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DEPARTMENT OF
WATER RESOURCES

COPY

**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

) RESPONSE TO MOTION FOR
) STAY OF PROCEEDINGS ON
) IDAHO POWER COMPANY
) WATER RIGHTS IN BASINS
) 2, 36 AND 37, OR
) ALTERNATIVELY TO
) CONSOLIDATE PROCEEDINGS

INTRODUCTION

Idaho Power disputes that the State of Idaho (“State”) holds legal title to certain water rights that are subject to the Swan Falls Agreement, and also disputes the nature and extent of the subordination of those rights.¹ Idaho Power has objected to the Director’s recommendations on

¹ Contrary to Idaho Power’s characterization, the company’s dispute is with the State of Idaho, not the Attorney General. See generally Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basins 2, 36, and 37, or Alternatively to Consolidate Proceedings at 4-5 (referring to positions taken by “the Attorney General”). The State of Idaho is the party at interest and the Attorney General has acted in this matter solely on behalf of the State.

these issues, and the dispute is now pending in a number of SRBA subcases. Idaho Power apparently wishes to avoid having these objections resolved in the subcases and has filed a complaint in the main SRBA case² that would take Idaho Power's objections outside the procedures of Administrative Order 1 and the general adjudication statutes of chapter 14, Title 42, Idaho Code. Idaho Power's Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basins 2, 36, and 37, or Alternatively to Consolidate Proceedings ("Motion for Stay") seeks to further this effort by substituting Idaho Power's Complaint in the main case for conventional SRBA subcase proceedings.

The Motion for Stay should be denied because it relies on the Complaint, which should itself be dismissed, and because conventional SRBA proceedings are the appropriate means for resolving Idaho Power's objections to the Director's recommendations. Further, the Motion for Stay incorrectly assumes that this Court should "comprehensively" interpret the Swan Falls Agreement's "meaning and effect" and take up a host of issues that exceed the scope of SRBA, including water rights administration issues that should be initially decided by the Director of the Idaho Department of Water Resources ("IDWR").

Moreover, Idaho Power's request to formally consolidate the relevant subcases is premature because there is no current risk of inconsistent rulings by different Special Masters, and no such risk will arise for some time, as the Basin 2 subcases will not be postured to proceed on the merits until well into 2008. Thus, formal consolidation at this time would unnecessarily delay resolution of the common factual and legal issues raised by Idaho Power's objections to the Director's recommendations.

² See Complaint and Petition for Declaratory and Injunctive Relief (filed May 11, 2007) ("Complaint").

ARGUMENT

I. The Court Should Deny Idaho Power's Request To Stay The Subcases.

Idaho Power requests an indefinite stay of all proceedings on water rights in Basins 2, 36 and 37 that are subject to the Swan Falls Agreement. Motion for Stay at 1-2. Idaho Power's principal justification for this unusual request is that the company's Complaint in the main SRBA case "comprehensively frames the issues raised by the Swan Falls Agreement which Idaho Power believes must be determined by the SRBA Court in conjunction with the Court's adjudication of its water rights." Motion for Stay at 3. Idaho Power argues that the Court should "comprehensively address in an integrated proceeding issues regarding the meaning and effect of the Swan Falls Agreement," and that the Complaint provides the "vehicle to proceed with the resolution of these issues." Motion for Stay at 6.

In short, the Motion for Stay asks the Court to abandon conventional SRBA procedures because the Complaint ostensibly is a better "vehicle" for resolving the issues Idaho Power seeks to raise. As discussed below, the Court should deny Idaho Power's request for a stay because the Complaint is a deeply flawed vehicle that should be stricken or dismissed, and because the "comprehensive" determination Idaho Power seeks of the "meaning and effect" of the Swan Falls Agreement goes significantly beyond the scope of determining the nature and extent of the water rights in question.

A. The Complaint Should Be Dismissed And Is Not Itself A Reason for Staying Conventional Subcase Proceedings.

The State defendants have moved to dismiss or strike Idaho Power's Complaint in the main SRBA case. The grounds for that motion are argued at length in the State's Memorandum in Support of Motion to Strike or Alternatively to Dismiss the Complaint and Petition for

Declaratory and injunctive Relief, filed May 30, 2007 (“Memorandum on Motion to Dismiss”), and will not be repeated in detail here.

For purposes of the Motion to Stay, however, it is important to recognize that conventional SRBA proceedings are the appropriate and statutorily authorized means for litigating Idaho Power’s disputes with the Director’s recommendations.³ *See, e.g.*, Memorandum on Motion to Dismiss at 7-13. These procedures have proved adequate in a variety of factual and legal contexts over the years, and Idaho Power’s suggestion that the Complaint provides a better “vehicle” for resolving the company’s objections is simply wrong. Further, by departing from established SRBA procedures and proceedings, the Complaint unnecessarily introduces delay, uncertainty and procedural complexity into a structured adjudication process that the Legislature and this Court intended to be streamlined and uniform. *See e.g.*, Idaho Code §§ 42-1401 — 42-1413; AO1.3 — AO1.10.

