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Farber Schreck

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DEPARTMENT OF
WATER RESOURCES

February 19, 2008

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All Counsel

Michael A. Gheleta
Attorney at Law
T 303.223.1104
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mgheleta@bhfs.com

RE: In Re SRBA, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find the following pleadings in the above referenced matter:

1. Supplemental Affidavit of Michael A. Gheleta Submitting Complete Copies of Exhibits Previously Filed in Support of Idaho Power Company's Response to State's Motion for Partial Summary Judgment, including exhibits;
2. Idaho Power Company's Reply to State's Response on Motion to Amend and Reconsider Scheduling Order, and Response to Request for Pretrial Conference and
3. Idaho Power Company's Second Set of Discovery Requests to State Defendants.

Please contact me if you have any questions Thank you.

Sincerely,



Alison Cameron

Enclosures
8607151126266.1

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Michelle C. Kales
Lauren E. Schmidt
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Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile

Attorneys for Idaho Power Company

**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	)	Consolidated Subcase: 92-23
	)	
IDAHO POWER COMPANY,	)	SUPPLEMENTAL AFFIDAVIT OF
	)	MICHAEL A. GHELETA SUBMITTING
Plaintiff,	)	COMPLETE COPIES OF EXHIBITS
	)	PREVIOUSLY FILED IN SUPPORT OF
v.	)	IDAHO POWER COMPANY'S
	)	RESPONSE TO STATE OF IDAHO'S
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	MOTION FOR PARTIAL SUMMARY
Governor of the State of Idaho; LAWRENCE G.	)	JUDGMENT
WASDEN, Attorney General of the State of Idaho;	)	
IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources	)	
	)	
Defendants.	)	
	)	

Supplemental Affidavit of Michael A. Gheleta Submitting
Complete Copies of Exhibits Previously Filed in Support of
Idaho Power Company's Response to State of
Idaho's Motion for Partial Summary Judgment

STATE OF COLORADO)
) ss.
County of Denver)

MICHAEL A. GHELETA, being first duly sworn upon oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff Idaho Power Company ("Idaho Power") in the above-entitled action, and submit the following affidavit based upon my personal knowledge and best belief.

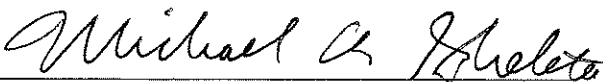
2. On February 7, 2008, Idaho Power filed its Response to State of Idaho's Motion for Partial Summary Judgment ("Idaho Power's Response Brief"), including as exhibits thereto excerpts from S. Rep. No. 100-8 (1987) and H.R. Rep. No. 100-418 (1987).

3. Attached hereto as Exhibit A is a true, correct and complete copy of S. Rep. No. 100-8 (1987), as issued by the U.S. Senate Committee on Energy and Natural Resources on February 3, 1987, excerpts of which were attached to Idaho Power's Response Brief as Exhibit 3.

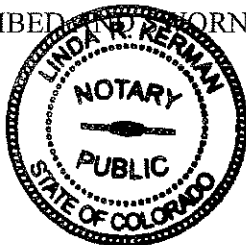
4. Attached hereto as Exhibit B is a true, correct and complete copy of H.R. Rep. No. 100-418 (1987), as issued by the U.S. House of Representatives Committee on Energy and Commerce on November 4, 1987, excerpts of which were attached to Idaho Power's Response Brief as Exhibit 4.

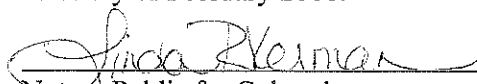
5. These exhibits are available through online electronic databases and other commonly available sources of legal authority, but Idaho Power is submitting the complete reports by means of this supplemental affidavit for the convenience of the Court and the State Defendants.

Dated this 19th day of February 2008.


Michael A. Gheleta, Esq.

SUBSCRIBED AND SWORN to before me this 19th day of February 2008.




Notary Public for Colorado
Residing at: Denver, Colorado
Commission Expires: 10/24/2011

~~My Commission Expires June 24, 2011~~
Supplemental Affidavit of Michael A. Gheleta Submitting
Complete Copies of Exhibits Previously Filed in Support of
Idaho Power Company's Response to State of
Idaho's Motion for Partial Summary Judgment

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of February 2008, I caused to be served a true and correct copy of the foregoing **SUPPLEMENTAL AFFIDAVIT OF MICHAEL A. GHELETA SUBMITTING COMPLETE COPIES OF EXHIBITS PREVIOUSLY FILED IN SUPPORT OF IDAHO POWER COMPANY'S RESPONSE TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** by the method indicated below, and addressed to each of the following:

Notice of Service filed with the Court via overnight FedEx.

Lawrence Wasden	<u> X </u> U.S. Mail, Postage Prepaid
Steven Olsen	
Karl T. Klein	
Michael C. Orr	<u> X </u> E-mail
700 W. Jefferson, Room 210	
P.O. Box 44449	
Boise, ID 83711-4449	
Attorneys for Defendant, State of Idaho	

IDWR Document Depository	<u> X </u> U.S. Mail, Postage Prepaid
PO Box 83720	<u> </u> Hand Delivered
Boise, ID 83720-0098	<u> </u> Overnight Mail
	<u> </u> Facsimile

United States Department of Justice	<u> X </u> U.S. Mail, Postage Prepaid
Environment & Nat'l Resources Div	<u> </u> Hand Delivered
550 W Fort Street, MSC 033	<u> </u> Overnight Mail
Boise, ID 83724	<u> </u> Facsimile

Chief, Natural Resources Division	<u> X </u> U.S. Mail, Postage Prepaid
Office of Attorney General	<u> </u> Hand Delivered
PO Box 44449	<u> </u> Overnight Mail
Boise, ID 83711-4449	<u> </u> Facsimile

Randall C. Budge	<u> X </u> U.S. Mail, Postage Prepaid
Candice M. McHugh	<u> </u> Hand Delivered
Racine Olson Nye Budge & Bailey, Chtd.	<u> </u> Overnight Mail
P.O. Box 1391	<u> </u> Facsimile
Pocatello, ID 83204-1391	

Josephine Beeman	<u> X </u> U.S. Mail, Postage Prepaid
Beeman & Associates, P.C.	<u> </u> Hand Delivered
409 W. Jefferson Street	<u> </u> Overnight Mail
Boise, ID 83702	<u> </u> Facsimile



Alison Cameron

SWAN FALLS WATER RIGHTS SETTLEMENT

FEBRUARY 3, 1987.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 214]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 214) to direct the Federal Energy Regulatory Commission to issue an order with respect to docket numbered EL-85-38-000, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

S. 214 would require the Federal Energy Regulatory Commission to approve a settlement under Idaho law of water rights attached to hydroelectric projects owned by Idaho Power Company on the Snake River.

BACKGROUND

In the 1950's, Idaho Power Company received a license from the Federal Energy Regulatory Commission for its Hells Canyon Hydroelectric Project located on the Snake River. A critical element in the decision to award a license to Idaho Power, rather than to allow development of an alternative Federal hydroelectric project, was Idaho Power's agreement to a subordination clause stating that the project would be "operated in such a manner as would not conflict with the future depletion in the flow of the waters of the Snake River and its tributaries" In 1977, Idaho Power ratepayers, believing that the Hells Canyon subordination did not apply to other utility water rights on the Snake River, filed a complaint with the Idaho Public Utilities Commission (IPUC) charging that Idaho Power had failed to protect its rights to water for its

91-010

(1)

EXHIBIT A

hydroelectric project, and by doing so, had caused overcharges to its ratepayers.

The Idaho Supreme Court in 1982, ultimately ruled that the Hells Canyon subordination applied only as far up river as Idaho Power's Swan Falls Project. *Idaho Power Co. v. Idaho*, 104 Idaho 575, 661 P. 2d 741 (1982). In order to protect itself from liability to its ratepayers, Idaho Power subsequently filed suit against those water users upstream from the Swan Falls Project who it believes are infringing on its water rights, as well as against applicants for new upstream water licenses who would deplete the river further. This action has had the effect of paralyzing economic development requiring new water rights in much of southern Idaho.

In 1984, Idaho Power entered into an agreement with the State of Idaho which would settle the Swan Falls controversy. While the provisions are complex, the agreement would basically resolve the dispute by:

(1) Recognizing Idaho Power's right to certain minimum flows at the Swan Falls project (albeit at lower levels than the disputed water right it currently holds for the project).

(2) Recognizing the rights of existing lawful upstream diverters.

(3) Requiring new diversions to meet new specific public interest criteria, including a balancing of the economic benefit from the new diversion against the loss of hydropower generation.

(4) Making the agreement contingent upon: (a) the enactment of State legislation insulating Idaho power from any State regulatory sanctions proceeding from its relinquishment of water rights; and (b) requiring approval of the agreement by the Federal Energy Regulatory Commission (FERC).

Presently, all actions for implementation of the agreement have taken place except issuance of a FERC order approving the agreement. Issuance of such an order is necessary to protect Idaho Power against allegations that by entering into the agreement it has: (1) alienated property (i.e. the disputed water rights) which is part of its Snake River hydroelectric projects in violation of standard license conditions; and (2) reduced the usefulness of its capital investments for purposes of consideration in wholesale ratemaking.

In November 1984, Idaho Power requested a declaratory order from FERC that implementation of the agreement would assure a sufficient supply of water to the affected hydroelectric projects and would be in the public interest. The request for declaratory order (which contains the text of the Swan Falls agreement) is included as an appendix to this report.¹

In the same proceeding, Idaho Power has submitted proposed settlements with the Department of the Interior, the National Marine Fisheries Service, and the Idaho Natural Resources Legal Foundation, Inc. that resolve their concerns over the effect of the agreement on fish and wildlife water requirements. In effect, these settlements reserve the environmental issues raised by the Swan Falls agreement for disposition in future relicensing proceedings. No action has been taken on the request for a declaratory order or on the proposed settlements. The Idaho Wildlife Federation has filed a

¹ Exhibits to the Swan Falls agreement have been omitted, and are retained in Committee files.

late intervention in the proceeding opposing the Swan Falls agreement.

S. 214 provides that FERC "is only authorized and directed, in lieu of" Idaho Power's request for a declaratory order to issue within 90 days of enactment of the Act an order providing that during the remainder of the license terms for Idaho Power's affected hydroelectric projects; (1) the agreement shall not be considered inconsistent with the licenses for the projects; and (2) the agreement shall not be deemed imprudent for purposes of section 205 of the Federal Power Act.

LEGISLATIVE HISTORY

S. 214 was introduced by Senators McClure and Symms on January 6, 1987. Identical legislation, H.R. 519, was introduced in the House of Representatives by Congressmen Craig and Stallings on January 7, 1987.

At the end of the 99th Congress, Senators McClure and Symms introduced a bill, S. 2894, which was similar to S. 214. S. 2894 was referred to the Committee on Energy and Natural Resources, but the Committee did not take further action.

S. 214 is materially identical to an amendment passed by the 99th Congress as part of H.R. 5465, the "National Appliance Energy Conservation Act of 1986." Although President Reagan vetoed H.R. 5465, he indicated support for the Swan Falls amendment in his veto message.

Not 5465
3/10/87
P. 3.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Committee on Energy and Natural Resources, in open business session on January 28, 1987, by unanimous voice vote with a quorum present, recommended that the Senate pass S. 214 without amendment.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 2, 1987.

Hon. J. BENNETT JOHNSTON, Jr.,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 214, a bill to direct the Federal Energy Regulatory Commission to issue an order with respect to docket numbered EL-85-38-000, as ordered reported by the Senate Committee on Energy and Natural Resources, January 29, 1987. CBO expects that this bill would result in no cost to the federal government or to state or local governments.

The bill would order the Federal Energy Regulatory Commission to approve an agreement between the State of Idaho and the Idaho Power Company concerning water rights on the Snake River.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT EVALUATION

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 214.

EXECUTIVE COMMUNICATIONS

No formal views on S. 214 have been requested from the Administration. However, in his message vetoing H.R. 5465 at the end of the 99th Congress, the President indicated support for an amendment to that Act which was materially identical to S. 214.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill, S. 214, as reported.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

IDAHO POWER COMPANY

PROJECT NOS

18-000

503-001

1975-000

2055-000

2061-000

2726-001

2777-001

2778-001

PETITION FOR DECLARATORY ORDER

Idaho Power Company, "Licensee", hereby petitions the Federal Energy Regulatory Commission for a declaratory order as requested herein. In support of this petition Licensee states as follows:

I

The exact name, business address and telephone number of the Licensee are:

Idaho Power Company
1220 Idaho Street
P O Box 70
Boise, Idaho 83707
1-208-383-2678

The Commission is respectfully requested to send copies of all communications, orders, and correspondence on this petition directly to:

Paul L Jauregui
Vice President, Secretary and
General Counsel
1220 Idaho Street
P O Box 70
Boise, Idaho 83707

Lee S Sherline
 Leighton & Sherline
 Suite 101
 1010 Massachusetts Avenue N W
 Washington, D C 20001-5402

II

Licensee is the holder of licenses issued by the Commission for the following projects on the Snake River and its tributaries:

<u>Project Number</u>	<u>Name</u>
18-000*	Twin Falls
503-001	Swan Falls
1975-000	Bliss
2055-000	C J Strike
2061-000	Lower Salmon
2726-001	Upper and Lower Malad
2777-001	Upper Salmon
2778-001	Shoshone Falls

*Licensee has pending an application for a new license for Project No 18-000 (Twin Falls) and is presently operating that project under an annual license.

III

A controversy has developed concerning the definition of Licensee's water rights for the projects listed above. Two state court actions and a complaint before the Idaho Public Utilities Commission have resulted from the controversy. An agreement dated October 25, 1984, among the State of Idaho, by and through 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 Licensee was executed, hereinafter referred to as the "Agreement". The Agreement is attached hereto as Exhibit A and by this reference made a part hereof. Licensee makes this petition pursuant to

Paragraph 13(B)(1) of the Agreement. The Agreement, if implemented in accordance with all of its terms and conditions, will define Licensee's water rights, resolve certain controversies now existing and assure a sufficient supply of water for the projects listed in Paragraph II hereof.

WHEREFORE, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, Petitioner requests a declaratory order that implementation of the Agreement, as provided therein, would assure a sufficient supply of water for Licensee's projects listed in Paragraph II hereof and that the Agreement, if it becomes effective pursuant to Paragraph 13 thereof, would be in the public interest.

DATED this ~~24th~~ day of September, 1984.

IDAHO POWER COMPANY

By James E Bruce
James E Bruce
Chairman of the Board
and Chief Executive Officer

CORPORATE SEAL

ATTEST:

By Paul L Jaurgeui
Paul L Jaurgeui
Vice-President, Secretary
and General Counsel

ACKNOWLEDGEMENT

STATE OF IDAHO)
) ss
County of Ada)

JAMES E BRUCE, being duly sworn, says that he is the Chairman of the Board and Chief Executive Officer of Idaho Power Company; that he has read the foregoing Petition for Declaratory Order and knows the contents thereof; and

that the allegations thereof are true and correct to the best of his knowledge, information and belief.

