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DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 30 2008	
By _____	Clerk
_____	Deputy Clerk

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
MOTION TO STRIKE,
OR ALTERNATIVELY,
MOTION IN LIMINE RE: SCOPE OF
STATE MOTION FOR SUMMARY
JUDGMENT**

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Idaho Power Company ("Idaho Power"), by and through its counsel, pursuant to Idaho Rule of Civil Procedure 7(b)(1) and I.R.C.P. 12(f), hereby files this motion to strike, or alternatively, motion in limine. Through this motion, Idaho Power seeks an Order striking or limiting legal issues and evidence associated with the State of Idaho's Motion for Summary Judgment on Subordination to Ground Water Recharge ("State Motion") which are outside the scope of the pleadings and matters properly before the Court in this consolidated subcase.

INTRODUCTION

The State's introduction of two documents into this litigation – its summary judgment motion and discovery requests – has made it necessary for Idaho Power to file the instant motion to obtain an order from the Court providing guidance before the parties proceed with what could be voluminous and superfluous discovery and briefing on cross-motions for summary judgment. The State's filings raise the question of whether the summary judgment proceedings currently scheduled by the Court will be: (a) focused on the limited issue of whether the water rights that are the subject of the Swan Falls Agreement are subordinate to ground water recharge; or (b) expanded to issues that to date have not been properly pled, and are neither related to the interpretation or application of the Swan Falls Agreement or the specific water rights that are subject thereto nor to the issue of whether those water rights are subordinate to recharge.

The State's Motion for Summary Judgment recites in its caption that it relates to "Subordination to Ground Water Recharge." However, the motion raises a broad variety of new issues which are not relevant or material to the issues in this consolidated subcase pursuant to the Court's orders and the parties' pleadings. This becomes evident when one considers the voluminous discovery requests served by the State that completely ignore the Court's express direction and reliance on the parties' "representations that the discovery would be limited to the recharge issue." See Transcript from May 20, 2008 Status and Scheduling Conference, at p. 1,

lines 21-22 (attached as Exhibit 1 hereto). Furthermore, a Motion to Participate in this consolidated subcase was recently filed by districts and canal companies alleging use of water for recharge, raising broad issues similar to the issues newly raised by the State.¹

The overall scope of this consolidated subcase is the interpretation and application of the Swan Falls Agreement. Following the Court's resolution of issues concerning ownership, the nature of the trust res, and related issues, the remaining substantive issue for resolution by the Court is whether the Swan Falls Agreement subordinated the Idaho Power water rights identified in the Agreement to the use of water for aquifer recharge. The State, however, has raised a number of issues which are outside, and unnecessarily expand and complicate, the scope of this litigation, including the following:

- The State's administration of the Snake River as a separate source above versus below Milner – a matter of State policy and water rights administration.
- The nature and enforcement of Idaho Power's rights under a 1923 Contract and 1976 Contracts between Idaho Power and the United States concerning American Falls Reservoir, and the effect of a 1934 Federal Power Commission License for Twin Falls Power Plant.
- The effect of a subordination condition in Idaho Power's water rights for its C.J. Strike facility, when this facility and these water rights are not among those listed in the Swan Falls Agreement or included in this consolidated subcase.
- The terms of subordination of Idaho Power's water rights to two specific water rights for ground water recharge, which have yet to be licensed, and which the parties agreed not to litigate pursuant to a 2006 Stipulation between the State and Idaho Power.

As discussed below, all of these issues are beyond the scope of this consolidated subcase, which concerns interpretation and application of the Swan Falls Agreement, and in particular whether under the Swan Falls Agreement Idaho Power subordinated the hydropower water rights listed in that Agreement to use of water for aquifer recharge. Moreover, many of the issues and

¹ Idaho Power will respond to the Motion to Participate, and to the State's discovery requests, separately as provided for under the Idaho Rules of Civil Procedure.

water rights now raised by the State are the subject of other proceedings in the SRBA and federal court. Included in these issues are questions concerning administration of water rights, an area which the State, until now, has argued should be addressed administratively before IDWR, and not before this Court. Idaho Power submits that the Court should reject the State's attempt to improperly inject these multifarious issues into this consolidated subcase as it will unnecessarily expand this litigation, require additional discovery, and require adjustment of the current summary judgment and trial schedule.

ARGUMENT

Through this motion, Idaho Power seeks to strike or limit legal issues and evidence improperly raised by the State in conjunction with its summary judgment motion that go beyond the issue of whether the water rights identified in the Swan Falls Agreement are subordinate to recharge by virtue of the Swan Falls Agreement. The matters raised by the State, many of which are completely unrelated to the Swan Falls Agreement, the issue of subordination to recharge, and even the water rights included this consolidated subcase are immaterial, impertinent, and outside the scope of the pleadings and matters properly before the Court. Idaho Power would be significantly prejudiced if the State were allowed to unilaterally inject these issues into the litigation at this late date.

A. Standard of Review

Pursuant to I.R.C.P. 12(f), a party may move, or the Court may act on its own initiative, to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Under Rule 12(f), the court may strike any matter that is "immaterial," which "simply means outside the scope of the action." *American Sheet Metal, Inc. v. EM-KAY Engineering Co.*, 478 F. Supp. 809, 815 (E.D. Cal. 1979) (construing the federal rule); *see also Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 529, 446 P.2d 895, 898 (1968) (applying

I.R.C.P. 12(f) and stating that "cases construing the federal rules are persuasive"). For purposes of a summary judgment motion under Rule 56, a "material" question or fact is one of consequence to resolution of a legal issue properly in the case. *See Argyle v. Stemaker*, 107 Idaho 668, 669-70, 691 P.2d 1283, 1284-85 (Ct. App. 1984) ("No dispute of fact is deemed 'material' within Rule 56(c) unless it relates to an issue disclosed by the pleadings"). The court may also strike a matter that is "impertinent," which means "[t]hat which does not belong to a pleading ... or other proceeding; out of place; superfluous; irrelevant; not necessary to constitute the cause of action or ground of defense." *Black's Law Dictionary* 679 (5th ed. 1979).

A motion to strike may be filed in response to a motion for summary judgment which is alleged to be deficient or otherwise improper. *See, e.g., Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 610, 862 P.2d 299, 302 (1993) (party may allege noncompliance with Rule 56 in response to a motion for summary judgment "by proper objection and motion to strike"). Moreover, it is appropriate for a court to consider a motion to strike matters outside the technical confines of "pleadings," where, as here, a party fails to file a pleading including the objectionable material and thereafter attempts to litigate it through subsequent submissions to the court. "The name given a motion is not critical," because in Idaho "[s]ubstance governs, not form." *Stewart*, 92 Idaho at 532, 446 P.2d at 901.

Alternatively, the court may properly rule on a motion in limine to limit evidence and issues that are beyond the scope of the proceedings, and therefore prejudicial to the moving party, pursuant to the court's "inherent authority to manage the course of trials." *See Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). Motions in limine may properly be brought in response to a motion for summary judgment in order to exclude impermissible testimony, *see Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533, 538 (2007) (granting motion in limine to exclude testimony offered in pre-trial hearing on motion for summary judgment), or to respond

substantively to the legal claims asserted by the opposing party. *See, e.g., Galloway v. Lyon*, 140 Idaho 672, 674-75, 99 P.3d 625, 627-28 (2004) (granting motion in limine that in substance requested determination that opposing party's claim was not cognizable under Idaho law). A trial court is vested with broad discretion in ruling on a motion in limine. *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000).

B. The Remaining Substantive Issue in this Consolidated Subcase Is Whether the Swan Falls Agreement Subordinated Idaho Power's Water Rights under the Agreement to Aquifer Recharge

The genesis of this consolidated subcase was a dispute between Idaho Power and the State regarding the effect of the Swan Falls Agreement on the Idaho Power water rights that are the subject of the Agreement. The Attorney General had filed Notices of Change of Ownership with IDWR claiming that the State owned legal title to the Idaho Power water rights identified in the Agreement, and IDWR issued new recommendations, or amended existing recommendations, reflecting the State's claimed ownership. Idaho Power filed its Complaint for Declaratory and Injunctive Relief in order to present for the Court's resolution in the same litigation a broader range of issues related to the parties' disputes over the effect of the Swan Falls Agreement, including whether the *res* of the trust established by the Agreement was water or water rights, and whether the subordination arrangement under the Agreement subordinated those water rights listed in the Agreement to aquifer recharge.

Pursuant to Idaho Power's motion to stay or consolidate, the Court issued its July 24, 2007 Order Consolidating Common Issues Into Consolidated Subcase ("Consolidation Order"). In that Order, the Court ordered that "issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement* in [specified subcases]² shall be separated

² The subcases in which "issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement*" were consolidated by the Court are: 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472,

and consolidated" into a single consolidated subcase 92-23 for purposes of resolution.

Consolidation Order at 16 (bold emphasis added). The Court reiterated that "[f]uture pleadings addressed to the issues of ownership and interpretation and/or application of the *Swan Falls Agreement* should be filed in said consolidated subcase." *Id.*

C. The Issue of Whether the Snake River Should Be Administered As Two Separate Sources Above and Below Milner Is Not Properly Before the SRBA Court in this Consolidated Subcase or in the State's Summary Judgment Motion

- 1. The history, operation and reach of the State statute concerning administration of water rights above versus below Milner is outside the scope of the Court's Consolidation Order and the issue of whether the Swan Falls Agreement included a subordination to recharge**

The first issue on which the State has moved for summary judgment significantly exceeds the scope of the remaining issue in this consolidated subcase. The State's motion describes the first issue on which it has moved for summary judgment as follows:

1. That the water rights at issue in this consolidated subcase are *subordinate to all water rights diverting from sources upstream from Milner Dam*, including ground water recharge water rights.

State Motion at 2 (emphasis added).

Through this description, the State seeks a broad ruling that Idaho Power has subordinated its water rights to "all water rights diverting from sources upstream from Milner Dam," and not simply to the use of water for recharge. The breadth of this issue is confirmed by a number of the State's discovery requests, which, contrary to the Court's direction at the May 20, 2008 status conference,³ are not strictly limited to the issue of subordination to recharge.⁴

37-20709, 37-20710, 02-02057, 02-02001A, 02-02001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032 A & B, 02-04000 A & B, 02-04001 A & B, and 02-00100. Consolidation Order at 16.

³ See Transcript from May 10, 2008 Status and Scheduling Conference, at p. 1, lines 21-22 (attached as Exhibit 1 hereto). Idaho Power intends to serve separately upon the State its objections and responses to the State's discovery requests in accordance with the Court's most recent scheduling order.

