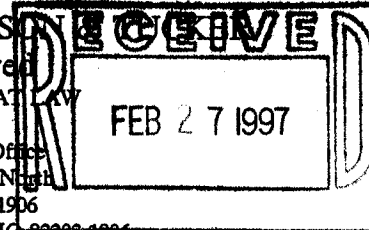


IPCO's 1996 ltr

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October 23, 1996

Idaho Department of Water Resources
1301 North Orchard
Statehouse Mail
Boise, ID 83720

HAND DELIVERED TO SOUTHERN REGION
IDAHO DEPARTMENT OF WATER RESOURCES
TWIN FALLS, IDAHO

ATTN: Karl Dreher, Director
Dave Tuthill, Adjudication Bureau Chief

Gentlemen:

Please find enclosed the following water right application and adjudication claims which we have presented for filing on this date on behalf of the Idaho Power Company:

- 1) Application for Permit - 7,850 cfs for power purposes @ American Falls;
- 2) Notice of Claim - 1,400 cfs for power purposes @ American Falls;
- 3) Notice of Claim - 6,000 cfs for power purposes @ American Falls;
- 4) Notice of Claim - 2,000 cfs for power purposes @ American Falls;
- 5) Notice of Claim - 136 cfs for power purposes @ American Falls; and
- 6) Notice of Claim - 3,500 cfs for power purposes @ Bliss power plant.

These filings are being made to supplement previous filings by the Company based upon the results of hydraulic capacity tests completed by the Company at various power facilities. These capacity tests were initiated in an effort to verify the previous SRBA claims filed by the Company. Tests at all of the Company's facilities have not been completed and further amended or supplementary filings may be forthcoming.

The filings at American Falls are further complicated, and in many respects necessitated, by the history of the development of the American Falls Reservoir and the adjudication filings for that facility made by the United States. Our review of pertinent records indicates that prior to the construction of the first American Falls Dam in 1927, the Company owned and operated three small power plants at American Falls, the West Side, Island, and East Side Plants. The diversion structure at the East Side Plant was capable of diverting 6,000 cfs in 1920. Permit No. 4168 was licensed in 1920 for 1,400 cfs, and Permit No. 14067 in 1924 for 4,600 cfs to make up the difference. In 1921, the Company filed an application to appropriate an additional 1,200 cfs for power purposes (Permit No. 15201/01-2041), along with an application for a permit to store 300,000 AF of water at the American Falls site. (Permit No. R-273/01-2065.) In each case, permits were subsequently issued to the Company.

About that same time, the Bureau of Reclamation became interested in the American Falls area as a reservoir site for the Minidoka Project. On June 15, 1923, the United States and the Company entered into a contract by which the United States acquired a portion of the Company's land and the water rights for the development of the American Falls site (The actual deed is dated April 13, 1926). This included the West Side and Island power plants. The Company retained the East Side Plant. The 1923 contract provided, among other things, that the Company was to acquire 45,000 AF of primary storage and 255,000 AF of "secondary storage" along with the right to use the water discharged from the dam for power production in the East Side Plant. The East Side power plant was not connected to the dam, so it made no use of the extra head created by the impoundment.

With the construction of the American Falls Dam in 1927, the capacity at the East Side Plant was increased to 9,000 cfs, and the corresponding the water rights consisted of the following:

1. 253 cfs With a priority date of July 15, 1901, transferred from the West Side Plant to the East Side Plant on June 17, 1929, by transfer No. 464;
2. 611 cfs With a priority date of August 1, 1901, transferred from the Island Plant to the East Side Plant on May 4, 1929, by transfer No. 463;
3. 1,400 cfs Permit No. 4168, with a priority date of September 3, 1908, licensed in 1920 to American Falls Power Company, No. 01-02017;

4.	4,600 cfs	Permit No. 14067, with a priority dated of March 8, 1919, licensed in 1924, No. 01-02032;
5.	2,000 cfs	Permit No. 16635, with a priority dated of October 15, 1926, licensed in 1971, No. 01-02046;
	8,864 cfs	TOTAL

The Company has previously filed adjudication claims on two of the licensed rights, Nos. 4 and 5 above (Water Right Nos. 01-02032 and 01-02046). Adjudication claims for Nos. 1 and 2 (the 1901 rights), No. 3 (No. 01-02017) along with a beneficial use claim for the 136 cfs necessary to bring the total water rights at the facility to 9,000 cfs are part of the current filing.¹

Permit Nos. 01-2041 and 01-2065, the permits issued to the Company for the 1200 cfs flow right and 300,000 AF storage right, respectively, were never licensed. In 1971, the Department of Water Administration (DWA) gave to the Company notice of its intention to cancel each of those permits for non-development. The Company opposed the cancellation based on provisions in the 1923 Contract, contending that the Company reserved its water rights at the American Falls site. The 1923 Contract, immediately following the provision transferring the Company's water rights to the U.S., provided:

But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations and are not to be considered as mere contract rights under contract with the United States. (1923 Contract, para 9(d), at p. 11)

Despite that language, the DWA decided that both permits should be canceled. In his written decision, the then director, R. Keith Higginson, stated:

After reviewing the files of the Department and the answer of the Idaho Power Company, the Director finds that the rights established by the Idaho Power Company, by reason of Permit Nos. 01-2041 and 01-2065, have been merged with rights granted the United States of America and that by

¹ You will note that the filings for the rights listed as Nos. 1 & 2 claim are for 6,000 cfs and 2,000 cfs, respectively. Although the Company only transferred the amounts listed above (253 and 611 cfs) to the East Side Plant, the balance of each right is included in the respective claim based on Judge Hurlbutt's recent decision in Basin-Wide # 10.

reason of contracts and agreements entered into between the Company and the United States of America, Bureau of Reclamation, *those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir.*

The Director further finds that since *the Company's rights to water at American Falls Dam and Reservoir are already covered by reason of licenses issued to the United States of America, under Permit Nos. R-269 and 4168² and contracts between the Company and the United States of America*, that Permit Nos. 01-2041 and 01-2065 are duplicate and should be canceled. The Company has failed to submit proof that it has constructed the necessary works to divert the water and apply it to beneficial use. (emphasis added)

In 1972, storage behind the American Falls Dam was restricted for safety reasons. This led to a non-governmental replacement program whereby the Company guaranteed bonds issued by the American Falls Reservoir District (AFRD) for reconstruction of the Dam in exchange for the right to connect its power plant directly to the Dam and use the water released from the Dam to generate power. On March 31, 1976 a contract (the "Government Contract") was entered into between AFRD and the United States. In that contract the United States acknowledged the existence of a "falling water contract" between AFRD and the Company and agreed that the Company could use the water released from the Dam, subject to the other provisions of the contract, for power generation purposes. (Government Contract, Art 18, p. 6) The Government Contract, and the use of the falling water, was authorized by the American Falls Enabling Act of December 28, 1973 (P.L. 93-206, 87 Stat. 904). Pursuant to the Government Contract and the Act, the AFRD, as the constructing agency, and the Company entered into a Falling Water Contract which authorized the Company to utilize the water discharged from the Dam in accordance with the Government Contract. (Falling Water Contract, Sec. 3.1, p. 13.) Also on March 31, 1976, the United States, AFRD and the Company entered into a Spaceholder Contract which provided:

Nothing herein shall in any way alter or change the present proportion of the storage rights of the spaceholder, and this Spaceholder Contract and the American Falls Replacement Dam Program constitute a reaffirmation by the United States of the rights of the spaceholder under the Existing Spaceholder Contract, except as modified by this Spaceholder Contract as authorized in the Act of December 28, 1973, and the Government Contract. The provisions of

². Permit No. 4168 for 1400 cfs was licensed to American Falls Power Company in 1920 and is one of the SRBA claims being contemporaneously filed by the Company. R-269 is current license #01-02064, held by the U.S., for 1.8 MAF of storage for irrigation and power purposes. The U.S. has filed an adjudication claim for this water right but did not include power as a purpose of use. See SRBA clm. # A01-02064.

the Existing Placeholder Contract shall in all respects remain in full force and effect except that the provisions of this Placeholder Contract with respect to the Replacement Dam, including but not limited to the operation and maintenance thereof and the distribution of water therefrom, shall prevail over the provisions of the Existing Placeholder Contract wherever and to whatever extent the provisions of the Existing Placeholder Contract are in conflict with the provisions of this Placeholder Contract. (Placeholder Contract, sec., 19, p. 6) [the 1923 Contract is identified as the "Existing Placeholder Contract" in Part 1, sec. 18]

The placeholder acknowledges that the water storage rights evidenced by permits, licenses and court decrees for the Existing Dam are held in the name of the United States and by this Placeholder Contract the water rights are reaffirmed and neither the United States, the Constructing Agency, nor the placeholders are required to make additional filings for the Replacement Dam. (Placeholder Contract, sec. 49, p. 23)

Despite the decision by the DWA in 1971 that the "Company's rights to water at American Falls Dam and Reservoir are already covered by reason of licenses issued to the United States of America . . .", questions remain as to whether additional SRBA filings by the Company are necessary to protect the Company's power rights at American Falls. Notwithstanding the 1971 decision, the contracts entered into in conjunction with the 1976 Dam Replacement Project reaffirmed the 1923 Contract and granted the Company the right to use water released from the Replacement Dam for purposes of power generation. While our review indicates that the United States holds various water rights at American Falls, only two have stated uses which include power generation. These are Water Rights Nos. 01-02064 (previously Permit No. R-269) and Water Right No. 01-04052, for a 1.8 MAF and 115,000 AF, respectively. Interestingly, the adjudication claim filed by the United States on the oldest power right, A01-02064, does not include power as a stated use. The later priority right, No. A01-04052, for 115,000 AF, does include power and contains the following under the remarks section: "Water furnished to private company for power generation." The amount of storage claimed under this right is significantly less than the 300,000 AF (45,000 primary and 255,000 secondary) of storage rights held by the Company under contract. Additionally, the U.S. has not claimed any flow rights for power purposes.

