Rules where such transactions are otherwise allowed by law. (3-18-22)

002. – 009. (RESERVED)

010. DEFINITIONS (RULE 10).

01. **Board.** The Idaho Water Resource Board. (3-18-22)

02. **Board’s Water Supply Bank.** The water exchange market operated directly by the Board to facilitate marketing of water rights. (3-18-22)

03. **Director.** The Director of the Idaho Department of Water Resources. (3-18-22)

04. **Department.** The Idaho Department of Water Resources. (3-18-22)

05. **Lease.** To convey by contract a water right to the Board’s water supply bank or stored water to a rental pool operated by a local committee. (3-18-22)

06. **Local Committee.** The committee which has been designated by action of the Board to facilitate marketing of stored water by operating a rental pool pursuant to Section 42-1765, Idaho Code. (3-18-22)

07. **Natural Flow.** Water or the right to use water that exists in a spring, stream, river, or aquifer at a certain time and which is not the result of the storage of water flowing at a previous time. (3-18-22)

08. **Rent.** To convey by contract a water right from the Board’s water supply bank or stored water from a rental pool. (3-18-22)

09. **Rental Pool.** A market for exchange of stored water operated by a local committee. (3-18-22)

10. **Stored Water.** Water made available by detention in surface reservoirs or storage space in a surface reservoir. (3-18-22)

11. **Water Right.** The right to divert and beneficially use the public waters of the state of Idaho including any storage entitlement. (3-18-22)

12. **Water Supply Bank.** The water exchange market operated by the Water Resource Board pursuant to Section 42-1761 through 42-1766, Idaho Code, and these rules and is a general term which includes the Board’s water supply bank and rental pools. (3-18-22)

13. **Year.** A time period of twelve (12) consecutive months. (3-18-22)

14. **Person.** Any company, corporation, association, firm, agency, individual, partnership, Indian tribe, government or other entity. (3-18-22)

011. – 024. (RESERVED)

025. ACQUISITION OF WATER RIGHTS FOR THE BOARD'S WATER SUPPLY BANK (RULE 25).

01. General. The Board may purchase, lease, accept as a gift or otherwise obtain rights to natural flow or stored water and credit them to the Board's water supply bank. These water rights may then be divided or combined into more marketable blocks provided that there is no injury to other right holders, or enlargement of use of the water rights, and the change is in the local public interest. Any person proposing to sell or lease water rights to the Board's water supply bank, or to otherwise make water available through the water supply bank for the purposes of Section 42-1763A, Idaho Code, shall file a completed application with the Director on a forms or in a format provided by the Department and provide such additional information as the Board or Director may require in evaluating the proposed transaction. The completed application form shall state the period of time a water right is offered for lease, or the period of time that storage water will be released for fish migration purposes in accordance with Section 42-1763A, Idaho Code, and the payment terms, if any, requested by the applicant. (3-18-22)

02. Application. Submitted with the completed application shall be: (3-18-22)

a. Evidence that the water right has been recorded through court decree, permit or license issued by the Department. If the right is included in an ongoing adjudication, a copy of the claim is required; (3-18-22)

b. Proof of current ownership of the water right by the applicant; (3-18-22)

c. Information that the water right has not been lost through abandonment, or forfeiture as defined by Section 42-222(2), Idaho Code; (3-18-22)

d. Evidence to demonstrate the relative availability of water in the source to fill the water right; and (3-18-22)

e. The written consent of such company, corporation or irrigation district to the proposed sale or lease must accompany the application if the right to the use of the water, or the use of the diversion works or irrigation system is represented by shares of stock in a company or corporation, or if such works or system is owned or managed by an irrigation district. (3-18-22)

f. A lease application filing fee of two hundred fifty dollars (\$250) per water right up to a maximum total of five hundred dollars (\$500.00) for overlapping water rights which have a common place of use or common diversion rate or diversion volume. The lease filing fee described herein shall be deposited in the Water Administration Account and shall not apply to applications to lease stored water into rental pools described in Rule 40. (3-18-22)