Perhaps concerned with, if not emboldened by, the State's overly broad statement of the "recharge issue," several weeks after the State filed its Summary Judgment Motion and sent out its discovery requests to Idaho Power, a number of irrigation districts and canal companies located above Milner filed a Joint Motion to Participate & Memorandum in Support ("Motion to Participate"),⁵ alleging that they have historically used water for "recharge" and would be affected by a ruling on the upcoming summary judgment motions. The proposed Participants also state that they are concerned with this Court's purported resolution of "such issues as the Snake River above and below Milner

⁴ For example, the State of Idaho's Third Set of Discovery Requests to Idaho Power Company (attached as Exhibit 2 hereto) include the following on issues concerning administration of water rights above versus below Milner:

REQUEST FOR ADMISSION NO. 11: Admit that the waters of the Snake River basin upstream from Milner Dam always have been managed and administered separately from the waters of the Snake River downstream from Milner Dam.

REQUESTS FOR ADMISSION NOS. 9/10: Admit that [no portion of / no water rights diverting from] the waters of the Snake River or surface or ground waters tributary to the Snake River upstream from Milner Dam are subject to [curtailment or other administration / curtailment] for purposes of enforcing, satisfying or filling the hydropower water rights referenced in the Swan Falls Agreement.

REQUESTS FOR ADMISSION NOS. 5/6: Admit that Idaho Power Company has never filed, submitted, made or placed a delivery call or any other request for water rights administration seeking [the curtailment of water rights diverting / the delivery, distribution or provision of] waters of the Snake River upstream from Milner Dam for purposes of enforcing, satisfying or filling the hydropower water rights for Idaho Power Company's hydropower facilities downstream from Milner Dam.

REQUESTS FOR ADMISSION NOS. 7/8: Admit that [waters of / ground waters tributary to] the Snake River upstream from Milner Dam are not subject to or encumbered by the trust established by Idaho Code § 42-203B.

REQUEST FOR ADMISSION NO. 18: Admit that Idaho Power Company agreed to the 1986 amendment of Idaho Code § 42-203B(2) to clarify that the Swan Falls Settlement was never intended to force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

REQUEST FOR ADMISSION NOS. 16/17: Admit that Idaho Power Company represented to [the Committee of Nine / Water District 01] prior to the enactment of the 1986 amendment of Idaho Code § 42-203B(2) that it was never the intent of the Parties that the Swan Falls Settlement would force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

Numerous examples of document production requests on this issue could be cited as well.

⁵ Idaho Power intends to respond separately to the merits of the Motion to Participate in accordance with the Idaho Rules of Civil Procedure and SRBA Administrative Order No. 1.

Dam being 'separate sources' for administrative purposes." Motion to Participate at 4. The proposed Participants further reveal their perception, also evident in the State's summary judgment motion and discovery, that there are two issues before the Court: the "subordination to recharge issue" and the "two source issue." *Id.* at 6. The proposed Participants conclude by emphasizing their interest in "protecting the integrity of the 'two rivers' doctrine" *Id.*

The Court's Consolidation Order consolidated "issues pertaining to ownership and interpretation and/or application of the Swan Falls Agreement." Consolidation Order at 16. The issue of State water rights administration in accordance with a concept of "two rivers" or "two sources," which is based on legislation enacted by the Idaho Legislature, is simply beyond the scope of the issues consolidated in this subcase.

2. The two separate source or two rivers administration questions now raised by the State have not been properly included by the State in a pleading in this consolidated subcase

Idaho follows a system of notice pleading. *Cafferty v. Dept. of Transportation*, 144 Idaho 324, 328, 160 P.3d 763, 767 (2007). Notice pleading serves the important purpose of timely informing parties of the legal and factual questions at issue in a case. *See Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986) ("The purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff bases his action."); *Argyle v. Slemaker*, 107 Idaho 668, 669, 691 P.2d 1283, 1284 (Ct. App. 1984) ("The issues considered on summary judgment are those raised by the pleadings.").

Idaho Power provided notice to the State and other interested parties of the issues it intended to litigate when it filed its Complaint and Petition for Declaratory and Injunctive Relief ("Complaint"). The State has never filed an Answer, Counterclaim, or any other responsive pleading to Idaho Power's Complaint. *See* I.R.C.P. 7(a). In light of this failure, the State cannot

properly inject into the case now an entirely new issue of sweeping scope – the history, operation and reach of the State's administration of the Snake River as two separate sources or two rivers above and below Milner – without having provided notice and framed the issues in a timely pleading. It does not suffice to simply recite the new issues in a summary judgment motion and then proceed to brief them. Such an approach is not proper under Idaho's notice pleading system and the Idaho Rules of Civil Procedure. This lack of notice is especially prejudicial to Idaho Power given that the parties are now preparing to litigate the final substantive issue properly in the case, whether the Swan Falls Agreement subordinated the Idaho Power water rights listed in that Agreement to recharge.

Nor is the State's stealth approach proper under SRBA Administrative Order No. 1 (AO#1). Under AO#1, pleadings permitted by the Idaho Rules of Civil Procedure may be filed in the SRBA, *see* AO#1, Sec. 2.r, which would include a Complaint, Answer or Counterclaim. *See* I.R.C.P. 7(a). While AO#1 also includes objections, responses to objections, and notices of claims as pleadings in the SRBA, the State has not included in pleadings the broad range of issues it now seeks to inject into this case. Accordingly, the State may not now raise issues concerning the history, operation and reach of legislative enactments and administrative rules concerning the administration of water rights above and below Milner in its motion for summary judgment.

3. Issues associated with the zero flow at Milner aspect of separate source or two source administration are being dealt with in SRBA subcases separate and distinct from this consolidated subcase

Related to the broad issue of separate source administration above and below Milner is the related issue of zero flow at Milner, which is already the subject of separate SRBA subcases. SRBA Subcase #92-00002GP, in which Idaho Power has filed objections, involves inclusion in the Director's Report for Basin 2 of General Provision No. 4, which states that "[t]he minimum

daily flows at the Milner gauging station shall remain as zero cubic feet per second." In addition, subcase 2-200 involves an Idaho Water Resource Board "instream flow" claim for zero flow at Milner, to which Idaho Power has also objected.

There are parties to the "zero flow" subcases who are not parties to this consolidated subcase. For example, subcase 92-00002GP includes the United States Bureau of Reclamation, and subcase 2-200 includes the Twin Falls Canal Company. These parties would be entitled to notice and an opportunity to participate before the parties and Court in this case proceed to resolve these related issues. The State and proposed Participants should attempt to raise their issues associated with above-below Milner administration and the zero flow policy and claims in appropriate proceedings focused on those matters, rather than in this litigation whose scope is limited to the interpretation and application of the Swan Falls Agreement.

4. The State's attempt to have this Court address water rights administration issues is contrary to its fundamental position in this litigation that administration questions must be resolved in administrative proceedings

Throughout the course of this litigation, the State has argued that an administrative proceeding before IDWR, and not judicial resolution by this Court, is the exclusive forum in which to address many of the concerns raised by Idaho Power in this case.⁶ At the same time, the State has argued that the purpose of the SRBA Court's jurisdiction is to determine elements of the water rights for adjudication.⁷ The State's injection of new water rights administration issues in this case contradicts its earlier positions. The State would like to preclude Idaho Power from

⁶ See State's Memorandum in Support of Motion to Strike or Alternatively to Dismiss Complaint and Petition for Declaratory and Injunctive Relief, dated May 30, 2007 at 15-16 ("State's May 30, 2007 Mem.") (seeking dismissal of Idaho Power's Sixth Claim for Relief on ground that "This Court May Not Review IDWR's Administration Of Water Rights," and arguing that "challenges to IDWR's administration of water rights may not be heard in a general adjudication proceeding"). See also Memorandum in Support of State of Idaho's Motion to Dismiss Filed May 7, 2008, dated May 30, 2008, at 2 ("Idaho law is clear that a party must exhaust its administrative remedies before seeking judicial relief for matters of water rights administration....")

⁷ See State's May 30, 2007 Mem. at 8 (arguing that Idaho Power's Complaint would remove SRBA Court's "core function" of determining elements of water rights).

resolving in this proceeding issues regarding water rights administration, but would like to have its own issues of interest regarding water rights administration resolved in this case. The issues related to the separate source or two rivers concepts relate solely to how water rights, once decreed by this Court, should be administered pursuant to statute, not whether a specific water right below Milner Dam is subordinated to all water rights above Milner Dam. If it were otherwise, this Court would be required to insert a subordination provision in all water rights below Milner Dam. This would not be proper, particularly since the State Legislature may in the future give new direction to IDWR's administration of water rights below and above Milner Dam. As such, these water rights administration issues are subject to wholly separate proceedings.

In summary, issues associated with the history, operation and reach of legislation concerning water rights administration under a concept of separate sources, or two rivers, above versus below Milner are not properly before the SRBA Court in this consolidated subcase or in the State's summary judgment motion. Accordingly, the Court should strike the first issue on which the State has moved for summary judgment.

D. Issues Concerning the Nature and Enforcement of Idaho Power's Rights under a 1923 Contract and 1976 Contracts Between Idaho Power and the United States on American Falls Reservoir, and the Effect of a 1934 Federal Power Commission License for Twin Falls Power Plant, Are Not Properly Before the SRBA Court in this Consolidated Subcase or in the State's Summary Judgment Motion

In the latest round of discovery pertaining to the upcoming cross-motions for summary judgment, the State included a number of discovery requests which are completely immaterial to the recharge subordination issue. These discovery requests relate to the 1923 Contract and 1976 Contracts between Idaho Power and the United States affecting the release of storage water from American Falls Reservoir. Indeed, the

State even includes the 1923 Contract as an exhibit to its discovery requests.⁸ In addition, the State includes in its latest round of discovery numerous requests which pertain to a 1934 Federal Power Commission License for Idaho Power's Twin Falls hydropower facility.⁹

⁸ The State's discovery requests regarding American Falls Reservoir include the following:

REQUEST FOR ADMISSION NO. 19: Admit that Article 21 of the 1923 American Falls Contract limits Idaho Power Company's right to demand the turning out of water from the American Falls Reservoir for release by and use below Milner Dam to the company's storage rights at American Falls Reservoir and the water referred to in the last sentence of Paragraph 10 of said contract. (A copy of this contract is included herewith as Exhibit 1).

REQUEST FOR ADMISSION NO. 20: Admit that not more than ten per cent (10%) of the water accruing to the active storage capacity in the American Falls Dam may be contractually scheduled for release from the American Falls Dam by the Idaho Power Company, except for temporary increases following a default by a Non-Participating Wateruser or Spaceholder as provided in Section 3.5 of the Falling Water Contract Dated as of March 31, 1976 by and between the American Falls Reservoir District and Idaho Power Company or arising from unusually wet or dry weather in the service area of the American Falls Dam.

