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

In Re SRBA

Case No. 39576

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

)
) Subcase No. 92-00023
)

) IDAHO POWER COMPANY'S
) RESPONSE TO DEFENDANTS'
) MOTION AND MEMORANDUM TO
) STRIKE OR ALTERNATIVELY TO
) DISMISS COMPLAINT AND
) PETITION FOR DECLARATORY
) AND INJUNCTIVE RELIEF
)

) Date: June 25, 2007

) Time: 10:00 a.m.

) Hon. John M. Melanson
)
)

RESOURCES; and DAVID TUTHILL, Director,)
Idaho Department of Water Resources)
)
Defendants.)
_____)

The Idaho Power Company ("Idaho Power") hereby responds to the Motion to Strike or Alternatively to Dismiss Complaint and Petition for Declaratory and Injunctive Relief ("Complaint and Petition"), and Memorandum in support thereof, filed by the State Defendants in the above captioned matter ("State Motion & Mem."). Pursuant to the Court's Order of June 1, 2007, this matter is set for expedited hearing on June 25, 2007, at 10:00 a.m.

INTRODUCTION

The Swan Falls Agreement and overall Swan Falls Settlement impact the adjudication of Idaho Power's water rights identified in the Agreement in three subbasins of the SRBA, Basins 2, 36 and 37. Following actions taken by Idaho state officials in 2006, including (1) the Attorney General's issuance of Attorney General Opinion 06-2 asserting that Idaho Power's water rights are subordinated to aquifer recharge, based in part on the Attorney General's view that the State holds "legal title" to those rights, (2) the Attorney General's filing with IDWR of a "notice" asserting legal title on the part of the State over the Idaho Power water rights, and (3) and IDWR's issuance of Director's reports a week later adopting the Attorney General's position on legal title, Idaho Power filed its Complaint and Petition in this case.

Idaho Power's Complaint and Petition seeks to obtain a comprehensive and integrated determination from the SRBA Court of issues concerning the impact of the Agreement and Settlement on Idaho Power's water rights which are necessary to adjudicate the subject water rights in the SRBA. Such a determination will promote judicial economy and eliminate the risk of inconsistent judgments from individual special masters addressing the same issues in different

subbasins, one of which has already proceeded to partial decree. In light of this comprehensive approach before the SRBA Court, Idaho Power also filed a motion to stay or alternatively to consolidate before this Court subcase proceedings in Basins 2, 36 and 37. Idaho Power further filed a motion for stay of Basin-Wide Issue No. 13, which appears to be limited to narrow procedural issues concerning the propriety of remarks in partial decrees rather than the substantive issues concerning the effect of the Swan Falls Settlement raised in this action.

The State's Motion to Strike or Dismiss seeks to block Idaho Power's attempt to obtain this comprehensive and integrated determination of issues related to the Swan Falls Settlement and its impact upon Idaho Power's water rights being adjudicated in the SRBA. Instead, the State takes the position that "conventional" SRBA subcase proceedings in different subbasins handled by different special masters are adequate to handle issues related to the Settlement. While holding out to this Court these subcase proceedings as an alternative forum, at the same time the State has moved to strike or dismiss pleadings filed by Idaho Power in the subcase proceedings, attempting to limit or preclude Idaho Power from raising the issues in any forum.

The Court should deny the State's Motion to Strike or Dismiss the Complaint and Petition in its entirety, since it is barred by a 2006 Stipulation between the State and Idaho Power expressly providing that either party may resolve disagreements or disputes regarding the Swan Falls Agreement by filing a petition for declaratory relief before a court of appropriate jurisdiction. Moreover, it is not proper for the Complaint and Petition to be "stricken" under I.R.C.P. 12(f). Nor should the Complaint and Petition be dismissed under I.R.C.P. 12(b). The SRBA Court has jurisdiction to address disputed issues concerning the right to the use of water and the nature, extent and priority of water rights, and the Complaint and Petition raises such issues, which encompass but extend beyond the legal title question posed by the Attorney General's filings and Director's recommendations. The Court also has authority to consider

claims concerning the administration of water rights which impact the adjudication of such rights in the SRBA or whether the State has breached specific contractual obligations regarding water rights administration in the Swan Falls Settlement. The Court further has authority to issue injunctive relief in conjunction with the adjudication of Idaho Power's water rights, including the injunctive relief pled by Idaho Power. Finally, the Court should not defer to partial and piecemeal resolution of the parties' disputes regarding the Swan Falls Settlement in subbasin proceedings in which the State has opposed Idaho Power's attempts to raise the relevant issues.

ARGUMENT

I. The State's Motion is Barred By the 2006 Stipulation

The Court should deny outright the State's Motion to Strike or Dismiss on the ground that it is contrary to and barred by the 2006 Stipulation between the parties concerning further proceedings relating to the Swan Falls Agreement. As set forth in ¶ 15 of the Complaint and Petition ("Cmplt. & Pet."), a Stipulation signed by Attorney General Wasden and counsel for Idaho Power, and filed with the IDWR Director on April 11, 2006 (Exhibit 1),¹ 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).

Through this Stipulation, the State 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 with a court of appropriate jurisdiction. Accordingly, Idaho

¹ Idaho Power requests that the Court take judicial notice of the Stipulation, which was filed with IDWR and is a matter of public record. See Crawford v. Dep't of Corr., 133 Idaho 633, 636, 991 P.2d 358, 361 n.1 (1999).

Power filed with the SRBA Court, following notice to counsel for the Attorney General, its Complaint and Petition for Declaratory and Injunctive Relief seeking to resolve its disagreements or disputes with the State concerning interpretation or application of the Agreement.²

The 2006 Stipulation was reached in the course of legislative proceedings and discussions between the State and Idaho Power concerning aquifer recharge efforts and their relation to Idaho Power water rights listed in the Swan Falls Agreement. The joint letter to the Director from Attorney General Wasden and counsel for Idaho Power enclosing the signed Stipulation made the "request that this Stipulation be filed in each of the relevant water right files," and advised the Director to "take such action as is necessary to reflect the Stipulation" with respect to the relevant water rights. See Exhibit 1. The motion filed in this action by the Attorney General, Director and other State Defendants completely ignores the Stipulation, even though it was prominently pled in the jurisdictional allegations of Idaho Power's Complaint and Petition. Regrettably, it is necessary for Idaho Power to have this Court enforce it in the face of the State's contrary motion.

All parties recognize that the SRBA Court has jurisdiction over Idaho Power's water rights in the Snake River Basin, including those listed in the Swan Falls Agreement. This recognition is evidenced by the State's filings in the SRBA claiming legal title to the water rights specified in ¶ 7.B of the Agreement. The State is consequently barred and estopped by the 2006 Stipulation from now asserting that while Idaho Power can proceed with resolution of disputes as to the Swan Falls Settlement in the SRBA, it cannot do so through a petition for declaratory relief filed with the SRBA Court, but instead must proceed on the basis of form objections and responses allowing it only to "check the boxes" pertaining to various water right elements.

The 2006 Stipulation demonstrates Idaho Power's Complaint and Petition is not an

² Administrative Order 1 ("AO1") § 3.i expressly authorizes the filing of a petition for injunctive relief in the SRBA.

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"unauthorized" pleading under SRBA Administrative Order 1 ("AO1"), the Idaho Rules of Civil Procedure, or chapter 14, Title 42 of the Idaho Code, as now contended by the State. AO1 § 2.r defines "[p]leadings" as "*[a]ll documents defined as pleadings by the I.R.C.P., objections, responses to objections, and notices of claims.*" (Emphasis added). I.R.C.P. 7(a) expressly includes a "complaint" among those pleadings allowed. Accordingly, Idaho Power's Complaint and Petition is not contrary to AO1 or the I.R.C.P.³ Thus, not only does the Stipulation authorize the filing of the Complaint and Petition with the SRBA Court, but AO1 and the I.R.C.P. also expressly permit its filing.