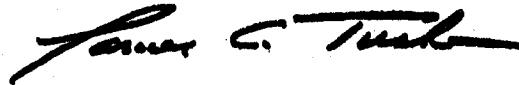
All of this further confuses and complicates the filings concerning American Falls. We are hopeful that with filing of the referenced claims that these issues can be addressed and resolved in the appropriate forum.

Finally, we are also enclosing the necessary fees for the referenced filings. The Company has previously paid the variable water use fees pursuant to I.C. § 42-1414(1)(b)(ii) and, as such, the enclosed fees for the adjudication claims are remitted under subsection

(1)(a) of that section. The filing fees for the water right application for American Falls are being conditionally paid. If it is determined that the water that is the subject of that application is not required, either based on the enclosed adjudication claims or the contract rights held by the Company, we would expect a remittance of the enclosed fees. In that regard, perhaps it would be appropriate to delay the processing of that application until the issues raised by the adjudication claims filed by both the Company and the U.S. at American Falls are resolved.

We will happy to discuss issues relating to any of the enclosed filings with you at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "James C. Tucker", with a stylized, flowing script.

JAMES C. TUCKER

Encls.

7-7-2000 IPCo letter

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May 9, 2000

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Regional Director
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Pacific Northwest Division
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Karl J. Dreher, Director
Idaho Department of Water Resources
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Boise, Idaho 83706

Idaho Water Resource Board
1301 North Orchard Street
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Water District No. 1 Rental Pool
900 North Skyline Drive
Idaho Falls, Idaho 83401

Water District No. 63 Rental Pool
6616 Overland
Boise, Idaho 83709

Water District No. 65 Rental Pool
102 N. Main Street
Payette, Idaho 83661

Re: Idaho Power Company water rights – Augmentation flows for salmon migration

On April 12, 2000, the Governor of the State of Idaho signed into law HB 794 – *Interim Authority for Rental of Storage Water to Augment Flows during the Migration of Snake River Salmon*, authorizing the rental of 427,000 acre feet of storage water from U. S. Bureau of Reclamation ("Reclamation") projects in the Snake River Basin to augment salmon flows in the Lower Snake River. This is a successor statute and the third time since 1992 that the Idaho Legislature has passed legislation authorizing the rental of Idaho water for flow augmentation use. The first such legislative authorization (I. C. § 42-1763A; S. L. 1992, ch. 101) was passed in reaction to a series of applications filed with the Idaho Department of Water Resources to allow

various state water rights held by Reclamation by adding an additional use – *anadromous fish enhancement on the Lower Snake River within and outside the State of Idaho*. The 1992 and subsequent legislative authorizations were intended as an interim measure to dispense with the potential for a protracted state administrative proceeding seeking to change the Reclamation water rights and also to give federal interests the opportunity to develop a recovery plan for the listed salmon species that properly balanced upstream and downstream measures for salmon protection. Each of the legislative authorizations had specific sunset provisions. HB 794 expires on January 1, 2001.

Each legislative authorization, including HB 794, also provided that the interim authorization granted did not constitute a finding under Idaho law that (i) the rental and use of water for flow augmentation purposes constituted a beneficial use of water, (ii) the use was in the public interest or (iii) such use injured existing water rights. Idaho Power Company (Idaho Power) objected to the applications filed by Reclamation to add *fish enhancement* in the Lower Snake River as a recognized use of its water rights on the basis that the change in use would injure its water rights. Idaho Power continues to believe that the use of storage water from Reclamation reservoirs for such purposes violates state water law and injures its water rights. Nonetheless, Idaho Power has cooperated with the implementation of the interim flow augmentation measures authorized under the referenced legislation. This cooperation has been based, in part, on discussions initiated in the context of the Snake River Basin Adjudication (SRBA) intended to resolve outstanding issues relating to the provision of flows from Idaho to mitigate for the impact of downstream federal actions, and by an agreement with the Bonneville Power Administration pursuant to 16 U.S.C. § 839b(h)(11)(A)(ii) which has partially offset the impact of flow augmentation on Idaho Power's hydroelectric operations.

In the past Idaho Power has been encouraged by apparent progress in the discussions that have occurred over the past several years between state, federal and tribal interests. However, in light of recent discussions, it can no longer rely upon them with confidence as a means of resolving pending issues in a reasonable time. As such, this correspondence is intended to place federal and state interests on notice that while Idaho Power will continue to cooperate with the interim flow augmentation measures contemplated by HB 794, Idaho Power does not waive nor relinquish any claims it may have for injury to its water rights occasioned by the present, past or future rental and movement of water pursuant to HB 794 or previous legislative authorizations. To insure that Idaho Power has the opportunity to take such actions as may be necessary to protect its water rights, Idaho Power requests that prior to the rental of any storage water pursuant to HB 794, that it receive notice of the filing of an application to rent storage water for flow augmentation purposes and be given an opportunity to participate in any proceeding related to such application. Idaho Power also would object to the release, storage or use of any water from Reclamation reservoirs or storage facilities that is not in strict compliance with either HB 794 or state water law.

For the purposes of clarity, the interests Idaho Power seeks to protect in this process are a matter of state water law. Idaho Power owns and operates 17 hydroelectric projects on the Snake River and its tributaries and holds state water rights for hydropower purposes with regard to

Exhibit to Letter dated May 9, 2000 to U.S. Bureau of Reclamation

Project	Water Right No.	Priority Date	Amount
American Falls	01-02017	09/03/1908	1400.0
	01-02032	03/08/1919	4600.0
	01-02046	10/15/1926	2000.0
	01-07128	10/23/1996	7850.0
	01-10382	07/15/1901	6000.0
	01-10383	08/01/1901	2000.0
	01-10384	01/01/1929	136.0
Bliss	02-02064	09/04/1947	12000.0
	02-02065	12/11/1947	3000.0
	02-10135	09/04/1947	3500.0
Brownlee	03-02018	10/17/1952	1,400,000 af
	03-02023	10/17/1952	20000.0
	03-02024	02/11/1964	10000.0
	03-07018	12/24/1975	5000.0
C.J. Strike	02-02080	06/21/1950	15420.0
Cascade	65-02232	12/03/1918	50.0
	65-02338A	08/24/1937	125.0
	65-02338X	10/06/1925	25.0
	65-12096	02/21/1978	2000.0
Clear Lakes	36-02018	01/18/1919	526.0
Hells Canyon	03-02017	05/29/1964	9000.0
	03-02020	05/18/1953	21000.0
Lower Malad	37-02472	05/14/1946	650.0
	37-02018	11/25/1908	700.0
Lower Salmon	02-02001A	05/11/1908	1700.0
	02-02001B	07/02/1908	1300.0
	02-02059	03/20/1935	250.0
	02-02060	08/08/1946	14000.0
Oxbow	03-02019	06/19/1947	16000.0
	03-02025	02/11/1964	14000.0
Shoshone Falls	02-02036	08/09/1920	1000.0
Swan Falls	02-02032	07/29/1919	4000.0
	02-07379	03/31/1982	6550.0
	A02-00100	01/17/1900	2150.0
	A02-04000	01/17/1900	1840.0
	A02-04001	04/17/1900	1460.0
Thousand Springs	36-02013	11/20/1912	600.0
	36-02026	05/01/1916	100.0
Twin Falls	02-02056	04/02/1929	1050.0
	02-07375	04/09/1982	5000.0
Upper Malad	37-02471	05/14/1946	900.0
Upper Salmon	02-02057	04/02/1929	6500.0

IPC 2001 ESA ltr



**IDAHO
POWER**

An IDACORP Company

IDAHO POWER COMPANY
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U.S. DEPT. OF JUSTICE
ENV. & NAT. RES. DIV.
DENVER, CO

01 OCT 22 PM 12:31

JAMES C. TUCKER
Senior Attorney

October 18, 2001

90-6-2-63
c: Peter
Yvonne

J. William McDonald
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D. Robert Lohn
Northwest Regional Administrator
National Marine Fisheries Service
7600 Sand Point Way NE
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Re: ESA § 7 Consultation – BOR projects in Snake River Basin above the HCC.

Gentlemen:

The Idaho Power Company (Company) continues to monitor ESA and related resource issues as they develop in Idaho and the Northwest. In this context, the Company has reviewed the interim biological opinion issued by the National Marine Fisheries Service (NMFS) on Bureau of Reclamation (Reclamation) projects in the upper Snake River.¹ We understand that this biological opinion expires in March 2002 and that Reclamation is preparing to re-initiate consultation on the continuing operations of the upper Snake Reclamation projects. Our review of the interim biological opinion indicates that NMFS included several references regarding the effects of the Hells Canyon Complex (HCC) on water quality and ESA-listed anadromous fisheries. These references and many of the conclusions that NMFS draws from them are inaccurate and are based on now-dated and incomplete science. While the Company expects to address these inaccuracies in continuing discussions it is having with NMFS and the Federal Energy Regulatory Commission (FERC) on ESA issues relating to the HCC, the Company is concerned that this may not result in correcting the inaccuracies in the context of the ongoing consultation between Reclamation and NMFS on the upper Snake River Reclamation projects. For that reason, the Company is submitting with this correspondence data and materials that address the NMFS inaccuracies in the interim May 2, 2001 Reclamation biological opinion.²

¹ *Biological Opinion – U.S. Bureau of Reclamation Operations and Maintenance of its Projects in the Snake River Basin above Brownlee Dam from Date Issued through March 2002* (NMFS 5/02/01).

² This material is attached as Attachment # 1.

Mr. J. William McDonald
Mr. D. Robert Lohn
October 18, 2001
Page 2 of 3

The Company further understands that the intent of the current consultation effort is to reach a long-term agreement that would facilitate the provision by Idaho interests of 427,000 acre feet, and perhaps more, of Idaho storage water annually to augment flows in the lower Snake River to help meet the flow targets at Lower Granite established by the 1995 Federal Columbia River Power System (FCRPS) biological opinion (and continued by the 2000 FCRPS biological opinion). This long-term agreement is to be a part of a larger Idaho agreement, negotiated in the context of the Snake River Basin Adjudication (SRBA) mediation, to resolve all pending tribal water right claims, and Endangered Species Act (ESA) and Clean Water Act (CWA) issues associated with the management of Idaho's water resources.

