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Department of Water Resources

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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	)	Consolidated Subcase No. 37-02499 <i>et al.</i>
	)	(Comprising Subcases listed in Exhibit A)
	)	
	)	STATE OF IDAHO'S RESPONSE TO MORE
Case No. 39576	)	DEFINITE STATEMENT FILED BY NORTH SNAKE
	)	GROUND WATER DISTRICT
	)	
	)	

The State of Idaho ("State"), in its sovereign capacity, by and through the Office of the Attorney General, files its response that supports designation of a Basin-Wide Issue regarding incorporation of the Swan Falls Settlement Agreement dated October 25, 1984, into the water rights determined in this matter.

COPY

The State provides this response in accordance with the ORDER SEPARATING AND CONSOLIDATING COMMON ISSUE FROM SUBCASES; AO1 §§ 11 AND 16, I.R.C.P. 42; ORDER FOR MORE DEFINITE STATEMENT; AND NOTICE OF HEARING ON WHETHER TO DESIGNATE AS BASIN-WIDE ISSUE AND SCHEDULING entered on November 26, 2002. The State comments on each item required to be included by paragraph 10 of SRBA Administrative Order No. 1 regarding designation of a Basin-Wide issue, are as follows:

1. The Issue.

The objector Faulkner Land & Livestock proposed a general provision in its MORE DEFINITE STATEMENT filed on January 10, 2003, to address the Swan Falls Settlement Agreement. While the State agrees that a general provision may well be necessary in this matter, the inquiry by the Court should be broader than suggested by the Court or the Objector. Several different approaches may be necessary to completely incorporate the Swan Falls Settlement into the affected water rights in the SRBA. Therefore, the State recommends that the Court designate the following issue as a basin-wide issue in this matter.

How should the benefits and burdens of the October 25, 1984 Swan Falls Settlement Agreement and the October 25, 1984 Swan Falls Contract be described in affected water rights?

This broader inquiry will not hamstring the Court in terms of solutions. Equally, if the parties and the Court are able to develop a single general provision that is sufficient to address the Swan Falls Settlement Agreement, then that result is also permissible under this broader inquiry. The State has not proposed any actual text of a general provision. Rather, the State

recommends that the text of any general provision and of any other proposal be the subject of mandatory mediation. This process provides the Court and parties the most flexibility.

2. Why the Issue is Broadly Significant.

The Swan Falls water rights dispute has its roots in early Idaho history. Entrepreneurs recognized early on the vast potential for production of electricity from hydroelectric facilities on Idaho's watercourses. During the early 1900's, the Trade Dollar Mining Co. initiated water rights on the Snake River at Swan Falls for purposes of producing electricity for the mines at Silver City, Idaho. Idaho Power Company (hereinafter "IPCo") later acquired these water rights and developed a hydroelectric facility at the Swan Falls site. *See G. Young & F. Cochrane, Hydro Era: The Story of Idaho Power Company*, 21-28 (1978). IPCo or its predecessor companies have also developed the following hydroelectric facilities on the Snake River and its tributaries: the American Falls Project, the Shoshone Project, the Twin Falls Project, the Bliss Project, the Upper Salmon Falls Project, the Lower Salmon Falls Project, the C.J. Strike Project, the Swan Falls Project, and the Hells Canyon complex of Brownlee Dam, Oxbow Dam, and Hells Canyon dam. *See Id.* At 21-29, 32-33, 46-53, 64-74.

The license issued by the Federal Power Commission (hereinafter the "FPC"), now the Federal Energy Regulatory Commission, for these hydroelectric facilities differed substantially. The FPC license for the Hells Canyon complex includes a provision subordinating the IPCo's rights to later-in-time upstream consumptive uses; the FPC licenses for the Swan Falls project failed to include such a provision. Thus, the stage was set for a major conflict between IPCo and consumptive users of waters of the Snake River.

