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MAR 26 2008

DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN (ISB # 5156)
Deputy Attorney General
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Deputy Attorney General
Natural Resources Division

700 West State Street, 2nd Floor
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Boise, ID 83711-4449
(208) 334-2400
Attorneys for The State of Idaho

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

In Re SRBA	)	Consolidated Subcase no. 92-23
	)	
Case No. 39576	)	AFFIDAVIT OF STEVEN L.
	)	OLSEN IN SUPPORT OF
	)	STATE OF IDAHO'S MOTION
	)	FOR PROTECTIVE ORDER
	)	

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

STEVEN L. OLSEN, being first duly sworn upon his oath, deposes and states
that:

1. I am a Deputy Attorney General and one of the attorneys of record for the

State of Idaho in this consolidated subcase.

2. The following is based upon my own personal knowledge.

3. Attached hereto as Exhibit 1 is a true and correct copy of "Idaho Power Company's First Set of Discovery Requests to State Defendants" in this matter, dated October 9, 2007.

4. Attached hereto as Exhibit 2 is a true and correct copy of the State's "Responses to Idaho Power Company's First Set of Discovery Requests" in this matter, dated November 13, 2007 (without attachments).

5. Attached hereto as Exhibit 3 is a true and correct copy of the State's "First Supplemental Response to Idaho Power Company's First Set of Discovery Requests" in this matter, dated December 17, 2007 (without attachments).

6. Attached hereto as Exhibit 4 is a true and correct copy of "Idaho Power Company's Second Set of Discovery Requests to State Defendants" in this matter, dated February 19, 2008.

7. Attached hereto as Exhibit 5 is a true and correct copy of the State's "Responses to Idaho Power Company's Second Set of Discovery Requests" in this matter, dated March 24, 2008 (without attachments).

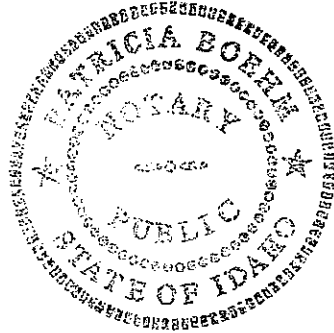
8. Counsel for the State and counsel for Idaho Power conferred by telephone on March 19, 2008 regarding several of the State's objections to Idaho Power's discovery requests but were unable to resolve them.

DATED this 24th day of March.



STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

SUBSCRIBED AND SWORN to before me this 24th day of March 2008.



Patricia Boehm

Notary Public for Idaho
Residing at: Boise ID
My commission expires: 11/6/09

CERTIFICATE OF SERVICE

I certify that on this 24th day of March, 2008, I caused to be served a true and correct copy of the foregoing AFFIDAVIT OF STEVEN L. OLSEN IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER, to the following parties by the indicated methods:

Clerk of the SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208-736-2121

Idaho Power Company
Represented by:
James C. Tucker
P.O. Box 70
1221 W. Idaho
Boise, ID 83707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

Idaho Power Company
Represented by:
James S. Lochhead
Adam T. DeVoe
Mark J. Mathews
Michael A. Gheleta
Michelle C. Kales
Brownstein Hyatt Farber Shreck
410 17th Street, Ste. 2200
Denver, CO 80202-4432

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- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 303-223-0904
- ☒ E-mail: MGheleta@BHFS.com

Idaho Power Company
Represented by
John K. Simpson
Shelley M. Davis
1010 W. Jefferson, Suite 102
Boise, ID 83701-2139

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83720-4449

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Not Applicable

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

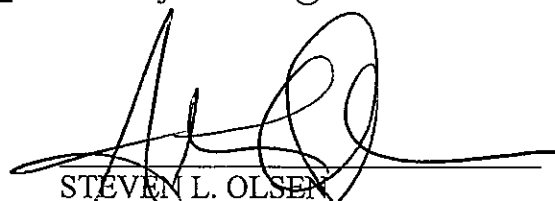
- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
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Candice M. McHugh
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STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

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DEPARTMENT OF
WATER RESOURCES

**EXHIBIT 1
TO
AFFIDAVIT OF STEVEN L. OLSEN
IN SUPPORT OF
STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER**

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TO
AFFIDAVIT OF STEVEN L. OLSEN
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OCT 15 2007

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Attorneys for Plaintiff 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

IDAHO POWER COMPANY,

Plaintiff,

v.

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

Defendants.

Consolidated Subcase No. 92-00023

IDAHO POWER COMPANY'S FIRST
SET OF DISCOVERY REQUESTS TO
STATE DEFENDANTS

Plaintiff Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, hereby submits its First Set of Discovery Requests to the State Defendants in this action, to be answered by all State Defendants in this action in accordance with the Idaho Rules of Civil Procedure.

Your responses to these Discovery Requests are due thirty (30) calendar days after service in accordance with the Idaho Rules of Civil Procedure, absent an agreed upon extension.

I. INSTRUCTIONS

1. The following definitions apply to each of these Discovery Requests:

a. **Communication.** The term "communication" means any contact between two or more persons, including but not limited to, (a) written contact by such means as electronic mail, letter, memoranda, telegrams, telex, or by any document, and (b) oral contact by means such as face-to-face meetings and telephone conversations.

b. **Complaint.** The term "Complaint" means Plaintiff's Complaint and Petition for Declaratory and Injunctive Relief in this matter.

c. **State Defendants.** The term "State Defendants" means the Defendants in this action, collectively and individually: the State of Idaho, C.L. "Butch" Otter, Lawrence G. Wasden, the Idaho Department of Water Resources ("IDWR"), and David Tuthill. In addition, Defendant State of Idaho encompasses all State agencies and officials, including IDWR and its Director David Tuthill.

d. **Document.** The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term in I.R.C.P. Rule 34(a), including, without limitation, electronic or computerized data compilations and other information stored in electronic form, which should be produced in the form of a CD or DVD disk. A draft or non-identical copy is a separate document within the meaning of this term.

e. **ESPA** means Idaho's "Eastern Snake Plain Aquifer."

f. **Identify (with respect to persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, present or last known telephone number, and when referring to a natural person, the person's present or last known place of employment and title. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requests requesting the identification of that person.

g. **Identify (with respect to documents).** When referring to documents, "to identify" means to give, to the extent known, the (i) type of document (e.g., letter, memorandum, email); (ii) the general subject matter; (iii) the date of the document; and (iv) the author(s), addressee(s) and recipient(s).

h. **IDWR** means the Idaho Department of Water Resources.

i. **Mediator's Term Sheet.** The term "Mediator's Term Sheet" means the document titled "Mediator's Term Sheet" dated April 20, 2004, and submitted on that date to the SRBA Court in SRBA Consolidated Subcase 03-10022 and SRBA Consolidated Subcase 67-13701, with all appendices to the document, which is referred to as the "Agreement" in Section 3(1) of Title X ("Snake River Water Rights Act of 2004"), 118 Stat. 3431.

j. **Person.** The term "person" is defined as any natural person or any business, legal or governmental entity or association.

k. **Relating to.** The term "relating to" means concerning, touching, referring or having reference to, or in any manner whatsoever, whether directly or indirectly.

l. **Swan Falls Daily Minimum Flows.** The term "Swan Falls Daily Minimum Flows" means average daily minimum stream flows in the Snake River of 3,900 c.f.s. in the summer (April 1 to October 31) and 5,600 c.f.s. in the winter (November 1 to March 31) measured at the Murphy Gage, as set forth in Paragraph 7(A) of the Swan Falls Agreement.

m. **Swan Falls Agreement.** The terms "Swan Falls Agreement" or "Agreement" mean the Agreement signed on October 25, 1984 by Idaho Power Company's Chairman of the Board and Chief Executive Officer James E. Bruce, Idaho Governor John V. Evans, and Idaho Attorney General Jim Jones.

n. **You/Yours.** The terms "you" and "yours" refer to the State Defendants, and anyone acting on their behalf, including, but not limited to, their employees, representatives, attorneys, investigators, and expert witnesses.

2. The following rules of construction apply to each of these Discovery Requests:

a. **All/Each.** The terms "all" and "each" shall be construed as all and each.

b. **And/Or.** The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Discovery Requests all responses that might otherwise be construed to be outside the scope of the Discovery Requests.

c. **Singular/Plural.** The use of the singular form of any word includes the plural and vice versa.

3. If you consider the content of any communication or document responsive to these Discovery Requests to be privileged or not otherwise subject to discovery in these proceedings, you are required to provide a complete privilege log for these communications or documents.

4. Each Discovery Request shall be answered fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the Discovery Request is not objectionable. If an objection is made, the reasons for that objection shall be stated with specificity.

5. Your answer to each Discovery Request must be as complete and straightforward as the information reasonably available to you permits. If a Discovery Request cannot be answered completely, answer to the greatest extent possible.

6. If you do not have enough personal knowledge to answer a Discovery Request, please state so specifically. You must make a reasonable and good faith effort to answer each Discovery Request by asking other persons who may have knowledge of the issue, unless the information is reasonably available to you.

7. With respect to Requests for Admission: If a denial is made, the answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify an answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.

8. With respect to Interrogatories: Each Interrogatory shall be answered fully in writing and under oath. The answers are to be signed and verified by the person making them, and the objections signed by the attorney making them.

9. With respect to Requests for Production: You are required to produce all documents in your possession, custody, or control. If you are unable to produce any document(s), state the reasons you are unable to produce the document(s) with as much specificity as possible. Please produce all documents for inspection either as they are kept in the usual course of business or organize and label them to correspond with the categories in the Requests for Production and related Requests for Admission.

10. These Discovery Requests are continuing and require supplemental responses up to the date of trial in accordance with I.R.C.P. 26(e). If any response is determined to be incomplete or incorrect, you have a continuing duty to supplement or change answers previously submitted.

II. REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit that if the quantity of water rights in a basin exceeds the physical supply of water available during all or portions of a year, that basin is considered "over appropriated."

REQUEST FOR ADMISSION NO. 2: Admit that the concept of "over appropriation" applies both to surface and interconnected ground water.

REQUEST FOR ADMISSION NO. 3: Admit that when a basin is "over appropriated," there is no unappropriated water available for new appropriation.

REQUEST FOR ADMISSION NO. 4: Admit that the water rights listed in Paragraph 22 of the Complaint are the only Idaho Power water rights which the State contends are subject to the Swan Falls Agreement, and that Idaho Power owns other water rights at other facilities, including hydropower projects, which are not subject to the terms of the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 5: Admit that the Swan Falls Agreement acknowledges and preserves Idaho Power's right and ability to purchase, lease, own, or otherwise acquire additional water for power purposes over and above the Swan Falls Daily Minimum Flows provided for in the Agreement.

REQUEST FOR ADMISSION NO. 6: Admit that additional water purchased, leased, owned, or otherwise acquired by Idaho Power for use below the Murphy Gage is not limited by or subject to the Swan Falls Agreement and must be administered and accounted for by the State of Idaho at the Murphy Gage in addition to the Swan Falls Daily Minimum Flows.

REQUEST FOR ADMISSION NO. 7: Admit that for 2006 and all years prior to 2006 during which the Bureau of Reclamation had a flow augmentation program, the State calculated the Swan Falls Daily Minimum Flows without taking into account additional water which was acquired by the Bureau of Reclamation and released into the Snake River as flow augmentation to aid migrating salmon pursuant to obligations under the Endangered Species Act.

REQUEST FOR ADMISSION NO. 8: Admit that the State's practice of including the Bureau of Reclamation flow augmentation water in the calculation of the Swan Falls Daily Minimum Flows in 2007 is a departure from its prior practice.

REQUEST FOR ADMISSION NO. 9: Admit that through the "Mediator's Term Sheet" agreement of the Snake River Water Rights Act of 2004, 118 Stat. 3431, the State agreed that the minimum flows established by the Swan Falls Agreement, designated in the "Mediator's Term Sheet" agreement as Tier 1 – Minimum Flow, shall be decreed in the SRBA to the Idaho Water Resource Board.

REQUEST FOR ADMISSION NO. 10: Admit that through the "Mediator's Term Sheet" agreement, the State, through IDWR, committed to regulate the Tier 1- Minimum Flow established by the "Mediator's Term Sheet" agreement in accordance with the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 11: Admit that the State as a party to the "Mediator's Term Sheet" agreement contemplated that the Tier 2 - Flow Augmentation instream flows would be in addition to the Tier 1 - Minimum Flow instream flows described in the "Mediator's Term Sheet" agreement.

REQUEST FOR ADMISSION NO. 12: Admit that the trustee of any trust established under the Swan Falls Agreement is the State of Idaho, acting by and through the Governor.

REQUEST FOR ADMISSION NO. 13: (a) Admit that the Swan Falls Agreement is premised on an assumption by the parties to the Agreement that then existing water uses in the Snake River basin above Swan Falls Dam resulted in a potential irrigation season low flow of approximately 4,500 c.f.s. at the Murphy Gage on an average daily basis. (b) Admit that based on such assumption, the Swan Falls Agreement set the minimum irrigation season low flow at 3,900 c.f.s., 600 c.f.s. below the assumed minimum of 4,500 c.f.s., in order to allow the State to authorize further development of consumptive water uses in the Snake River Basin including the ESPA without violating the 3,900 c.f.s. minimum flow established by the Agreement.

REQUEST FOR ADMISSION NO. 14: Admit that prior to the execution of the Swan Falls Agreement, all trust water had been previously appropriated under Idaho Power's water rights described in Paragraph 7 of the Agreement.

REQUEST FOR ADMISSION NO. 15: Admit that prior to the execution of the Swan Falls Agreement, there was not 600 c.f.s. of unappropriated water to constitute the trust water described in Paragraph 7 of the Agreement.

REQUEST FOR ADMISSION NO. 16: Admit that under the Swan Falls Agreement, the State is obligated to take reasonable steps to insure the Swan Falls Daily Minimum Flows.

REQUEST FOR ADMISSION NO. 17: Admit that under the Swan Falls Agreement, the State is obligated to not issue any permits in the Snake River Basin for ground or surface water use after October 1, 1984, if the use of water under such permits would deplete the flow of the Snake River below the Swan Falls Daily Minimum Flows.

REQUEST FOR ADMISSION NO. 18: Admit that because of the hydrologic interconnectivity of the ESPA and the Snake River, withdrawals of ground water from the ESPA impact flows in the River, and vice-versa.

REQUEST FOR ADMISSION NO. 19: Admit that the depletive effect of withdrawals of ground water from the ESPA on Snake River flows is delayed for a period, often many years, depending upon various factors, including the distance from the well to the River.

REQUEST FOR ADMISSION NO. 20: Admit that existing water uses in the Snake River Basin above the Murphy Gage up to and including 1984 were causing depletions in the hydrologic system, which were not manifested in reduced flows in the Snake River at the Murphy Gage in 1984.

REQUEST FOR ADMISSION NO. 21: Admit that the total delayed depletive effect of ground water withdrawals from the ESPA occurring before 1984 is not yet reflected in Snake River flows at the Murphy Gage.

REQUEST FOR ADMISSION NO. 22: Admit that on July 12, 2003, average daily flows in the Snake River measured at the Murphy Gage and calculated under the Swan Falls Agreement fell below the Swan Falls Daily Minimum Flows.

REQUEST FOR ADMISSION NO. 23: Admit that the flows in the Snake River at the Murphy Gage on July 12, 2003 did not reflect the total delayed depletive effect of ground water withdrawals from the ESPA that had been allowed to occur by the State of Idaho prior to October 1, 1984.

REQUEST FOR ADMISSION NO. 24: Admit that the flows in the Snake River at the Murphy Gage on July 12, 2003 did not reflect the total delayed depletive effect of ground water withdrawals from the ESPA from trust water permit/license and non-trust water permit/license appropriations that have been allowed to occur by the State of Idaho since October 1, 1984.

REQUEST FOR ADMISSION NO. 25: Admit that at the time of the Swan Falls Agreement, the Snake River Basin was over appropriated after consideration of the Swan Falls Daily Minimum Flows.

REQUEST FOR ADMISSION NO. 26: Admit that the ESPA and the Snake River upstream from the Murphy Gage are currently over appropriated and threaten the Swan Falls Daily Minimum Flows insured by the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 27: Admit that there never was any trust water available for use by post-1984 water uses, there was no trust res, and there exists no trust under the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 28: Admit that IDWR has processed and approved numerous applications for new appropriations of trust water since 1984.

REQUEST FOR ADMISSION NO. 29: Admit that through the issuance of trust water permits, IDWR authorized the use of trust water that did, and does, not exist.

REQUEST FOR ADMISSION NO. 30: Admit that the water supply and public interest analyses which IDWR performed to issue trust water permits do not reflect the present hydrologic conditions of the ESPA and the Snake River.

REQUEST FOR ADMISSION NO. 31: Admit that Idaho Power owns the following water rights (bracketed names below refer to Company Projects): 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).

REQUEST FOR ADMISSION NO. 32: Admit that the Attorney General and IDWR have asserted that legal title to a portion of Idaho Power's water rights under the Swan Falls Agreement is held by the State of Idaho, and that equitable title to a portion of those water rights is held by Idaho Power and by the State of Idaho.

REQUEST FOR ADMISSION NO. 33: Admit that the Governor has never asserted that the State holds legal title to a portion of Idaho Power's water rights under the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 34: Admit that one purpose of the State in seeking legal title to a portion of Idaho power's water rights is to subordinate those water rights to ground water recharge.

REQUEST FOR ADMISSION NO. 35: Admit that the first notification provided by the Idaho Attorney General to Idaho Power that the Attorney General intended to file the Notices of Change in Water Right Ownership with IDWR was a telephone call from two members of the Attorney General's staff on December 22, 2006, the same day that the Attorney General filed the Notices with IDWR and that Idaho Power received them.