By James E. Bruce
James E. Bruce

SUBSCRIBED AND SWORN to before me this 26th day of November, 1984.

(NOTARIAL SEAL)

1st Louis L. Snyder
NOTARY PUBLIC
Residing at Boise, Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 1984, I mailed a true and correct copy of the foregoing Petition for Declaratory Order upon:

Honorable James A. McClure
United States Senate
Washington, D C 20510

Honorable Steve Symms
United States Senate
Washington, D C 20510

Honorable Larry Craig
U S House of Representatives
Washington, D C 20510

Honorable George Hansen
U S House of Representatives
Washington, D C 20510

Honorable John V. Evans
Governor of the State of Idaho
Statehouse
Boise, ID 83707

Jim Jones (2)
Attorney General
Statehouse
Boise, ID 83720

David J. Barber, Deputy Attorney General
Idaho Department of Water Resources
450 West State Street
Boise, ID 83720

Clive Strong - 12th
Deputy Attorney General
Statehouse
Boise, ID 83720

Steven V. Goddard
Deputy Attorney General
Idaho Department of Fish and Game
600 South Walnut
P O Box 25
Boise, ID 83707

Michael Gilmore
Deputy Attorney General
Idaho Public Utilities Commission
Statehouse
Boise, ID 83720

Chairman
Idaho Water Resources Board
Statehouse
Boise, ID 83720

Director
Idaho Department of Water Resources
450 West State Street
Boise, ID 83720

Director
Idaho Department of Lands
Statehouse
Boise, ID 83720

Director
Idaho Fish and Game Department
600 South Walnut Street
P O Box 25
Boise, ID 83707

Director
Idaho Department of Parks
and Recreation
Statehouse
Boise, ID 83720

Chief
Bureau of Water Quality
Idaho Department of Health & Welfare
500 North Curtis
Boise, ID 83704

State Historic Preservation Officer
Idaho Historical Society
610 North Julia Davis Drive
Boise, ID 83706

Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83720

Oregon Public Utility Commissioner
200 Public Service Building
Salem, OR 97310

Nevada Public Service Commission
505 East King Street
Carson City, Nevada 89701

Wyoming Public Service Commission
Supreme Court Building
Cheyenne, Wyoming 82001

U S Department of the Army
North Pacific Division
Corps of Engineers
P O Box 2870
Portland, OR 97208

Chief
Engineering Division
Department of the Army
Walla Walla District Corps of Engineers
Building 602, City-County Airport
Walla Walla, WA 99362

Federal Energy Regulatory Commission
Quenton Edson, Director
Office of Hydro Power Licensing
825 North Capitol
Washington, D C 20426

Regional Engineer
Federal Energy Regulatory Commission
333 Market Street, 6th Floor
San Francisco, CA 94105

Regional Administrator, Region X
Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101

Environmental Protection Agency
422 West Washington Street
Boise, ID 83702

Secretary of the Interior
Washington, D C 20240

Regional Director
Region 1
U S Fish and Wildlife Service
Lloyd Building, Suite 1692
500 NE Multnomah Street
Portland, OR 97232

Regional Director
U S Fish and Wildlife Service
4620 Overland Road
Boise, ID 83705

Office of Environmental Project
Review
Department of the Interior
Washington, D C 20240

Regional Environmental Officer
Department of the Interior
Suite 1692
500 NE Multnomah Street
Portland, OR 97232

Mr Bill Lloyd
Regional Director
Bureau of Reclamation
Box 043-550 West Fort Street
Boise, ID 83724

Regional Director
Upper Colorado Region
Bureau of Reclamation
P O Box 11568
Salt Lake City, UT 84111

National Parks Service
Room 990
915 Second Avenue
Seattle, WA 98174

State Director
Bureau of Land Management
230 Collins Road
Boise, ID 83702

National Marine Fisheries Service
7600 Sandpoint Way NE
BIN C15700
Seattle, WA 98115

Secretary of Agriculture
General Counsel
Department of Agriculture
Washington, D C 20250

Chief of the Forest Service
Department of Agriculture
P O Box 2417
Washington, D C 20013

Water Resources Coordinator
U S Coast Guard (G-WS/73)
Department of Transportation
Washington, D C 20590

Director, Division of Hydroelectric
Resource Development
Department of Energy
Federal Building, Room 7104
12th & Pennsylvania Avenue, NW
Washington, D C 20461

Bonneville Power Administration
Box 3621
Portland, OR 97208

Northwest Power Planning Council
Suite 200
700 S W Taylor Street
Portland, OR 97205

Northwest Power Planning Council
450 West State Street
Boise, ID 83720

Oregon Department of Fish and Wildlife
P O Box 3503
Portland, OR 97208

Washington Department of Fisheries
Room 115, General Administration Building
Olympia, WA 98504

Washington Department of Game
600 North Capitol Way
Olympia, WA 98504

Mr Gordon High Eagle
Nez Perce Tribal Executive Committee
P O Box 305
Lapwai, ID 83540

Mr Robert C Strom
Nez Perce Tribal Executive Committee
P O Box 305
Lapwai, ID 83540

Chairman
Shoshone Bannock Tribal Council
P O Box 306
Fort Hall, ID 83203

Chairman
Yakima Tribal Council
P O Box 151
Toppenish, WA 98948

Board of County Commissioners:
Twin Falls County
Twin Falls, ID 83301

Board of County Commissioners
Jerome County
Jerome, ID 83338

Board of County Commissioners:
Gooding County
Gooding, ID 83330

Board of County Commissioners:
Elmore County
Mountain Home, ID 83647

Board of County Commissioners:
Owyhee County
Murphy, ID 83650

Board of County Commissioners
Ada County
650 Main Street
Boise, ID 83702

Nicolas R Ysursa

Nicolas R Ysursa
Attorney for Idaho Power Company
Idaho Power Company
1220 Idaho Street
P O Box 70
Boise, Idaho 83707

EXHIBIT A

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

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. *to provide notice of the agreement as to certain agreements*
- G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 6 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), 02-2066 (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)(1);
 - 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.

8. 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.

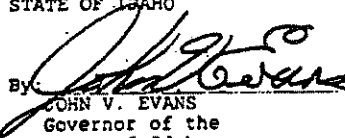
21. Multiple Originals

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

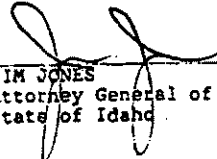
IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

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:


 Paula Jauregui
 Secretary of Idaho Power

CERTIFICATE OF SECRETARY

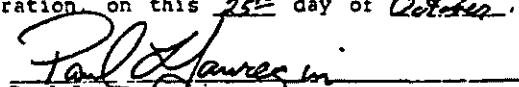
Paul L. Jauregui, as secretary of Idaho Power Company,
 a Maine Corporation, hereby certifies as follows:

(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.




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.

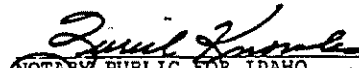
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.


 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

○

SWAN FALLS AGREEMENT

NOVEMBER 4, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DINGELL, from the Committee on Energy and Commerce,
submitted the following

REPORT

[To accompany H.R. 519]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 519) to direct the Federal Energy Regulatory Commission to issue an order with respect to Docket No. EL-85-38-000, having considered the same, report favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. FERC ORDER.

(a) ISSUANCE OF ORDER.—Notwithstanding the petition filed by the Idaho Power Company on November 26, 1984, with the Federal Energy Regulatory Commission for a declaratory order concerning an Agreement dated October 25, 1984 (Exhibit A, Petition of Idaho Power Company for Declaratory Order, FERC Docket No. EL-85-38-000), relative to the projects of such company specifically referenced in the petition, the Federal Energy Regulatory Commission is authorized and directed, in lieu of the petition request, to issue an order under the Federal Power Act providing that such Agreement shall not be considered by the Commission, in any subsequent

19-006

EXHIBIT B

proceeding before the Commission during the remaining term of the licenses applicable to such projects, to be either—

- (1) inconsistent with the terms and conditions of such licenses concerning the retention of project property; or
- (2) imprudent for purposes of section 205 of the Federal Power Act.

The order, subject to the requirements of section 3(a)(2), shall be issued within 90 calendar days after enactment of this Act and shall take effect on the date provided in section 3.

(b) **CONSIDERATION OF OTHER MATTERS.**—Notwithstanding the issuance of an order pursuant to this section, except for the specific terms and conditions referred to in subsection (a)(1) and the specific provisions of the Federal Power Act referred to in subsection (a)(2), the Commission may, at any time, consider, in accordance with existing and applicable law, whether the settlement agreement and the licensee are in full compliance with—

- (1) any terms and conditions of the license (including those relating to the protection, mitigation, and enhancement of fish and wildlife), and
- (2) any other applicable provision of Federal environmental law (including section 10 of the Federal Power Act).

(c) **OFFERS OF SETTLEMENT.**—In issuing an order pursuant to this section, the Commission shall accept and adopt as part of the order the Offers of Settlement pending before the Commission on enactment of this Act between the licensee, the State of Idaho, the Secretary of the Interior, the National Marine Fisheries Service and others.

SEC. 2. SAVINGS PROVISION.

(a) **FISH AND WILDLIFE AGREEMENTS AND STIPULATIONS.**—Nothing in section 1 or in any order issued by the Commission pursuant to section 1 shall be construed as affecting any stipulation or other agreement entered into by the State of Idaho or the Idaho Power Company prior to the date of enactment of this Act relating to any fish and wildlife matters affected by any such project.

(b) **FERC AUTHORITY.**—Nothing in section 1 shall be construed to modify, change, expand, or limit the authority of the Federal Energy Regulatory Commission under the Federal Power Act or other applicable law relating to fish and wildlife.

(c) **WATER.**—Nothing in this Act shall be construed as (1) affecting the rights of jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource; (2) altering or establishing the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right; or (3) altering, amending, repealing, interpreting, modifying, or be in conflict with, the Treaty rights or other rights of any Indian tribe.

SEC. 3 STUDY.

(a) **JOINT AGREEMENT TO CONDUCT STUDY.**—

(1) The Federal and licensee parties to the Offers of Settlement and the settlement agreement referred to in section 1 shall immediately after enactment of this Act enter into good faith negotiations for a joint agreement to conduct and adequately finance detailed evaluations and studies (and issue a report thereon) concerning the timing, quantity and quality of instream flows and related matters to protect, enhance, and mitigate fish and wildlife resources, including anadromous fish and related habitat of the Snake River and the Deer Flat National Wildlife Refuge. Such agreement shall be filed with the Federal Energy Regulatory Commission and shall be considered thereafter as part of the order issued pursuant to section 1. Such negotiations shall be completed and a joint agreement entered into by all such parties and filed with the Commission not later than 60 calendar days after the order is issued under section 1.

(2) If a joint agreement is not entered and filed within the 60-day period referred to in paragraph (1), the Commission shall within 60 calendar days after the expiration of such period issue an order under this paragraph requiring that the evaluations and studies referred to in paragraph (1) be undertaken and the duties and responsibilities of such parties to conduct and finance them. The Commission may for good cause extend the time for issuance of the order under this paragraph an additional period of not more than 45 calendar days. The Commission is issuing an order under this subsection, may take into consideration such information as the parties may stipulate and file with the Commission resulting from such negotiations. The Commission is not required, notwithstanding any provision of law, to afford the parties any other opportunity to make oral or written presentations to the Commission regarding such order. In any judicial review of the order issued under section 1, the order (or the adequa-

cy thereof) issued under this paragraph shall not be a basis for that review or for a stay of the effective date of the order issued under section 1.

(3) The order referred to in section 1 shall be effective and final when the joint agreement referred to in paragraph (1) is filed by all the parties with the Commission, or not later than 60 calendar days after such order is issued under section 1, whichever comes first. The order referred to in paragraph (2) shall be effective and final when issued. When effective, each order issued and joint agreement adopted shall be enforced by the Commission under the Federal Power Act and the licensee shall pay its assigned share at the times and in the manner directed by the Commission.

(4) The evaluations and studies and the report thereof required by this subsection shall be made available by the Federal parties to the public and the Commission and shall be considered by the Commission in accordance with existing and applicable law.

(5) Any final order issued pursuant to this Act shall be subject to judicial review in the same manner as final orders under the Federal Power Act are subject to judicial review under the Act.

(b) PARTICIPATION BY GOVERNOR.—At any time prior to the effective date of the order issued under section 1(a) of this Act, the Governor of the State of Idaho shall have the option to participate in good faith in the negotiations required by section 3 of this Act. In exercising such option, the Governor shall agree to carry out the State's responsibilities under the agreement or any order issued by the Commission under subsection (a).

(c) FUNDING FOR FEDERAL SHARE OF STUDIES.—The Secretary of the Interior and the National Oceanic and Atmospheric Administration shall, subject to applicable appropriation Acts, utilize such funds as may be available for carrying out the evaluations and studies required by this Act to be conducted by the parties referred to in subsection (a) and such agencies are authorized and directed to seek further appropriations as may be necessary. All such funds shall be available until expended. The Federal share of the costs of carrying out the evaluations and studies shall be determined pursuant to the joint agreement under subsection (a) (or the Commission order under subsection (a)(2), if applicable). The Federal agencies shall provide for consultation with the affected Indian tribes and other interested public or private persons during the conduct of any study conducted pursuant to this Act.

SEC. 4. PROVIDING INFORMATION TO CONGRESS.

The Federal Energy Regulatory Commission, the Secretary of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration shall keep the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate fully and currently informed of the status of all actions taken or required by this Act and of any delays (and the reasons therefor) in implementing all such actions.

PURPOSE AND SUMMARY

One purpose of the legislation is to resolve a petition filed three years ago in the Federal Energy Regulatory Commission (FERC) relative to a Settlement Agreement aimed at enhancing the resolution or adjudication of water rights on the Snake River in Idaho. The second purpose is to ensure that the Agreement, any order issued by FERC concerning the agreement, and subsequent adjudications and other actions will not be adverse to the needs of valuable fish and wildlife resources, including anadromous fish, and related habitat of the Snake River, including the Deer Flat National Wildlife Refuge.

The legislation would direct FERC to ignore a petition filed in November 1984 with the Commission for a declaratory order in regard to several projects on the Snake River in favor of a more limited order under the Federal Power Act relative to an October 25, 1984 Agreement. The order would protect the Idaho Power Company, a FERC licensee, during the remaining term of the firm's license in regard to project property and the issue of prudence under the Federal Power Act. Related Offers of Settlement

involving Federal fish and wildlife agencies will be a part of the FERC order.

In addition, the legislation calls for a jointly conducted and financed study of fish and wildlife resources of the Snake River and an ultimate report.