Remarkably, the State now takes the position that Idaho Power must proceed in incomplete and piecemeal fashion to resolve only one of the parties' disputes concerning the Swan Falls Agreement (i.e., legal ownership), and must do so in "conventional" SRBA subcase proceedings. However, it should be noted as discussed in Section III.D infra that: (i) the State has moved to strike or dismiss Idaho Power's relevant filings in Basin 37; (ii) the parties and issues will not even be determined until responses are filed in 2008 in Basin 2; and (iii) a partial decree has been entered by the SRBA Court in Basin 36 that recognizes Idaho Power's title to the water rights, and only the SRBA Court has jurisdiction over its partial decree.

The inadequacy of these myriad "conventional" SRBA subcase proceedings to comprehensively resolve issues concerning the effect of the Swan Falls Settlement on Idaho Power's water rights illustrates why it was sensible for the parties to stipulate to resolution of their disputes on such issues through a single petition for declaratory relief in a single court with jurisdiction such as the SRBA Court. The Court should dispose of the State's Motion to Strike or Dismiss in its entirety by finding that the State is bound by the 2006 Stipulation signed by the

³ By contrast, the "Notice[s] of Change in Water Right Ownership" filed by the Attorney General with IDWR, under which the State has asserted "legal title" to Idaho Power's water rights, do not constitute a pleading authorized under AO1 or the I.R.C.P. The State has never filed a Notice of Claim in the SRBA for the water rights it now claims to own, as required by Idaho Code § 42-1409(4). See Cmplt. & Pet. at 16 ¶ 45.

Attorney General, and reject outright the State's attempt to limit the issues and forum available to Idaho Power to resolve its legitimate disputes with the State concerning its water rights and the effect of the Swan Falls Settlement upon them.

II. The Complaint and Petition Cannot and Should Not Be Stricken under I.R.C.P. 12(f)

The State asserts that Idaho Power's Complaint and Petition should be stricken under I.R.C.P. 12(f) on the grounds that it is "unauthorized, immaterial and redundant." State Mem. at 4-5. In seeking to "strike" the Complaint and Petition, the State, which cites neither any case law nor the relevant language from I.R.C.P. 12(f), misapplies the procedural mechanism of a motion to strike. I.R.C.P. 12(f) cannot be used to strike a complaint in its entirety. Rule 12(f) permits a court to strike "*from any pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Emphasis added).

The wording of I.R.C.P. 12(f) "indicates that a motion to strike is not the proper or authorized method for securing the *dismissal* of a complaint." Stewart v. Arrington Constr. Co., 92 Idaho 526, 529, 446 P.2d 895, 898 (1968) (emphasis in original). Rather, as applied to complaints, Rule 12(f) "can be used . . . only to eliminate unnecessary or objectionable verbiage." 92 Idaho at 530, 446 P.2d at 899. Thus, "a complaint or defense will still stand after a 12(f) attack, stripped only of redundant, immaterial, impertinent, or scandalous matter," and "[m]otions to strike will not be granted if the result would render the complaint meaningless." Id. Furthermore, "[a]llegations in a complaint which allege one ground of relief will not be stricken upon a motion to strike if the complaint is sufficient to claim relief on *any* other ground." Id. (Emphasis in original). "No matter should be stricken which, on any admissible theory, is, or might possibly become, material or relevant to the cause of action or defense." Callahan v. Wolfe, 88 Idaho 444, 448-49, 400 P.2d 938, 940 (1965).

The State's argument that the Complaint and Petition filed with this Court should be

stricken on the ground that it is "redundant" given Idaho Power's filing of a virtually identical Counterclaim in the Basin 37 subcases is particularly disingenuous. Idaho Power maintains that the SRBA Court is the proper forum in which to resolve the issues raised in the Complaint and Petition. Idaho Power filed a Counterclaim with its responses to objections in Basin 37 in the face of upcoming deadlines in order to ensure that it could have these issues addressed in some forum, but also seeks to stay all pending related matters in Basins 2, 36 and 37. The State, however, has moved to strike or dismiss not only the Complaint and Petition before the Court in this case, but also Idaho Power's Counterclaim in Basin 37 (see discussion in Section III.D infra). The State also seeks to limit the range of issues which Idaho Power may raise in litigation regarding the Swan Falls Agreement. A motion to strike will not be granted "where the effect would be to leave a party with no cause of action or with one different from that alleged." Callahan, 88 Idaho at 448, 400 P.2d at 940. The Court should reject the State's attempt to leave Idaho Power without a cause of action, or a forum, in which to litigate the disputed issues between the parties regarding the Agreement.

In short, the Complaint and Petition cannot be stricken under I.R.C.P. 12(f), and even if it could, the State has not presented grounds for doing so in this instance.

III. The Complaint and Petition Should Not Be Dismissed Under I.R.C.P. 12(b)

The State argues that the Complaint and Petition should be dismissed in its entirety under I.R.C.P. 12(b)(8). The State also asserts that some or all of the claims in the Complaint and Petition should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(2) for lack of jurisdiction over the Director and IDWR, and/or under 12(b)(6) for failing to state a claim upon which relief can be granted. As shown below, the State's arguments under each of these rules are without merit.

A. Standards of Review for Motions to Dismiss

In considering a Rule 12(b)(1) motion to dismiss, a court assumes that all factual allegations in the complaint are true. Owsley v. Idaho Indus. Comm'n, 141 Idaho 129, 133, 106 P.3d 455, 459 (citation omitted). A Rule 12(b)(6) motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Taylor v. Maile, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005). "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.'" Sumpter v. Holland Realty, Inc., 140 Idaho 349, 351, 93 P.3d 680, 682 (2004), quoting BHA Invs., Inc. v. State, 138 Idaho 348, 350, 63 P.3d 474, 476 (2003). If a court "cannot say, based on the general allegations in the complaint, that there is no conceivable set of facts which would entitle [plaintiff] to relief," the Rule 12(b)(6) motion should be denied. Orthman v. Idaho Power Co., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). Under Rule 12(b)(6), the court need not find that plaintiff "can obtain the particular relief prayed for" in order to deny the motion, but must simply "ascertain that some relief may be granted." Cunningham v. Jensen, 2005 Ida. LEXIS 145, 11-12 (Idaho Sept. 14, 2005) (citing Wright & Miller, 2 *Federal Practice and Procedure: Civil* § 1359 (1990)).

I.R.C.P. 12(b)(8) provides for a motion to dismiss on the basis that there is "another action pending between the same parties for the same cause." The Idaho Supreme Court explained that a trial court's decision under Rule 12(b)(8) is discretionary. Klaue v. Hern, 133 Idaho 437, 439, 988 P.2d 211, 213 (1999). Assuming the other case has not gone to judgment, which may bar additional litigation, the court should exercise its discretion through application of the following guidelines:

The trial court is to consider whether the court in which the matter already is pending is *in a position to determine the whole controversy and to settle all the rights of the parties*. Additionally, the court may take into account the

occasionally competing objectives of judicial economy, minimizing costs and delay to litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments.

Id., 133 Idaho at 440, 988 P.2d at 214 (emphasis in original, citations omitted).

B. The Complaint and Petition Seeks Resolution of Issues Regarding the Nature, Extent and Priority of Water Rights, and the Effect of Contracts and Statutes on those Water Rights, Which Encompass But Extend Beyond the Director's Recommendations

The State mischaracterizes the Complaint and Petition as focused on attacking the Director's recommendations to the SRBA Court, in a futile attempt to characterize this action as a standard challenge to IDWR recommendations. A thorough reading of the Complaint and Petition, however, demonstrates that this is not the case. The Director's recommendations are not even mentioned until more than halfway through the Complaint. Cmplt. & Pet. at 14-15. By contrast, the brief filed by the Attorney General's Office conspicuously omits any mention of the actions of the Attorney General which precipitated this suit. Indeed, the Attorney General's actions are at the center of this lawsuit.