REQUEST FOR ADMISSION NO. 36: Admit that prior to the Attorney General's filing of the Notices of Change in Water Right Ownership, representatives of the Attorney General's Office discussed the State's claim of ownership to a portion of Idaho Power's water rights and its intent to file notices of change of ownership with the Director, or representatives, of IDWR.

REQUEST FOR ADMISSION NO. 37: Admit that representatives of the Attorney General's Office and the Director, or representatives, of IDWR coordinated the filing of the Notices of Change in Water Right Ownership and the issuance of the Director's Report for Basin 2.

REQUEST FOR ADMISSION NO. 38: Admit that neither the Director, nor representatives, of IDWR conducted any independent investigation of the validity of the Notices of Change in Water Right Ownership filed by the Attorney General or the basis for the claims of ownership asserted in such Notices.

REQUEST FOR ADMISSION NO. 39: Admit that the State has never filed a Notice of Claim to a Water Right in the SRBA pursuant to Idaho Code § 42-1409(4) with respect to any of Idaho Power's water rights listed in Paragraph 7 of the Swan Falls Agreement or any other water right held or claimed by Idaho Power.

REQUEST FOR ADMISSION NO. 40: Admit that the res of any trust created under the Swan Falls Agreement is water and not water rights.

REQUEST FOR ADMISSION NO. 41: Admit that Idaho Power's water rights were not to be available for distribution to new uses pursuant to the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 42: Admit that nowhere in the Swan Falls Agreement, or any documents related thereto, is there any reference made to the State of Idaho owning or claiming legal title to Idaho Power's water rights as trustee.

REQUEST FOR ADMISSION NO. 43: Admit that nowhere in the Swan Falls Agreement, or any documents related thereto, is there any reference made to Idaho Power conveying its water rights into a trust.

REQUEST FOR ADMISSION NO. 44: Admit that the State approved applications and issued permits for the use of trust water under new priority dates, not the priority dates of any water rights owned by Idaho Power.

REQUEST FOR ADMISSION NO. 45: Admit that until the actions of the State referenced in the Complaint, the State of Idaho has never claimed or asserted legal title to Idaho Power's water rights, requested conveyance of title, otherwise asserted that legal title was necessary for the State of Idaho to undertake its duties as trustee of the trust water, or otherwise contested ownership of Idaho Power's water rights.

REQUEST FOR ADMISSION NO. 46: Admit that the State of Idaho through IDWR submitted recommendations to the SRBA Court that water right decrees in Basins 2, 36 and 37 for water rights listed in Paragraph 7 of the Swan Falls Agreement be adjudicated in the name of Idaho Power as the owner of such water rights. (b) Admit that such recommendations were

based on IDWR's investigation of Idaho Power's Notices of Claim to a Water Right pursuant to Idaho Code § 42-1410 authorizing and requiring IDWR's investigation of water right claims.

REQUEST FOR ADMISSION NO. 47: Admit that the actions of the State, its officials, and its agencies following the execution of the Swan Falls Agreement through at least 2005 have been consistent with title to the water rights remaining with Idaho Power.

REQUEST FOR ADMISSION NO. 48: (a) Admit that on March 9, 2006, Attorney General Wasden, in response to questions in a February 27, 2006 letter from State House Speaker Bruce Newcomb, issued Attorney General Opinion 06-2 "Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)" (hereinafter "Attorney General Opinion 06-2"). (b) Admit that the Attorney General or members of his staff, before receiving such letter, discussed with Speaker Newcomb or other members of the legislature the preparation of an Attorney General opinion concerning the subordination of Idaho Power's hydropower water rights under the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 49: Admit that the water levels in the ESPA have progressively declined, and continue to decline, resulting in diminishing spring flows, reach gains and flows in the Snake River, and that a contributing factor in such hydrologic developments is the pumping of ground water.

REQUEST FOR ADMISSION NO. 50: Admit that diminishing spring flows, reach gains and flows in the Snake River have resulted in a number of water right "calls" made by senior priority appropriators utilizing surface and spring water from the Snake River, and that a contributing factor in such calls is the pumping of ground water under junior water rights.

REQUEST FOR ADMISSION NO. 51: Admit that ground water pumping from the ESPA has hydrologic impacts on the aquifer and interconnected surface waters beyond the year that pumping occurs.

REQUEST FOR ADMISSION NO. 52: Admit that to date IDWR has not taken into account the multiple year impacts of ground water pumping from the ESPA in its administration of junior ground water and senior surface water rights.

REQUEST FOR ADMISSION NO. 53: Admit that IDWR has curtailed or threatened to curtail ground water rights only on the basis of within-the-year or seasonal impacts of such pumping.

REQUEST FOR ADMISSION NO. 54: Admit that the State's failure to account for the multiple year impacts of ground water pumping, to the extent that that failure results in a violation of the Swan Falls Daily Minimum Flows, is unreasonable and constitutes a breach of the Swan Falls Agreement.

III. INTERROGATORIES

INTERROGATORY NO. 1: For each of your responses to Requests for Admission 1 through 54 above that is not an unqualified admission, state the number of the Request for Admission, state all facts upon which you base your response, identify each person who has knowledge of these facts, and identify all documents and other tangible things that support your response.

IV. REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Produce all documents identified in or related to your responses to Interrogatory No. 1 and Requests for Admission Nos. 1 through 54 above.

Dated this 9th day of October, 2007.

IDAHO POWER COMPANY

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Senior Attorney, Idaho Power Company
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Denver, CO 80202

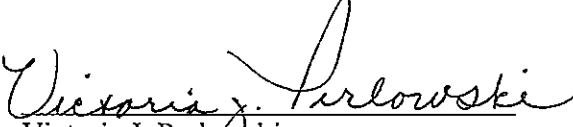
Attorneys for Idaho Power Company

CERTIFICATE OF MAILING

I certify that on October 9, 2007, I mailed copies of **IDAHO POWER COMPANY'S FIRST SET OF DISCOVERY REQUESTS TO STATE DEFENDANTS** to the following persons by U.S. Mail:

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Victoria J. Perlowski

RECEIVED

MAR 26 2008

DEPARTMENT OF
WATER RESOURCES

**EXHIBIT 2
TO
AFFIDAVIT OF STEVEN L. OLSEN
IN SUPPORT OF
STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER**

COPY

NATURAL RESOURCES



LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
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Chief, Civil Litigation Division

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

	)	Consolidated Subcase no. 92-23
In Re SRBA	)	
	)	RESPONSES TO IDAHO POWER
Case No. 39576	)	COMPANY'S FIRST SET OF
	)	DISCOVERY REQUESTS
	)	

The State of Idaho, Governor C.L. "Butch" Otter, Attorney General Lawrence G. Wasden, the Idaho Department of Water Resources, and David Tuthill, Director of the Department of Water Resources (collectively, "the State"), hereby submit their responses to "Idaho Power Company's First Set of Discovery Requests to State Defendants"

(hereinafter, "First Set of Discovery Requests"). The State has made good faith inquiries into the matters raised by Idaho Power Company's First Set of Discovery Requests in the time allotted, is continuing such inquiries, and will supplement these responses, if necessary, as required by the Idaho Rules of Civil Procedure.

OBJECTIONS

1. **Objection To First Set of Discovery Requests To The Extent They Are Propounded To Non-Parties.**

The State objects to each and every request and interrogatory in Idaho Power Company's First Set of Discovery Requests to the extent they are propounded to the Idaho Department of Water Resources ("the Department") and David Tuthill, the Director of the Department ("the Director"). The Idaho Rules of Civil Procedure provide that Requests for Admissions, Interrogatories and Requests for Production of Documents are available only as to a "party" to a case. See I.R.C.P. 33(a), 34(a), 36(a). The Department and the Director are not parties to the Snake River Basin Adjudication. Idaho Code §§ 42-1401B(2); 42-1401A(3). Without waiving these objections, the Department and the Director join in these responses.

2. **Objection To Interrogatory No. 1 To The Extent It Applies To Requests for Admission Nos. 41-54.**

The State objects to Idaho Power Company's "First Set of Discovery Requests to State Defendants" to the extent that they exceed the limitation of forty (40) interrogatories established in Rule 33(a) of the Idaho Rules of Civil Procedure. Idaho Power Company's discovery requests include an interrogatory requesting that "for each of your responses to Requests for Admission 1 through 54 that is not an unqualified admission, state the number of the Request for Admission, state all facts upon which you base your response, identify each person who has knowledge of these facts, and identify all documents and other tangible things that support your response."

Combining multiple Requests for Admission with a single interrogatory in this manner transforms each Request for Admission into a separate interrogatory. See *Safeco of America v. Rawstron*, 181 F.R.D. 441, 445-46 (C.D. Cal. 1998). Further, the State has made no unqualified admissions in its responses to the fifty-four Requests for Admission in Idaho Power Company's First Set of Discovery Requests. Thus, Idaho Power Company's First Set of Discovery Requests includes fifty-four (54) separate interrogatories, in violation of the forty (40) interrogatory limit established by Rule 33(a) of the Idaho Rules of Civil Procedure. See *id.* Nonetheless, without waiving this objection, the State has responded to each of the fifty-four interrogatories.

3. **Objection To Discovery Requests Nos. 7-11, 18-19, 21-24, 26, 28-30, 32, 35-38, 44, and 46-54 As Exceeding The Scope Of The Order of July 23, 2007.**

The State also objects to Idaho Power Company's first set of discovery requests to the extent they contravene the Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues Into Consolidated Subcase; And Permitting Discovery; And Notice of

Scheduling Conference (July 23, 2007) ("Order"). This objection applies to Requests for Admission Nos. -11, 18-19, 21-24, 26, 28-30, 32, 35-38, 44, and 46-54, and the corresponding interrogatories and requests for production of documents.

The Order provides that "preliminary issues" of the scope and ownership of the disputed water rights will be addressed and resolved first. Following these determinations, "this Court will transfer issues of compliance and enforcement to an administrative body of appropriate jurisdiction." Order at 13. Requests for Admission Nos. -11, 18-19, 21-24, 26, 28-30, 32, 35-38, 44, and 46-54, and the corresponding interrogatories and requests for production of documents, seek discovery on issues of compliance with and enforcement of the Swan Falls "Agreement" (hereinafter, "Swan Falls Agreement" or "Agreement") and a claim that has been dismissed. Accordingly, these requests and interrogatories exceed the scope of the subject matter of the pending action, as limited by the Court, and therefore exceed the scope of discovery under Rule 26(b)(1) of the Idaho Rules of Civil Procedure.

4. Objection To Discovery Requests Nos. 7-8, 10-11, 18-19, 21-24, 26, 28-30, 32, 35-38, 44 and 46-54 As Exceeding The Scope Of The Snake River Basin Adjudication As Established By Idaho Law.

The State also objects to Idaho Power Company's first set of discovery requests to the extent they exceed the scope of the Snake River Basin Adjudication under applicable Idaho law. This objection applies to Requests for Admission Nos. 7-8, 10-11, 18-19, 21-24, 26, 28-30, 32, 35-38, 44 and 46-54, and the corresponding interrogatories and requests for production of documents.

The Idaho Code and controlling Idaho Supreme Court precedent provide that a claimant may not obtain review of agency actions of the Department of Water Resources in the Snake River Basin Adjudication. Idaho Code § 42-1401D, *Twin Falls Canal Co. v. IDWR*, 127 Idaho 688, 905 P.2d 89 (1995). Requests for Admission Nos. 7-8, 10-11, 18-19, 21-24, 26, 28-30, 32, 35-38, 44 and 46-54 contravene these limitations because they seek to develop or support claims that expressly seek, or would necessarily entail, judicial review of agency actions of the Department of Water Resources in the Snake River Basin Adjudication. These requests and interrogatories therefore exceed the scope of the Snake River Basin Adjudication under Idaho law and the scope of discovery under Rule 26(b)(1).

5. Objection To Discovery Requests Nos. 7-8, 18-19, 21-24, 26, 28-30, 35, 44, 47 and 49-54 As Contrary To The Requirement Of Exhaustion Of Administrative Remedies.

The State also objects to Idaho Power Company's first set of discovery requests to the extent they seek to develop or support claims seeking or requiring judicial review of the administrative actions of the Director and/or the Department. This objection applies to Requests for Admission Nos. 7-8, 18-19, 21-24, 26, 28-30, 35, 44, 47 and 49-54, and the corresponding interrogatories and requests for production of documents.

Claims for judicial review of the administrative actions or decisions of the Director and the Department may not be raised, heard or otherwise developed in a court or by the use of judicial procedures in the absence of a final agency action and a fully developed administrative

record, and until administrative remedies have been exhausted. *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007); Idaho Code § 67-5271. Requests for Admission Nos. 7-8, 18-19, 21-24, 26, 28-30, 35, 44, 47 and 49-54, and the corresponding interrogatories and requests for production of documents, expressly seek or necessarily require judicial review of administrative actions of the Director and/or the Department in the absence of a final agency action and a fully developed administrative record, and prior to the exhaustion of administrative remedies. These requests and interrogatories are therefore in violation of the exhaustion requirement set forth in chapter 52, Title 67, Idaho Code and applicable decisions of the Idaho Supreme Court.

RESPONSES TO REQUESTS FOR ADMISSION AND INTERROGATORIES

REQUEST FOR ADMISSION NO. 1: Admit that if the quantity of water rights in a basin exceeds the physical supply of water available during all or portions of a year, that basin is considered "over appropriated."

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Objection. This Request for Admission seeks disclosure of confidential attorney work-product. Without waiving this objection, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 1: Objection. This Interrogatory and the corresponding Request for Production of Documents seeks disclosure of the confidential attorney work product. Without waiving this objection, the State responds that the concept of "over appropriation" as proposed and defined by Idaho Power Company is contrary to the prior appropriation doctrine as established by Idaho law.

REQUEST FOR ADMISSION NO. 2: Admit that the concept of "over appropriation" applies both to surface and interconnected ground water.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 2: See the Response To Interrogatory – Request For Admission No.1, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO.3: Admit that when a basin is "over appropriated," there is no unappropriated water available for new appropriation.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 3: See the Response To Interrogatory – Request For Admission No.1, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 4: Admit that the water rights listed in Paragraph 22 of the Complaint are the only Idaho Power water rights which the State contends are subject to the Swan Falls Agreement, and that Idaho Power owns other water rights at other facilities, including hydropower projects, which are not subject to the terms of the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: The State denies this Request for Admission to the extent it implies that Idaho Power Company holds legal title to all of the water rights listed in Paragraph 22 of the Complaint. The State also denies that the water rights listed in Paragraph 22 of the Complaint are the only water rights that are subject to the Swan Falls Agreement. The State admits that Idaho Power Company owns other water rights at other facilities, including hydropower facilities, which are not subject to the Swan Falls Agreement.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO.4: In addition to the water rights listed in Paragraph 22 of the Idaho Power Company's "Complaint and Petition for Declaratory and Injunctive Relief" ("Complaint"), the Swan Falls settlement also encompasses water rights 02-2032A, 02-2032B, 02-4000A, 02-4000B, 02-4000A and 02-4000B, beneficial use water right claims 37-20709, 37-20710, and 02-10135, and any other claims for water rights for power purposes at any of the Idaho Power Company facilities referenced in Paragraph 7 of the Swan Falls Agreement. Further, it should be noted that the Agreement was only one component of the settlement of the Swan Falls controversy. The settlement also included amendments to the State Water Plan and the enactment of a number of pieces of implementing legislation. Among other things, this legislation establishes a trust and provides that "[a]ny portion of the water rights for power purposes in excess of [the minimum flows established at the Murphy Gage] shall be held in trust by the state of Idaho." Idaho Code § 42-203B(2), (5). Thus, it is incorrect to characterize the water rights as to which ownership is disputed in this consolidated subcase as "Idaho Power water rights" insofar as such a characterization implies that Idaho Power Company has legal ownership of the water rights held in trust. The State holds legal title to the water rights held in trust for the benefit of Idaho Power Company and the People of the State of Idaho. *Id.* As one of the beneficiaries of the trust, Idaho Power Company may use the water available at its facilities for power purposes to the extent of the water rights held in trust, "subject to subordination to and depletion by future upstream users whose rights are acquired pursuant to State law, including compliance with the requirements of Idaho Code § 42-203C." *Id.*

For purposes of identifying the documents that support this response, the State refers to documents previously provided to Idaho Power Company via hand delivery to James C. Tucker on December 22, 2006, and via service of the State of Idaho's First Set Of Requests For Admission And Requests For Production Of Documents To Idaho Power Company, dated October 18, 2007. The hand delivery to Idaho Power Company of December 22, 2006, included the following:

1. Notices of Change of Water Right Ownership;
2. A five-page letter from the Attorney General to the Department explaining the basis for the Notices of Change of Water Right Ownership;

3. Copies of documents that were cited in the Attorney General's letter, or that otherwise supported the Notices of Change of Water Right Ownership, including the following:
 - a. The Swan Falls "Agreement" of October 25, 1984;
 - b. the Federal Energy Regulatory Commission ("FERC") order of March 25, 1988 in the proceedings on Idaho Power Company's petition for a declaratory order on the Swan Falls Agreement (FERC Docket EL-85-38-000);
 - c. the Joint Agreement Regarding Fish and Wildlife Studies (EL-85-38-000), between Idaho Power Company and the United States Marine Fisheries Service;
 - d. Legislation enacted to implement the Swan Falls settlement, including:
 - i. 1985 Idaho Session Laws, Chapter 14 (SB1005)
 - ii. 1985 Idaho Session Laws, Chapter 16 (SB1007)
 - iii. 1985 Idaho Session Laws, Chapter 17 (SB1008)
 - iv. 1985 Idaho Session Laws, Chapter 224 (HB186)
 - v. 1985 Idaho Session Laws, Chapter 204 (SB1205)
 - vi. 1986 Idaho Session Laws, Chapter 116 (SB1358)
 - vii. Idaho Code §§ 42-203A, 42-203B, 42-203C, 42-203D and 61-502B;
 - e. Legislative history of the legislation enacted to implement the Swan Falls settlement, including:
 - i. Pages 58-61 of the 1985 Journal of the State Senate (Statement of Legislative Intent for S1008);
 - ii. Minutes of the Senate Resources & Environment Committee for:
 1. January 1, 1985
 2. January 11, 1985
 3. January 21, 1985
 4. January 25, 1985
 5. February 1, 1985
 6. March 4, 1985
 7. February 19, 1986
 - iii. Minutes of the Senate State Affairs Committee for:
 1. January 25, 1985
 2. February 1, 1985
 - iv. Minutes of the House Resources & Conservation Committee for:
 1. February 1, 1985
 2. February 11, 1985
 3. February 19, 1985
 4. March 7, 1985
 5. March 13, 1986;

- f. District Court filings:
 - i. Consent Judgment in Ada County Case No. 81375
 - ii. Consent Judgment in Ada County Case No. 62237
 - iii. Order for Entry of Judgment in Ada County Case No. 62237
 - iv. Stipulation for Entry of Judgment in Ada County Case No. 62237;
- g. The Contract to Implement, Chap. 256, Sess. Laws 1983 of October 25, 1984 ("1180 Contract");
- h. 1983 Idaho Session Laws, chapter 259;
- i. Idaho Code §§ 61-539, 61-540;
- j. Legislative History for the 1180 Contract, including minutes of the following:
 - i. Senate Resources & Environment Committee, March 30, 1983
 - ii. Senate Resources & Environment Committee, April 4, 1983
 - iii. House Resources & Conservation Committee, April 8, 1983;
- k. Legal descriptions for points of diversion and places of use.