Thus, the Court should strike or dismiss Idaho Power’s Complaint. *See generally* Memorandum on Motion to Dismiss. Similarly, the Court should deny Idaho Power’s request for a stay of subcase proceedings, because it would replace them with the dubious and unauthorized proceeding sought by the Complaint.

B. Idaho Power Seeks A “Comprehensive” Interpretation Of The Swan Falls Agreement That Is Beyond The Scope Of The SRBA And Would Inject Issues That Are Not Germane To A Determination Of The Water Rights Into SRBA Proceedings.

1. The Swan Falls Agreement Should Be Addressed In The SRBA Only To The Extent Necessary To Determine The Water Rights In Question.

The Court should deny Idaho Power’s Motion for Stay because it fundamentally misapprehends the SRBA’s purpose and would improperly expand the scope of the proceedings.

³ Further, and despite Idaho Power’s suggestion to the contrary, conventional SRBA procedures also provide the means for interested persons to intervene, by filing motions to participate. AO1.2.p, AO1.10.k.

The Motion for Stay assumes the SRBA is principally designed to “comprehensively address . . . the meaning and effect of the Swan Falls Agreement.” Motion for Stay at 6. The SRBA’s purpose is not to “comprehensively address” the Swan Falls Agreement, however, but rather 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. Idaho Power’s argument incorrectly assumes that in making these determinations, the SRBA must also exhaustively address the entire “meaning and effect of the Swan Falls Agreement,” or at least all the “issues related to the Swan Falls Agreement” that Idaho Power may choose to raise. Motion for Stay at 3. This all-or-nothing approach misunderstands the purposes and procedures of the SRBA and would burden the proceedings with issues that need not be addressed or resolved for purposes of defining the water rights.

To be sure, the Court may need to consult or refer to certain terms or provisions of the Agreement, and possibly even interpret their “meaning and effect,” in making the determinations necessary to decree the water rights.⁴ It does not follow, however, that the Court should go further and “comprehensively” interpret the Agreement simply because there may be other issues that happen to be “related to the Swan Falls Agreement.” Motion for Stay at 3.

Moreover, and contrary to Idaho Power’s assertions, judicial economy will not be served if the SRBA “comprehensively” addresses the meaning and effect of the Swan Falls Agreement. Indeed, doing so would have the opposite effect, by injecting into the SRBA matters considerably beyond the scope of determining the ownership, nature and extent of water rights.⁵

⁴ Ultimately, it is the State’s position that the statutes that implement the Agreement, rather than the Agreement itself, control most or all of the issues raised by Idaho Power’s objections to the Director’s recommendations. Nothing herein is intended as a waiver or abandonment of that position, which the State expressly reserves.

⁵ For instance, the Agreement contains provisions regarding the State Water Plan, the sale of utility property, the jurisdiction of the Idaho Public Utilities Commission (“IPUC”), the rulemaking and moratorium authority of the

“Comprehensively” addressing the Swan Falls Agreement’s meaning and effect in the SRBA as Idaho Power urges would unnecessarily delay and complicate the proceedings rather than promote judicial economy.

2. The “Comprehensive” Interpretation of The Swan Falls Agreement That Idaho Power Seeks Is Primarily A Request For Judicial Administration Of The Water Rights.

Further, the “comprehensive” interpretation that Idaho Power seeks is in large part a request for this Court to decide questions of water rights administration that should initially be resolved by the Director of IDWR rather than a court. For instance, the Complaint seeks declarations that the State has failed to take reasonable steps in administering water rights in the Snake River Basin, has failed to account for multiple year impacts of ground water pumping, and requests an order requiring IDWR “to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls daily Minimum Flows.” Complaint at 23, 26.

This Court has already observed that questions of water rights administration arising under the Swan Falls Agreement should be decided in the first instance in an administrative forum rather than in the SRBA:

Moreover, because the *Agreement* deals with the administration of water rights, any disagreement over the interpretation or application of the *Swan Falls Agreement* should first be decided administratively if and when an issue arises, based on the attendant facts at the time enforcement of a term of the *Agreement* is being sought. Jurisdictionally, this would occur before the Idaho Department of Water Resources and under the Administrative Procedures Act.