Ratepayers of IPCo filed a complaint in the later 1970's with the Idaho Public Utilities Commission (IPUC) charging that IPCo's failure to protect its water rights by not preventing

upstream consumptive development had resulted in IPCo's rate base being overstated because its hydroelectric facilities were no longer fully useful. In response, IPCo filed an action against the State of Idaho and a small number of water users to determine the status of IPCo's water rights. The State asserted that IPCo had subordinated its rights to upstream consumptive uses; the IPCo vigorously opposed this assertion.

The Idaho Supreme Court held that the FPC license for the Hells Canyon complex did not in and of itself subordinate the IPCo water rights at the Swan Falls facility. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). The IPCo responded by filing a second lawsuit naming as defendants the State of Idaho and about 7,500 persons claiming water rights in the Snake River Basin.

Ultimately, the State of Idaho and IPCo reached agreement on the settlement of the Swan Falls dispute reflected in the agreement dated October 25, 1984. In this agreement, the State agreed to increases in minimum flows in the Snake River at Swan Falls, and the IPC agreed to subordination of its water rights above those minimum flows. The State agreed to commence a general adjudication of water rights in the Snake River basin in order to ensure that the state had the information needed to meet its commitment regarding the increased minimum flows at Swan Falls. Thus, the SRBA is one of the building blocks that the State will use to ensure the Swan Falls Agreement is properly implemented. If any issue may be characterized as broadly significant, the present issue concerning the Swan Falls dispute must be so classified.

3. The need for its early resolution.

Judicial economy would be promoted if the District Court designated this matter as a Basin-Wide Issue. Litigation in individual subcases before several different special masters is a waste of those resources.

4. The type of right or rights affected by this issue.

Consumptive water rights upstream of IPCo's hydroelectric facilities.

Idaho Power Company's water rights for hydroelectric power.

5. A description of how those rights would be affected.

The benefits of the subordination of water rights accrue to the consumptive water users upstream of the hydroelectric facilities of IPCo. The burden of the subordination of water rights is borne by IPCo's water rights for hydroelectric power from the Snake River. Conversely, the burden of the increased minimum flows at Swan Falls Dam is borne by those water users that are junior to the priority date associated with the increased minimum flows established at Swan Falls Dam.

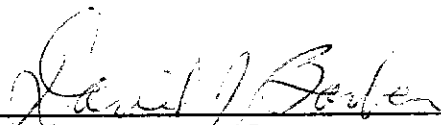
CONCLUSION

The issue related to incorporation of the Swan Falls Settlement Agreement of October 25, 1984 into the water rights determined in the Snake River Basin Adjudication is a major issue affecting many water users in southern Idaho. The State of Idaho respectfully requests that the issue described above be designated a Basin-Wide Issue.

DATED this 7th day of February, 2003.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 7th day of February, 2003, I caused to be served the original or a true and correct copy of the STATE OF IDAHO'S RESPONSE TO MORE DEFINITIVE STATEMENT FILED BY NORTH SNAKE GROUND WATER DISTRICT on the following parties by the methods indicated below:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

U.S. Mail

2. One copy to the party who filed an objection at the following address:

North Snake Ground Water District
Faulkner Land & Livestock Co., Inc.
1989 S. 1875 E.
Gooding, ID 83330

U.S. MAIL

Josephine Beeman
E.409 W. Jefferson St.
Boise, ID 83702

U.S. MAIL

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

STATEHOUSE MAIL

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

(not applicable)

United States Department of Justice
Environment and Natural Resource Division
550 W. Fort Street, MSC 033
Boise, ID 83724

U.S. MAIL

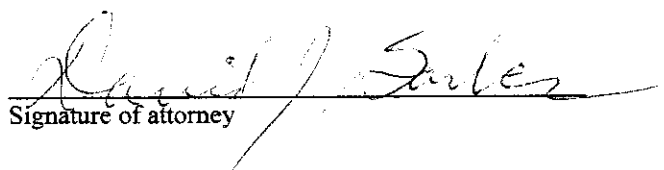

Signature of attorney

EXHIBIT A

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37-2515A	37-4085	37-7315B	37-7572	37-8112	37-12773
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