INTERROGATORY NO. 5: Explain how Idaho Power Company's position on the questions of whether recharge water rights diverting from surface waters of the Snake River upstream from Milner Dam, or from surface waters tributary thereto, are secondary to the hydropower water rights referenced in the Swan Falls Agreement is consistent with Article 21 of the 1923 American Falls Contract, or if Idaho Power Company's position is inconsistent with Article 21 of the 1923 American Falls Contract please so indicate. (A copy of the 1923 American Falls Contract is included herewith as Exhibit 1.)

REQUEST FOR PRODUCTION NO. 48: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to Article 21 of the 1923 American Falls Contract.

REQUEST FOR PRODUCTION NO. 49: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the Idaho Power Company's water rights, water use, and/or contract rights to the storage capacity in the American Falls reservoir.

REQUEST FOR PRODUCTION NO. 52: Produce all documents in your possession that pertain to the rebuilding of American Falls dam during the 1970s, including but not limited those documents pertaining to United States S.1258 & S.1259; Public Law 93-206 (Dec. 28, 1973); United States H.R.9968; Public Law 94-164 (Dec. 23, 1975); the Falling Water Contract Dated March 31, 1976 between the American Falls Reservoir District and the Idaho Power Company; the Spaceholder Contract among the United States, the American Falls Reservoir District, and the Idaho Power Company Dated March 31, 1976; and the Contract between the United States of America and American Falls Reservoir District for Construction and Operation and Maintenance of the American Falls Replacement Dam Program Dated March 31, 1976.

⁹ The State's discovery requests regarding the 1934 FPC License for the Twin Falls facility include the following:

REQUEST FOR ADMISSION NO 14: Admit that in 1934 Idaho Power Company stipulated and agreed that the hydropower water rights for Idaho Power Company's Twin Falls hydropower facility "shall be held and considered at all times to be subject, inferior, and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at [the Twin Falls] project the water from the 45,000 acre-feet of primary storage capacity which [Idaho Power Company] holds in American

Issues concerning the effect of these federal actions are not included in any pleadings and not properly subject to resolution by the Court in this consolidated subcase involving the interpretation and application of the Swan Falls Agreement. Resolution of

Falls Reservoir under paragraph 16 of the certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at [the Twin Falls] project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream tow of Milner Dam in Snake River, Idaho, and the site of the project covered by this license."

REQUEST FOR ADMISSION NO. 15: Admit that the stipulation and agreement set forth in Article 14 of the Federal Power Commission License of June 11, 1934, for Idaho Power Company's Twin Falls hydropower facility is a covenant running with the title to that facility, and that the Idaho Power Company agreed to execute and acknowledge under authority of a suitable resolution of its board of directors a recordable contract or deed embodying the provision, conditions, and limitations set out in such stipulation and agreement so that the same could be recorded in the counties in which the Twin Falls hydropower facility is located. (A copy of the Federal Power Commission License of June 11, 1934, for Idaho Power Company's Twin Falls hydropower facility is included herewith as Exhibit 2.)

INTERROGATORY NO. 6: Explain how Idaho Power Company's position on the question of whether recharge water rights diverting from surface waters of the Snake River upstream from Milner Dam, or from surface waters tributary thereto, are secondary to the hydropower water rights referenced in the Swan Falls Agreement is consistent with Article 14 of the 1934 Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility, or if Idaho Power Company's position is inconsistent with Article 14 of said license please so indicate. (A copy of the license is included herewith as Exhibit 2.)

REQUEST FOR PRODUCTION NO. 43: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, submitted, mailed, faxed, e-mailed, otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, or to the United States of America or any of its executive or administrative department, agencies, bureaus, commissions, boards, employees, officers, attorneys, agents or representatives, that address, analyze, evaluate, discuss, refer or otherwise pertain to Article 14 of the 1934 Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility. (A copy of said license is attached hereto as Exhibit 2.)

REQUEST FOR PRODUCTION NO. 44: Produce the "recordable contract or deed embodying the provisions, conditions, and limitations set forth" in Article 14 of the first Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility that Idaho Power Company agreed to execute and acknowledge pursuant to Article 14 of said license. (A copy of said license is attached hereto as Exhibit 2.)

REQUEST FOR PRODUCTION NO. 45: Produce the "recordable contract or deed embodying the provisions, conditions, and limitations set forth" in Article 14 of Federal Power Commission license for Project No. 18 "that the Idaho Power Company's Board of Directors authorized Company officers to execute and acknowledge pursuant to a resolution unanimously adopted at a special meeting on May 11, 1934. (A copy of the "Minutes of Special Meeting" of Idaho Power Company's Board of Directors (May 11, 1934) is included herewith as Exhibit 4.)

REQUEST FOR PRODUCTION NO. 46: Produce all documents in your possession that address, discuss, analyze, evaluate, refer or otherwise pertain to Article 14 of the 1934 Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility. (A copy of said license is attached hereto as Exhibit 2.)

issues concerning rights under contracts executed between Idaho Power and the United States would require the presence of the United States as a necessary party, and the United States is not a party to this consolidated subcase. Rather, the 1923 and 1976 Contracts are the subject of separate proceedings in SRBA Basin 1, and in federal court litigation between Idaho Power and the United States. Issues concerning the American Falls federal contracts, and the 1934 Federal Power Commission License, should be resolved in those proceedings and not in the upcoming summary judgment proceedings as they are entirely unrelated to the Swan Falls Agreement.

Therefore, Idaho Power seeks a ruling from the Court before summary judgment briefing is underway that issues concerning these federal actions are not properly before the SRBA Court in this consolidated subcase, or in the upcoming summary judgment motions which are solely focused on whether the Swan Falls Agreement subordinated Idaho Power's water rights to recharge.

E. The State's Arguments Regarding Alleged Subordination of Water Rights at Idaho Power's C.J. Strike Facility Are Not Properly Before the SRBA Court in this Consolidated Subcase or in the State's Summary Judgment Motion

The State also includes in its discovery requests several requests suggesting that Idaho Power has subordinated its water rights at its C.J. Strike hydropower facility, pursuant to state water right permit and license provisions.¹⁰ The C.J. Strike facility is

¹⁰ The State's discovery requests concerning the C.J. Strike hydropower facility include the following:

REQUEST FOR ADMISSION NO. 12: Admit that the hydropower water rights held by Idaho Power Company for use at its C.J. Strike hydropower facility are subordinate to all existing and future upstream diversion and use of water for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

REQUEST FOR ADMISSION NO. 13: Admit that Idaho Power Company has no right to seek curtailment of existing or future water rights diverting from waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam to satisfy any of the hydropower water rights held by Idaho Power Company for its C.J. Strike hydroelectric facility.

not listed among the Idaho Power water rights subject to subordination in Paragraph 7 of the Swan Falls Agreement, and therefore is not affected by that Agreement. The hydropower water right for C.J. Strike is the subject of a separate SRBA proceeding in Basin 2 and thus is not included in this consolidated subcase.

REQUEST FOR PRODUCTION NO. 19: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the origin, formulation, negotiation, approval, acceptance, meaning and/or effect of the following provisions in the license and permit for the water right for Idaho Power Company's C.J. Strike hydropower facility (water right 02-2080):

The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion in the flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

(Copies of said license and permit are included herewith as Exhibit 3).

REQUEST FOR PRODUCTION NO. 20: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the origin, formulation, negotiation, approval, acceptance, meaning and/or effect of the following provisions in the license and permit for the water right for Idaho Power Company's C.J. Strike hydropower facility (water right 02-2080):

The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion in the flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

(Copies of said license and permit are included herewith as Exhibit 3).

REQUEST FOR PRODUCTION NO. 21: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the origin, formulation, negotiation, approval, acceptance, meaning and/or effect of the following provisions in the license and permit for the water right for Idaho Power Company's C.J. Strike hydropower facility (water right 02-2080):

The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion in the flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

(Copies of said license and permit are included herewith as Exhibit 3).

Accordingly, Idaho Power seeks a ruling from the Court that State arguments regarding alleged subordination of Idaho Power's C.J. Strike water rights are not properly before the SRBA Court, both generally in this consolidated subcase, and in specifically in the upcoming summary judgment motions concerning whether the Swan Falls Agreement subordinated Idaho Power's water rights to recharge.

F. The Terms of Idaho Power's Subordination under a 2006 Stipulation to Two Specific Recharge Permits Not Yet Licensed Are Not Properly Before the SRBA Court in this Consolidated Subcase or in the State's Summary Judgment Motion

The State's third issue in its summary judgment motion is described as follows:

3. That the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, *as finally licensed*. (Emphasis added).

The State requests that the Court find the water rights at issue in this case are subordinate to the two recharge permits "as finally licensed." However, these recharge water rights have not yet been licensed, and proof of beneficial use on the permits is not due until June 1, 2009. *See Exhibit 3* hereto (IDWR order approving request for extension of time). Until these recharge water rights have been licensed, it is impossible to predict what the final license terms might say. Thus, any pronouncement regarding the nature or terms of subordination to these recharge water rights is not only premature, but would be an impermissible advisory opinion on a non-justiciable question. *See Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984) (A "justiciable controversy ... must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (internal citation omitted); *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, 52 P.2d 141, 144 (1935) (A judgment on a question

raised in an adversary proceeding "must involve actual and existing facts," otherwise it is "advisory on questions not yet justiciable).

Even if these water rights were licensed and a justiciable question were presented, the referenced water right permits are the subject of a 2006 Stipulation signed by the Idaho Attorney General and Idaho Power (attached hereto as **Exhibit 4**), which describes the terms of subordination of Idaho Power's water rights to these particular permits. Because the terms of subordination to these two permits are governed by the 2006 Stipulation, issues concerning subordination of the two permits are immaterial to the issue properly before the Court, whether Idaho Power subordinated its water rights to recharge pursuant to the Swan Falls Agreement.

Indeed, to the extent that the State raises the 2006 Stipulation to support its arguments before this Court on the issue of alleged subordination of hydropower water rights to recharge, the State is acting in violation of the Stipulation, which provides in Paragraph 6:

Nothing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding, other than that those seeking approval of the Stipulation, for interpretation, enforcement or administration of this Stipulation or for a purpose contemplated by Idaho Rule of Evidence 408.

Idaho Power does not deny that it agreed to the Stipulation, and is aware of no need for its interpretation, enforcement, or administration.

Consequently, Idaho Power requests an order from the Court striking the third issue in the State's summary judgment motion. Because ground water recharge water right permits nos. 01-7054 and 37-7842 have not yet been licensed, and are also governed by the terms of the 2006 Stipulation, any judicial pronouncement would be both an

impermissible advisory opinion and immaterial to the issue of whether Idaho Power subordinated under the Swan Falls Agreement its hydropower water rights to recharge.

