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

In Re SRBA	)	
Case No. 39576	)	
_____	)	Consolidated Subcase No. 92-00023
IDAHO POWER COMPANY,	)	
Plaintiff,	)	IDAHO POWER COMPANY'S
	)	MEMORANDUM IN SUPPORT OF
v.	)	CROSS MOTION FOR SUMMARY
	)	JUDGMENT
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.	)	
_____	)	

The Plaintiff Idaho Power Company ("Idaho Power"), by and through its counsel of record, hereby submits this Memorandum in Support of Plaintiff's Cross Motion for Partial Summary Judgment. The Motion and this Memorandum are also supported by the Affidavit of Shelley M. Davis in Support of Memorandum in Support of Cross Motion for Summary Judgment filed concurrently herewith.

INTRODUCTION

Idaho Power seeks an order of this Court granting partial summary judgment in its favor holding that the State Defendants ("State") are barred by the Consent Judgments entered in Ada County Cases *Idaho Power Company v. the State of Idaho, et al.*, Case No. 62237 and *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case No. 81375 (the "Consent Judgments"), from now asserting to this Court that the decreed and licensed water rights of Idaho Power should be titled in the name of the State of Idaho. In the Consent Judgments, the State expressly agreed that the water rights of Idaho Power which are the subject of the Swan Falls Agreement are owned solely by Idaho Power. Therefore, the State is barred by the doctrines of *res judicata* and judicial estoppel from taking its new and inconsistent position before this tribunal. Idaho Power is entitled to an order on partial summary judgment declaring the named owner of said water rights to be Idaho Power, and quieting title to said water rights in the name of Idaho Power pursuant to the Complaint in this action.

STATEMENT OF PERTINENT FACTUAL AND PROCEDURAL HISTORY

On October 25, 1984, the Governor of the State of Idaho John Evans, CEO of Idaho Power Jim Bruce, and Attorney General Jim Jones signed the Swan Falls Agreement, among other things, in an attempt to resolve two lawsuits filed by Idaho Power. Affidavit of Shelley M. Davis in Support of Cross Motion for Summary Judgment ("Davis Aff."), Ex. A, the Swan Falls

Agreement. One of the requirements of the Swan Falls Agreement, set forth at paragraph 7.F. stated that:

Upon implementation of the Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

Davis Aff., Ex. A, p. 4 (emphasis added). The Consent Judgments restated verbatim paragraphs 7.A. through 7.E. of the Swan Falls Agreement. Davis Aff., Exs. A, B and C. Neither the Consent Judgments nor the Swan Falls Agreement describe, discuss, or intimate that it was contemplated Idaho Power would convey all or any part of its water rights to the State or into a trust. *Id.* In fact, all three documents expressly state that "Idaho Power Company's water rights shall be as follows" and then go on to list each of the water rights that the State now claims should be titled in its name. *Id.*

Idaho Power's Complaint in Case No. 62237, Paragraph II, alleges that Idaho Power "holds certain decreed and licensed water rights on the Snake River in the State of Idaho for power production at its Swan Falls hydro-electric plant." Davis Aff., Ex. D. It then describes four rights which total 9,450 c.f.s. of water with priority dates dating from January 17, 1900. *Id.* In its first prayer for relief Idaho Power sought an order of the court:

Adjudging and decreeing that plaintiff's water rights at its Swan Falls powerplant are valid, subsisting water rights not subject to upstream depletion and the subsequent rights of holders of water rights in the Snake River above Swan Falls and below Milner Dam are subject to the said rights of Idaho Power Company.
Id.

Idaho Power's Second Amended Complaint in Case No. 81375, Paragraph VI of Count One, alleges Idaho Power "is the holder of certain licensed and decreed water rights for the generation of power" at Swan Falls. Davis Aff., Ex. E. The Complaint goes on to allege in Counts Two through Five that Idaho Power holds licensed or decreed water rights for its Bliss,

Lower Salmon, and Upper Salmon power plants. *Id.* Idaho Power sought relief as to all counts alleging the ownership of its water rights in the form of a judgment decreeing that its water rights were superior to subsequently granted consumptive water rights claimed by each of the named Defendants, and that the Defendants' rights were junior and subordinate to Idaho Power's water rights at each of the projects listed in the Complaint. *Id.*

As a result, both cases sought to have Idaho Power's water rights adjudged and decreed as belonging to the Idaho Power. Davis Aff., Exs. D and E.