03. Review. Upon receipt of the completed application the Director will review it for completeness and make such further review as he deems necessary to adequately brief the Board on the proposed transaction. (3-18-22)

04. Inadequate Application. If an application is not complete, the Director will correspond with the applicant to obtain the needed information. If the requested information is not returned in thirty (30) days, the application will no longer be considered a valid request to place a water right into the Board's water supply bank. (3-18-22)

05. Consideration. The Board may consider an application at any regular or special meeting. (3-18-22)

06. Criteria. The Board will consider the following in determining whether to accept an offered water right into the Board's water supply bank: (3-18-22)

a. Whether the applicant is the current owner, title holder or contract water user of the water right proposed to be transferred to the Board's water supply bank or has authority to act on behalf of the owner; (3-18-22)

b. Whether all necessary consents have been filed with the Board; (3-18-22)

- c. Whether the information available to the Board indicates that the water right has been abandoned or forfeited; (3-18-22)
- d. Whether the offering price or requested rental rate is reasonable; (3-18-22)
- e. Whether acquisition of the water right will be contrary to the State Water Plan; (3-18-22)
- f. Whether the application is in the local public interest as defined in Section 42-1763, Idaho Code; (3-18-22)
- g. The probability of selling or renting the water right from the Board's water supply bank. (3-18-22)
- h. Whether there are sufficient funds on hand to acquire the water right for the Board's water supply bank, provided that, if there are insufficient funds, or if in the opinion of the Board, existing funds should not immediately be expended for such acquisition, the Board may find that the water right should be acquired on a contingency basis, with payment to be made to the seller or lessor only after water is subsequently sold or rented from the Board's water supply bank, and (3-18-22)
- i. Such other factors as determined to be appropriate by the Board. (3-18-22)

07. Resolution of Board. The Board may by resolution accept an application to sell or lease a water right to the Board's water supply bank, or to otherwise make water available through the water supply bank for the purposes of Section 42-1763A, Idaho Code. An application to lease together with the resolution accepting it becomes a lease and the water right is placed into the Board's water supply bank upon adoption of the resolution. A resolution accepting an application to sell a right to the Board's water supply bank will provide authority for the chairman of the Board to enter an agreement to purchase the water right. The resolution may include conditions of approval, including but not limited to, the following: (3-18-22)

- a. A condition providing the length of time the water right will be retained in the Board's water supply bank. (3-18-22)
- b. A condition describing the terms for payment to the owner of the water right and the sale or rental price from the Board's water supply bank. (3-18-22)
- c. Other conditions as the Board determines appropriate, including a condition recognizing that water is being made available through the water supply bank pursuant to the provisions of Section 42-1763A, Idaho Code, for purposes of fish migration. (3-18-22)

08. Placement of Water Right. Effect of placement of a water right into the Board's water supply bank. (3-18-22)

- a. Upon acceptance of a water right into the Board's water supply bank, the owner of the right may withdraw the right within thirty (30) days of acceptance into the bank if the owner does not agree with the conditions of acceptance. (3-18-22)
- b. Upon acceptance of a water right into the Board's water supply bank, the owner of the water right is not authorized to continue the diversion and use of the right while it is in the Board's water supply bank, unless the water right is for hydropower and is placed in the Board's water supply bank to be released for salmon migration and power production purposes. (3-18-22)
- c. A water right which has been accepted shall remain in the Board's water supply bank for the period designated by the Board unless removed by resolution of the Board. (3-18-22)
- d. The owner of the water right shall remain responsible to take actions required to claim the water right in an adjudication or other legal action concerning the water right and to pay taxes, fees, or assessments related to the water right. (3-18-22)

e. The forfeiture provisions of Section 42-222(2), Idaho Code are tolled during the time period the water right is in the Board's water supply bank, pursuant to the provisions of Section 42-1764, Idaho Code. (3-18-22)

026. -- 029. (RESERVED)