G. If the State Is Permitted to Expand the Issues in this Consolidated Subcase Beyond Interpretation and Application of the Swan Falls Agreement, Then the Case Schedule Will Need to be Modified Due to Additional Discovery and Factual Disputes Likely on the Expanded Issues

The current schedule for briefing of the cross-motions for summary judgment on the recharge subordination issue was adopted by the Court largely pursuant to the scheduling proposal of Idaho Power. See Transcript from May 20, 2008 Status and Scheduling Conference, at p. 2, lines 14-15 (**Exhibit 1** hereto). That scheduling proposal assumed that the scope of this consolidated subcase was as announced by the Court in its initial ruling in the case – "issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement*" (Consolidation Order at 16) – and that the "subordination recharge" issue within the scope of the case was whether the Swan Falls Agreement subordinated Idaho Power's water rights to recharge.

The issues in this consolidated subcase stand on the brink of being substantially broadened beyond this limited scope by the State and the proposed Participants, to include issues concerning: (1) the State's administration of the Snake River as a separate source above versus below Milner pursuant to State policy and statute; (2) the effect of the 1923 Contract and 1976 Contracts between Idaho Power and the United States concerning American Falls Reservoir; (3) the effect of the 1934 Federal Power Commission License for Twin Falls Power Plant; (4) alleged subordination of Idaho Power's water rights for its C.J. Strike facility under its water right permits and licenses; and (5) the terms of subordination of Idaho Power's water rights to two specific recharge

water rights, which have yet to be licensed, under the 2006 Stipulation between the State and Idaho Power.

If these issues are going to be included in this consolidated subcase, and Idaho Power believes that they should not be, then the overall schedule in this case will need to be revisited. Depending on the scope of the issues allowed to be included in this case, additional time will be necessary for discovery on the newly expanded issues to determine whether summary judgment proceedings can appropriately resolve some or all of these issues or whether factual disputes may prevent resolution of the issues as a matter of law,¹¹ all with the result that the intended scope and timing of the trial may need to be modified.

CONCLUSION

For all of the foregoing reasons, Idaho Power respectfully requests that the Court grant its motion to strike, or in the alternative, motion in limine. The Court should issue an order striking from the State's current motion for summary judgment, or limiting in these proceedings, the matters set forth therein which are immaterial to the issues properly in this case. The Court should also direct the parties, in advance of the upcoming briefing on the cross-motions for summary judgment, to confine their briefing to the issue of whether under the Swan Falls Agreement Idaho Power subordinated its water rights to aquifer recharge.

Idaho Power requests oral argument on this motion, and further requests that the matter be heard in conjunction with the related Joint Motion to Participate which is currently noticed for hearing July 15, 2008 at 2:30 p.m.

¹¹ Just as one example, in order to determine whether resolution of legal and factual issues concerning interpretation of the 1923 and 1976 Contracts on American Falls Reservoir can occur through summary judgment or evidentiary proceedings, Idaho Power is engaged in discovery with the United States in federal court litigation over the meaning and effect of the American Falls Contracts. See, e.g., Exhibit 5 hereto.

Respectfully submitted,

Dated this 30th day of June 2008.

IDAHO POWER COMPANY

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By: Michael Gheleta

Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION IN LIMINE RE: SCOPE OF STATE'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM** via the method indicated below, and addressed to each of the following:

Lawrence Wasden	☒	U.S. Mail, Postage Prepaid
Steven Olsen	☐	Hand Delivered
Karl T. Klein	☐	Overnight Mail
Michael C. Orr	☐	Facsimile
700 W. Jefferson, Room 210	☒	Electronic Mail
P.O. Box 44449		
Boise, ID 83711-4449		
IDWR Document Depository	☒	U.S. Mail, Postage Prepaid
PO Box 83720	☐	Hand Delivered
Boise, ID 83720-0098	☐	Overnight Mail
	☐	Facsimile
United States Department of Justice	☒	U.S. Mail, Postage Prepaid
Environment & Nat'l Resources Div	☐	Hand Delivered
550 W Fort Street, MSC 033	☐	Overnight Mail
Boise, ID 83724	☐	Facsimile
Chief, Natural Resources Division	☒	U.S. Mail, Postage Prepaid
Office of Attorney General	☐	Hand Delivered
PO Box 44449	☐	Overnight Mail
Boise, ID 83711-4449	☐	Facsimile
Randall C. Budge	☒	U.S. Mail
Candice M. McHugh	☐	Hand Delivered
Racine Olson Nye Budge & Bailey, Chtd.	☐	Overnight Mail
P.O. Box 1391	☐	Facsimile
Pocatello, ID 83204-1391		
Josephine Beeman	☒	U.S. Mail
Beeman & Associates, P.C.	☐	Hand Delivered
409 W. Jefferson Street	☐	Overnight Mail
Boise, ID 83702	☐	Facsimile

Jerry R. Rigby
Rigby Andrus & Moeller Chtd.
P.O. Box 250
Rexburg, ID 83440

☒	U.S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile

Attorney for Joint Motion to Participate Movants: Fremont Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District & The United Canal Company.

Randall C. Budge
Racine Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, ID 83204-1391

☒	U.S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile

Attorney for Joint Motion to Participate Movant: Aberdeen-Springfield Canal Company

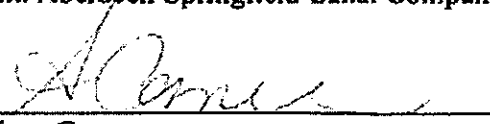

Alison Cameron

Exhibit 1

1 IN THE DISTRICT COURT OF THE
2 FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
3 IN AND FOR THE COUNTY OF TWIN FALLS
4

5 IN RE SREA)
6 Case No. 29576) REPORTER'S TRANSCRIPT
7 Subcase 03-92023)
8

9 PARTIAL TRANSCRIPT OF PROCEEDINGS
10 Judge's comments
11 BEFORE THE HONORABLE JOHN M. MELANSON
12 District Judge, Presiding

13 DATE: May 20, 2008
14 TIME: 10:00 a.m.
15 PLACE: COURTROOM OF THE DISTRICT COURT
16 SNAKE RIVER BASIN ADJUDICATION
17 BUILDING - 253 3RD AVE. NORTH
18 TWIN FALLS, IDAHO
19
20
21

22 Reported by:
23 Maureen Newton, CSR. No. 321
24 P.O. Box 132
25 Heyburn, ID 83336
(208) 431-1587

EXHIBIT 1

1 THE COURT: All right. Well, here's what I'll
2 do. I think I can rule on part of this from the bench so
3 that the parties will have some guidance now as to what's
4 coming up through the summer.
5 Looking at the beginning of the proposed
6 schedules, that is, the parties beginning discovery on
7 May 23rd with responses due no later than June 25, it
8 appears that the parties agree with those dates and the
9 only difference is the State's suggestion that there would
10 be a requirement that the party receiving discovery
11 provides notice within 14 days thereafter of additional
12 requests for depositions or of requests for depositions.
13 I don't think that's going to make much
14 difference in the final analysis here. My inclination is
15 to simply adopt the schedule as stated by Idaho Power, at
16 least the beginning of it there. If there is a need for
17 additional discovery requests or requests for depositions,
18 that can be done by July 9th.
19 And I recognize that there might be some disputes
20 about discovery. I'm relying to a large extent here on
21 Idaho Power's representations that the discovery would be
22 limited to the recharge issues and that the parties can
23 resolve whatever discovery disputes may arise. I'll try to
24 be available on as short a notice as possible to resolve
25 the ones that need to be resolved by the court and

1

1 hopefully preserve the hearing dates.
2 As far as the date for hearing on the cross
3 motions for summary judgment, I think a later date's
4 acceptable to the court, that is, one around the date
5 proposed by Idaho Power. The problem is I've got some
6 other obligations coming up this summer, other cases, that
7 may conflict with that exact date. So it's my intention to
8 adopt the scheduling order set forth by Idaho Power, but I
9 may have to set the final date -- that is, I may have to
10 change that December 16 date, but I won't make it earlier
11 than that. That's a Tuesday. I may set it on the 15th, a
12 Monday, rather than Tuesday the 16th, but I just have to
13 take a look at my schedule and try to coordinate that a
14 little bit. So with that one exception I'll adopt the
15 scheduling order as set forth by Idaho Power, with the
16 understanding that the parties will attempt to cooperate
17 and agree on discovery issues as much as possible, and also
18 with the understanding, as I said, that the court will be
19 available as quickly as possible to get the matter resolved
20 if that's necessary.
21 On the motion to dismiss regarding the asserted
22 administrative matters, I'll have to take that under
23 advisement. You know, I guess the judicial economy part of
24 me says, Look, the final result here, if the State
25 prevails, is going to be a dismissal without prejudice.

2

1 Idaho Power agrees to allow dismissal without prejudice.
2 The State believes that there are some matters that need to
3 be heard and decided by the court, even recognizing that
4 the final result if the State prevails is likely to be
5 dismissal without prejudice; and also Idaho Power
6 recognizes there are some issues that maybe could be
7 winnowed out during the process. So there are some
8 countervailing, I guess, issues there.
9 On the one hand judicial economy dictates
10 dismissing without prejudice; on the other, trying to, I
11 guess, move this case along with decisions made for the
12 parties as we going along dictates perhaps that the court
13 should hear it. I'll make that decision within the week I
14 think and then it will be included in the written order
15 that I enter on this scheduling conference. So if the
16 court decides to hear it, I imagine I'll be adopting the
17 schedule proposed by Idaho Power again since it does allow
18 a little bit of additional time.
19 Is there anything further in this matter from
20 Idaho Power then?
21 MR. GHELETA: No, Your Honor.
22 THE COURT: Anything further from the State?
23 MR. OLSON: No, Your Honor.
24 THE COURT: Anything further then from the
25 parties participating by telephone?

3

1 MS. McRUGH: No, Your Honor.
2 THE COURT: All right, court will be in recess.
3 Thank you very much.
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Exhibit 2

LAWRENCE G. WASDEN
Attorney General

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

KARL T. KLEIN (ISB # 5156)
MICHAEL C. ORR (ISB # 6720)
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(208) 334-2400
Attorneys for the State of Idaho

COPY

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

In Re SRBA	)	
	)	Consolidated Subcase No. 00-92023 (92-23)
	)	
Case No. 39576	)	STATE OF IDAHO'S THIRD SET OF
	)	DISCOVERY REQUESTS TO
	)	IDAHO POWER COMPANY
	)	

TO: IDAHO POWER COMPANY AND ITS ATTORNEYS OF RECORD:

YOU WILL PLEASE TAKE NOTICE that the State of Idaho requires you to respond to the following discovery requests within thirty (30) days from the date of service hereof in conformance with the Idaho Rules of Civil Procedure. These discovery requests are deemed continuing and you are required to supplement your responses as provided in the Idaho Rules of Civil Procedure.

