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

In Re SRBA	)	
	)	Subcase Nos. 37-2128, 37-2471,
	)	37-2472, 37-20709, 37-20710
	)	
	)	MEMORANDUM IN SUPPORT
	)	OF AMENDED MOTION TO
Case No. 39576	)	STRIKE OR ALTERNATIVELY
	)	TO DISMISS COUNTERCLAIM
	)	
_____	)	
IDAHO POWER COMPANY,	)	
	)	
Plaintiff,	)	
	)	

v.)
)
 STATE OF IDAHO; C.L. "BUTCH" OTTER,)
 Governor of the State of Idaho; LAWRENCE G.)
 WASDEN, Attorney General of the State of)
 Idaho; IDAHO DEPARTMENT OF WATER)
 RESOURCES; and DAVID TUTHILL, Director,)
 Idaho Department of Water Resources,)
)
 Defendants.)
)

Idaho Power Company's "Counterclaim" of May 11, 2007 arises from a dispute over who possesses legal title to hydropower water rights that were placed in trust under the Swan Falls Agreement. The Amended Director's Report recommends that the water rights be decreed in the name of the State of Idaho as a trustee for Idaho Power Company and the People of the State of Idaho.¹ The State concurs in this recommendation. The State nevertheless filed a standard form objection to correct certain technical errors in the Report.²

Idaho Power then filed a standard form Response to the State's objection. The scope of Idaho Power's Response, however, far exceeds the substance of a typical standard form Response. This is because Idaho Power's Response also attaches a "Counterclaim" that purportedly asserts private causes of action seeking civil relief against the State and other "Defendants." Idaho Power's "Counterclaim" invites the

¹ Idaho Power objected to the Director's Report. The grounds for Idaho Power's objection are highlighted in the "Counterclaim" that is the subject of this motion. In sum, Idaho Power claims the parties intended the trust's "res" to be some quantity of "water" (rather than water "rights" as stated in the Agreement and its implementing statutes). Idaho Power contends the parties mistakenly believed this amount of water existed when they signed the Agreement. Idaho Power claims there actually was no trust "water." Accordingly, there is no trust "res," the trust is void, and Idaho Power owns the water it says does not exist.

² The Amended Director's Report misstates the Swan Falls Agreement's year of execution as 1985 instead of 1984. Additionally, the "Name and Address" section names both the State, as legal title holder, and also Idaho Power and the People of the State as the equitable title holders. Consistent with *United States of America v. Pioneer Irrigation District*, which was handed down after the Director issued the Amended Report, the "Name and Address" section should list only the legal title holder, i.e. the State.

Court to abandon well-settled SRBA procedures, AO1, and the general adjudication statutes, and to countenance what amounts to a private quiet title action in which Idaho Power is allowed to sue third parties for civil relief. It also seeks declaratory and injunctive relief against parties over which this Court lacks jurisdiction, and on matters that exceed the Court's charge to determine the ownership, nature and extent of the water rights in question. The Court should reject Idaho Power's invitation to so radically depart from the SRBA's purpose and procedures, and it should strike or dismiss the "Counterclaim."

ARGUMENT

I. The Court Should Strike The "Counterclaim" Because It Is Redundant, Immaterial And Impertinent.

IRCP 12(f) empowers a court to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matters." The Court should strike Idaho Power's "Counterclaim" under this rule.

A. The "Counterclaim" Is A Redundant Attempt To Resolve Idaho Power's Objections To The Director's Recommendations.

The underlying dispute the "Counterclaim" seeks to resolve is Idaho Power's objections to the Director's recommendations. The "Counterclaim" recognizes that the Director has recommended that legal title to the water rights be decreed in the State's name, "Counterclaim" at 14-15 ¶¶ 39-42, and directly challenges this recommendation by seeking a judicial declaration that Idaho Power holds legal title to the water rights. *Id.* at

22, 26 (“Third Claim for Relief”).³ The “Counterclaim” further attacks the Director’s recommendations by seeking:

- a declaration that the Swan Falls trust—the basis for the Director’s recommendation that legal title be decreed in the State—never came into existence. *See* “Counterclaim” at 25, 21 (seeking a declaration that “no valid trust was established under the Swan Falls Settlement”) (“First Claim for Relief”);
- judicial reformation of the Swan Falls Agreement “eliminating any asserted trust.” “Counterclaim” at 25, 21 (“Second Claim for Relief”); and
- a declaration that the State’s claim to legal title to the water rights is barred under theories of estoppel, waiver and laches. “Counterclaim” at 22-26 (“Fourth Claim for Relief”).

The “Fifth Claim for Relief” similarly challenges the Director’s recommendation as to legal title by seeking a declaration that “Idaho Power’s water rights” are not subordinate to the use of water for ground water recharge. “Counterclaim” at 23, 26 (“Fifth Claim for Relief”). This claim also attacks the Director’s recommendation that the rights be subordinate to “subsequent beneficial upstream uses upon approval of such

³ Idaho Power objects to the Director’s recommendation that the State as trustee holds legal title to the rights. Idaho Power’s “Counterclaim” clarifies the objection and contends that ownership is a contractual interpretation question hinging principally on whether the Agreement’s parties mistakenly believed that some quantity of “trust water” existed when they signed the Agreement. The State’s contrasting position is that determining who owns the rights is not a matter of contract law but of applying statutes that were attached to, and enacted to implement, the Swan Falls Agreement. These statutes conferred legal title to the State in rights for flows above the minimums at Murphy. *See* Idaho Code § 42-203B (the “water rights” listed in the Agreement “shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of water for power purposes, and of the people of the state of Idaho” to the extent they exceed the minimum flows established at Murphy”); *see also* Journal of the State Senate at 60, “Statement of Legislative Intent – S 1008,” Feb. 6, 1985 (“[T]his trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum flows”).

uses by the Idaho Department of Water Resources in accordance with State law.”⁴ The claim thus seeks to prevent subordination to ground water recharge uses even if they are approved in accordance with State law. See “Counterclaim” at 23, 26 (seeking a declaration that the water rights are not subordinate to uses of water for ground water recharge, “through the Swan Falls Settlement or otherwise”).

The requests for injunctions in the “Seventh Claim for Relief” also seek relief that conflicts with the Director’s recommendations regarding legal title and the nature and extent of the water rights at issue. See, e.g., Counterclaim at 24, 26 (referring to “Idaho Power’s water rights,” “Idaho Power’s hydropower water rights,” and seeking an injunction barring the State from taking any action “on the basis of the State’s asserted legal title to such water rights”).

Thus, six of the seven claims for relief⁵ in the “Counterclaim” inevitably reduce to a series of objections to the Director’s recommendations. The fact that Idaho Power artfully presents these objections as a “Counterclaim” setting forth “claims for relief” against various “Defendants” does not change their essential nature, or that Idaho Power’s underlying goal is to have the water rights decreed as the company originally claimed them, rather than in accordance with the Director’s recommendations. The “Counterclaim” is a redundant attempt to resolve Idaho Power’s objections to the Director’s recommendations.

⁴ See *AMENDED DIRECTOR’S REPORTS*, Exhibit A (Director’s recommendations for the water rights in question).

⁵ The remaining claim, the “Sixth Claim for Relief,” is omitted from this discussion because it challenges the Director’s administration of water rights priorities in the Snake River Basin rather than his recommendations as to the water rights at issue. The Sixth Claim for Relief is therefore outside the Court’s jurisdiction under Idaho Code §§ 42-1401B(3) and 1401D, as discussed later in this memorandum.