In November 1984, after the signing of the Swan Falls Agreement, Idaho Power and the State moved to stay both actions until after the 1985 legislative session had adjourned to allow for an "evaluation by the parties and the Court of the probabilities of success in implementing the agreement." Davis Aff., Ex. F, Motions for Stay submitted by counsel for Idaho Power Company and counsel for the State of Idaho. Both courts granted the Motions and no further proceedings were had (aside from the periodic dismissal of named defendants from Case No. 81375), until the parties moved in 1989 to enter the Consent Judgments. Davis Aff., Ex. G, Orders Granting Motions for Stay, also see Davis Aff., Exs. B and C, Consent Judgments.

Prior to entry of the Consent Judgments the parties exchanged proposed draft consent judgments, negotiating the terms thereof. Davis Aff., Ex. H, April 5, 1989 letter from Tom Nelson to Clive Strong. (Rejecting the terms proposed by the State that did not conform to the language of the Swan Falls Agreement). The final negotiated Consent Judgments presented to the Court for approval were in "bare-bones compliance with the agreement in stating the Company's rights as resolved by the Agreement." *Id.* The clear language of the Consent Judgments state, in pertinent part:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Idaho Power Company's water rights shall be as follows.....

A. State Water License Numbers 36-2013..., 37-2128 & 37-2472..., 37-2471..., 36-2018..., 36-2026..., 02-2057..., 02-2001A, 02-2001B, 02-2059, 02-2060..., 02-2064, 02-2065..., 02-2056..., 02-2036..., 02-2032, 02-4000, 02-4001, and Decree Number 02-0100, entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls.

...

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use, but not to exceed those amounts states in State Water License Numbers [listed in the paragraph above], but such rights in excess of the amounts stated in 1(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violated or will violate paragraph 1(A).

C. The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State of Idaho and company implementing the terms of Idaho Code §§ 61-539 and 61-540.

D. The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

4. The Swan Falls Agreement, dated October 25, 1984, shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect independent of this Judgment.

Davis Aff., Exs. B and C (emphasis added). The language of the Consent Judgments reiterated verbatim the language in the Swan Falls Agreement, paragraphs 7.A. through 7.E., including the language which expressly states that the "Company's water right shall be as follows." Davis Aff., Ex. A. There is no language in the Swan Falls Agreement or in any of the Exhibits 1 through 8 attached thereto that purports to request, require, intend or intimate that Idaho Power would convey all or any portion of its water rights to the State of Idaho or into a trust as now

asserted by the State. *Id.* Therefore, the State is now barred from relying on the Swan Falls Agreement, the legislation enacted in support of the Swan Falls Agreement, or any other law of the State of Idaho, to justify its actions taken in December 2006, when it filed Notices of Change of Water Right Ownership of a portion of all of Idaho Power's water rights. Davis Aff., Ex. I, the Notices of Change of Water Right Ownership filed by the State. The State expressly agreed, in two binding Consent Judgments, that Idaho Power's water rights that were at issue in Ada County Case Nos. 62237 and 81375, and that were the subject of the Swan Falls negotiations, are "the Company's water rights[.]" Davis Aff. Exs. A, B and C.

The Consent Judgments were entered six years after the Swan Falls Agreement, and five years after the legislature enacted the implementing legislation. Davis Aff., Exs. A, B, and C. The Snake River Basin Adjudication had been adjudicating water rights, including the element of ownership, for four years by the time the Court entered the Consent Judgments. The Complaints in both actions clearly sought judicial decrees as to the ownership interest of Idaho Power in its rights for the Bliss, Upper Salmon, Lower Salmon and Swan Falls power projects. Davis Aff., Exs. D and E.