BACKGROUND AND NEED FOR THE LEGISLATION

The legislation results from a petition filed in November 26, 1984 by the Idaho Power Company with FERC for a declaratory order. The company is the licensee under the Federal Power Act for eight hydropower projects on the Snake River and its tributaries. The petition sought FERC recognition of a water rights settlement between the State of Idaho and the Company. The Settlement is referred to as the "Swan Falls Agreement" which, among other things, calls for a complete adjudication of the Snake River, including the Deer Flat National Wildlife Refuge. The petition requested that FERC find that implementation of the agreement "would assure a sufficient supply of water for the licensee's projects" listed therein and also that the Agreement, if it becomes effective, "would be in the public interest."

Subsequent to receiving the petition, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) both informed FERC of significant fish and wildlife concerns. The FWS was concerned that the proposed minimum flows could adversely affect the island segments of the Deer Flat National Wildlife Refuge and downstream fishery resources, including anadromous fish and white sturgeon. The NMFS was primarily concerned about the adverse effects on anadromous fish. After negotiations with the State and the Company, both agencies agreed to a joint offer of settlement that was intended to allow FERC approval of the petition and the Swan Falls Agreement.

Despite this apparent environmental settlement, FERC was slow to act on the petition. Thus, late in the 99th Congress, at the urging of Congressman Richard Stallings and Senator James A. McClure, the Committee agreed to limited legislation as part of the Appliance bill, H.R. 5465, in the 99th Congress. In doing so, both Houses agreed that the Company's petition was far too broad and granted authority for a more limited FERC order. In doing so, there was an exchange of letters in the Congressional Record for October 15, 1986 (p. H10909). In a letter to the then Chairman of the Senate Committee on Energy and Natural Resources, Chairman John D. Dingell said:

I understand that in connection with H.R. 5465, the House-passed appliance legislation, Congressman Stallings and you have suggested a germane Senate amendment seeking to settle, on a one-time basis, a petition pending at the Federal Energy Regulatory Commission (FERC) since 1984 concerning several licensed projects in Idaho. As I understand the proposal, it is unique and not precedent setting. It relates to an agreement that enjoys broad support in the state and will not affect any existing or future actions relative to fish and wildlife resources of the area. Most importantly, it does not affect the application or re-

quirements of section 10 of the Federal Power Act, including existing section 10(a) and the new section 10(j).

The proposal, as worked out with participation of our Committee staff, appears workable, limited, and acceptable. Most importantly, it is not a precedent for similar amendments in the future which is clearly a concern we both share. For these reasons, I can accept it and support it when the bill is returned to the House. I know that Subcommittee Chairman Markey, who also participated in the development of the proposal, shares my view.

I commend you and Congressman Stallings for your joint efforts in working it out and helping to gain passage of the House bill.

In his reply, Chairman McClure said:

With respect to the current agreement on the Idaho projects, I agree that the circumstances are so unique that they cannot be considered a precedent for future congressional action.

Just prior to a pocket veto on November 1, 1986 of the Appliance legislation containing the so-called "Swan Falls" provision, FERC Chairman Martha O. Hesse wrote the Committee on October 30, 1986, that she was committed to "request that the Commission, within ninety days of passage of H.R. 5465 by the Congress, issue an order in Docket No. EL85-38-000 relating to the petition for declaratory order filed by the Idaho Power Company." To this day, FERC had not met that commitment.

At the beginning of the 100th Congress, H.R. 519 was introduced. It was identical to the version included in the vetoed bill. An identical bill, S. 214, was introduced in the Senate and was quickly passed as the Committee still assumed that the bill had no environmental opposition and that it was adequate substantively. However, the Committee soon learned from the Golden Eagle Audubon Society in Idaho that there were serious environmental concerns. In a February 9, 1987, letter to FERC, Chairman Dingell noted these concerns and requested information from FERC and the Federal fish and wildlife agencies:

As you know, H.R. 519 and S. 214 have been introduced in this Congress. These bills are identical to the provisions enacted in the last Congress, but vetoed by the President. As you also know, when that provision was adopted by the Congress, this Committee understood that *all* fish and wildlife interests were satisfied with the petition pending at the Commission and thus had no objection to the legislation. We understood that the stipulation would be a part of the order and would protect those interests, although not resolve the issues concerning water flows, etc., for fish and wildlife. However, only a few days ago, I received the enclosed letter and attachments from the Golden Eagle Audubon Society of the National Audubon Society. The letter and attachments indicate some opposition to the petition and to S. 214 and H.R. 519. That position apparently was adopted on January 5, 1987 or just prior to the intro-

duction of the bills. Thus, it appears that even the House and Senate sponsors were unaware of that opposition. It is not clear that the opposition is soundly based.

* * * * *

While I am very sympathetic to the need to resolve this petition in order to settle the underlying controversy and want to work closely with Congressman Stallings and Senators Symms and McClure to achieve that result if possible, I also want to be assured that this declaratory order adopted by the Commission (either under existing law or under the pending legislation) is sound environmentally and will not result in adverse consequences for the Federal refuge or fish and wildlife resources and that it will not result in any precedent (adverse or otherwise) relating to Federal refuges and their need for water. I reiterate my understanding that the adopted stipulations will be a part of the order and will preserve fish and wildlife interests. I know that Subcommittee Chairman Sharp, whose Subcommittee now has jurisdiction of this matter, and the former Subcommittee Chairman, Congressman Markey, share these views.

I, therefore, request that the Commission, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service promptly examine these matters and advise the Committee whether or not the allegations and concerns are real, whether the Commission, in approving the petition under existing law, can ensure that any adverse consequences will be prevented or adequately mitigated, whether legislation would be required, whether the petition should be approved at all, and whether or not the stipulations adequately protect fish and wildlife interests.

Shortly thereafter, the National Audubon Society, in a March 6, 1987 letter, raised concerns:

We are concerned that the proposed agreement relating to Swan Falls will result in a minimum flow which would have serious impacts on the Deer Flat National Wildlife Refuge. Earlier, we provided information concerning the possible impacts of the agreement on the refuge to your staff. It is critically important that provision must be made to ensure that fish and wildlife resources will not be adversely harmed by the agreement or by any action of Congress embracing the agreement. Your letter of February 9, 1987 to FERC Chairman Hesse is most welcome and the response you receive should provide at least some of the information needed to determine how best to protect fish and wildlife resources on the river.

We recently participated in a meeting with other conservation groups and representatives from the state of Idaho and Idaho Power Company. It was a productive exchange of ideas and information. While the meeting itself did not result in a resolution to the problem, representatives from the state and the company did agree to carefully consider

our concerns and, if possible, suggest a solution that may be acceptable from the conservation standpoint. We are waiting to hear their recommendation and we are hopeful that the response will be acceptable.

We strongly encourage you to continue your probe for additional information from FERC. We see no compelling reason to force this legislation through the Congress in a hasty manner. The possible impacts of the bill, as we still understand them, are too great to proceed without more knowledge and a better understanding of the capability of the federal agencies (FWS and NMFS) to protect the natural resources entrusted to them. Your action is both timely and welcome.

FERC, in a February 27, 1987 reply, said:

The Commission has not yet acted on the petition, because it needs additional information to resolve certain factual and legal issues. Legal issues raised in the EL85-38 proceeding include: (a) whether an environmental impact statement is needed; (b) whether there is a federal reserved water right for the downstream Deer Flat National Wildlife Refuge (Refuge); (c) whether the settlement comports with the Fish and Wildlife Program of the Northwest Power Planning Council; and (d) whether the settlement complies with Section 19(a)(1) of the Federal Power Act.

Then on April 15, 1987 FERC said:

Until staff has provided me with its recommendations on this matter, I do not know whether legislation is necessary to resolve the Swan Falls matter. Of course, I have no objection if the Congress wishes to enact a legislative solution to the matter.

Thereafter, Chairman Dingell explained that merely expressing "no objection" was not helpful to the Committee in light of the concerns expressed by the environmental organizations. In a May 12 letter to FERC, the Chairman said:

Enclosed is a letter from the Director of the U.S. Fish and Wildlife Service who sees no "need for legislation to resolve this situation" (which might be interpreted as an "objection") and expresses certain understandings of the impact of a FERC adopted agreement, together with the Offer of Settlement. In an April 24, 1987 letter to Congressman Richard Stallings, the Idaho Wildlife Federation said:

"Our objections stem from our conviction that the Agreement establishes minimum flows at Swan Falls that are wholly inadequate to protect important Snake River fish and wildlife habitat. A particular concern is that by Congress ratifying the Agreement, the Bill would, by legal, political, and practical implications, weaken the position of the Federal Government, (notably the Fish and Wildlife Service) in the assertion and protection of federal reserve water rights for in-stream uses."

While I appreciate that you are unable at this time to provide any conclusion about the pending petition, it is appropriate and necessary that you provide, on behalf of FERC, an explanation of the effect of the legislation (to which you do not object) on your responsibilities for this and related projects under section 10(a) and on the matters raised by the Fish and Wildlife Service and the National Marine Fisheries Service insofar as the legislation is concerned. Clearly, it is my understanding of the intent of the sponsor of H.R. 519 and this Committee that the understandings of the two Federal fish and wildlife agencies will be fully fulfilled with enactment of the legislation and a subsequent FERC order. It is also my understanding that such legislation would *not* change FERC's responsibilities under section 10(a) concerning this or other projects. I am not, however, sure what, if any, impact such legislation and subsequent order would have on other projects or that you agree with these understandings.

On June 15, 1987, FERC provided an extensive reply which is included in this report under the heading "Agency Views," along with other exchanges of correspondence with the Committee. The reply clearly indicated that the understandings on which the legislation was originally based were not adequately addressed by the introduced bills. In a June 19 letter to the Federal fish and wildlife agencies, Chairman Dingell pointed out these earlier understandings and discussed the FERC response as follows:

Each of your agencies have responded to my inquiries concerning the so-called "Swan Falls" legislation by letters dated March 3 and May 26, 1987 from the National Oceanic and Atmospheric Administration (NOAA) and April 4, 1987 from the Fish and Wildlife Service.

In its letter, the Fish and Wildlife Service said:

It is my understanding that the IPC/Idaho agreement, in conjunction with the Offer of Settlement, would establish the minimum flow required for the Swan Falls project. If deemed necessary by the Commission, flows above this "floor" may be required for other purposes including the protection of fish and wildlife as well as to meet the needs of the Refuge. At this time insufficient information exists for the Service to accurately estimate the flows necessary to protect the Refuge. The Service's analysis of the possible effects of actually reaching the minimum flows contained in the IPC/Idaho agreement outlined in the Service's March 11, 1985, memorandum should be verified through an actual *in situ* study evaluating the effects of the proposed flows and determining the flows and water level needed to protect the integrity of the Refuge. Furthermore, studies are necessary to determine flows adequate to flush salmon and steelhead smolts downstream and protect white sturgeon.

It is my further understanding that the adoption of the entire package would not interfere with the Department proceeding with its attempts to quantify the reserved

water rights necessary to protect the Refuge. It is anticipated that the Department will assert its claims during ongoing negotiations with the State of Idaho. If these negotiations break down, the State is expected to file a general adjudication of all rights to the use of the surface waters of the Snake River Basin and Federal reserved water right claims will be resolved then.

In summary, the Service is not opposed to the Commission ordering the adoption of the IPC/Idaho agreement provided the Offer of Settlement, which has been signed by the Secretary of the Interior and representatives of the IPC and State, is also adopted.

In its March 3 letter, NOAA said:

After negotiations with the State of Idaho and IPC, NMFS agreed to a joint Offer of Settlement that would allow the Petition and the Swan Falls Agreement to be approved by FERC. The Settlement clarifies that neither the State nor IPC are requesting that the Swan Falls Agreement be accepted in satisfaction of Section 10(a) of the Federal Power Act, and states NMFS' view that the Agreement does not represent a comprehensive plan which fully takes into account the public interest in anadromous fisheries. It also provides that nothing in the agreement, or FERC's approval of it, will preclude compliance with existing fisheries flow regimes or limit the Commission's consideration of improved flow regimes and other fishery conditions for anadromous fish. This last provision is of critical importance to NMFS and to efforts to restore Snake River fisheries. The Northwest Power Planning Council recently adopted an interim goal of doubling current runs in keeping with the Pacific Northwest Electric Power Planning and Conservation Act. Achievement of this goal will undoubtedly require improved fish habitat conditions in the Snake River drainage.

Thus, as long as the Commission approves the Settlement, its approval of the Petition for Declaratory Order should have no effect on anadromous fishery resources below Hells Canyon Dam. Similarly, approval of the Petition should have no effect on the federally protected or reserved water rights that will be formally adjudicated for the Snake River. NMFS cannot comment on the effects of such approval on resident fish and wildlife resources above Hells Canyon which is the issue raised by the letters of the U.S. Fish and Wildlife Service and the Audubon Society that you reference.

Finally, we see no reason why legislation would be required for FERC approval of either the Petition or the Offer of Settlement. Current authority under the Federal Power Act appears adequate for this purpose.

The second NOAA letter was a little more equivocal.

As you know, I have been skeptical about the Settlement Agreement and its impact and the related "Offers of Settlement". Letters

from several environmental organizations expressing similar concerns have only added to my skepticism. I have been particularly concerned about your understandings relative to the agreement and to the pending legislation which the Idaho delegation believes quite important. Indeed, Congressman Stallings in the House has strongly urged its enactment. The Congressman and his colleagues in the Senate clearly believe that the legislation is needed. They all are unhappy with the slow pace at the Federal Energy Regulatory Commission (FERC).

Enclosed is a letter I have received from FERC's Chairman, Ms. Martha O. Hesse, in reply to my May 12, 1987 letter to FERC. Also enclosed is a copy of a NOAA filing of June 17 with FERC. Both documents seem to call into question your understandings.

Let me stress that I generally do not support specific project legislation and would prefer that such matters be resolved generally under the Federal Power Act, as amended. However, because of the long delay at FERC and because of the history of this legislation, I feel somewhat constrained to support H.R. 519 so long as I am fully satisfied that, with amendments, it does not adversely affect fish and wildlife interests.

I agree with FERC's interpretation of section 1 of the bill. It is intended solely to protect the power company during the remaining term of the license from possible challenges that "it had failed to protect its rights to water for its hydroelectric projects and by doing so, had caused overcharges to its ratepayers." I also agree that it is not intended as a ruling on the very broad petition of the power company for a declaratory order or as an "approval" of the settlement except for these very narrow purposes. I do not, however, agree that it is intended to "bar" FERC "from considering the consistency" of the agreement "with all aspects of the license terms and conditions," including those that "address various environmental matters, such as minimum flows." Indeed, the disclaimer in section 2 was intended by this Member (in the version included in the vetoed Appliance legislation of the 99th Congress) to preclude such an interpretation. However, I agree that a disclaimer does not have the same impact as a positive statement. Clearly, section I must be amended expressly to carry out that intention.