The Company has been, and continues to be, a participant in the SRBA mediation and remains hopeful that a comprehensive agreement can be reached in that forum on these issues of importance to Idaho and the region. The Company supports Reclamation's efforts to reach agreement on the upper Snake River issues, but cautions that an agreement on how Reclamation facilities may be utilized to assist with downstream ESA issues should not be negotiated without input from and consideration of all interests that may be impacted by such an agreement.

In May of 2000, the Company advised Reclamation, as well as Idaho water managers, that the storage and use of water from Idaho reservoirs for flow augmentation purposes, as then authorized by the Idaho Legislature, might under certain circumstances injure the Company's water rights.³ The Company remains concerned about the potential impact that a long-term agreement providing for the use of upper Snake River storage water for downstream flow augmentation may have on the Company's water rights and certain contract rights it has with the United States regarding certain Reclamation reservoir operations in Idaho.

One such contract is dated June 15, 1923 (U.S. contract I1r-733). This 1923 contract entitles the Company to the use of 45,000 acre-feet of primary storage capacity and 255,000 acre-feet of secondary storage capacity in American Falls Reservoir.⁴ The use of this secondary storage capacity is available to the Company between October 1 of any year and June 10 of the following year and, in combination with the 45,000 acre-feet of primary storage capacity, was granted to the Company for the purpose of regulating and controlling 300,000 acre-feet of water that was reserved to the Company in the contract and which the United States holds in trust for the Company's use.⁵ At various times since the execution of the 1923 contract, the Company's

³ A copy of the Company's May 9, 2000 correspondence is attached as Attachment 2.

⁴ The Company referred to this contract, and the storage rights granted to the Company, in a letter dated October 23, 1996 to the Idaho Department of Water Resources in connection with the filing of numerous SRBA claims relating to American Falls. A copy of that letter is attached. As that letter reflects, the Company had anticipated that issues relating to the Company's rights at American Falls would be resolved through the SRBA process. The prospect of a long-term agreement which may affect upper Snake reservoir operations makes it necessary for the Company to raise this issue in these negotiations.

⁵ See: *Memorandum Decision, In the Matter of Permit Nos. 01-2041 and 01-2065 in the Name of Idaho Power Company*, Idaho Department of Water Administration, April 21, 1971.

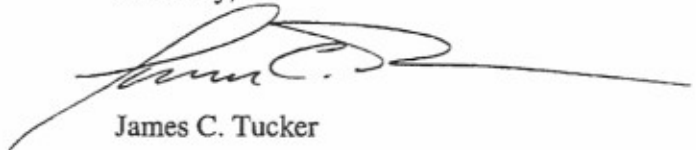
Mr. J. William McDonald
Mr. D. Robert Lohn
October 18, 2001
Page 3 of 3

use of the 255,000 acre-feet of secondary storage has been affected by subsequent contracts with the United States as well as by a general Company policy of coordinating the development of hydropower on the Snake River with the corresponding development and use of that resource for irrigation purposes. Nevertheless, the Company's rights and entitlements under the 1923 contract remain valid and enforceable⁶, and in critically short water years, such as 2001, the ability of the Company to call on the reservoir to increase downstream flows for power generation is of substantial value to the Company's customers.⁷

We understand that in the current upper Snake River consultation discussions that Reclamation may seek to change the manner in which the upper Snake River Federal reservoirs, such as American Falls, will be operated to facilitate the prospective use of the water stored in those reservoirs for flow augmentation in the lower Snake River to mitigate for the impact of the lower Snake Federal projects. Because the Company believes that such changes in the operations of the reservoirs and use of the stored waters in the upper Snake River will significantly affect its vested water and contract rights, the Company requests that Reclamation and the other participants in the upper Snake discussions include the Company in any discussions related to the use of upper Snake River storage water for flow augmentation purposes. Only through inclusion in the process can the Company try to insure that its rights are considered and protected in any agreement that may be reached.

We trust the enclosed information on HCC will be useful in the context of the development of a new biological opinion on the upper Snake BOR projects, and that you share our view that the Company's participation in those ongoing discussions will inure to the benefit of all. If you have any questions, please contact the undersigned.

Sincerely,



James C. Tucker

cc: Wm. Hogarth/NMFS
D.R. Lohn/NMFS- NW
A. Klee/Interior
J. Mark Robinson/FERC
Jim Yost/Governor's Office
Francis McGovern/SRBA Mediator
All counsel/SRBA Mediation

⁶ Paragraph 17 of the 1923 Contract provides that for the purposes of operation and maintenance charges to be paid by the Company, each acre-foot of secondary storage capacity shall be considered the equivalent of 7/20th of an acre-foot of primary storage capacity. The Company has been paying, and continues to pay, annual project operation and maintenance charges on its secondary storage capacity rights.

⁷ Because this is a critically short water year, the Company is placing Reclamation on notice, through separate correspondence, of its intent to exercise its contract right to such portion of the 255,000 acre-feet of secondary storage capacity as may be necessary to meet the specified flows at Twin Falls (§ 21, 1923 Contract.)

Idaho Power Company Comments
Re: Upper Snake Interim Biological Opinion

The National Marine Fisheries Service (NMFS) asserts in the Upper Snake Biological Opinion¹ that water quality below the Hells Canyon Complex (HCC) is detrimental to certain anadromous species listed under the Endangered Species Act (ESA). NMFS identifies temperature and low dissolved oxygen levels as the principal problems. NMFS' assertions are incorrect. NMFS is incorrect in regard to both the facts on the ground and their implications for the listed species.

1) Temperature

NMFS' assertions regarding water temperature begin with an incorrect hypothesis – that the thermal regime downstream of the HCC is radically different than what might have been expected to have been the case historically in the middle and upper Snake River reaches. In the past NMFS has also asserted that this alleged temperature variance is detrimental to fish because it delays the emergence of fall chinook which adversely affects fall chinook growth rates, delays fall chinook spawning, and causes increased pre-spawning mortality. Like NMFS underlying hypothesis, these assertions are wrong.

There is no scientific data to support the basic assertion that the present-day thermal regime downstream of the HCC is significantly different than the historic regime upstream from the HCC. While present-day temperatures downstream of the HCC are generally cooler than present-day upstream temperatures during springtime and summer, the temperatures below the HCC may actually more closely mimic predevelopment (historic) conditions. Qualitatively, one would expect that anthropogenic development of the watershed likely increased springtime temperatures from historic conditions, especially during low flow years. In fact, the Environmental Protection Agency (EPA) stated that flow depletion from storage and irrigation diversion, and surface return of irrigation water warmed on fields act together to raise prevailing temperatures. (EPA 1974). EPA specifically stated that almost complete utilization of Snake River flows for irrigation accelerates warming of the river. (Id.) Clearly, it is reasonable to conclude that present-day springtime river temperatures are warmer than historic springtime temperatures. In fact, any efforts to make the thermal regime downstream of the HCC more closely match the regime above the HCC may actually move the thermal regime below the HCC further from historic conditions.

a. Emergence Timing - NMFS is wrong in claiming that fall chinook emergence timing has been altered to the detriment of the listed species.

NMFS error likely stems from information contained in Connor et al. (1997), a reference NMFS cites. In that report a hypothetical comparison of emergence was made for the Snake River downstream of the Grande Ronde River ("G.R. Reach," downstream

¹ *Biological Opinion – U.S. Bureau of Reclamation Operations and Maintenance of its Projects in the Snake River Basin above Brownlee Dam from Date Issued through March 2002* (NMFS 5/02/01).

of the HCC), and the Snake River near Marsing, Idaho ("M. Reach," upstream of the HCC). The data used for the G.R. Reach was from the period 1976-1981, and for the M. Reach was from 1960-1970. (These two sets of data are representative of two very different decades. In addition, data from the G.R. Reach does not represent the environment found between the HCC and the Grande Ronde River - the "H.C. Reach," also downstream of the HCC). In order to complete the analysis, the authors averaged the spawn timing information for spawning observed from the HCC downstream to Asotin, Washington from 1991-1995. That portion of the Snake River includes both the H.C. Reach and the G.R. Reach. The resulting spawn timing was then assumed to occur in the M. Reach historically. An emergence time was then calculated for the G.R. Reach (using the estimated spawn timing and the temperature data from 1976-1981), and for the M. Reach (using the same estimated spawn timing and the temperature data from 1960-1970). No analysis was completed for the H.C. Reach. The resulting emergence estimates reflected that the theoretical fish in the M. Reach would have emerged almost 2 weeks earlier than those fish in the G.R. Reach. This analysis is misleading, and results in biases concerning the thermal environment downstream of the HCC, and what historically occurred in the M. Reach.

The analysis made by Connor et al. ignores the fact that the thermal regime between the H.C. Reach and the G.R. Reach is very different, and that, depending on spawn timing in those two reaches, emergence in the upper H.C. Reach is often as much as two weeks earlier than in the lower G.R. Reach (similar to what was estimated for the historical M. Reach). Additionally, the thermal difference observed between the H.C. Reach and the G. R. Reach is mostly due to thermal influences from the Salmon and Grande Ronde Rivers, essentially uncontrolled rivers – not from HCC operations. Also, when the data were analyzed, only spawn timing data for 1991-1995 were available. Indeed, during those years (especially in 1991 and 1992) spawn timing was generally later in the fall, with a median date of about November 17th. If more recent spawn timing information is included (1991-2000), the median spawn time is around November 6th – and most spawning has more recently occurred upstream of the Salmon River (80% 1998-2000).

