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MAY 14 2007

DEPARTMENT OF
WATER RESOURCES

May 10, 2007

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 3rd Avenue North
Twin Falls, ID 83301

RE: Subcases 37-2128, 37-2471, 37-2472, 37-10709 and 37-10710

Dear Special Master Bilyeu:

Included with this letter is Idaho Power Company's Standard Form 2 *Response to Objection to Amended Director's Report*, together with a *Counterclaim* which is an attachment to and incorporated as part of the Response. The Counterclaim raises various issues concerning the Swan Falls Agreement and its relation to the subject water rights, and encompasses the issues raised by the State concerning alleged legal title to the water rights.

Idaho Power's Response with attachment responds to the Standard Form 1 *Objection to Amended Director's Report* filed by the State of Idaho on May 3, 2007. Since the State's Objection is the subject of the State's Motion to File Late Objection, which is scheduled to be heard on May 11, 2007 at 2:00 p.m., Idaho Power respectfully requests that its Response to that Objection be lodged with the Court right away, and then filed immediately after the State's Objection is accepted for filing by the Court.

In addition, Idaho Power would like to notify you that in an effort to obtain an integrated and comprehensive determination of issues concerning the Swan Falls Agreement in the SRBA, Idaho Power has also filed, with the SRBA Court: (1) a Complaint and Petition for Declaratory and Injunctive Relief; (2) a Motion for Stay of Basin-Wide Issue No. 13; and (3) a Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basins 2, 36 and 37, or Alternatively to Consolidate Proceedings. Idaho Power has requested an expedited hearing on the two motions filed with the SRBA Court, which has been set for June 19, 2007 at 1:30 p.m.

Sincerely,

James C. Tucker
Senior Attorney

cc: State of Idaho
IDWR Document Depository
United States Dept. of Justice
Chief, Natural Resources Division

LODGED

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

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MAY 14 2007

DEPARTMENT OF
WATER RESOURCES

**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	)	A. Subcase Nos. 37-2128, 37-2471, 37-2472,
	)	37-20709 and 37-10710
Case No. 39576	)	STANDARD FORM 2
	)	RESPONSE TO OBJECTION
_____	)	TO AMENDED DIRECTOR'S REPORT

B. NAME AND ADDRESS OF PERSON RESPONDING:

Name: IDAHO POWER COMPANY
Address: P. O. BOX 70
BOISE, IDAHO 83707
Daytime Phone: (208) 388-2112

Name and Address of Attorney:

John K. Simpson
Barker, Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701
Telephone: (208) 336-0700

James S. Lochhead
Michael A. Gheleta
Adam T. DeVoe
Brownstein Hyatt Farber Schreck, P.C.
410 17th St., Suite 2200
Denver, CO 80202
Telephone: (303) 223-1100

**C. NAME AND ADDRESS OF PERSON(S) WHO FILED OBJECTION TO WHICH
YOU ARE RESPONDING:**

Name: State of Idaho
Address: 700 W. Jefferson, Room 210
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-2400

D. I am responding to the objection(s) to the following elements:

1. ☒ Name and Address
2. ☐ Source
3. ☐ Quantity
4. ☐ Priority Date
5. ☐ Point(s) of Diversion
6. ☐ Instream Flow Description
7. ☐ Purpose(s) of Use
8. ☐ Period of Year
9. ☐ Place of Use

10. ☒ Other.

Idaho Power is filing, as an attachment to this Response to Objection to Amended Director's Report, a Counterclaim for Declaratory and Injunctive Relief ("Counterclaim"), which is hereby incorporated as part of this Response. The Counterclaim raises various issues concerning the Swan Falls Agreement and its relation to the subject water rights, and encompasses the issues raised by the State concerning alleged legal title to the water rights.

In an effort to obtain an integrated and comprehensive determination of issues concerning the Swan Falls Agreement in the SRBA, as opposed to proceeding piecemeal in individual subbasins, Idaho Power is also filing, with the SRBA Court, a Complaint and Petition for Declaratory Relief, a Motion for Stay of Basin-Wide Issue No. 13, and a Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basins 2, 36 and 37, or Alternatively to Consolidate Proceedings.

Idaho Power reserves the right to amend this Response to Objection to Amended Director's Report in accordance with the schedule in these subcases, which provides that Responses to Objections are due on June 22, 2007.

11. Recommendation:

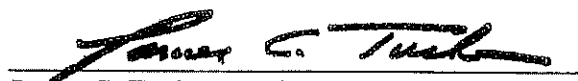
- ☐ This water right should not exist
- ☐ This water right was not recommended, but should be recommended with the elements described above.

VERIFICATION

State of IDAHO)
) ss.
County of Gooding)

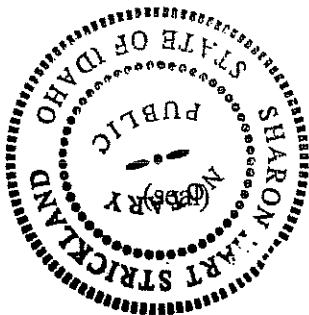
James C. Tucker, duly sworn, upon oath, deposes and says:

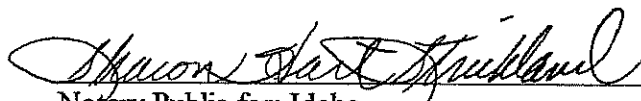
That I am the party/claimant filing this response, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding, and that I have read this response, know its contents and believe that the statements are true to the best of my knowledge.