B. The “Counterclaim” is an Immaterial and Impertinent Departure From Prescribed SRBA Procedures.

The State concurs that Idaho Power’s objections to the Director’s recommendations regarding title and subordination should be resolved in SRBA subcase proceedings. Such questions, however, can and should be resolved through conventional SRBA procedures and not through the artifice of a “Counterclaim.”

The procedure for resolving water rights disputes in the SRBA are prescribed by statute and AO1. *See generally* Idaho Code §§ 42-1406—42-1413; AO1. Under these procedures, the starting point is the Director’s recommendations for the elements of the partial decree, which are presumptively correct. Idaho Code § 42-1411. The Director’s recommendations may be challenged only by standard form “objections” and “responses.” AO1 §§ 3-4. The issues to be heard are identified by the notices of claim, the objections, and the responses. Idaho Code § 42-1412(3).

Nothing in AO1 or the applicable statutes contemplates or authorizes a “counterclaim,” “claims for relief” or a private quiet title action to challenge the Director’s recommendations, and a standard form 2 response, such as that to which Idaho Power has bootstrapped its “Counterclaim,” has nothing to do with alleging or answering private claims for relief. This is because the SRBA is not a forum for private civil claims. Rather, it is a statutory “general adjudication” proceeding under Idaho Code §§ 42-1401 – 42-1428. A standard form 2 “response to objection” in the SRBA is used solely to “identify issues to be heard for water rights acquired under state law.” Idaho Code § 42-1412(3). Those issues, in turn, “hinge upon the information contained in the director’s report” (*North Snake Ground Water Dist. v. Gisler*, 136 Idaho 747, 749, 40 P.3d 105, 108 (2002)) and not on the private “claims for relief” a party might wish to

inject into a subcase. Accordingly, while it *may* have been acceptable for Idaho Power's response to attach a narrative describing the "issues to be heard for water rights acquired under state law," Idaho Code § 42-1412(3), it was improper for Idaho Power to designate that attachment as a "Counterclaim" asserting private claims for relief against "Defendants." See AO1.4.d.1.a ("No other form of objection or response may be filed with the court").

Allowing a party who is dissatisfied with the Director's recommendations to circumvent SRBA procedures by the simple expedient of filing a "Counterclaim" would defeat the intent of AO1 and the general adjudication statutes, essentially rendering them surplusage. See *Ag Services of America, Inc. v. Kechter ex rel. Kechter*, 137 Idaho 62, 67, 44 P.3d 1117, 1122 (2002) ("We will not construe a statute in a way that makes mere surplusage of provisions included therein"). It would also be analogous to allowing a "private water rights adjudication," which may not be maintained after a general adjudication has commenced. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 789 P.2d 1135, 1139 (1994); *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

Idaho Power apparently believes it can depart from standard SRBA procedure and file its "Counterclaim" by attempting to invoke the general civil jurisdiction of a district court. See "Counterclaim" at 5 (alleging jurisdiction under Idaho Code §§ 1-705, 6-401, 10-1201). Idaho Power is, of course, wrong. The SRBA District Court is not a court of general jurisdiction. It "is, in effect, a separate division of the district courts and exercises the unique jurisdiction given it by the legislature. As in the case of the magistrate division of the district courts, which exercises jurisdiction as a division of the

district courts pursuant to Idaho Code § 1-2208, the SRBA district court exercises jurisdiction pursuant to Idaho Code §§ 42-1401 through 42-1423.” *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).⁶

The SRBA is intended to make a “comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water” of the Snake River system. Idaho Code § 42-1406A. It not an alternative forum for filing civil actions, challenging the State’s administration of water rights, or seeking affirmative relief beyond a determination of the rights to the use of water. *See, e.g.*, Idaho Code § 42-1401B(3) (providing that the Director--whom Idaho Power has attempted to sue here-- may not be a party to a general adjudication); *id.* § 42-1401D (providing that judicial review of IDWR administrative actions --such as those which Idaho Power seeks to have reviewed here-- may not be heard in a general adjudication).⁷

In sum, the Court should strike the “Counterclaim” as an immaterial and impertinent departure from SRBA procedures as prescribed by the general adjudication statutes and AOI.

C. Established SRBA Procedures Are Adequate For Resolving Idaho Power’s Objections To The Director’s Recommendations.

Moreover, conventional SRBA procedures are quite adequate for resolving the title and subordination issues the “Counterclaim” seeks to raise, which are not uniquely

⁶ The Idaho Supreme Court set the SRBA’s venue. *See* Idaho Code § 42-1407.

⁷ The Statement of Legislative Intent for Idaho Code § 42-1401(d) clarifies: “A principal goal of the Legislature is the timely completion of the pending Snake River Basin Adjudication resulting in a judicial determination of all water rights within the Snake River basin....” This expressed goal would be frustrated if the Court were to consider adjudicating other issues, such as those raised in Idaho Power’s “Counterclaim.” “It is and has been the intention of the Legislature that the [SRBA Court] exercises unique jurisdiction over the ‘judicial determination’ of the elements of the water rights subject to the court’s jurisdiction.” *Id.*

difficult or intractable. At most, Idaho Power's concerns contemplate extensive discovery, but that can be managed within SRBA procedural norms.

Indeed, "the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam." *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). Determining disputed questions of ownership is a principal function of standard SRBA proceedings. *See generally United States v. Pioneer Irrigation District*, ___ Idaho ___, ___ P.3d ___, 2007 WL 703701 (Mar. 9, 2007). It would be contrary to the purpose and procedures of the SRBA to have the water rights in question determined on the basis of a "counterclaim" rather than in conventional SRBA procedures. These procedures have worked well over the years in a wide variety of factual and legal contexts, and provide the obvious means for resolving the ownership and subordination issues Idaho Power has raised.

In short, not only is the "Counterclaim" an unauthorized departure from conventional SRBA procedures, it is unnecessary. Idaho Power's "Counterclaim" is redundant, immaterial and impertinent and the Court should strike it under Rule 12(f). In the alternative, other compelling reasons support the dismissal of the "Counterclaim" or portions thereof, as discussed below.

II. Alternatively, The Court Should Dismiss The "Counterclaim."

A. The "Counterclaim" Fails To State A Claim Upon Which Declaratory Relief May Be Granted.

The "Counterclaim" seeks declaratory relief. Idaho Power's "declaratory relief" claims are, however, quintessentially factual and beyond the purview of a declaratory

judgment action. Idaho Power contemplates that the claims will require extensive discovery on a host of issues, such as the effects of multi-year ground water withdrawals before, during and after the Swan Falls controversy; the amount of “trust water” in the Snake River system in those time periods; the past and present hydrology of the Snake River basin; whether the parties executed the Swan Falls Agreement holding certain beliefs; whether those beliefs ultimately were mistaken; IDWR’s permitting and administration of water rights since the Swan Falls Agreement; and most likely a number of other matters as well.

Idaho Power’s claims thus would primarily require a court to resolve disputed issues of fact, with purely legal interpretation and analysis taking a decidedly secondary role. This is not the function of a declaratory judgment action:

While it has been held that a declaratory judgment proceedings may be maintained, although such proceedings involve the determination of a disputed question of fact, it cannot be used where the object of the proceedings is to try such fact as a determinative issue, and a declaratory judgment should be refused where the questions presented should be the subject of judicial investigation in a regular action.

Ennis v. Casey, 72 Idaho 181, 185, 238 P.2d 435, 438 (1951) (citations omitted) (emphasis added). Idaho Power’s claims are more appropriately litigated under conventional subcase procedures, which unlike declaratory judgment actions are intended to allow for full development of determinative issues of disputed fact.⁸ Thus, the “Counterclaim” should be dismissed in its entirety under Rule 12(b)(6) for failure to state a claim upon which declaratory relief may be granted.