As set forth in the Complaint and Petition, on December 22, 2006 and January 2, 2007, the Attorney General filed with IDWR several Notices of Change in Water Right Ownership, asserting that the State owns "legal title" to all or a portion of Idaho Power water rights referenced in the Swan Falls Agreement which are located in Basins 2, 36 and 37. Cmplt. & Pet. at 14 ¶ 39. This action followed the Attorney General's issuance of Attorney General ("AG") Opinion 06-2 on March 9, 2006, during debate in the legislature on legislation concerning aquifer recharge. Id. at 19 ¶ 54. AG Opinion 06-2 found, among other things, that because the State, in the Attorney General's view, holds "legal title" to the trust water, Idaho statutes which subordinate use of water for recharge to use of water for hydropower have no effect, and Idaho Power's water rights accordingly are subordinated to recharge under the Swan Falls Agreement.

Id. at 18-19 ¶ 53.

It was only after the Attorney General took these actions that the IDWR Director filed his recommendations with the SRBA Court. In fact, IDWR filed its Director's Report in Basin 2 only six days after the Attorney General filed the Notices of Change in Water Right Ownership, essentially tracking the ownership claims as asserted in the Notices. This timing suggests that the actions of the Attorney General and IDWR may have been coordinated. Id. at 14-15 ¶ 41. IDWR then proceeded on February 14, 2007 to amend the Director's Report for Basin 37, which for over a year had recognized Idaho Power as the sole water right owner for the water rights in Basin 37 referenced in Paragraph 7.B of the Agreement, but which following the amendment instead recognized the State as holding legal title to the water rights. Idaho Power is not challenging the Director's recommendation on its water rights in Basin 36, since those water rights have already been partially decreed in Idaho Power's name by the SRBA Court, and neither the Director nor the special master in Basin 36 have authority to act upon them. Nevertheless, because the Attorney General filed Notices of Change in Water Right Ownership in Basin 36 claiming legal title to these rights on behalf of the State, Idaho Power included those water rights in this action before the SRBA Court, which alone has jurisdiction over these partially decreed rights.

These filings by the Attorney General and IDWR raise a series of related issues concerning the nature, extent and priority of the water rights identified in Paragraph 7.B of the Swan Falls Agreement, and the effect of the Agreement on those water rights. Idaho Power maintains these issues must be resolved in order to fully adjudicate its water rights in the SRBA.⁴

⁴ These issues pled in the Complaint and Petition include the following:

(1) When the Swan Falls Agreement was executed in 1984, the Snake River Basin above the Murphy Gage was over appropriated, with the result that there was no trust water available for appropriation by others, there was no trust *res*, and therefore no valid trust established under the Swan Falls Settlement (Cmplt. & Pet. at 21 ¶ 61);

All of these issues raised by the Complaint and Petition concern the nature, extent and priority of Idaho Power's water rights, consistent with the legislation commencing the SRBA. See Idaho Code § 42-1406A. Thus, this action involves not only the State's claim of legal title to the water rights, but also other interrelated issues concerning the nature, extent and priority of the water rights, and the effect upon those water rights of contracts (i.e., the Swan Falls Agreement) and statutes (i.e., the legislation implementing the Swan Falls Agreement, as well as legislation concerning the relative priority of the use of water for hydropower versus recharge). With this description of issues raised in the Complaint and Petition, Idaho Power demonstrates below that this Court has jurisdiction to address them in this litigation.

C. The SRBA Court Has Jurisdiction To Address Disputed Issues Raised in the Complaint and Petition Concerning the Right to the Use of Water and the Nature, Extent and Priority of Water Rights

This Court has jurisdiction to resolve all of the issues raised in Idaho Power's Complaint and Petition. The SRBA district court is a separate division of the district courts and exercises the unique jurisdiction given it by the legislature. Walker v. Big Lost River Irr. Dist., 124 Idaho 78, 81, 856 P.2d 868, 871 (1993). The SRBA Court's jurisdiction over water rights, however, is

(2) To the extent that the River was over appropriated in 1984, the parties, who had assumed that Trust Water was available for new appropriations, were operating under a mutual mistake of fact, requiring reformation of the Swan Falls Agreement (Id. at 21-22, ¶ 63);

(3) To the extent that there was some amount of Trust Water available in 1984, and to the extent that a valid trust was created under the Settlement, the trust *res* is water and not water rights, the State does not hold legal title to Idaho Power's water rights, and title to the water rights is therefore quieted in Idaho Power (Id. at 22 ¶ 65);

(4) The State since 1984 has acted in a manner consistent with ownership of the water rights remaining in Idaho Power, including approving applications for use of Trust Water by junior appropriators and issuing permits under new priority dates rather than the priority dates of Idaho Power's water rights, and the State's claim of legal title to the water rights is therefore barred by the doctrines of estoppel, waiver and laches (Id. at 17-18 ¶ 49-50, and 23 ¶ 67);

(5) Under applicable law, Idaho Power's water rights for hydropower generation are not, through the Swan Falls Agreement or otherwise, subordinate to use of water for ground water recharge, and Attorney General Opinion 06-2 is therefore wrong as a matter of law (Id. at 23 ¶ 69);

(6) The State has an obligation to insure and guarantee the Swan Falls Daily Minimum Flows, and has failed to take reasonable steps in its administration of water rights priorities in the Snake River Basin, including failing to account for the multiple year impacts of ground water pumping (Id. at 23 ¶ 71); and

(7) The State has taken and threatens to take action affecting Idaho Power's water rights pursuant to the State's actions asserting that the State holds legal title to the water rights, and that Idaho Power's hydropower water rights are subordinated to aquifer recharge, creating the danger of real, immediate and irreparable harm to Idaho Power which may be prevented only by injunctive relief. (Id. at 24 ¶ 74).

broad. Under Idaho Code § 42-1406A, the SRBA Court has authority to make "a *comprehensive determination of the nature, extent and priority* of the rights of all users of surface and ground water" in the Snake River basin. (Emphasis added). Case law also demonstrates that the SRBA Court is not restricted to determining only traditional elements of water rights such as quantity, priority, and point of diversion. The Court also has jurisdiction to resolve other disputed issues concerning the right to the use of water.⁵

In Walker, a landowner sued an irrigation district to obtain a writ of mandate and permanent injunction to compel the district to deliver stored water to the landowner's lands outside the district, as well as for damages for failure to deliver the stored water. Walker, 124 Idaho at 80, 856 P.2d at 870. The trial court applied theories of estoppel, implied contract, laches and waiver, which required the court to make findings and assumptions concerning the underlying water rights. 124 Idaho at 81, 856 P.2d at 871. The Idaho Supreme Court concluded that the case was "a water rights case," 124 Idaho at 79, 856 P.2d at 869, that required the trial court not only "to determine the right to the use of water," id., but also "to resolve disputed issues concerning the right to the use of water," 124 Idaho at 81, 856 P.2d at 871. Accordingly, the court concluded that the case could only be addressed as part of the SRBA. 124 Idaho at 79, 856 P.2d at 869.

In Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co., 126 Idaho 202, 879 P.2d 1135 (1994), the plaintiff ranch brought an action in district court, seeking a declaratory judgment that it was not bound by a 1925 decree, and that "irrigation season" meant whenever the ranch could put the water to beneficial use. 126 Idaho at 203, 879 P.2d at 1136. The district court, after finding that the ranch was not bound by the 1925 decree, held that the interpretive

⁵ The State's position that "trust and subordination remarks" are "elements of ... water rights" subject to determination by the SRBA Court illustrates that even water right elements can be considered to include a broad variety of issues. See State Mem. at 8.

issue regarding irrigation season was within the exclusive jurisdiction of the SRBA Court. 126 Idaho at 204, 879 P.2d at 1137. The Idaho Supreme Court affirmed, holding that because resolution of this interpretive issue "would require the district court to resolve disputed issues concerning the right to the use of water," that issue could be decided only by the SRBA Court. 126 Idaho at 206, 879 P.2d at 1139. The court quoted Walker in holding that the SRBA court has exclusive jurisdiction over issues that would require the court to "make findings and assumptions concerning the underlying water rights." Id.⁶

Idaho Power's Complaint and Petition similarly requests the SRBA Court to resolve disputed issues concerning the right to the use of water encompassed by the water rights referenced in Paragraph 7.B of the Swan Falls Agreement, including the nature, extent and priority of such rights. Even the State admits that "the first five claims for relief require determinations of the nature and extent of the water rights that are subject to the Swan Falls Agreement." State Mem. at 7. Idaho Power submits that this description applies to all seven claims for relief. Accordingly, the issues raised in the Complaint and Petition are within the SRBA Court's jurisdiction.

