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DEPARTMENT OF
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February 7, 2008

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

Dear Parties:

Enclosed please find the following for filing in the above referenced matter:

1. Idaho Power Company's Response to State of Idaho's Motion for Partial Summary Judgment;
2. Affidavit of Michael A. Gheleta in Support of Idaho Power Company's Response to State's Motion for Partial Summary Judgment, including exhibits;
3. Affidavit of Greg Ponter in Support of Idaho Power Company's Response to State's Motion for Partial Summary Judgment, including exhibits; and
4. Affidavit of Sharon Strickland in Support of Idaho Power Company's Response to State's Motion for Partial Summary Judgment.
5. A CD containing the Response Exhibits and the Exhibits to the Affidavit of Michael A. Gheleta.

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Sincerely,

A handwritten signature in cursive script, appearing to read 'Alison Cameron', written in dark ink.

Alison Cameron

ac

Enclosures

cc: IDWR Document Depository

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A copy of the CD can be found in both the repository and legal file

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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: 92-23
	)	
IDAHO POWER COMPANY,	)	IDAHO POWER COMPANY'S
	)	RESPONSE TO STATE OF IDAHO'S
Plaintiff,	)	MOTION FOR PARTIAL SUMMARY
v.	)	JUDGMENT
	)	
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	
Governor of the State of Idaho; LAWRENCE G.	)	
WASDEN, Attorney General of the State of Idaho;	)	Date: February 21, 2008
IDAHO DEPARTMENT OF WATER	)	Time: 1:30 p.m.
RESOURCES; and DAVID TUTHILL, Director,	)	Hon. John M. Melanson
Idaho Department of Water Resources	)	
	)	
Defendants.	)	
	)	

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The Idaho Power Company (“Idaho Power” or the “Company”) hereby files this response to the State of Idaho’s Motion for Partial Summary Judgment and supporting Memorandum (collectively, the “Motion”).

INTRODUCTION

This matter arises from the State’s new-found position that Idaho Code § 42-203 enacted in 1985 (the “Swan Falls Legislation” or “Legislation”) gave the State legal title to Idaho Power’s hydropower water rights that exceeded certain minimum flows at the Murphy Gage below Swan Falls dam. This audacious attempt to take ownership of Idaho Power’s water rights must be rejected.

The State premises its argument in support of the first issue in its Motion almost exclusively upon one phrase in Idaho Code § 42-203B. Yet this provision is unclear and contains ambiguities and inconsistencies that undermine the State’s position. Moreover, the State’s myopic focus upon this single provision ignores the broad canvass of information the Court should consider as a matter of statutory construction, including the entirety of the Swan Falls Legislation; the legislative history; actions taken by the State during the past twenty years interpreting and applying the Legislation; and the October 25, 1984 agreement between the parties (the “Swan Falls Agreement” or “Agreement”) that established the terms of, and gave rise to, the Legislation.¹ A balanced reading of these documents inescapably confirms that until the State’s recent about-face on the issue, no party intended or believed that Idaho Power had conveyed legal title to any of its water rights to the State. Accordingly, the State cannot satisfy its burden of demonstrating that there is no genuine issue of material fact entitling it to summary judgment on the first issue.

¹ The Swan Falls Agreement is attached as Exhibit A to the Affidavit of Michael Gheleta (“Gheleta Aff.”).

The second issue in the State's Motion regarding the terms of subordination is simply a blatant attempt to rewrite a specific provision of the Swan Falls Agreement defining the terms of subordination. In keeping with its desire to own and control Idaho Power's water rights, the State seeks to broaden the subordination terms beyond the language of the Agreement, state law at the time of the Agreement, and even the issue as originally presented to the Court in the State's Motion. The State's Motion should be denied as to the second issue for all of these reasons.