INSTRUCTIONS

1. The following definitions apply to each of these discovery requests:
 - a. **1180 Contract:** the term "1180 Contract" means the "Contract to Implement Chapter 259, Sess. Laws, 1983" executed by the State of Idaho and Idaho Power Company on October 25, 1984.
 - b. **1923 American Falls Contract:** the term "1923 American Falls Contract" means that certain contract between the United States of America and Idaho Power Company stamped "Symbol Ilr-733" and entitled "CONTRACT Between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho. Dated June 15, 1923." A copy of this contract is included herewith as Exhibit 1.

- c. **Agency:** the term "Agency" means any executive or administrative body of the State of Idaho, including but not limited to agencies, boards, departments, and commissions, and their directors, administrators, members, officers, officials, employees, staff, agents and representatives.
- 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. 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. **Framework:** the term "Framework" means the "Framework for Final Resolution of Snake River Water Rights Controversy" executed on October 1, 1984 by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power C.E.O. James E. Bruce.
- f. **Governor:** the term "Governor" means the individual(s) serving as the Governor of the State of Idaho during times relevant to the discovery request, and any employee, agent, representative or staff of the Governor.
- g. **Idaho Legislature:** the term "Idaho Legislature" means the Idaho Legislature; and any committee, subcommittee or member of the Idaho Legislature; and any employee, agent, representative or staff of the Idaho Legislature; and employee, agent, representative or staff of any committee, subcommittee or member of the Idaho Legislature.
- h. **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, e-mail, etc.), (ii) the general subject matter, (iii) the date of the document, and (iv) the author(s), address(es) and recipient(s).
- i. **Identify (with respect to persons):** when referring to persons, 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 present or last known place of employment and title.
- j. **Milner Dam:** the term "Milner Dam" means and encompasses both the Milner Dam and the Milner gauging station.
- k. **Parties:** the term "parties" means the parties to the Swan Falls Agreement.
- l. **Possession (with respect to documents):** when referring to documents, the term "possession" means any and all documents that Idaho Power Company, and anyone acting on its behalf, including, but not limited to, its employees, representatives, attorneys, investigators, and expert witnesses, actually possess or reasonably can obtain.
- m. **Recharge:** the term "recharge" refers to the use of water for ground water recharge or aquifer recharge purposes under a permit, license or decree.
- n. **Swan Falls Agreement:** this term refers to the Swan Falls "Agreement" executed by the Governor of the State of Idaho, the Attorney General of the State of Idaho, and the Idaho Power Company on October 25, 1984.
- o. **Swan Falls Settlement:** the term "Swan Falls Settlement" refers to and includes the 1180 contract, the Swan Falls Agreement, and the executive,

- legislative, administrative, regulatory and judicial actions required to implement the Swan Falls Agreement under Paragraphs 6, 12 and 13 therein.
- p. **Water Right:** the term "water right" means and includes any legal authorization to use the public waters of the State of Idaho, including but not limited to water right permits, water right licenses, water right decrees and constitutional/beneficial use water rights.
 - q. **You/Yours:** the terms "you" and "yours" refer to Idaho Power Company, and anyone acting on its behalf, including, but not limited to, its lobbyists, employees, officers, directors, representatives, attorneys, investigators, and expert witnesses.
- 2. The following rules of construction apply to each of the interrogatories and requests for production herein:
 - a. **All/Each:** the terms "all" and "each" shall be construed as all and each.
 - b. **And/Or:** the terms "and" and "or" and "and/or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the interrogatories and requests for production herein all responses and documents that might otherwise be construed to be outside the scope of the interrogatories and requests for production.
 - c. **Singular/Plural:** the use of the singular form of any word includes the plural and vice versa.
 - 3. These discovery requests do not contemplate or require that you produce documents that the State previously produced to you in this consolidated subcase.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit that prior to 1977, Idaho Power Company represented to federal and state officials, Idaho agricultural and irrigation organizations and entities, and the public that the hydropower water rights for the Company's Snake River hydropower facilities were subordinate, secondary or subject to existing upstream water rights for irrigation purposes.

REQUEST FOR ADMISSION NO. 2: Admit that prior to 1977, Idaho Power Company represented to federal and state officials, Idaho agricultural and irrigation organizations and entities, and the public that the hydropower water rights for the Company's Snake River hydropower facilities were subordinate, secondary or subject to future upstream water rights for irrigation purposes.

REQUEST FOR ADMISSION NO. 3: Admit that no document in your possession supports the contention that under the Swan Falls Settlement recharge is secondary to the hydropower water rights referenced in the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 4: Admit that no document in your possession supports the contention that the Parties to the Swan Falls Settlement intended recharge to be secondary to the hydropower water rights referenced in the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 5: Admit that Idaho Power Company has never filed, submitted, made or placed a delivery call or any other request for water rights administration seeking the curtailment of water rights diverting waters of the Snake River upstream from Milner Dam or surface or ground waters tributary to the Snake River upstream from Milner Dam for purposes of enforcing, satisfying or filling the hydropower water rights for Idaho Power Company's hydropower facilities downstream from Milner Dam.

REQUEST FOR ADMISSION NO. 6: Admit that Idaho Power Company has never filed, submitted, made or placed a delivery call or any other request for water rights administration, seeking the delivery, distribution or provision of waters of the Snake River upstream from Milner Dam or surface or ground waters tributary to the Snake River upstream from Milner Dam for purposes of enforcing, satisfying or filling the hydropower water rights for Idaho Power Company's hydropower facilities downstream from Milner Dam.

REQUEST FOR ADMISSION NO. 7: Admit that the waters of the Snake River upstream from Milner Dam and the surface waters tributary to the Snake River upstream from Milner Dam are not subject to or encumbered by the trust established by Idaho Code § 42-203B.

REQUEST FOR ADMISSION NO. 8: Admit that ground waters tributary to the Snake River upstream from Milner Dam are not subject to or encumbered by the trust established by Idaho Code § 42-203B.

REQUEST FOR ADMISSION NO. 9: Admit that no portion of the waters of the Snake River or surface or ground waters tributary to the Snake River upstream from Milner dam are subject to curtailment or other administration for purposes of enforcing, satisfying or filling the hydropower water rights referenced in the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 10: Admit that no water rights diverting from the waters of the Snake River or surface or ground waters tributary to the Snake River upstream from Milner Dam are subject to administration for purposes of enforcing, satisfying or filling the hydropower water rights referenced in the Swan Falls Agreement.

REQUEST FOR ADMISSION NO. 11: Admit that the waters of the Snake River basin upstream from Milner Dam always have been managed and administered separately from the waters of the Snake River basin downstream from Milner Dam.

REQUEST FOR ADMISSION NO. 12: Admit that the hydropower water rights held by Idaho Power Company for use at its C.J. Strike hydropower facility are subordinate to all existing and future upstream diversion and use of water for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

REQUEST FOR ADMISSION NO. 13: Admit that Idaho Power Company has no right to seek curtailment of existing or future water rights diverting from waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam to satisfy any of the hydropower water rights held by Idaho Power Company for its C.J. Strike hydroelectric facility.

REQUEST FOR ADMISSION NO. 14: Admit that in 1934 Idaho Power Company stipulated and agreed that the hydropower water rights for Idaho Power Company's Twin Falls hydropower facility "shall be held and considered at all times to be subject, inferior, and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at [the Twin Falls] project the water from the 45,000 acre-feet of primary storage capacity which [Idaho Power Company] holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at [the Twin Falls] project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license."

REQUEST FOR ADMISSION NO. 15: Admit that the stipulation and agreement set forth in Article 14 of the Federal Power Commission License of June 11, 1934, for Idaho Power Company's Twin Falls hydropower facility is a covenant running with the title to that facility, and that the Idaho Power Company agreed to execute and acknowledge under authority of a suitable resolution of its board of directors a recordable contract or deed embodying the provision, conditions, and limitations set out in such stipulation and agreement so that the same could be recorded in the counties in which the Twin Falls hydropower facility is located. (A copy of the Federal Power Commission License of June 11, 1934, for Idaho Power Company's Twin Falls hydropower facility is included herewith as Exhibit 2.)

REQUEST FOR ADMISSION NO. 16: Admit that Idaho Power Company represented to the Committee of Nine prior to the enactment of the 1986 amendment of Idaho Code § 42-203B(2) that it was never the intent of the Parties that the Swan Falls Settlement would force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

REQUEST FOR ADMISSION NO. 17: Admit that Idaho Power Company represented to Water District 01 prior to the enactment of the 1986 amendment of Idaho Code § 42-203B(2) that it was never the intent of the Parties that the Swan Falls Settlement would force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

REQUEST FOR ADMISSION NO. 18: Admit that Idaho Power Company agreed to the 1986 amendment of Idaho Code § 42-203B(2) to clarify that the Swan Falls Settlement was never intended to force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

REQUEST FOR ADMISSION NO. 19: Admit that Article 21 of the 1923 American Falls Contract limits Idaho Power Company's right to demand the turning out of water from the American Falls Reservoir for release by and use below Milner Dam to the company's storage rights at American Falls Reservoir and the water referred to in the last sentence of Paragraph 10 of said contract. (A copy of this contract is included herewith as Exhibit 1.)

REQUEST FOR ADMISSION NO. 20: Admit that not more than ten per cent (10%) of the water accruing to the active storage capacity in the American Falls Dam may be contractually scheduled for release from the American Falls Dam by the Idaho Power Company, except for temporary increases following a default by a Non-Participating Wateruser or Spaceholder as provided in Section 3.5 of the Falling Water Contract Dated as of March 31, 1976 by and between the American Falls Reservoir District and Idaho Power Company or arising from unusually wet or dry weather in the service area of the American Falls Dam.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all documents responsive to the Requests for Production set forth herein.

INTERROGATORY NO. 2: Identify all persons having knowledge of the subject matter of the documents you produced in response to the Requests for Production set forth herein, including each person's full name, address and telephone number.

INTERROGATORY NO. 3: Identify all persons who assisted in preparing your responses to the discovery requests herein.