Even if this Court did not have jurisdiction to resolve all of the disputed issues in the Complaint and Petition in its capacity as the SRBA district court (which Idaho Power maintains it does), it could resolve the issues in its capacity as a district court of general jurisdiction. As alleged in the Complaint and Petition, jurisdiction over this action is proper in the district courts under Idaho Const. Art. V, § 20, which confers a broad grant of jurisdiction to the district courts,

⁶ Other examples could be cited which support the proposition that the SRBA Court has jurisdiction to resolve disputed issues concerning water rights being adjudicated which go beyond basic water right elements. See, e.g., Rowan v. Riley, 131 Idaho 831, 965 P.2d 191 (1998) (declaratory judgment action for determination of ownership of water well held to be within exclusive jurisdiction of SRBA Court); Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 982 P.2d 917 (1999) (SRBA jurisdiction in action seeking foreclosure of liens for unpaid assessments on property, with counterclaims for partial forfeiture of water rights, civil rights violations, and unjust enrichment).

providing that "[t]he district court shall have original jurisdiction in all cases, both at law and in equity" Idaho Code § 1-705 also empowers the district courts with original jurisdiction "in all cases and proceedings."

While the Idaho legislature has delineated the jurisdiction of the district court in the SRBA, by so doing it cannot eliminate the district court's constitutional authority to exercise its general jurisdiction.⁷ Jurisdiction is conferred both by the constitution and statute. See Whitney v. Randall, 58 Idaho 49, 56, 70 P.2d 384 (1937) (upholding jurisdiction of district court over a quiet title action as being vested both by the constitution (art. V, § 20) and by statute (I.C. § 9-401)). The Idaho Supreme Court has held that the legislature "has no power to prescribe a jurisdiction for the district courts of the state, which is less broad than contained in section 20, article 5, of the constitution." Fox v. Flynn, 27 Idaho 580, 585-86, 150 P. 44 (1915).

This Court may act in both its capacity as the SRBA district court and its capacity as a district court of general jurisdiction as necessary to address the issues raised in Idaho Power's Complaint and Petition -- exercising both its specific jurisdiction as the legislatively established SRBA Court, and its general jurisdiction as a constitutionally empowered district court of the State of Idaho.

D. The SRBA Court Should Not Defer to Partial and Piecemeal Resolution in Subbasin Proceedings in Which the State Has Opposed Idaho Power's Attempts to Raise the Issues in its Complaint and Petition

The State argues that the issues raised in the Complaint and Petition can and should be resolved in "conventional" SRBA subcases, which are handled by different special masters depending on the subbasin involved. The State further observes that Idaho Power has raised the same issues alleged in the Complaint and Petition in Basin 37 through an objection and a

⁷ In the May 31, 2007 Order of Reassignment to Judge Melanson in Idaho Ground Water Appropriators v. IDWR, Case No. CV 2007-526, Judge Wood acknowledged the dual capacities of this district court in providing that "[t]his assignment is to Judge Melanson in his capacity as a District Judge of the Fifth Judicial District and not in his capacity as the District Judge for the SRBA, Case No. 39576."

response that attached and incorporated a Counterclaim pleading virtually identical to the Complaint and Petition filed with the SRBA Court.

Subsequent to the filing of the Complaint and Petition before this Court, Idaho Power filed its objection and response in Basin 37 to avoid waiver of relevant issues in the face of upcoming Basin 37 deadlines. However, unlike the Complaint and Petition filed with this Court, the objection and response in Basin 37 do not provide a vehicle to address the same issues concerning Idaho Power water rights located in Basins 2 and 36. These matters will not be addressed in Basin 2 anytime soon, since objections and responses do not have to be filed there until 2008. And these matters will *never* be resolved in Basin 36 proceedings, since the SRBA Court has partially decreed the water rights in Idaho Power's name, and the Special Master no longer has jurisdiction over these partially decreed rights. Accordingly, Idaho Power filed its Complaint and Petition with the SRBA Court, which alone has jurisdiction over the Idaho Power water rights in Basins 2, 36 and 37, so that the Court could address the issues concerning the Swan Falls Agreement in a single integrated proceeding.

The State in reality is playing a shell game in arguing that this Court should refrain from exercising jurisdiction over the Complaint and Petition so that the issues can be resolved in SRBA subcase proceedings. In the very proceedings where the State suggests Idaho Power's concerns can be addressed, the State has moved to strike and dismiss the Counterclaims in which Idaho Power has set forth these same issues. The State's Amended Motion to Strike or Alternatively to Dismiss "Counterclaim" in Basin 37 ("Basin 37 Amended Motion), and its supporting Memorandum ("Basin 37 Mem."), are attached as Exhibit 2.⁸ In its Basin 37 Amended Motion, the State refuses to concede that Idaho Power's Counterclaim is even a valid

⁸ Idaho Power requests the Court to take judicial notice of these SRBA pleadings. See Larson v. State, 91 Idaho 908, 909, 435 P.2d 248, 249 (1967) (district court may take judicial notice of its own records).

pleading. Moreover, in both this action and the Basin 37 proceeding, the State refuses to acknowledge that Idaho Power can even raise the issues it has set forth. See Basin 37 Amended Motion at 2 (State views Counterclaim "at best, as being a list of *issues that Idaho Power wishes to inject* into these subcases) (emphasis added). See also State Mem. at 11 n. 9 (State does not seek to prevent Idaho Power "from identifying *ownership and subordination issues that Idaho Power asserts should be heard* in the Basin 37 subcases") (emphasis added). The State is hard pressed to argue that Idaho Power cannot raise in the SRBA its issues regarding the effect of the Swan Falls Agreement on its water rights, when that is exactly what the State has done through the Director's recommendations which contain extensive "Other Provision" remarks interpreting and applying provisions of the Agreement. See Exhibit A to State Mem.

The State attempts to convince this Court that the issues in Idaho Power's Complaint and Petition can be resolved in SRBA subcases, but resorts to further gamesmanship in its Motion and Memorandum that it filed in Basin 37. The State asserts that in this Court's Order of Reference appointing Special Master Bilyeu in Basin 37, there is no mention of any Basin 2 or Basin 36 subcases, precluding the Special Master from addressing the Idaho Power water rights in Basins 2 and 36 to which the State has claimed legal title. See Basin 37 Mem. at 11-12. The State also argues that the Counterclaim should be dismissed on the ground that it asserts claims against persons and entities "who were never served" (Basin 37 Amended Motion at 3) – even though counsel for the State were informed in advance of Idaho Power's filings and agreed to accept service on behalf of the State Defendants. In the course of this last argument, the State accuses Idaho Power of "wasting judicial resources and setting up the possibility of different rulings on the very same issues."

Idaho Power also believes that judicial resources should not be wasted, and that the proceedings should not result in different rulings on the same issues. It is for the very reasons of

"judicial economy" and "avoiding potentially inconsistent judgments" that Idaho Power filed its Complaint and Petition before the SRBA Court, seeking to raise the issues surrounding Idaho Power's water rights in Basins 2, 36 and 37 in a single integrated proceeding before the one court with jurisdiction "to determine the whole controversy and to settle all of the rights of the parties" – the SRBA Court. See Klaue v. Hern, 133 Idaho at 440, 988 P.2d at 214 (providing guidelines for I.R.C.P. 12(b)(8) motions) [also set forth in Section III.A supra]. Idaho Power therefore respectfully requests that the SRBA Court exercise its jurisdiction over the Complaint and Petition, and reject the State's attempt to address (or avoid addressing) relevant issues in an incomplete and piecemeal manner in only some subbasins where the water rights exist.