NMFS misinterprets and misapplies available data on emergence timing. If one examines two important studies, Mains and Smith (1964) and Krzma and Raleigh (1970), one comes to the conclusion that juvenile fall chinook salmon emergence and out-migration timing are similar to what likely occurred historically. An appropriate method to identify historic emergence dates is use available data and estimate a date of emergence based on size at date of capture, an accepted daily growth rate, and an accepted size at emergence. (The footnote below illustrates how this method might be used.²)

² As an example, assume a fish emerged from the gravel at a size of 35 mm, that its growth rate was 1 mm/day, and that it was captured on April 10 at a size of 40 mm. The difference between the size at capture and the estimated emergence size is 5 mm. By dividing the change in size by the growth rate (5 mm / 1 mm/day) it is learned that the fish was 5 days post-emergence at the time of capture on April 10. Therefore it is reasonable to estimate that the fish emerged from the gravel on April 5.

b. Growth Rate

NMFS also has claimed that juvenile fall chinook growth rates are likely being adversely affected by temperature variances below the HCC, and that their growth rate would not likely compensate for the alleged later emergence timing. This is incorrect. The growth rate of Snake River fall chinook salmon has been reported by Connor et al. (1997) as 1.4 mm/day. Comparing this information with information from Groot and Margolis (1991), as well as hatchery observations, illustrates NMFS' error. Natural sub-yearling chinook within the Sacramento River, California, showed growth rates between 0.33 – 0.86 mm/day. (Kjelson et al. 1982). Groot and Margolis (1991) estimated that natural sub-yearling chinook salmon in the Nitinat and Cowichan Rivers, Canada, grew at rates between 0.21 – 0.62 mm/day. Sub-yearling chinook salmon held at constant temperature at Lyons Ferry hatchery (Snake River) have an average growth rate of 0.7 mm/day (unpublished data from Lyons Ferry). In all instances, natural sub-yearling fall chinook salmon juveniles within the Snake River downstream of the HCC have the highest growth rates observed. As such, it does not appear plausible that temperature variances related to operations at the HCC are adversely affecting the growth rate of ESA-listed fish.

c. Pre-Spawning Mortality

NMFS has also erred in asserting that temperature variances related to HCC operations has increased pre-spawning mortality and has delayed spawning relative to historic norms. With respect to pre-spawning mortality, data for fall chinook escapement over the lower Snake River Dams and the relationship of escapement past Lower Granite Dam and the number of redds observed upstream of that dam reveals the errors in NMFS' assertion. Beginning in 1993, and continuing through 2000, researchers with the Idaho Power Company and the U.S. Fish and Wildlife Service combined remote deep-water video searches with weekly aerial redd surveys during the fall spawning period in an attempt to more accurately enumerate the total number of redds found upstream of Lower Granite Dam. (Groves and Garcia 1998, Groves and Chandler 1999, Garcia et al. 1999). During this time period the Nez Perce Tribe began a more thorough attempt to enumerate redds observed within the Clearwater River. (Garcia et al. 1999). For the years 1993-2000 the loss of fish between Lower Monumental Dam and number of adults counted at Lower Granite Dam (less natural returns to Lyons Ferry hatchery, natural turnoff of spawners into the Tucannon River, and fish removed at Lower Granite Dam) has resulted in an average "loss" of 20% of the run (range between 3-40%). However, this "loss" does not take into account the potential number of fish spawning in the tailrace of Little Goose and Lower Granite Dams as observed by Dauble et al. (1999), occurrence of fall back (Mendel et al. 1992), potential errors at the counting stations, or the possibility of deep-water redd construction in the Clearwater and Grande Ronde Rivers. Of these extraneous factors, fall back is the most problematic, and could potentially lead to pre-spawn mortality – but that would in fact be caused by the existence of the federal government's Lower Snake River Dams, not operations at the HCC.

In light of these uncertainties, the loss of fish upstream through the Lower Snake River may actually be negligible. More importantly though, with the advent of the deep-water video surveys and more consistent aerial surveys in all of the systems upstream of Lower Granite Dam, the average fish to redd ratio has stabilized at 3.0:1 (range 2.0:1 – 3.6:1). (Garcia et al. 1999)(Idaho Power Company, unpublished data 1993-2000. In comparison, the fish to redd ratio within the Hanford Reach of the Columbia River has been estimated at about 3.4:1. (Visser 2000). This is an important point, as it is generally thought that the Hanford Reach fish experience less pre-spawn mortality than Snake River fall chinook because they encounter fewer dams, and they are subjected to a more amenable environment that is similar to what was historically present in the Marsing Reach spawning grounds of the Snake River. If that is the case, it would be expected that the fish to redd ratios would be significantly higher within the Hells Canyon Reach of the Snake River, but in fact they are almost exactly the same. It is more reasonable to conclude that pre-spawning mortality does not occur in significant numbers, nor is there any evidence or substantive link to operations at the HCC.

Any conclusion that spawn timing within the present day Snake River has been altered with respect to what may have occurred historically in the Marsing Reach of the Snake River also has no justification. At best, it would be based on sparse anecdotal information from Evermann (1895) that fall chinook salmon within the Marsing Reach “likely” began spawning by about the first week of October, peaked around the first week of November, and may have concluded spawning by the middle of November. The data from Evermann (1895) that this assumption is built upon is from the collection of less than 30 spent female chinook by a commercial fisherman during a single year.

With this background it is now useful to examine what is known about present-day fall chinook spawn timing within the Snake River downstream of the HCC. Since 1991, the Company has participated in cooperative aerial spawning surveys along the Snake River downstream of the HCC. These surveys are conducted on a weekly periodicity during the fall spawning period, have been reported through various venues (Groves and Chandler 1996, Garcia et al. 1999, Groves and Chandler 1999, Garcia et al. 2000) and are especially useful for illustrating spawn timing. From those spawning surveys it is notable that as the number of fall chinook escaping over Lower Granite Dam increases, then the start date of spawning occurs earlier (**Figure 1**). As an example, in 1992 (escapement of 686 adults, 45 total redds) spawning initiated in the Snake River downstream of the HCC within a few days of October 28th, peaked by about November 18th, and ended by December 9th – while in 1999 (escapement of 1770 adults, 273 total redds) spawning began about October 18th, peaked by November 10th, and virtually ended by November 23rd (**Figure 2**).

Figure 1. Relationship of time of initiation of spawning dependent on total number of adult fall Chinook salmon escapement at Lower Granite Dam (1991-2000)

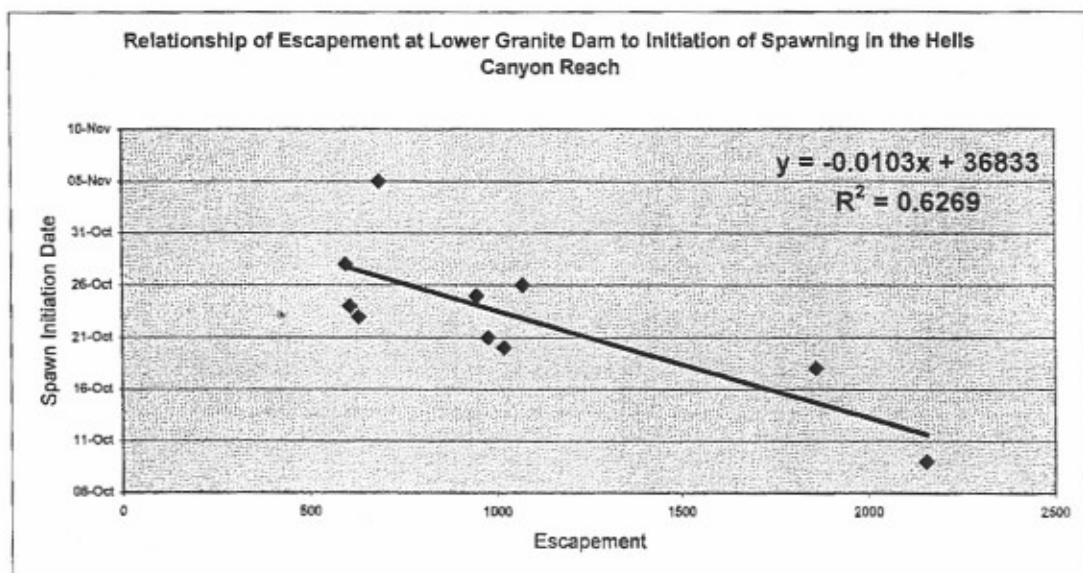
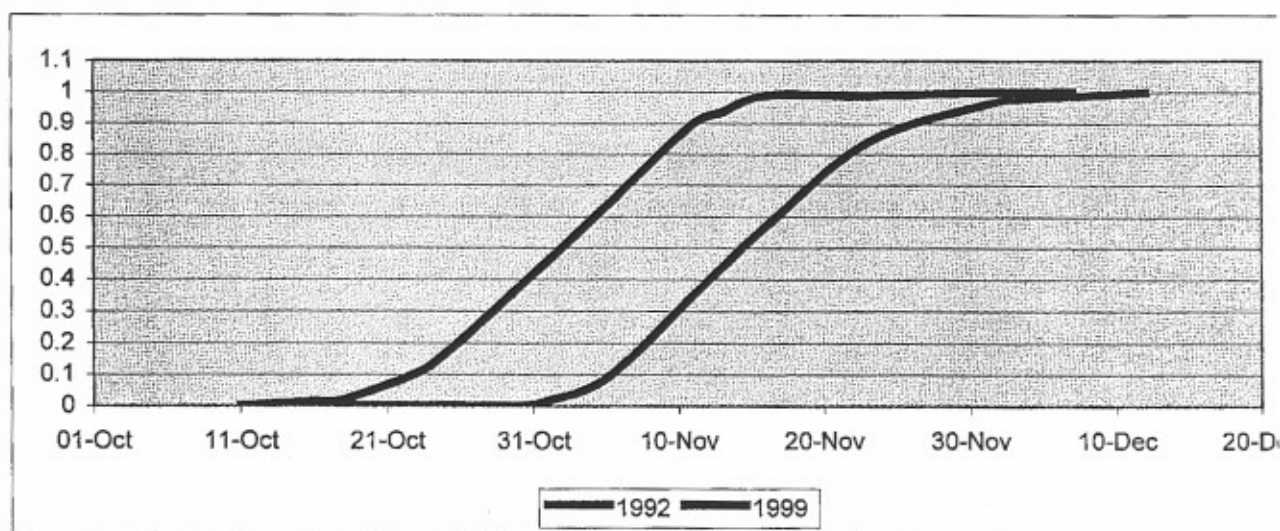


Figure 2. Example of how spawn timing has changed within the Snake River; a comparison plot of cumulative percent redd construction in 1992 and 1999. Note that during 1999 six times as many adult fall Chinook salmon returned to the Snake River to spawn – spawning in that year began earlier, peaked earlier and ended earlier.