INTERROGATORY NO. 4: Explain how Idaho Power Company's position on the question of whether recharge water rights diverting from surface waters of the Snake River upstream from Milner Dam, or from surface waters tributary thereto, are secondary to the hydropower water rights referenced in the Swan Falls Agreement is consistent with the following statutory directives in Idaho Code § 42-203B(2), or if Idaho Power Company's position is inconsistent with the statutory directives please so indicate:

provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

INTERROGATORY NO. 5: Explain how Idaho Power Company's position on the question of whether recharge water rights diverting from surface waters of the Snake River upstream from Milner Dam, or from surface waters tributary thereto, are secondary to the hydropower water rights referenced in the Swan Falls Agreement is consistent with Article 21 of the 1923 American Falls Contract, or if Idaho Power Company's position is inconsistent with Article 21 of the 1923 American Falls Contract please so indicate. (A copy of the 1923 American Falls Contract is included herewith as Exhibit 1.)

INTERROGATORY NO. 6: Explain how Idaho Power Company's position on the question of whether recharge water rights diverting from surface waters of the Snake River upstream from

Milner Dam, or from surface waters tributary thereto, are secondary to the hydropower water rights referenced in the Swan Falls Agreement is consistent with Article 14 of the 1934 Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility, or if Idaho Power Company's position is inconsistent with Article 14 of said license please so indicate. (A copy of the license is included herewith as Exhibit 2.)

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Produce all documents that support your responses to the Requests for Admission and Interrogatories set forth herein.

REQUEST FOR PRODUCTION NO. 2: Produce all documents in your possession that Idaho Power Company contends support its "Answer to Interrogatory No. 11" on page 24 of "Idaho Power Company's Answer to State of Idaho's First Set of Interrogatories," dated December 20, 2007.

REQUEST FOR PRODUCTION NO. 3: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the "Framework."

REQUEST FOR PRODUCTION NO. 4: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the "Framework."

REQUEST FOR PRODUCTION NO. 5: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the "Framework."

REQUEST FOR PRODUCTION NO. 6: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the question of whether hydropower water rights, including but not limited to those claimed, owned or used by Idaho Power Company, are subordinated or may be subordinated, through the Swan Falls Settlement or otherwise, to recharge.

REQUEST FOR PRODUCTION NO. 7: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C.

Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the question of whether hydropower water rights, including but not limited to those claimed, owned or used by Idaho Power Company, are subordinated or may be subordinated, through the Swan Falls Settlement or otherwise, to recharge.

REQUEST FOR PRODUCTION NO. 8: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer to, set forth or otherwise evidence the intent of the Parties as to whether the hydropower water rights referenced in the Swan Falls Agreement were subordinated or may be subordinated in the future, through the Swan Falls Settlement or otherwise, to recharge.

REQUEST FOR PRODUCTION NO. 9: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether hydropower water rights, including but not limited to those claimed, owned or used by Idaho Power Company, are subordinated or may be subordinated, through the Swan Falls Settlement or otherwise, to recharge.

REQUEST FOR PRODUCTION NO. 10: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the formulation, adoption, enactment, amendment and/or implementation of Idaho Code §§ 42-234, 42-4201, 42-4201A, including but not limited to 1978 House Bill 598, 1982 House Bill 710, 1985 House Bill 266, 1994 Senate Bills 1564, 1565, 1574 and/or 1575.

REQUEST FOR PRODUCTION NO. 11: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the formulation, adoption, enactment, amendment and/or implementation of Idaho Code §§ 42-234, 42-4201, 42-4201A, including but not limited to 1978 House Bill 598, 1982 House Bill 710, 1985 House Bill 266, 1994 Senate Bills 1564, 1565, 1574 and/or 1575.

REQUEST FOR PRODUCTION NO. 12: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the formulation, adoption, enactment, amendment and/or implementation of Idaho Code §§ 42-234, 42-4201, 42-4201A, including but not limited to 1978 House Bill 598, 1982 House Bill 710, 1985 House Bill 266, 1994 Senate Bills 1564, 1565, 1574 and/or 1575.

REQUEST FOR PRODUCTION NO. 13: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C.

Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the formulation, adoption, enactment, amendment and/or implementation of Idaho Code §§ 42-203B, 42-203C, 42-203D and 1985 Idaho Session Laws Chapters 14 and 204, including but not limited to 1985 Senate Bills 1005, 1006 and 1008, and 1986 Senate Bills 1358 and/or 1358aa.

REQUEST FOR PRODUCTION NO. 14: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the formulation, adoption, enactment, amendment and/or implementation of Idaho Code §§ 42-203B, 42-203C, 42-203D and 1985 Idaho Session Laws Chapters 14 and 204, including but not limited to 1985 Senate Bills 1005, 1006 and 1008, and 1986 Senate Bills 1358 and/or 1358aa.

REQUEST FOR PRODUCTION NO. 15: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the formulation, adoption, enactment, amendment and/or implementation of Idaho Code §§ 42-203B, 42-203C, 42-203D and 1985 Idaho Session Laws Chapters 14 and 204, including but not limited to 1985 Senate Bills 1005, 1006 and 1008, and 1986 Senate Bills 1358 and/or 1358aa.

REQUEST FOR PRODUCTION NO. 16: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the "Water Appropriation Rules" originally proposed in 1985 (*see, e.g.*, Exhibits 49-59 to the "Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment" (Jan. 9, 2008)), and that are currently codified at IDAPA 37.03.08.001-.999.

REQUEST FOR PRODUCTION NO. 17: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the "Water Appropriation Rules" originally proposed in 1985 (*see, e.g.*, Exhibits 49-59 to the "Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment" (Jan. 9, 2008)), and that are currently codified at IDAPA 37.03.08.001-.999.

REQUEST FOR PRODUCTION NO. 18: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the "Water Appropriation Rules" originally proposed in 1985 (*see, e.g.*, Exhibits 49-59 to the "Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment" (Jan. 9, 2008)), and that are currently codified at IDAPA 37.03.08.001-.999.

REQUEST FOR PRODUCTION NO. 19: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the origin, formulation, negotiation, approval, acceptance, meaning and/or effect of the following provisions in the license and permit for the water right for Idaho Power Company's C.J. Strike hydropower facility (water right 02-2080):

The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion in the flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

(Copies of said license and permit are included herewith as Exhibit 3).

REQUEST FOR PRODUCTION NO. 20: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to the origin, formulation, negotiation, approval, acceptance, meaning and/or effect of the following provisions in the license and permit for the water right for Idaho Power Company's C.J. Strike hydropower facility (water right 02-2080):

The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion in the flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

(Copies of said license and permit are included herewith as Exhibit 3).

REQUEST FOR PRODUCTION NO. 21: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the origin, formulation, negotiation, approval, acceptance, meaning and/or effect of the following provisions in the license and permit for the water right for Idaho Power Company's C.J. Strike hydropower facility (water right 02-2080):

The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion in the flow of the waters of the Snake River and its tributaries, or prevent or

interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

(Copies of said license and permit are included herewith as Exhibit 3).

REQUEST FOR PRODUCTION NO. 22: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, and James C. Tucker, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to 2006 House Bill 800.

REQUEST FOR PRODUCTION NO. 23: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, and James C. Tucker, received, on behalf of Idaho Power Company, from the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, that pertain to 2006 House Bill 800.

REQUEST FOR PRODUCTION NO. 24: Produce all other documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to 2006 House Bill 800.

REQUEST FOR PRODUCTION NO. 25: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed, or otherwise provided, on behalf of Idaho Power Company, to the Attorney General of the State of Idaho, or any employee, representative, agent or staff of the Attorney General, that pertain to the Swan Falls Settlement.

REQUEST FOR PRODUCTION NO. 26: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Attorney General of the State of Idaho, or any employee, representative, agent or staff of the Attorney General, that pertain to the Swan Falls Settlement.

REQUEST FOR PRODUCTION NO. 27: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided to the Attorney General of the State of Idaho, or any employee, representative, agent or staff of the Attorney General, that pertain to 1986 Senate Bills 1358 and/or 1358aa, and/or the 1986 amendments to Idaho Code § 42-203B(2).

REQUEST FOR PRODUCTION NO. 28: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert

witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from the Attorney General of the State of Idaho, or any employee, representative, agent or staff of the Attorney General, that pertain to 1986 Senate Bills 1358 and/or 1358aa, and/or the 1986 amendments to Idaho Code § 42-203B(2).

REQUEST FOR PRODUCTION NO. 29: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to 1986 Senate Bill 1358 and/or 1358aa, and/or the 1986 amendments to Idaho Code § 42-203B(2).

REQUEST FOR PRODUCTION NO. 30: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to 1986 Senate Bill 1358 and/or 1358aa, and/or the 1986 amendments to Idaho Code § 42-203B(2).

REQUEST FOR PRODUCTION NO. 31: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed or otherwise provided, on behalf of Idaho Power Company, to Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether waters of the Snake River upstream from Milner Dam and surface water and ground water tributary the Snake River upstream from Milner Dam are subject to the trust established under the Swan Falls Settlement.

REQUEST FOR PRODUCTION NO. 32: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights

Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether waters of the Snake River upstream from Milner Dam and surface water and ground water tributary to the Snake River upstream from Milner Dam are subject to the trust established under the Swan Falls Settlement.

REQUEST FOR PRODUCTION NO. 33: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether waters of the Snake River upstream from Milner Dam and surface water and ground water tributary the Snake River upstream from Milner Dam are subject to the trust established under the Swan Falls Settlement.

REQUEST FOR PRODUCTION NO. 34: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed, or otherwise provided, on behalf of Idaho Power Company, to Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether hydropower water rights, including but not limited to those claimed, owned or used by Idaho Power Company, are subordinated or may be subordinated, through the Swan Falls Settlement or otherwise, to recharge.

REQUEST FOR PRODUCTION NO. 35: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received, on behalf of Idaho Power Company, from Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether hydropower water rights, including but not limited to those claimed, owned or used by Idaho Power Company, are subordinated or may be subordinated, through the Swan Falls Settlement or otherwise, to recharge.

REQUEST FOR PRODUCTION NO. 36: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, submitted, mailed, faxed, e-mailed, or otherwise provided, on behalf of Idaho Power Company, to Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address,

analyze, evaluate, discuss, refer or otherwise pertain to the question of whether water rights diverting from the Snake River upstream from Milner Dam, or from surface waters or ground waters tributary thereto, are subject to water rights diverting downstream from Milner Dam.

REQUEST FOR PRODUCTION NO. 37: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, including but not limited to James Bruce, Logan Lanham, Greg Panter, James C. Tucker and Thomas G. Nelson, received on behalf of Idaho Power Company, from Water District 01, the Committee of Nine, the Idaho Water Users Association, Idaho Water Rights Defense, or to any irrigation district, canal company or other water use entity or water distribution entity operating in the Snake River basin, or to their officers, directors, staff, employees, members, representatives, attorneys or agents, that address, analyze, evaluate, discuss, refer or otherwise pertain to the question of whether water rights diverting from the Snake River upstream from Milner Dam, or from surface waters or ground waters tributary thereto, are subject to water rights diverting downstream from Milner Dam

REQUEST FOR PRODUCTION NO. 38: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to water right permits numbers 01-7054 and 37-7842.