E. The Court May Resolve Factual Issues in the Course of an Action Including Requests for Declaratory Relief

The State takes issue with Idaho Power's inclusion of requests for declaratory relief in its Complaint and Petition. As discussed in Section I supra, the State is barred from challenging Idaho Power's requests for declaratory relief under the 2006 Stipulation signed by Idaho Power and the Attorney General (Exhibit 1), under which the parties agreed that "either party . . . may file a petition for declaratory relief" in order to resolve "disagreements or disputes between the parties as to the interpretation or application of the Swan Falls Agreement."

The State nevertheless seeks to preclude Idaho Power's efforts to obtain declaratory relief by arguing that the claims are "quintessentially factual," and that they will be determined by resolving disputed issues of fact and relegating legal interpretation and analysis to a secondary role. State Mem. at 12. The State goes on to assert that the issues it would like to have determined concerning legal title and subordination are properly resolved principally as a matter of law. State Mem. at 13, n. 10. In reality, *both* legal and factual issues will need to be resolved in order to resolve the parties' disputes regarding Idaho Power's water rights and the effect of the

Swan Falls Agreement on them in this action.

Under Idaho Code § 10-1201, which Idaho Power pleaded as a basis for jurisdiction (Cmplt. & Pet. at 5 ¶ 13), the Idaho courts have power "to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." In accordance with this authority, Idaho Power's Complaint and Petition requests a declaratory judgment to "clarify and settle the legal relations at issue" with respect to the disputes between Idaho Power and the State concerning interpretation or application of the Swan Falls Settlement and its impact upon the subject water rights. Cmplt. & Pet. at 3 ¶ 3. See Sweeney v. American Nat'l Bank, 62 Idaho 544, 115 P.2d 109, 111 (1941) (criteria for granting declaratory judgment is whether it will clarify and settle legal relations in issue, and whether declaration will afford relief from uncertainty and controversy giving rise to the proceeding).

A declaratory judgment is not the proper remedy where the main issue is determination of a question of fact. See Ennis v. Casey, 72 Idaho 181, 238 P.2d 435 (1951), cited by the State in its brief. However, it is not unusual and is entirely proper for a court to make factual findings in the course of a declaratory judgment action. See, e.g., Idaho Schs. for Equal Educ. Opportunity v. State, 142 Idaho 450, 456-57, 129 P.3d 1199, 1205-06 (2005) (upholding district court's findings of fact regarding safety concerns in schools); Briscoe v. Nishitani, 105 Idaho 175, 179, 667 P.2d 278, 282 (Idaho Ct. App. 1983) (upholding special jury verdict as constituting implied finding of fact upon which court granted declaratory relief). Indeed, in a cause of action for declaratory judgment, it is insufficient to merely aver a disagreement without pleading the facts disclosing the grounds for and at least the basis of plaintiff's claim in connection with the disagreement. Ayers v. General Hosp., 67 Idaho 430, 182 P.2d 958 (1947).

This case involves interpretation of a contract and its relation to the water rights being adjudicated. Declaratory judgment actions are particularly appropriate for disputes involving

interpretation of contracts. See Whitney v. Randall, 58 Idaho 49, 70 P.2d 384 (1937); Iverson v. Canyon County, 69 Idaho 132, 204 P.2d 259 (1949). As alleged at the outset of and throughout the Complaint and Petition, this action focuses on the interpretation and meaning of the Swan Falls Settlement, the parties' disputes regarding interpretation of the Settlement, and the impact of these disputes upon the subject water rights. Cmplt. & Pet. at 3 ¶¶ 2-3. Resolution of these issues will require both legal and factual determinations, which are properly made by this Court pursuant to Idaho Power's Complaint and Petition for Declaratory and Injunctive Relief.

IV. The Court May Exercise Personal Jurisdiction over the Director and IDWR, Who Would Be Bound By the Court's Rulings Binding the State In Any Event

The State claims that the Director of IDWR, David Tuthill, and IDWR itself, should be dismissed from this action under I.R.C.P. 12(b)(2) on the grounds that the SRBA Court lacks personal jurisdiction over both the Director and IDWR. In making this argument, the State does not seek to dismiss any claim for relief or other aspect of the Complaint and Petition, but rather to dismiss these two State Defendants. The practical effect of this argument is unclear, since IDWR and its Director would be bound by a ruling from the SRBA Court in any event. Idaho Power maintains, however, that IDWR and its Director should not be dismissed from this action based on the allegations of the Complaint and Petition.

Even if the Director, and by extension IDWR, technically are not parties to the SRBA, the Court can exercise jurisdiction over the Director and IDWR as parties to this case in its capacity as a district court of general jurisdiction. See Section III.C supra.

To the extent that the Court acts in its capacity as the SRBA district court, it cannot dismiss the Director and IDWR as defendants under the Complaint and Petition without properly ascertaining the jurisdictional facts. Under a motion to dismiss for lack of personal jurisdiction under I.R.C.P. 12(b)(2), the Idaho Supreme Court has held that as long as the plaintiff alleges

facts that would give rise to jurisdiction, the trial court cannot simply grant the defendants' Rule 12(b)(2) motion, but must hold an evidentiary hearing on the jurisdictional facts. Marco Distrib., Inc. v. Biehl, 97 Idaho 853, 857, 555 P.2d 393, 397 (1976). The court "must determine first whether, under plaintiff's view of the facts, grounds exist for the exertion of jurisdiction over the person of the . . . defendant." Id. Once a court has proceeded to an evidentiary hearing, it must dismiss the complaint if it resolves in defendant's favor the dispute over jurisdictional facts. Id.

In this case, there is a factual dispute regarding who made the State's determination that the State holds "legal title" to Idaho Power's water rights – the Attorney General when he filed with IDWR his Notices of Change in Water Right Ownership, or IDWR and its Director when less than a week later they submitted recommendations to the SRBA Court that essentially tracked the Attorney General's filing. In light of these allegations, it is unclear whether IDWR and the Director were acting as an advisor to the Court, which is the rationale for them not being a party to the SRBA, or as an advocate for the State in conjunction with the State's claim of legal title to Idaho Power's water rights. Under these circumstances, IDWR and the Director should not be dismissed out of the case at this early stage of the litigation.

V. The Court Does Not Lack Authority to Reform the Parties' Swan Falls Agreement Merely Because the Legislature Enacted Implementing Legislation

The State argues that this Court lacks authority to reform the Swan Falls Agreement based on mutual mistake of fact, on the grounds that the legislature enacted legislation implementing the Agreement. The Court should reject the State's attempt to divest the court of its constitutional power to formulate equitable relief under established principles of contract law.

According to the Idaho Supreme Court, "[i]f an instrument does not reflect the true intent of the parties due to mutual mistake, then reformation of that instrument may be the proper remedy." Hughes v. Fisher, LLC, 142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006). Where

there has been a mutual mistake, equity may empower a court to reform the parties' contract to conform to the parties' true intent. Mutual of Enumclaw Ins. Co. v. Wood By-Products, 107 Idaho 1024, 1027, 695 P.2d 409, 412 (Idaho Ct. App. 1984). Other Idaho appellate courts have acknowledged "the power of an equity court to eliminate the effect of mistake by supplying a new term or otherwise modifying the agreement as justice requires, thus protecting the parties' reliance interests." Thieme v. Worst, 113 Idaho 455, 459, 745 P.2d 1076, 1080 (Idaho Ct. App. 1987). "The court acts properly in reforming [a contract] to reflect the agreement the parties would have made but for the mistake." Hughes, 142 Idaho at 482, 129 P.3d at 1231.