The documents previously provided to Idaho Power Company via service of the State of Idaho's First Set Of Requests For Admission And Requests For Production Of Documents To Idaho Power Company, dated October 18, 2007, included copies of the following:

Exhibit No. in State's First
Set of Discovery Requests

Document

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|-----|--|
| 1.1 | 1984 House Bill 675 and its Statement of Purpose; |
| 1.2 | 1984 House Bill 459 and its Statement of Purpose; |
| 1.3 | 1984 House Bill 574 and its Statement of Purpose; |
| 1.4 | 1985 Senate Bill 1008 and its Statement of Purpose; |
| 1.5 | 1985 Senate Bill 1005 and its Statement of Purpose; |
| 1.6 | Complete set of minutes for the 1985 meetings of the Senate Resources and Environment Committee, including attachments; |
| 1.7 | Minutes of the meetings of the 1985 meetings House Resources and Conservation Committee, including attachments, for January 17, 21 and 31; February 1, 11, 13, 15, 19 and 25; and for March 7; |

Exhibit No. in State's First
Set of Discovery Requests

Document

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|------|--|
| 1.8 | Minutes of the meetings Senate State Affairs Committee of January 25, 1985 and February 1, 1985; |
| 1.9 | Pages 22 and 58-61 of the Journal of the State Senate, Organizational Session and First Regular Session of the Forty Eighth Legislature of the State of Idaho, 1985; |
| 2.1 | 1986 Senate Bill 1358, including amendment, and Statement of Purpose; |
| 2.2 | Minutes of the meetings of the Senate Resources and Environment Committee of February 5, 1986, and February 19, 1986; |
| 2.3 | Minutes of the meeting of the House Resources and Conservation Committee of March 13, 1986; |
| 2.4 | Complete set of the minutes of the 1986 Idaho Legislative Council (Interim) Committee on Ground Water Resources, including attachments and Final Report; |
| 2.5 | Complete set of the minutes of the 1993 Idaho Legislative Council Interim Committee on Aquifer Recharge, including attachments and Final Report; |
| 2.6 | 1994 Senate Bills 1564, 1565, 1574, and 1575 and their Statements of Purpose; |
| 2.7 | Minutes of the Senate State Affairs Committee meeting of March 9, 1994; |
| 2.8 | Minutes of the meeting of the Senate Resources and Environment Committee, including attachments, of March 11, 1994; |
| 2.9 | Minutes of the meetings of the House Resources and Conservation Committee, including attachments, of March 21, 1994, and March 23, 1994; |
| 2.10 | Page 413 of the Journal of the House of Representatives, Second Regular Session of the Fifty Second Legislature of the State of Idaho, 1994; |

Exhibit No. in State's First
Set of Discovery Requests

Document

- 2.11. Page 269 of the Journal of the State Senate, Second Regular Session of the Fifty Second Legislature of the State of Idaho, 1994;
- 3 The ratepayer complaint filed with the Idaho Public Utilities Commission in June 1977, initiating IPUC Case No. U-1006-124;
- 4 A letter to Governor Evans from Idaho Power Company Chief Executive Officer James Bruce dated April 11, 1984;
- 5 A letter to Idaho Power Company Chief Executive Officer James Bruce from Governor Evans dated May 9, 1984;
- 6 A letter to Governor Evans from Idaho Power Company Chief Executive Officer James Bruce dated May 23, 1984;
- 7 The "Framework for Final Resolution of Snake River Water Rights Controversy" of October 1, 1984;
- 8 The Swan Falls "Agreement" of October 25, 1984;
- 9 The "Contract to Implement Chapter 259, Sess. Laws, 1983" of October 25, 1984;
- 10 The Idaho Water Resources Board resolution of March 1, 1985, approving amendments to Policy 32 of the State Water Plan;
- 11 1985 Idaho Session Laws chapter 14;
- 12 1985 Idaho Session Laws chapters 15 and 16;
- 13 1985 Idaho Session Laws chapters 17, 18 and 19;
- 14 1985 Idaho Session Laws chapter 162;
- 15 1985 Idaho Session Laws chapter 204;
- 16 1985 Idaho Session Laws chapter 224;
- 17 1986 Idaho Session Laws chapter 117;

Exhibit No. in State's First
Set of Discovery Requests

Document

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| 18 | 1994 Idaho Session Laws chapter 274; |
| 19 | 1994 Idaho Session Laws chapter 433; |
| 20 | "Currents," November 1984, "Special Swan Falls Agreement Edition"; |
| 21 | "Currents," January 1985 "Special Swan Falls Edition II"; |
| 22 | "Currents," March 1985, Vol. 3, No. 3; |
| 23 | "Currents," October 1985, "Special Water Allocation Rules Edition"; |
| 24 | Currents," December 1985, "Special Water Allocation Rules Edition II"; |
| 25 | "Currents," September 1986," State Water Plan Draft" edition; |
| 26 | A letter dated June 13, 1985, from Thomas G. Nelson, of Nelson, Rosholt, Robertson, Tolman & Tucker, Chtd., to A. Kenneth Dunn, Director of the Idaho Department of Water Resources (including attachment); |
| 27 | A letter dated November 5, 1985, from Thomas G. Nelson, of Nelson, Rosholt, Robertson, Tolman & Tucker, Chtd., to Mr. Ken Dunn, Director of the Idaho Department of Water Resources (including attachments); |
| 28 | Idaho Power Company's "Petition for the Amendment of Rule 5,2. of the Water Appropriation Rules and Regulations Adopted April 8, 1986," filed with the Department of Water Resources on April 28, 1986; |
| 29 | Idaho Power Company's "Petition for Declaratory Judgment" filed in the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Twin Falls, Case No. 38256, on April 28, 1986; |
| 30 | Idaho Department of Water Resources Water Right Permit No. 01-7054; |

Exhibit No. in State's First
Set of Discovery Requests

Document

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| 31 | Idaho Department of Water Resources Water Right Permit No. 37-7842; |
| 32 | The Idaho Department of Water Resources' Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls, issued November 3, 1988. |

Additional documents supporting the State's response are identified below. Copies of these documents are included with these responses.

Memorandum to James E. Bruce from Thomas G. Nelson regarding the possibility of using the Swan Falls water right to stop upstream depletion of the Snake River (June 22, 1976);

Minutes of the Legislative Council Committee on Water Rights (May 10, 1983);

Minutes of the Second Meeting of the Snake River Technical Advisory Committee (July 15, 1983);

Minutes of the Organizational Meeting of the Snake River Technical Advisory Committee (June 29, 1983);

Minutes of the Third Meeting of the Snake River Technical Advisory Committee (August 4-5, 1983);

"News Release" from the Office of the Governor (January 4, 1985);

Executive Order 84-19 (Office of the Governor)

Minutes of the First Meeting of the Snake River Studies Advisory Committee (Feb. 7, 1985);

Memorandum to Governor Evans from Keith Anderson regarding the third meeting of the Snake River Studies Advisory Committee (May 22, 1985);

Memorandum from Sheri Grow to Dick Gardner re: summary minutes of the Snake River Studies Advisory Committee (Dec. 11, 1986);

Memorandum to Governor Evans from Keith Anderson regarding the fifth and final meeting of the Snake River Studies Advisory Committee (Dec. 22, 1986);

Memorandum to the Snake River Advisory Committee from Dick Gardner regarding economic studies update (Aug. 12, 1986);

Testimony of Governor John V. Evans on Proposed Revisions to State Water Plan Policy Number 32 (Feb. 5, 1985);

Affirmation of Continuation of Agreement (May 15, 1985);

Letter to the Honorable John V. Evans from Attorney General Jim Jones (Oct. 25, 1984);

Letter to the Honorable John V. Evans from Attorney General Jim Jones (May 17, 1984);

Letter to the Honorable John V. Evans from Attorney General Jim Jones (Oct. 17, 1984);

Idaho Water Rights Defense New Letter (Oct. 19, 1984);

Mediator's Term Sheet;

Minutes of the Third Meeting of the Snake River Studies Advisory Committee (April 18, 1985);

Certified copy of case file, FERC Docket No. EL-85-38-000

Memorandum to Norm Young from Alan Robertson regarding tributary determination, Milner to Swan Falls (April 14, 1986);

Review of Flow at Swan Falls In Relation To Its Power Rights (Feb. 7, 1984);

Brief of Respondent Idaho Power Company on Rehearing, *Miles v. Idaho Power Company*, Idaho Supreme Court case no. 16614 (Feb. 21, 1989);

Brief of Respondent Idaho Power Company, *Miles v. Idaho Power Company*, Idaho Supreme Court case no. 16614 (Jan. 21, 1987);

Letter to Paul L. Jauregui from Patrick Kole (Jan. 19, 1984);

Exhibits 1-5 to Idaho Power Company's "Petition for Declaratory Judgment" filed in the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Twin Falls, Case No. 38256 (April 28, 1986);

Letter to Mark B. Clark from Thomas G. Nelson regarding Ada County case no. 81375 (August 29, 1989);

Memo to Norm from Ron regarding commencement of permit processing (May 2, 1988);

"Picking up the Pieces After Swan Falls," by Norm Young (Dec. 8-9, 1989);

Needed Water Resources Programs In The Snake River Basin by Snake River Technical Advisory Committee (Nov. 1983);

Water Resources Management Needs In The Snake River Basin Executive Summary by Snake River Technical Advisory Committee (Nov. 1983);

Commentary on Swan Falls Resolution by Patrick D. Costello and Patrick J. Kole (Summer 1985);

Letter to the Honorable John D. Dingell from Governor Cecil Andrus regarding H.R. 519 (Swan Falls Legislation): Idaho's Comments on Issues Raised by FERC and NMFS (July 24, 1987);

Legacy of Light, by Susan M. Stacy (1991);

Letter to R. Keith Higginson from Thomas G. Nelson regarding Swan Falls Policy and Implementation Plan (Oct. 14, 1988);

Copy of case file, Idaho Public Utilities Commission docket no. U-1006-244;

Memorandum to J. Vard Chatburn from Pat Costello regarding elements of the Swan Falls legislative package and their relation to overall agreement (Feb. 4, 1985);

Attendance sheets for Idaho Water Resources Board Public Hearings on Amendments To Policy 32 of the State Water Plan, including attachments, exhibits and testimony (Jan. & Feb., 1985);

Letter to Mr. Pat Costello from Sherl Chapman (Oct. 16, 1984);

Idaho State Water plan adopted by the Idaho Water Resources Board (Jan. 19, 1982);

Amended Complaint, *Idaho Power Company v. State of Idaho*, Ada County case no. 62237 (Nov. 8, 1977);

Second Amended Complaint, *Idaho Power Company v. State of Idaho*, Ada County case no. 81375 (Dec. 28, 1983);

Notice of Dismissal of Certain Defendants, *Idaho Power Company v. State of Idaho*, Ada County case no. 81375 (Oct. 25, 1984);

Order for Judgment and Consent Judgment, *Idaho Power Company v. State of Idaho*, Ada County case no. 81375 (Feb. 16, 1990);

Minutes of Meeting No. 9-84, Idaho Water Resource Board, Boise, Idaho (Nov. 2, 1984);

Letter to the Idaho Department of Water Resources from Attorney General Lawrence G. Wasden regarding Notices of Change in Water Right Ownership Under Swan Falls Agreement and Implementing Legislation (Dec. 22, 2006);

Notices of Change in Water Right Ownership (Dec. 22, 2006);

Letter to James C. Tucker from Chief Deputy Attorney General Sherman F. Furey III regarding Notices of Change in Water Right Ownership Under The Swan Falls Agreement and Implementing Legislation (Dec. 22, 2006);

Attachments to Notices of Change in Water Right Ownership (Dec. 22, 2006);

Letter to the Idaho Department of Water Resources from Attorney General Lawrence G. Wasden regarding Notices of Change in Water Right Ownership Under Swan Falls Agreement and Implementing Legislation (Jan. 2, 2007);

Notices of Change of Water Right Ownership (Jan. 2, 2007);

Letter to the Honorable Lawrence G. Wasden from Bruce Newcomb (Feb. 27, 2006);

Attorney General Opinion 06-2 (March 9, 2006);

Attorney General Opinion 06-2A (Feb. 13, 2007; effective March 9, 2006);

Swan Falls Data And Research Program Status Report by Idaho Technical Committee on Hydrology (Nov. 1987);

Memorandum to Alan Robertson, Wayne Haas, and Norm Young from Paul Castelin regarding streamflow depletion criteria, Snake River corridor, Milner to Murphy (Sept. 18, 1985);

Letter to A. Kenneth Dunn from Clive J. Strong regarding permit no. 36-7815 and 36-7894 of Idaho Land and Cattle, Inc. d/b/a Heiss Charolais Ranch (Sept. 17, 1986);

Letter to Clive J. Strong from Thomas G. Nelson regarding permit nos. 36-7815 and 36-7894 (Sept. 25, 1986);

Minutes of the Second Meeting of the Snake River Advisory Studies Committee (Mar. 14, 1985);

Meeting of the Snake River Studies Advisory Committee (Oct. 3, 1985);

Minutes of the Sixth Meeting of the Snake River Technical Advisory Committee (Oct. 11, 1983);

Resolution Before The Idaho Water Resources Board In The Matter of Policy 32 of the State Water Plan (Mar. 1, 1985);

Recordings of Idaho Water Resources Board public information meetings on October 25, 1984, October 31, 1984 and November 1, 1984;

Recordings of Senate Resources & Environment Committee meetings of January 18, 1985, January 21, 1985, January 25, 1985 and February 1, 1985;

The State identifies the following persons as having knowledge of the facts. The State has made a good faith effort to determine the contact information for these persons in the time allotted, and will supplement with any additional such information required under the Idaho Rules of Civil Procedure:

<u>Name</u>	<u>Address & Telephone Number</u>
Hal Anderson	Idaho Department of Water Resources, 322 E. Front Street, Boise, Idaho, 83720-0098; 208-287-4800
Cecil Andrus	Office of Governor, 999 Main St., Boise, ID. 83702, (208) 332-0102
David Barber	Office of the Attorney General; PO Box 83720, Boise, ID 83720; (208) 334-2400
Charles Brockway	
James E. Bruce	
Ron Carlson	P.O. Box 322, Boise, ID. 83720-0098, (208) 287-4800
Ben Cavaness	
Sherl Chapman	
Patrick Costello	University of Idaho, College of Law 208-885-4628
Mike Crapo	251 E. Front Street, Suite 205, Boise, Idaho 83702 208-334-1776
Paul Cunningham	

Karl J. Dreher	Brown and Caldwell; 1697 Cole Blvd., Suite 200, Golden, CO 80401; (303) 239-5400
A. Kenneth Dunn	44640 S. Heritage Palms Drive, Indio, California 92201 760-360-2931
John V. Evans	
Kent Foster	Holden, Kidwell, Hahn & Crapo, PLLC; PO Box 50130, Idaho Falls, ID 83405; (208) 523-0620
Richard L. Gardner	752 E. Braemere Road, Boise, Idaho 83702 208-859-8878
Mike Gilmore	Office of the Attorney General; PO Box 83720, Boise, ID 83720; (208) 334-4130
Gene Gray	
Wayne Haas	
Richard Hahn	
Joel Hamilton	
John Hatch	
Richard High	
Paul Jauregui	PO Box 8802 Boise, ID 83707; (208) 412-7651
Jim Jones	Idaho Supreme Court; PO Box 83720, Boise ID 83720; (208) 334-3186
John Keyes	
Patrick Kole	Idaho Potato Commission; PO Box 1670, Eagle, ID 83616-9104; (208) 334-2350
Logan Lanham	
Roger Ling	Ling, Robinson & Walker; PO Box 396, Rupert, ID 83350; (208) 436-4717

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1200

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REQUEST FOR ADMISSION NO.5: Admit that the Swan Falls Agreement acknowledges and preserves Idaho Power's right and ability to purchase, lease, own, or otherwise acquire additional water for power purposes over and above the Swan Falls Daily Minimum Flows provided for in the Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 5: The Swan Falls Agreement speaks for itself and the applicable provision, Paragraph 7E, provides that Idaho Power 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." Further, the term "Swan Falls Daily Minimum Flows" does not appear in the Agreement, and the definition of "Swan Falls Daily Minimum Flows" in Idaho Power Company's First Set of Discovery Requests conflates or confuses two discrete legal standards created under the settlement: (1) the minimum flows as established by

the State Water Plan amendments implementing the Swan Falls settlement, and (2) the upper limit of Idaho Power Company's water right defined by Paragraph 7A of the Agreement.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 6: Admit that additional water purchased, leased, owned, or otherwise acquired by Idaho Power for use below the Murphy Gage is not limited by or subject to the Swan Falls Agreement and must be administered and accounted for by the State of Idaho at the Murphy Gage in addition to the Swan Falls Daily Minimum Flows.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 6: The Swan Falls Agreement speaks for itself and the applicable provisions, Paragraphs 7B and 7E, provide that “fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows,” and that “Company’s ability to purchase, lease, own, or otherwise acquire 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.” Further, Idaho Power Company’s definition of the term “Swan Falls Daily Minimum Flows” is incorrect. See also prior responses, including but not limited to the Response To Interrogatory No. 1 – Request For Admission No. 5, which the State incorporates herein by this reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 7: Admit that for 2006 and all years prior to 2006 during which the Bureau of Reclamation had a flow augmentation program, the State calculated the Swan Falls Daily Minimum Flows without taking into account additional water which was acquired by the Bureau of Reclamation and released into the Snake River as flow augmentation to aid migrating salmon pursuant to obligations under the Endangered Species Act.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 7: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these

objections, the State responds that for the years prior to 2003, the flows measured at the Murphy Gage were in excess of the sum of the minimum flows, senior water rights and augmentation flows, and therefore it was unnecessary for the Department to administer water rights in the Milner to Murphy reach of the Snake River, including but not limited to the minimum flows established at the Murphy Gage. Beginning in about 2003, as the flows measured at Murphy began to approach the sum of the minimum flows, senior water rights and the augmentation flows, the Department began to consider how to appropriately administer these various rights.