As to the "Offers of Settlement," FERC indicates, contrary to your letters, that the bill "provides for no specific disposition of these pending matters by the Commission." Indeed, FERC states that it would "dismiss" the offers.

Congressman Stallings (and I believe the Senate sponsors of the Senate version) and myself all expected a different interpretation from FERC. Now that our understanding apparently is not fully shared by FERC, it is clear that the bill must be amended to make the offers a part of the FERC order. However, even if that is done, I request your explanation of the effect of that action in light of the enclosed June 17 filing by NOAA. My view is that the FERC action in issuing an order should not result in the State, the power company, or others resolving the water issue to the detriment of fish and wildlife needs. The NOAA filing suggests that the Swan Falls Agreement "may well create water conditions that are worse than the most critical conditions previously experienced." Indeed, the NOAA filing flatly states on behalf of NMFS, "Idaho, and IPC

cannot prevent adverse impacts to anadromous fish resources." If that is true, what is the purpose of the Offers of Settlement? Clearly, that was not my understanding.

As to section 2 of the legislation, the conclusion stated in the next to last paragraph of page 3 of the FERC letter is consistent with my understanding of the section.

I request that your agencies explain in greater detail what actions you plan (and when) to ensure adequate water flows for fish and wildlife, including the refuge. The explanation should identify any study required for this purpose, indicate when any such study will be started, how long they will take, and how they will be financed.

In their replies, the U.S. Fish and Wildlife Service and NOAA made it clear that they could not support the bill without amendment to meet their concerns. They pointed out that the "resources of concern are the Deer Flat National Wildlife Refuge, and the anadromous and white sturgeon fish resources in the Snake River." They added that because the "extent of impact of the flows" on these fish and wildlife resources" is not known "at this time . . . additional studies are needed."

H.R. 519 as amended by the Committee addresses these concerns and, we believe, achieves the objectives of its sponsors and the House and Senate when the Appliance legislation was passed in the 99th Congress.

The Committee assumes, incidentally, that in light of past history, FERC will not act to dispose of the petition and the pending motions for intervention while this legislation is pending in the 100th Congress. The Committee does not fault FERC for its delay in acting on this petition and related matters, especially since October 1986, as the issues are quite complicated, including the issue of whether it is appropriate under the Federal Power Act for FERC jurisdictionally to act on the petition. Regional interest in the matter is great. Only recently, the Committee understands that the State of Washington and an Indian tribe have filed late motions to intervene. This bill, without resolving the issue of FERC's jurisdiction to consider the pending petition and related matters, seeks to resolve the controversy without establishing any precedents for the future.

During the course of the consideration of this bill, the Committee received great assistance and cooperation from the Idaho Congressional delegation, particularly Congressman Richard Stallings and Senator James McClure. Both Members provided strong bipartisan support for developing legislation that met the objectives of the State, the Idaho Power Company, and the interested environmental organizations.

The Committee is also grateful to the Governor of Idaho, the Attorney General of Idaho, the Idaho Power Company, the Federal fish and wildlife agencies, FERC, the National Audubon Society, Friends of the Earth, representatives of Indian Tribes, and others. All have been helpful in developing this legislation.

COMMITTEE CONSIDERATION

On October 6, 1987, the Committee met in open session and by voice vote, a quorum being present, voted to accept an amendment in the nature of a substitute, and ordered reported the bill H.R. 519, as amended.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(1)(3)(A) of Rule XI of the Rules of the House of Representatives, the Committee conducted oversight and made findings which are reflected in this report.

COMMITTEE ON GOVERNMENT OPERATIONS

Pursuant to clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of Rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will not have any impact on the Federal Energy Regulatory Commission beyond that required by existing law. The Federal fish and wildlife agencies should be able to fund their share of the study from existing funds.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

The Congressional Budget Office has not provided an estimate as of the date of this report.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee concludes that there is no inflationary impact of the reported bill.

SECTION-BY-SECTION ANALYSIS

H.R. 519 does not directly amend the Federal Power Act (FPA), but requires FERC to take certain actions under such Act.

Section 1.—FERC Order

Subsection (a) of section 1 of the bill provides that in lieu of acting on the petition filed by the Idaho Power Company, FERC has authority and statutory direction to issue a formal order, as if issued under FPA, providing that the 1984 Settlement Agreement "shall not be considered by the Commission" in any subsequent Commission proceeding during the balance of the applicable license term either to be (1) inconsistent with the terms and conditions of such licenses which relate to the retention by the licensee of project property, or (2) imprudent for purposes of section 205 of the FPA. The bill, subject to the provisions of section 3(a)(2), requires FERC to issue the order within 90 calendar days after enactment. It will take effect as provided in section 3. It is expected that in issuing the order, FERC will dismiss the petition.

The purpose of the order is to afford protection to the Idaho Power Company from a future challenge at FERC on the basis that the Company was allowing some of project property assets to be dissipated or to otherwise act imprudently in agreeing to the Settlement Agreement. As FERC notes in commenting on the companion bill, S. 214, the intent of the order is deemed necessary to protect against possible charges that the Company has "alienated property" which are an asset of the project.

In its letter of June 15, 1987, FERC, is discussing this section of the introduced bill, said:

On the other hand, this provision could be read to bar the Commission from considering whether the utilization of the eight projects in accordance with the settlement agreement is consistent with all of the license conditions, including those that address various environmental matters, such as minimum flows. If it is the intent of the legislation not to bar Commission consideration of the consistency of the settlement agreement with all aspects of the license terms and conditions, this intent could be further clarified by legislative history prior to enactment.

H.R. 519, as amended, specifically provides in subsection (b) of section 1 that such a bar is not intended, nor does it exist. Except for the narrow purpose discussed above, the bill and the order do not alter, limit, modify or expand FERC's authority to ensure that at all times the licensee and the Settlement Agreement are in full compliance with the license's terms and conditions, including, but not limited to, those relating to the protection, mitigation and enhancement of fish and wildlife and related habitat, and the applicable provisions of Federal environmental law which includes the revised section 10 of the FPA and the National Environmental Policy Act of 1969, and water pollution control legislation.

As already discussed, the Offer of Settlement by the Federal fish and wildlife agencies are considered to be a part of the Order. However, in its June 15 letter, FERC reached a different conclusion based on the word "only" in the introduced bill. FERC said:

The Senate Report acknowledges that pending before the Commission are: (1) offers of settlement between IPC and the State with the Department of the Interior, the National Marine Fisheries Service (NMFS), and the Idaho Natural Resources Legal Foundation, Inc. (INRLF) that resolve their concerns over the effect of the agreement on fish and wildlife water requirements; and (2) a late petition for intervention by the Idaho Wildlife Federation opposing the agreement. The language of the bills provides for no specific disposition of these pending matters by the Commission. While the point is not entirely clear, enactment would presumably mean the Commission would not rule on these matters, and would dismiss them, along with a pending petition for late intervention by Interior. This result is indicated by the section 1 use of language that the Commission is "only authorized and directed" and by

the explicit reference to only the first agreement between IPC and the State.

In subsection(a), the word "only" has been deleted. In subsection (c), the amended bill directs FERC, in issuing a section 1 order, to accept and adopt as part of the order the pending Offers of Settlement. They are to be enforced as part of that order. The Committee leaves to FERC the decision whether to act upon or dismiss the motions of intervenors.

Section 2.—Savings Provision

Subsection (a) is identical to the first sentence of section 2 of H.R. 519 as introduced. In commenting on this provision, FERC said:

Section 2, in its first sentence, provides that nothing in section 1 or any Commission order pursuant to section 1 shall be construed as affecting "any stipulation or other agreement entered into with" the State or IPC prior to the date of enactment relating to fish and wildlife matters affected by "any such project." Presumably this sentence is a savings provision for fish and wildlife stipulations and agreements for any of the eight projects. It would seem to apply to all the settlements described above. In addition, this language could be construed as permitting the Commission, in taking the action mandated by section 1, to take into account all of the environmental settlements. For example, the settlement offer between IPC, the State of Idaho, NMFS and INRLF provides that nothing in the settlement, which is the subject of the petition for declaratory order currently pending before the Commission, "shall operate to preclude or compel compliance with existing fisheries flow requirements nor to prevent, compel or limit FERC's consideration of flow regimes or fisheries conditions for projects in the Snake River." Offer of Settlement, filed July 31, 1985, p. 2. Further clarification of the intended impact of the first sentence of section 2 would be useful.

The Committee, in light of the provisions of section 1(c) of the amended bill, does not now believe that further clarification beyond that mentioned by FERC is necessary, except to concur in the following FERC discussion from its letter of June 15:

. . . the requirements of section 10 of the EPA, including section 10(a)(1), appear to apply to any and all Commission action regarding the eight projects except for the Commission action required by section 1. This construction of section 2 appears to be supported by the floor statements of Senators Johnston and McClure, which represent that S. 214 respects various environmental agreements' reservation of the environmental issues raised by the proposed settlement agreement for disposition in future relicensing proceedings and "does not affect in any way requirements that may be necessary as a result of the Electric Consumers Protection Act of 1986 when the dams in-

volved are subject to relicensing." 133 Cong. Rec. S2207 (February 19, 1987). Thus, to the extent this legislation addresses IPC's utilization of the eight projects to produce less power than that authorized by these projects' licenses, this legislation does not appear to insulate IPC from compliance with either section 10 or current license conditions, designed to address environmental concerns.

Subsection (b) is a disclaimer. It provides that provisions of section 1 of the amended bill are not intended to constrain, change, or expand FERC's authority under the FPA or other laws in regard to fish and wildlife.

Subsection (c) is also a standard disclaimer regarding water rights, including Indian water rights.

Section 3.—Study

This section is new. It stems from discussions with environmental organizations, Indian tribes, and the Federal fish and wildlife agencies, the State and the licensee. It has broad environmental support particularly. In its July 31 letter, the U.S. Fish and Wildlife Service said:

During the fall of 1985, when the Department's Offer of Settlement was negotiated, Company and Idaho officials assured the Service of their willingness and readiness to cooperate in the conduct of studies needed to determine the impacts of the flows proposed in the Agreement of fish and wildlife resources in the Snake River. Since the spring of 1986, the Service has on several occasions requested the cooperation of the Company and the State to conduct necessary *in situ* studies in the Snake River to assess the impact of various flows on the Snake River Islands segment of the Deer Flat National Wildlife Refuge. However, studies have not taken place. At this time, the Service is discussing with Idaho the nature and extent of the needed study. I anticipate that the State will authorize the conduct of the studies as outlined below in the near future. The sources of funding for these studies have not yet been identified.

This section provides an enforceable procedure for ensuring that these studies are initiated in a timely fashion and are jointly financed.

Subsection (a) directs that the two Federal fish and wildlife agencies and the licensee immediately after enactment enter into good faith negotiations for a joint agreement to conduct and finance detailed evaluations and studies concerning the timing, quantity, and quality of instream water flows and related matters to protect, enhance, and mitigate fish and wildlife resources, including anadromous fish and related habitat of the Snake River, and the Deer Flat National Wildlife Refuge. The Committee views these study provisions as essentially a condition precedent to our adopting this legislation after learning in this Congress about the considerable environmental concerns relative to the Settlement Agreement, the petition, and this legislation. The legislation does not attempt to

constrain the negotiators as to the scope of the area or matters to be evaluated and studies. The Committee's intent is that the scope be sufficiently broad to ensure that these valuable natural resources are protected, enhanced and, where appropriated, receive mitigation. When the joint agreement is reached, it becomes a part of the section 1 order.

The amended bill directs that the negotiations be completed and agreement reached within 60 calendar days after the section 1 order is issued by FERC. Assuming that the FERC order is not issued much before the allotted 90 day period in the bill, this would allow about 150 calendar days for negotiation. Hopefully, the negotiations will not take this long, as the issues are certainly not new to the parties as shown by the FWS letter. However, if the parties are unable to reach agreement after a good faith effort within this period, paragraph (2) of this subsection of the amended bill provides a procedure under which FERC will issue a binding order regarding the study. FERC will have 60 calendar days to do so, although this time may be extended by FERC for another 45 calendar days. If the Commission has to exercise this authority because of a failure of the parties to reach an agreement, FERC may, but is not required to, obtain written comments or hold hearings. Further, FERC, in order to facilitate its efforts, is authorized to consider any information provided by stipulation by the parties that result from their negotiations. FERC, however, is not limited to relying on only stipulated information, nor is FERC precluded from considering input from other public or private entities or persons. FERC should act on the best information available.

The Committee does not want to unduly delay the effectiveness of the section 1 order. Thus, this paragraph makes clear that in any judicial review of that order the FERC order under paragraph (2) shall not be a basis for reviewing the section 1 order or for staying its effectiveness.

Paragraph (3) of subsection (a) provides that the section 1 order shall be effective and final when the joint fish and wildlife study agreement is filed at FERC, or 60 calendar days after such order is issued, whichever comes first. The section 2 FERC order, if any, will be effective and final when issued. Each order and the joint agreement, when effective, must be enforced by EFRC using the applicable provisions of the FPA. For that purpose, it is intended that the joint agreement shall be treated as if it was an order under the FPA. The license will be obligated to pay its assigned share of the studies as directed by FERC.

Paragraph (4) of subsection (a) provides for public participation in the studies and the public availability of the report. It also directs that FERC consider the report in accordance with applicable law.

The State of Idaho is a party to the Settlement Agreement and would have been welcomed by the Committee as a party to the negotiations. However, in discussions with the State Attorney General's Office, that office was fearful that the Idaho legislature might not want to be bound through Congressional action by the joint agreement or FERC order. Thus, the State declined to be named as a party unless it could be free of that responsibility.

The legislation, however, gives the State an option to participate in good faith at any time prior to the effective date of the section 1 order. The earlier the better, of course, because it would not be helpful if the State entered at the last moment and tried to reopen matters already agreed to by the participants. Of course, the State's participation is conditioned on the Governor agreeing at the outset to be bound by the joint agreement or the FERC order.

Subsection (c) provides for the Federal funding of the studies. It directs the Federal fish and wildlife agencies, subject to congressional appropriations, to use available funds to finance their share of the studies and evaluations and to seek additional funding. The joint agreement or FERC order shall spell out the Federal share which the Committee expects will be reasonable. The costs of the studies and evaluations, or the studies and evaluations themselves, are not yet known, but the clear intent is that all parties participate financially in them. This is not to be financed primarily by the Federal agencies. Such participation can, of course, be in kind or money, or both.

The legislation directs that the Federal agencies periodically consult the affected Indian tribes and others in the conduct of the studies, including interested States, environmental groups, and others. Presumably, the agencies will consult during the negotiations as well.

Section 4.—Providing Information to Congress

This section directs FERC and the other Federal agencies to keep the Committee informed about the actions taken or planned under the bill to ensure full and timely implementation. If delays occur, the Committee wants to learn about them.