Stripping the courts of their power to fashion equitable contract remedies simply because the legislature has enacted legislation pertaining to a contract would raise serious separation of powers concerns. See Idaho Const. Art. II, § 1 ("no person or department charged with exercise of powers belonging to one department shall exercise any powers properly belonging to either of the others")

Contrary to the State's arguments, if a court were to reform a contract based on mutual mistake of fact under its equitable powers, this would not "amend" a statute pertaining to that contract. Rather, the legislature itself could if necessary amend its legislation in response to the judicial ruling. In fact, in 1986 the legislature amended the 1985 legislation implementing the Swan Falls Agreement. Under the State's theory of impermissible legislative amendment through contract modification, the legislature's enactment of legislation pertaining to a contract would even prevent the parties from voluntarily amending the terms of the contract to reflect a mutual mistake of fact acknowledged both parties. This would be an illogical and unjust result.

The State's further argument that judicial reformation of the Swan Falls Agreement would render provisions of the implementing statutes "meaningless surplus" requires impermissibly going beyond the question of whether Idaho Power has stated a claim for relief,

and proceeding to address the merits of issues concerning the interpretation and effect of the Swan Falls Settlement. The Court should decline to address the merits on a motion to dismiss without a full record before it. Indeed, while the statutory provision cited by the State, Idaho Code § 42-203B, references "*rights . . . held in trust*," Idaho Code § 42-203C references "*water which is held in trust*," so the statutes alone provide no conclusive answer on the issue of whether the trust *res* consists of water or water rights. (Emphasis added). Idaho Code § 42-203B also makes multiple references to the "agreement" itself, which is not before the Court on the State's motion to dismiss. The State's argument that this Court lacks authority to reform the Swan Falls Agreement is accordingly without merit.

VI. The Court May Consider Claims Concerning the Administration of Water Rights Which Impact the Adjudication of Such Rights in the SRBA or Whether the State Has Breached its Contractual Obligations under the Swan Falls Settlement

The Sixth Claim for Relief in the Complaint and Petition seeks a declaration as to the State's obligations regarding the Swan Falls Daily Minimum Flows and administration relevant to fulfilling the State's obligations under the Swan Falls Settlement. The Complaint and Petition alleges that the State has an obligation under the Swan Falls Settlement to "insure and guarantee" such flows. Cmpl. & Pet. at 9 ¶ 24, 11 ¶ 30, 19-20 ¶ 58, and 23 ¶ 71. It also alleges that Idaho Power has the right under the Swan Falls Settlement to "compel the State to take reasonable steps" to insure that the flows are not violated. *Id.* at 9 ¶ 24, 19-20 ¶ 58, and 23 ¶ 71. The Complaint and Petition further alleges 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. *Id.* at 23 ¶ 71. The State's failure to meet its obligations under the Swan Falls Settlement in these respects is alleged to be unreasonable and to constitute a breach or violation of the Settlement. *Id.* at 20 ¶ 59, 23 ¶ 71.

These issues concerning the State's obligations under the Swan Falls Settlement concerning administration of water rights are properly raised in conjunction with adjudication of Idaho Power's water rights in the SRBA general adjudication. Idaho Code § 42-1401A(5) defines "[g]eneral adjudication" broadly as meaning "an action *both for the judicial determination of the extent and priority* of the rights to all persons to use water from any water system within the State of Idaho that is conclusive as to the nature of *all rights to the use of water* in the adjudicated water system . . . *and for the administration of those rights.*" (Emphasis added).⁹ In conjunction with the Court's determination of the extent and priority of Idaho Power's water rights, including the impact of the Swan Falls Settlement on these water rights, Idaho Power has raised in the Sixth Claim for Relief the issues specified above concerning the State's obligations regarding administration of those water rights under the Settlement.

In describing the Sixth Claim for Relief, the State omits the allegations concerning the State's obligation to insure and guarantee the Swan Falls Daily Minimum Flows, and the related allegations concerning violation of the Swan Falls Settlement. Instead, the State attempts to characterize the Sixth Claim for Relief as focused on water rights administration in the Snake River Basin generally, without even mentioning the Swan Falls Settlement.

In support of its argument that the water rights administration issues raised in the Sixth Claim for Relief cannot be resolved in the SRBA, the State cites Idaho Code § 42-1401D, providing that review of IDWR agency action that is subject to the provisions of chapter 52, title 67 of the Idaho Code (Idaho Administrative Procedure Act ("APA")) cannot be heard in any water rights adjudication proceeding commenced under chapter 14, title 42. The State, however, through the actions of the Attorney General and IDWR, has asserted legal title to Idaho Power's

⁹ The State and Idaho Power both agree that the SRBA is a statutory general adjudication governed and defined by Idaho Code § 42-1401A(5) and other provisions of chapter 14, Title 42 of the Idaho Code. See State Mem. at 4.

water rights in the SRBA. In doing so, the State has squarely placed before the SRBA Court in this adjudication, and not before a district court undertaking APA review, issues concerning the Swan Falls Settlement.¹⁰ Accordingly, Idaho Code § 42-1401D is inapplicable here.

Moreover, this action does not raise issues concerning administration of water rights merely within the legal framework of the State's general water rights administration duties, but primarily in the context of the State's contractual obligations under the Swan Falls Settlement. Under ¶ 7(A) of the Agreement, the Swan Falls Daily Minimum Flows "are not subject to depletion," and under ¶ 7(B) of the Agreement, Idaho Power retains "the right to compel State to take reasonable steps to insure" and guarantee such flows. Cmplt. & Pet. at 9 ¶¶ 23-24. In ¶ 2 of the Agreement, the parties agreed to "commit the executive branch of Idaho state government" to actions to be taken by the State pursuant to it. Accordingly, under the Swan Falls Settlement, the Governor, and IDWR as the relevant executive branch agency, have a *contractual* obligation to Idaho Power regarding water rights administration under the Settlement apart from the general legal obligations of IDWR to administer water rights.

Breaches of contract by State entities are subject to review, not under the APA as agency actions, but under the constitutional authority of the district courts for adjudicating all cases in law and equity pursuant to Idaho Const., Art. V, § 20. See Sanchez v. State, Dep't of Correction, 143 Idaho 239, 141 P.3d 1108, 1116 (2006); Grant Const. Co. v. Burns, 92 Idaho 408, 413, 443 P.2d 1005, 1010 (1968). As such, if Idaho Power is unable to obtain relief in district court for the State's breach of its contractual obligations regarding water rights administration under the Swan Falls Settlement, Idaho Power would be left without a forum for redress. The Court should exercise jurisdiction over the administration issues raised in the Complaint and Petition to avoid

¹⁰ The issues concerning the Swan Falls Settlement subject to resolution by the SRBA Court include not just the narrow issue of legal title, but the full range of issues associated with the State's obligations under the Swan Falls Settlement.

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this unjust result.

The cases cited by the State on this issue also do not support its position. In Sagewillow v. IDWR, 138 Idaho 831, 70 P.3d 669 (2003), the Idaho Supreme Court did not hold that the SRBA Court could not hear challenges to IDWR's administrative actions; but simply referenced the legislature's enactment of Idaho Code § 42-1401D. Moreover, in contrast to this case involving the adjudication of water rights, Sagewillow involved judicial review of an IDWR order regarding forfeiture and transfer of water rights issued pursuant to contested case proceedings under the Idaho APA. 138 Idaho at 835-36, 70 P.3d at 673-74. That IDWR administrative order was consequently subject to judicial review under the Idaho APA. Id. No similar IDWR administrative order is being challenged in this action.