James C. Tucker, Senior Attorney
Idaho Power Company

Attorneys for Respondents

Subscribed and sworn to before me on: May 10, 2007




Notary Public for: Idaho
Residing at: Gooding
My Commission Expires: 12-22-09

RESOURCES; and DAVID TUTHILL, Director,
Idaho Department of Water Resources

Defendants.

Plaintiff Idaho Power Company ("Idaho Power"), an Idaho corporation, hereby files this Counterclaim in conjunction with its Response to the State of Idaho's Objection to the Amended Director's Report in Basin 37 of the Snake River Basin Adjudication ("SRBA").

INTRODUCTION

1. The State of Idaho has been enmeshed in controversy on a number of fronts with respect to the continuing decline of ground water levels in the Eastern Snake Plain Aquifer ("ESPA") and the resulting decline of Snake River flows. IDWR has had to deal with a number of water right "calls" made by senior priority appropriators utilizing surface and spring water from the Snake River, the flows of which are affected by withdrawals of ground water from the ESPA. However, to date IDWR has not taken into account the multiple year impacts of groundwater pumping from the ESPA in its administration of water rights, and instead has curtailed or threatened to curtail groundwater rights only on the basis of within-the-year or seasonal impacts of such pumping. The Idaho judiciary has been required to address the constitutionality of IDWR's administrative rules governing conjunctive management of ground water and surface water, with a trial court first holding the rules facially unconstitutional, and the Idaho Supreme Court then upholding the facial constitutionality of the rules, still leaving the possibility of a constitutional challenge based on application of the rules in the future. The Idaho legislature has initiated various processes, including through the Idaho Water Resource Board, in an attempt to understand and identify ways to address the decline of the ESPA and spring and River flows.

2. The decline of the ESPA reflects the basic fact that the Snake River System is over appropriated presently, and has been for some time. In the face of this reality, the State has continued to search for ways to satisfy existing water users with existing supplies.

Unfortunately, in an over appropriated system such opportunities come at the expense of the owners of existing water rights. One idea pursued by the State is the possibility of recharging ground water in the ESPA through deliveries of surface water from the Snake River, including water encompassed by Idaho Power's water rights. Another attempt recently made by the State is to interpret the Swan Falls Settlement, reached between the State and Idaho Power in settlement of litigation over 20 years ago, in a manner which minimizes the amount of water available to Idaho Power under its water rights, while maximizing control of the water by the State. This latest effort involving interpretation of the Swan Falls Settlement and its purported trust arrangement spearheaded by the Idaho Attorney General has put at issue in the SRBA the interpretation and meaning of the Swan Falls Settlement in a number of respects.

3. The actions of the Attorney General and IDWR have raised disputes concerning interpretation or application of the Swan Falls Settlement. A declaratory judgment by this Court resolving these disputes and their impact upon the subject water rights will clarify and settle the legal relations at issue. Accordingly, Idaho Power brings this Counterclaim respectfully requesting the Court to issue declaratory and injunctive or other appropriate relief regarding the status and nature of Idaho Power's water rights, as well as the respective rights, duties and responsibilities of the parties under the Swan Falls Settlement, all as more fully set forth herein.

PARTIES

4. Idaho Power is an Idaho corporation with its principal place of business in Boise, Idaho. Idaho Power owns and operates numerous facilities in the Snake River Basin, including hydroelectric power, fish propagation, commercial, domestic and irrigation facilities. These

facilities operate under water rights decreed, permitted, licensed and beneficially used pursuant to Idaho law.

5. The State of Idaho and its officials are subject to the Idaho Constitution, including Article XV concerning water rights, and other applicable law.

6. C.L. "Butch" Otter is the Governor of the State of Idaho. Pursuant to Article IV, § 6 of the Idaho Constitution, the supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed. The Governor is a party to the Swan Falls Agreement, having executed the Agreement on behalf of the State of Idaho.

7. Lawrence G. Wasden is the Attorney General of the State of Idaho, and is responsible for carrying out the duties of that office under Article IV, § 1 of the Idaho Constitution, Idaho Code § 67-1401, and other applicable law. The Attorney General is a party to the Swan Falls Agreement, having executed the Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in litigation relating to the Swan Falls Agreement that was pending at the time of its execution.

8. The Idaho Department of Water Resources ("IDWR") is an executive department of the government of the State of Idaho, and is charged with duties regarding management and administration of water resources under Idaho Code §§ 42-1701 et seq. and other applicable law.

9. David Tuthill is the Director of IDWR, and is charged with duties regarding administration of water rights under Idaho Code §§ 42-1701 et seq. and other applicable law.

JURISDICTION AND VENUE

10. Jurisdiction over this action is proper in the district courts under Idaho Const. Art. V, § 20, and Idaho Code § 1-705. Venue is proper in this district court under Idaho Code § 5-

401, in that the subject of the action or some part thereof is situated in this county, and under Idaho Code § 5-402.2, in that the cause of action or some part thereof arose in this county.

11. Jurisdiction and venue in this case are proper in the SRBA Court under Idaho Code §§ 42-1401A and 42-1406A, since this matter seeks the determination of the nature, extent and priority of water rights, the adjudication of the right to the use of water, and the resolution of disputed issues concerning the right to the use of water within the Snake River Basin.