AGENCY VIEWS

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC, February 9, 1987.

HON. MARTHA O. HESSE,
Chairman, Federal Energy Regulatory Commission, Washington, DC.

HON. FRANK DUNKLE,
Director, U.S. Fish and Wildlife Service, Department of Interior, Washington, DC.

HON. ANTHONY J. CALIO,
Administrator, National Oceanic and Atmospheric Administration, Washington, DC.

DEAR MADAM CHAIRMAN HESSE, DIRECTOR DUNKLE, AND ADMINISTRATOR CALIO: On October 30, 1986, Chairman Hesse wrote advising our Committee that she was committed to "request that the Commission, Within ninety days of passage of H.R. 5465 by the Congress, issue an order in Docket No. EL85-38-000 relating to the petition for declaratory order filed by the Idaho Power Company."

More than ninety days have passed and to my knowledge that commitment has not been fulfilled. That is troublesome. I request that the Commission provide to the Committee a detailed chronology of the Commission's actions in this matter from the date of the

declaratory order until the congressional enactment of H.R. 5465 and a detailed explanation as to why the Commission did not act favorably or unfavorably on the petition. Please include the identity of any legal issues arising from this petition. Please also explain in detail (a) the effect of the order and related stipulations if it is adopted, including its effect on fish and wildlife interests, and (b) whether or not the Commission can modify the order in a manner that reasonably achieves (consistent with the policy and requirements of the amended Federal Power Act) for the remaining term of the license only those limited objectives that need to be achieved by the petitioner. I understand that all parties and intervenors, including the Federal and State fish and wildlife agencies, support a petition. Is that true?

When Congress considered H.R. 5465 in the 99th Congress and adopted the Swan Falls provision, this Committee believed that the requested relief by the petitioner was far too broad. It should not, in light of recent amendments to the Federal Power Act, apply or restrict the Commission or the fish and wildlife agencies in relicensing proceedings. Further, it was our clear intent that fish and wildlife will not be adversely affected. Obviously, I want to know whether or not the Commission will be able, absent special legislation such as H.R. 519, to meet these concerns adequately through the Commission's administrative proceedings.

As you know, H.R. 519 and S. 214 have been introduced in this Congress. These bills are identical to the provisions enacted in the last Congress, but vetoed by the President. As you also know, when that provision was adopted by the Congress, this Committee understood that all fish and wildlife interests were satisfied with the petition pending at the Commission and thus had no objection to the legislation. We understood that the stipulation would be a part of the order and would protect those interests, although not resolve the issues concerning water flows, etc., for fish and wildlife. However, only a few days ago, I received the enclosed letter and attachments from the Golden Eagle Audubon Society of the National Audubon Society. The letter and attachments indicate some opposition apparently was adopted on January 5, 1987 or just prior to the introduction of the bills. Thus, it appears that even the House and Senate sponsors were unaware of that opposition. It is not clear that the opposition is soundly based.

My concern is primarily with one of the letters included in the attachment. That September 7, 1985 letter from the U.S. Fish and Wildlife Service advises your agency that the minimum flows proposed under the declaratory order would appear to be inadequate to meet the needs of the Service in its administration of the Deer Flat National Wildlife Refuge in southwest Idaho. The enclosed chart entitled "Snake River NR Murphy Summary Hydrograph Avg. and Min. 1972-1983" which was given to our staff last week by representatives of the National Audubon Society and Friends of the Earth seem to confirm the Service's contention.

While I am very sympathetic to the need to resolve this petition in order to settle the underlying controversy and want to work closely with Congressman Stallings and Senators Symms and McClure to achieve that result if possible, I also want to be assured that this declaratory order adopted by the Commission (either

under existing law or under the pending legislation) is sound environmentally and will not result in adverse consequences for the Federal refuge or fish and wildlife resources and that it will not result in any precedent (adverse or otherwise) relating to Federal refuges and their need for water. I reiterate my understanding that the adopted stipulations will be a part of the order and will preserve fish and wildlife interests. I know that Subcommittee Chairman Sharp, whose Subcommittee now has jurisdiction of this matter, and the former Subcommittee Chairman, Congressman Markey, share these views.

I, therefore, request that the Commission, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service promptly examine these matters and advise the Committee whether or not the allegations and concerns are real, whether the Commission, in approving the petition under existing law, can ensure that any adverse consequences will be prevented or adequately mitigated, whether legislation would be required, whether the petition should be approved at all, and whether or not the stipulations adequately protect fish and wildlife interests.

I request your independent responses to the above matters not later than 30 days after receipt of this letter. Please provide a copy of your responses to Chairman Sharp and the House and Senate sponsors of the legislation.

I observe that the Subcommittee on Energy and Power will probably markup the bill (H.R. 519) this week.

With best wishes.

Sincerely,

JOHN D. DINGELL, *Chairman.*

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, February 27, 1987.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of February 9, 1987, in which you posed a number of questions concerning the petition for declaratory order filed with the Federal Energy Regulatory Commission, in Docket No. EL85-38-000, by the Idaho Power Company (IPC) and the State of Idaho (Idaho). The petition requests the Commission to find in the public interest, and thus approve, a settlement agreement between IPC and Idaho for the subordination of IPC's water rights at the Swan Falls Project on the Snake River. Enclosed is a chronology of events affecting this proceeding.

The Commission has not yet acted on the petition, because it needs additional information to resolve certain factual and legal issues. Legal issues raised in the EL85-38 proceeding include: (a) whether an environmental impact statement is needed; (b) whether there is a federal reserved water right for the downstream Deer Flat National Wildlife Refuge (Refuge); (c) whether the settlement comports with the Fish and Wildlife Program of the Northwest Power Planning Council; and (d) whether the settlement complies with Section 10(a)(1) of the Federal Power Act.

As I have previously stated, I place a high priority on the resolution of this matter. To assist staff in its review of this matter, the Director, Office of Hydropower Licensing, by letter dated January 30, 1987, requested Idaho and IPC to provide technical information relating to the agreement. By letter of January 30, 1987, the Director also requested the U.S. Department of the Interior (Interior) and National Marine Fisheries Service (NMFS) to provide clarification of their roles in the water right allocation process identified in the agreement. In addition, the National Wildlife Federation (NWF) was requested to provide data to support its assertions that the flow reduction would adversely affect various environmental resources. Idaho and IPC were requested to provide the information or a schedule for filing the information by March 16, 1987. Interior, NMFS, and NWF were requested to provide this information by March 2, 1987. Enclosed are copies of these letters.

You asked whether all parties and intervenors support the petition. Under the Commission's rules of practice and procedure, to be a party in a proceeding one must be the applicant or be granted intervention. 18 C.F.R. § 385.102(c) (1986). Parties to the proceeding are IPC, NMFS, and the Idaho Natural Resources Legal Foundation, Inc. The parties support the settlement agreement. Interior and the Idaho Wildlife Federation (IWF) have filed late motions to intervene, which the Commission has not yet acted on. Interior supports the settlement agreement; IWF opposes it. The Golden Eagle Audubon Society and the Idaho Consumer Affairs, Inc., neither of which is a party, have filed protests and letters in opposition, requesting (as does the IWF) that the Commission hold public hearings in Idaho before acting on the petition.

Thank you for your interest in this matter. If I can be of any further assistance on this or any other Commission matter, please let me know.

Sincerely,

MARTHA O. HESSE.

Enclosures.

CHRONOLOGY

November 22, 1982—Decision of Idaho Supreme Court that IPC's water rights at Swan Falls were not subordinated.

December 1, 1982—Governor requests FERC to include provision in license that would subordinate project water rights.

December 22, 1982—License issued with Article (#43) allowing Governor 90 days to submit specific recommendations and supporting information.

March 18, 1983—Governor requests subordination provision in Swan Falls license.

March 30, 1983—IPC opposes Governor's request.

April 12 and 21, 1983—IWF opposes Governor's request.

November 27, 1984—Petition for declaratory order filed with attached settlement agreement.

January 9, 1985—NMFS intervenes in opposition to settlement.

January 14, 1985—Letter in opposition to settlement (Mark Hilliard).

January 18, 1985—Golden Eagle Audubon Society resolution opposing settlement.

February 7, 1985—IWF resolution and letter in opposition to settlement.

April 1, 1985—Idaho Natural Resources Legal Foundation, Inc. intervenes in opposition to settlement.

July 18, 1985—Public notice of petition for declaratory order issued.

July 31, 1985—NMFS and INRLF offer of settlement and stipulations.

September 7, 1985—USFWS letter expresses concern that settlement could impact Deer Flat National Wildlife Refuge.

September 26, 1985—IWF letter stating additional environmental concerns.

December 3, 1985—Letter in opposition to settlement (Harold Miles).

December 16, 1985—Letter in opposition to settlement (Idaho Consumer Affairs, Inc.).

March 11, 1986—IWF intervenes in opposition to settlement.

March 17, 1986—Interior intervention, offer of settlement and stipulations.

October 30, 1986—H.R. 5465 passed.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Washington, DC, March 3, 1987.

HON. JOHN D. DINGELL,
Chairman, House Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. DINGELL: You have asked for the views of the National Marine Fisheries Service (NMFS) regarding the Petition for Declaratory Order filed with the Federal Energy Regulatory Commission (FERC) by the Idaho Power Company (IPC), Docket No. EL-85-38-000. NMFS has no objection to its approval provided there is concurrent approval of the Offer of Settlement between NMFS and IPC dated July 30, 1985.

The Petition was originally filed in 1984 and addressed eight hydroelectric projects in the Snake River drainage. It requested FERC recognition for a water rights settlement between the State of Idaho and the IPC, known as the Swan Falls Agreement. In 1985, NMFS filed a motion to intervene in the FERC proceedings to consider the Swan Falls Agreement because of the Agreement's potential adverse effects on anadromous fishery resources in the Snake River Basin below Hells Canyon Dam. As you know, these salmon and steelhead resources, and the fisheries that depend on them, have been severely reduced due to hydroelectric development and operation. NMFS was also concerned with Paragraph 11 of the Agreement, which stated that it would be presented to FERC as a "comprehensive plan" for the Snake River under Section 10 of the Federal Power Act.

After negotiations with the State of Idaho and IPC, NMFS agreed to a joint Offer of Settlement that would allow the Petition and the Swan Falls Agreement to be approved by FERC. The Settlement clarifies that neither the State nor IPC are requesting that the Swan Falls Agreement be accepted in satisfaction of Section 10(a) of the Federal Power Act, and states NMFS' view that the

Agreement does not represent a comprehensive plan which fully takes into account the public interest in anadromous fisheries. It also provides that nothing in the Agreement, or FERC's approval of it, will preclude compliance with existing fisheries flow regimes or limit the Commission's consideration of improved flow regimes and other fishery conditions for anadromous fish. This last provision is of critical importance to NMFS and to efforts to restore Snake River fisheries. The Northwest Power Planning Council recently adopted an interim goal of doubling current runs in keeping with the Pacific Northwest Electric Power Planning and Conservation Act. Achievement of this goal will undoubtedly require improved fish habitat conditions in the Snake River drainage.

Thus, as long as the Commission approves the Settlement, its approval of the Petition for Declaratory Order should have no effect on anadromous fishery resources below Hells Canyon Dam. Similarly, approval of the Petition should have no effect on the federally protected or reserved water rights that will be formally adjudicated for the Snake River. NMFS cannot comment on the effects of such approval on resident fish and wildlife resources above Hells Canyon, which is the issue raised by the letters of the U.S. Fish and Wildlife Service and the Audubon Society that you reference.

Finally, we see no reason why legislation would be required for FERC approval of either the Petition or the Offer of Settlement. Currently authority under the Federal Power Act appears adequate for this purpose.

Thank you for the opportunity to summarize our views on this important fisheries issue.

Sincerely,

ANTHONY J. CALIO.

U.S. DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE,
Washington, DC, April 14, 1987.

HON. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I have received your letter of February 9, 1987, requesting that I review matters concerning the petition for declaratory order filed by the Idaho Power Company (IPC) for the Swan Falls hydropower project. The power company is seeking approval of a settlement agreement between IPC and the State of Idaho concerning subordination of the IPC's water rights at the Swan Falls project for future upstream irrigation uses.

Over a year ago the Fish and Wildlife Service (Service) determined that the agreement between IPC and Idaho, standing alone, proposed flows which could be inadequate to protect fish and wildlife resources. The Service outlined its concerns in the September 7, 1985, letter which you reference. Specifically, these concerns are that the minimum flows of 5,600 cubic feet per second (cfs) from November to March and 3,900 cfs from April to October could adversely affect the island segment of the Deer Flat National Wildlife Refuge and could be inadequate for the protection of downstream fishery resources, including anadromous fish and white sturgeon, listed by the State of Idaho as a species of special concern.

In order to ensure the protection of the Refuge and other affected resources, appropriate Department of the Interior (Department) officials negotiated a March 13, 1986, Offer of Settlement (copy enclosed for your reference) with IPC and Idaho which would allow the IPC/Idaho agreement to be ordered by the Federal Energy Regulatory Commission (Commission) without our opposition provided the agreement would not be perceived as preventing the Department from requesting adequate flows later in the process. Section 3 of the Offer of Settlement was included to clarify the position that the Service reserves the right to request adequate minimum streamflows in the segment of the Deer Flat National Wildlife Refuge and to protect other fish and wildlife interests. It is the Service's position that the Commission's approval of the agreement and issuance of the declaratory order would not preclude the Commission from considering and ordering an alternative flow regime for the Snake River based upon the recommendations of the Service to provide for adequate minimum instream flows to protect the fishery resources of the river. However, it is not known whether the Commission agrees with this position or will require adequate minimum flows through its administrative process. The settlement agreement was presented before the Commission together with the Department's Motion to Intervene.

It is my understanding that the IPC/Idaho agreement, in conjunction with the Offer of Settlement, would establish the minimum flow required for the Swan Falls project. If deemed necessary by the Commission, flows above this "floor" may be required for other purposes including the protection of fish and wildlife as well as to meet the needs of the Refuge. At this time insufficient information exists for the Service to accurately estimate the flows necessary to protect the Refuge. The Service's analysis of the possible effects of actually reaching the minimum flows contained in the IPC/Idaho agreement outlined in the Service's March 11, 1985, memorandum should be verified through an actual *in situ* study evaluating the effects of the proposed flows and determining the flows and water level needed to protect the integrity of the Refuge. Furthermore, studies are necessary to determine flows adequate to flush salmon and steelhead smolts downstream and protect white sturgeon.

It is my further understanding that the adoption of the entire package would not interfere with the Department proceeding with its attempts to quantify the reserved water rights necessary to protect the Refuge. It is anticipated that the Department will assert its claims during ongoing negotiations with the State of Idaho. If these negotiations break down, the State is expected to file a general adjudication of all rights to the use of the surface waters of the Snake River Basin and Federal reserved water right claims will be resolved then.