The State also selectively lifts and takes out of context quotations from a lengthy passage in American Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 154 P.3d 433 (2007). The Idaho Supreme Court did not indicate there that the "conjunctive administration issues" which the State suggests are involved in this case "are not to be resolved in the SRBA." Rather, in the context of determining the constitutionality of conjunctive management rules promulgated by IDWR governing delivery calls by senior appropriators against juniors, the court addressed an argument that IDWR's determinations of reasonableness of diversions and whether waste is taking place constitute a "re-adjudication" of junior water rights. ____ Idaho ____, 154 P.3d at 447-48. The court concluded that such determinations did not constitute a re-adjudication, and contrasted them with determinations typically made by the SRBA Court, including water sources, quantity, priority date, point of diversion, place, period and purpose of use. Id.

None of the authorities cited by the State addresses whether the SRBA or another adjudication court can hear issues of water rights administration which impact the water rights adjudication, or which relate to whether the State has breached contract obligations regarding

administration. In conjunction with this general adjudication as defined Idaho Code § 42-1401A(5), this Court may consider claims concerning the administration of water rights which impact adjudication of such rights in the SRBA or the State's compliance with its water right administration obligations under the Swan Falls Settlement.

VII. The Court Has Authority to Issue Injunctive Relief in Conjunction with Adjudication of Idaho Power's Water Rights

The State raises a number of complaints regarding the injunctive relief pled in the Complaint and Petition. Significantly, AO1 § 3.i expressly authorizes the filing of a motion or petition for injunctive relief in the SRBA, and provides that it may be heard by the SRBA Presiding Judge. This provision of AO1 further reveals the incorrectness of the State's argument that Idaho Power's Complaint and Petition for Declaratory and Injunctive Relief is not an authorized SRBA pleading. In any event, the State's arguments regarding injunctive relief are premature. The Complaint and Petition is a notice pleading which must plead injunctive relief requested. Idaho Power is not moving for a preliminary injunction at this stage of the proceedings, and will file an appropriate motion should this become necessary. The necessity and nature of injunctive relief will be developed further as this litigation proceeds.

Regardless, the State's arguments seeking dismissal of the entire Seventh Claim for Relief pleading injunctive relief should be rejected. The State raises several arguments concerning the first request for injunctive relief, which seeks to "enjoin[] 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." Cmplt. & Pet. at 26 ¶ G. The basis of this request is that the State has "asserted legal title" to the subject water rights, a proposition which cannot reasonably be disputed. Idaho Power is not precluded from pleading a request for injunctive relief simply because the issue of who holds legal title to the water rights is a disputed issue at this early stage of the litigation, as

suggested by the State. The State's further argument that the SRBA Court may determine only the nature and extent of water rights, while resolution of other matters including injunctive relief are left to later proceedings in district courts, is flatly contradicted by AO1 § 3.i, which authorizes the filing of a motion or petition for injunctive relief in the SRBA.

The State also reads too much into the first request for injunctive relief, as Idaho Power has neither pled nor has any intention of using this request to preclude the State from pursuing claims or making arguments in the SRBA proceedings or any subsequent appeal. Moreover, since the first request seeks to enjoin "the State defendants," which would include the State itself, the State's assertion that IDWR and the Director are not subject to the jurisdiction of this Court (an argument which is addressed in Section IV supra) is inconsequential. Should an injunction be entered against the State, all State agencies and officials would be obligated to comply. The same holds true for the second and fourth requests for injunctive relief, which are directed at IDWR as pled. Should IDWR or the Director be dismissed from this case, Idaho Power can simply amend these requests for injunctive relief to direct them at the State generally.

The State also takes issue with the third request for injunctive relief, which as pled would order "the Attorney General to repeal Idaho Attorney General ["AG"] Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement." Cmplt. & Pet. at 26 ¶ G. The State argues that this request is premature, and Idaho Power maintains that the State's argument itself is premature. Among the issues to be resolved in this case is whether AG Opinion 06-2 is erroneous as a matter of law and breaches the Swan Falls Settlement. When that issue is addressed by the parties, Idaho Power will tailor its injunctive relief request accordingly.

Idaho Power does not agree with the State's view that an Attorney General Opinion cannot inflict legally cognizable harm, even if a court ultimately determines that the opinion is wrong as a matter of law. AG Opinion 06-2 was issued in the midst of legislative debate on

legislation pertaining to aquifer recharge. While that legislation was not enacted, some legislators assumed that the AG Opinion was correct during the legislative process. Therefore, it is important that this Court exercise its constitutional duty to provide judicial guidance on this legal issue, lest the legislature be called upon again to act based upon an erroneous legal opinion.

The State is wrong in its suggestions that the Idaho courts lack power to take action impacting opinions of the Attorney General on legal issues. The judicial power and duty under the Idaho Constitution includes the power to interpret the law. Mead v. Arnell, 117 Idaho 660, 669, 791 P.2d 410, 419 (1990). Courts have the responsibility to construe legislative language in order to determine the law. Mason v. Donnelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001). The "[j]udicial power cannot be conferred upon any agency of the executive department, in the absence of constitutional authority, where the constitution has specifically provided for the creation of a judicial system." State v. Finch, 79 Idaho 275, 281, 315 P.2d 529, 531 (1957). This Court has the power to declare AG Opinion 06-2 incorrect as a matter of law. In addition, the Court has the power to declare the AG Opinion to breach the Swan Falls Agreement.¹¹ The Court may fashion injunctive relief on either basis. Idaho Power believes it would be ill-advised for the State to keep on the books an Attorney General Opinion that has been found legally incorrect by the Idaho judiciary, which is why Idaho Power has pled a request for injunctive relief regarding AG Opinion 06-2.

¹¹ The Agreement provides in ¶ 4 that the "State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement."

CONCLUSION

For the reasons set forth herein, Idaho Power requests that the Court deny the State's Motion to Strike or Dismiss the Complaint and Petition. This Court is the only forum in which there can be a comprehensive and integrated determination of issues associated with the Swan Falls Settlement and its impact upon Idaho Power's water rights being adjudicated in the SRBA.

Dated this 21st day of June, 2007

Respectfully submitted,



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CERTIFICATE OF MAILING

I certify that on June 21, 2007, I mailed copies of the **IDAHO POWER COMPANY'S RESPONSE TO DEFENDANTS' MOTION AND MEMORANDUM TO STRIKE OR ALTERNATIVELY TO DISMISS COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF** to the following persons by U.S. Mail:

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(also by e-mail on June 22, 2007)

DAVID HENSLEY, COUNSEL
OFFICE OF THE GOVERNOR
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(also by e-mail on June 22, 2007)


Victoria J. Perlowski

86075\1052440.3

EXHIBIT 1

RECEIVED

APR 11 2006

DEPARTMENT OF
WATER RESOURCES

April 11, 2006

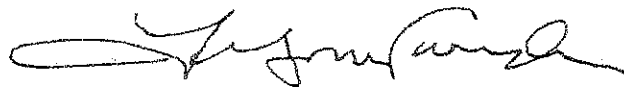
Karl Dreher, Director
Idaho Department of Water Resources
322 E Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Water Right Permit Nos. 01-7054, 37-7842, and Water Right Licenses
enumerated in the Swan Falls Water Right Agreement, dated October 25, 1984
and ratified by Idaho Code § 42-203B(5)

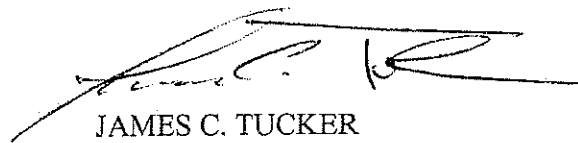
Dear Director Dreher:

The State of Idaho and Idaho Power Company have entered into the attached Stipulation dated April 11, 2006, which recognizes that the hydropower water rights listed in the Swan Falls Agreement are subordinate to Water Right Permit Nos. 01-7054 and 37-7842. We request that this Stipulation be filed in each of the relevant water right files and that you take such action as is necessary to reflect the Stipulation in each of the enumerated water rights.