Moreover, in 1989, at the same time the State and Idaho Power were negotiating the terms of the Consent Judgments, Idaho Power expanded the capacity of its Swan Falls power plant, and sought additional water rights for the expanded capacity. Idaho Power consulted the Idaho Department of Water Resources concerning how to address the Swan Falls Agreement in its application for the new water right license. Davis Aff., Ex. J, March 15, 1989 letter from IDWR to Idaho Power Co. The State responded that it would "propose to condition the right to be subordinate to all future upstream uses." *Id.* The letter was sent by carbon copy to the Governor's office. *Id.* The State did not take the position that the new right or any portion

thereof should be titled in the name of the State. *Id.* Had the State intended in 1990 for the ownership of any portion of Idaho Power's water rights to be transferred to the State, by that time the State should have understood the necessity to clearly state such fact in the Consent Judgments.

STANDARD OF REVIEW

Pursuant to Idaho Rule of Civil Procedure 56(c) a motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. ID. R. CIV. P. 56(c). "When assessing a motion for summary judgment, all facts are to be liberally construed in favor of the non-moving party and the Court draws any reasonable inferences and conclusions in that party's favor." *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 419, 111 P.3d 100, 104 (2005), citing *G M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991).

ARGUMENT

A. The Doctrine of Res Judicata Bars the State From Now Asserting that It and Not Idaho Power is the Owner of the Water Rights Described in the Consent Judgments.

Despite the entry of the Consent Judgments, the State of Idaho decided to take the new position that the Swan Falls Agreement and the resulting implementing legislation intended Idaho Power to assign its water rights to the State of Idaho. This new position is belied by the language of the Agreement, both negotiated Consent Judgments, and the actions of the State of Idaho for the past 23 years.

As described above, in each of the actions in which the Consent Judgments were entered, Idaho Power sought a judgment declaring the extent and priority of its water rights at its Bliss,

Upper Salmon, Lower Salmon and Swan Falls power projects. Davis Aff., Exs. D and E. The Consent Judgments included dismissal with prejudice and were intended to be final resolutions of the actions, stating:

3. The above-captioned case is hereby dismissed with prejudice as against the State defendants as to all claims of the Plaintiff not resolved by the decisions of the Idaho Supreme Court reported as Idaho Power Company v. The State of Idaho, 104 Idaho 570, 661 P.2d 736 and 104 Idaho 575, 661 P.2d 741 (1983) or by entry of this judgment.

Davis Aff., Exs. B and C, identical language contained in both Consent Judgments. The doctrine of res judicata applied to a voluntary dismissal with prejudice just as if it were a final judgment. *See Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613-14, 826 P.2d 1332, 1325-26 (1992).

Moreover, the Consent Judgments also contained a clause stating that the Swan Falls Agreement would “remain in full force and effect independent of this Judgment.” *Id.* The parties intended for the Consent Judgments and the Swan Falls Agreement to resolve the actions seeking a determination of Idaho Power’s water rights at its power projects. The intentions and merits of the Agreement and Consent Judgments were not attacked until December 2006, when the State filed its Notice of Change of Ownership of Water Rights. Davis Aff., Ex. I.

A consent judgment may count as the final judgment required for claim preclusion. *Inouye v. Kemna*, 504 F.2d 705, 708 (9th Cir. 2007). See also, *In Re the General Adjudication of all Rights to Use of Water of the Gila River System and Source*, 212 Ariz. 64, 70 n. 8, 127 P.3d 882, 888 (2006), citing *Arizona v. California*, 520 U.S. 392, 414, 120 S.Ct. 2304 (2000) (“[C]onsent Judgments ordinarily support claim preclusion but not issue preclusion.”). *Res Judicata*, or claim preclusion in this action prevents the State from taking its new and inconsistent position, for the reason that the ownership of Idaho Power’s water rights has already been agreed to and entered in a final judgment of two court actions. “Claim preclusion bars

adjudication not only on the matters offered and received to defeat the claim, but also as to
‘every matter which might and should have been litigated in the first suit.’” *Id.*, citing *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993) (citations omitted) (emphasis added). “In other words, when a valid, final judgment is rendered in a proceeding, it ‘extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.’” *Id.* (quoting *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990)).