In summary, the Service is not opposed to the Commission ordering the adoption of the IPC/Idaho agreement provided the Offer of Settlement, which has been signed by the Secretary of the Interior and representatives of the IPC and State, is also adopted.

Finally, I do not see the need for legislation to resolve this situation. The Commission's authority under the Federal Power Act to

approve the agreement and Offer of Settlement appears to be sufficient.

Thank you for the opportunity to provide this information. Please feel free to contact me should you have any questions.

Sincerely,

FRANK DUNKLE, *Director.*

Enclosures.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC, March 16, 1987.

HON. MARTHA O. HESSE,
Chairman, Federal Energy Regulatory Commission, Washington, DC.

DEAR MADAM CHAIRMAN: Thank you for your February 27, 1987 reply on my February 9 letter about H.R. 519 and a petition by the Idaho Power Company concerning the Swan Falls Project (No. EL85-38-000).

I appreciate your advising the Committee that the Federal Energy Regulatory Commission (FERC) "has not yet acted on the petition because it needs additional information to resolve certain factual and legal issues." What troubles me is that this matter has been pending at FERC since 1984 and last October you committed to "request" the Commission "within ninety days of passage of H.R. 5465 by the Congress" to issue an order in this case. I understand that to be a real commitment. As I understand the matter, that request was never made. Instead, on January 30 FERC sent letters to obtain additional information. I cannot imagine that FERC was unaware of this information gap on October 30, 1986 when you wrote to me, inasmuch as the President vetoed H.R. 5465 on November 1, 1986.

I do not object to your seeking new information. But I am troubled that FERC waited until January 30 to do so. I am also bothered that you gave Idaho Power an indefinite time to reply, while others had only 30 days.

I am equally bothered that your letter did not reply fully to all my requests for information, including the information requested in the last three sentences of the second paragraph of my letter. I request that information, together with a copy of the replies to your January 30 letters. Also, please explain in more detail these "legal issues" and the basis for them. Please provide any memoranda in FERC files about them.

I note that you did not write to the Idaho Department of Fish and Game which, according to some sources, is thought to be opposed to the petition and legislation, although you did write to the Governor. Please explain why you have not written to that agency.

Enclosed in a copy of a March 3, 1987 letter from the National Marine Fisheries Service which describes that agency's understanding of the settlement and the effect of the petition with the approval of FERC. Do you agree with the Service's understanding?

Also enclosed is a copy of a letter from the National Audubon Society.

Please also provide the Commission's view on the legislation.

I do not plan to schedule the legislation for full Committee consideration at least until all this information is received. I request your reply within 30 days.

With best wishes.

Sincerely,

JOHN D. DINGELL, *Chairman.*

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, April 15, 1987.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of March 16, 1987, in which you posed additional questions concerning the petition for a declaratory order filed with respect to the Swan Falls agreement by the Idaho Power Company (IPC) and the State of Idaho (Idaho), in Docket No. EL85-38-000.

I share your wish to resolve this matter as soon as possible. However, as illustrated by the correspondence to you from the Idaho Wildlife Federation (IWF) and the National Audubon Society (NAS) (attached to your letter), the settlement agreement pending before the Commission apparently has not satisfied everyone's concerns. Following my October 30, 1986 letter, I directed staff to carefully review the record in this proceeding in order to prepare a recommendation for the Commission on this matter. Staff review indicated that more information was needed before I could recommend any particular course of action to the Commission on this matter. Accordingly, the Commission staff sent letters to the appropriate entities requesting additional information.

The issues described in my February 27, 1987, letter to you, and of which you want a more detailed explanation, are those raised by IWF in its petition to intervene. First, IWF asserts that a grant of Idaho's and IPC's request to reduce instream flows below the Swan Falls hydroelectric project would constitute a major Federal action that would significantly affect the river, fish, riparian habitat, raptors, mammals, and other wildlife values in and adjacent to the river area, as well as the economic wellbeing of Idaho's citizens. As a consequence, IWF argues that the Commission must prepare an environmental impact statement to review the impacts of approving the agreement.

Second, IWF asserts that the Commission should not approve reduction of instream flows below that which is necessary to protect the Government's reserved right in unappropriated water for the purposes of the Deer Flat National Wildlife Refuge.

Third, IWF states that, in order for the Commission's action with respect to the settlement to be consistent with its responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act, the Commission must protect, mitigate, and enhance the wildlife at the Deer Flat Wildlife Refuge, other wildlife species, and the white sturgeon population below Swan Falls. IWF asserts that the minimum stream flows proposed by Idaho and IPC would damage rather than protect the habitat of the white sturgeon, and that a reduction of the stream flow below Swan Falls will signifi-

cantly and adversely affect wildlife in the Deer Flat Refuge during the critical nesting period.

Fourth, IWF states that the Commission's exercise of its comprehensive planning responsibilities under Section 10(a)(1) of the Federal Power Act requires it to consider the needs of the white sturgeon and of wildlife in the Deer Flat Wildlife Refuge. In conclusion, IWF requests an evidentiary hearing to develop a record to establish the public interest.

In order to meet the statutory responsibilities and standards applicable to its action on the Swan Falls settlement, the Commission must have an adequate evidentiary record before it. It was for this reason that the Commission staff requested additional information from the appropriate entities.

You express concern that the Commission staff's request for additional information gave IPC "an indefinite time" to reply, while others were given only 30 days. In fact, both IPC and Idaho were requested to respond, or to provide a schedule for responding, within 45 days from the date of staff's letter. The letters to the three other entities—Interior, NMFS, and IWF—requested a response within 30 days, because the information sought from those parties was significantly less than that sought from Idaho and IPC. As you requested, I enclose copies of the responses we have received to date. We have not as yet received a response from Interior, and Idaho and IPC have requested more time to respond.

You indicated that my February 27, 1987, letter to you did not respond to the request in your February 9, 1987, letter for (1) an explanation of the effect of granting the petition for declaratory order, and whether such grant could modify the petition to reasonably achieve only those limited objections that need to be achieved by the petitioners during the remaining license term; and (2) clarification of whether all intervenors support the petition. Regretably, until staff has an opportunity to review the additional information requested, I am not in a position to respond to the first request. For the same reason, I cannot express an opinion on NMFS' understanding of the settlement and the effect of the petition if approved. After the staff obtains more information and makes its recommendations, the Commission will be in a position to consider the matter. As to the second request, as my February 27 letter stated, IPC, NMFS, and the Idaho Natural Resources Legal Foundation, Inc. have party status and support the settlement; Interior and IWF have filed late motions to become parties; and Interior supports the settlement but IWF opposes it.

You asked why the staff wrote to the Governor of Idaho instead of the Idaho Department of Fish and Game (IDFG). It was the Governor who initially requested the Commission to subordinate IPC's water rights at the Swan Falls Project and who represents Idaho in the proceeding. IDFG has not participated in the proceeding. However, in an April 8, 1987, letter to me, the Director of IDFG stated that the Governor's position reflects that of IDFG.

Until staff has provided me with its recommendations on this matter, I do not know whether legislation is necessary to resolve the Swan Falls matter. Of course, I have no objection if the Congress wishes to enact a legislative solution to the matter.

In response to your request for any memoranda in FERC files relating to the legal issues raised in Docket No. EL85-38-000, I am

pleased to enclose these memoranda and related documents filed in the docket. The memoranda from Commission staff are internal documents whose confidentiality should be maintained in order to protect the integrity of the Commission's decisionmaking process.

Thank you for your interest in this matter. Your letter will be placed in the Commission's public files in association with Docket No. EL85-38-000. If I can be of further assistance in this or any other Commission matter, please let me know.

Sincerely,

MARTHA O. HESSE, *Chairman.*

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC, March 16, 1987.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter regarding the Swan Falls Agreement. In my previous letter to you (copy enclosed), I described the views of the National Marine Fisheries Service (NMFS). That letter further described actions that NMSF had taken leading to a settlement that we believed would clear the way toward rapid approval by the Federal Energy Regulatory Commission (FERC) of the Petition for Declaratory Order filed by the Idaho Power Company (IPC). The settlement was intended to defer potential conflicts over water flows for anadromous fish by preserving the status quo. It ensured that the Agreement could not be used to shield IPC from having to modify its operations for fishery purposes in the future. With this interpretation of the settlement, a Section 10(a) evaluation would be unnecessary. Similarly, we believe that an Environmental Impact Statement is unnecessary since, approval of both the settlement and the Agreement would have no substantive effects on the human environment.

After reading Chairman Hesse's letter to you, it appears that FERC considers the petition to be a major license modification. If that assumption is correct, then our settlement cannot be relied on to defer full evaluation of the fisheries issues. The Commission will have to take the Columbia River Basin Fish and Wildlife Program (Program) into account to the fullest extent practicable. One of the key provisions of the Program is a water budget which identifies river flows that are necessary for spring migrating salmonids in the Snake River. Thus far, these flow levels have not been met because of several problems, including the lack of participation by IPC. This issue would have to be resolved.

The Commission will also have to provide equitable treatment for fish and wildlife as specified in the Pacific Northwest Electric Power Planning and Conservation Act (PNEPPCA) and the Electric Consumers Protection Act (ECPA). Conformity with all pertinent provisions of the Program as well as the PNEPPCA and ECPA would require extensive deliberation and could greatly extend the time required for approval of the Petition.

Thank you for the opportunity to reaffirm and clarify our views.

Sincerely,

(For Anthony J. Calio).

Enclosure.

FEDERAL ENERGY REGULATORY COMMISSION,
Washington DC., June 15, 1987.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR CHAIRMAN DINGELL: Thank you for your letter of May 12, 1987. In that letter you request an explanation and discussion of our understanding of the impact of pending legislation, S. 214 and H.R. 519.

I appreciate the opportunity to comment on these bills. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

MARTHA O. HESSE.

Enclosure.

REPORT ON S. 214 AND H.R. 519: SWAN FALLS PROJECT NO. 503

Chairman Dingell, in his letter of May 12, 1987, requested an explanation and discussion of our understanding of the impact of pending legislation relating to the Swan Falls Project No. 503.

The pending legislation, S. 214 and H.R. 519, concerns a petition by Idaho Power Company (IPC) for a declaratory order and an attached settlement agreement (Swan Falls water rights settlement) between IPC and the State of Idaho relating to eight of IPC's licensed projects on the Snake River. The petition asks that the Commission determine that implementation of the settlement agreement on water rights between IPC and the State of Idaho (1) would assure a sufficient supply of water to the eight projects; and (2) would be in the public interest.

Section 1 of S. 214 and H.R. 519 provides that, notwithstanding IPC's petition for a declaratory order, the Commission is "only authorized and directed, in lieu of the petition request," to issue an order that such agreement "shall not be considered by the Commission," during the remaining terms of the licenses for the eight projects, to be (1) inconsistent with the terms and conditions of such licenses concerning project property or the utilization thereof; or (2) imprudent for purposes of section 205 of the FPA. The import of this language would seem to be that the subrogation of water rights specified by the settlement agreement would not be inconsistent with the utilization of the projects as provided for by the terms and conditions of the licenses. This language of section 1 would appear to dictate the action required of the Commission within 90 days of enactment.

The Commission's order would not rule on IPC's petition for declaratory order. Nor would the Commission's order actually "approve" the settlement. Statements in the present legislative history that would indicate "approval" would not seem to overcome the plain language of section 1. However, the overall, but unstated, effect of the order could be construed as "approval" for the narrow purposes of barring the Commission from considering the settlement agreement's consistency with the terms and conditions of the eight projects' licenses regarding the utilization of project property or the prudence of the settlement agreement under section 205 of

the Federal Power Act. The exact import of this language is not entirely clear. It appears that the legislation is designed to protect IPC from a challenge at the Commission based on the settlement agreement for not fully utilizing the power potential of these eight projects as authorized by IPC's licenses. This intent is reflected in the Senate's consideration of S. 214, where the settlement agreement was understood as necessary to "protect Idaho Power against allegations that it has: First, alienated property, that is, the disputed water rights—which is part of its hydroelectric projects in violation of standard license terms and conditions; and second, reduced the usefulness of its capital investments for purposes of consideration in wholesale ratemaking." Statement of Senator J. Bennett Johnston, 133 Cong. Rec. S2207 (February 19, 1987). Apparently, the settlement agreement was the result of litigation initiated by IPC to protect itself from challenges that it had failed to protect its rights to water for its hydroelectric projects and, by doing so, had caused overcharges to its ratepayers. S. Rep. No. 8, 100th Cong., 1st Sess. 1-2 (1987). On the other hand, this provision could be read to bar the Commission from considering whether the utilization of the eight projects in accordance with the settlement agreement is consistent with all of the license conditions, including those that address various environmental matters, such as minimum flows. If it is the intent of the legislation not to bar Commission consideration of the consistency of the settlement agreement with all aspects of the license terms and conditions, this intent could be further clarified by legislative history prior to enactment.

The Senate Report acknowledges that pending before the Commission are: (1) offers of settlement between IPC and the State with the Department of the Interior, the National Marine Fisheries Service (NMFS), and the Idaho Natural Resources Legal Foundation, Inc. (INRLF) that resolve their concerns over the effect of the agreement on fish and wildlife water requirements; and (2) a late petition for intervention by the Idaho Wildlife Federation opposing the agreement. The language of the bills provides for no specific disposition of these pending matters by the Commission. While the point is not entirely clear, enactment would presumably mean the Commission would not rule on these matters, and would dismiss them, along with a pending petition for late intervention by Interior. This result is indicated by the section 1 use of language that the Commission is "only authorized and directed" and by the explicit reference to only the first agreement between IPC and the State.

Section 2, in its first sentence, provides that nothing in section 1 or any Commission order pursuant to section 1 shall be construed as affecting "any stipulation or other agreement entered into with" the State or IPC prior to the date of enactment relating to fish and wildlife matters affected by "any such project." Presumably this sentence is a savings provision for fish and wildlife stipulations and agreements for any of the eight projects. It would seem to apply to all of the settlements described above. In addition, this language could be construed as permitting the Commission, in taking the action mandated by section 1, to take into account all of the environmental settlements. For example, the settlement offer between IPC, the State of Idaho, NMFS and INRLF provides that nothing in the settlement, which is the subject of the petition for declaratory

order currently pending before the Commission, "shall operate to preclude or compel compliance with existing fisheries flow requirements nor to prevent, compel or limit FERC's consideration of flow regimes or fisheries conditions for projects in the Snake River." Offer of Settlement, filed July 31, 1985, p. 2. Further clarification of the intended impact of the first sentence of section 2 would be useful.

The second sentence of section 2 provides that, except as expressly provided in section 1, nothing in such section shall affect the application or requirements of section 10 or other provision of the FPA to any person or project. The implication of this sentence seems to be that, except for the Commission action directed by section 1, section 10 and all other provisions of the FPA would remain fully applicable to the eight projects which are the subject of the settlement agreement.