030. SALE OR RENTAL OF WATER RIGHTS FROM THE BOARD'S WATER SUPPLY BANK (RULE 30).

01. General. The Board may in its discretion initiate the process to sell or rent water rights from the Board's water supply bank to achieve the purposes stated in Rule 1. The Board may from time to time, as water rights are available, authorize the Director to announce the availability of the rights from the Board's water supply bank, establishing a time and date for receiving applications in the office of the Director to purchase or rent the water rights. An application shall be on a form or in a format provided by the Director. The sale or rental price shall be the price, if any, as determined by the Board. The Director will evaluate applications with respect to the purposes of Rule 1, as to whether there will be injury to other water rights, whether the proposal would constitute an enlargement of the water right, whether the water will be put to a beneficial use, whether the water supply available from applicable rights in the Board's water supply bank is sufficient for the use intended, and whether the proposal is in the local public interest. For applications submitted pursuant to the interim authority provided by Section 42-1763A, Idaho Code, the Director will only make an evaluation as to whether the proposed use of water will cause injury to other water rights. The Director may defer the evaluation of potential injury to other water rights conditioned upon the right of any affected water right holder to petition the Director pursuant to Section 42-1766, Idaho Code, to revoke or modify the rental approval upon a showing of injury. (3-18-22)

02. Notice. The Director may give notice of an intended rental as he deems necessary, provided that prior to approving any application for purchase, or for rental for a period of more than five (5) years, he shall give notice as required in Section 42-222(1), Idaho Code. (3-18-22)

03. Approval. Sale or rental shall be approved only for use of water within the state of Idaho. The Director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in Section 42-401(3), Idaho Code, except that this evaluation shall not be required for applications submitted pursuant to the interim authority provided by Section 42-1763A, Idaho Code. (3-18-22)

04. Consideration. All applications received on or prior to the announced date for receiving applications shall be considered as having been received at the same time. Applications received after the close of the application date may be considered only if sufficient available water remains in the Board's water supply bank after all acceptable, timely applications have been filed. (3-18-22)

05. Authorized to Rent. The Director is authorized to rent water rights offered by the Board from the Board's water supply bank for a period up to five (5) years, but shall submit applications for purchase, or rental for a period of more than five (5) years to the Board for action. The Director will advise the Board on applications which require Board approval under Rule Subsection 025.06 whether he can approve the application in whole or in part or with conditions to comply with Section 42-1763, Idaho Code. (3-18-22)

06. Board Review. The Board will review applications for purchase or which propose the rental of water rights for a duration of more than five (5) years, and may approve, approve with conditions or may reject the applications as the Board determines to best meet the purposes of Rule 1 and promote the interest of the people of the state of Idaho. (3-18-22)

07. Order of Consideration. When renting water from the bank, the Director and the Board shall consider rental of water rights in the order the rights were leased to the bank, with first consideration for the rights which have continuously been in the bank the longest period of time provided the rights are suitable for the purpose of the renter. (3-18-22)

031. -- 034. (RESERVED)

035. HANDLING OF MONEY ASSOCIATED WITH THE BOARD'S WATER SUPPLY BANK (RULE 35).

Payments received by the Department from the sale or rental of water rights from the Board's water supply bank shall be handled as follows: (3-18-22)

01. Credited Amount. Ten percent (10%) of the gross amount received from the sale or rental of a water right from the Board's water supply bank and the entire lease application fee received pursuant to Rule 025 shall be credited to the Water Administration Account created by Section 42-238a, Idaho Code, or to the federal grant fund if the payment is received from a federal agency, for administrative costs of operating the Water Supply Bank. The ten percent (10%) charge described herein shall not apply to stored water rented from the rental pools described in Rule 040. (3-18-22)

02. Excess Funds. Any funds in excess of the amount needed to compensate the owner of the water right in accordance with the resolution accepting the water right into the Board's water supply bank and the administrative charge of Rule Subsection 035.01 shall be credited to the Water Management Account created by Section 42-1760, Idaho Code, for use by the Board for the purposes of Rule 1. (3-18-22)

036. -- 039. (RESERVED)