Order Designating Basin-Wide Issue Re: To What Extent, If Any, Should The Swan Falls Agreement Be Addressed In The SRBA Or Memorialized In A Decree? at 7 (“Order on Basin-

Department of Water Resources, a damages waiver by Idaho Power, the “1180 Contract,” regulatory approvals by IPUC and the Federal Energy Regulatory Commission, and other subjects. *See, e.g.*, Swan Falls Agreement at ¶¶ 4-6, 8, 11, 12. A copy of the Swan Falls Agreement is attached hereto as **Exhibit A**.

Wide Issue 13”), *In re SRBA, Basin-Wide Issue 91-13* (Aug. 23, 2004).

The Idaho Supreme Court has also clarified that challenges to water rights administration must be initially decided by IDWR rather than through declaratory judgment actions, and that subsequent judicial review is available only if there is a fully developed administrative record and the petitioner has exhausted administrative remedies. *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, ___, 154 P.3d 433, 441-43 (2007).⁶ Even then, judicial review may not be sought in the SRBA. Idaho Code § 42-1401D; *see also Sagewillow v. IDWR*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003).

These principles reflect that under Idaho law the adjudication of water rights and the subsequent administration of such rights are related but separate functions. The SRBA conclusively determines the elements of water rights, and IDWR administers water rights in accordance with the partial decrees. This means that many questions of administration are beyond the scope of the SRBA, as this Court has previously observed:

Legally, the Court does not need to adjudicate the specific interrelationships between water rights. IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree. . . . Rather, IDWR makes this determination based on its knowledge and data regarding how water rights are physically interrelated. Mechanisms are available for water rights holders in disagreement with IDWR’s administrative actions to challenge and seek review of the same. This same legal reasoning should apply as between ground and surface sources, and therefore, a determination of the specific physical relationships between all water rights need not be made in the SRBA.

Order in Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits at 19, *In re SRBA Subcase 91-00005 (Basin-Wide Issue 5)* (July 2, 2001).

⁶ *See also generally Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction, Idaho Ground Water Appropriators, Inc. v. IDWR*, No. CV-2007-526 (Fifth Jud. Dist., June 12, 2007) (dismissing complaint for failure to exhaust administrative remedies).

The Idaho Supreme Court also recently affirmed that while IDWR's administration of water rights must be consistent with the SRBA District Court's determinations of the elements of water rights, the SRBA does not "comprehensively" address or resolve all of the issues that may arise in administration:

Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication. 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). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912). 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.

American Falls Reservoir Dist. No. 2, 143 Idaho at ___, 154 P.3d at 447-48. These principles apply with particular force to the administrative matters that Idaho Power has raised: the complex and contentious issues attending IDWR's attempts to conjunctively administer surface water rights in the Snake River and ground water rights in the Eastern Snake Plain Aquifer. *See generally id.*; *see also Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction, Idaho Ground Water Appropriators, Inc. v. IDWR*, No. CV-2007-0000526 (Fifth Jud. Dist., June 12, 2007).

Idaho Power attempts to avoid this conclusion by characterizing the requirement that water rights administration questions be decided initially in an administrative forum as an attempt by the State to engage in a "piecemeal" interpretation of the Swan Falls Agreement. This flawed characterization brings into clear focus the company's misapprehension of the scope and purpose of the SRBA, and of the settled distinction in Idaho law between the adjudication of water rights and the administration of water rights.

While the determination and the administration of the water rights subject to the Swan Falls Agreement are unquestionably “interrelated,” Motion for Stay at 5, it does not follow that all the administrative issues raised in the Complaint must be “comprehensively address[ed] in an integrated proceeding” in the SRBA. Motion for Stay at 6. Indeed, it would be directly contrary to Idaho law to do so. Idaho Power’s arguments that the Court should not take a “piecemeal” approach to the Swan Falls Agreement amounts to an attempt to circumvent the proper channels and procedures for administering water rights in Idaho.

C. The Existence of Partial Decrees in Basin 36 Does Not Support A Stay Of Subcase Proceedings.

Idaho Power also argues that the Court should stay all subcase proceedings because the Court already has entered partial decrees in Idaho Power’s name for the Basin 36 water rights referenced in the Swan Falls Agreement.⁷ The existence of Basin 36 partial decrees does not change the fact that the Complaint is unauthorized and fundamentally flawed, and should not be allowed to replace conventional SRBA proceedings and procedures. It also does not warrant a stay of the subcases proceedings on the water rights in Basin 37 and Basin 2.