Sincerely,



LAWRENCE G. WASDEN,
Attorney General
State of Idaho



JAMES C. TUCKER
Attorney for Idaho Power Company

Attachment

STIPULATION

The Idaho Power Company and the State of Idaho ("State") hereby stipulate and agree, by and through their respective undersigned counsel, as follows:

1) Stipulation Regarding Water Right Permit Nos. 01-7054 and 37-7842: Recognizing that Water Right Permit Nos. 01-7054 and 37-7842 are subject to the Swan Falls Settlement –

a) The Company agrees that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement and will neither contest nor otherwise oppose the exercise of those water rights on the basis of priority, the Swan Falls Agreement, or I.C. §§ 42-234, 42-4201 and 42-4201A. The Company further agrees that those water rights may be exercised in a manner consistent with state law.

b) The parties agree that all provisions of the Swan Falls Agreement and the implementing legislation shall continue to apply to Water Right Permit Nos. 01-7054 and 37-7842, including I.C. §§ 61-539 and 61-540 for the benefit of Idaho Power Company.

c) The parties further agree that in the event that the Idaho Water Resource Board (IWRB) seeks to have said permits licensed or decreed, that the Company will not file a protest or objection in such proceedings, but that the State, in recognition of its obligations under the Swan Falls Agreement and state law, through the Idaho Department of Water Resources (IDWR), will appropriately investigate such permits to ensure that they meet applicable requirements and that the licensed or decreed water rights fully comply with state law.

2) Further Proceedings Relating to the Swan Falls Agreement. The parties agree that in the event that 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

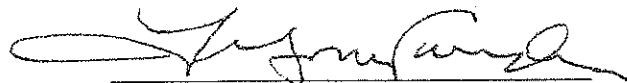
any such disagreements to their mutual satisfaction, either party, after notice to the other, may file a petition for declaratory relief with a court of appropriate jurisdiction to have the disagreement resolved and the Swan Falls Agreement interpreted and neither this Stipulation nor I.C. §§ 42-234, 42-4201, or 42-4201A shall act as a bar to the filing of such action.

- 3) Request for Recognition of the Stipulation. The parties agree to submit this Stipulation in all administrative and judicial proceedings involving the recognition of Water Right Permit Nos. 01-7054 and 37-7842 and to jointly present affidavits and such other evidence as may be required for the recognition of the Stipulation.
- 4) Defense of Stipulation. The parties agree to jointly support and defend the terms of the Stipulation against any and all objections or other challenges that may arise against the terms of the Stipulation in any administrative or judicial proceeding.
- 5) Stipulation Does Not Affect Statutory or Regulatory Authority. The parties agree that nothing in this Stipulation shall be construed or interpreted to affect the authority of the State as provided by constitution, statute or regulation. Nor shall this Stipulation be construed or interpreted to affect the rights of any person not a party to the Stipulation.
- 6) Stipulation Not to be Used Against Parties. Except as provided herein, neither party by entry into this Stipulation waives any legal position or arguments it may have regarding any legal disputes that may exist between the parties. Nothing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding, other than those seeking approval of the Stipulation, for interpretation, enforcement or administration of this Stipulation or for a purpose contemplated by Idaho Rule of Evidence 408.

- 7) Stipulation is Binding. The terms of this Stipulation shall bind and inure to the benefit of the respective successors of the parties.
- 8) Mutual Covenants of Authority. The parties represent and acknowledge that each of the undersigned is authorized to execute this Stipulation on behalf of the party they represent.
- 9) Non-Severability. The provisions of this Stipulation are not severable.
- 10) Triplicate Originals. This Stipulation is executed in triplicate. Each of the three Stipulations with an original signature of each party shall be an original.

The parties have executed this Stipulation on the date following their respective signatures.

FOR THE STATE OF IDAHO, including THE IDAHO WATER RESOURCE BOARD:



LAWRENCE G. WASDEN,
Attorney General
Office of the Attorney General
State of Idaho
P.O. Box 44449
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(208) 334-4126

Date: 4/11/06

FOR IDAHO POWER COMPANY:



JAMES C. TUCKER
Idaho Power Company
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(208) 388-2112

Date: 4/11/06

EXHIBIT 2

COPY

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Chief, Civil Litigation Division

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Deputy Attorney General
Civil Litigation Division

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Attorneys for Defendants

DAVID HENSLEY (ISB # 6600)
Counsel to the Governor

Attorney for Defendant C.L. "Butch" Otter, Governor of the State of Idaho

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

In Re SRBA

Case No. 39576

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

)
) Subcase Nos. 37-2128, 37- 2471,
) 37-2472, 37-20709, 37-20710

) AMENDED
) MOTION TO STRIKE OR
) ALTERNATIVELY TO DISMISS
) "COUNTERCLAIM"

duty to reply and deeming the "Counterclaim" to simply identify the issues Idaho Power Company seeks to raise in support of its objections to the Amended Director's Reports in these subcases for purposes of Idaho Code § 42-1412(3).

The grounds for the Objectors' motion are that the "Counterclaim" contains redundant, immaterial, and impertinent matters. Further, it is not a claim, objection, or response contemplated for use in the SRBA or allowed under AO1 or the above-referenced statutes, and it seeks relief beyond a determination of the elements of a water right and beyond the scope of the Order of Reference. Idaho Power's "Counterclaim" asserts claims involving persons, entities, and subjects over which the Court lacks jurisdiction. It asserts claims against persons and entities who are not parties to these subcases and who were never served. It also asserts claims upon which relief may not be granted. Further, Idaho Power filed the "Counterclaim" despite having filed a virtually identical "Complaint" against the same "Defendants" in the main SRBA case, thereby wasting judicial resources and setting up the possibility of different rulings on the very same issues.

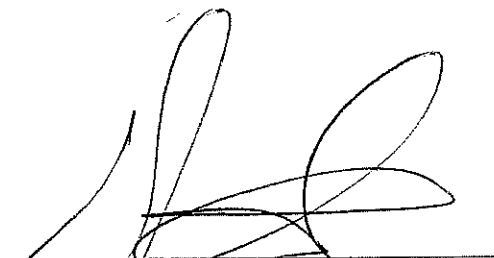
The Objectors request oral argument.

DATED this 13th day of June, 2007.

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, the Idaho
Department of Water Resources, and Director
David Tuthill


David Hensley
Counsel to the Governor

CERTIFICATE OF MAILING

I certify that on June 13, 2007, I caused the foregoing **Amended Motion To Strike Or Alternatively To Dismiss "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

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Brownstein Hyatt Farber Schreck, P.C.
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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
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U.S. MAIL

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

U.S. MAIL

Pocatello, Idaho 83204
Facsimile: (208) 232-6109

3. 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

v.)
)
 STATE OF IDAHO; C.L. "BUTCH" OTTER,)
 Governor of the State of Idaho; LAWRENCE G.)
 WADDEN, 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 AO1.

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."

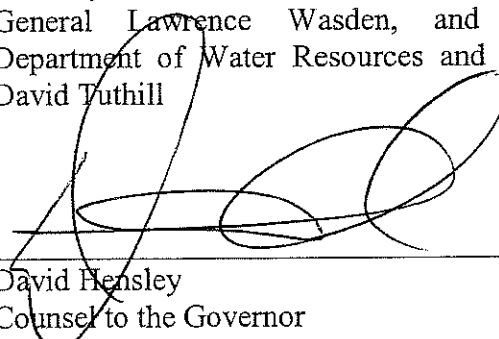
DATED this 13th day of June, 2007.

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
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U.S. MAIL & E-Mail

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

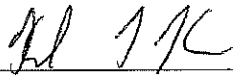
STATEHOUSE MAIL

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.

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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.

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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.

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SRBA

DIRECTORS REPORT 37-20709

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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 Power	Period of Use 01-01 TO 12-31	Quantity 100.00 CFS
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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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SRBA

DIRECTORS REPORT 37-10710

[Return to SRBA Home Page](#)

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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SRBA

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.

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 LOWER MALAD GORGE POWER PLANT.

[Return to SRBA Home Page](#)