⁸ While the claims and issues Idaho Power alleges in the Counterclaim are inherently factual, the State does not concede that the extensive factual development Idaho Power seeks is necessary to resolve the questions of legal title and subordination. The State reserves its position that such questions are properly resolved principally as matters of law.

B. The Basin 2 And Basin 36 Claims, The Requests For Injunctive Relief, And The Request To “Reform” The Swan Falls Agreement Are Beyond The Scope Of The Order Of Reference.

The “Counterclaim” requests declaratory and injunctive relief regarding water rights in Basins 2, 36 and 37. *See generally* “Counterclaim” at 25-27. Many of these requests for relief are outside the authority of the Special Master under the applicable statutes and order of reference.

A Special Master in SRBA subcase proceedings is tasked with conducting a trial “on an objection or any group of objections.” Idaho Code § 42-1412(5). The authority of a Special Master is defined by the order of reference from the presiding judge. Idaho Code § 42-1422(2); *see also Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002) (“The district court shall specify the powers and duties of a special master in the order of reference”).

Idaho Power’s “Counterclaim” asks the Special Master to “reform” the Swan Falls Agreement, declare that the State has failed to properly administer water rights priorities in the Snake River Basin, and issue various forms of injunctive relief. “Counterclaim” at 25-27. These requests for relief are beyond the scope of resolving “an objection or any group of objections” to the Director’s recommendations for the elements of the decrees, Idaho Code § 42-1412(5), and thus outside the authority of a Special Master in a general adjudication proceeding. *See generally* chapter 14, Title 42, Idaho Code.

The requests for relief with respect to Basin 2 and Basin 36 are also beyond the scope of the order of reference. The order of reference for the subcases at issue

encompasses the “irrigation and other subcases in Reporting Area 16, Basin 37, Part I.” Order of Reference Appointing Brigitte Bilyeu Special Master for Irrigation and Other Claims in Reporting Area 16, Basin 37, Part I, (“Order of Reference”) at 1. There is no mention of any Basin 2 or Basin 36 subcases or issues in the Order of Reference. Thus, the requests for relief in the “Counterclaim” regarding water rights in Basins 2 and 36 must be dismissed under Rule 12(b)(1) and Rule 12(b)(6) as outside the jurisdiction and authority of the Special Master under the Order of Reference.

For similar reasons, the requests for a reformation of the Swan Falls Agreement, for a declaration that the State has failed to properly administer water right priorities in the Snake River Basin, and for injunctive relief must also be dismissed. The Order of Reference only authorizes the Special Master to “issue reports as set forth in SRBA Administrative Order 1.” Order of Reference at 1. Nothing in the Order of Reference or AO1 authorizes the Special Master’s reports to recommend relief so far afield from determining the elements, nature and extent of the water rights in question as that Idaho Power requests. Thus, the claims for declaratory and injunctive relief and a “reformation” of the Swan Falls Agreement must also be dismissed under Rules 12(b)(1) and 12(b)(6).

C. The “Counterclaim” Alleges Claims Against Non-Parties Who Were Not Served.

The “Counterclaim” also should be dismissed to the extent it is an sues the Governor, the Attorney General, the Director of IDWR, and IDWR because, as noted in section I above, they are not parties to these subcases and have asserted no claims for Idaho Power to “counter.” A “counterclaim” may only be asserted against “opposing parties.” I.R.C.P. 13(a)-(b); *Metcalf v. Golden (In re Adbox, Inc.)*, No. 05-55158 (9th Cir.

June 4, 2007) (citing F.R.C.P. 13); *see also Ute Indian Tribe of the Uintah & Ouray Reservation v. Ute Distribution Corp.*, 2007 WL 1231499 (D. Utah Apr. 23, 2007) (“A counterclaim can be directed only at existing Plaintiffs.”)

The Governor, the Attorney General, the Director of IDWR, and IDWR have not filed any notices of claim, objections or responses in these subcases,⁹ or alleged any claims against Idaho Power, nor has Idaho Power sought joinder of these four “Defendants.” *see* I.R.C.P. 13(h) (providing that non-parties may be made parties to a counterclaim only in accordance with the joinder provisions of the Idaho Rules of Civil Procedure). Thus, the Governor, the Attorney General, the Director of IDWR, and IDWR are not “opposing parties” in these subcases, and there is no legal basis for asserting a “counterclaim” against them. I.R.C.P. 13(a)-(b). The “Counterclaim” is ineffective as against these four “Defendants.”

Moreover, the Court never issued a summons in connection with the “Counterclaim” and Idaho Power has not, therefore, served the Governor, the Attorney General, the Director of IDWR, and IDWR with a summons. Accordingly, the “Counterclaim” should be dismissed under Rule 13(a),(b),(h), and Rule 12(b)(2), (4)-(5) and (6) to the extent the “Counterclaim” alleges claims against the Governor, the Attorney General, the Director of IDWR, and IDWR.

D. The SRBA District Court Lacks Jurisdiction Over The Director And IDWR, And Idaho Power Has Failed to State A Claim Against Them.

Idaho Power’s attempt to circumvent standard SRBA procedure and the Court’s role is highlighted by the Counterclaim’s attempt to name the Director of IDWR, David Tuthill, and IDWR itself, as “Defendants. These “Defendants” clearly should be

⁹ The Attorney General’s filings in these subcases have been made in his representative capacity as counsel for the State of Idaho, not on his own behalf.

dismissed from the “Counterclaim” under I.R.C.P. 12(b)(2) and/or 12(b)(6) because they have been statutorily removed as parties to SRBA litigation. Idaho Code § 42-1401B(3) provides that “[t]he director shall not be a party to an adjudication,” and section 42-1401A(4) defines the term “Director” as including IDWR.

Thus, in *Twin Falls Canal Co. v. IDWR*, 127 Idaho 688, 905 P.2d 89 (1995), the Idaho Supreme Court held that the Director and IDWR may not be joined or sued in an declaratory judgment action in the SRBA. *Id.* at 689, 905 P.2d at 90. Idaho Power’s “Counterclaim” alleges a declaratory judgment action in the SRBA against, among others, the Director and IDWR. Under these circumstances, sections 42-1401A, 42-1401B and *Twin Falls Canal Company* are controlling and require the dismissal of the Director and IDWR from this action—and ultimately from the “Counterclaim” in the Basin 37 subcases, as well.¹⁰ The SRBA Court lacks personal jurisdiction over the Director Tuthill and the IDWR and IPCO’s “Counterclaim” fails to state claims for relief which can be granted against those “Defendants.”

E. The SRBA District Court Cannot Reform The Statutorily Implemented Swan Falls Agreement.

The Court should dismiss the “Counterclaim’s” second claim for relief for lack of subject matter jurisdiction under Rule 12(b)(1) and/or failure to state a claim for which relief can be granted under Rule 12(b)(6). The second claim for relief expressly seeks judicial “reformation of the Swan Falls Agreement” to eliminate the trust provisions, based on an alleged mutual mistake of fact. Counterclaim at 25 ¶ B; *see also id.* at 21-22 ¶ 63.

¹⁰ The fact that the Counterclaim attempts to invoke the general jurisdiction of district courts is not sufficient to make the Director and IDWR parties to the Counterclaim, for reasons previously discussed.

It is undisputed, however, that the Swan Falls Agreement was implemented, as originally written, by appropriate legislation. *See* Counterclaim at 7 ¶ 20 (alleging the existence of “subsequent implementing legislation”). The Legislature expressly ratified the Agreement by statute, Idaho Code § 42-203B(5), and declared that the Agreement established the Swan Falls minimum flows and “defin[ed] such rights in excess thereof as being held in trust by the state.” Idaho Code § 42-203B(5).