Similarly, Idaho Power’s assertion that the State has not provided the Court a roadmap for future proceedings on the partially decreed water rights in Basin 36 fails to cure the defects in the Complaint, or to provide any justification for staying subcase proceedings in Basin 37 and Basin 2. Moreover, no such procedural roadmap or plan need be developed for the Basin 36 subcases at this point, because they are essentially closed with no action pending. It may be appropriate for the Court and the parties to consider what action should be taken with respect to the Basin 36 water rights after the Court resolves Idaho Power’s objections to the Director’s recommendations on the Basin 37 and Basin 2 water rights, but that question need not be

⁷ The water rights in Basin 36 are 36-2013, 36-2018, and 36-2026. The partial decrees were entered in 1997.

resolved at this time, and is no reason to presently stay the current subcase proceedings in Basin 37 and Basin 2.

In addition, Idaho Power is mistaken in apparently arguing that the partial decrees for the Basin 36 water rights foreclose any future consideration of how the Swan Falls Agreement and the implementing legislation might affect those rights. This Court has already observed that it was an “oversight” that the Basin 36 rights were decreed “without reference to the Swan Falls Agreement.” Order on Basin-Wide Issue 13 at 6 n.6.

Indeed, Idaho Power counsel James Tucker admitted this fact in a 2003 hearing, telling this Court that Idaho Power’s water rights in Basin 36 were decreed “without reference to the Swan Falls Agreement. That was an oversight, if you will, by both the State of Idaho and Idaho Power Company and certainly does not mean that those rights were not affected by the Swan Falls Agreement.”⁸ He also told the Court that “[i]t has always been my assumption that the Swan Falls Agreement and reference to that agreement would be part of Idaho Power’s water rights.”⁹ Thus, the suggestion that the partial decrees for the Basin 36 water rights foreclose future consideration of how the Swan Falls Agreement and the implementing legislation might affect those rights contradicts the record and Idaho Power’s own statements to the Court.

In short, the fact that the Basin 36 water rights have been partially decreed is an ancillary issue that is of little importance at this point in the proceedings, and certainly does not warrant staying all the other subcases. The Court’s determinations of the issues raised by Idaho Power’s objections in Basin 37 and Basin 2 ultimately will control the resolution of the “oversight” in the

⁸ Transcript of Monthly Status Hearing of Tuesday, February 18, 2003, at page 52. A copy of the pages 1 and 49-53 of the transcript is attached hereto as **EXHIBIT B**.

⁹ Transcript of Monthly Status Hearing of Tuesday, February 18, 2003, at page 50.

Basin 36 partial decrees. Idaho Power's argument that the existence of partial decrees for the Basin 36 water rights necessitates a stay of all subcase proceedings should be rejected.

II. The Request To Consolidate Subcases Is Premature And Should Be Denied.

As an alternative to staying the pending subcases for the water rights subject to the Swan Falls Agreement, Idaho Power seeks to formally consolidate the subcases. Motion for Stay at 6. While Idaho Power's objections to the Director's recommendations in Basin 2 and Basin 37 raise common issues of fact and law, formal consolidation at this time should be denied because it would not promote judicial economy or the expeditious resolution of the issues at hand, and is not necessary to avoid inconsistent rulings by different Special Masters.

A. Idaho Power's Objections To The Director's Recommendations For the Water Rights In Basin 37 and Basin 2 Hinge On Common Issues Of Fact And Law.

Administrative Order 1 and Rule 42(a) of the Idaho Rules of Civil Procedures govern requests to consolidate subcases. *See generally* AO1.11; I.R.C.P. 42(a). Whether to consolidate actions is a matter of discretion. *Fawcett v. Irby*, 92 Idaho 48, 52, 436 P.2d 714, 718 (1968); *see also Branom v. Smith Frozen Foods*, 83 Idaho 502, 365 P.2d 958 (1961).

In asking the Court to consolidate the subcases, Idaho Power asserts that all the water rights in question "involve common issues related to the meaning and effect of the Swan Falls Agreement." Motion for Stay at 2. Idaho Power is correct: the factual and legal issues raised by Idaho Power's objections to the Director's recommendations are common to all of the water rights that are subject to the Swan Falls Agreement. The mere commonality of issues does not, however, mandate consolidation.

B. Formal Consolidation At The Present Time Is Not Necessary And Would Impede Judicial Economy And The Expeditious Resolution Of Issues Common To All The Water Rights.

Consolidation should not be ordered simply because different subcases turn on common issues of fact and law. Rather, Administrative Order 1 pointedly notes that consolidation is appropriate “when resolution of those issues can be most expeditiously and effectively achieved” through consolidated proceedings. AO1.11. Similarly, Rule 42(a) indicates that consolidation is appropriate when it tends to “avoid unnecessary costs and delay.” I.R.C.P. 42(a).

Thus, the key question for the Court is not whether the issues in the subcases are the same—it is whether formal consolidation would promote expeditious resolution of the issues and avoid unnecessary delay. The answer to this question is no, because, as explained below, formal consolidation at this time would be premature, unnecessarily delaying the resolution of issues common to all the water rights by halting proceedings in the Basin 37 subcases. Further, there will be no risk of inconsistent rulings by different Special Masters until February 2008 or even months later, and in the meantime considerable progress can be made by moving forward in Basin 37.