IDWR administers the minimum flows established by the Swan Falls settlement as an obligation separate and apart from additional water acquired by the United State Bureau of Reclamation and released into the Snake River as flow augmentation. The Department allocates the flow at the Murphy Gage to satisfy the separate obligations under the Swan Falls settlement and the Bureau of Reclamation flow augmentation water. Further, Idaho Power Company's definition of the term "Swan Falls Daily Minimum Flows" is incorrect. See also prior responses, including but not limited to the Response To Interrogatory No. 1 – Request For Admission No. 5, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 8: Admit that the State's practice of including the Bureau of Reclamation flow augmentation water in the calculation of the Swan Falls Daily Minimum Flows in 2007 is a departure from its prior practice.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 8: Objection. This Interrogatory and the corresponding Request for Production of Documents exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that the Department's practice is and has been to administer flow augmentation water and the minimum flows established at Murphy as separate obligations, and therefore additional water acquired by the United States Bureau of Reclamation and released into the Snake River as flow augmentation is accounted for separate and apart from the minimum flows. The Department calculates the combined quantities of these separate obligations only for purposes of administrative convenience in determining whether flow augmentation obligations have been satisfied. This method of calculation in no way modifies the minimum flows established under the Swan Falls settlement. Further, Idaho Power Company's definition of the term "Swan Falls Daily Minimum Flows" is incorrect. See also prior responses, including but not limited to the Responses To Interrogatory No. 1 – Requests For Admission Nos. 5 and 7, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 9: Admit that through the "Mediator's Term Sheet" agreement of the Snake River Water Rights Act of 2004, 118 Stat. 3431, the State agreed that the

minimum flows established by the Swan Falls Agreement, designated in the "Mediator's Term Sheet" agreement as Tier I - Minimum Flow, shall be decreed in the SRBA to the Idaho Water Resource Board.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Objection. This Request for Admission exceeds the scope of the issues defined in the Order. Without waiving this objection, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 9: Objection. This Interrogatory and the corresponding Request for Production of Documents exceeds the scope of the issues defined in the Order. Without waiving this objection, the State responds that the "Mediator's Term Sheet" speaks for itself and the applicable provision, paragraph III.B. (entitled "Tier 1 – Minimum Flows"), provides that "[t]he minimum flows established by the Swan Falls Agreement shall be decreed in the SRBA to the Idaho Water Resource Board." It should also be noted that while the Swan Falls Agreement of October 25, 1984, contemplated and was expressly conditioned on the passage of amendments to the State Water Plan that would establish enhanced minimum flows at the Murphy Gage, the Agreement did not in and of itself establish such minimum flows. Rather, the Idaho Water Resource Board established these minimum flows for via implementing amendments to the State Water Plan, which were in turn ratified by the Idaho Legislature. See also prior responses, including but not limited to the Response To Interrogatory No. 1 – Request For Admission No. 5, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 10: Admit that through the "Mediator's Term Sheet" agreement, the State, through IDWR, committed to regulate the Tier 1 – Minimum Flow established by the "Mediator's Term Sheet" agreement in accordance with the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 10 & INTERROGATORY NO. 1: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 10: Objection. This Interrogatory and the corresponding Request for Production of Documents exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State responds that Paragraph III.B. of the "Mediator's Term Sheet" speaks for itself and provides that "[i]f the Idaho Department of Water Resources fails to regulate these minimum instream flows in accordance with the Swan Falls Agreement, then any party to this agreement shall be entitled to seek injunctive relief through the state district court responsible for the SRBA."

REQUEST FOR ADMISSION NO. 11: Admit that the State as a party to the "Mediator's Term Sheet" agreement contemplated that the Tier 2 - Flow Augmentation instream flows would be in

addition to the Tier I - Minimum Flow instream flows described in the "Mediator's Term Sheet" agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State denies this Request for Admission to the extent it suggests that the Nez Perce settlement agreement altered the Swan Falls Agreement or the legislation and State Water Plan amendments implementing the Swan Falls Agreement.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 11: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State responds that the State contemplated that the Tier – 2 Flow Augmentation program described in the "Mediator's Term Sheet" would provide opportunities to address or resolve issues arising under the Endangered Species Act in a manner consistent with Idaho law, including the Swan Falls settlement and the implementing legislation. This Request for Admission incorrectly suggests that the Nez Perce settlement agreement was intended to modify or alter the Swan Falls Agreement and/or the implementing legislation and State Water Plan amendments. See also prior responses, including but not limited to the Response to Interrogatory No. 1 – Request For Admission No. 7, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 12: Admit that the trustee of any trust established under the Swan Falls Agreement is the State of Idaho, acting by and through the Governor.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 12: The Swan Falls Agreement did not establish a trust. Rather, the Agreement provides that "the State shall . . . assert the existence of water rights held in trust by the State." The Idaho Legislature created the trust by enacting the subordination legislation proposed by the Agreement. The subordination legislation speaks for itself and provides, among other things, that the water rights in question "shall be held in trust by the State of Idaho, by and through the governor. . . ." Idaho Code § 42-203B(2).

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 13: (a) Admit that the Swan Falls Agreement is premised on an assumption by the parties to the Agreement that then existing water uses in the Snake River basin above Swan Falls Dam resulted in a potential irrigation season low flow of approximately 4,500 c.f.s. at the Murphy Gage on an average daily basis. (b) Admit that based on such assumption, the Swan Falls Agreement set the minimum irrigation season low flow at 3,900

c.f.s., 600 c.f.s. below the assumed minimum of 4,500 c.f.s., in order to allow the State to authorize further development of consumptive water uses in the Snake River Basin including the ESPA without violating the 3,900 c.f.s. minimum flow established by the Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 13: The Swan Falls Agreement expressly provides that it sets forth all of the parties' understandings, but does not recite, refer to or otherwise purport to rely on any predicate assumptions, understandings or stipulated facts with respect to the then-existing water uses in the Snake River basin above Swan Falls, or the effect of such uses on then-existing flows of the Snake River. Further, the parties and the Idaho Legislature recognized that the data and information regarding existing uses of water above Swan Falls dam in 1984 was incomplete and structured the overall settlement and the implementing legislation accordingly. This structure authorized the State to subordinate the water rights held in trust in order to allow future development of consumptive uses of water above Swan Falls Dam under rights acquired pursuant to State law, including compliance with the requirements of Idaho Code § 42-203C, and protection of the minimum flows established at the Murphy Gage. It should be noted that the Swan Falls Agreement of October 25, 1984 did not establish the minimum flow of 3,900 c.f.s at the Murphy Gage in and of itself, rather this minimum flow was established by amendments to the State Water Plan that implemented the overall Swan Falls settlement. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 5 and 9, which the State incorporates herein by this reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 14: Admit that prior to the execution of the Swan Falls Agreement, all trust water had been previously appropriated under Idaho Power's water rights described in Paragraph 7 of the Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: The State admits that the flows beneficially used under the water rights held in trust by the State were originally appropriated by Idaho Power Company. The State denies the remainder of this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 14: The concept of "trust water" as defined and used by Idaho Power Company in its First Set of Discovery Requests and in the Complaint is contrary to the Swan Falls settlement and applicable Idaho law. The Swan Falls Agreement expressly contemplates "water rights held in trust by the State," and makes no references to "trust water." The legislation that implements the settlement proposed in the Agreement also defines the trust as holding water rights rather than water. See the Response to Request for Admission No. 4, and the Response to Interrogatory No. 1 – Request for Admission No. 4, including the documents and persons identified therein, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 15: Admit that prior to the execution of the Swan Falls Agreement, there was not 600 c.f.s. of unappropriated water to constitute the trust water described in Paragraph 7 of the Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 15: Paragraph 7 of the Swan Falls Agreement speaks for itself and does not contain or describe the terms “trust” or “trust water.” Further, the flows of the Snake River as measured at the Murphy Gage in 1984 contained more than 600 c.f.s of unappropriated water in spring runoff flows alone. This request is also incorrect to the extent it appears to characterize the flows that are beneficially used under the water rights held in trust by the State as “unappropriated.” They were appropriated prior to the execution of the Agreement and remained appropriated thereafter, but subject to subordination by the State of Idaho to new water rights acquired pursuant to State law. See also prior responses, including but not limited to the Response to Request for Admission No. 14, and the Response to Interrogatory No. 1 – Request for Admission No. 14, which the State incorporates herein by this reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 16: Admit that under the Swan Falls Agreement, the State is obligated to take reasonable steps to insure the Swan Falls Daily Minimum Flows.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 16: The Swan Falls Agreement speaks for itself and the applicable provision, Paragraph 7B, provides that Idaho Power Company “retains the right to compel [the] State to take reasonable steps to insure the average daily flows.” Further, Idaho Power Company’s definition of the term “Swan Falls Daily Minimum Flows” is incorrect. See also prior responses, including but not limited to the Response to Interrogatory No. 1 – Request for Admission No. 5, which the State incorporates herein by this reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 17: Admit that under the Swan Falls Agreement, the State is obligated to not issue any permits in the Snake River Basin for ground or surface water use after

October 1, 1984, if the use of water under such permits would deplete the flow of the Snake River below the Swan Falls Daily Minimum Flows.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 17: Nothing in the Swan Falls Agreement imposes, requires or contemplates that a permitting moratorium is the only allowable means for satisfying the minimum flows at the Murphy Gage. Further, such an approach is contrary to the Idaho Code §§ 42-203B and 42-203C, the applicable administrative rules, the State Water Plan, and the structure and framework of the overall Swan Falls settlement as proposed in the Agreement. Further, Idaho Power Company's definition of the term "Swan Falls Daily Minimum Flows" is incorrect. See also prior responses, including but not limited to the Response To Interrogatory No. 1 – Request For Admission No. 5, which the State incorporates herein by this reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 18: Admit that because of the hydrologic interconnectivity of the ESPA and the Snake River, withdrawals of ground water from the ESPA impact flows in the River, and vice-versa.

RESPONSE TO REQUEST FOR ADMISSION NO. 18: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State admits that ground water withdrawals from the ESPA can, under certain circumstances and subject to a variety of factors, affect surface flows in the Snake River to varying degrees. The State otherwise denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 18: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that this Request for Admission oversimplifies a matter of considerable complexity, and which is one of the central issues presented and addressed in the conjunctive administration of water rights in interconnected ground water sources and surface water sources by the Director and the Department. This is demonstrated by the Director's orders in such matters and applicable decisions of the Idaho Supreme Court. For instance, it is incorrect to characterize the physical relationship between the ESPA and the Snake River as a generalized "hydrologic interconnectivity." Rather, ground water in the ESPA is hydraulically connected to the Snake River and tributary surface sources at various places and to varying degrees. Amended Order of May 2, 2005 at 5 ¶ 23 (*In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District,*

North Side Canal Company and Twin Falls Canal Company.) Moreover, this Request for Admission improperly condenses a variety of complex factual and legal questions regarding the relationship between and effects of diversions or withdrawals from interconnected surface water sources and ground water sources into a single yes-or-no question of whether sources are hydraulically connected. "Conjunctive administration requires knowledge by the Department of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources. That is precisely the reason for the [Conjunctive Management] Rules and the need for analysis and administration by the Director." *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, ___, 154 P.3d 433, 448 (2007) (internal quotation marks and citation omitted). Further, it is imprecise to assert that flows in the Snake River affect "withdrawals of ground water" from the ESPA. Rather, flows of the Snake River can, under certain circumstances and subject to a variety of factors, affect ground water levels in the ESPA in various ways to varying degrees.

REQUEST FOR ADMISSION NO. 19: Admit that the depletive effect of withdrawals of ground water from the ESPA on Snake River flows is delayed for a period, often many years, depending upon various factors, including the distance from the well to the River.

RESPONSE TO REQUEST FOR ADMISSION NO. 19: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State admits that the depletive effects of ground water withdrawals from the ESPA on Snake River flows can be delayed to varying degrees depending on a number of factors, including the distance from the well to the river, but are not necessarily delayed in all cases or circumstances. The State otherwise denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 19: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that this Request for Admission oversimplifies a matter of considerable complexity, and which is one of the central issues presented and addressed in the conjunctive administration of water rights in interconnected ground water sources and surface water sources by the Director and the Department. This is demonstrated by the Director's orders in such matters: "The time required for depletionary effects in a hydraulically-connected reach of the Snake River to first be expressed, the time required for those depletionary effects to reach maximum amounts . . . can range from days to years or even decades . . ." Amended Order of May 2, 2005 at 6 ¶ 27. Factors affecting the timing of depletionary effects include "the proximity of the well to various hydraulically-connected reaches, the transmissivity of the aquifer (hydraulic conductivity multiplied by saturated thickness) between the well and the hydraulically-connected reach of the Snake River, the riverbed conductivity, the specific yield of the aquifer (ratio of the volume of water yielded from a portion of the aquifer to the volume of that portion of the aquifer), the period of time over which the ground water is pumped from the well, and the amount of ground water pumped that is consumptively used." *Id.* ¶ 26.

REQUEST FOR ADMISSION NO. 20: Admit that existing water uses in the Snake River Basin above the Murphy Gage up to and including 1984 were causing depletions in the hydrologic system, which were not manifested in reduced flows in the Snake River at the Murphy Gage in 1984.

RESPONSE TO REQUEST FOR ADMISSION NO. 20 & INTERROGATORY NO. 1: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 20: This Request for Admission oversimplifies matters of considerable complexity and cannot be admitted as formulated. The request lumps all uses of water up to and including 1984, and all of their depletive effects, into a single group when in fact each individual use has different effects over time. Some of the existing water uses were fully reflected in flows in 1984, but some amounts of the full depletive effect of some of the existing uses of water were probably not fully expressed in the flows at the Murphy Gage in 1984. See also prior responses, including but not limited to the State's Responses To Interrogatory No. 1 – Requests For Admission Nos. 18 and 19, which the State incorporates herein by this reference. In any event, whether the depletive effects of existing uses were fully reflected in the flows at the Murphy Gage in 1984 is irrelevant because the Swan Falls settlement anticipated and provided for the depletive effects of water rights existing before 1984 as well as all future water rights above the Murphy Gage acquired pursuant to State law.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 21: Admit that the total delayed depletive effect of ground water withdrawals from the ESPA occurring before 1984 is not yet reflected in Snake River flows at the Murphy Gage.

RESPONSE TO REQUEST FOR ADMISSION NO. 21: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 21: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, this request oversimplifies complex water right administration matters and cannot be admitted as formulated for reasons expressed in prior responses, including but not limited to the Response To Interrogatory No. 1 – Request For Admission No. 20, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 22: Admit that on July 12, 2003, average daily flows in the Snake River measured at the Murphy Gage and calculated under the Swan Falls Agreement fell below the Swan Falls Daily Minimum Flows.

RESPONSE TO REQUEST FOR ADMISSION NO. 22: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 22: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that United States Geological Survey and Department data show that the flows at the Murphy Gage on July 12, 2003, exceeded the minimum flow of 3,900 c.f.s. In addition, the flows at Murphy on that date would have been even higher but for fluctuations resulting from the operation of Idaho Power Company facilities above Murphy. Further, Idaho Power Company's definition of the term "Swan Falls Daily Minimum Flows" is incorrect. See also prior responses, including but not limited to the Response To Interrogatory No. 1 – Request For Admission No. 5, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 23: Admit that the flows in the Snake River at the Murphy Gage on July 12, 2003 did not reflect the total delayed depletive effect of ground water withdrawals from the ESPA that had been allowed to occur by the State of Idaho prior to October 1, 1984.