REQUEST FOR PRODUCTION NO. 39: Produce all documents in your possession evidencing that the water rights that are the subject of the Swan Falls Agreement include or carry a right to obtain the administration of water rights diverting from the Snake River upstream from Milner Dam, or diverting from surface waters or ground waters tributary to the Snake River upstream from Milner Dam.

REQUEST FOR PRODUCTION NO. 40: Produce all documents in your possession evidencing that the water rights that are the subject of the Swan Falls Agreement include or carry a right to obtain the distribution of waters of the Snake River upstream from Milner Dam, or surface waters or ground waters tributary to the Snake River upstream from Milner Dam.

REQUEST FOR PRODUCTION NO. 41: Produce all documents in your possession that address, analyze, evaluate, discuss, characterize or refer to the quantity or source(s) of flows available or expected to be available for power purposes at Idaho Power Company's hydroelectric power generation facilities at Twin Falls, Shoshone Falls, Upper Salmon Falls, and Lower Salmon Falls.

REQUEST FOR PRODUCTION NO. 42: Produce all documents that Idaho Power Company or its lobbyists, counsel, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, submitted, mailed, faxed, e-mailed, or otherwise provided, on behalf of Idaho Power Company to the Federal Energy Regulatory Commission ("FERC") in connection with Idaho Power Company's "Petition for Declaratory Order" filed with the Federal Energy regulatory Commission (FERC docket. No. EL-85-38-000), including but not limited to any presentations to FERC officers, staff or employees.

REQUEST FOR PRODUCTION NO. 43: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, submitted, mailed, faxed, e-mailed, otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, or to the United States of America or any of its executive or administrative department, agencies, bureaus, commissions, boards, employees, officers, attorneys, agents or representatives, that address, analyze, evaluate, discuss, refer or otherwise pertain to Article 14 of the 1934 Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility. (A copy of said license is attached hereto as Exhibit 2.)

REQUEST FOR PRODUCTION NO. 44: Produce the "recordable contract or deed embodying the provisions, conditions, and limitations set forth" in Article 14 of the first Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility that Idaho Power Company agreed to execute and acknowledge pursuant to Article 14 of said license. (A copy of said license is attached hereto as Exhibit 2.)

REQUEST FOR PRODUCTION NO. 45: Produce the "recordable contract or deed embodying the provisions, conditions, and limitations set out in the stipulation and agreement contained in Article 14 of Federal Power Commission license for Project No. 18" that the Idaho Power Company's Board of Director's authorized Company officers to execute and acknowledge pursuant to a resolution unanimously adopted at a special meeting on May 11, 1934. (A copy of the "Minutes of Special Meeting" of Idaho Power Company's Board of Director's (May 11, 1934) is included herewith as Exhibit 4.)

REQUEST FOR PRODUCTION NO. 46: Produce all documents in your possession that address, discuss, analyze, evaluate, refer or otherwise pertain to Article 14 of the 1934 Federal Power Commission license for Idaho Power Company's Twin Falls hydropower facility. (A copy of said license is attached hereto as Exhibit 2.)

REQUEST FOR PRODUCTION NO. 47: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, submitted, mailed, faxed, e-mailed, or otherwise provided, on behalf of Idaho Power Company, to the United States of America or any of its executive or administrative department, agencies, bureaus, commissions, boards, employees, staff, officers, attorneys, agents or representatives that address, analyze, evaluate, discuss, refer or otherwise pertain to Article 21 of the 1923 American Falls Contract.

REQUEST FOR PRODUCTION NO. 48: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to Article 21 of the 1923 American Falls Contract.

REQUEST FOR PRODUCTION NO. 49: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the Idaho Power Company's water rights, water use, and/or contract rights to the storage capacity in the American Falls reservoir.

REQUEST FOR PRODUCTION NO. 50: Produce all documents that Idaho Power Company or its lobbyists, employees, officers, directors, representatives, attorneys, investigators, or expert witnesses, submitted, mailed, faxed, e-mailed, or otherwise provided, on behalf of Idaho Power Company, to the Idaho Legislature, the Governor, or any Agency, as those terms are defined above, or to the United States of America or any of its executive or administrative department, agencies, bureaus, commissions, boards, employees, staff, officers, attorneys, agents or representatives, that address, analyze, evaluate, discuss, refer or otherwise pertain to the 1928 amendment to the Idaho Constitution that added the following passage to section 3 of Article XV: "except that the State may regulate and limit the use thereof for power purposes."

REQUEST FOR PRODUCTION NO. 51: Produce all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the 1928 amendment to the Idaho Constitution that added the following passage to section 3 of Article XV: "except that the State may regulate and limit the use thereof for power purposes."

REQUEST FOR PRODUCTION NO. 52: Produce all documents in your possession that pertain to the rebuilding of American Falls dam during the 1970s, including but not limited those documents pertaining to United States S.1258 & S.1259; Public Law 93-206 (Dec. 28, 1973); United States H.R.9968; Public Law 94-164 (Dec. 23, 1975); the Falling Water Contract Dated March 31, 1976 between the American Falls Reservoir District and the Idaho Power Company; the Spaceholder Contract among the United States, the American Falls Reservoir District, and the Idaho Power Company Dated March 31, 1976; and the Contract between the United States of America and the American Falls Reservoir District for Construction and Operation and Maintenance of the American Falls Replacement Dam Program Dated March 31, 1976.

REQUEST FOR PRODUCTION NO. 53: Produce all documents in your possession that set forth, consist of, include, summarize, address, analyze, evaluate, discuss, or refer to any economic or hydrologic studies, analyses or reports pertaining to subordination of hydropower water rights or uses to recharge.

REQUEST FOR PRODUCTION NO. 54: Produce all documents in your possession relevant to the intent of the parties to the Swan Falls Agreement as to whether hydropower water rights exceeding the Swan Falls minimum flows would be subject to subordination to uses of water designated as beneficial uses, and types of entities making such uses, under state law as modified in the future.

REQUEST FOR PRODUCTION NO. 55: Produce all documents in your possession relevant to the intent of the Idaho Legislature as to whether hydropower water rights exceeding the Swan Falls minimum flows would be subject to subordination to uses of water designated as beneficial uses, and types of entities making such uses, under state law as modified in the future.

REQUEST FOR PRODUCTION NO. 56: Produce all documents in your possession relevant to the intent of the parties to the Swan Falls Agreement in 1984 as to whether hydropower water rights exceeding the Swan Falls minimum flows would not be subject to subordination to the management or use of water for aquifer recharge.

REQUEST FOR PRODUCTION NO. 57: Produce all documents in your possession relevant to the intent of the Idaho Legislature as to whether hydropower water rights exceeding the Swan Falls minimum flows would not be subject to subordination to the management or use of water for aquifer recharge.

REQUEST FOR PRODUCTION NO. 58: Produce all documents in your possession which relate to the Framework for Final Resolution of Snake River Water Rights Controversy ('Framework'), signed on October 1, 1984 by Governor John Evans, Attorney General Jim Jones, and Idaho Power Chairman and C.E.O. James Bruce, including but not limited to all drafts of the Framework, documents considered in its formulation, and documents referring to it.

REQUEST FOR PRODUCTION NO. 59: Produce all documents in your possession relating to the consideration of aquifer recharge by the 1986 Legislative Council interim committee on ground water resources, other than the minutes and final report of this committee.

REQUEST FOR PRODUCTION NO. 60: Produce all documents in your possession relating to the consideration of aquifer recharge by the 1993 Legislative Council interim committee on aquifer recharge, other than the minutes and final report of this committee.

REQUEST FOR PRODUCTION NO. 61: Produce all documents in your possession relating to the initial adoption, and the continuation, of the State policy concerning a flow of zero c.f.s. minimum flow at Milner as described in various versions of the Idaho State Water Plan.

REQUEST FOR PRODUCTION NO. 62: Produce all documents upon which Idaho Power Company intends to rely in defending against the State's May 7, 2008 Motion for Summary Judgment, and in support of the motion for summary judgment that Idaho Power Company intends to file.

REQUEST FOR PRODUCTION NO. 63: Produce all documents you have not already produced but which you referenced, reviewed or in any way relied upon to respond to the Requests for Admission and Interrogatories set forth herein.

DATED this 30th day of May 2008.

LAWRENCE G. WASDEN
Attorney General

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

KARL T. KLEIN
MICHAEL C. ORR
SHASTA KILMINSTER-HADLEY
Deputy Attorneys General


Michael C. Orr

Exhibit 3

Form No. 204
12/99
FILING FEE \$50.00

For Office Use Only
\$50 Fee Received by [Signature]
Date APR 26 2004
Receipt No. [Signature]

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
REQUEST FOR EXTENSION OF TIME
TO PROVIDE ADDITIONAL TIME IN WHICH TO SUBMIT PROOF OF
BENEFICIAL USE FOR A WATER RIGHT PERMIT

Department of Water Resources

The Idaho Department of Water Resources will consider this form as a request that the permit holder(s) be granted an additional period of time under the provisions of Section 42-204, Idaho Code in which to complete development of a water right.

Permit No. 01-7054 & 37-7842

Name(s) of Permit Holder: Idaho Water Resource Board

Address: 1301 N. Orchard St. City Boise State ID Zip 83706

Telephone No. Brian Patton 327-5432 Date Proof is Due: June 1, 2004

Describe what work has been completed toward the development of this water right:
(This must be filled out! If no work has been completed, show "none".)

These projects are being developed for diversion into recharge sites.

Costing \$

The permit holder(s) has been unable to complete the remainder of the work for the following reasons:

Funds and efforts to meet federal agency requirements

Permit holder(s) request an extension to June 1, 2009.

(Signature)* [Signature] Chairman, Idaho Water Resource Board

*If other than permit holder, Power of Attorney must be supplied.

ACTION OF THE DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above request for extension of time be
APPROVED and the time within which to submit proof of beneficial use is extended
to June 1, 2009.