“For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment.” *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007), citing *Farmers Nat’l Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994). In the present action, all three elements are met and the doctrine of *res judicata* bars the State from now seeking to alter the rights of the parties by filing its Notices of Change of Water Rights Ownership with the Idaho Department of Water Resources. Unquestionably, the parties in the present action, and in the first two actions, as well as to the settlement negotiations that led to the Swan Falls Agreement, are the same. In the first two actions, and in the present action, the question of the ownership of Idaho Power’s water rights was, and is again, at issue. Final judgments, in the form of negotiated Consent Judgments, were entered in both of the Ada County cases defining “Idaho Power Company’s water rights[.]” Davis Aff., Exs. B and C. The State is therefore barred by the doctrine of *res judicata* from now asserting it is the owner of Idaho Power’s water rights. Idaho Power requests an order of this Court on partial summary judgment adjudging Idaho Power’s water rights to be the property of the Idaho Power.

B. The State is Barred by the Doctrine of Judicial Estoppel from Asserting that it is the Owner of Idaho Power’s Water Rights.

“The doctrine of judicial estoppel prohibits ‘a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding.’” *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 121, 138 P.3d 316, 321 (2006), *citing A & J Const. Co. v. Wood*, 141 Idaho 682, 688, 116 P.3d 12, 18 (2005). Because judicial estoppel is an equitable doctrine existing to protect the dignity of the judicial process, it is ‘invoked by a court at its discretion.’” *Id.*, *citing Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004). “The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings.” *Sword v. Sweet*, 140 Idaho 242, 252 (2004), *citing Risetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). The Idaho Supreme Court first adopted the doctrine of judicial estoppel in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954). In that action the Court stated

It is quite generally held that where a litigant, by means of such sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or right against another party, arising out of the same transaction or subject matter.

Id. at 93-94, 277 P.2d at 565.

In Case Nos. 62237 and 81375, Idaho Power sought a judgment that its rights were superior under the priority doctrine to all later acquired water rights which infringed on its water rights at the Bliss, Upper Salmon and Lower Salmon and Swan Falls power projects. Davis Aff., Exs. D and E. As a result of the negotiations, and to resolve the cases as reflected in the Consent Judgments, Idaho Power subordinated its rights above the minimum flow rates to subsequent beneficial users of the water, a clear concession “advantage or consideration” for the resolution of those actions. *Id.* Idaho Power, did not, by the terms of the Consent Judgments or the Swan Falls Agreement, agree to convey ownership of all or any portion its water rights to the State or

to a trust. The State should be estopped from taking that inconsistent position before the Idaho Department of Water Resources and this Court.

This Motion presents an extremely compelling case for this Court to invoke the doctrine of judicial estoppel because the State is attempting to collaterally attack a settlement agreement, the terms of which were negotiated for months, the results of which took years to implement, and the product of which were two negotiated Consent Judgments resolving two lawsuits that had the potential to affect thousands of water users upstream of the Swan Falls power plant.

A judgment by consent or stipulation of the parties is construed as a contract between them embodying the terms of the judgment. It excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment. In the absence of fraud, mistake, or want of jurisdiction, a judgment by consent will not be reviewed on appeal.

Kershaw v. Pierce Cattle Co., 87 Idaho 323, 329, 393 P.2d 31, 34 (1964), *citing Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wash.2d 89, 316 P.2d 126 (1957). The State, through the Governor and the Attorney General negotiated with Idaho Power to develop the Swan Falls Agreement and the proposed implementing legislation appended thereto. Davis Aff., Ex. A. Pursuant to the Agreement, Idaho Power and the State worked to have the legislation enacted, the Swan Falls Agreement approved by the Federal Energy Regulatory Commission, and to establish the Snake River Basin Adjudication. When all of these conditions were satisfied, the parties negotiated the final condition: the Consent Judgments stating that “Idaho Power Company’s water rights shall be as follows.” Davis Aff., Exs. B and C. At no time in those six years did the State propose to take possession of the Idaho Power’s water rights.