The Court should also reject the State's arguments on the third issue in its Motion. The Court is not precluded, as the State contends, from exercising its judicial function and applying the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver and laches, and indeed such preclusion would violate Idaho's Constitutional separation of powers doctrine. Moreover, the State's allegations of "unclean hands" are wholly unfounded and inappropriate given the parties' legitimate disputes over the interpretation and application of the Swan Falls Agreement. Accordingly, nothing in the State's Motion on the third issue precludes the Court from considering Idaho Power's equitable claims.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

The State's Statement of Undisputed Facts is limited to a general background discussion of the subordination of Idaho Power's water rights and the State's distorted interpretation of the meaning and effect of a single provision of Idaho Code § 42-203B. In fact, the circumstances giving rise to the Legislation and the Agreement are more complex than the State suggests.

In 1983, as the result of a lawsuit against Idaho Power by ratepayers alleging that Idaho Power had failed to protect its assets, Idaho Power filed suit against the State and

thousands of upstream water users seeking injunctive relief against the defendants for interference with its water rights.² This litigation resulted in a host of competing legislative proposals during the 1983 legislative session, each of which attempted to subordinate or take Idaho Power's water rights based upon the asserted authority of the State under the 1928 amendment to Article 15, section 3 of the Idaho Constitution.³ Because Idaho Power's water rights predate the constitutional amendment, the debate in the Legislature focused on whether the attempted subordination would require the condemnation of such rights and the payment of just compensation.⁴

The answer was far from clear in the view of the Idaho Attorney General's office. On March 16, 1983, deputy attorney general Robie Russell opined that "[w]hether such regulation amounts to a taking . . . will undoubtedly have to be determined by the courts."⁵ Russell reasoned that the distinction between the power of eminent domain and that of the police power – the latter of which is "not capable of precise definition" – is "at times somewhat clouded and results in much litigation when the government exercises its police power regulatory function."⁶ The 1983 session ended without either subordination or condemnation legislation being considered by the full House. It was clear that nothing short of a negotiated compromise would resolve the stalemate.

² Affidavit of Greg Panter ("Panter Aff.") ¶¶ 2, 3.

³ *Id.* ¶ 3.

⁴ Jeffrey C. Fereday and Michael C. Creamer, *Swan Falls in 3-D: A New Look At The Historical, Legal And Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 IDAHO L. REV. 573, 597-8 (1991-92) (hereinafter referred to as "Swan Falls in 3-D").

⁵ Gheleta Aff. Ex. B (Letter from Robie G. Russell, Deputy Attorney General, to the Honorable Walter E. Little, Idaho House of Representatives (Mar. 16, 1983)) at 10.

⁶ *Id.* at 4-5.

Accordingly, the 1983 legislature adopted Senate Bill 1180, which authorized the governor or his designee to negotiate and execute a contract with Idaho Power to dismiss certain water users from the Idaho Power complaint filed in response to the Idaho Supreme Court's decision in *Idaho Power Company v. State*.⁷ Idaho Power promoted SB 1180 throughout the 1983 session as a compromise in which Idaho Power would receive protection from further claims filed against it before the IPUC, based on Idaho Power not enforcing its senior hydropower rights against:

(1) junior priority consumptive water uses for any consumptive purpose prior to November 19, 1982, (2) junior priority consumptive water uses for irrigation where substantial investments in irrigation wells and irrigation equipment were made prior to November 19, 1982, but were not operating in 1982, and (3) junior priority consumptive water uses for domestic, nonconsumptive commercial, nonconsumptive industrial or nonconsumptive municipal uses occurring from and after November 19, 1982.⁸

Execution of the 1180 Contract was delayed by extensive public comment, definitional issues, and concerns by both the Governor and the attorney general as to the constitutionality of the agreement, and the 1984 legislative session again resulted in no acceptable compromise. It was clear that a more comprehensive solution was necessary for a resolution of the controversies surrounding Idaho Power's water rights. At the core of this controversy was the fact that Idaho Power held water rights – which are vested property rights – that the State could not unilaterally subordinate without the significant threat that subordination would require the payment of just compensation to Idaho Power.

⁷ See Gheleta Aff. Ex. KK (Law of Apr. 25, 1983, § 2, 1983 Idaho Sess. Laws ch. 259, 689-91 (hereinafter "SB 1180")).