12. The court has jurisdiction to quiet title pursuant to Idaho Code § 6-401.

13. The court has jurisdiction to issue a declaratory judgment pursuant to Idaho Code § 10-1201 and Idaho R. Civ. P. 57.

14. The court has jurisdiction to issue injunctive relief pursuant to Idaho R. Civ. P. 65.

15. The State of Idaho has consented and agreed to resolution of disputes concerning interpretation or application of the Swan Falls Agreement through the mechanism of a petition for declaratory relief such as this Counterclaim. A Stipulation signed by Attorney General Wasden and counsel for Idaho Power, and submitted to the IDWR Director on April 11, 2006, provides:

Further Proceedings Relating to the Swan Falls Agreement. The parties agree that in the event there are *disagreements or disputes between the parties as to the interpretation or application of the Swan Falls Agreement* that they will endeavor to resolve those disagreements through informal discussions and negotiation. In the event that the parties are unable to resolve any such disagreements to their mutual satisfaction, *either party, after notice to the other, may file a petition for declaratory relief with a court of appropriate jurisdiction to have the disagreement resolved and the Swan Falls Agreement interpreted* and neither this Stipulation nor I.C. §§ 42-234, 42-4201, or 42-4201A shall act as a bar to the filing of such action. (Emphasis added).

Idaho Power has provided notice of this Counterclaim to counsel representing the Idaho Attorney General.

GENERAL ALLEGATIONS

The Ownership and Use of Water in Idaho

16. Waters in Idaho “flowing in their natural channels,” including surface water and ground water, are the property of the State. Idaho Code § 42-101. However, the right to the use of any of the waters of the State by the people of Idaho is “recognized and confirmed.” *Id.* The State’s interest in the waters of the State is subject to the Constitutional guarantee that “the right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied.” IDAHO CONST. art. XV, § 3. Therefore, the State’s role is to “supervise” the “appropriation and allotment to those diverting” water “for any beneficial purpose.” Idaho Code § 42-101.

17. Unappropriated water may be appropriated by the diversion and the application thereof to beneficial use. Once water is appropriated a water right is established, which is a right to use the waters owned by the State. A water right is a real property right, which vests upon appropriation.

18. Once a water right has been established, priority of appropriation shall govern the relative rights of those using water. IDAHO CONST. art. XV, § 3.

19. If the quantity of water rights in a basin exceeds the physical supply of water available during all or portions of a year, that basin is considered “over appropriated.” In such a circumstance, the Constitutional right to divert and appropriate unappropriated water cannot exist, since there is no unappropriated water available for appropriation. Idaho law recognizes the interconnected nature of surface water and tributary ground water. Thus, the concept of “over appropriation” applies both to surface and interconnected ground water.

Swan Falls Settlement

20. An "Agreement," which was the centerpiece of what has come to be known as the overall "Swan Falls Settlement," was signed on October 25, 1984, by Idaho Power Company's Chairman of the Board and Chief Executive Officer James E. Bruce, Idaho Governor John V. Evans, and Idaho Attorney General Jim Jones. In addition to this 1984 "Agreement," the overall "Swan Falls Settlement" also includes: subsequent implementing legislation, rules, regulations and administrative practices by the State of Idaho; an October 25, 1984 Contract executed by the three parties pursuant to Senate Bill No. 1180 ("1180 Contract"); and a Consent Judgment entered by the court in 1990 in the pending litigation in Case No. 81375 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada.

21. The Agreement contemplated enactment of a legislative program to implement the Agreement, including legislation relating to the subordination of certain of Idaho Power's water rights, the funding of a general stream adjudication (the SRBA) to assist in determining water availability and facilitate water administration, and the establishment of public interest criteria to facilitate the use of trust water by subsequent appropriators as contemplated by the Agreement. Legislation was subsequently enacted in 1985, and amended in 1986.

22. The Settlement recognized the water rights appropriated and owned by Idaho Power and used at its facilities referenced in the Agreement as valid existing rights. Specific to this Counterclaim, the hydroelectric generation facilities owned and operated by Idaho Power which are more fully set forth in the Settlement, the licenses and decrees under which such facilities divert and beneficially use water, and the amounts of such licenses and decrees are as follows:

- a. Thousand Springs Power Plant: License No. 36-2013 (600 c.f.s.) (Partial Decree entered 11/25/97.)

- b. Lower Malad Power Plant: License No. 37-2128 (700 c.f.s.); and License No. 37-2472 (650 c.f.s.)
- c. Upper Malad Power Plant; License No. 37-2471 (900 c.f.s.)
- d. Clear Lake Power Plant: License No. 36-2018 (526 c.f.s.) (Partial Decree entered 11/25/97.)
- e. Sand Springs [used at Thousand Springs Power Plant]: License No. 36-2026 (100 c.f.s.) (Partial Decree entered 11/25/97.)
- f. Upper Salmon Power Plant; License No. 02-2057 (6,500 c.f.s.)
- g. Lower Salmon Power Plant: License No. 02-2001A (1,700 c.f.s.); License No. 02-2001B (1,300 c.f.s.); License No. 02-2059 (250 c.f.s.); and License No. 02-2060 (14,000 c.f.s.)
- h. Bliss Power Plant: License No. 02-2064 (12,000 c.f.s.); and License No. 02-2065 (3,000 c.f.s.)
- i. Twin Falls Power Plant: License No. 02-2056 (1,050 c.f.s.)
- j. Shoshone Falls Power Plant: License No. 02-2036 (1,000 c.f.s.)
- k. Swan Falls Power Plant; License No. 02-2032 (4,000 c.f.s.); License No. 02-4000 (1,840 c.f.s.); License No. 02-4001 (1,460 c.f.s.); and Decree No. 02-100 (2,150 c.f.s.) (While the licenses and decree for Swan Falls Power Plant total 9,450 c.f.s., the Idaho Supreme Court found in Idaho Power I, 104 Idaho at 578, that Power Plant capacity, and accordingly the limit of Idaho Power's Swan Falls water rights in 1984, was 8,400 c.f.s.)