It is also worth noting that the survey flight date that corresponded to >90% completion of spawning in 1992 was December 4th, and in 1999 was November 11th. Daily average water temperatures associated with the initiation of spawning in 1992 were between 12.5 and 14.3 °C, while in 1999 they were between 15.0 and 16.3 °C. In order to be more complete, **Table 1** shows date of spawning initiation and associated water temperatures for the upper and lower sub-reaches of the Snake River downstream of the HCC (demarcated by the Salmon River confluence) for the years 1991-1999. **Table 1** illustrates that it is impossible to predict when spawning will be initiated based on temperature alone. Also, as has been mentioned earlier, conditions within the Hanford Reach of the Columbia River are generally thought to be similar to what may have historically occurred in the Marsing Reach of the Snake River, cooler fall temperatures. If that is the case, and operations at the HCC have altered the spawn timing, then it would be expected that spawn timing in the Hanford Reach of the Columbia River would start as much as two weeks earlier than in the Snake River downstream of the HCC. In comparison, spawning in the Hanford Reach has been estimated to start as early as October 16th and be complete by as late as November 24th. (Dell and Kindley 1985, Dell and Carlson 1987, Dell and Carlson 1988a, Dell and Carlson 1988b, Carlson and Dell 1990, and Carlson and Dell 1992). In 1991 and 1992 spawning within the Snake River began late (by late October – early November) and ended late (by early to mid-December); whereas in more recent years 1998, 1999 and 2000 spawning began by mid-October and virtually ended by mid to late-November – similar to what is observed in the

Hanford Reach. While spawn timing in the Snake River may have been retarded by about two weeks in 1991 and 1992 (very low water years and two of the lowest return years on record for Snake River fall chinook), that is by no means what has been observed in more recent years. There is no evidence that operations at the HCC have retarded the spawn timing of fall chinook salmon within the Snake River with respect to the historical population from the Marsing Reach.

Available data can be used (as in the discussions above) to show (1) that Snake River fall chinook spawn timing is no different than what it likely was historically, (2) that temperature cannot be used as a predictor of initiation of spawning (and thus that altering the temperature downstream of the HCC would have an effect on spawn timing), (3) that there is no evidence of pre-spawn mortality - due to temperature - within the influence of HCC operations, (4) that incubation timing and emergence are not significantly affected (prolonged - and later than historically believed) because of temperatures, or (5) that growth rates downstream of the HCC are being adversely affected.

Table 1. Observations of initial spawning in the sub-reaches of the Snake River up and downstream of the Salmon River confluence and associated water temperatures.

Year	Location	Spawn Begin	Mean Weekly Temp Prior to Spawn Initiation (degrees C)
1991	Below	28-Oct	13.5
1992	Below	05-Nov	12.5
1993	Below	25-Oct	13.8
1994	Below	01-Nov	12.5
1995	Below	30-Oct	11.1
1996	Below	28-Oct	11.4
1997	Below	20-Oct	14.0
1998	Below	26-Oct	12.0
1999	Below	18-Oct	15.0
1991	Above	11-Nov	12.5
1992	Above	05-Nov	14.3
1993	Above	01-Nov	14.0
1994	Above	24-Oct	15.8
1995	Above	23-Oct	14.9
1996	Above	21-Oct	15.6
1997	Above	27-Oct	13.5
1998	Above	26-Oct	14.5
1999	Above	18-Oct	16.3

2) Dissolved Oxygen

NMFS asserts in the Upper Snake Biological Opinion that low DO downstream of the HCC may adversely affect listed fall chinook and steelhead migrating within 20 miles of Hells Canyon Dam during the late summer and fall. NMFS also asserts that incubating fall chinook eggs and fry are also likely to adversely affected by being subjected to "low" levels of DO in this reach, which may result in decreased survival through emergence and reduced size and fitness of fry at hatching and emergence. Existing data do not support NMFS' assertions.

First NMFS relies on incomplete data in reaching its conclusion that DO is at, or remains at, low levels during critical times for anadromous fish. To reach its conclusions, NMFS used oxygen data collected by the Company in August 1999 at Pine Bar (20 miles downstream of Hells Canyon Dam) to define the downstream boundary of oxygen levels <6.0 mg/l. In August 1999, oxygen levels in water leaving Hells Canyon Dam were <6.0 mg/l, and were measured at approximately 7.0 mg/l downstream at Pine Bar. Lacking data between the two points, NMFS assumed that fish anywhere within the 20 mile river reach between Pine Bar and Hells Canyon Dam could potentially be adversely affected by the low oxygen levels. Additional data collected by the Company in 2000 shows that during August-October, even when oxygen levels coming out of Hells Canyon Dam fell below 6.0 mg/l, oxygen levels had risen to 6.0 mg/l or above within approximately 7 miles downstream of Hells Canyon Dam (**Table 2**). A large rapid (Wildsheep Rapids) appeared to provide sufficient aeration to elevate oxygen levels in the water to the 6.0 mg/l threshold.

NMFS' inaccurate assumption results in an overstatement of the potential geographic impact of oxygen levels <6.0 mg/l. Even with an overestimate of the zone of low DO levels at 20 miles of river, most of the listed species are unlikely to occur within the reach. Relying upon sound data to reduce the zone of potential impact to less than half the assumed length should reduce the already unlikely occurrence of listed species straying into areas with oxygen levels <6.0mg/l.

Table 2. Summary of dissolved oxygen sampling results downstream of Hells Canyon Dam, August-October, 2000.

Date	D.O. in HC Dam tailwater	D.O. above Wildsheep Rapids	Location D.O. reached 6.0 mg/l	Miles of river <6.0 mg/L
August 21,22	3.9	5.1	Between Wildsheep and Granite Rapids (RM 241)	6.5
August 24	4.0	6.0	Above Wildsheep Rapids (RM 241.5)	6.0
September 7	4.9	5.6	Between Wildsheep and Granite Rapids (RM 241)*	6.5
September 15	4.5	5.6	Between Wildsheep and Granite Rapids (RM 241)*	6.5
September 22	5.7	6.4	Stud Creek Rapids (RM 245-246)	2.0
September 29	6.2	7.5	Hells Canyon Dam	0
October 4	6.0	6.7	Hells Canyon Dam	0
October 14	5.7	7.0	Cliff Mt. Rapid (RM 246.5)	1.0

* Measurements were not taken downstream of Wildsheep Rapids. The location was estimated based on the measured oxygen increase through Wildsheep Rapids on August 21 and 22.

NMFS has also been too simplistic in evaluating the effect of reduced dissolved oxygen levels on the development and survival of fall chinook embryos within the gravel below HCC. While dissolved oxygen levels within the gravel can be lower than what is observed in the water column, NMFS fails to take into account that an initially created redd has a dissolved oxygen level that is similar to the dissolved oxygen level in the water column. Idaho Power Company biologists have been studying habitat quality in artificial redds in the historic Marsing area, and have noted that intra-gravel dissolved oxygen averages only 2.0 mg/l less than the water column for the first two months post redd construction. (Idaho Power Company, unpublished data.). In comparison, Reiser (1981) measured dissolved oxygen within artificial redds constructed in the Hells Canyon Reach (upstream of the Salmon River confluence) as part of his masters thesis, and noted that there was no difference within redds when compared to the water column. We understand that NMFS believes that dissolved oxygen within a redd is 3.0 mg/l less than what is observed within the water column. This is incorrect. It is more likely that during the "life" of a redd, dissolved oxygen levels start out similar to what is observed in the water column, and deteriorate through time (become more disparate from the water column) as embryos develop and intra-redd siltation reduce intra-gravel water flow. In the end, near emergence, intra-redd dissolved oxygen could be as much as 3.0 – 4.0 mg/l less than what is in the water column. However, this needs to be evaluated in light of what developing embryos require with respect to dissolved oxygen.

Developing embryos have a variable requirement for dissolved oxygen, as has been shown by various authors (Alderdice et al. 1958, Silver et al. 1963, Shumway et al.

1964, Garside 1966). This dissolved oxygen requirement is related to intra-gravel water velocity and stage of development. In summary, these authors have reported that oxygen requirement is lowest in the early stages of development (survival is not significantly affected at levels as low as 2.0 mg/l), and that the most critical period, requiring higher dissolved oxygen, is around the time of hatching. The time required to reach the hatch stage is about 2 months – which in the Hells Canyon Reach (depending on spawn timing) can be anytime between early January and late February. During that time period (spawning in mid October through hatch in early January), dissolved oxygen levels in the water column (within the six miles just downstream of the HCC) are increasing from about 6.0 to over 9.0 mg/l (see **Table 3**). Developing embryos are likely being exposed to dissolved oxygen levels within the gravel between about 4.0 to 7.0 mg/l. These levels are not indicative of significant mortality or concern in developing embryos. Working in concert with the dissolved oxygen levels is the intra-gravel water velocity. As intra-gravel water velocity increases (because of increased sediment permeability) embryos are able to tolerate and continue normal development even when dissolved oxygen levels are apparently low (<3.0 mg/l). The percent composition of fines of the spawning substrate within the Hells Canyon Reach has been shown to be low, indicative of high permeability (high intra-gravel velocities) and increased survival of incubating embryos (Eaton and Bennett 1999).