Indeed, the idea had previously crossed the mind of the State. In May of 1984, before commencement of the Swan Falls Negotiations, Governor Evans sent a letter to Jim Bruce, CEO for Idaho Power proposing that “[i]n exchange for an assignment of Idaho Power Company’s

water rights on the Snake River to the State of Idaho, the State could establish a new higher minimum flow at level mutually agreeable to the State and the power company.” Davis Aff., Ex. K, May 9, 1984 letter from Governor Evans to James Bruce. Had Idaho Power agreed to these terms, there would have been no need to negotiate the Swan Falls Agreement, and a requirement for a clear ‘assignment of rights’ would have been established. However, on May 23, 1984, Mr. Bruce responded to the Governor’s letter by rejecting the proposed assignment of the Company’s water rights. Davis Aff., Ex. L, May 23, 1984 letter to Governor Evans from James Bruce. The State’s current position, demonstrated in the filing of the Notices of Change Water Right of Ownership forms, is an inconsistent position taken in derogation of the terms of the Consent Judgments, and this Court should prevent the State from undermining the final and binding judgments entered in those actions.

In the *New Hampshire v. Maine*, 121 S.Ct. 1808, 532 U.S. 742 (2001), the United States Supreme Court considered a case very similar to the matter now before this Court. In 1976, the Supreme Court entered a consent judgment fixing the lateral marine boundary between the states in the Piscataqua River from the closing line of the Portsmouth Harbor five miles seaward to the Gosport Harbor in the Isles of Shoals. *Id.* at 1812, 532 U.S. at 746-747. The consent judgment entered in that action had been negotiated over the course of many months, relying on a great deal of historical research. *Id.* Some 25 years later, New Hampshire approached the Court again, contending based on newly discovered historical documents that the inland river boundary actually ran along the low water mark along the entire shore of Maine. New Hampshire, therefore, claimed sovereignty over the entire Piscataqua River. *Id.* at 1813-1814, 532 U.S. at 747-749. The Supreme Court, relying on the doctrine of judicial estoppel, rejected New Hampshire’s position.

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. [Internal citation omitted.] This rule, known as judicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’

Id., citing *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895), and citing *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000),

(additional citations omitted.) The Court expressly rejected New Hampshire’s position that it had entered into the consent judgment without a “searching historical inquiry into what the term ‘middle of the river’ meant.” *New Hampshire v. Maine*, 121 S. Ct. at 1816, 532 U.S. at 753 (2001). The Court stated “[a]ccording to New Hampshire, had it known then what it knows now about the relevant history, it would not have entered into the decree. We do not question that it may be appropriate to resist application of judicial estoppel ‘when a party’s prior position was based on inadvertence or mistake. [internal citations omitted.] We are unpersuaded, however, that New Hampshire’s prior position in 1977 fairly may be regarded as a product of inadvertence or mistake.” *Id.* The Court went on to hold:

Having convinced this Court to accept one interpretation of ‘Middle of River,’ and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine’s expense. Were we to accept New Hampshire’s latest view, the ‘risk of inconsistent court determinations,’ *United States v. C.I.T. Constr. Co.*, 944 F.2d 253, 259 (5th Cir. 1991), would become a reality. We cannot interpret ‘Middle of the River’ in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

New Hampshire v. Maine, 121 S. Ct. at 1817, 532 U.S. at 755 (2001).

The same potential undermining of the judicial process is at work in this action. For 23 years the State has not attempted to acquire ownership of Idaho Power’s water rights. Now, however, the State has changed its mind about what it meant when it called Idaho Power’s water

rights, “Idaho Power Company’s water rights” in the Swan Falls Agreement and the Consent Judgments. Davis Aff., Exs. A, B and C.