Idaho Power owns other water rights at other facilities, including hydropower projects, which are not subject to the terms of the Swan Falls Settlement.

23. As more fully set forth in Paragraph 7(A) of the Agreement, the water rights of Idaho Power identified in Paragraph 22 entitle Idaho Power to an unsubordinated right to average daily minimum stream flows in the Snake River of 3,900 c.f.s. in the summer (April 1 to October 31) and 5,600 c.f.s in the winter (November 1 to March 31) measured at the Murphy Gage (the "Swan Falls Daily Minimum Flows"). These flows are not subject to depletion.

24. As more fully set forth in Paragraph 7(B) of the Agreement, Idaho Power is entitled to the use of the flow of the Snake River at its facilities to the extent of its actual beneficial use up to the full amounts of the water rights identified in Paragraph 22 above. However, Idaho Power subordinated those water rights in excess of the Swan Falls Daily Minimum Flows to beneficial upstream uses subsequent to October 1, 1984, upon approval of such uses by the State in accordance with State law, unless the depletion violates or will violate the Swan Falls Daily Minimum Flows. Idaho Power retained its right to contest any appropriation of water in accordance with State law, and the right to compel the State to take reasonable steps to insure and guarantee the Swan Falls Daily Minimum Flows.

25. As more fully set forth in Paragraphs 7(C) and 7(D) of the Swan Falls Agreement, and also as more fully set forth in the 1180 Contract and the consent judgment entered in Case No. 81375 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Idaho Power also subordinated the water rights identified in Paragraph 22 above to then existing uses -- specifically to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the 1180 Contract, and to those persons who beneficially used water prior to October 1, 1984, and who filed an application or claim for said use by June 30, 1985. Idaho Power does not challenge here this subordination to existing uses set forth more fully in Paragraphs 7(C) and 7(D) of the Agreement, the 1180 Contract, or the consent judgment in Case

No. 81375 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada.

26. As more fully set forth in Paragraph 7(E) of the Agreement, the Swan Falls Daily Minimum Flows are determined without taking into account additional water which Idaho Power may acquire. The use of such acquired water by Idaho Power is not limited by or subject to the Agreement, and must be administered and accounted for by the State of Idaho in addition to the Swan Falls Daily Minimum Flows. The parties acknowledged Idaho Power's right and ability to acquire additional water for power purposes over and above the Swan Falls Daily Minimum Flows by agreeing in Paragraph 6(C) of the Agreement to support legislation relative to the establishment of an effective water marketing system.

27. The Agreement provides in Paragraph 4 that the State and Idaho Power "shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement."

28. The Settlement purports to establish a "trust." The parties to the purported trust intended that the trust beneficiaries would be Idaho Power and the people of the State of Idaho. The parties to the purported trust also intended that the trustee of such trust would be the State of Idaho, acting by and through the Governor.

Over Appropriation of Snake River Basin Above Murphy Gage and Absence of Trust Res

29. Fundamental to the establishment of the purported trust arrangement was the mutual assumption, based on the information available to the parties in 1984, that there was some amount of water in the Snake River Basin, including groundwater in the ESPA, that was available for use by new appropriations subsequent to October 1, 1984, the use of which would not cause the flow of the Snake River at the Murphy Gage to drop below the Swan Falls Daily

Minimum Flows. This additional water over and above the Swan Falls Daily Minimum Flows was referred to as the "Trust Water."

30. All Trust Water had been previously appropriated under Idaho Power's water rights described in Paragraph 22 above. However, under the Settlement, the parties established a mechanism by which Idaho Power would subordinate its use of water previously appropriated under Idaho Power's water rights to subsequent appropriation for beneficial uses, that were authorized at that time, by junior water users after October 1, 1984, based upon the State's determination that such appropriations would not cause the flow of the Snake River to drop below the Swan Falls Daily Minimum Flows, and upon the State's determination that such appropriations satisfied specified public interest criteria. Thus, the State was obligated under the Swan Falls Settlement to insure and guarantee the Swan Falls Daily Minimum Flows, and to not issue any permits in the Snake River Basin for ground or surface water use after October 1, 1984, if the use of water under such permits would deplete the flow of the Snake River below the Swan Falls Daily Minimum Flows.

31. In reaching this mutual understanding in 1984 that Trust Water existed for future development, the parties to the Agreement, based upon the best hydrologic data available at the time, believed that the full depletive effect of then-existing uses of ground water in the ESPA was reflected in the historic low flow of the Snake River. Because of the hydrologic interconnectivity of the ESPA and the Snake River, withdrawals of ground water from the ESPA impact flows in the River, and vice-versa. However, the depletive effect of withdrawals of ground water from the ESPA on Snake River flows is delayed for a period, often many years, depending upon various factors, including the distance from the well to the River. Contrary to the assumption of the parties to the Agreement, ground water withdrawals from the ESPA that had occurred prior to 1984 caused depletions in the hydrologic system, which were not

manifested in reduced flows in the Snake River in 1984 when the Agreement was reached. Moreover, information now available indicates that the impact of such groundwater withdrawals may not yet be reflected in Snake River flows at the Murphy Gage.