Table 3. Summary fall/winter dates of when dissolved oxygen levels in the Hells Canyon Dam discharge increased above 6.0 mg/l, 9.0 mg/L, and spring/summer dates when oxygen fell below 9.0 mg/L.

Year	Date D.O. outflow reached 6.0 mg/l	Date D.O. outflow reached 9.0 mg/l	Date D.O. outflow fell below 9.0 mg/l
1991	November 1	December 30	May 7
1992	Unknown	Unknown	May 5
1993	November 11	December 20	Unknown
1994	October 11	November 28	April 26
1995	October 31	December 7	May 11
1996	October 15	December 13	May 7
1997	September 18	December 14	July 8
1998	October 29	December 21	June 24
1999	Unknown	December 10	June 23
2000	September 29	Unknown	May 22

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Chartered

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May 9, 2000

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Re: Idaho Power Company water rights - Augmentation flows for salmon migration

On April 12, 2000, the Governor of the State of Idaho signed into law HB 794 - *Interim Authority for Rental of Storage Water to Augment Flows during the Migration of Snake River Salmon*, authorizing the rental of 427,000 acre feet of storage water from U. S. Bureau of Reclamation ("Reclamation") projects in the Snake River Basin to augment salmon flows in the Lower Snake River. This is a successor statute and the third time since 1992 that the Idaho Legislature has passed legislation authorizing the rental of Idaho water for flow augmentation use. The first such legislative authorization (I. C. § 42-1763A; S. L. 1992, ch. 101) was passed in reaction to a series of applications filed with the Idaho Department of Water Resources to change

U. S. Bureau of Reclamation

May 9, 2000

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various state water rights held by Reclamation by adding an additional use - *anadromous fish enhancement on the Lower Snake River within and outside the State of Idaho*. The 1992 and subsequent legislative authorizations were intended as an interim measure to dispense with the potential for a protracted state administrative proceeding seeking to change the Reclamation water rights and also to give federal interests the opportunity to develop a recovery plan for the listed salmon species that properly balanced upstream and downstream measures for salmon protection. Each of the legislative authorizations had specific sunset provisions. HB 794 expires on January 1, 2001.

Each legislative authorization, including HB 794, also provided that the interim authorization granted did not constitute a finding under Idaho law that (i) the rental and use of water for flow augmentation purposes constituted a beneficial use of water, (ii) the use was in the public interest or (iii) such use injured existing water rights. Idaho Power Company (Idaho Power) objected to the applications filed by Reclamation to add *fish enhancement* in the Lower Snake River as a recognized use of its water rights on the basis that the change in use would injure its water rights. Idaho Power continues to believe that the use of storage water from Reclamation reservoirs for such purposes violates state water law and injures its water rights. Nonetheless, Idaho Power has cooperated with the implementation of the interim flow augmentation measures authorized under the referenced legislation. This cooperation has been based, in part, on discussions initiated in the context of the Snake River Basin Adjudication (SRBA) intended to resolve outstanding issues relating to the provision of flows from Idaho to mitigate for the impact of downstream federal actions, and by an agreement with the Bonneville Power Administration pursuant to 16 U.S.C. § 839b(h)(11)(A)(ii) which has partially offset the impact of flow augmentation on Idaho Power's hydroelectric operations.

In the past Idaho Power has been encouraged by apparent progress in the discussions that have occurred over the past several years between state, federal and tribal interests. However, in light of recent discussions, it can no longer rely upon them with confidence as a means of resolving pending issues in a reasonable time. As such, this correspondence is intended to place federal and state interests on notice that while Idaho Power will continue to cooperate with the interim flow augmentation measures contemplated by HB 794, Idaho Power does not waive nor relinquish any claims it may have for injury to its water rights occasioned by the present, past or future rental and movement of water pursuant to HB 794 or previous legislative authorizations. To insure that Idaho Power has the opportunity to take such actions as may be necessary to protect its water rights, Idaho Power requests that prior to the rental of any storage water pursuant to HB 794, that it receive notice of the filing of an application to rent storage water for flow augmentation purposes and be given an opportunity to participate in any proceeding related to such application. Idaho Power also would object to the release, storage or use of any water from Reclamation reservoirs or storage facilities that is not in strict compliance with either HB 794 or state water law.

For the purposes of clarity, the interests Idaho Power seeks to protect in this process are a matter of state water law. Idaho Power owns and operates 17 hydroelectric projects on the Snake River and its tributaries and holds state water rights for hydropower purposes with regard to

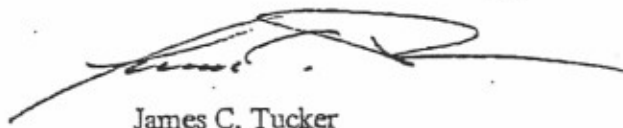
those projects. (A list of the projects together with a description of the associated water rights and their priority dates is attached to this correspondence.) Pursuant to subordination provisions included in either state water right licenses or permits, related licenses for Idaho Power hydropower projects issued by the Federal Energy Regulatory Commission, or the Swan Falls Agreement (1984), Idaho Power's water rights are subordinate to existing authorized upstream diversions and uses of water for the irrigation of lands and other beneficial consumptive uses and subject to subordination to future upstream beneficial consumptive users whose water rights are acquired pursuant to state law. I. C. § 42-203B. Thus, while Idaho Power's water rights are subordinate to the storage of water in Reclamation reservoirs for uses associated with the state water rights applicable to those reservoirs,¹ they are not subordinate to the storage and use of water to augment flows in the lower Snake River for salmon migration purposes. To the extent the storage and use of water for such purposes injures senior priority water rights held by Idaho Power, Idaho Power intends to undertake such actions as are necessary to protect those senior rights.

Please notify Idaho Power of the filing of any application for the rental of water pursuant to HB 794 authorization at the following address:

Idaho Power Company
c/o James C. Tucker
Rosholt, Robertson & Tucker
P. O. 2139
1221 W. Idaho, Suite 600
Boise, Idaho 83701-2139

If for any reason you believe that notice is either not required or you do not intend to provide notice of the filing of an application, please advise the undersigned without delay.

Very truly yours,



James C. Tucker

¹ See W/R #s: 65-2927A (Cascade Reservoir) - irrigation & hydropower storage; 65-2927B (Cascade Reservoir) - municipal & industrial storage; 65-2917 (Deadwood Reservoir) - hydropower storage; 65-9483 (Deadwood Reservoir) - irrigation storage; 63-3613 (Arrowrock Reservoir) - irrigation storage; 63-5262 (Arrowrock Reservoir) - irrigation storage; 63-5261 (Anderson Ranch Reservoir) - irrigation & hydropower storage; 63-3614 (Anderson Ranch Reservoir) - irrigation & hydropower storage; 63-3618 (Lucky Peak Reservoir) - irrigation, wildlife & recreation storage; 63-5263 (Lucky Peak Reservoir) - irrigation storage; 01-2064 (American Falls Reservoir) - irrigation & hydropower storage; 01-4052 (American Falls Reservoir) - irrigation & hydropower storage; 01-2068 (Palisades Reservoir) - irrigation & hydropower storage; 01-4056 (Palisades Reservoir) - irrigation & hydropower storage; 01-4057 (Palisades Reservoir) - irrigation & hydropower storage; 21-2156 (Island Park Reservoir) - irrigation & hydropower storage; 21-4156 (Island Park Reservoir) - irrigation & hydropower storage; 21-4157 (Island Park Reservoir) - irrigation & hydropower storage; 21-4055 (Island Park Reservoir) - irrigation & hydropower storage;

Exhibit to Letter dated May 9, 2000 to U.S. Bureau of Reclamation

Project	Water Right No.	Priority Date	Amount
American Falls	01-02017	09/03/1908	1400.0
	01-02032	03/08/1919	4600.0
	01-02046	10/15/1926	2000.0
	01-07128	10/23/1996	7850.0
	01-10382	07/15/1901	6000.0
	01-10383	08/01/1901	2000.0
	01-10384	01/01/1929	136.0
Bliss	02-02064	09/04/1947	12000.0
	02-02065	12/11/1947	3000.0
	02-10135	09/04/1947	3500.0
Brownlee	03-02018	10/17/1952	1,400,000 af
	03-02023	10/17/1952	20000.0
	03-02024	02/11/1964	10000.0
	03-07018	12/24/1975	5000.0
C.J. Strike	02-02080	06/21/1950	15420.0
Cascade	65-02232	12/03/1918	50.0
	65-02338A	08/24/1937	125.0
	65-02338X	10/06/1925	25.0
	65-12096	02/21/1978	2000.0
Clear Lakes	36-02018	01/18/1919	526.0
Hells Canyon	03-02017	05/29/1964	9000.0
	03-02020	05/18/1953	21000.0
Lower Malad	37-02472	05/14/1946	650.0
	37-02018	11/25/1908	700.0
Lower Salmon	02-02001A	05/11/1908	1700.0
	02-02001B	07/02/1908	1300.0
	02-02059	03/20/1935	250.0
	02-02060	08/08/1946	14000.0
Oxbow	03-02019	06/19/1947	16000.0
	03-02025	02/11/1964	14000.0
Shoshone Falls	02-02036	08/09/1920	1000.0
Swan Falls	02-02032	07/29/1919	4000.0
	02-07379	03/31/1982	6550.0
	A02-00100	01/17/1900	2150.0
	A02-04000	01/17/1900	1840.0
	A02-04001	04/17/1900	1460.0
Thousand Springs	36-02013	11/20/1912	600.0
	36-02026	05/01/1916	100.0
Twin Falls	02-02056	04/02/1929	1050.0
	02-07375	04/09/1982	5000.0
Upper Malad	37-02471	05/14/1946	900.0
Upper Salmon	02-02057	04/02/1929	6500.0

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BOISE, IDAHO 83701-2139
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Fax: (208) 344-6034

MEMORANDUM

TO: Clive Strong - Id. AG's office Fax # 334-2690
FROM: Jim Tucker
DATE: October 23, 1996
SUBJECT: IPC SRBA/water claims

Attached is a copy of a letter we have submitted to IDWR on this date along with the described claims. This is part of a process we have initiated to review and update IPC's water rights and SRBA claims. I suspect there will additional filings as the review process continues. If the attached raises questions, please give me a call.