RESPONSE TO REQUEST FOR ADMISSION NO. 23: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 23: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that this request oversimplifies complex water rights administration matters and cannot be admitted as formulated for reasons expressed in prior responses, including but not limited to Responses To Interrogatory No. 1 – Requests For Admission No. 18 – 21, which the State incorporates herein by this reference. Further, whether the total delayed depletive effects of ground water withdrawals from the ESPA that had occurred prior to 1984 were fully reflected in the flows at the Murphy Gage on July 12, 2003, is irrelevant because the Swan Falls settlement anticipated and provided for the depletive effects of water rights existing before 1984 as well as all future water rights above the Murphy Gage acquired pursuant to State law.

REQUEST FOR ADMISSION NO. 24: Admit that the flows in the Snake River at the Murphy Gage on July 12, 2003 did not reflect the total delayed depletive effect of ground water withdrawals from the ESPA from trust water permit/license and non-trust water permit/license appropriations that have been allowed to occur by the State of Idaho since October 1, 1984.

RESPONSE TO REQUEST FOR ADMISSION NO. 24: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 24: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that this request oversimplifies complex water rights administration matters and cannot be admitted as formulated for reasons expressed in prior responses, including but not limited to Responses To Interrogatory No. 1 – Requests For Admission Nos. 14, 18 – 21 and 23, which the State incorporates herein by this reference.

REQUEST FOR ADMISSION NO. 25: Admit that at the time of the Swan Falls Agreement, the Snake River Basin was over appropriated after consideration of the Swan Falls Daily Minimum Flows.

RESPONSE TO REQUEST FOR ADMISSION NO. 25: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 25: The State denies this Request for Admission because Idaho Power Company's definition of "over appropriation" and "Swan Falls Daily Minimum Flows" are contrary to Idaho law and/or the Swan Falls settlement. See also prior responses, including but not limited to the Responses To Interrogatory No. 1 – Requests For Admission Nos. 1, 5 and 15, which the State incorporates herein by this reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 26: Admit that the ESPA and the Snake River upstream from the Murphy Gage are currently over appropriated and threaten the Swan Falls Daily Minimum Flows insured by the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 26: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under

Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 26: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission because Idaho Power Company's definition of "over appropriation" and "Swan Falls Daily Minimum Flows" are contrary to Idaho law and/or the Swan Falls settlement. See also prior responses, including but not limited to the Responses To Interrogatory No. 1 – Requests For Admission Nos. 1, 5, 15, and 21-24, which the State incorporates herein by this reference. Further, the Swan Falls Agreement does not "insure" the minimum flows at the Murphy Gage. Rather, the applicable provision of the Agreement, Paragraph 7B, provides that Idaho Power Company "retains the right to compel State to take reasonable steps to insure the average daily flows . . ."

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 27: Admit that there never was any trust water available for use by post-1984 water uses, there was no trust res, and there exists no trust under the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 27: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 27: The concept of "trust water" as defined and used by Idaho Power Company is contrary to the Swan Falls settlement and applicable Idaho law. Further, the trust was established by legislation that provides that the *res* of the trust is water rights. Idaho Code § 42-203B. In addition, flows above the minimum flows established at the Murphy Gage pursuant to the Swan Falls settlement were available for use by post-1984 uses. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 14, 15 and 21-24, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 28: Admit that IDWR has processed and approved numerous applications for new appropriations of trust water since 1984.

RESPONSE TO REQUEST FOR ADMISSION NO. 28: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under

Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 28:

Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds the concept of “trust water” as defined and used by Idaho Power Company is contrary to the Swan Falls settlement and applicable Idaho law. Rather than authorizing “applications for new appropriations of trust water,” the State through the Department has subordinated the water rights held in trust to upstream uses upon the Department’s determination that an application for such a use complies with State law, including the requirements of Idaho Code § 42-203C. The Department has approved a number of permit applications under these requirements since 1984. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 4, 14, 15 and 27, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 29: Admit that through the issuance of trust water permits, IDWR authorized the use of trust water that did, and does, not exist.

RESPONSE TO REQUEST FOR ADMISSION NO. 29: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 29:

Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that the concept of “trust water” as defined and used by Idaho Power Company is contrary to the Swan Falls settlement and applicable Idaho law. Further, water was available for use under new water rights acquired in compliance with State law, including the requirements of Idaho Code § 42-203C, because such compliance subordinated the water rights held in trust by the State. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 4, 14, 15 and 27-28, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 30: Admit that the water supply and public interest analyses which IDWR performed to issue trust water permits do not reflect the present hydrologic conditions of the ESPA and the Snake River.

RESPONSE TO REQUEST FOR ADMISSION NO. 30: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under

Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 30: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that the concepts of “trust water” and “trust water permits” as defined and used by Idaho Power Company are contrary to the Swan Falls settlement and applicable Idaho law. Further, the analyses the Department has performed in subordinating the water rights held in trust to new uses are consistent with the requirements of controlling State law. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 4, 14, 15 and 27-29, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 31: Admit that Idaho Power owns the following water rights (bracketed names below refer to Company Projects): 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).

RESPONSE TO REQUEST FOR ADMISSION NO. 31: The State admits only that Idaho Power Company owns water right 02-0100, and owns portions of water rights 02-2032, 02-4000 and 02-4001 as reflected in the Director’s Report for Basin 2. The State denies the remainder of this request for admission. See also prior responses, including but not limited to the Responses To Requests For Admission Nos. 4 and 14, which the State incorporates herein by reference.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 31: With the exception of the water right 02-0100 and portions of water rights 02-2032, 02-4000 and 02-4001, as reflected in the Director’s Report for Basin 2, the State holds legal title to the water rights listed in this Request for Admission in trust for the benefit of Idaho Power Company and the People of the State of Idaho. Idaho Power Company, as a beneficiary of the trust, retains the right to beneficially use the flows at the above-referenced facilities for power purposes, subject to subordination to and depletion by junior uses under rights acquired pursuant to State law, including compliance with the requirements of Idaho Code § 42-203C. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 4 and 14, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 32: Admit that the Attorney General and IDWR have asserted that legal title to a portion of Idaho Power's water rights under the Swan Falls Agreement is held by the State of Idaho, and that equitable title to a portion of those water rights is held by Idaho Power and by the State of Idaho.

RESPONSE TO REQUEST FOR ADMISSION NO. 32: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State admits that the Attorney General has asserted in the SRBA, as counsel for the State of Idaho, that the State holds legal title to certain water rights pursuant to the Swan Falls settlement, and that the equitable title to those water rights is held by the People of the State of Idaho and Idaho Power Company. The State denies the remainder of this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 32: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State responds that the Department has made no "assertions" in this matter. The Department filed Director's Reports in the SRBA, as required by statute. The Director's Reports are not "assertions" but rather the Director's determination of the elements of the water right. Idaho Code § 42-1411. Further, the Director and the Department are not parties or claimants on behalf of the State in the SRBA. Idaho Code §§ 42-1401B(2)-(3); 42-1041A(2)-(3). In addition, the Attorney General asserted in the Notices of Change of Water Right Ownership that equitable title is held by Idaho Power Company and the People of the State of Idaho, while the Director recommended that equitable title be decreed in Idaho Power Company and in the "State of Idaho, in and for the people of the State of Idaho." In addition, the water rights as to which ownership is disputed in this consolidated subcase are not "Idaho Power's water rights." Rather, the State holds legal title to these water rights in trust pursuant to Idaho Code § 42-203B and the other elements of the Swan Falls settlement. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 4, 14, and 31, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 33: Admit that the Governor has never asserted that the State holds legal title to a portion of Idaho Power's water rights under the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 33: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 33: While in office, former Governors John Evans and Cecil Andrus, throughout the implementation of the Swan Falls settlement, asserted that the State holds legal title to the hydropower water rights that are the subject of the settlement, in their statements and actions and those of their counsel and cabinet members. Such actions included, but are not limited to, testimony by or on behalf of the Governor to the legislative committees that considered the "subordination legislation" proposed by the Swan Falls settlement, testimony by or on behalf of the Governor to the Idaho Water Resources Board regarding the amendments to the State Water Plan proposed by the Swan Falls

settlement, participation in drafting the Statement of Legislative Intent for the “subordination legislation,” signing of the “subordination legislation,” testimony and information provided to the Federal Energy Regulatory Commission regarding the Swan Falls settlement, and the processing and approval of applications to appropriate water under the criteria and requirements established by Idaho Code § 42-203C, and the other statutes and administrative rules that implement the Swan Falls settlement. In addition, former Governor Evans asserted that the State holds legal title to a portion of the water rights in his testimony in hearings on House Bill 800 on March 27, 2006, before the Senate Resources & Environment Committee. Further, the water rights as to which ownership is disputed in this consolidated subcase are not “Idaho Power’s water rights.” Rather, the State holds legal title to these water rights in trust pursuant to Idaho Code § 42-203B and the other elements of the Swan Falls settlement. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 4, 14, 31, 32, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 34: Admit that one purpose of the State in seeking legal title to a portion of Idaho Power’s water rights is to subordinate those water rights to ground water recharge.

RESPONSE TO REQUEST FOR ADMISSION NO. 34: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 34: The State obtained legal title to certain water rights formerly claimed or held by Idaho Power Company in 1985, upon the enactment of Idaho Code § 42-203B. The State’s purpose at that time was, and continues to be, to ensure that the water rights held in trust are be subordinated to future upstream water rights acquired pursuant to State law. The State is participating in this matter to ensure that the SRBA partial decrees for the water rights in question recognize and reflect what the Idaho Legislature already accomplished in Idaho Code § 42-203B, which provides that “[t]he rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” The State’s purpose is to fulfill its obligations under the Swan Falls Agreement, to uphold and give effect to the Idaho laws enacted to implement the settlement proposed through the Agreement. The water rights as to which ownership is disputed in this consolidated subcase are not “Idaho Power’s water rights.” Rather, the State holds legal title to these water rights in trust pursuant to Idaho Code § 42-203B and the other elements of the Swan Falls settlement. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 4, 14, 28, 31, 32 and 33, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 35: Admit that the first notification provided by the Idaho Attorney General to Idaho Power that the Attorney General intended to file the Notices of Change in Water Right Ownership with IDWR was a telephone call from two members of the Attorney General's staff on December 22, 2006, the same day that the Attorney General filed the Notices with IDWR and that Idaho Power received them.

RESPONSE TO REQUEST FOR ADMISSION NO. 35: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State admits that on December 22, 2006, the Attorney General notified Idaho Power Company that the State intended to file Notices of Change in Water Right Ownership, and would file such Notices that day. The State denies the remainder of this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 -- REQUEST FOR ADMISSION NO. 35: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State responds that this request is incorrect to the extent it implies that the Attorney General acted in his personal capacity when he filed the Notices of Change in Water Right Ownership. The Attorney General filed the Notices, and gave notification of this filing to Idaho Power Company, in his constitutional and statutory capacity as counsel for the State of Idaho. Further, the December 22, 2006, telephone call was placed as a courtesy, and was made directly to Idaho Power Company's general counsel, James C. Tucker. Formal written notification was provided to Idaho Power Company, by hand delivery addressed to Mr. Tucker, on the same day. This written notification included copies of all documents filed with the Department on that day, including the Notices, the Attorney General's explanatory cover letter to the Department, and the volume of supporting documentation filed in support of the Notices.

REQUEST FOR ADMISSION NO. 36: Admit that prior to the Attorney General's filing of the Notices of Change in Water Right Ownership, representatives of the Attorney General's Office discussed the State's claim of ownership to a portion of Idaho Power's water rights and its intent to file notices of change of ownership with the Director, or representatives, of IDWR.

RESPONSE TO REQUEST FOR ADMISSION NO. 36: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State admits that prior to filing the Notices of Change of Water Right Ownership, the Attorney General notified the Department that the State intended to file the Notices. The State denies the remainder of this request for admission.

RESPONSE TO INTERROGATORY NO. 1 -- REQUEST FOR ADMISSION NO. 36: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. The State further objects to this Interrogatory and the corresponding Request for Production of

Documents to the extent they might be understood to seek disclosure of privileged attorney-client communications. Without waiving these objections, the State responds that this request incorrectly suggests that it was improper for the State to notify the Department of its intent to file the Notices of Change of Water Right Ownership. In addition, the water rights as to which ownership is disputed in this consolidated subcase are not "Idaho Power's water rights." Rather, the State holds legal title to these water rights in trust pursuant to Idaho Code § 42-203B and the other elements of the Swan Falls settlement. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 4 and 14, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 37: Admit that representatives of the Attorney General's Office and the Director, or representatives, of IDWR coordinated the filing of the Notices of Change in Water Right Ownership and the issuance of the Director's Report for Basin 2.

RESPONSE TO REQUEST FOR ADMISSION NO. 37: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 37: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State responds that this request incorrectly suggests that it was improper for the Department to take into account the State's Notices of Change of Water Right Ownership when preparing the Director's Report for Basin 2. The State independently filed the Notices of Change of Water Right Ownership consistent with the requirements of the Swan Falls Agreement. The Notices were filed to preserve State's ownership of the water rights within the time frames established by the Department for filing the Director's Report in Basin 2. The Director in his statutory role was required to consider these Notices in preparing his recommendations.

REQUEST FOR ADMISSION NO. 38: Admit that neither the Director, nor representatives, of IDWR conducted any independent investigation of the validity of the Notices of Change in Water Right Ownership filed by the Attorney General or the basis for the claims of ownership asserted in such Notices.

RESPONSE TO REQUEST FOR ADMISSION NO. 38: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 38: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State responds that the Attorney General filed the Notices on behalf of the State. The Department conducted a thorough, independent review and

investigation of all aspects of the water rights in question, including the State's Notices of Change in Water Right Ownership, in accordance with Idaho law.

REQUEST FOR ADMISSION NO. 39: Admit that the State has never filed a Notice of Claim to a Water Right in the SRBA pursuant to Idaho Code § 42-1409(4) with respect to any of Idaho Power's water rights listed in Paragraph 7 of the Swan Falls Agreement or any other water right held or claimed by Idaho Power.

RESPONSE TO REQUEST FOR ADMISSION NO. 39: The State admits that it has not filed a Notice of Claim to a Water Right for the disputed water rights that are at issue in this consolidated subcase, or for any other water right claimed or held by Idaho Power Company. The State denies the remainder of this Request for Admission and affirmatively asserts that the filing of Notices of Change of Water Right Ownership with the Department complied with the SRBA process for claiming ownership of the water rights that are subject to the Swan Falls Agreement.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 39: The water rights as to which ownership is disputed in this consolidated subcase are not water rights "held" by Idaho Power Company. Rather, the State holds legal title to these water rights in trust pursuant to Idaho Code § 42-203B and the other elements of the Swan Falls settlement. See also prior responses, including but not limited to the Responses to Requests for Admission Nos. 4 and 14, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 40: Admit that the res of any trust created under the Swan Falls Agreement is water and not water rights.

RESPONSE TO REQUEST FOR ADMISSION NO. 40: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 40: The Swan Falls Agreement did not create a trust. Rather, the Swan Falls Agreement contemplated, and was expressly conditioned on, the creation of the trust by the Idaho Legislature. The trust was established by legislative action through the enactment of the "subordination legislation" proposed by the Agreement, Idaho Code § 42-203B. This statute provides that the trust *res* consists of water rights. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 4 and 27, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 41: Admit that Idaho Power's water rights were not to be available for distribution to new uses pursuant to the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 41: The State denies this Request for Admission to the extent the phrase "Idaho Power's water rights" means that Idaho Power Company holds legal title to the disputed water rights at issue in this consolidated subcase. The State also denies this Request for Admission to the extent it implies that flows originally appropriated under the hydropower water rights held in trust by the State would not be available for beneficial uses under junior water rights acquired pursuant to applicable State law through subordination of the water rights held in trust. Without waiving these partial denials, the State admits that the water rights were to be held in trust by the State under the Swan Falls settlement for the continuing use for hydropower generation by Idaho Power Company, but subject to the State's authority to subordinate the water rights held in trust to future upstream uses under water rights acquired pursuant to State law.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 41: The water rights as to which ownership is disputed in this consolidated subcase are not "Idaho Power's water rights." Rather, the State holds legal title to these water rights in trust pursuant to Idaho Code § 42-203B and the other elements of the Swan Falls settlement. Further, the Swan Falls settlement as proposed by the Agreement and implemented by legislation provided for flows originally appropriated under the hydropower water rights held in trust by the State to be available for new uses through subordination of the rights held in trust to uses under water rights acquired pursuant to State law, including compliance with the requirements of Idaho Code § 42-203C. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admissions Nos. 4, 14, 28, 29, 31, 34 and 40, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 42: Admit that nowhere in the Swan Falls Agreement, or any documents related thereto, is there any reference made to the State of Idaho owning or claiming legal title to Idaho Power's water rights as trustee.

RESPONSE TO REQUEST FOR ADMISSION NO. 42: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 42: The Agreement, the legislation proposed by the Agreement and enacted to pursuant to it, the relevant legislative history, the implementing administrative rules, and the parties' statements explaining the Agreement and the overall settlement, all contain explicit statements or references that the State owns or claims legal title, to be held in trust, to certain water rights formerly held or claimed by Idaho Power Company. The State also denies this Request for Admission to the extent the phrase "Idaho Power's water rights" means that Idaho Power Company holds legal title to the disputed water rights at issue in this consolidated subcase. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admissions Nos. 4 and 14, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 43: Admit that nowhere in the Swan Falls Agreement, or any documents related thereto, is there any reference made to Idaho Power conveying its water rights into a trust.