Accordingly, and while there are some uncertainties as to the full congressional intent of section 2, the requirements of section 10 of the FPA, including section 10(a)(1), appear to apply to any and all Commission action regarding the eight projects except for the Commission action required by section 1. This construction of section 2 appears to be supported by the floor statements of Senators Johnston and McClure, which represent that S. 214 respects various environmental agreements' reservation of the environmental issues raised by the proposed settlement agreement for disposition in future relicensing proceedings and "does not affect in any way requirements that may be necessary as a result of the Electric Consumers Protection Act of 1986 when the dams involved are subject to relicensing." 133 Cong. Rec. S2207 (February 19, 1987). Thus, to the extent this legislation addresses IPC's utilization of the eight projects to produce less power than that authorized by these projects' licenses, this legislation does not appear to insulate IPC from compliance with either section 10 or current license conditions, designed to address environmental concerns.

Chairman Dingell also requests our view as to what, if any, impact the pending legislation and resulting order would have on projects other than the eight IPC projects referenced in the petition for a declaratory order. The purpose of this legislation appears to be to shelter IPC from a challenge that producing less power at these eight projects than is authorized by the projects' licenses, based on the settlement agreement, is either a violation of such licenses or imprudent under section 205 of the FPA. This question is project specific. As such, to the extent this legislation is designed to address this narrow issue, it is difficult to imagine how this legislation could impact any projects other than the eight projects referenced in the petition for a declaratory order.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC, June 29, 1987.

Hon. FRANK DUNKLE,
*Director, U.S. Fish and Wildlife Service,
Department of the Interior, Washington, DC.*

Hon. ANTHONY J. CALIO,
*Under Secretary, National Oceanic and Atmospheric Administration,
Department of Commerce, Washington, DC.*

DEAR MESSRS. DUNKLE AND CALIO: Each of your agencies have responded to my inquiries concerning the so-called "Swan Falls" legislation by letters dated March 3 and May 26, 1987 from the National Oceanic and Atmospheric Administration (NOAA) and April 4, 1987 from the Fish and Wildlife Service.

In its letter, the Fish and Wildlife Service said:

It is my understanding that the IPC/Idaho agreement, in conjunction with the Office of Settlement, would establish the minimum flow required for the Swan Falls project. If deemed necessary by the Commission, flows above this "floor" may be required for other purposes including the protection of fish and wildlife as well as to meet the needs of the Refuge. At this time insufficient information exists for the Service to accurately estimate the flows necessary to protect the Refuge. The Service's analysis of the possible effects of actually reaching the minimum flows contained in the IPC/Idaho agreement outlined in the Service's March 11, 1985, memorandum should be verified through an actual *in situ* study evaluating the effects of the proposed flows and determining the flows and water level needed to protect the integrity of the Refuge. Furthermore, studies are necessary to determine flows adequate to flush salmon and steelhead smolts downstream and protect white sturgeon.

It is my further understanding that the adoption of the entire package would not interfere with the Department proceeding with its attempts to quantify the reserved water rights necessary to protect the Refuge. It is anticipated that the Department will assert its claims during ongoing negotiations with the State of Idaho. If these negotiations break down, the State is expected to file a general adjudication of all rights to the use of the surface waters of the Snake River Basin and Federal reserved water right claims will be resolved then.

In summary, the Service is not opposed to the Commission ordering the adoption of the IPC/Idaho agreement provided the Offer of Settlement, which has been signed by the Secretary of the Interior and representatives of the IPC and State, is also adopted.

In its March 3 letter, NOAA said:

After negotiations with the State of Idaho and IPC, NMFS agreed to a joint Offer of Settlement that would allow the Petition and the Swan Falls Agreement to be ap-

proved by FERC. The Settlement clarifies that neither the State nor IPC are requesting that the Swan Falls Agreement be accepted in satisfaction of Section 10(a) of the Federal Power Act, and states NMFS' view that the Agreement does not represent a comprehensive plan which fully takes into account the public interest in anadromous fisheries. It also provides that nothing in the Agreement, or FERC's approval of it, will preclude compliance with existing fisheries flow regimes or limit the Commission's consideration of improved flow regimes and other fishery conditions for anadromous fish. This last provision is of critical importance to NMFS and to efforts to restore Snake River fisheries. The Northwest Power Planning Council recently adopted an interim goal of doubling current runs in keeping with the Pacific Northwest Electric Power Planning and Conservation Act. Achievement of this goal will undoubtedly require improved fish habitat conditions in the Snake River drainage.

Thus, as long as the Commission approves the Settlement, its approval of the Petition for Declaratory Order should have no effect on anadromous fishery resources below Hells Canyon Dam. Similarly, approval of the Petition should have no effect on the federally protected or reserved water rights that will be formally adjudicated for the Snake River. NMFS cannot comment on the effects of such approval on resident fish and wildlife resources above Hells Canyon, which is the issue raised by the letters of the U.S. Fish and Wildlife Service and the Audubon Society that you reference.

Finally, we see no reason why legislation would be required for FERC approval of either the Petition or the Offer of Settlement. Current authority under the Federal Power Act appears adequate for this purpose.

The second NOAA letter was a little more equivocal.

As you know, I have been skeptical about the Settlement Agreement and its impact and the related "Offers of Settlement". Letters from several environmental organizations expressing similar concerns have only added to my skepticism. I have been particularly concerned about your understandings relative to the agreement and to the pending legislation which the Idaho delegation believes quite important. Indeed, Congressman Stallings in the House has strongly urged its enactment. The Congressman and his colleagues in the Senate clearly believe that the legislation is needed. They all are unhappy with the slow pace at the Federal Energy Regulatory Commission (FERC).

Enclosed is a letter I have received from FERC's Chairman, Ms. Martha O. Hesse, in reply to my May 12, 1987 letter to FERC. Also enclosed is a copy of a NOAA filing of June 17 with FERC. Both documents seem to call into question your understandings.

Let me stress that I generally do not support specific project legislation and would prefer that such matters be resolved generally under the Federal Power Act, as amended. However, because of the long delay at FERC and because of the history of this legislation, I

feel somewhat constrained to support H.R. 519 so long as I am fully satisfied that, with amendments, it does not adversely affect fish and wildlife interests.

I agree with FERC's interpretation of section 1 of the bill. It is intended solely to protect the power company during the remaining term of the license from possible challenges that "it had failed to protect its rights to water for its hydroelectric projects and by doing so, had caused overcharges to its ratepayers." I also agree that it is not intended as a ruling on the very broad petition to the power company for a declaratory order or as an "approval" of the settlement except for these very narrow purposes. I do not, however, agree that it is intended to "bar" FERC "from considering the consistency" of the agreement "with all aspects of the license terms and conditions," including those that "address various environmental matters, such as minimum flows." Indeed the disclaimer in section 2 was intended by this Member (in the version included in the vetoed Appliance legislation of the 99th Congress) to preclude such an interpretation. However, I agree that a disclaimer does not have the same impact as a positive statement. Clearly, section 1 must be amended expressly to carry out that intention.

As to the "Offers of Settlement," FERC indicates, contrary to your letters, that the bill, "provides for no specific disposition of these pending matters by the Commission." Indeed, FERC states that it would "dismiss" the offers.

Congressman Stallings (and I believe the Senate sponsors of the Senate version) and myself all expected a different interpretation from FERC. Now that our understanding apparently is not fully shared by FERC, it is clear that the bill must be amended to make the offers a part of the FERC order. However, even if that is done, I request your explanation of the effect of that action in light of the enclosed June 17 filing by NOAA. My view is that the FERC action in issuing an order should not result in the State, the power company, or others resolving the water issue to the detriment of fish and wildlife needs. The NOAA filing suggest that the Swan Falls Agreement "man well create water conditions that are worse than the most critical conditions previously experienced." Indeed, the NOAA filing flatly states that the "offers of settlement submitted to the Commission on behalf of NMFS, Idaho, and IPC cannot prevent adverse impacts to anadromous fish resources." If that is true, what is the purpose of the Offers of Settlement? Clearly, that was not my understanding.

As to section 2 of the legislation, the conclusion stated in the next to last paragraph of page 3 of the FERC letter is consistent with my understanding of the section.

I request that your agencies explain in greater detail what actions you plan (and when) to ensure adequate water flows for fish and wildlife, including the refuge. The explanation should identify any study required for this purpose, indicate when any such study will be started, how long they will take, and how they will be financed.

I request your reply to the above matters within 30 days after receipt of this letter. Please do not be late, as the Committee wants to try to resolve this matter, if possible, before the August recess. Congressman Stallings informs me of Idaho's need for early resolu-

tion and I understand that the Idaho Senators have expressed a similar need. If you oppose the legislation, please explain why. Please do not repeat an earlier comment by NOAA that you "see no reason why legislation would be required for FERC approval" since existing law "appears adequate." Such a comment is really not helpful, particularly since action under existing law has *not* been forthcoming.

I am sending copies of this letter to Governor Andrus, the power company, and several environmental groups so they may comment within the same time frame.

With best wishes.

Sincerely,

JOHN D. DINGELL, *Chairman.*

U.S. DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE,
Washington, DC, July 31, 1987.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of June 29, 1987, concerning the proposed Swan Falls legislation (H.R. 519) directing the Federal Energy Regulatory Commission (Commission) to issue a declaratory order with respect to a petition filed by the Idaho Power Company (Company).

Since many of your questions are technical in nature, I referred them to the Assistant Director for Fish and Wildlife Enhancement. His response is enclosed. I trust this will satisfactorily answer your questions.

The Department of the Interior's (Department) Offer of Settlement was intended to allow the Commission to issue the requested declaratory order without Departmental opposition, provided the Swan Falls Agreement would not be used to preclude the Department from requesting an adequate instream flow regime to protect fish and wildlife resources, or asserting Federal reserved water rights, at a later time. The Offer of Settlement did not resolve the issue of adequate instream flows, but rather deferred the issue for later resolution. Furthermore, the Commission has approved neither the Offer of Settlement nor the Department's motion to intervene, thus the Offer of Settlement is of no force and effect.

As presently written and interpreted by the Commission, H.R. 519 precludes the Commission from addressing the instream flow issue. The Service can support this proposed legislation, as currently interpreted by the Commission, only if it is amended to clearly incorporate the Department's Offer of Settlement and to clarify the effect of the legislation on fish and wildlife resource issues in subsequent Commission proceedings involving these projects.

Thank you for your interest in this issue.

Sincerely,

FRANK DUNKLE, *Director.*

Enclosure.

U.S. DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE,
Washington, DC, July 31, 1987.

To: Director.

From: Assistant Director—Fish and Wildlife Enhancement.

Subject: Response of the Fish and Wildlife Service to June 29, 1987,
Letter from Chairman John Dingell Concerning the Proposed
Swan Falls Legislation (H.R. 519).

On June 29, 1987, John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives, wrote to you regarding H.R. 519, the proposed legislation directing the Federal Energy Regulatory Commission (Commission) to issue an order which, in essence, would approve the Swan Falls Agreement (Agreement) for certain purposes. The Idaho Power Company (Company) requested approval of the Agreement in a petition filed on November 26, 1984, which is pending before the Commission in Commission Docket No. EL-85-38-000. That Agreement would establish the Company's water rights for hydropower generation at eight projects located in the Snake River in Idaho.

In your letter of April 14, 1987, responding to a previous inquiry by Chairman Dingell concerning this matter, you informed him that the Fish and Wildlife Service (Service) is concerned that reducing the level of flows in the Snake River to minimum flows proposed in the Agreement may result in adverse impacts to important fish and wildlife resources. The resources of concern are the Deer Flat National Wildlife Refuge, and the anadromous and white sturgeon fish resources in the Snake River. The extent of impact of the flows proposed in the Agreement on these fish and wildlife resources is not known at this time; thus, additional studies are needed. Furthermore, the Agreement would lead to new water rights, new water project construction and new hydropower project construction that would have a direct effect on fish and wildlife resources. Public disclosure of the cumulative impacts (both direct and indirect) of an action by the Commission to concur with the Agreement should occur pursuant to the National Environmental Policy Act. The Agreement would foreclose any existing hydropower potential at each of the projects presently operating on the Snake River. This loss of potential production at existing projects would speed depletion of the existing energy surplus in the northwest and lead to the licensing and construction of new projects to make up the difference.

In his letter of June 29, 1987, Chairman Dingell requested, among other things, the following information:

1. An explanation of the purpose of the Offer of Settlement among the Department of the Interior (Department), the Company and the State of Idaho (Idaho) signed on March 13, 1986; as well as the Offer of Settlement among the National Marine Fisheries Service (Marine Fisheries), the Company and Idaho, signed on July 30, 1985; in light of the June 17, 1987, filing of the Marine Fisheries stating that "the Offer of Settlement cannot prevent adverse impacts to anadromous fish resources;"

2. An explanation of the effect of amending H.R. 519 so as to require the Commission to approve the Offer of Settlement identified above;

3. An explanation of actions planned to ensure adequate water flows for fish and wildlife resources, including the Deer Flat National Wildlife Refuge; and

4. An identification of any studies required under (3) above, and an explanation of when the studies will begin, how long they will take, and how they will be financed.

The following discussion addresses Chairman Dingell's concerns.

1. Purpose of the Offer of Settlement

The Marine Fisheries and the Department negotiated separate Offers of Settlement with the Company and Idaho which were signed by the parties on July 30, 1985, and March 13, 1986, respectively.

The Department's Offer of Settlement, Motion for Late Intervention, Motion to Intervene, and Stipulation are pending before the Commission in the Commission Docket No. EL-85-38-000. The Commission has not ruled on these motions or approved the Department's Offer of Settlement. Without Commission approval, the Offer of Settlement is of no force and effect.

The Department's Offer of Settlement was intended to allow the Commission to issue the requested declaratory order without Departmental opposition, provided the Agreement would not be used to preclude the Department from requesting an adequate instream flow regime to protect fish and wildlife resources or asserting Federal reserved water rights at a later time. Incumbent in this action is the need for the Service to collect adequate data to determine the appropriate flows for protection of fish and wildlife. Thus, as stated by the Marine Fisheries in its June 17, 1987, filing with the Commission, the Department's Offer of Settlement did not resolve the issue of adequate instream flows, but rather deferred the issue for later resolution. Unfortunately, as discussed below, H.R. 519 as presently written may preclude the Commission from ever reaching this important issue.