040. APPOINTMENT OF LOCAL RENTAL POOL COMMITTEES (RULE 40).

01. Board Meetings for Committee Appointments. The Board may at any regular or special meeting to consider appointing an entity to serve as a local committee to facilitate the lease and rental of stored water. At least ten (10) days prior to the meeting, the entity seeking appointment shall provide to the Director information concerning the organization of the entity, a listing of its officers, a copy of its bylaws and procedures, if applicable, a copy of the proposed local committee procedures, pursuant to which the local committee would facilitate the lease and rental of stored water, together with a copy of each general lease and rental form proposed to be used by the local committee. The local committee procedures must be approved by the Board and must provide for the following: (3-18-22)

- a. Determination of priority among competing applicants to lease stored water to the rental pool and to rent stored water from the rental pool; (3-18-22)
- b. Determination of the reimbursement schedule for those leasing stored water into the rental pool; (3-18-22)
- c. Determination of the rental price charge to those renting stored water from the rental pool; (3-18-22)
- d. Determination of the administrative charge to be assessed by the local committee; (3-18-22)
- e. Allocation of stored water leased to the bank but not rented; (3-18-22)
- f. Notification of the Department and the watermaster of any rentals where stored water will be moved from the place of use authorized by the permit, license, or decree establishing the stored water right; (3-18-22)
- g. Submittal of applications to rent water from the rental pool for more than five (5) years to the Board for review and approval as a condition of approval by the local committee; (3-18-22)
- h. Prevention of injury to other water rights; (3-18-22)
- i. Protection of the local public interest, except for applications submitted pursuant to the interim authority provided by Section 42-1763A, Idaho Code; (3-18-22)
- j. Consistency with the conservation of water resources within the state of Idaho, except for applications submitted pursuant to the interim authority provided by Section 42-1763A, Idaho Code; (3-18-22)

k. Management of rental pool funds as public funds pursuant to the Public Depository Law, Chapter 1, Title 57, Idaho Code. (3-18-22)

02. Local Committee Procedures. The local committee procedures shall provide that a surcharge of ten percent (10%) of the rental fee charged per acre foot of stored water rented from the rental pool shall be assessed and credited to the revolving development account and the water management account established in Sections 42-1752 and 42-1760, Idaho Code, in such proportion as the Board in its discretion shall determine. Such moneys, together with moneys accruing to or earned thereon, shall be set aside, and made available until expended, to be used by the Board for the purposes of Rule 1 unless the surcharge is prohibited by statute, compact or inter-governmental agreement. (3-18-22)

03. Review by Director. The Director will review the local committee procedures and submit them along with the Director's recommendation to the Board. The lease and rental form must receive the Director's approval. The Board may designate the applying entity as the local committee for a period not to exceed five (5) years. A Certificate of Appointment will be issued by the Board. The Board may extend the appointment for additional periods up to five (5) years, upon written request of the local committee. The Board may revoke a designation upon request of the local committee, or after a hearing pursuant to the promulgated Rules of Practice and Procedure of the Board, if the Board determines that the local committee is no longer serving a necessary purpose or is not abiding by its own approved procedures, these rules or applicable statutes. (3-18-22)

04. Annual Report. The local committee shall report annually on the activity of the rental pool on forms provided by the Board. (3-18-22)

05. Submission of Amendments to Procedures to Board. Amendments to the approved procedures of an appointed local committee which change the amount charged for the rental of stored water shall be submitted to the Board by April 1st of any year. The amendment will be considered approved by the Board unless specifically disapproved at the first regular Board meeting following the amendment action of the local committee. The Board may, upon good cause being determined by the Board, specifically approve of amendments submitted after April 1 of any year. (3-18-22)

041. -- 999. (RESERVED)

Exhibit

5

State of Idaho
THE STATE WATER PLAN

C.L. "Butch" Otter, Governor

Idaho Water Resource Board

Terry T. Uhling
Chairman

Roger W. Chase
Vice-Chairman

Robert Graham
Secretary

Vince Alberdi
Leonard Beck
Charles "Chuck" Cuddy
Peter Van Der Meulen
Jeff Raybould

Idaho Water Resource Board
November 2012

Implementation Strategies:

- Review existing statutes and regulations and recommend revisions as necessary to establish a more efficient process for changes in the use of water rights.
- Review Department policies and procedures and recommend revisions as necessary to implement a more efficient process for changes in the use of water rights.