RESPONSE TO REQUEST FOR ADMISSION NO. 43: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 43: The main body of the Swan Falls Agreement of October 25, 1984 did not expressly convey the water rights into a trust, but Exhibit 7B to the Agreement proposed the “subordination legislation” that provided for the creation of a State-controlled trust and transfer of the water rights into it. The Agreement was expressly conditioned upon the passage of the “subordination legislation,” the creation of the trust, and the conveyance of the water rights into the trust. Further, there are references to Idaho Power Company conveying its water rights into a trust in documents related to the Swan Falls Agreement, such as the record of the proceedings of the Idaho Legislature and the Idaho Water Resource Board with respect to the passage of the legislation and State Water Plan amendments that implemented the overall settlement proposed by the Swan Falls Agreement. See also prior responses, including but not limited to the Response to Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 44: Admit that the State approved applications and issued permits for the use of trust water under new priority dates, not the priority dates of any water rights owned by Idaho Power.

RESPONSE TO REQUEST FOR ADMISSION NO. 44: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 44: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that the Department has not issued “trust water permits” as that term is defined by Idaho Power Company. Rather, the Department has subordinated the water rights held in trust by the State by approving applications for permits to appropriate water under

the requirements of Idaho Code §§ 42-203B and 42-203C, and the other statutes and administrative rules that implement the Swan Falls settlement. The State admits that such permits have different priority dates than those of the water rights held in trust by the State. See also prior responses, including but not limited to the Responses to Requests for Admission Nos. 4, 14-15, 28, 34 and 41, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 45: Admit that until the actions of the State referenced in the Complaint, the State of Idaho has never claimed or asserted legal title to Idaho Power's water rights, requested conveyance of title, otherwise asserted that legal title was necessary for the State of Idaho to undertake its duties as trustee of the trust water, or otherwise contested ownership of Idaho Power's water rights.

RESPONSE TO REQUEST FOR ADMISSION NO. 45: Denied.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 45: The State has asserted legal title to the water rights held in trust, and has asserted that the State's legal ownership of the water rights was and is necessary for the State to carry out its duties as trustee. See also prior responses, including but not limited to the Responses to Requests for Admission Nos. 4, 14-15, 28, 34 and 41, which the State incorporates herein by reference. The State also repeatedly asserted legal title to the water rights in question in periodic discussions between the State and Idaho Power Company regarding the Swan Falls settlement.

The documents that support this response and the persons having knowledge of the facts are identified in the Response To Interrogatory No. 1 – Request For Admission No. 4, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 46: Admit that the State of Idaho through IDWR submitted recommendations to the SRBA Court that water right decrees in Basins 2, 36 and 37 for water rights listed in Paragraph 7 of the Swan Falls Agreement be adjudicated in the name of Idaho Power as the owner of such water rights. (b) Admit that such recommendations were based on IDWR's investigation of Idaho Power's Notices of Claim to a Water Right pursuant to Idaho Code § 42-1410 authorizing and requiring IDWR's investigation of water right claims.

RESPONSE TO REQUEST FOR ADMISSION NO. 46: Objection. This Request for Admission exceeds the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State denies this Request for Admission to the extent it implies that the Department's filing of Director's reports for Basins 2, 36 and 37 in the SRBA was an action on behalf of the State in its capacity as a party to the SRBA. The State also denies that the Director filed reports in the SRBA court recommending that the Basin 2 water rights that are subject to the Swan Falls settlement be decreed in the name of Idaho Power Company. Without waiving these denials, the State admits that the Director's reports for the Basin 36 and Basin 37 water rights that are subject to the Swan Falls settlement recommended that the water rights be decreed in the name of Idaho Power Company, but denies that the amended Director's reports for the Basin 37 water rights recommended that the legal title to the

rights be decreed in the name of Idaho Power Company. The State admits that the initial Director's reports and amended Director's reports regarding the water rights in Basins 2, 36 and 37 that are subject to the Swan Falls settlement were based upon the Department's investigation pursuant to Idaho law, and that these investigations included the relevant Notices of Claim to a Water Right submitted by Idaho Power Company and the State's Notices of Change of Water Right Ownership.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 46: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order and the scope of the SRBA under Idaho law. Without waiving these objections, the State refers to the Director's Reports and amended Director's Reports for the water rights in Basins 2, 37 and 36, which Idaho Power Company possesses. I.R.C.P. 33(c).

REQUEST FOR ADMISSION NO. 47: Admit that the actions of the State, its officials, and its agencies following the execution of the Swan Falls Agreement through at least 2005 have been consistent with title to the water rights remaining with Idaho Power.

RESPONSE TO REQUEST FOR ADMISSION NO. 47: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 47: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that actions since the execution of the Agreement have been consistent with legal title to the water rights in question being held by the State. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 4, 14-15, 28, 34, 41 and 44, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 48: (a) Admit that on March 9, 2006, Attorney General Wasden, in response to questions in a February 27, 2006 letter from State House Speaker Bruce Newcomb, issued Attorney General Opinion 06-2 "Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)" (hereinafter "Attorney General Opinion 06-2"). (b) Admit that the Attorney General or members of his staff, before receiving such letter, discussed with Speaker Newcomb or other members of the legislature the preparation of an Attorney General opinion concerning the subordination of Idaho Power's hydropower water rights under the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 48: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is not reasonably calculated to lead to the discovery of admissible evidence

because the Idaho Power Company's claim for a "repeal" of Attorney General Opinion 06-2 has been dismissed.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 48: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are not reasonably calculated to lead to the discovery of admissible evidence because the Idaho Power Company's claim for a "repeal" of Attorney General Opinion 06-2 has been dismissed.

REQUEST FOR ADMISSION NO. 49: Admit that the water levels in the ESPA have progressively declined, and continue to decline, resulting in diminishing spring flows, reach gains and flows in the Snake River, and that a contributing factor in such hydrologic developments is the pumping of ground water.

RESPONSE TO REQUEST FOR ADMISSION NO. 49: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 49: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. The State also objects to this Request for Admission as ambiguous because it does not define a time frame reference for the alleged progressive "declines" and "diminishments" in spring discharges and rivers flows, nor has the term "progressive" been defined. Without waiving these objections, the State responds that this Request for Admission oversimplifies a matter of considerable complexity, and which is one of the central issues presented and addressed in the conjunctive administration of water rights in interconnected ground water sources and surface water sources by the Director and the Department. This is demonstrated by the Director's orders in such matters:

5. From the pre-irrigation conditions of the 1860s until the 1950s, the amount of water diverted from the Snake River and its tributaries for gravity flood/furrow irrigation increased substantially, from about 8 million acre-feet, or less, in the early 1900s to about 9.5 million acre-feet in the early 1950s. USGS Professional Paper 1408-F, p. F14. Significant quantities of the surface water diverted were in excess of crop consumptive uses and provided incidental recharge to the ESPA above the average incidental recharge of 3.4 million acre feet described in Finding 3 for the May 1980 through April 2002 time period. Ground water levels across the ESPA responded by rising at many locations. For example, the average rise in ground water levels near Jerome, Idaho, and near Fort Hall, Idaho, was 20 to 40 feet over several tens of years. The average rise in ground water levels west of American Falls was 60 to 70 feet. USGS Professional Paper 1408-A, p. A40. As a result, spring discharges in the Thousand Springs area correspondingly increased based on USGS data as shown in Attachment A.

6. Beginning in about the 1960s to 1970s time period through the most recent years, the total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water supplies have declined from an average of nearly 9 million acre-feet annually to less than 8 million acre-feet annually, notwithstanding years of drought, because of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities. The measured decrease in cumulative surface water diversions above Milner Dam for irrigation reflects the fact that less water is generally needed in the present time to fully irrigate lands authorized for irrigation with a certain crop mix under certain climatic growing conditions than was needed in the 1960s to 1970s for the same lands, crop mix, and climatic growing conditions. With parallel appropriations of ground water, which dramatically increased in about 1950, ground water levels across the ESPA have responded by declining at most locations where levels had previously risen, exacerbated by the worst consecutive period of drought years on record for the upper Snake River Basin. As a result, spring discharges in the Thousand Springs area have correspondingly declined based on USGS data as also shown on Attachment A.

Order of May 19, 2005 (*In the Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-07210, and 36-07427*) (“Blue Lakes Delivery Call”), at 2 ¶¶ 5-6. “[A]s of May 2002, the Snake River Plain aquifer [sic] is close to dynamic equilibrium.” Amended Order of May 2, 2005 at 17 ¶ 80 (Surface Water Coalition Delivery Call). See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 18-20, 21, 23 and 49, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 50: Admit that diminishing spring flows, reach gains and flows in the Snake River have resulted in a number of water right “calls” made by senior priority appropriators utilizing surface and spring water from the Snake River, and that a contributing factor in such calls is the pumping of ground water under junior water rights.

RESPONSE TO REQUEST FOR ADMISSION NO. 50: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State admits that certain delivery calls submitted to the Department by holders of rights to the use of the surface flows of the Snake River and spring flows in the Snake River canyon have asserted or alleged that the spring flows and reach gains have diminished and that a contributing factor in such diminishment is the pumping of ground water under junior water rights. The State denies this Request for Admission to the extent that it implies that such allegations and assertions are true or correct.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 50: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. See also prior responses,

including but not limited to the Responses to Interrogatory No. 1 – Requests For Admission Nos. 18-20, 21, 23 and 49, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 51: Admit that ground water pumping from the ESPA has hydrologic impacts on the aquifer and interconnected surface waters beyond the year that pumping occurs.

RESPONSE TO REQUEST FOR ADMISSION NO. 51: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 51: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds that this Request for Admission oversimplifies a matter of considerable complexity and cannot be admitted as formulated. See prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 18-20, 21, 23 and 49-50, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 52: Admit that to date IDWR has not taken into account the multiple year impacts of ground water pumping from the ESPA in its administration of junior ground water and senior surface water rights.

RESPONSE TO REQUEST FOR ADMISSION NO. 52: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 52: Objection. This Interrogatory and the corresponding Request for Production of Documents are outside the scope of the issues defined in the Order, outside the scope of the SRBA under Idaho law, and contrary to the requirement of exhaustion of administrative remedies. Without waiving this objection, the State responds that the Department and the Director routinely consider the multiple year effects of ground water pumping from the ESPA when conjunctively administering water rights in interconnected ground water sources and surface water sources, and modeling the depletionary effects of ground water withdrawals and curtailments. For instance, the Director's orders in response to delivery calls by holders of senior surface water and spring rights against junior ground water right holder uses expressly consider both the transient and "steady state" depletionary effects of ground water pumping that "continues from year to year." Order of May 19, 2005 at 3 ¶ 9 (Blue Lakes Delivery Call); Amended Order of May 2, 2005 at 6 ¶ 25, 17 ¶ 77 (Surface Water Coalition Delivery Call). Similarly, in the Surface Water Coalition's delivery call, the Director ordered that he would make annual determinations of the extent of injury

reasonably likely to occur to the members of the Surface Water Coalition from out-of-priority ground water depletions, and require mitigation or curtailment as warranted without further demand by members of the Coalition until such time that a permanent mitigation plan might be approved. Amended Order of May 2, 2005 at 47 ¶ 12. This means the Director required mitigation in the form of replacement water in equal quantities to depletions to hydraulically-connected surface water that would result from out-of-priority ground water withdrawals, in lieu of curtailment of such junior priority ground water rights, over the length of period, including multiple-years, that shortages to senior priority surface water rights continued. The amounts of replacement water provided must equal the total gains to the hydraulically-connected surface water that would have accrued from curtailment of junior priority ground water rights over the length of period, including multiple-years, that senior priority rights would have otherwise been injured. Similarly, in response to the Blue Lakes delivery call, the Director analyzed the effects of curtailing certain ground water uses "on an ongoing basis." Order of May 19, 2005 at 17 ¶ 78. Further, the computer model for the ESPA, a basic tool for the Department's administration and planning, is calibrated using data and measurements covering a period of over twenty years, thereby including the multiple year impacts of groundwater withdrawals. See, e.g., Amended Order of May 2, 2005 at 7 ¶ 30. See also prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 18-20, 21, 23, and 49-51, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 53: Admit that IDWR has curtailed or threatened to curtail ground water rights only on the basis of within-the-year or seasonal impacts of such pumping.

RESPONSE TO REQUEST FOR ADMISSION NO. 53: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 53: Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds by referring to prior responses, including but not limited to the Responses to Interrogatory No. 1 – Requests for Admission Nos. 18-20, 21, 23, and 49-52, which the State incorporates herein by reference.

REQUEST FOR ADMISSION NO. 54: Admit that the State's failure to account for the multiple year impacts of ground water pumping, to the extent that that failure results in a violation of the Swan Falls Daily Minimum Flows, is unreasonable and constitutes a breach of the Swan Falls Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 54: Objection. This Request for Admission exceeds the scope of the issues defined in the Order, the scope of the SRBA under

Idaho law, and is contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State denies this Request for Admission.

RESPONSE TO INTERROGATORY NO. 1 – REQUEST FOR ADMISSION NO. 54:
Objection. This Interrogatory and the corresponding Request for Production of Documents exceed the scope of the issues defined in the Order, the scope of the SRBA under Idaho law, and are contrary to the exhaustion of administrative remedies requirement. Without waiving these objections, the State responds by referring to prior responses, including but not limited to the Responses To Interrogatory No. 1 – Requests for Admission Nos. 5, 7-8, 18-19, 21-30 and 48-53, which the State incorporates herein by reference.

DATED this 13th day of November, 2007.

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN (ISB # 5156)
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MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General
Natural Resources Division



DAVID HENSLEY (ISB # 6600)
Counsel to the Governor



FOR DAVID HENSLEY

RECEIVED

MAR 26 2008

DEPARTMENT OF
WATER RESOURCES

**EXHIBIT 3
TO
AFFIDAVIT OF STEVEN L. OLSEN
IN SUPPORT OF
STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER**

EXHIBIT 3
TO
AFFIDAVIT OF STEVEN L. OLSEN
IN SUPPORT OF
STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER

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

In Re SRBA	)	Consolidated Subcase no. 92-23
	)	
	)	FIRST SUPPLEMENTAL RESPONSE
	)	TO IDAHO POWER COMPANY'S
Case No. 39576	)	FIRST SET OF DISCOVERY
	)	REQUESTS
_____	)	

The State of Idaho hereby submits its first supplemental responses to Idaho Power Company's first set of discovery requests. The State has made good faith inquiries into the matters raised by Idaho Power Company's First Set of Discovery Requests in the time allotted, is continuing such inquiries, and will supplement these responses, if necessary, as required by the Idaho Rules of Civil Procedure.

OBJECTIONS

The State re-asserts and retains all objections stated in its October 18, 2007, "Responses to Idaho Power Company's First Set of Discovery Requests," dated November 13, 2007, and such objections are incorporated and re-asserted herein by reference.

SUPPLEMENTAL RESPONSES TO INTERROGATORY NO. 1 AND REQUEST FOR PRODUCTION NO. 1:

In supplementing its responses to Interrogatory No. 1 and Request for Production of Documents No. 1, the State identifies the following documents, copies of which are produced herewith:

1. Audio recordings of the following Idaho Water Resources Board public hearings on the proposed amendments to Policy 32 of the State Water Plan pursuant to the Swan Falls settlement:

a. Idaho Falls, Idaho	January 28, 1985
b. Pocatello, Idaho	January 29, 1985
c. Burley, Idaho	January 30, 1985
d. Twin Falls, Idaho	January 31, 1985
e. Boise, Idaho	February 5, 1985
f. Lewiston, Idaho	February 6, 1985
2. Attendance sheets and exhibits for the January 31, 1985, public hearing of the Idaho Water Resources Board on the proposed amendments to Policy 32 of the State Water Plan pursuant to the Swan Falls settlement ("Twin Falls, Idaho)."
3. "Affirmation of Continuation of Agreement," executed by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power Company Vice President Logan Lanham, on May 15, 1985.
4. The case file of the Idaho Public Utilities Commission ("IPUC") for IPUC case number U-1006-244, including:
 - a. Idaho Power Company's Petition in the Alternative for a Declaratory Order (Nov. 1, 1984)
 - b. Newspaper clippings (Nov. 1984 - Feb. 1985)
 - c. Attorney General's Petition to Intervene (Dec. 14, 1984)
 - d. Order no. 19320 granting Attorney General intervenor status (Dec. 26, 1984)
 - e. Order no. 19362 Notice of Petition (Jan. 8, 1985)
 - f. Petition to Intervene of Peter A. Bowler (Feb. 1, 1985)

- g. Order no. 19437 granting Peter A Bowler intervenor status (Feb. 11, 1985)
 - h. Order no. 19590, Final Order, dismissing Idaho Power Company's Petition (April 12, 1985)
 - i. Petition for Reconsideration of Order no. 19590 (April 22, 1985)
- 5. "Request for Comment and Notice of Intent to Write and Adopt Rules and Regulations for Water Appropriation," IDWR, May 31, 1985.
 - 6. IDWR "News Release," September 1, 1988.
 - 7. Cover sheet, "Draft Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area," IDWR, September 19, 1988.
 - 8. Minutes of the meetings of the Idaho Water Resources Board for:
 - a. October 5, 1984
 - b. November 2, 1984
 - c. December 13, 1984
 - d. January 17, 1985
 - e. March 1, 1985
 - f. May 21, 1985
 - g. July 30, 1985
 - h. September 11, 1985
 - i. October 18, 1985
 - j. April 29, 1986
 - k. June 6, 1986
 - l. March 6, 1987
 - 9. "Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area," IDWR, November 3, 1988
 - 10. Cover sheet dated November 10, 1988 (by Glen Saxton), for "Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area," IDWR, November 3, 1988.

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DATED this 17th day of December, 2007.