The Basin 37 subcases are being litigated as a group, and are currently postured for resolution. The applicable objection and response periods have closed, several hearings have already been held, and the Special Master has set a trial date. In contrast, the Basin 2 objection period will not close until December 5, 2007, the response period will not close until February 2, 2008, and it could be some months after that before the initial hearings are held. Thus, the Basin 2 subcases will not be postured for resolution before February 2008 at the earliest, and it is possible they will not be ready to proceed on the merits for another year (or even longer).

In the meantime, the Basin 37 proceedings offer an opportunity to immediately move forward on issues that are common to all the water rights subject to the Swan Falls Agreement. For the next seven months, and possibly longer, these issues could be focused and developed in the Basin 37 proceedings before there is any risk of inconsistent rulings by different Special Masters.

For instance, the State believes that Idaho Power's objections are appropriately determined as a matter of law under the statutes that implement the trust and subordination provisions of the Agreement, which were drafted by the parties, appended to the Agreement, and the enactment of which was an express pre-condition for the Agreement to take effect.¹⁰ The State believes Idaho Power's objections can and should be resolved via summary judgment with minimal discovery and expert analysis, and the State is prepared to move forward on this basis.

Thus, the same issues that will arise in Basin 2 could be resolved or moved significantly forward in Basin 37 before the Basin 2 subcases are joined. Even if the State's summary judgment motion were denied, or if Idaho Power appealed a summary judgment ruling in the State's favor, allowing the Basin 37 subcases to proceed would at least move matters forward and focus the remaining issues for the parties and the Court. Further, the Basin 37 and Basin 2 subcases could still be formally consolidated with the Basin 2 subcases at some point in the future, if and when it becomes necessary or advisable to do so.

While formal consolidation may ultimately be desirable at some point in order to avoid inconsistent rulings and promote judicial economy, this is simply not the case at the present time. There is no risk of inconsistent rulings prior to the initial hearings on the Basin 2 subcases, and in the meantime consolidation would impede rather than promote judicial economy and the

¹⁰ See Swan Falls Agreement ¶ 13 and exhibits 7A and 7B to the Agreement (attached hereto as **Exhibit A**). The implementing statutes remain in effect. See, e.g., Idaho Code §§ 42-203B, 42-203C.

expeditious resolution of Idaho Power's objections to the Director's recommendations. Formal consolidation at this time is premature, and the Court should deny Idaho Power's consolidation request so that the Basin 37 subcases may proceed.

CONCLUSION

For the reasons set forth herein, the State requests that the Court deny Idaho Power's Motion for Stay in its entirety.

DATED this 22nd day of June, 2007.

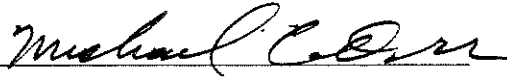
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Certificate of Mailing for Expedited Hearings

I HEREBY CERTIFY that on this 22nd day of June 2007, I caused to be served a true and correct copy of the foregoing **Response to Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basin 2, 36 and 37, or Alternatively to Consolidate Proceedings** to the following parties by U.S. Mail, and further served the same on certain parties by electronic mail, as indicated:

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BURLEY, ID 83318

RICHARD A. CUMMINGS
PO BOX 1545
BOISE, ID 83701

B J DRISCOLL
PO BOX 50731
IDAHO FALLS, ID 83405

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PO BOX 83720
BOISE, ID 83720-0098

RANDALL C BUDGE (also served via e-mail at rcb@racinelaw.net)
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
201 E CENTER, STE A2
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232 E MAIN ST
PO BOX 828
WEISER, ID 83672

CLIFF S. BENTZ
YTURRI, ROSE, BURNHAM, EBERT & BENTZ
PO BOX 450
FRUITLAND, ID 83619

RICHARD L. HARRIS
1023 ARTHUR ST

KAM & MOELLER, CHTD
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

CHARLES L. HONSINGER
DANIEL V. STEENSON
RINGERT, CLARK CHTD.
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773

CHARLES J OLSON
RT 1 BOX 777E
MOUNTAIN HOME, ID 83647

BRANDELLE WHITWORTH
SHOSHONE-BANNOCK TRIBES
TRIBAL COUNSEL OFFICE
PO BOX 306
FORT HALL, ID 83203

DOUGLAS B.L. ENDRESON
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS,
SACHSE, ENDRESON &
PERRY LLC
1425 K STREET, NW STE 600
WASHINGTON, DC 20005