32. Over appropriation of the Snake River Basin is a long-term issue, and the State, in fulfilling its obligation to manage both surface water and ground water so as to not violate the Swan Falls Daily Minimum Flows, must take into account the multiple year impacts of ground water depletions from the ESPA.

33. On or about July 12, 2003, average daily flows in the Snake River measured at the Murphy Gage and calculated under the Swan Falls Settlement fell below the Swan Falls Daily Minimum Flows. Such flows did not reflect the total delayed depletive effect of ground water withdrawals from the ESPA that occurred prior to October 1, 1984, or the total delayed depletive effect of ground water withdrawals from the ESPA of Trust Water and non-Trust Water under appropriations that have been allowed by the State of Idaho since October 1, 1984.

34. Based on hydrologic conditions in the Snake River Basin that have manifested since the Settlement, it is apparent that at the time of the Agreement, the Snake River Basin was over appropriated to the extent of the Swan Falls Daily Minimum Flows. The condition of the ESPA and the Snake River upstream from the Murphy Gage remains over appropriated and continues to threaten the Swan Falls Daily Minimum Flows guaranteed by the Settlement. As a result, there never was any Trust Water available for use by post-1984 water uses, there was no trust *res*, and there exists no trust. Therefore, the parties to the Swan Falls Settlement were operating under a mutual mistake of fact in entering into and establishing the "trust" relationship.

IDWR's Erroneous Issuance of Appropriation Permits Pursuant to Swan Falls Subordination

35. Despite the absence of Trust Water, IDWR has processed and approved numerous applications for new appropriations of Trust Water since 1984, which permits were premised upon the erroneous assumption that Trust Water was available for use and which rely upon subordination of Idaho Power's water rights under the Swan Falls Settlement. Put simply, IDWR authorized the use of Trust Water that did, and does, not exist.

36. Following the Swan Falls Settlement, pursuant to various policies and rules, IDWR processed water right filings for the use of Trust Water. IDWR established a Trust Water Area, which was the area of the Snake River Basin in which the State determined Trust Water was located. IDWR also determined to issue some permits for the use of Trust Water for specific terms long enough to amortize development investment of the permittees. Upon expiration of the permit term the permits would be reprocessed, which would involve reconsideration of the adequacy of the water supply and reevaluation of the public interest criteria.

37. IDWR has issued numerous permits for the appropriation of Trust Water, including permits with 20 year terms. The terms of many of these term permits are nearing expiration. The water supply and public interest analyses which IDWR performed to issue permits pursuant to the subordination provided for in the Swan Falls Settlement are out of date and must be updated, and the Court, based on its findings, should order IDWR to take appropriate action to review and reconsider these term permits in consideration of the fact that no Trust Water ever existed.

Attorney General's and IDWR Director's Filings Concerning Interpretation or Application of Swan Falls Agreement

38. Faced with the continuing decline of ground water levels in the ESPA, and the resulting declines in Snake River flows, the State must finally acknowledge that the Snake River

System is and has been over appropriated as to the Swan Falls Daily Minimum Flows. To date, however, the State has been reluctant to do so, and has consequently been searching for ways to satisfy existing water users with existing supplies. Most recently, both the Idaho Attorney General and IDWR have made efforts to interpret the Settlement in a manner that minimizes the amount of water available to Idaho Power under its water rights, while maximizing control of this water by the State. Specifically, the Attorney General and IDWR have asserted legal title to Idaho Power's water rights under the Settlement, and by virtue of such claim of ownership have sought to subordinate Idaho Power's rights to ground water recharge.

39. On December 22, 2006 and January 2, 2007, Attorney General Wasden filed with IDWR several "Notice[s] of Change in Water Right Ownership" (hereinafter "Notices"), asserting that the State of Idaho owns "legal title" to all or a portion of a number of the water rights referenced in Paragraph 22 on the Snake River in Basins 2, 36 and 37, to which decrees, licenses or beneficial uses have been established by Idaho Power and issued by the State, but which the Attorney General now asserts the State acquired as part of the Settlement's purported trust arrangement.

40. The first notification provided by the Idaho Attorney General to Idaho Power that the Attorney General intended to file the Notices with IDWR was a telephone call from two members of the Attorney General's staff on December 22, 2006, the same day that the Attorney General filed the Notices with IDWR and that Idaho Power received them. The Attorney General's filing of the Notices constituted a breach of a Stipulation signed by Attorney General Wasden and counsel for Idaho Power, and filed with the IDWR Director on April 11, 2006.

41. On December 28, 2006, six days after the Attorney General filed the Notices, IDWR filed with the SRBA Court its Director's Report for Basin 2. As to the water rights in Basin 2 referenced in Paragraph 22, the Director's Report essentially tracked the ownership

claims as asserted in the Notices of Change in Water Right Ownership filed by the Attorney General. The issuance of the IDWR Director's Report less than one week after the Attorney General's filing of the Notices of Change in Water Right Ownership indicates that the actions of the Attorney General and IDWR apparently were coordinated.

42. On or about November 1, 2005, IDWR filed a Director's Report in the SRBA for Basin 37 which recognized Idaho Power as the sole water right owner for water rights in Basin 37 referenced in Paragraph 22. However, following the Attorney General's filings, on February 14, 2007, IDWR filed a Notice of Completed Administrative Proceeding ("NCAP") listing such water rights as asserted in the Attorney General's filings. Attached to the NCAP were replacement pages from the Director's Report for Basin 37 concerning each of the five listed water rights in that Basin, which essentially tracked the ownership claims as asserted in the Notices of Change in Water Right Ownership filed by the Attorney General. These replacement pages apparently comprise the Amended Director's Report.