* * *

OCT 23 '96 15:05 FROM RRT TWIN FALLS

TO RRT

PAGE.001/001

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October 23, 1996

Idaho Department of Water Resources
1301 North Orchard
Statehouse Mail
Boise, ID 83720HAND DELIVERED TO SOUTHERN REGION
IDAHO DEPARTMENT OF WATER RESOURCES
TWIN FALLS, IDAHOATTN: Karl Dreher, Director
Dave Tuthill, Adjudication Bureau Chief

Gentlemen:

Please find enclosed the following water right application and adjudication claims which we have presented for filing on this date on behalf of the Idaho Power Company:

- 1) Application for Permit - 7,850 cfs for power purposes @ American Falls;
- 2) Notice of Claim - 1,400 cfs for power purposes @ American Falls;
- 3) Notice of Claim - 6,000 cfs for power purposes @ American Falls;
- 4) Notice of Claim - 2,000 cfs for power purposes @ American Falls;
- 5) Notice of Claim - 136 cfs for power purposes @ American Falls; and
- 6) Notice of Claim - 3,500 cfs for power purposes @ Bliss power plant.

These filings are being made to supplement previous filings by the Company based upon the results of hydraulic capacity tests completed by the Company at various power facilities. These capacity tests were initiated in an effort to verify the previous SRBA claims filed by the Company. Tests at all of the Company's facilities have not been completed and further amended or supplementary filings may be forthcoming.

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Attn: Karl Dreher & Dave Tuckill
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The filings at American Falls are further complicated, and in many respects necessitated, by the history of the development of the American Falls Reservoir and the adjudication filings for that facility made by the United States. Our review of pertinent records indicates that prior to the construction of the first American Falls Dam in 1927, the Company owned and operated three small power plants at American Falls, the West Side, Island, and East Side Plants. The diversion structure at the East Side Plant was capable of diverting 6,000 cfs in 1920. Permit No. 4168 was licensed in 1920 for 1,400 cfs, and Permit No. 14067 in 1924 for 4,600 cfs to make up the difference. In 1921, the Company filed an application to appropriate an additional 1,200 cfs for power purposes (Permit No. 15201/01-2041), along with an application for a permit to store 300,000 AF of water at the American Falls site. (Permit No. R-273/01-2065.) In each case, permits were subsequently issued to the Company.

About that same time, the Bureau of Reclamation became interested in the American Falls area as a reservoir site for the Minidoka Project. On June 15, 1923, the United States and the Company entered into a contract by which the United States acquired a portion of the Company's land and the water rights for the development of the American Falls site (The actual deed is dated April 13, 1926). This included the West Side and Island power plants. The Company retained the East Side Plant. The 1923 contract provided, among other things, that the Company was to acquire 45,000 AF of primary storage and 255,000 AF of "secondary storage" along with the right to use the water discharged from the dam for power production in the East Side Plant. The East Side power plant was not connected to the dam, so it made no use of the extra head created by the impoundment.

With the construction of the American Falls Dam in 1927, the capacity at the East Side Plant was increased to 9,000 cfs, and the corresponding the water rights consisted of the following:

1. 253 cfs With a priority date of July 15, 1901, transferred from the West Side Plant to the East Side Plant on June 17, 1929, by transfer No. 464;
2. 611 cfs With a priority date of August 1, 1901, transferred from the Island Plant to the East Side Plant on May 4, 1929, by transfer No. 463;
3. 1,400 cfs Permit No. 4168, with a priority date of September 3, 1908, licensed in 1920 to American Falls Power Company, No. 01-02017;

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4.	4,600 cfs	Permit No. 14067, with a priority dated of March 8, 1919, licensed in 1924, No. 01-02032;
5.	2,000 cfs	Permit No. 16635, with a priority dated of October 15, 1926, licensed in 1971, No. 01-02046;
	<u>8,864 cfs</u>	TOTAL

The Company has previously filed adjudication claims on two of the licensed rights, Nos. 4 and 5 above (Water Right Nos. 01-02032 and 01-02046). Adjudication claims for Nos. 1 and 2 (the 1901 rights), No. 3 (No. 01-02017) along with a beneficial use claim for the 136 cfs necessary to bring the total water rights at the facility to 9,000 cfs are part of the current filing.¹

Permit Nos. 01-2041 and 01-2065, the permits issued to the Company for the 1200 cfs flow right and 300,000 AF storage right, respectively, were never licensed. In 1971, the Department of Water Administration (DWA) gave to the Company notice of its intention to cancel each of those permits for non-development. The Company opposed the cancellation based on provisions in the 1923 Contract, contending that the Company reserved its water rights at the American Falls site. The 1923 Contract, immediately following the provision transferring the Company's water rights to the U.S., provided:

But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations and are not to be considered as mere contract rights under contract with the United States. (1923 Contract, para 9(d), at p. 11)

Despite that language, the DWA decided that both permits should be canceled. In his written decision, the then director, R. Keith Higginson, stated:

After reviewing the files of the Department and the answer of the Idaho Power Company, the Director finds that the rights established by the Idaho Power Company, by reason of Permit Nos. 01-2041 and 01-2065, have been merged with rights granted the United States of America and that by

¹ You will note that the filings for the rights listed as Nos. 1 & 2 claim are for 6,000 cfs and 2,000 cfs, respectively. Although the Company only transferred the amounts listed above (253 and 611 cfs) to the East Side Plant, the balance of each right is included in the respective claim based on Judge Hurlbutt's recent decision in Basin-Wide # 10.

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TO RRT

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Attn: Earl Dreher & Dave Tufell
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reason of contracts and agreements entered into between the Company and the United States of America, Bureau of Reclamation, *those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir.*

The Director further finds that since *the Company's rights to water at American Falls Dam and Reservoir are already covered by reason of licenses issued to the United States of America, under Permit Nos. R-269 and 4168² and contracts between the Company and the United States of America, that Permit Nos. 01-2041 and 01-2065 are duplicate and should be canceled. The Company has failed to submit proof that it has constructed the necessary works to divert the water and apply it to beneficial use. (emphasis added)*

In 1972, storage behind the American Falls Dam was restricted for safety reasons. This led to a non-governmental replacement program whereby the Company guaranteed bonds issued by the American Falls Reservoir District (AFRD) for reconstruction of the Dam in exchange for the right to connect its power plant directly to the Dam and use the water released from the Dam to generate power. On March 31, 1976 a contract (the "Government Contract") was entered into between AFRD and the United States. In that contract the United States acknowledged the existence of a "falling water contract" between AFRD and the Company and agreed that the Company could use the water released from the Dam, subject to the other provisions of the contract, for power generation purposes. (Government Contract, Art 18, p. 6) The Government Contract, and the use of the falling water, was authorized by the American Falls Enabling Act of December 28, 1973 (P.L. 93-206, 87 Stat. 904). Pursuant to the Government Contract and the Act, the AFRD, as the constructing agency, and the Company entered into a Falling Water Contract which authorized the Company to utilize the water discharged from the Dam in accordance with the Government Contract. (Falling Water Contract, Sec. 3.1, p. 13.) Also on March 31, 1976, the United States, AFRD and the Company entered into a Spaceholder Contract which provided:

Nothing herein shall in any way alter or change the present proportion of the storage rights of the spaceholder, and this Spaceholder Contract and the American Falls Replacement Dam Program constitute a reaffirmation by the United States of the rights of the spaceholder under the Existing Spaceholder Contract, except as modified by this Spaceholder Contract as authorized in the Act of December 28, 1973, and the Government Contract. The provisions of

² Permit No. 4168 for 1400 cfs was licensed to American Falls Power Company in 1920 and is one of the SRBA claims being contemporaneously filed by the Company. R-269 is current license #01-02064, held by the U.S., for 1.8 MAF of storage for irrigation and power purposes. The U.S. has filed an adjudication claim for this water right but did not include power as a purpose of use. See SRBA cfm. # A01-02064.

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TO RRT

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*Idaho Department of Water Resources
Attn: Karl Dreher & Dave Tushoff
October 23, 1996
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the Existing Spaceholder Contract shall in all respects remain in full force and effect except that the provisions of this Spaceholder Contract with respect to the Replacement Dam, including but not limited to the operation and maintenance thereof and the distribution of water therefrom, shall prevail over the provisions of the Existing Spaceholder Contract wherever and to whatever extent the provisions of the Existing Spaceholder Contract are in conflict with the provisions of this Spaceholder Contract. (Spaceholder Contract, sec., 19, p. 6) [the 1923 Contract is identified as the "Existing Spaceholder Contract" in Part 1, sec. 18]

The spaceholder acknowledges that the water storage rights evidenced by permits, licenses and court decrees for the Existing Dam are held in the name of the United States and by this Spaceholder Contract the water rights are reaffirmed and neither the United States, the Constructing Agency, nor the spaceholders are required to make additional filings for the Replacement Dam. (Spaceholder Contract, sec. 49, p. 23)

Despite the decision by the DWA in 1971 that the "Company's rights to water at American Falls Dam and Reservoir are already covered by reason of licenses issued to the United States of America . . .", questions remain as to whether additional SRBA filings by the Company are necessary to protect the Company's power rights at American Falls. Notwithstanding the 1971 decision, the contracts entered into in conjunction with the 1976 Dam Replacement Project reaffirmed the 1923 Contract and granted the Company the right to use water released from the Replacement Dam for purposes of power generation. While our review indicates that the United States holds various water rights at American Falls, only two have stated uses which include power generation. These are Water Rights Nos. 01-02064 (previously Permit No. R-269) and Water Right No. 01-04052, for a 1.8 MAF and 115,000 AF, respectively. Interestingly, the adjudication claim filed by the United States on the oldest power right, A01-02064, does not include power as a stated use. The later priority right, No. A01-04052, for 115,000 AF, does include power and contains the following under the remarks section: "Water furnished to private company for power generation." The amount of storage claimed under this right is significantly less than the 300,000 AF (45,000 primary and 255,000 secondary) of storage rights held by the Company under contract. Additionally, the U.S. has not claimed any flow rights for power purposes.