Thus, reforming the Swan Falls Agreement as requested by Idaho Power would either have the effect of amending the implementing and ratifying statutes, or rendering critical provisions of those statutes meaningless surplus. Either result is disfavored and beyond the Court’s authority. Moreover, such relief is beyond the scope of the Order of Reference, as previously discussed. Accordingly, the second claim for relief should be dismissed under Rule 12(b)(1) and/or Rule 12(b)(6).

F. The SRBA District Court May Not Review IDWR’s Administration Of Water Rights.

The sixth claim for relief should be dismissed because it seeks relief regarding the administration of water rights rather than the adjudication and determination of such rights. The sixth claim for relief seeks declarations that “the State has failed to take reasonable steps in its administration of water right priorities in the Snake River Basin,” Counterclaim at 23 ¶ 71, and that “the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for multiple year impacts of ground water pumping.” Counterclaim at 26 ¶ F. The Director and IDWR administer water rights in Idaho, *see generally* Title 42, chapter 2, Idaho Code, and therefore claim six seeks judicial review of such administration.

The Idaho Code provides that challenges to IDWR's administration of water rights may not be heard in a general adjudication proceeding commenced under chapter 14 of Title 42:

Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter.

Idaho Code § 42-1401D. Thus, the SRBA District Court may not hear challenges to IDWR's administrative actions. *Sagewillow v. IDWR*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003).

Moreover, in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), the Idaho Supreme Court made it clear that the type of conjunctive administration issues raised in the "Counterclaim" are not to be resolved in the SRBA, but rather by the Director under the Rules for the Conjunctive Management of Surface and Ground Water Resources:

For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42-1411(2)(a)-(j). . . . Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source. . . . Conjunctive administration 'requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.' *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

Id. at ___, 154 P.3d at 448.¹¹ The Director's actions in this respect are subject to judicial review under the Administrative Procedures Act in a district court, not in the SRBA. *See*

¹¹ The *American Falls* decision is not yet final because a petition for rehearing remains pending.

generally id; Idaho Code § 42-1401D. Moreover, claims of improper or unlawful water rights administration must be presented to the Director, and administrative remedies exhausted, before a court may review them. *American Falls Reservoir District No. 2*, 143 Idaho at ___, 154 P.3d at 441-43.

Accordingly, claim six of the Counterclaim should be dismissed under I.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, and/or failure to state a claim for which relief may be granted, under I.R.C.P. 12(b)(6).

G. The SRBA District Court Lacks Authority To Provide The Injunctive Relief Idaho Power Seeks.

The seventh claim for relief should also be dismissed in its entirety because each of its four different requests for injunctive relief is beyond this Court's authority to provide, as discussed below.

1. The Court Lacks Jurisdiction And Authority To Grant Injunctive Relief Request "A."
 - a. The Court Lacks Jurisdiction Over The Director and IDWR.

Injunctive relief request "A" seeks an order enjoining "the State Defendants"—including IDWR and the Director—"from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights." Counterclaim at 25 ¶ 81(a). This Court lacks authority to enter such orders against IDWR or the Director because, as previously discussed, they are not and cannot be parties in the SRBA. *Twin Falls Canal Co.*, 127 Idaho at 689, 905 P.2d at 90. Injunctive relief request "A" must, therefore, be dismissed to the extent it applies to the Director and IDWR.

b. Injunctive Relief Request “A” Exceeds The Scope Of Determining The Nature and Extent of the Water Rights in Question.

Injunctive relief request “A” ignores that this Court’s authority is limited to determining the nature and extent of water rights. The Court should leave matters that hinge on such determinations – such as the review of how IDWR administered water under the rights or approved new rights to use trust water under the public interest criteria - to the district courts. *See, e.g.,* Idaho Code § 42-1401D (providing that claims for review of IDWR actions may not be heard in a general adjudication proceeding).

Additionally, to the extent the “Counterclaim” assumes the Court ultimately decree that Idaho Power has legal title to the rights and then asks the Court to enjoin the Defendants from violating those rights, the “Counterclaim” is based on pure speculation. The “Counterclaim” notably does not allege that the “Defendants” will fail to honor any of this Court’s decisions or decrees. It would be improper and premature to enter the order sought in injunctive relief request “A” based on what appears to be Idaho Power’s speculation that one or more of the State defendants would ignore the Court’s determination of who holds legal title to the water rights. *See, e.g., See Roberts v. Board of Trustees, Pocatello, School District No. 25*, 134 Idaho 890, 894, 11 P.3d 1108, 1112 (2000) (“As a general rule, there is a presumption of regularity in the performance of official duties by public officers.”).

c. Injunctive Relief Request “A” Is Impermissibly Overbroad.

Injunctive relief request A seeks a sweeping order “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.” Counterclaim at 25 ¶ 81(a). This request is

overbroad as a matter of law because it would even bar the State from pursuing its claims and arguments in SRBA proceedings, seeking a re-hearing or re-consideration of a decision in this Court, or an appeal. *See Drew v. Sorensen*, 133 Idaho 534, 542, 989 P.2d 276, 284 (1999) (injunction may not be so “overly broad” as to deprive a party of the “right of access to the courts to raise legitimate challenges.”).

Similarly, the injunction sought would impermissibly bar the Director from fulfilling his statutory obligations to act “as an independent expert and technical assistant” to assure that claims are reported accurately and in accordance with statutory procedures. Idaho Code § 42-1401B. The injunction would also prevent the Director from determining the elements of a water right, “to the extent the Director deems appropriate and proper, to define and administer the water rights acquired under state law,” as he is required by statute. Idaho Code § 42-1411(2).

Thus, the first request for injunctive relief is overbroad as a matter of law and should be dismissed as outside the Court’s authority, and as failing to state a claim on which relief can be granted. I.R.C.P. 12(b)(1), (6).

2.. The Court Lacks Jurisdiction To Grant Injunctive Relief Requests “B” and “D.”

Injunctive Relief Requests “B” and “D” seek, respectively, relief “ordering IDWR to re-evaluate water availability, and take appropriate action,” and “ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin.” Counterclaim at 25 ¶ 81(b), (d); *id.* at 26 ¶ G(b), (d). As previously discussed, this Court lacks authority to enter such orders against IDWR or the Director because they are not and cannot be parties in the SRBA, and because judicial review of IDWR’s administration of water rights may not be had in the SRBA. Injunctive relief requests

“B” and “D” must be dismissed in their entirety for lack of personal jurisdiction under I.R.C.P. 12(b)(2).

3. The Court Lacks Authority To Grant Injunctive Relief Request “C.”

Injunctive relief request “C” seeks an order requiring the 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.” Counterclaim at 25 ¶ 81(c). This request is beyond this Court’s authority to determine the nature and extent of water rights. It also is problematic because it seeks the “repeal” of an Attorney General opinion on a question of law. The Attorney General is statutorily obligated to provide an opinion on a question of law when so requested by a member of the legislature, Idaho Code § 67-1401(6), as was the case with the opinion in question. “Counterclaim” at 18 § 51. Nothing in the Idaho Code, Idaho Rules of Civil Procedure or AO1 authorizes the SRBA District Court—or any district court of the State—to order the “repeal” or withdrawal of such a statutorily-authorized opinion. Indeed, the notion that a Court might require the Attorney General—an elected constitutional officer—to “repeal” such an opinion raises significant separation of power concerns.¹²

Moreover, an Attorney General’s opinion is just that—an opinion. The Attorney General is statutorily obligated to provide his or her interpretation of the law in certain circumstances. Such an interpretation is not legally binding and does not inflict legally cognizable harm, even if a court ultimately determines that the opinion is erroneous.