LAWRENCE G. WASDEN
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STEVEN L. OLSEN
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Chief, Civil Litigation Division

KARL T. KLEIN (ISB # 5156)
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MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General
Natural Resources Division


Michael C. Orr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of December 2007, I caused to be served a true and correct copy of the foregoing FIRST SUPPLEMENTAL REPSONSE TO IDAHO POWER COMPANY'S FIRST SET OF DISCVOERY REQUESTS on the following parties by the method indicated:

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Idaho Power Company

Represented by:

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MICHAEL C. ORR

Deputy Attorney General

RECEIVED

MAR 26 2008

DEPARTMENT OF
WATER RESOURCES

**EXHIBIT 4
TO
AFFIDAVIT OF STEVEN L. OLSEN
IN SUPPORT OF
STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER**

RECEIVED BY

FEB 20 2008

OFFICE OF THE
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Attorneys for Plaintiff 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 No. 92-00023
IDAHO POWER COMPANY,	)	
Plaintiff,	)	IDAHO POWER COMPANY'S
	)	SECOND SET OF DISCOVERY
v.	)	REQUESTS TO STATE
	)	DEFENDANTS
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	
Governor of the State of Idaho; LAWRENCE G.	)	
WASDEN, Attorney General of the State of	)	
Idaho; IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources	)	
Defendants.	)	
_____	)	

Plaintiff Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, hereby submits its Second Set of Discovery Requests in this action, to be answered by all State Defendants in this action in accordance with the Idaho Rules of Civil Procedure.

Your responses to these Discovery Requests are due thirty (30) calendar days after service in accordance with the Idaho Rules of Civil Procedure, absent an agreed upon extension.

I. INSTRUCTIONS

1. The following definitions apply to each of these Discovery Requests:

a. **Communication.** The term "communication" means any contact between two or more persons, including but not limited to, (a) written contact by such means as electronic mail, letter, memoranda, telegrams, telex, or by any document, and (b) oral contact by means such as face-to-face meetings and telephone conversations.

b. **State Defendants.** The term "State Defendants" means the Defendants in this action, collectively and individually: the State of Idaho, C.L. "Butch" Otter, Lawrence G. Wasden, the Idaho Department of Water Resources ("IDWR"), and David Tuthill. In addition, Defendant State of Idaho encompasses all State agencies and officials, including IDWR and its Director David Tuthill.

c. **Document.** The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term in I.R.C.P. Rule 34(a), including, without limitation, electronic or computerized data compilations and other information stored in electronic form, which should be produced in the form of a CD or DVD disk. A draft or non-identical copy is a separate document within the meaning of this term.

d. **ESPA** means Idaho's "Eastern Snake Plain Aquifer."

e. **Framework.** The term "Framework" means the Framework for Final Resolution of Snake River Water Right Controversy signed on October 1, 1984 by Idaho Power Company's Chairman of the Board and Chief Executive Officer James E. Bruce, Idaho Governor John V. Evans, and Idaho Attorney General Jim Jones.

f. **Identify (with respect to persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, present or last known telephone number, and when referring to a natural person, the person's present or last known place of employment and title. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requests requesting the identification of that person.

g. **Identify (with respect to documents).** When referring to documents, "to identify" means to give, to the extent known, the (i) type of document (e.g., letter, memorandum, email); (ii) the general subject matter; (iii) the date of the document; and (iv) the author(s), addressee(s) and recipient(s).

h. **IDWR** means the Idaho Department of Water Resources.

i. **Person.** The term "person" is defined as any natural person or any business, legal or governmental entity or association.

j. **Relating to.** The term "relating to" means concerning, touching, referring or having reference to, or in any manner whatsoever, whether directly or indirectly.

k. **Swan Falls Contract to Implement.** The term "Swan Falls Contract to Implement" or "Contract" means the Contract signed on October 25, 1984 by Idaho Power Company Secretary Paul L. Jauregui, Idaho Governor John V. Evans, and Idaho Attorney General Jim Jones

l. **Swan Falls Daily Minimum Flows.** The term "Swan Falls Daily Minimum Flows" means average daily minimum stream flows in the Snake River of 3,900 c.f.s. in the summer (April 1 to October 31) and 5,600 c.f.s. in the winter (November 1 to March 31) measured at the Murphy Gage, as set forth in Paragraph 7(A) of the Swan Falls Agreement.

m. **Swan Falls Agreement.** The terms "Swan Falls Agreement" or "Agreement" mean the Agreement signed on October 25, 1984 by Idaho Power Company's Chairman of the Board and Chief Executive Officer James E. Bruce, Idaho Governor John V. Evans, and Idaho Attorney General Jim Jones.

n. **Swan Falls Legislation.** The term "Swan Falls Legislation" means the legislation enacted to implement the Swan Falls Agreement as codified at [need to insert cites].

o. **Trust Water.** The term "Trust Water" means the amount of water in the Snake River Basin, including ground water in the ESPA, over and above the Swan Falls Daily Minimum Flows, available for use by new appropriations subsequent to October 1, 1984.

p. **You/Yours.** The terms "you" and "yours" refer to the State Defendants, and anyone acting on their behalf, including, but not limited to, their employees, representatives, attorneys, investigators, and expert witnesses.

2. The following rules of construction apply to each of these Discovery Requests:

a. **All/Each.** The terms "all" and "each" shall be construed as all and each.

b. **And/Or.** The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Discovery Requests all responses that might otherwise be construed to be outside the scope of the Discovery Requests.

c. **Singular/Plural.** The use of the singular form of any word includes the plural and vice versa.

3. If you consider the content of any communication or document responsive to these Discovery Requests to be privileged or not otherwise subject to discovery in these proceedings, you are required to provide a complete privilege log for these communications or documents.

4. Each Discovery Request shall be answered fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the Discovery Request is not objectionable. If an objection is made, the reasons for that objection shall be stated with specificity.

5. Your answer to each Discovery Request must be as complete and straightforward as the information reasonably available to you permits. If a Discovery Request cannot be answered completely, answer to the greatest extent possible.

6. If you do not have enough personal knowledge to answer a Discovery Request, please state so specifically. You must make a reasonable and good faith effort to answer each Discovery Request by asking other persons who may have knowledge of the issue, unless the information is reasonably available to you.

7. With respect to Interrogatories: Each Interrogatory shall be answered fully in writing and under oath. The answers are to be signed and verified by the person making them, and the objections signed by the attorney making them.

8. With respect to Requests for Production: You are required to produce all documents in your possession, custody, or control. If you are unable to produce any document(s), state the reasons you are unable to produce the document(s) with as much specificity as possible. Please produce all documents for inspection either as they are kept in the usual course of business or organize and label them to correspond with the categories in the Requests for Production and related Requests for Admission.

9. These Discovery Requests are continuing and require supplemental responses up to the date of trial in accordance with I.R.C.P. 26(e). If any response is determined to be incomplete or incorrect, you have a continuing duty to supplement or change answers previously submitted.

II. INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons employed or consulted by the State Defendants involved with or having knowledge concerning the determination of the availability of Trust Water in the negotiations leading up to the negotiation of the Swan Falls Agreement in October, 1984.

INTERROGATORY NO. 2: Identify all persons employed or consulted by the State Defendants involved with or having knowledge concerning the determination of or agreement to an irrigation season low flow of 4500 cfs at the Murphy Gage on an average daily basis, as referenced in the Framework.

INTERROGATORY NO. 3: Identify the lowest average daily minimum flow in the Snake River that has occurred at the Murphy Gage as calculated pursuant to the Swan Fall Agreement.

INTERROGATORY NO. 4: Describe the basis and method used to measure, calculate, and determine average daily flows at the Murphy Gage, including the lowest average daily minimum flow referenced in Interrogatory No. 3.

INTERROGATORY NO. 5: Describe the process used and basis for defining the area described as the "Geographic Area From Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach" (the "Tributary Area"), as depicted in Appendix A of the IDWR Water Appropriation Rules, IDAPA 37.03.08 (July 1, 1993), attached hereto as Exhibit A.

INTERROGATORY NO. 6: Identify all persons employed or consulted by the State Defendants involved with or having knowledge concerning the definition of the Tributary Area referenced in Interrogatory No. 5.

INTERROGATORY NO. 7: Describe the basis for the following regulatory definition of "trust water flows" as originally set forth in the IDWR Water Appropriation Rules and Regulations, IDAPA 37.0, Rule 1.5,1.3 (adopted Oct. 8, 1986), and unchanged in IDAPA 37.03.08, Rule 030.01.c.:

Trust water flows under the Snake River water rights agreement [the Swan Falls Agreement] are those occurring in the Snake River and tributaries in the geographic area designated in Rule 1.5,1.1. [now Rule Subsection 030.01.a.] which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement.

INTERROGATORY NO. 8: Describe the process used and the factors, analysis, and any assumptions employed by the IDWR Director in determining, in accordance with the terms of the April 30, 1993 IDWR Amended Moratorium Order, whether "the development and use of water pursuant to an application will have no effect on prior surface and ground water rights because of its location."

INTERROGATORY NO. 9: Describe the basis for the IDWR Director's determination in the April 30, 1993 IDWR Amended Moratorium Order that ground water aquifers had, after six consecutive years of drought, become stressed by a reduction in natural recharge due to changes in diversion and use of surface waters and by the increased volume of ground water pumping then occurring, including any reports, analyses, or other documentation showing what portion of the aquifer decline was attributable to changes in diversion and use of surface waters, and what portion was attributable to the increased volume of ground water pumping.

III. REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Produce any index(ices) created by or on behalf of IDWR that reflects documents maintained in IDWR's files during the period of 1970-1989, whether said documents are currently located at IDWR or in another location.

REQUEST FOR PRODUCTION NO. 2: Produce any index(ices) created by or on behalf of the Idaho Public Utilities Commission ("IPUC") that reflects documents maintained in IPUC's files, during the period of 1970-1989, whether said documents are currently located at IPUC or in another location.

REQUEST FOR PRODUCTION NO. 3: Produce any index(ices) created by or on behalf of the Idaho Attorney General's Office that reflects documents maintained in the files of the Attorney General's office during the period of 1970-1989, whether said documents are currently located at the Attorney General's office or in another location.

REQUEST FOR PRODUCTION NO. 4: Produce any and all documents relating in any way to the Swan Falls Agreement and/or the Swan Falls Legislation, including without limitation, any and all documents (i) evidencing the intent or perceptions of any State Defendant regarding the Swan Falls Agreement and/or the Swan Falls Legislation; (ii) any and all transcripts, minutes, notes or similar documents reflecting meetings, hearings, or other discussions regarding the Swan Falls Agreement and/or Legislation; (iii) any and all drafts of the Swan Falls Agreement and/or Swan Falls Legislation and (iv) any and all correspondence regarding the Swan Falls Agreement and/or the Swan Falls Legislation.

REQUEST FOR PRODUCTION NO. 5: Produce the letter from Idaho Governor Dirk Kempthorne to the Secretary of the U.S. Department of Energy, dated December 21, 2000, referenced in Order No. 28605 issued by the Idaho Public Utilities Commission in case no. GNR-E-00-1.

REQUEST FOR PRODUCTION NO. 6: Produce any and all reports, studies, memoranda, or any and all similar documents quantifying, discussing, projecting, or otherwise analyzing and/or interpreting the effect of ground water development in the ESPA upon surface flows in the Milner to Murphy reach of the Snake River as of October, 1984, including appropriations then applied for but yet to be permitted.

REQUEST FOR PRODUCTION NO. 7: Produce all documents used, considered, consulted, or relating to the determination by the State Defendants of the amount and availability of Trust Water.

REQUEST FOR PRODUCTION NO. 8: Produce any and all documents relating to or supporting in any way the proposition that a "600 cfs block of water," as measured at the Murphy Gauge, was available as of October, 1984 for future appropriation without reducing Snake River flows below the Swan Falls Daily Minimum Flows.

REQUEST FOR PRODUCTION NO. 9: Produce any and all reports, studies, memoranda, or any and all similar documents relating in any way to hydrological models that were in existence in 1984 and that were known to exist by the State Defendants that were used or could have been used to determine the geographic location and nature (e.g., groundwater, surface water, non-tributary groundwater, etc.) of waters that are hydrologically connected to the surface flows of the Snake River between Milner and Murphy Gauge.

REQUEST FOR PRODUCTION NO. 10: Produce all documents used, considered, consulted or relating to the determination or agreement by the State Defendants of an irrigation season low flow of 4500 cfs at the Murphy Gage on an average daily basis, as referenced in the Framework.

REQUEST FOR PRODUCTION NO. 11: Produce all documents used, considered, consulted or relating to the determination of the basis for all IDWR moratoriums that have been placed on the processing of applications for permits for the appropriation of ground water both prior to and

since the announcement of the Idaho Supreme Court decision in *Idaho Power Company v. Idaho Dep't of Water Resources*, 104 Idaho 575, 661 P.2d 741 (1983).

REQUEST FOR PRODUCTION NO. 12: Produce any and all documents that quantify, list, describe, or otherwise reflect the total (in cubic feet per second) of surface and ground water flows proposed to be diverted by those persons who were dismissed from Ada County Civil No. 81375 pursuant to the terms of the Swan Falls Contract to Implement, by virtue of having previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, as defined and provided by paragraphs 2(a) and 2(b) of the Contract.

REQUEST FOR PRODUCTION NO. 13: Produce any and all documents that quantify, list, describe, or otherwise reflect the total (in cubic feet per second) of surface and ground water flows proposed to be diverted by those persons who had beneficially used water prior to October 1, 1984 and filed an application or claim for such use after October 25, 1985 but prior to June 30, 1985, pursuant to paragraph 7.D. of the Swan Falls Agreement.

REQUEST FOR PRODUCTION NO. 14: Produce all correspondence, memoranda, notes, or other documents relating to or evidencing discussions between State Defendants and Idaho Power involving any assertion by the State Defendants of legal title to a portion of Idaho Power's water rights.

REQUEST FOR PRODUCTION NO. 15: Produce any and all documents relating to or supporting IDWR's independent review and investigation of the water rights at issue in the Notices of Change in Water Right Ownership filed with IDWR by the Attorney General on December 22, 2006.

REQUEST FOR PRODUCTION NO. 16: Produce any and all documents consulted, reviewed, or otherwise considered in compiling the State Defendants' response to the Interrogatories submitted herewith.

Dated this 19th day of February, 2008.

IDAHO POWER COMPANY

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SCHRECK, LLP

410 17th Street, Twenty-Second Floor

Denver, CO 80202

Attorneys for Idaho Power Company

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 **IDAHO POWER COMPANY'S SECOND SET OF DISCOVERY REQUESTS TO STATE DEFENDANTS** by the method indicated below, and addressed to each of the following:

Lawrence Wasden
Steven Olsen
Karl T. Klein
Michael C. Orr
700 W. Jefferson, Room 210
P.O. Box 44449
Boise, ID 83711-4449
Attorneys for Defendant, State of Idaho

 X U.S. Mail, Postage Prepaid

 X E-mail

IDWR Document Depository
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 Hand Delivered
 Overnight Mail
 Facsimile

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

 X U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

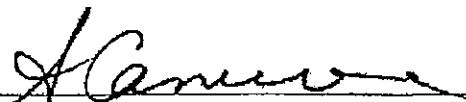
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Randall C. Budge
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Alison Cameron

RECEIVED

MAR 26 2008

**DEPARTMENT OF
WATER RESOURCES**

**EXHIBIT 5
TO
AFFIDAVIT OF STEVEN L. OLSEN
IN SUPPORT OF
STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER**

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN (ISB # 5156)
Deputy Attorney General
Civil Litigation Division

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(208) 334-2400
Attorneys for The State of Idaho

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

In Re SRBA	)	Consolidated Subcase no. 92-23
	)	
Case No. 39576	)	RESPONSES TO IDAHO
	)	POWER COMPANY'S SECOND
	)	SET OF DISCOVERY REQUESTS
	)	

The State of Idaho, Governor C.L. "Butch" Otter, and Attorney General Lawrence G. Wasden (collectively, "the State"), hereby submit their responses to "Idaho Power Company's Second Set of Discovery Requests to State Defendants" (hereinafter, "Second Set of Discovery Requests"). The State has made good faith inquiries into the matters raised by the Second Set of Discovery Requests in the time allotted, is continuing such inquiries, and will supplement these responses, if necessary, to the extent required by the Idaho Rules of Civil Procedure.

OBJECTIONS

1. Objection To Idaho Power Company's Second Set of Discovery Requests As Contravening The Scope Of The Order of July 23, 2007.

The State objects to Idaho Power's Second Set of Discovery Requests to the extent it contravenes the Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues Into Consolidated Subcase; And Permitting Discovery; And Notice of Scheduling Conference (July 23, 2007) ("Order"). The Order separates and stays Idaho Power's claims against the Director and the Department, Order at 14, and provides that after making preliminary determinations of the ownership and scope of the water rights at issue, the Court will transfer issues of compliance with and enforcement of the partial decrees to an administrative body or court of appropriate jurisdiction. Order at 13. Idaho Power's Second Set of Discovery Requests contravenes the Order by seeking discovery on claims against the Director and the Department, on challenges to their permitting and administration of water rights, and on matters of compliance with and enforcement of the water rights at issue in this consolidated subcase.

2. Objection To Idaho Power Company's Second Set of Discovery Requests As Exceeding The Scope Of The Snake River Basin Adjudication As Established By Idaho Law.

The State objects to Idaho Power's Second Set of Discovery Requests to the extent it seeks to develop or support claims for judicial review of the administrative actions of the Director and/or the Department. Claims for judicial review of administrative actions of the Director or Department may not be heard in the Snake River Basin Adjudication. Idaho Code § 42-1401D. Idaho Power's Second Set of Discovery Requests violates this provision by seeking discovery on claims for judicial review of agency actions of the Department and/or the Director in the Snake River Basin Adjudication.

3. Objection To Idaho Power Company's Second Set of Discovery Requests As Contrary To The Requirement Of Exhaustion Of Administrative Remedies.