43. IDWR issued a Director's Report in 1992, and an Amended Director's Report in 1995, for Basin 36 which recommended that the SRBA Court decree Idaho Power's Water Right Nos. 36-0213, 36-0218 and 36-02026 as claimed in the name of Idaho Power Company. No objections were filed to the IDWR recommendations, by the State or any other parties, relating to ownership of the water rights. On November 25, 1997, SRBA Presiding Judge Daniel C. Hurlbutt, Jr. entered three Orders of Partial Decree, ordering that these three Idaho Power water rights be decreed as set forth in the Partial Decrees attached to the Orders. The Partial Decrees decreed the water rights in the name of Idaho Power Company.

44. On December 22, 2006, the Idaho Attorney General filed with IDWR a Notice of Change in Water Right Ownership asserting that the State of Idaho held legal title to Water Right

Nos. 36-0213, 36-0218 and 36-02026. The Attorney General's filing provided no indication that these three water rights had been recognized in partial decrees almost a decade earlier.

45. The State has never filed a Notice of Claim in the SRBA regarding Idaho Power's water rights referenced in Paragraph 22, as required by Idaho Code § 42-1409(4).

46. The Attorney General's filing of the Notices claiming and the IDWR Director's Reports recommending legal title in the State to Idaho Power's water rights raise the prospect and establish the threat and intent of the State to take actions prejudicial to Idaho Power on the basis of this assertion of legal title allegedly arising out of the purported Swan Falls Settlement trust, prevent Idaho Power from exercising its full rights as legal owner of its water rights, and are in and of themselves a breach of the Agreement.

Water As Res of Any Trust Under Swan Falls Agreement

47. If there in fact was any Trust Water available for distribution at the time of, or subsequent to, the 1984 Swan Falls Agreement, and a valid trust was established through the Settlement, then the Court should proceed to address the parties' disputes regarding the trust relationship. The State's assertion of ownership of Idaho Power's water rights referenced in Paragraph 22 is based on the State's assertion that under the Settlement such water rights were placed into trust and constitute the trust *res*. The State asserts its ownership interest as a trustee. Idaho Power maintains that under the Settlement, the *res* of any created trust is the Trust Water. It was the Trust Water, not Idaho Power's water rights, that was to be available for new uses under the public interest criteria established by the Settlement.

48. The Settlement made this *res* of Trust Water subject to appropriation for beneficial uses authorized at that time by water users junior to Idaho Power's water rights, and based upon the State's determination, as trustee for such water, that any such appropriations individually and cumulatively satisfied public interest criteria set forth in statutes and regulations

implementing the Agreement. Upon the State's approval of the appropriation of Trust Water by junior water users, Idaho Power's water rights identified in the Agreement were to be automatically subordinated to the extent of such junior appropriations. Pending the use of Trust Water by such junior appropriations, Idaho Power retains full title to and use of its water rights. Even once such rights are subordinated, Idaho Power retains full title to and the right to use water under such rights when available, and the right to contest any appropriation of water in accordance with State law.

49. Nowhere in the Settlement is there any reference made to the State of Idaho owning or claiming legal title to Idaho Power's water rights as trustee, or to Idaho Power conveying its water rights into a trust. Pursuant to the Settlement, starting approximately twenty years ago the State of Idaho has processed and approved applications for the use of Trust Water by junior water users in the Snake River Basin. The State approved such applications and issued permits under new priority dates, not the priority dates of any water rights owned by Idaho Power. The subordination provisions of the Agreement and the establishment of the Trust Water concept thus did not eliminate, seize or provide for the redistribution or reallocation of Idaho Power's water rights. The Agreement and Settlement merely prevents Idaho Power from asserting the priority of its senior water rights above the Swan Falls Daily Minimum Flows against certain upgradient tributary junior priority water rights that Idaho Power subordinated to under (i) Paragraphs 7(C) and 7(D) of the Agreement, (ii) the 1180 Contract or the Consent Judgment in Case No. 81375 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, or (iii) the Trust Water provisions of the Settlement.

50. Until the actions of the State referenced in this Complaint, the State of Idaho has never claimed nor asserted legal title to Idaho Power's water rights, requested conveyance of title, otherwise asserted that legal title was necessary for the State of Idaho to undertake its duties

as trustee of the Trust Water, or otherwise contested ownership of Idaho Power's water rights. To the contrary, the State of Idaho through IDWR previously submitted recommendations to this Court that water right decrees be adjudicated in the name of Idaho Power as the owner of such water rights. As a result, the actions of the State, its officials, and its agencies following execution of the Agreement have been consistent with title to the water rights remaining with Idaho Power. Idaho Power has relied upon the conduct of the State, its officials, and its agencies. Accordingly, the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

Attorney General's 2006 Opinion Concerning Alleged Subordination of Idaho Power Water Rights to Aquifer Recharge

51. In addition to its claims of legal title, the State has sought to interpret the Settlement in a manner which would allow water appropriated under Idaho Power's water rights to be utilized to recharge the declining ESPA. On March 9, 2006, Attorney General Wasden, in response to questions in a February 27, 2006 letter from State House Speaker Bruce Newcomb, issued Attorney General Opinion 06-2 "Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)" (hereinafter "Attorney General Opinion 06-2").