¹² The State does not dispute that a district court of general jurisdiction could declare the Attorney General’s opinion incorrect as a matter of law. It is quite a different thing, however, for a Court to order the “repeal” of such an opinion.

Finally, an Attorney General opinion is an exercise of discretion, and while a court may require the Attorney General to exercise his discretion in appropriate circumstances, it cannot control the way in which he exercises the discretion by requiring the opinion to be withdrawn or to reach certain conclusions. *See Oklahoma City News Broadcasters Ass'n, Inc. v. Nigh*, 683 P.2d 72, 77 (Okla. 1984) (declining to order withdrawal of an Attorney General opinion), *superseded by statute on different grounds*; *Draper v. State*, 621 P.2d 1142, 1146-47 (Okla. 1980) (similar).

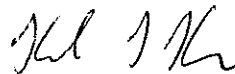
CONCLUSION

For the reasons set forth herein, the State requests that the Court strike or dismiss the "Counterclaim."

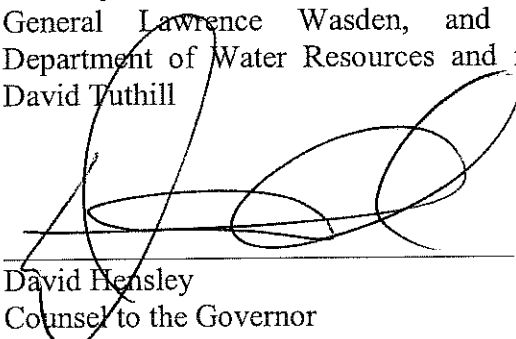
DATED this 13th day of June, 2007.

Respectfully submitted,

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



By: Karl T. Klein, Deputy Attorney General,
Attorneys for Defendants State of Idaho, Attorney
General Lawrence Wasden, and the Idaho
Department of Water Resources and its Director,
David Tuthill



David Hensley
Counsel to the Governor

CERTIFICATE OF MAILING

I certify that on June 13, 2007, I caused the foregoing Memorandum in Support of Amended Motion to Dismiss or Alternatively To Strike "Counterclaim" to be served on the following persons by the method designated:

1. Original to:

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

Hand Delivery

2. One copy to each entity identified in the ownership section of the water right at the following addresses:

STATE OF IDAHO
700 W. Jefferson, Room 210
P.O. Box 44449
Boise, Idaho 83711-4449

NOT APPLICABLE

IDAHO POWER CO.
P.O. Box 70
Boise, Idaho 83707

U.S. MAIL

James S. Lochhead
Brownstein Hyatt Farber Schreck, P.C.
410 17th Street, Suite 2200
Denver, Colorado 80202
lochhead@bhfs.com

U.S. MAIL & E-Mail

John K. Simpson
Barker Rosholt & Simpson
P.O. Box 2139
Boise, Idaho 83701

U.S. MAIL

Josephine P. Beeman
409 West Jefferson
Boise, Idaho 83702
Facsimile: (208) 331-0954

U.S. MAIL

Scott J. Smith
Racine, Olson, Nye, Budge & Bailey
P.O. Box 1391
Pocatello, Idaho 83204

U.S. MAIL

3. Facsimile: (208) 232-6109

Copies to:

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

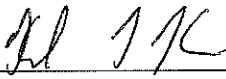
STATEHOUSE MAIL

United States Department of Justice
Environment & Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

U.S. MAIL

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

HAND DELIVERY



Karl T. Klein

SRBA

DIRECTORS REPORT 37-02128

[Return to SRBA Home Page](#)

IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 37-02128

*
* THIS DIRECTORS REPORT HAS BEEN AMENDED SINCE *
* IT WAS 1ST FILED. *
*

Name and Address: EQUITABLE TITLE
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

LEGAL TITLE
STATE OF IDAHO
STATEHOUSE
PO BOX 83720
BOISE, ID 83720

EQUITABLE TITLE
STATE OF IDAHO, IN AND FOR THE
PEOPLE OF THE STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720

ALTHOUGH THE NAME OF THE STATE OF IDAHO APPEARS IN THE NAME AND ADDRESS SECTION OF THIS PARTIAL DECREE, LEGAL TITLE IS HELD IN TRUST BY THE STATE OF IDAHO, FOR THE USE AND BENEFIT OF THE USER OF THE WATER, IDAHO POWER COMPANY, FOR POWER PURPOSES AND THE PEOPLE OF THE STATE OF IDAHO, PURSUANT TO THE SWAN FALLS AGREEMENT AND IDAHO CODE SECTION 42-203B.

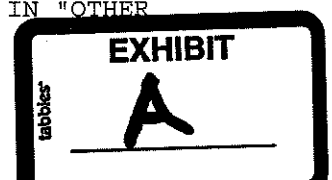
Source: COVE CREEK Tributary: MALAD RIVER
MALAD RIVER Tributary: SNAKE RIVER

Point of injection and point of redirection from the Malad River.

Quantity: 700.00 CFS

700 CFS IS HELD IN TRUST FOR THE USE AND BENEFIT OF THE USER OF THE WATER FOR POWER PURPOSES, AND OF THE PEOPLE OF THE STATE OF IDAHO.

THE QUANTITY OF THIS RIGHT IS FURTHER DEFINED BELOW IN "OTHER



PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS
WATER RIGHT."

Priority Date: 11-25-1908

Diversion Point:	T06S R13E S25	SWSW	Within Gooding County
	S35	NENW	
		NENW	(Inject Gooding
		NENW	(Redive Gooding

Purpose and			
Period of Use:	Purpose of Use	Period of Use	Quantity
	Power	01-01 TO 12-31	700.00 CFS

Place of Use:	Power	Within Gooding County
	T06S R13E S27 LOT 2	(SWSW)

Other Provisions Necessary for Definition / Administration of this Water Right:

1. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710 ENTITLE THE COMPANY TO UNSUBORDINATED AVERAGE DAILY FLOWS OF 3900 CFS FROM APRIL 1 TO OCTOBER 31, AND 5600 CFS FROM NOVEMBER 1 TO MARCH 31, BOTH TO BE MEASURED AT THE MURPHY U.S.G.S. GAUGING STATION IMMEDIATELY BELOW SWAN FALLS. THESE FLOWS ARE NOT SUBJECT TO DEPLETION BY JUNIOR WATER RIGHT HOLDERS. (EXCEPTIONS TO THE COMPANY'S UNSUBORDINATED AVERAGE DAILY FLOWS ARE LISTED BELOW IN PARAGRAPHS 2 THROUGH 5.) THE MURPHY GAUGING STATION IS LOCATED AT LATITUDE 43 DEGREES 17' 31", LONGITUDE 116 DEGREES 25' 12", IN T01S, R01W, S35, NWNESE, BOISE MERIDIAN, ADA COUNTY HYDROLOGIC UNIT 17050103, ON THE RIGHT BANK 4.2 MILES DOWNSTREAM FROM SWAN FALLS POWER PLANT, 7.5 MILES NE OF MURPHY, AT RIVER MILE 453.5.

2. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, WHEN USED IN COMBINATION IN AMOUNTS SPECIFIED ABOVE SHALL BE SUBORDINATE TO SUBSEQUENT BENEFICIAL UPSTREAM USES UPON APPROVAL OF SUCH USES BY THE IDAHO DEPARTMENT OF WATER RESOURCES IN ACCORDANCE WITH STATE LAW UNLESS THE DEPLETION VIOLATES THE FLOWS SET FORTH IN PARAGRAPH 1. AVERAGE DAILY FLOW, AS USED HEREIN, SHALL BE BASED UPON ACTUAL FLOW CONDITIONS; THUS, ANY FLUCTUATIONS RESULTING FROM THE OPERATION OF COMPANY FACILITIES SHALL NOT BE CONSIDERED IN THE CALCULATION OF THE MINIMUM DAILY STREAM FLOWS SET FORTH HEREIN.

3. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THE WATER RIGHTS OF THOSE PERSONS DISMISSED FROM IDAHO POWER CO. V STATE OF IDAHO, CASE NO. 81375 (FOURTH JUDICIAL DIST. BED. 16, 1990) PURSUANT TO THE CONTRACT EXECUTED BETWEEN THE STATE AND COMPANY IMPLEMENTING THE TERMS OF I.C. SECTIONS 61-539 AND 61-540.

4. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THOSE WATER RIGHTS WITH A PRIORITY DATE PRIOR TO OCTOBER 1, 1984.

5. THE PORTION OF RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B,

02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, IN EXCESS OF THE AMOUNTS SET FORTH IN PARAGRAPH 1 ARE HELD IN TRUST BY THE STATE OF IDAHO, BY AND THROUGH THE GOVERNOR, FOR THE USE AND BENEFIT OF THE USERS OF WATER FOR POWER PURPOSES AND OF THE PEOPLE OF THE STATE OF IDAHO AS PROVIDED FOR IN THE CONTRACT ENTERED INTO BY THE GOVERNOR AND THE IDAHO POWER COMPANY ON OCTOBER 25, 1985, AND RATIFIED BY THE IDAHO LEGISLATURE BY IDAHO CODE SECTION 42-203B(5).

Explanatory Material: Basis of Claim - License

POWER GENERATION IS AT THE LOWER MALAD GORGE POWER PLANT.

[Return to SRBA Home Page](#)

SRBA

DIRECTORS REPORT 37-02471

[Return to SRBA Home Page](#)

IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 37-02471

*
* THIS DIRECTORS REPORT HAS BEEN AMENDED SINCE *
* IT WAS 1ST FILED. *
*

Name and Address: EQUITABLE TITLE
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

LEGAL TITLE
STATE OF IDAHO
STATEHOUSE
PO BOX 83720
BOISE, ID 83720

EQUITABLE TITLE
STATE OF IDAHO, IN AND FOR THE
PEOPLE OF THE STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720

ALTHOUGH THE NAME OF THE STATE OF IDAHO APPEARS IN THE NAME AND ADDRESS SECTION OF THIS PARTIAL DECREE, LEGAL TITLE IS HELD IN TRUST BY THE STATE OF IDAHO, FOR THE USE AND BENEFIT OF THE USER OF THE WATER, IDAHO POWER COMPANY, FOR POWER PURPOSES AND THE PEOPLE OF THE STATE OF IDAHO, PURSUANT TO THE SWAN FALLS AGREEMENT AND IDAHO CODE SECTION 42-203B.

Source: COVE CREEK Tributary: MALAD RIVER
MALAD RIVER Tributary: SNAKE RIVER

Quantity: 900.00 CFS

900 CFS IS HELD IN TRUST FOR THE USE AND BENEFIT OF THE USER OF THE WATER FOR POWER PURPOSES, AND OF THE PEOPLE OF THE STATE OF IDAHO.

THE QUANTITY OF THIS RIGHT IS FURTHER DEFINED BELOW IN "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT."

Priority Date: 05-14-1946

Diversion Point: T06S R13E S25 SWSW Within Gooding County
SWSW

Purpose and			
Period of Use:	Purpose of Use	Period of Use	Quantity
	Power	01-01 TO 12-31	900.00 CFS

Place of Use: Power Within Gooding County
T06S R13E S35 NENW

Other Provisions Necessary for Definition / Administration of this Water Right:

1. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710 ENTITLE THE COMPANY TO UNSUBORDINATED AVERAGE DAILY FLOWS OF 3900 CFS FROM APRIL 1 TO OCTOBER 31, AND 5600 CFS FROM NOVEMBER 1 TO MARCH 31, BOTH TO BE MEASURED AT THE MURPHY U.S.G.S. GAUGING STATION IMMEDIATELY BELOW SWAN FALLS. THESE FLOWS ARE NOT SUBJECT TO DEPLETION BY JUNIOR WATER RIGHT HOLDERS (EXCEPTIONS TO THE COMPANY'S UNSUBORDINATED AVERAGE DAILY FLOWS ARE LISTED BELOW IN PARAGRAPHS 2 THROUGH 5.) THE MURPHY GAUGING STATION IS LOCATED AT LATITUDE 43 DEGREES 17' 31", LONGITUDE 116 DEGREES 25' 12", IN T01S, R01W, S35, NWNESE, BOISE MERIDIAN, ADA COUNTY HYDROLOGIC UNIT 17050103, ON THE RIGHT BANK 4.2 MILES DOWNSTREAM FROM SWAN FALLS POWER PLANT, 7.5 MILES NE OF MURPHY, AT RIVER MILE 453.5.
2. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, WHEN USED IN COMBINATION IN AMOUNTS SPECIFIED ABOVE SHALL BE SUBORDINATE TO SUBSEQUENT BENEFICIAL UPSTREAM USES UPON APPROVAL OF SUCH USES BY THE IDAHO DEPARTMENT OF WATER RESOURCES IN ACCORDANCE WITH STATE LAW UNLESS THE DEPLETION VIOLATES THE FLOWS SET FORTH IN PARAGRAPH 1. AVERAGE DAILY FLOW, AS USED HEREIN, SHALL BE BASED UPON ACTUAL FLOW CONDITIONS; THUS, ANY FLUCTUATIONS RESULTING FROM THE OPERATION OF COMPANY FACILITIES SHALL NOT BE CONSIDERED IN THE CALCULATION OF THE MINIMUM DAILY STREAM FLOWS SET FORTH HEREIN.
3. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THE WATER RIGHTS OF THOSE PERSONS DISMISSED FROM IDAHO POWER CO. V STATE OF IDAHO, CASE NO. 81375 (FOURTH JUDICIAL DIST. BED. 16, 1990) PURSUANT TO THE CONTRACT EXECUTED BETWEEN THE STATE AND COMPANY IMPLEMENTING THE TERMS OF I.C. SECTIONS 61-539 AND 61-540.
4. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THOSE WATER RIGHTS WITH A PRIORITY DATE PRIOR TO OCTOBER 1, 1984.
5. THE PORTION OF RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, IN EXCESS OF THE AMOUNTS SET FORTH IN PARAGRAPH 1 ARE HELD IN TRUST BY THE STATE OF IDAHO, BY AND THROUGH THE GOVERNOR, FOR THE USE AND BENEFIT OF THE USERS OF WATER FOR POWER PURPOSES AND OF THE PEOPLE OF THE STATE OF IDAHO

AS PROVIDED FOR IN THE CONTRACT ENTERED INTO BY THE GOVERNOR AND
THE IDAHO POWER COMPANY ON OCTOBER 25, 1985, AND RATIFIED BY THE
IDAHO LEGISLATURE BY IDAHO CODE SECTION 42-203B(5).

Explanatory Material: Basis of Claim - License

POWER GENERATION IS AT THE UPPER MALAD GORGE POWER PLANT.