The State also objects to Idaho Power's Second Set of Discovery Requests to the extent it seeks to develop or support claims involving judicial review of the administrative actions of the Director and/or the Department prior to the exhaustion of administrative remedies. Claims for judicial review of administrative actions or decisions of the Director or the Department may not be raised in court prior to the exhaustion of administrative remedies. *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007); Idaho Code § 67-5271. Idaho Power's Second Set of Discovery Requests seeks discovery on claims for judicial review of administrative actions of Director and the Department without first exhausting administrative remedies.

4. **Objection To Idaho Power Company's Second Set of Discovery Requests To The Extent They Are Propounded To Non-Parties.**

The State objects to Idaho Power's Second Set of Discovery Requests to the extent they are propounded to the Idaho Department of Water Resources ("the Department") and David Tuthill, the Director of the Department ("the Director"). The Idaho Rules of Civil Procedure provide that Requests for Admissions, Interrogatories and Requests for Production of Documents are available only as to a "party" to a case. See I.R.C.P. 33(a), 34(a), 36(a). The Department and the Director are not parties to the Snake River Basin Adjudication. Idaho Code §§ 42-1401B(2); 42-1401A(3); *Twin Falls Canal Co. v. IDWR*, 127 Idaho 688, 905 P.2d 89 (1995). Without waiving this objection, however, the State of Idaho has provided documents from the Department that are responsive to the requests.

5. **Objection To Idaho Power Company's Second Set of Discovery Requests For Exceeding the Forty (40) Interrogatory Limitation Established By Rule 33(a) Of The Idaho Rules Of Civil Procedure.**

The State objects to Idaho Power's Second Set of Discovery Requests as exceeding the limitation of forty (40) interrogatories established in Rule 33(a)(3) of the Idaho Rules of Civil Procedure. Idaho Power already exceeded the forty (40) interrogatory limit in the Company's First Set of Discovery Requests, as discussed in Objection No. 2 on page 2 of the State's "Responses to Idaho Power Company's First Set of Discovery Requests," served November 13, 2007. The State incorporates said objection herein in its entirety by this reference.

6. **Objection To Idaho Power Company's Second Set Of Discovery Requests As Exceeding The Permissible Scope Of Discovery Under Rule 26(b)(1).**

The State also objects to Idaho Power's Second Set of Discovery Requests on the ground that it impermissibly seeks to supplement the legislative record for the Legislature ratification of the Swan Falls Agreement, endorsement of the overall Swan Falls settlement, and enactment 1985 Idaho Session Laws chapters 14-19, 162, 204, and 1986 Idaho Session Laws chapter 117. *Gillihan v. Gump*, 140 Idaho 264, 92 P.3d 914 (2004). Idaho Power's Second Set of Discovery Requests thus are not reasonably calculated to lead to the discovery of admissible evidence and exceed the permissible scope of discovery under Rule 26(b)(1).

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons employed or consulted by the State Defendants involved with or having knowledge concerning the determination of the

availability of Trust Water in the negotiations leading up to the negotiation of the Swan Falls Agreement in October, 1984.

RESPONSE TO INTERROGATORY NO. 1: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference. The State further objects because this Interrogatory is vague and ambiguous. Further, Idaho Power's definition of "Trust Water" contradicts Idaho law by defining "trust water" as a quantity of "water." IDAPA 37.03.08.010 defines "trust water" as "[t]hat portion of an unsubordinated **water right** used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code." (emphasis added). Idaho Power's definition of "trust water" is also contrary to the Swan Falls settlement. The State further objects to this Interrogatory's use of the phrase "the negotiations leading up to the negotiation of the Swan Falls Agreement" as vague and ambiguous. Without waiving these objections, the State responds that it has no knowledge of any such persons because the water supply issue resolved in the pre-agreement negotiations was not a determination of "Trust Water" as defined by Idaho Power but rather a determination of the new seasonal minimum flow levels for the Murphy Gage that the parties intended to propose for purposes of amending the State Water Plan. To the extent that this Interrogatory seeks identification of persons the State employed or consulted with, and were involved with or had knowledge of this determination, the State incorporates herein its response to Interrogatory No. 2, below.

INTERROGATORY NO. 2: Identify all persons employed or consulted by the State Defendants involved with or having knowledge concerning the determination of or agreement to an irrigation season low flow of 4500 cfs at the Murphy Gage on an average daily basis, as referenced in the Framework.

RESPONSE TO INTERROGATORY NO. 2: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference. Without waiving these objections, the State responds that it has no knowledge of such persons because there was no reference on the October 1, 1984 "Framework for Final Resolution of Snake River Water Rights Controversy" ("Framework") to a "determination of or an agreement to an irrigation season low flow of 4500 cfs at the Murphy Gage on an average daily basis." Rather, the "Framework" simply stated that "[t]he best available hydrologic data indicate that existing uses result in a potential irrigation season low flow of approximately 4,500 c.f.s. at the Murphy Gage on an average daily basis." To the extent that this Interrogatory seeks identification of persons the State employed or consulted with, and were involved with or had knowledge of the basis for this statement, the State identifies the following:

Patrick Costello

University of Idaho, College of Law, Moscow, ID 83844
208-885-4628

A. Kenneth Dunn	44640 S. Heritage Palms Drive, Indio, CA 92201 760-360-2931
John V. Evans	
Wayne Haas	3315 Manchester, Boise, ID 83704 208-322-8912
Bob Sutter	824 E. Bannock Street, Boise, ID 83712 208-345-3599
Jim Jones	Idaho Supreme Court; PO Box 83720, Boise ID 83720; 208-334-3186
Patrick Kole	Idaho Potato Commission; PO Box 1670, Eagle, ID 83616- 9104; 208-334-2350
Alan Robertson	6486 Kaniksu Shores Circle, Sandpoint, ID 83864 208-263-9537
Glen Saxton	7823 West Apache Way, Boise, ID 83714; 208-853-2743
Clive J. Strong	Office of the Attorney General; PO Box 83720, Boise, ID 83720; 208-334-4126
David Tuthill	Idaho Department of Water Resources; PO Box 83720, Boise, ID 83720; 208-287-4803
Norm Young	ERO Resources Corporation; 3314 Grace Street, Boise, ID 83703; 208-373-7983

INTERROGATORY NO. 3: Identify the lowest average daily minimum flow in the Snake River that has occurred at the Murphy Gage as calculated pursuant to the Swan Fall Agreement.

RESPONSE TO INTERROGATORY NO. 3: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference. Without waiving these objections, the State responds that Idaho Power Company has been operating and monitoring the Murphy Gage since April, 2004.

INTERROGATORY NO. 4: Describe the basis and method used to measure, calculate, and determine average daily flows at the Murphy Gage, including the lowest average daily minimum flow referenced in Interrogatory No.3.

RESPONSE TO INTERROGATORY NO. 4: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference. Without waiving these objections, the State responds that Idaho Power Company has been operating and monitoring the Murphy Gage since April, 2004.

INTERROGATORY NO. 5: Describe the process used and basis for defining the area described as the “Geographic Area from Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach” (the “Tributary Area”), as depicted in Appendix A of the IDWR Water Appropriation Rules, IDAPA 37.03.08 (July 1, 1993), attached hereto as Exhibit A.

RESPONSE TO INTERROGATORY NO. 5: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference. The State also notes that the copy of Idaho Power Company’s Second Set of Discovery Requests served on the State did not include “Exhibit A” as described in this Interrogatory.

INTERROGATORY NO. 6: Identify all persons employed or consulted by the State Defendants involved with or having knowledge concerning the definition of the Tributary Area referenced in Interrogatory No.5.

RESPONSE TO INTERROGATORY NO. 6: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference.

INTERROGATORY NO. 7: Describe the basis for the following regulatory definition of “trust water flows” as originally set forth in the IDWR Water Appropriation Rules and Regulations, IDAPA 37.0, Rule 1,5,1,3 (adopted Oct. 8,1986), and unchanged in IDAPA 37.03.08, Rule 030.01.c:

Trust water flows under the Snake River water rights agreement [the Swan Falls Agreement] are those occurring in the Snake River and tributaries in the geographic area designated in Rule 1,5,1,1. [now Rule Subsection 030.01.a] which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement.

RESPONSE TO INTERROGATORY NO. 7: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference.

INTERROGATORY NO. 8: Describe the process used and the factors, analysis, and any assumptions employed by the IDWR Director in determining, in accordance with the terms of the April 30, 1993 IDWR Amended Moratorium Order, whether “the development and use of water pursuant to an application will have no effect on prior surface and ground water rights because of its location.”

RESPONSE TO INTERROGATORY NO. 8: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference.

INTERROGATORY NO. 9: Describe the basis for the IDWR Director’s determination in the April 30, 1993 IDWR Amended Moratorium Order that ground water aquifers had, after six consecutive years of drought, become stressed by a reduction in natural recharge due to changes in diversion and use of surface waters and by the increased volume of ground water pumping then occurring, including any reports, analyses, or other documentation showing what portion of the aquifer decline was attributable to changes in diversion and use of surface waters, and what portion was attributable to the increased volume of ground water pumping.

RESPONSE TO INTERROGATORY NO. 9: The State objects to this Interrogatory for the reasons explained in Objections Nos. 1-6, above, which are incorporated herein by this reference.

RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Produce any index(ices) created by on behalf of IDWR that reflects documents maintained in IDWR’s files during the period of 1970 - 1989, whether said documents are currently located at IDWR or in another location.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that the term “index(ices)” is vague and ambiguous, on the ground that this request is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State’s possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional

documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 2: Produce any index(ices) created by or on behalf of the Idaho Public Utilities Commission ("IPUC") that reflects documents maintained in IPUC's files, during the period of 1970-1989, whether said documents are currently located at IPUC or in another location

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-3 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that the term "index(ices)" is vague and ambiguous, on the ground that this request is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 3: Produce any index(ices) created by or on behalf of the Idaho Attorney General's Office that reflects documents maintained in the files of the Attorney General's office during the period of 1970-1989, whether said documents are currently located at the Attorney General's office or in another location.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-3 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that the term "index(ices)" is vague and ambiguous, on the ground that this request is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 4: Produce any and all documents relating in any way to the Swan Falls Agreement and/or the Swan Falls Legislation, including without limitation, any and all documents (i) evidencing the intent or perceptions of any

State Defendant regarding the Swan Falls Agreement and/or the Swan Falls Legislation;
(ii) any and all transcripts, minutes, notes or similar documents reflecting meetings, hearings, or other discussions regarding the Swan Falls Agreement and/or Legislation;
(iii) any and all drafts of the Swan Falls Agreement and/or Swan Falls Legislation and
(iv) any and all correspondence regarding the Swan Falls Agreement and/or the Swan Falls Legislation.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the grounds that it is overbroad and unreasonably burdensome. The State further objects to this request to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, the attorney work-product doctrine, and/or information concerning settlement negotiations. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 5: Produce the letter from Idaho Governor Dirk Kempthorne to the Secretary of the U.S. Department of Energy, dated December 21, 2000, referenced in Order No. 28605 issued by the Idaho Public Utilities Commission in case no. GNR-E-00-1.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5 The State responds that it has performed a reasonable search and has been unable to locate the requested document. Based on the date of the letter the State believes that the request is likely objectionable for the reasons explained in Objections Nos. 1-3 and 6, above, which are incorporated herein by this reference.

REQUEST FOR PRODUCTION NO. 6: Produce any and all reports, studies, memoranda, or any and all similar documents quantifying, discussing, projecting, or otherwise analyzing and/or interpreting the effect of ground water development in the ESPA upon surface flows in the Milner to Murphy reach of the Snake River as of October, 1984, including appropriations then applied for but yet to be permitted.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that it is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds

that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 7: Produce all documents used, considered, consulted, or relating to the determination by the State Defendants of the amount and availability of Trust Water.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects that this request is vague and ambiguous because Idaho Power's definition of "Trust Water" contradicts Idaho law by incorrectly defining "trust water" as a quantity of "water" rather than as "[t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code." IDAPA 37.03.08.010. The State further objects to this request on the ground that it is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 8: Produce any and all documents relating to or supporting in any way the proposition that a "600 cfs block of water," as measured at the Murphy Gauge, was available as of October, 1984 for future appropriation without reducing Snake River flows below the Swan Falls Daily Minimum Flows.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that it is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Additionally, the State objects that this request is vague and ambiguous because it mischaracterizes "600 cfs block of water" as a term of the Swan Falls settlement. In fact, while the parties for convenience at times referred to

water above the minimum flow as 600 cfs, the water available for future development consisted of "[t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code." IDAPA 37.03.08.010. Without waiving these objections, the State further responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 9: Produce any and all reports, studies, memoranda, or any and all similar Documents relating in any way to hydrological models that were in existence in 1984 and that were known to exist by the State Defendants that were used or could have been used to determine the geographic location and nature (e.g., groundwater, surface water, non-tributary groundwater, etc.) of waters that are hydrologically connected to the surface flows of the Snake River between Milner and Murphy Gauge.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that it is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 10: Produce all documents used, considered, consulted or relating to the determination or agreement by the State Defendants of an irrigation season low flow of 4500 cfs at the Murphy Gage on an average daily basis, as referenced in the Framework.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that it is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or

the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 11: Produce all documents used, considered, consulted or relating to the determination of the basis for all IDWR moratoriums that have been placed on the processing of applications for permits for the appropriation of ground water both prior to and since the announcement of the Idaho Supreme Court decision in *Idaho Power Company v. Idaho Dep't of Water Resources*, 104 Idaho 575, 661 P.2d 741 (1983).

RESPONSE TO REQUEST FOR PRODUCTION NO. 11: The State objects to this Request for Production for the reasons explained in Objections Nos. 1-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that it is overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 12: Produce any and all documents that quantify, list, describe, or otherwise reflect the total (in cubic feet per second) of surface and ground water flows proposed to be diverted by those persons who were dismissed from Ada County Civil No. 81375 pursuant to the terms of the Swan Falls Contract to Implement, by virtue of having previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, as defined and provided by paragraphs 2(a) and 2(b) of the Contract.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: The State objects to this Request for Production for the reasons explained in Objections Nos. 1-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the ground that it is vague and ambiguous, overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent

of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Moreover, such records are part of Ada County Civil No. 81375, and are public records in the possession of Idaho Power Company or otherwise available from the Fourth Judicial District Court. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 13: Produce any and all documents that quantify, list, describe, or otherwise reflect the total (in cubic feet per second) of surface and ground water flows proposed to be diverted by those persons who had beneficially used water prior to October 1, 1984 and filed an application or claim for such use after October 25, 1985 but prior to June 30, 1985, pursuant to paragraph 7.D. of the Swan Falls Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: The State objects to this Request for Production for the reasons explained in Objections Nos. 1-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the grounds that it is vague and ambiguous, overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Moreover, such records are part of Ada County Civil No. 81375, and are public records in the possession of Idaho Power Company or otherwise available from the Fourth Judicial District Court. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 14: Produce all correspondence, memoranda, notes, or other documents relating to or evidencing discussions between State Defendants and Idaho Power involving any assertion by the State Defendants of legal title to a portion of Idaho Power's water rights.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14: The State objects to this Request for Production for the reasons explained in Objections Nos. 2-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the grounds that it is overbroad and unreasonably burdensome. The State further objects to this request to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, the attorney work-product doctrine, and/or information concerning settlement negotiations. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the

parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 15: Produce any and all documents relating to or supporting IDWR's independent review and investigation of the water rights at issue in the Notices of Change in Water Right Ownership filed with IDWR by the Attorney General on December 22, 2006.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15: The State objects to this Request for Production for the reasons explained in Objections Nos. 1-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the grounds that it is vague and ambiguous, overbroad and unreasonably burdensome, and to the extent it seeks disclosure of documents that are protected by the attorney-client privilege and/or the attorney work-product doctrine. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

REQUEST FOR PRODUCTION NO. 16: Produce any and all documents consulted, reviewed, or otherwise considered in compiling the State Defendants' response to the Interrogatories submitted herewith.

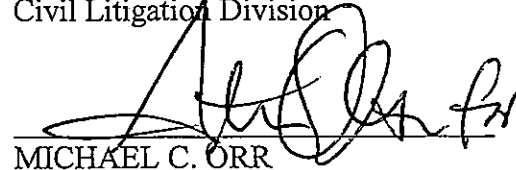
RESPONSE TO REQUEST FOR PRODUCTION NO. 16: The State objects to this Request for Production for the reasons explained in Objections Nos. 1-4 and 6, above, which are incorporated herein by this reference. The State further objects to this request on the grounds that it is overbroad and unreasonably burdensome. The State further objects to this request to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, the attorney work-product doctrine, and/or information concerning settlement negotiations. Without waiving these objections, the State responds that it has already produced to Idaho Power all responsive documents in the State's possession, custody, and control that are relevant to determining the intent of the Legislature with respect to the Swan Falls settlement and the contractual intent of the parties with respect to the Swan Falls Agreement, as well as other documents responsive to this request. Additional documents responsive to the elements of this request not relevant to intent are included herewith.

Dated this 24th day of March, 2008.

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN
Deputy Attorney General
Civil Litigation Division

A handwritten signature in black ink, appearing to read "Michael C. Orr", is written over a horizontal line.

MICHAEL C. ORR
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 24th day of March 2008, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S RESPONSES TO IDAHO POWER COMPANY'S SECOND SET OF DISCOVERY REQUESTS, to the following parties by the indicated methods:

Idaho Power Company

Represented by:

James C. Tucker

P.O. Box 70

1221 W. Idaho

Boise, ID 83707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

Idaho Power Company

Represented by:

James S. Lochhead

Adam T. DeVoe

Mark J. Mathews

Michael A. Gheleta

Michelle C. Kales

Brownstein Hyatt Farber Shreck

410 17th Street, Ste. 2200

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Idaho Power Company

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- ☐ U.S. Mail
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MICHAEL C. ORR
Deputy Attorney General