Milestones:

- Number of changes in the use of water rights that meet emerging needs.

1D - WATER SUPPLY BANK

The sale or lease of water is critical to the efficient management and optimal use of the state's water resources. Thus, use of the state's Water Supply Bank should be expanded to meet traditional and emerging needs for water.

Discussion:

As the state approaches the time when there is little or no unappropriated water, the Water Supply Bank, established by Idaho Code § 42-1761, provides an efficient mechanism for the sale or lease of water from natural flow and storage. The purpose of the Water Supply Bank is to obtain the highest duty of water, provide a source of adequate water supplies to benefit new and supplemental water users, and provide a source of funding for improving water use facilities and efficiencies. By aggregating water available for lease, rental pools operating under the authority of the Water Supply Bank can supply the water needs of many users, provided there is no injury to other right holders, or enlargement of the use of the water rights, and the change is in the local public interest. Idaho Code § 42-1763.

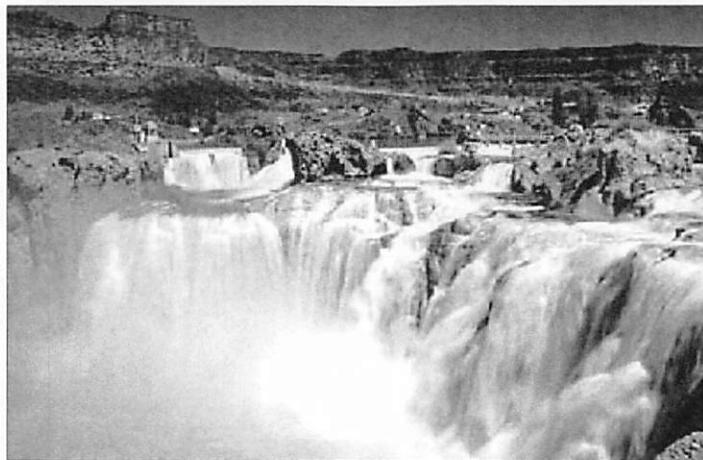


Photo: Shoshone Falls near Twin Falls (IDWR Photo)

The Idaho Water Resource Board has adopted rules governing the sale or lease of water through the Water Supply Bank. IDAPA 37.02.03. Pursuant to state law, the Board has authorized local entities to operate storage and natural flow rental pools in numerous water districts that meet regional needs. The Shoshone-Bannock Tribes are also authorized by the state to operate a storage water rental pool.

The scope of existing and future water use needs requires further development of flexible water banking systems that address local water use needs and ensure the optimum use of the state's water resources. The Water Supply Bank should provide for efficient mechanisms that are responsive to traditional and emerging needs for water.

Implementation Strategies:

- Monitor existing procedures, statutes, and rules of the Water Supply Bank to determine whether additional strategies are needed to meet current and future water use demands.
- Establish through state action, natural flow and storage rental pools in basins where local water users have identified the need for rental pools.
- Develop a public information and education program to promote use of the Water Supply Bank.

Milestones:

- Increased use of the Water Supply Bank.
- New storage and natural flow rental pools established.
- Efficient mechanisms in place that facilitate the optimum use of water.

1E - CONJUNCTIVE MANAGEMENT

Where a hydraulic connection exists between ground and surface waters, they should be conjunctively managed to maintain a sustainable water supply.

Discussion:

Region-specific factors impact the available supply of ground and surface water and effect changes in regional water budgets. This can result in insufficient water supplies to satisfy beneficial uses and may result in increased administrative curtailment, conflict among water users, and litigation.

This policy addresses conjunctive management and not water rights administration. Water rights administration is the enforcement of the relative rights of water right holders under the prior appropriation doctrine. By comparison, conjunctive management encompasses actions other than water rights administration that can be taken to optimize the benefits and value of Idaho's water resources. While conjunctive management is not a substitute for water rights administration, the legislature has determined that it is in the public interest to adopt plans and policies that facilitate and encourage a resolution of