[Return to SRBA Home Page](#)

SRBA

DIRECTORS REPORT 37-02472

[Return to SRBA Home Page](#)

IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 37-02472

*
* THIS DIRECTORS REPORT HAS BEEN AMENDED SINCE *
* IT WAS 1ST FILED. *
*

Name and Address: EQUITABLE TITLE
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

LEGAL TITLE
STATE OF IDAHO
STATEHOUSE
PO BOX 83720
BOISE, ID 83720

EQUITABLE TITLE
STATE OF IDAHO, IN AND FOR THE
PEOPLE OF THE STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720

ALTHOUGH THE NAME OF THE STATE OF IDAHO APPEARS IN THE NAME AND ADDRESS SECTION OF THIS PARTIAL DECREE, LEGAL TITLE IS HELD IN TRUST BY THE STATE OF IDAHO, FOR THE USE AND BENEFIT OF THE USER OF THE WATER, IDAHO POWER COMPANY, FOR POWER PURPOSES AND THE PEOPLE OF THE STATE OF IDAHO, PURSUANT TO THE SWAN FALLS AGREEMENT AND IDAHO CODE SECTION 42-203B.

Source: MALAD RIVER Tributary: SNAKE RIVER

Quantity: 650.00 CFS

650 CFS IS HELD IN TRUST FOR THE USE AND BENEFIT OF THE USER OF THE WATER FOR POWER PURPOSES, AND OF THE PEOPLE OF THE STATE OF IDAHO.

THE QUANTITY OF THIS RIGHT IS FURTHER DEFINED BELOW IN "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT."

Priority Date: 05-14-1946

Diversion Point: T06S R13E S35 NENW Within Elmore County

Purpose and Period of Use:	Purpose of Use Power	Period of Use 01-01 TO 12-31	Quantity 650.00 CFS
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Place of Use: Power Within Elmore County
T06S R13E S27 LOT 2 (SWSW)

Other Provisions Necessary for Definition / Administration of this Water Right:

1. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710 ENTITLE THE COMPANY TO UNSUBORDINATED AVERAGE DAILY FLOWS OF 3900 CFS FROM APRIL 1 TO OCTOBER 31, AND 5600 CFS FROM NOVEMBER 1 TO MARCH 31, BOTH TO BE MEASURED AT THE MURPHY U.S.G.S. GAUGING STATION IMMEDIATELY BELOW SWAN FALLS. THESE FLOWS ARE NOT SUBJECT TO DEPLETION BY JUNIOR WATER RIGHT HOLDERS. (EXCEPTIONS TO THE COMPANY'S UNSUBORDINATED AVERAGE DAILY FLOWS ARE LISTED BELOW IN PARAGRAPHS 2 THROUGH 5.) THE MURPHY GAUGING STATION IS LOCATED AT LATITUDE 43 DEGREES 17' 31", LONGITUDE 116 DEGREES 25' 12", IN T01S, R01W, S35, NWNESE, BOISE MERIDIAN, ADA COUNTY HYDROLOGIC UNIT 17050103, ON THE RIGHT BANK 4.2 MILES DOWNSTREAM FROM SWAN FALLS POWER PLANT, 7.5 MILES NE OF MURPHY, AT RIVER MILE 453.5.

2. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, WHEN USED IN COMBINATION IN AMOUNTS SPECIFIED ABOVE SHALL BE SUBORDINATE TO SUBSEQUENT BENEFICIAL UPSTREAM USES UPON APPROVAL OF SUCH USES BY THE IDAHO DEPARTMENT OF WATER RESOURCES IN ACCORDANCE WITH STATE LAW UNLESS THE DEPLETION VIOLATES THE FLOWS SET FORTH IN PARAGRAPH 1. AVERAGE DAILY FLOW, AS USED HEREIN, SHALL BE BASED UPON ACTUAL FLOW CONDITIONS; THUS, ANY FLUCTUATIONS RESULTING FROM THE OPERATION OF COMPANY FACILITIES SHALL NOT BE CONSIDERED IN THE CALCULATION OF THE MINIMUM DAILY STREAM FLOWS SET FORTH HEREIN.

3. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THE WATER RIGHTS OF THOSE PERSONS DISMISSED FROM IDAHO POWER CO. V STATE OF IDAHO, CASE NO. 81375 (FOURTH JUDICIAL DIST. BED. 16, 1990) PURSUANT TO THE CONTRACT EXECUTED BETWEEN THE STATE AND COMPANY IMPLEMENTING THE TERMS OF I.C. SECTIONS 61-539 AND 61-540.

4. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THOSE WATER RIGHTS WITH A PRIORITY DATE PRIOR TO OCTOBER 1, 1984.

5. THE PORTION OF RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, IN EXCESS OF THE AMOUNTS SET FORTH IN PARAGRAPH 1 ARE HELD IN TRUST BY THE STATE OF IDAHO, BY AND THROUGH THE GOVERNOR, FOR THE USE AND BENEFIT OF THE USERS OF WATER FOR POWER PURPOSES AND OF THE PEOPLE OF THE STATE OF IDAHO AS PROVIDED FOR IN THE CONTRACT ENTERED INTO BY THE GOVERNOR AND THE IDAHO POWER COMPANY ON OCTOBER 25, 1985, AND RATIFIED BY THE

IDAHO LEGISLATURE BY IDAHO CODE SECTION 42-203B(5).

Explanatory Material: Basis of Claim - License

POWER GENERATION IS AT THE LOWER MALAD GORGE POWER PLANT.

[Return to SRBA Home Page](#)

SRBA

DIRECTORS REPORT 37-20709

[Return to SRBA Home Page](#)

IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 37-20709

*
* THIS DIRECTORS REPORT HAS BEEN AMENDED SINCE *
* IT WAS 1ST FILED. *
*

Name and Address: EQUITABLE TITLE
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

LEGAL TITLE
STATE OF IDAHO
STATEHOUSE
PO BOX 83720
BOISE, ID 83720

EQUITABLE TITLE
STATE OF IDAHO, IN AND FOR THE
PEOPLE OF THE STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720

ALTHOUGH THE NAME OF THE STATE OF IDAHO APPEARS IN THE NAME AND ADDRESS SECTION OF THIS PARTIAL DECREE, LEGAL TITLE IS HELD IN TRUST BY THE STATE OF IDAHO, FOR THE USE AND BENEFIT OF THE USER OF THE WATER, IDAHO POWER COMPANY, FOR POWER PURPOSES AND THE PEOPLE OF THE STATE OF IDAHO, PURSUANT TO THE SWAN FALLS AGREEMENT AND IDAHO CODE SECTION 42-203B.

Source: COVE CREEK Tributary: MALAD RIVER
MALAD RIVER Tributary: SNAKE RIVER

Quantity: 100.00 CFS

100 CFS IS HELD IN TRUST FOR THE USE AND BENEFIT OF THE USER OF THE WATER FOR POWER PURPOSES, AND OF THE PEOPLE OF THE STATE OF IDAHO.

THE QUANTITY OF THIS RIGHT IS FURTHER DEFINED BELOW IN "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT."

Priority Date: 06-14-1948

Diversion Point: T06S R13E S25 SWSW Within Gooding County
SWSW

Purpose and			
Period of Use:	Purpose of Use	Period of Use	Quantity
	Power	01-01 TO 12-31	100.00 CFS

Place of Use: Power Within Gooding County
T06S R13E S35 NENW

Other Provisions Necessary for Definition / Administration of this Water Right:

1. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710 ENTITLE THE COMPANY TO UNSUBORDINATED AVERAGE DAILY FLOWS OF 3900 CFS FROM APRIL 1 TO OCTOBER 31, AND 5600 CFS FROM NOVEMBER 1 TO MARCH 31, BOTH TO BE MEASURED AT THE MURPHY U.S.G.S. GAUGING STATION IMMEDIATELY BELOW SWAN FALLS. THESE FLOWS ARE NOT SUBJECT TO DEPLETION BY JUNIOR WATER RIGHT HOLDERS. (EXCEPTIONS TO THE COMPANY'S UNSUBORDINATED AVERAGE DAILY FLOWS ARE LISTED BELOW IN PARAGRAPHS 2 THROUGH 5.) THE MURPHY GAUGING STATION IS LOCATED AT LATITUDE 43 DEGREES 17' 31", LONGITUDE 116 DEGREES 25' 12", IN T01S, R01W, S35, NWNESE, BOISE MERIDIAN, ADA COUNTY HYDROLOGIC UNIT 17050103, ON THE RIGHT BANK 4.2 MILES DOWNSTREAM FROM SWAN FALLS POWER PLANT, 7.5 MILES NE OF MURPHY, AT RIVER MILE 453.5.

2. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, WHEN USED IN COMBINATION IN AMOUNTS SPECIFIED ABOVE SHALL BE SUBORDINATE TO SUBSEQUENT BENEFICIAL UPSTREAM USES UPON APPROVAL OF SUCH USES BY THE IDAHO DEPARTMENT OF WATER RESOURCES IN ACCORDANCE WITH STATE LAW UNLESS THE DEPLETION VIOLATES THE FLOWS SET FORTH IN PARAGRAPH 1. AVERAGE DAILY FLOW, AS USED HEREIN, SHALL BE BASED UPON ACTUAL FLOW CONDITIONS; THUS, ANY FLUCTUATIONS RESULTING FROM THE OPERATION OF COMPANY FACILITIES SHALL NOT BE CONSIDERED IN THE CALCULATION OF THE MINIMUM DAILY STREAM FLOWS SET FORTH HEREIN.

3. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THE WATER RIGHTS OF THOSE PERSONS DISMISSED FROM IDAHO POWER CO. V STATE OF IDAHO, CASE NO. 81375 (FOURTH JUDICIAL DIST. BED. 16, 1990) PURSUANT TO THE CONTRACT EXECUTED BETWEEN THE STATE AND COMPANY IMPLEMENTING THE TERMS OF I.C. SECTIONS 61-539 AND 61-540.

4. THE RIGHTS LISTED IN PARAGRAPHS 1 AND 2 ABOVE ARE SUBORDINATE TO THOSE WATER RIGHTS WITH A PRIORITY DATE PRIOR TO OCTOBER 1, 1984.

5. THE PORTION OF RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710, IN EXCESS OF THE AMOUNTS SET FORTH IN PARAGRAPH 1 ARE HELD IN TRUST BY THE STATE OF IDAHO, BY AND THROUGH THE GOVERNOR, FOR THE USE AND BENEFIT OF THE USERS OF WATER FOR POWER PURPOSES AND OF THE PEOPLE OF THE STATE OF IDAHO

AS PROVIDED FOR IN THE CONTRACT ENTERED INTO BY THE GOVERNOR AND
THE IDAHO POWER COMPANY ON OCTOBER 25, 1985, AND RATIFIED BY THE
IDAHO LEGISLATURE BY IDAHO CODE SECTION 42-203B(5).

Explanatory Material: Basis of Claim - Beneficial Use

POWER GENERATION IS AT THE UPPER MALAD GORGE POWER PLANT.

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DIRECTORS REPORT 37-10710

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IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 37-10710

Name and Address: PATTERSON LAND & LIVESTOCK INC
MANNING PATTERSON
1450 S 2050 E
GOODING, ID 83330

Source: GROUNDWATER

Quantity: .07 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000
GALLONS PER DAY.

Priority Date: 01-01-1900

Diversion Point: T02S R13E S09 SESESE Within Camas County

Purpose and Period of Use:	Purpose of Use	Period of Use	Quantity
	Domestic 1 HOME	01-01 TO 12-31	.04 CFS
	Stockwater	05-15 TO 10-15	.07 CFS

Place of Use: Stockwater Within Camas County
T02S R13E S09 SESE

Domestic Within Camas County
T02S R13E S09 SESE

Other Provisions Necessary for Definition / Administration of this Water Right:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.

Explanatory Material: Basis of Claim - Beneficial Use

PARCEL NOS. RP02S13E090101A, RP02S13E090101A
STOCKWATER, 300 BEEF CATTLE

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DIRECTORS REPORT 37-20710

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IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 37-20710

*
* THIS DIRECTORS REPORT HAS BEEN AMENDED SINCE *
* IT WAS 1ST FILED. *
*

Name and Address: EQUITABLE TITLE
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

LEGAL TITLE
STATE OF IDAHO
STATEHOUSE
PO BOX 83720
BOISE, ID 83720

EQUITABLE TITLE
STATE OF IDAHO, IN AND FOR THE
PEOPLE OF THE STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720

ALTHOUGH THE NAME OF THE STATE OF IDAHO APPEARS IN THE NAME AND ADDRESS SECTION OF THIS PARTIAL DECREE, LEGAL TITLE IS HELD IN TRUST BY THE STATE OF IDAHO, FOR THE USE AND BENEFIT OF THE USER OF THE WATER, IDAHO POWER COMPANY, FOR POWER PURPOSES AND THE PEOPLE OF THE STATE OF IDAHO, PURSUANT TO THE SWAN FALLS AGREEMENT AND IDAHO CODE SECTION 42-203B.

Source: MALAD RIVER Tributary: SNAKE RIVER

Quantity: 150.00 CFS

150 CFS IS HELD IN TRUST FOR THE USE AND BENEFIT OF THE USER OF THE WATER FOR POWER PURPOSES, AND OF THE PEOPLE OF THE STATE OF IDAHO.

THE QUANTITY OF THIS RIGHT IS FURTHER DEFINED BELOW IN "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT."

Priority Date: 05-24-1950

Diversion Point: T06S R13E S35 NENW Within Gooding County

Purpose and			
Period of Use:	Purpose of Use	Period of Use	Quantity
	Power	01-01 TO 12-31	150.00 CFS

Place of Use: Power Within Gooding County
T06S R13E S27 LOT 2 (SESW)

Other Provisions Necessary for Definition / Administration of this Water Right:

1. RIGHT NOS. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, AND 37-20710 ENTITLE THE COMPANY TO UNSUBORDINATED AVERAGE DAILY FLOWS OF 3900 CFS FROM APRIL 1 TO OCTOBER 31, AND 5600 CFS FROM NOVEMBER 1 TO MARCH 31, BOTH TO BE MEASURED AT THE MURPHY U.S.G.S. GAUGING STATION IMMEDIATELY BELOW SWAN FALLS. THESE FLOWS ARE NOT SUBJECT TO DEPLETION BY JUNIOR WATER RIGHT HOLDERS. (EXCEPTIONS TO THE COMPANY'S UNSUBORDINATED AVERAGE DAILY FLOWS ARE LISTED BELOW IN PARAGRAPHS 2 THROUGH 5.) THE MURPHY GAUGING STATION IS LOCATED AT LATITUDE 43 DEGREES 17' 31", LONGITUDE 116 DEGREES 25' 12", IN T01S, R01W, S35, NWNESE, BOISE MERIDIAN, ADA COUNTY HYDROLOGIC UNIT 17050103, ON THE RIGHT BANK 4.2 MILES DOWNSTREAM FROM SWAN FALLS POWER PLANT, 7.5 MILES NE OF MURPHY, AT RIVER MILE 453.5.
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IDAHO LEGISLATURE BY IDAHO CODE SECTION 42-203B(5).

Explanatory Material: Basis of Claim - Beneficial Use

POWER GENERATION IS AT THE LOWER MALAD GORGE POWER PLANT.

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