JAMES P. SPECK
SPECK & AANESTAD
120 EAST AVENUE
PO BOX 987
KETCHUM, ID 83340

MARK POTTER
SUSAN POTTER
220 WILLOW LANE
HAGERMAN, ID 83332

Exhibit A

The Swan Falls Agreement of October 25, 1984

AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. 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.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

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- 1 -

EX NO.	2
Mr. WEISS	
DATE	10-31-91
BURNHAM, HABEL & ASSOCIATES, INC.	

stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

- B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.
- C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. Legislative Program

The parties agree to propose and support the following legislation to implement this Agreement:

- A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

- B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.
- C. Establishment of an effective water marketing system.
- D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.
- E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.
- F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.
- G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

- A. State Water License Numbers 36-2013 -(Thousand Springs), 37-2128 & 37-2472 -(Lower Malad), 37-2471 -(Upper Malad), 36-2018 -(Clear Lake), 36-2026 -(Sand Springs), 02-2057 -(Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 -(Lower Salmon), 02-2064, 02-2065 -(Bliss), 02-2056 -(Twin Falls), 02-2036 -(Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 -(Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow 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. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.
- B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. 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. This paragraph shall constitute a subordination condition.

- C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.
- D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.
- E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.
- F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains its rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in paragraph 13.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

- A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

- B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).
- ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.
- iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

- C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.
- D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

- A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:
 - i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;
 - ii. Enactment of the legislative program outlined in paragraph 6;
 - iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;
 - iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);
 - v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;
 - vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement.

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

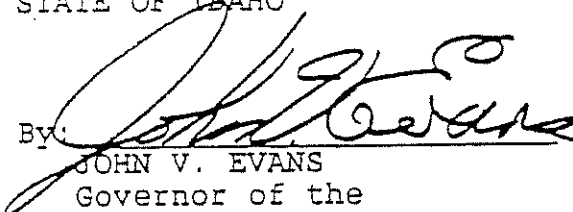
21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

IDAHO POWER COMPANY

By: 

JOHN V. EVANS
Governor of the
State of Idaho

By: 

JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

By: 

JIM JONES
Attorney General of the
State of Idaho

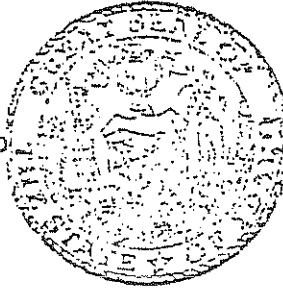
ATTEST:



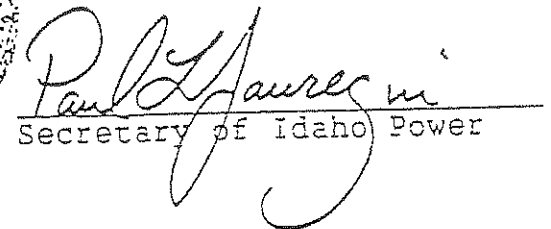
PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho
Power Company)



ATTEST:


Secretary of Idaho Power

CERTIFICATE OF SECRETARY

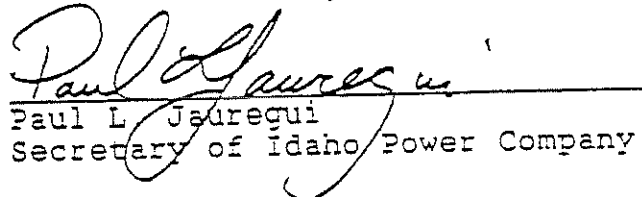
Paul L. Jauregui, as secretary of Idaho Power Company,
a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof,
affixed to the instrument is in fact the seal of the
corporation, or a true facsimile thereof, as the case may be;
and

(2) That any officer of the corporation executing the
instrument does in fact occupy the official position indicated,
that one in such position is duly authorized to execute such
instrument on behalf of the corporation, and that the signature
of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of
the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the
secretary of Idaho Power Company, a Maine corporation, have
executed this certificate and affixed the seal of Idaho Power
Company, a Maine Corporation, on this 25th day of October,
1984.


Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE
OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and
2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and
3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.



A handwritten signature in cursive script, reading "Pete T. Cenarrusa", written over a horizontal line.

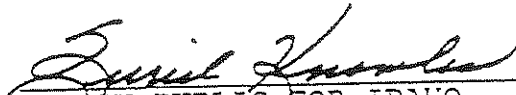
PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

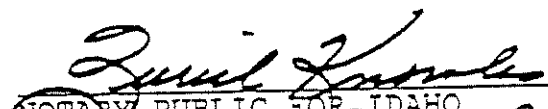
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.


NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.


NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203, Idaho Code be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. ~~On and after the passage/ approval and effective date of this section/~~ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; and (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also state in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a1) that it will reduce the quantity of water under existing water rights, or (b2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use/; The director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller less quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, ~~feeling~~ aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

42-203C. PUBLIC INTEREST DETERMINATION -- CRITERIA --
WEIGHT -- BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

(2)(a) The director in making such determinations for purposes of this section shall consider:

- (i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;
- (ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;
- (iii) the promotion of the family farming tradition;
- (iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho;
- (v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under this section shall be on the protestant.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. The department shall review all permits issued prior to the effective date of this section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of chapter 2, title 42, Idaho Code. If the department finds that the proposed use does not satisfy the criteria of chapter 2, title 42, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with chapter 2, title 42, Idaho Code. If the department finds that the permit satisfies the criteria established by chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 5209 through 5215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE

BILL NO.

BY

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT.
(1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

- (a) the boundaries of the entire system within the state to be adjudicated;
 - (b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and
 - (c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.
- (2) Upon issuance of an order by the district court which:
- (a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;
 - (b) defines the system boundaries;
 - (c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and
 - (d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEES FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights The department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-221, Idaho Code, except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration or a water right which has previously been adjudicated by a state or federal court, the claimant shall pay a filing fee of only

ten dollars (\$10.00) fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. Provided/ However/ that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act/ Chapter 153/ Laws of 1971/ was enacted/ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-
watering rights \$25.00

2. Claims for all other rights. \$50.00

B. Additional variable water use fee for each claim filed:

1. Irrigation use: \$ 1.00 per acre.

2. Power: \$ 25.00 per c.f.s.

3. Aquaculture: \$ 10.00 per c.f.s.

4. Municipal, Industrial, Commercial,
Mining, Heating, Cooling: \$100.00 per c.f.s.

5. Public: \$100.00 per c.f.s.

6. Miscellaneous: flat fee only.

C. Payment of a variable water use fee of more than \$1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE
DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of \$200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A
NEW SECTION 61-502B TO PROVIDE THAT GAIN UPON SALE OF A
PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF
THE RATEPAYERS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the
same is hereby amended by the addition thereto of a NEW
SECTION, to be known and designated as Section 61-502B, Idaho
Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used
for the generation of electricity shall accrue to the benefit
of the ratepayers.

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the []
shall not constitute a sale, assignment, conveyance or
transfer within the meaning of §§61-327, 61-328, 61-329,
61-330, and 61-331, I.C., to the extent any of those sections
may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.
2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.
3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.
4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.
5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

[The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be 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. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE
DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE
THE POWER TO ESTABLISH RULES AND REGULATIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1805, be, and the same is hereby
amended to read as follows:

42-1805. ADDITIONAL DUTIES -- In addition to other duties
prescribed by law, the director of the department of water
resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to
interstate and international water rights affecting Idaho water
resources; and to cooperate with all agencies, now existing or
hereafter to be formed, within the state or within other
jurisdictions, in matters affecting the development of the
water resources of this state.

(2) To prepare a present and continuing inventory of the
water resources of this state, ascertain means and methods of
conserving and augmenting these and determine as accurately as
possible the most effective means by which these water
resources may be applied for the benefit of the people of this
state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

Exhibit B

Pages 1 and 49-53 of the Reporter's Transcript
of the Monthly Status Hearing,
Tuesday, February 18, 2003.
In re SRBA (Fifth Jud. Dist. Case No . 39576)



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

REPORTER'S TRANSCRIPT

Case No. 39576

MONTHLY STATUS HEARING
TAKEN BEFORE
HON. ROGER S. BURDICK
District Judge, Presiding

DATE: TUESDAY, FEBRUARY 18, 2003

TIME: 1:30 P.M.

PLACE: COURTROOM OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
BUILDING - 253 3RD AVENUE NORTH
TWIN FALLS, IDAHO

Reported By:
Virginia M. Bailey, RPR, CSR No. 262
Official Court Reporter

1 this point in time we have a period of time before
2 the '02 and '03 reports are reported out by the
3 director. At least give us a short period of time
4 to come back and report to the court, and we can
5 either say, look, we don't agree at all, and we'll
6 just do it in the normal process, or we do, do think
7 there's a chance for agreement, or whatever, maybe
8 we'll have something. But in any event, I think
9 that would be a useful use of our time and would
10 recommend that to the court.

11 I don't really have anything further,
12 other than to say that we're in agreement. We want
13 no erasure of the Swan Falls agreement by accident.
14 So we believe it is appropriate to address it in an
15 appropriate manner, and we'll leave that to the
16 court to figure out that, what is that appropriate
17 manner. Thank you.