To determine whether it is appropriate to invoke the doctrine of judicial estoppel, courts ask three questions. *New Hampshire v. Maine*, 532 U.S. 742, 750-751, 121 S.Ct. 1808, 1815 (2001), additional citations omitted. First, is the new position taken by the party clearly inconsistent with the party’s earlier position? *Id.* In this case, the State’s negotiators agreed and consented to the entry of two judgments defining “Idaho Power Company’s water rights,” and it now seeks to have those rights assigned to the State. These two positions cannot be reconciled with one another. Therefore, the first question is answered in the affirmative. Davis Aff., Exs. A, B, and C. Second, did the party in the first action convince the court to accept the earlier position, therefore risking conflicting court determinations by granting inconsistent relief? *New Hampshire, supra.* Prior to entry of both Consent Judgments, a hearing was held before the Court, counsel presented oral argument, and the Court granted the parties’ Joint Motion for Entry of Judgment. Therefore, the second question is answered in the affirmative. Davis Aff., Ex. M, Notice of Hearing and Court’s Minute Entry for Hearing on Joint Motion for Entry of Judgment. Third, the court asks “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped?” *New Hampshire, supra.* (additional citations omitted.) In this action, allowing the State to take possession of Idaho Power’s water rights, that were clearly defined as such in the Swan Falls Agreement and the Consent Judgments, and which action was expressly rejected by the CEO for Idaho Power Company in negotiations, would be an ‘unfair detriment’ to the Company. Davis Aff., Exs. A, B, C, K, and L. Therefore, the third question is answered in the affirmative.

In his deposition taken on October 31, 1990, only months after the entry of the consent judgments, Tom Nelson, counsel for Idaho Power who negotiated the Swan Falls Agreement, and who drafted the final Consent Judgments, was asked what was intended when the negotiators for the State and Idaho Power agreed upon the minimum flows at Swan Falls. He responded

The agreement basically says in shorthand that the water rights up to 3,900 and 5,600 are unsubordinated and unsubordinatable. That the Company can defend it, and the state will recognize those water rights in administering the river. Above 3,900 and 5,600, the company's water rights remain intact, but they are subject to subordination to later approved uses which meet the new criteria. So that the company's 1903 water right, for example, could be used to block a 1995, which does not meet the statutory criteria, or even a 1980 undeveloped filing which does not meet the statutory criteria.

Davis Aff., Ex. N, Excerpt of Nelson Depositions taken October 31, 1990 (emphasis added).

Had the State and Idaho Power intended by the Agreement or the Consent Judgments to transfer Idaho Power's water rights to the ownership of the State, Mr. Nelson would certainly have expressed that under oath at his deposition taken only eight months after the Consent Judgments were entered by the Court.

The State and Idaho Power entered two Consent Judgments that the evidence demonstrates were negotiated between the parties. Davis Aff., Exs. B, C, and H. The State proposed to Idaho Power during the negotiations that the Company assign its water rights in the Snake River to the State, and that proposal was rejected. Davis Aff., Exs. K and L. Not until December 2006, without notice to the Company the State filed Notices of Change of Water Right Ownership with the Idaho Department of Water Resources, alleging ownership of Idaho Power Company's water rights. Davis Aff., Ex. I. These actions do not indicate that the State believes that the Swan Falls Agreement or the implementing legislation clearly intended to transfer Idaho Power's water rights to the State. Rather, the State has changed its mind about what it intended when it described "Idaho Power Company's water rights" in the Consent Judgments, and is

impermissibly trying to take possession of Idaho Power's water rights. Idaho Power requests this court employ judicial estoppel to prevent the State from gaining a new and not previously contemplated 'additional advantage' from Idaho Power that was not negotiated between the parties, or agreed to in the final and binding Consent Judgments. *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954).

CONCLUSION

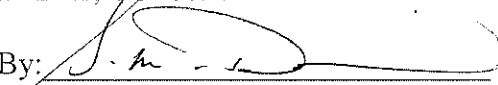
FOR THE FOREGOING REASONS, Idaho Power seeks an order on summary judgment from this Court adjudging Idaho Power to be sole and lawful owner of the water rights as described and entered in Ada County Cases *Idaho Power Company v. the State of Idaho, et al.*, Case No. 62237 and *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case No. 81375, and quieting title thereto in Idaho Power.

Dated this 24th day of January, 2008.

IDAHO POWER COMPANY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January 2008, I caused to be served a true and correct copy of the foregoing **IDAHO POWER COMPANY'S MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** by the method indicated below, and addressed to each of the following:

Filed with the Court via U.S. Mail, Postage Prepaid.

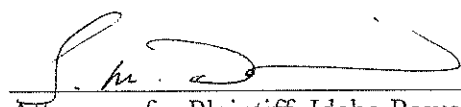
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