All of this further confuses and complicates the filings concerning American Falls. We are hopeful that with filing of the referenced claims that these issues can be addressed and resolved in the appropriate forum.

Finally, we are also enclosing the necessary fees for the referenced filings. The Company has previously paid the variable water use fees pursuant to LC. § 42-1414(1)(b)(ii) and, as such, the enclosed fees for the adjudication claims are remitted under subsection

*Idaho Department of Water Resources
Attn: Kari Dreher & Dave Tuckell
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(1)(a) of that section. The filing fees for the water right application for American Falls are being conditionally paid. If it is determined that the water that is the subject of that application is not required, either based on the enclosed adjudication claims or the contract rights held by the Company, we would expect a remittance of the enclosed fees. In that regard, perhaps it would be appropriate to delay the processing of that application until the issues raised by the adjudication claims filed by both the Company and the U.S. at American Falls are resolved.

We will happy to discuss issues relating to any of the enclosed filings with you at your convenience.

Very truly yours,



JAMES C. TUCKER

Encls.

IPC 2001 Flow ltr

**IDAHO
POWER**

An IDACORP Company

IDAHO POWER COMPANY
P.O. BOX 70
BOISE, IDAHO 83707**JAMES C. TUCKER**
Senior Attorney

October 18, 2001

J. William McDonald
Regional Director
U. S. Bureau of Reclamation
Pacific Northwest Division
P. O. Box 43
1150 N. Curtis Road, Suite 100
Boise, Idaho 83706

Re: Idaho Power Company water/storage rights - Flow Augmentation

Dear Mr. McDonald:

Idaho is experiencing drought conditions this year and is entering the fall and winter reservoir storage season with low reservoir levels and uncertain precipitation forecasts. As you know, the Idaho Power Company (Company) owns and operates 17 hydroelectric projects on the Snake River and its tributaries downstream from U.S. Bureau of Reclamation (Reclamation) reservoirs, and holds state water rights for hydropower purposes at each of those projects. In this sense, the Company and Reclamation rely upon the same resource to fulfill their respective projects purposes. This common reliance on the Snake River has fostered a symbiotic relationship between the Company and Reclamation premised upon contractual rights and obligations, consistent historic operations and state water law. Drought conditions test such relationships. But this is neither the first nor the worst drought Idaho has experienced and yet the relationship has continued. In part, this has been because of the certainty necessarily built into the relationship by virtue of the contract rights, historic operations and state water law principles that govern it. However, a new variable is developing in the context of Reclamation's upper Snake River operations that necessarily creates uncertainty with regard to Idaho water resource issues which when coupled with the current drought conditions, threatens to undermine our long-standing relationship.

The Company understands that discussions are underway between Reclamation, the State of Idaho, Idaho irrigation interests and the National Marine Fisheries Service (NMFS) in an effort to reach a long-term agreement relative to the use of upper Snake River storage water to augment flows in the lower Snake River. By letter of even date herewith, the Company has requested that it be included in those discussions so that it might protect its interests. A copy of this letter is attached for your reference.

Mr. J. William McDonald
October 18, 2001
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While the Company intends to participate in these upper Snake discussions, in light of the severe drought conditions facing the region it feels compelled to advise Reclamation of certain concerns it has concerning the apparent intent of the United States to use Idaho water to resolve problems created by Federal facilities. These concerns relate to three general areas - certain contract rights the Company has with regard to the American Falls and Cascade reservoirs and the effect of using storage water from Idaho for flow augmentation purposes on the Company's water rights.

As to the latter issue, last year the Company advised Reclamation and Idaho's water managers that the rental of storage water in Idaho for the purpose of augmenting flows in the lower Snake River to mitigate for the impact of the four lower Snake Federal projects on listed anadromous fisheries may injure the Company's state water rights. The Company's concern in this regard remains. Idaho water law, and particularly the prior appropriation doctrine, governs Reclamation's access to and use of Idaho storage water for flow augmentation purposes. Reclamation neither holds state water rights authorizing the storage of water for flow augmentation purposes nor is flow augmentation either a beneficial use under Idaho law or an authorized Reclamation project purpose.¹ As such, any reservoir space either created by the previous evacuation of water from that space for flow augmentation purposes, or intended to be used for such purposes in future years, is "last to fill" in the sense that all other senior priority water rights on the river, including the Company's, must be satisfied before water can be diverted to storage in that reservoir space.² If Reclamation either intends to fill or use reservoir space in the upper Snake for flow augmentation purposes, the Company objects to the extent such use injures the Company's prior natural flow water rights at projects downstream from Reclamation reservoirs.

The issues relating to American Falls and Cascade reservoirs evolve from certain contract rights the Company enjoys at each facility. As such, they will be dealt with separately.

American Falls - On June 15, 1923, the Company and the United States entered into a contract that ultimately led to the development of the American Falls project (U.S. contract Ilr-733). This 1923 contract entitles the Company to the use of 45,000 acre-feet of primary storage capacity

¹ See W/R #s: 65-2927A (Cascade Reservoir) - irrigation & hydropower storage; 65-2927B (Cascade Reservoir) - municipal & industrial storage; 65-2917 (Deadwood Reservoir) - hydropower storage; 65-9483 (Deadwood Reservoir) - irrigation storage; 63-3613 (Arrowrock Reservoir) - irrigation storage; 63-5262 (Arrowrock Reservoir) - irrigation storage; 63-5261 (Anderson Ranch Reservoir) - irrigation & hydropower storage; 63-3614 (Anderson Ranch Reservoir) - irrigation & hydropower storage; 63-3618 (Lucky Peak Reservoir) - irrigation, wildlife & recreation storage; 63-5263 (Lucky Peak Reservoir) - irrigation storage; 01-2064 (American Falls Reservoir) - irrigation & hydropower storage; 01-4052 (American Falls Reservoir) - irrigation & hydropower storage; 01-2068 (Palisades Reservoir) - irrigation & hydropower storage; 01-4056 (Palisades Reservoir) - irrigation & hydropower storage; 01-4057 (Palisades Reservoir) - irrigation & hydropower storage; 21-2156 (Island Park Reservoir) - irrigation & hydropower storage; 21-4156 (Island Park Reservoir) - irrigation & hydropower storage; 21-4157 (Island Park Reservoir) - irrigation storage; 01-4055 (Jackson Lake Reservoir) - irrigation & hydropower storage; and 25-7004 (Ririe Reservoir) - irrigation storage.

² Copies of last year's correspondence between Reclamation and the Company with regard to this issue are attached.

Mr. J. William McDonald
October 18, 2001
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and 255,000 acre-feet of secondary storage capacity in American Falls Reservoir. The use of this secondary storage capacity is available to the Company between October 1 of any year and June 10 of the following year and, in combination with the 45,000 acre-feet of primary storage capacity, was granted to the Company for the purpose of regulating and controlling 300,000 acre-feet of water that was reserved to the Company in the contract and which the United States holds in trust for the Company's use. The Company's right to demand the turning out of this water for use below Milner Dam is limited to the 45,000 acre-feet of primary storage rights and such portion of the 255,000 acre-feet of secondary right as may be necessary to maintain a total flow at the Twin Falls power plant of:

690 cfs from October 1st to November 30th, inclusive
790 cfs from December 1st to January 31st, "
690 cfs from February 1st to February 12th, "
590 cfs from February 13th to April 15th, "
690 cfs from April 16th to June 10th, "

*These are
indicated in
accordance with
of 1916 Cont.*

This right to secondary storage is not restricted to water currently stored in the reservoir, but includes water flowing into the reservoir after October 1st and actually storable therein.

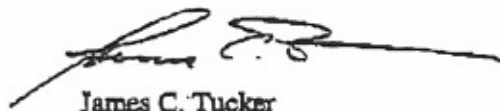
Flows at the Twin Falls power plant since October 1st have at times been below the 690 cfs called for in the contract. Therefore, consistent with the 1923 contract, the Company hereby demands that Reclamation release from, or pass through, American Falls Reservoir sufficient water to maintain flows at Twin Falls of 690 cfs through November 30, 2001, 790 cfs from December 1st through January 31st, 2002, 690 cfs from February 1st to February 12th, 2002, 590 cfs from February 13th to April 15th, 2002 and 690 cfs from April 16th to June 10th, 2002. These releases should continue for so long as necessary to maintain the flows at Twin Falls at the stated minimums or until the Company's secondary storage rights under the contract (totaling 255,000 acre-feet) have been exhausted.

Cascade Reservoir - On October 10, 2001, Jerrold D. Gregg of the Snake River Area Reclamation office advised the Company that Reclamation was instructing the Watermaster for Water District 65 to restrict outflows from Cascade Reservoir to the natural flow entering the reservoir. The Company disagrees with Reclamation's interpretation of the 1981 contract referenced in Mr. Gregg's letter and continues to maintain that Reclamation has a contractual obligation to provide continuous flows of 200 cfs to the Company's project below Cascade Dam. Attached is a copy of Mr. Gregg's letter to the Company along with a letter of even date herewith to Mr. Gregg objecting to Reclamation's action and explaining the basis for that objection.

Mr. J. William McDonald
October 18, 2001
Page 4 of 4

The Company looks forward to continuing to work with Reclamation to resolve the above issues either in the context of the ongoing discussions taking place in the SRBA mediation effort or through direct discussions with Reclamation.

Sincerely,



James C. Tucker

JCT/dkd

cc: Wm. Hogarth/NMFS
D.R. Lohn/NMFS- NW
A. Klee/Interior
J. Mark Robinson/FERC
Jim Yost/Governor's Office
Francis McGovern/SRBA Mediator
All counsel/SRBA Mediation