2. H.R. 519

The importance of H.R. 519 as presently written is not clear. For example, I am concerned about how H.R. 519 would affect the responsibility of the Commission, the Secretary of the Interior, and Federal and State fish and wildlife agencies under the Federal Power Act and other Federal statutes during the remaining terms of existing licenses or in subsequent Commission proceedings. The Commission may interpret H.R. 519, as presently written, as authorizing it to ignore fish and wildlife issues. As Chairman Dingell noted, section 1 of the bill seems to be intended to protect the Company during the remaining terms of the pertinent licenses from possible challenges by ratepayers that the Company failed to protect its rights to water for eight hydroelectric projects. However, as the Commission states in its June 15, 1987, letter to Chairman Dingell, section 1 could be construed as barring the Commission "from considering whether the utilization of the eight affected projects in accordance with the settlement agreement is consistent with all li-

cense conditions, including those that address environmental matters, such as minimum flows." Thus, under this interpretation, the Agreement could be viewed as superseding existing Federal laws designed to protect fish and wildlife resources despite the "savings provision" of section 2. Therefore, the Service should oppose such legislation. If the legislation is pursued, I agree with Chairman Dingell that H.R. 519 must be amended to order the Commission to approve the Department's Offer of Settlement and to clarify the effect of the legislation on fish and wildlife resource issues in subsequent Commission proceedings involving these projects.

3. Action Planned to Ensure Adequate Flows

During the fall of 1985, when the Department's Offer of Settlement was negotiated, Company and Idaho officials assured the Service of their willingness and readiness to cooperate in the conduct of studies needed to determine the impacts of the flows proposed in the Agreement on fish and wildlife resources in the Snake River. Since the spring of 1986, the Service has on several occasions requested the cooperation of the Company and the State to conduct necessary *in situ* studies in the Snake River to assess the impact of various flows on the Snake River Islands segment of the Deer Flat National Wildlife Refuge. However, studies have not taken place. At this time, the Service is discussing with Idaho the nature and extent of the needed studies. I anticipate that the State will authorize the conduct of the studies as outlined below in the near future. The sources of funding for these studies have not yet been identified.

4. Identified Study Needs

This has been and will continue to be a low-water year in Idaho. Winter snow pack was significantly below normal and flows in the Snake River will be significantly lower than normal. Minimal monitoring at this time could produce substantial information. As the instream flow drops to its annual minimum (lower this year than most), it would be very useful to conduct the following studies at the indicated costs:

- a. Measure water temperature at select sites in the reach between Twin Falls and Brownlee Reservoir using recording thermographs with 30-day capacity (\$4,000);
- b. Measure dissolved oxygen at the same select sites using recording equipment and specific point samples at sunrise (\$5,500); and
- c. Take aerial photographs at an elevation that would enclose 2 miles per frame at the projected seasonal low flow to examine the island integrity of the Deer Flat National Wildlife Refuge (\$19,000).

Additional in-depth studies are needed to address other aspects of lower Snake River flows such as effects of fish habitat quantity and quantity, effects on smolt outmigration flows, shape of the annual hydrography, etc. This information is needed to support the Department's water right claims in the Snake River and to make recommendations for appropriate fish and wildlife mitigation meas-

ures in subsequent Commission proceedings. These additional studies are briefly described in the following attachment.

RONALD E. LAMBERTSON.

Attachment.

Snake River flow study

<i>Work</i>	<i>Cost Estimates</i>
Scoping (hydrogeomorphologist)	\$12,000
Island Integrity and Fish Habitat:	
3-4 cross-sections/Aggregate; 3 Aggregates/site	
3-4 sites (27-30 cross-sections)	
First Field Session:	
50 days x 4 persons = 200 person days	133,750
Travel (about 100 miles/day)	2,500
Equipment:	
Boat	6,250
IFIM related equipment	6,250
Range Finders	6,250
Radios	1,250
Expenditures: Rebar and flagging	1,250
First Field Session Subtotal (depth, velocity, substrat, cover evaluation)	157,500
Second Field Session Subtotal (stage/discharge evaluation)	78,750
Third Field Session Subtotal (stage/discharge evaluation)	78,750
Aerial Photos:	
(3 flight correlated with field sessions)	
Modeling	
Interpretation/Analysis	
Aerial Photos Subtotal	31,250
Total	358,750

U.S. DEPARTMENT OF COMMERCE,
THE UNDER SECRETARY,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Washington, DC, August 31, 1987.

HON. JOHN D. DINGELL,
*Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN. This is in response to your letter regarding the Swan Falls legislation, H.R. 519, and the activities of the National Oceanic and Atmospheric Administration to ensure adequate water flows for anadromous fish in the Snake River. H.R. 519 would require the Federal Energy Regulatory Commission (FERC) to approve a settlement agreement (the Swan Falls Agreement) involving water rights attached to a hydroelectric project located on the Snake River.

The Department of Commerce (the Department) filed an Offer of Settlement (copy enclosed at Tab A) with FERC to clarify that the Swan Falls Agreement submitted by the Idaho Power Company (IPC) to FERC would not prevent the Department from raising or FERC from resolving the issue of the adequacy of instream flows for anadromous fishery resources in subsequent FERC proceedings involving Idaho Power projects on the Snake River. Additional information provided by the State of Idaho and the IPC subsequent

to our offer of Settlement confirm that this clarification is required.

As presently drafted, H.R. 519 could be interpreted to preclude FERC from addressing instream flow requirements for anadromous fishery resources in subsequent proceedings involving these projects. The bill should be amended to incorporate our Offer of Settlement and to clarify that neither the Swan Falls Agreement nor the bill can be interpreted to affect further consideration by FERC of instream flow requirements for anadromous fishery resources in subsequent proceedings or to be used by FERC as a basis for not increasing instream flows for anadromous fish. This clarification could be achieved, in part, by striking the phrase "Except as expressly provided in section 1," in section 2.

If the bill were amended consistent with our recommendations, we could support its enactment.

We are enclosing a background report (Tab B) and a report on the National Marine Fisheries Service activities to ensure adequate flows for anadromous fish in the Snake River (Tab C).

We have been advised by the Office of Management and Budget that there is no objection to submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

(For Anthony J. Calio).

Enclosures.

DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
OFFICE OF GENERAL COUNSEL, GCNW,
Seattle, WA, July 30, 1985.

Re Project Nos. 18-000, 503-001, 1975-000, 2055-000, 2061-000,
2726-001, 2777-001, 2778-001.

Hon. KENNETH PLUMB,
Secretary, Federal Energy Regulatory Commission, Washington, DC.

DEAR MR. PLUMB: Enclosed for filing in the referenced proceedings is an Offer of Settlement submitted on behalf of the Idaho Power Company, the State of Idaho, the National Marine Fisheries Service and the Idaho Natural Resources Legal Foundation.

Sincerely,

F. LORRAINE BODI,
Staff attorney.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In the matter of petition for declaratory order by Idaho Power
Company

Project Nos. 18-000, 503-001, 1975-000, 2055-000, 2061-000, 2726-
001, 2777-001, 2778-001

ORDER OF SETTLEMENT

I. INTRODUCTION AND EXPLANATORY STATEMENT

On November 26, 1984, the Idaho Power Company (IPCo.) filed a Petition for Declaratory Order with the Federal Energy Regulatory Commission regarding the definition of water rights for Projects No. 18-000, 503-001, 1975-000, 2055-000, 2061-000, 2726-001, 2777-001, 2778-001. IPCo. submitted an October 25, 1984, Agreement between the State of Idaho (Idaho) and IPCo. (the Agreement) and requested that the Commission issue a declaratory order that implementation of the Agreement would assure a sufficient supply of water for the referenced projects and be in the public interest.

On December 21, 1984, Idaho filed a motion to intervene in the proceeding which supported the IPCo's Petition for Declaratory Order.

The National Marine Fisheries Service (NMFS) and the Idaho Natural Resources Legal Foundation (INRLF) also filed motions to intervene in the proceeding, raising concerns over the effect of the Agreement on downstream flows for anadromous fishery resources.

This order of settlement represents a clarification of the IPCo's Petition for Declaratory Order agreeable to the parties. It is submitted in accordance with 18 C.F.R. § 385.602.

The record in this proceeding consists of the filings of the parties.

II. SETTLEMENT TERMS

The parties have agreed to the following clarification of the Petition for Declaratory Order filed in this proceeding.

(1) The Agreement is not being presented to the Commission in this proceeding as a comprehensive plan under Sec. 10(a) of the Federal Power Act, (16 U.S.C. § 803(a)) nor are the parties now requesting that FERC adopt the Agreement as a comprehensive plan under Sec. 10(a) of the Federal Power Act.

(2) NMFS and INRLF do not agree that the Agreement represents a comprehensive plan under Sec. 10(a) of the Federal Power Act which fully takes into account the public interest in anadromous fisheries.

(3) Nothing in the Agreement nor in FERC's approval of it in this proceeding shall operate to preclude or compel compliance with existing fisheries flow regimes nor to prevent, compel, or limit FERC's consideration or other flow regimes or fisheries conditions for projects in the Snake River Basin.

III. CONCLUSION

Wherefore, the parties respectfully request that the Commission approve this offer of settlement in accordance with 18 C.F.R. § 385.602.

Dated this 20th day of July, 1985.

Respectfully submitted,

FOR THE IDAHO POWER COMPANY:
PAUL L. JAUREQUI,
Vice-President, Secretary, and General Counsel.
FOR THE STATE OF IDAHO:
JIM JONES,
Attorney General, State of Idaho.
FOR THE NATIONAL MARINE
FISHERIES SERVICE:
F. LORRAINE BODI,
Staff attorney.
FOR THE IDAHO NATURAL
RESOURCES LEGAL
FOUNDATION:
EDWIN W. STOCKLY.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

In the matter of petition for declaratory order by Idaho Power
Company

Project Nos. 18-000, 503-001, 1975-000, 2055-000, 2061-000, 2726-
001, 2777-001, 2778-001

ORDER

1. The Federal Energy Regulatory Commission hereby approves the Offer of Settlement submitted in this proceeding.
2. The Commission's approval of the Offer of Settlement does not constitute approval of or precedent regarding any principle or issue in this proceeding.

Dated this — day of July, 1985.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

In the matter of petition for declaratory order by Idaho Power
Company

Project Nos. 18-000, 503-001, 1975-000, 2055-000, 2061-000, 2726-
001, 2777-001, 2778-001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by depositing in the U.S. mails, postage prepaid, a copy of the foregoing documents on all parties of record to these proceedings in accordance with the Rules of Practice and Procedure.

Dated this 30th day of July 1985, at Seattle, Washington,
 F. LORRAINE BODI,
*Staff Attorney, National Oceanic
 and Atmospheric Administration.*

BACKGROUND REPORT ON THE SWAN FALLS AGREEMENT

As a means of resolving litigation and ensuring water rights for several hydroelectric projects on the Snake River, Idaho Power Company (IPC) entered into an agreement with the State of Idaho (Idaho) on October 25, 1984 (Agreement). This Agreement would ensure a sufficient supply of water for the referenced projects, allow further depletion of flows in the Snake River resulting from upstream agricultural development, and increase from 3,300 cfs to 3,900 cfs the minimum streamflow at the Murphy gauge. IPC also requested that FERC issue a declaratory order that implementation of the agreement would be in the public interest, and would define water rights for the reference projects.

On January 9, 1987, the National Marine Fisheries Service (NMFS) filed an Offer of Settlement with the Federal Energy Regulatory Commission (FERC). This offer stipulated that the Agreement not be accepted in satisfaction of section 10(a) of the Federal Power Act or foreclose on future requests for fishery enhancement flows in the Snake River. At the time of this Offer of Settlement, information was not available that fully described potential conflicts between the Agreement and anadromous fisheries resources. New information has been presented by IPC and Idaho, and NMFS has submitted a Response to Finds that addresses this new information.

Idaho and IPC have evaluated the potential impacts of the Agreement on Snake River instream flows based upon the lowest minimum daily flow recorded in the last several decades (4,500 cfs). They stated that depletions allowed by the Agreement would result in decreases in flows of 600 cfs (4,500-3900).

Recently available information indicates that monthly average flows, which are much more likely to occur, are much higher than 4,500 cfs (10 year averages for May-September are: May-16,678; June-13,859; July-7,453; August-7,433; and September-9,103). Thus, the potential depletion and environmental impacts may be much greater than implied by Idaho and IPC. The Agreement could threaten the availability of water needed to ensure downstream passage of juvenile anadromous fish.

NATIONAL MARINE FISHERIES SERVICE ACTIVITIES TO ENSURE ADEQUATE FLOWS FOR ANADROMOUS FISH IN THE SNAKE RIVER

The National Marine Fisheries Service (NMFS) has several activities underway to ensure adequate flows for anadromous fish resources in the Snake River.

First, NMFS has been working with the multi-agency Fish Passage Center and the Northwest Power Planning Council (the Council) to monitor the implementation of the Snake River Water Budget called for in the Council's Fish and Wildlife Program. This is an ongoing effort that has met with mixed results. Although the Water Budget for the Snake River consists of 1.2 million acre-feet

(in addition to base power flows), the maximum volume ever provided has been about 450,000 acre feet, or less than half. This is because of the need to obtain water releases from Snake River reservoirs operated by the Corps of Engineers, the Bureau of Reclamation, and the Idaho Power Company. To improve this situation, it would be helpful to have a detailed evaluation of uncontracted, available water in these reservoirs and commitments from the reservoir operators for the necessary water releases to meet the water budget.

Second, NMFS has begun looking at the adequacy of the current water budget in conjunction with the Fish Passage Center, state and federal fishery agencies, and the Columbia Basin Indian tribes.

There are good indications that the current water budget cannot ensure adequate minimum flows (estimated to be 100,000 cfs) needed to augment measures implemented to reverse the decline of Snake River anadromous fish stocks, including increased hatchery production and supplementation of naturally spawning stocks and habitat improvements. In fact, the current Snake River Water Budget was reduced from levels recommended by NMFS and other fishery interests because of Council questions about water availability. As noted above, these questions can only be answered through a detailed evaluation of uncontracted, available water and corresponding commitments from reservoir operators for water releases.

Third, NMFS has been an active participant in hydroelectric proceedings in the Snake River to ensure equitable treatment of anadromous fish and their supporting habitat. NMFS has intervened in all Federal Energy Regulatory Commission (FERC) proceedings where anadromous fish could be at risk, including the proceedings requesting FERC approval of the Swan Falls Agreement. Our Offer of Settlement with Idaho and the Idaho Power Company in those proceedings (which is not effective until approved by FERC) was based on the premise that fish flows would not be adversely affected by the Agreement. Unfortunately, new information submitted to FERC by Idaho and the Idaho Power company indicates otherwise. As a result, the Offer of Settlement can serve little purpose.

NMFS now believes that there should be a thorough evaluation of potential depletion of anadromous fish flows from the Swan Falls Agreement and a determination of appropriate limits to ensure that flows necessary for fish are not depleted before the Agreement is approved. The evaluations we are suggesting are not underway or currently financed. Once initiated, they could likely be completed in less than a year, although negotiation of flow release commitments could take longer. NMFS would pledge its full cooperation to such an effort.