Signed this 25th day of August, 2004

Gary Spackman
GARY SPACKMAN

EXHIBIT 3

Exhibit 4

RECEIVED

APR 11 2006

DEPARTMENT OF
WATER RESOURCES

April 11, 2006

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

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

Dear Director Dreher:

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

Sincerely,



LAWRENCE G. WASDEN,
Attorney General
State of Idaho



JAMES C. TUCKER
Attorney for Idaho Power Company

Attachment

STIPULATION

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

- 1) Stipulation Regarding Water Right Permit Nos. 01-7054 and 37-7842: Recognizing that Water Right Permit Nos. 01-7054 and 37-7842 are subject to the Swan Falls Settlement –
 - a) The Company agrees that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement and will neither contest nor otherwise oppose the exercise of those water rights on the basis of priority, the Swan Falls Agreement, or I.C. §§ 42-234, 42-4201 and 42-4201A. The Company further agrees that those water rights may be exercised in a manner consistent with state law.
 - b) The parties agree that all provisions of the Swan Falls Agreement and the implementing legislation shall continue to apply to Water Right Permit Nos. 01-7054 and 37-7842, including I.C. §§ 61-539 and 61-540 for the benefit of Idaho Power Company.
 - c) The parties further agree that in the event that the Idaho Water Resource Board (IWRB) seeks to have said permits licensed or decreed, that the Company will not file a protest or objection in such proceedings, but that the State, in recognition of its obligations under the Swan Falls Agreement and state law, through the Idaho Department of Water Resources (IDWR), will appropriately investigate such permits to ensure that they meet applicable requirements and that the licensed or decreed water rights fully comply with state law.
- 2) Further Proceedings Relating to the Swan Falls Agreement. The parties agree that in the event that there are disagreements or disputes between the parties as to the interpretation or application of the Swan Falls Agreement that they will endeavor to resolve those disagreements through informal discussions and negotiation. In the event that the parties are unable to resolve

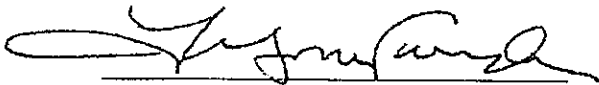
any such disagreements to their mutual satisfaction, either party, after notice to the other, may file a petition for declaratory relief with a court of appropriate jurisdiction to have the disagreement resolved and the Swan Falls Agreement interpreted and neither this Stipulation nor I.C. §§ 42-234,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

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

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

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

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



LAWRENCE G. WASDEN,
Attorney General
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-4126

Date: 4/11/06

FOR IDAHO POWER COMPANY:



JAMES C. TUCKER
Idaho Power Company
P.O. Box 70
Boise, ID 83707
(208) 388-2112

Date: 4/11/06

Exhibit 5

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile

James S. Lochhead
Michael A. Gheleta
Mark J. Mathews
BROWNSTEIN HYATT FARBER SCHRECK, P.C.
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile

Attorneys for Plaintiff Idaho Power Company

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO POWER COMPANY	)	Civil Action No: 07-443-S-EJL
	)	
Plaintiff,	)	
	)	
v.	)	IDAHO POWER'S FIRST SET OF
	)	DISCOVERY REQUESTS TO THE
UNITED STATES OF AMERICA,	)	UNITED STATES
U.S. DEPARTMENT OF THE INTERIOR;	)	
BUREAU OF RECLAMATION	)	
	)	
Defendants.	)	

Plaintiff Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, hereby submits its First Set of Discovery Requests to Defendant the United States to be answered in accordance with the Federal Rules of Civil Procedure and the Rules of this Court.

Your responses to these Discovery Requests are due thirty (30) calendar days after

service in accordance with the Federal Rules of Civil Procedure, or as otherwise ordered by the Court, absent an agreed upon extension.

I. INSTRUCTIONS

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

a. **Agency.** The term "Agency" means any executive or administrative body of the United States, including but not limited to agencies, boards, departments, and commissions, and their directors, administrators, members, officers, officials, employees, staff, agents and representatives.

b. **Answer.** The term "Answer" means the Defendant's Answer to the Complaint in this matter.

c. **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.

d. **Complaint.** The term "Complaint" means Plaintiff's Complaint in this matter.

e. **Document.** The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term in Fed. R. Civ. P. 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.

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

i. **Possession (with respect to documents).** When referring to documents, the term "possession" means any and all documents that the United States, and anyone acting on its behalf, including, but not limited to, employees, representatives, attorneys, investigators, and expert witnesses, actually possess or could reasonably obtain.

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. **State.** The term "State" means the State of Idaho, and encompasses all current and former State officials, agencies, and entities.

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

m. **The 1923 Contract.** The term "1923 Contract," or variations thereof, means Contract No. Ilr-733 between the United States of America and Idaho Power Company,

dated June 15, 1923, and entitled "CONTRACT Between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho."

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 that fully explains the basis for the privilege claim.

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 and in a manner that complies with the Federal Rules of Civil Procedure.

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.

9. These Discovery Requests are continuing and require supplemental responses up to the date of trial in accordance with F.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.

INTERROGATORIES

INTERROGATORY NO. 1: Paragraph 35 of your Answer states that "Plaintiffs claims are barred by the applicable statute of limitations. There is a 6-year statute of limitations for government contracts and all contracts relevant to this action were signed more than six years prior to the lawsuit." Please describe in detail your basis for this contention, including within

your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 2: Paragraph 36 of your Answer states that "Plaintiff's claims are barred by the doctrine of laches." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 3: Paragraph 37 of your Answer states that "Plaintiff's claims are barred by the doctrine of accord and satisfaction insofar as the 1923 contract has been modified and superseded by later contracts. The parties executed another contract on March 31, 1976, which modified the earlier contracts." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 4: Paragraph 38 of your Answer states that "[t]his Court does not possess jurisdiction to entertain claims based on alleged breach of fiduciary responsibility, and no trust relationship exists between Plaintiff and the United States." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 5: Paragraph 39 of your Answer states that "Plaintiff's claims are barred by the doctrines of mistake and impossibility. The 1923 contract was based on the parties' assumption that the hydrology of the Snake River would permit enough flow of water between the end of one irrigation season and the beginning of the next to guarantee both a full reservoir for irrigation and sufficient water for winter power flow. This assumption has proven to be incorrect, especially in years of extreme drought or other organic conditions that

have an impact on the total amount of water in the Snake River." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 6: Paragraph 39 of your Answer also states that "Plaintiff's claims are barred by the doctrines of mistake and impossibility. . . . The Idaho state watermaster controls the Snake River below the Milner dam, thereby making it impossible for defendants to protect the flow available for Plaintiff." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 7: Paragraph 40 of your Answer states that "Plaintiff's claims are barred by the doctrine of changed circumstances. Conditions on the Snake River upstream from the American Falls Dam have changed dramatically since the 1923 contract was signed. The Palisades Dam was subsequently constructed on the Snake River near the Wyoming border and it now captures much of the water that the 1923 planners assumed would flow into the American Falls Reservoir. Moreover, in 1992, Plaintiff added a power plant at Milner, between the American Falls Reservoir and the 1923 measuring point at Twin Falls." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 8: Paragraph 40 of your Answer also states that "Plaintiff's claims are barred by the doctrine of changed circumstances. . . . [P]eriods of drought have recurred with unforeseen regularity and intensity. Agricultural acreage has expanded, increasing the amounts of water needed to accommodate irrigation demands. Irrigation practices themselves have changed from flood irrigation to sprinkler systems, which produce less run-off.

Additionally, power consumption patterns have changed with the development of air conditioning. Formerly, peak demand periods occur in the winter months to provide light and heat. Now, peak demand periods occur in the summer months to provide cooling. These changed circumstances materially alter the assumptions on which the parties' 1923 agreement was based." Please describe in detail your basis for this contention, including within your description and without limitation each and every fact, witness, and document that you believe supports the contention.

INTERROGATORY NO. 9: Please describe in detail how the overall operation of the federal reservoir system on the Upper Snake River above Milner affects storage in and releases from American Falls Reservoir, including but not limited to storage and releases made pursuant to the 1923 Contract, and how storage and releases are accounted for in individual reservoirs and in the overall federal reservoir system.

INTERROGATORY NO. 10: Identify all documents responsive to the Requests for Production set forth herein.

INTERROGATORY NO. 11: Identify all persons who provided information for or assisted in preparing your responses to the discovery requests herein, and specify the specific responses to which each person contributed.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce all documents that support or contradict your responses to the Interrogatories set forth herein.

REQUEST FOR PRODUCTION NO. 2: Please produce any and all documents you referenced, considered, reviewed or in any way relied upon when drafting or finalizing your responses to the Interrogatories set forth herein.

REQUEST FOR PRODUCTION NO. 3: Please produce all Spaceholder Contracts concerning storage in American Falls Reservoir and any documents related to those contracts, including any contract amendments or letters interpreting contract terms.

REQUEST FOR PRODUCTION NO. 4: Please produce all Spaceholder Contracts concerning storage in Palisades Reservoir and any documents related to those contracts, including any contract amendments or letters interpreting contract terms.

REQUEST FOR PRODUCTION NO. 5: Please produce any and all documents in your possession that you claim amend or modify the rights and obligations of the parties to the 1923 Contract.

REQUEST FOR PRODUCTION NO. 6: Please produce any and all documents in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain to the 1923 Contract or any subsequent contract, document or authority that that you claim amends or modifies the rights and obligations of the parties to the 1923 Contract.

REQUEST FOR PRODUCTION NO. 7: Please produce any and all correspondence between the Bureau of Reclamation and Water District No. 1, the Committee of Nine, Staff and management of the Idaho Water Resources Department ("IDWR"), Contract Spaceholders, and Irrigators using water from the Snake River, as well as meeting minutes and notes, plans, and documents, which relate to operations of American Falls Reservoir and upstream Snake River reservoirs concerning storage distribution, flood control, and water bank transactions.

REQUEST FOR PRODUCTION NO. 8: Please produce any and all internal Bureau of Reclamation memoranda and other documents having any relation to water accounting and priority of distribution among spaceholders having contracts with the United States concerning

storage in federal storage facilities on the Snake River upstream from and including Milner Reservoir and Dam.

REQUEST FOR PRODUCTION NO. 9: Please produce any and all documentation, model code, model software, model input and output data, and any models, working or not, in your possession that address, analyze, evaluate, discuss, refer or otherwise pertain specifically to American Falls Reservoir operations and water accounting, and more generally to American Falls operations and water accounting in relation to all reservoir and surface water operations in the Snake River basin upstream from and including Milner Reservoir and Dam.

Dated this 20th day of June, 2008.

Respectfully submitted,

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627



James S. Lochhead, Esq.
Michael A. Gheleta, Esq.
Mark J. Mathews, Esq.
BROWNSTEIN HYATT FARBER
SCHRECK, P.C.
410 Seventeenth Street, Suite 2200
Denver, CO 80202

*Attorneys for Plaintiff
Idaho Power Company*

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 20th day of June 2008, a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S FIRST SET OF DISCOVERY REQUESTS TO THE UNITED STATES** was served upon the following person via U.S. mail.

Warren S. Derbidge,
Assistant United States Attorney
District of Idaho
Washington Group, Plaza IV
800 Park Blvd. Suite 600
Boise, Idaho 83712


Victoria J. Perkowski

86075\1163198.2