52. Attorney General Opinion 06-2 raised the following question: "Is aquifer recharge a use to which Idaho Power Company subordinated its hydropower water rights under the Swan Falls Agreement?" On this question, the Opinion erroneously concluded that "the hydropower rights referenced in the Swan Falls Agreement are subordinated to aquifer recharge in accordance with state law."

53. Attorney General Opinion 06-02 reached its erroneous conclusion by also finding that statutory law in place currently, which makes water rights for recharge secondary to water rights for hydropower otherwise subordinated under the Settlement, could be ignored as a result

of the Attorney General's interpretation of the Settlement. Specifically, the Opinion found that statutes currently in place, including Idaho Code §§ 42-234(2) and 42-4201A(2), have no legal effect and are "trumped" by the Settlement, since according to the Opinion "the State, as trustee, holds legal title to the water placed in trust and, in accordance with the Swan Falls Agreement, the State has the right to determine how the [T]rust [W]ater will be used."

54. The Idaho legislature considered proposed legislation concerning the relationship between vested water rights for hydropower and water rights for aquifer recharge during the 2006 legislative session. During the legislative proceedings for H 800, significant emphasis was put on Attorney General Opinion 06-2, with some legislators assuming that the Attorney General Opinion was legally correct.

55. The Attorney General's issuance of Attorney General Opinion 06-2, coupled with the Attorney General's filing of the Notices of Change in Water Right Ownership, both of which rely upon the allegation that the State holds "legal title" to water rights licensed to Idaho Power, raise a dispute regarding interpretation of the Settlement appropriate for judicial resolution.

56. The finding in Attorney General Opinion 06-2 that Idaho Power's water rights are subordinate to recharge breaches the Agreement and further raises the prospect and establishes the threat and intent of the State to take actions prejudicial to Idaho Power.

Declaration as to State's Obligations Regarding Swan Falls Minimum Flows and Administrative Duties

57. The Settlement provides for the initiation and completion of the adjudication of water rights in the Snake River Basin through the SRBA, and the integrated and comprehensive administration of such rights by the State.

58. Pursuant to the Settlement, the State is obligated to insure and guarantee the Swan Falls Daily Minimum Flows. The State is further obligated under the Settlement to not issue any

permits in the Snake River Basin for ground or surface water use after October 1, 1984, if the use of water under such permits would deplete the flow of the Snake River below the Swan Falls Daily Minimum Flows. Under Paragraph 7(B) of the Agreement, Idaho Power retained the right to compel the State to take reasonable steps to insure that the Swan Falls Daily Minimum Flows were not violated.

59. Despite the State's obligations, as a result of pumping of ground water under junior water rights, the water levels in the ESPA have steadily declined, and continue to decline, resulting in diminishing spring flows, reach gains and flows in the Snake River. Average daily flows in the Snake River measured at the Murphy Gage and calculated under the Swan Falls Settlement fell below the Swan Falls Daily Minimum Flows on or about July 12, 2003. In addition to causing a violation of the Swan Falls Daily Minimum Flows, the diminishing water flows have resulted in a number of water right "calls" made by senior priority appropriators utilizing surface and spring water from the Snake River, the flows of which are affected by withdrawals of ground water from the ESPA. However, to date IDWR has not taken into account the multiple year impacts of groundwater pumping from the ESPA in its administration of water rights, even though it cannot be disputed that ground water pumping from the ESPA has impacts beyond the year of such pumping. IDWR instead has curtailed or threatened to curtail ground water rights only on the basis of within-the-year or seasonal impacts of such pumping. The State's failure to insure the Swan Falls Daily Minimum Flows, and its failure to account for the multiple year impacts of ground water pumping, are unreasonable and constitute a breach of the Settlement.

FIRST CLAIM FOR RELIEF

(Declaration as to the Absence of Trust Water and No Valid Trust)

60. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 59 of this Counterclaim.

61. The Defendants have acted outside their authority and in breach of the Swan Falls Settlement in their actions described above, and there is no adequate administrative remedy. Accordingly, pursuant to Idaho R. Civ. P. 57, Idaho Code § 10-1201, and the parties' Stipulation of April 11, 2006, Idaho Power seeks declarations that: when the Swan Falls Agreement was executed in 1984, the Snake River Basin tributary to the Murphy Gage, including surface water and tributary ground water in the ESPA, was over appropriated; (b) on account of such over appropriation, there was no unappropriated water available in this portion of the Snake River Basin on a firm, average daily basis above the average daily minimum flows provided for in the Agreement, i.e., there was no "Trust Water"; and (c) because no Trust Water existed in 1984, there was no trust *res* and therefore no valid trust established under the Settlement.

SECOND CLAIM FOR RELIEF

(Reformation Based on Mutual Mistake Eliminating Trust While Retaining Other Provisions of Swan Falls Settlement)

62. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 61 of this Counterclaim.

63. Pursuant to Idaho R. Civ. P. 57, Idaho Code § 10-1201, and the parties' Stipulation of April 11, 2006, Idaho Power seeks declarations that: to the extent that the Snake River Basin above the Murphy Gage, including the ESPA, was over appropriated in 1984 as to the Swan Falls Daily Minimum Flows, the parties, who had assumed that Trust Water was

available for new appropriations under the Swan Falls Agreement's trust arrangement, were acting on the basis of a mutual mistake of fact regarding the existence of Trust Water. The Swan Falls Settlement should therefore be reformed based on mutual mistake of fact regarding the existence of Trust Water available in 1984, eliminating any asserted trust while retaining provisions unrelated to the purported trust, including (i) subordination to specified existing uses, and (ii) Idaho Power's right to acquire additional water from sources upstream of its power plants and to convey such water to and past its power plants below Milner Dam independent of any minimum flows established under the Agreement.