18 THE COURT: Thank you, Mr. Barber.
19 Mr. Tucker, then Mr. Simpson.

20 MR. TUCKER: Thank you, Your Honor.
21 James Tucker for Idaho Power Company.

22 I guess I have to confess, I don't know
23 how substantive this is going to be, number one, but
24 I have to confess a bit of confusion from the start
25 here.

1 Idaho Power likewise does not want an
2 erasure of the Swan Falls agreement. Certainly, the
3 Swan Falls agreement has been the very fabric of
4 water management or administration in southern Idaho
5 since the agreement in 1984; but I don't know what
6 the case or controversy is here.

7 Idaho Power has in the past several years
8 had a dialogue with the state Attorney General's
9 office on how to preserve, if you will, the Swan
10 Falls agreement and to reference that agreement in
11 the context of Idaho Power's rights; and I guess in
12 that sense, I have to express agreement with the
13 court's initial question or at least answer the
14 court's initial question. It has always been my
15 assumption that the Swan Falls agreement and
16 reference to that agreement would be part of Idaho
17 Power's water rights. It would be a reference in
18 Idaho Power's water rights that Idaho Power's rights
19 were subject to the Swan Falls agreement; and the
20 confusion to me comes when we expand that out to a
21 larger, albeit perhaps it could be a basin-wide
22 issue, but to a larger question of what the benefits
23 of that agreement are.

24 I'm concerned, just in what I've heard
25 today, in the context of the possibility of

1 mediation, for instance, of what we're going to be
2 mediating. There has not been a controversy in the
3 last 17 years, 17 or 18 years, as to what the Swan
4 Falls agreement has meant or how it has been
5 applied; and I hesitate to embark upon a mediation
6 where we are going to attempt to interpret a
7 document that heretofore has not been ambiguous. I
8 think that's fraught with peril. I think it gets us
9 into a situation very much like we were in, in the
10 1980s, if we get to a point where we want to
11 interpret what the Swan Falls agreement means. As I
12 say, I don't think there's been an expression here
13 today that people don't know what it means. There
14 certainly are benefits from the Swan Falls agreement
15 to any number of water users, and I don't know that
16 those water users haven't been adequately protected
17 for the last 18 years in the benefits that the Swan
18 Falls agreement has provided for them.

19 So again, I think the court's suggestion
20 this afternoon of preserving this question until
21 Idaho Power's rights are in play, certainly has
22 some, I think, some merit, and certainly because
23 again, from Idaho Power's standpoint, we in no way
24 want to give the impression that Idaho Power Company
25 is attempting to back away from or take a second

1 look at the Swan Falls agreement. It certainly does
2 affect Idaho Power's rights. It does affect the
3 administration of water in the basin. It is
4 appropriate for it to be referenced in the context
5 of the SRBA. How that reference should be done, I
6 admit, is open to question; but I fail to see the
7 controversy right here today that kind of brings it
8 to the forefront, absent the issue that Ms. Beeman
9 raises and Mr. Barber also, and I concur in, that we
10 don't want to have a -- we don't want to blow by the
11 Swan Falls issue and have it be left by default
12 behind us.

13 And I might say, in that context, the
14 discussions I've had in the past with Mr. Strong of
15 the Attorney General's office, has been in the
16 context of Basin 36 and the Idaho Power's Thousands
17 Springs right in Basin 36, which that right was
18 decreed, and I think the Clear Lakes -- or the Clear
19 -- Clear Lakes right was also decreed, without
20 reference to the Swan Falls agreement. That was an
21 oversight, if you will, by both the State of Idaho
22 and Idaho Power Company and certainly does not mean
23 that we don't believe that those rights were not
24 affected by the Swan Falls agreement. We do and
25 we've been talking to the Attorney General's office

1 for some time about how to appropriately deal with
2 that issue.

3 So it certainly is still very much in
4 play; and if it's a basin-wide issue, if the court
5 decides that there's some sort of mediation, we will
6 certainly participate. But again, in the absence of
7 a controversy, I just wonder what we're going to be
8 mediating. So thank you, Your Honor.

9 THE COURT: Thank you, Mr. Tucker.
10 Mr. Simpson.

11 MR. SIMPSON: Thank you, Your Honor. John
12 Simpson on behalf of Clear Springs. And we did file
13 a response to the statement filed by North Snake,
14 Your Honor; and in that response we, Your Honor,
15 just questioned whether or not this was going to be
16 an issue for Basin 37 alone or it was going to be a
17 basin-wide issue in the context of the whole Snake
18 River Basin Adjudication, and at this point in
19 time --

20 THE COURT: When you say Basin 37 issue,
21 do you mean because Swan Falls is in Basin 37?

22 MR. SIMPSON: No, Your Honor. Just
23 because those objections that were filed were simply
24 in response to the director's report for Basin 37.

25 THE COURT: I understand.