THIRD CLAIM FOR RELIEF

(Declaration as to Nature of Trust Res and Quiet Title)

64. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 63 of this Counterclaim.

65. Alternatively, pursuant to Idaho R. Civ. P. 57, Idaho Code § 10-1201, Idaho Code § 6-401, and the parties' Stipulation of April 11, 2006, Idaho Power seeks declarations that to the extent there was in fact some amount of Trust Water available in 1984, and to the extent that a valid trust was created under the Settlement: (i) the trust *res* is water and not water rights; (ii) the State of Idaho does not hold legal title to Idaho Power's water rights; and (iii) title to the water rights referenced in Paragraph 22 is therefore quieted in Idaho Power.

FOURTH CLAIM FOR RELIEF

(Waiver, Estoppel, Laches)

66. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 65 of this Counterclaim.

67. Pursuant to Idaho R. Civ. P. 57, Idaho Code § 10-1201, and the parties' Stipulation of April 11, 2006, Idaho Power seeks declarations that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

FIFTH CLAIM FOR RELIEF

(Declaration as to No Subordination to Recharge)

68. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 67 of this Counterclaim.

69. Pursuant to Idaho R. Civ. P. 57, Idaho Code § 10-1201, and the parties' Stipulation of April 11, 2006, Idaho Power seeks declarations that: Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to use of water for ground water recharge.

SIXTH CLAIM FOR RELIEF

(Declaration as to State's Obligations Regarding Swan Falls Minimum Flows and Administration)

70. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 69 of this Counterclaim.

71. Pursuant to Idaho R. Civ. P. 57, Idaho Code § 10-1201, and the parties' Stipulation of April 11, 2006, Idaho Power seeks declarations that: the State has failed to take reasonable steps in its administration of water rights priorities in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including failing to account for the multiple year impacts of ground water pumping, and accordingly has violated the Swan Falls Settlement.

SEVENTH CLAIM FOR RELIEF

(Preliminary and Permanent Injunction)

72. Idaho Power incorporates by reference and realleges the allegations of Paragraphs 1 through 71 of this Counterclaim.

73. The Idaho Attorney General and IDWR assert in the SRBA that the State of Idaho holds "legal title" to water rights encompassed by water right licenses issued to Idaho Power. The Attorney General further relied upon his view that the State holds "legal title" to Idaho Power's water rights in issuing Idaho Attorney General Opinion 06-2, which erroneously concludes that "the hydropower rights referenced in the Swan Falls Agreement are subordinated to aquifer recharge in accordance with state law."

74. Because IDWR and the Idaho legislature have taken and may take actions affecting Idaho Power's water rights pursuant to the State's actions asserting that the State holds legal title to the subject water rights, and that Idaho Power's hydropower water rights are subordinated to aquifer recharge, Idaho Power is in danger of real, immediate and irreparable harm which may be prevented only by injunctive relief.

75. Idaho Power is already suffering immediate and irreparable harm as a result of: (a) the State's issuance of permits for the appropriation of water from the ESPA based on the erroneous assumption that Trust Water was available for appropriation; and (b) a resultant improper reduction in Snake River flows which otherwise could be used by Idaho Power under its water rights.

76. Idaho Power has a reasonable probability of success on the merits.

77. There is no plain, speedy and adequate remedy at law to prevent the risk of immediate and irreparable harm to Idaho Power.

78. The granting of injunctive relief would be in the public interest.

79. The balance of equities in this matter favors injunctive relief.

80. A preliminary injunction enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights and asserted opinion that Idaho Power's hydropower water rights are subordinate to recharge will preserve the status quo pending a trial on the merits.

81. Accordingly, Idaho Power requests preliminary and permanent injunctive relief: (a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple year impacts of ground water pumping in the ESPA.

PRAYER FOR RELIEF

WHEREFORE, Idaho Power prays for the following relief:

A. A declaration that there was no "Trust Water" available when the Swan Falls Agreement was executed in 1984, and therefore no trust *res* and no valid trust established under the Swan Falls Settlement.

B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.

C. A declaration that to the extent there is a valid trust, the trust *res* is water and not water rights, the State of Idaho does not hold legal title to Idaho Power's water rights, and title to the water rights referenced in the Swan Falls Agreement is quieted in Idaho Power.

D. A declaration that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

E. A declaration that Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to the use of water for ground water recharge.

F. A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for the multiple year impacts of ground water pumping.

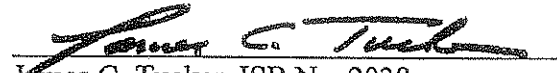
G. Preliminary and permanent injunctions: (a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple year impacts of ground water pumping in the ESPA.

H. Attorney's fees, costs and expenses, including expert witness fees; and

I. Such further relief as this Court deems just and proper.

Dated this 10th day of May, 2007.

Respectfully submitted,



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CERTIFICATE OF MAILING

I certify that on May 10th, 2007, I mailed copies of this **Response and Counterclaim**, to the following persons:

1. One copy to the claimant and parties who filed the objections at the following address:

Idaho Power Company
P.O. Box 70
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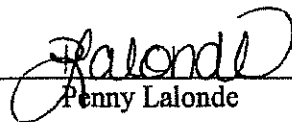
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2. Copies to:

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Penny Lalonde