⁸ See, e.g., Gheleta Aff. Ex. KK (SB 1180); Ex. C (Statement of Idaho Power Co. to the Idaho Water Res. Bd. (Mar. 4, 1983)) at 3; Ex. D (Letter from Logan Lanham, Idaho Power Co., to the Honorable Tom W. Stivers, Speaker of the Idaho House of Representatives (Mar. 21, 1983)) at 2; Ex. E (House Minutes, Remarks of Logan Lanham, Idaho Power Co. (Mar. 21, 1983)) at 1-2.

As a result, the Governor and Idaho Power agreed to negotiate. In the exchange of correspondence initiating the negotiations, Idaho Power expressly rejected the State's idea of an assignment of its rights to the State, a position from which Idaho Power has never wavered.⁹

The Swan Falls Agreement resolved this impasse. In Paragraph 6 of the Agreement, Idaho Power and the State agreed to propose to the Legislature a "Legislative Program," consisting of some seven legislative proposals that represented the desire of the parties to achieve the effective quantification and management of water rights in the entire Snake River Basin, and recognition that at some point the Snake River Basin would become fully appropriated.¹⁰

The Agreement, in Paragraph 7, also carefully defined the nature and extent of Idaho Power's water rights and the terms on which they could be subordinated in the future. This definition of the Company's water rights formed the basis of the decree by the Ada County District Court in the suits filed by Idaho Power against the State and junior water users that finally resolved the litigation. Key provisions of Paragraph 7 include:¹¹

⁹ Panter Aff. ¶ 4.

¹⁰ *Id.* ¶ 6. See also Gheleta Aff. Ex. F (Framework for Final Resolution of Snake River Water Rights Controversy (Oct. 1, 1984) (hereinafter the "Framework")) at 2-8. The legislative proposals were: (1) enactment of Public Interest Criteria, which eventually became Idaho Code § 42-203C; (2) funding for the Snake River Basin Adjudication designed to achieve the quantification of water rights in the Snake River Basin, which eventually became Idaho Code § 42-1414; (3) establishment of an effective water marketing system, see H.Com. Res. 33, 48th Leg., 1st Reg. Sess., 1985 Idaho Sess. Laws 758-59; (4) funding for hydrologic and economic studies, see S.B. 1193, 48th Leg., 1st Reg. Sess., 1985 Idaho Sess. Laws Ch. 162, 437-38; (5) allocation of gains upon the sale of utility property, eventually codified as Idaho Code § 61-502B; (6) limitations on IPUC jurisdiction, eventually codified as Idaho Code § 61-539; and (7) rulemaking and moratorium authority for the Idaho Department of Water Resources, eventually codified as Idaho Code § 42-1805.

¹¹ Gheleta Aff. Ex. A (Swan Falls Agreement among the Governor of Idaho, Attorney General of Idaho, and Idaho Power Company (Oct. 25, 1984)) (hereinafter "Swan Falls Agreement") ¶ 7.

- Paragraph 7.A: The “*Company’s water right*” listed by the Company’s water right license numbers at its various project facilities¹² entitles the Company to “an unsubordinated right” of 3900 c.f.s. (cubic feet per second) average daily flow from April 1 – October 31, and 5600 c.f.s. average daily flow from November 1 – March 31, both measured at the Murphy Gage, and that such flows are not subject to depletion (hereinafter referred to as the “Swan Falls Minimum Flows”) (emphasis added).
- Paragraph 7.B: The Company is also entitled to beneficially use Snake River flows up to the full amounts stated in its water right licenses, but “*such rights* in excess of the amounts specified in Paragraph 7.A shall be subordinate to subsequent upstream uses upon approval of such uses by the State in accordance with State law” (emphasis added). Idaho Power further expressly retains under Paragraph 7.B the right to contest any appropriation of water subject to the Swan Falls Agreement Water Rights in accordance with state law, as well as the right to compel the State to take reasonable steps to ensure the Swan Falls Minimum Flows established by the Agreement.
- Paragraph 7.C: The Swan Falls Agreement Water Rights are deemed “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.” The Agreement further provides at Paragraph 7.E that Idaho Power’s “ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam Shall not be limited by this agreement.”
- Finally, Paragraph 7.F states that upon implementation of the Agreement, the State and Idaho Power would consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 “that describe the Company’s water right as provided [herein]” (hereinafter referred to as the “Consent Decrees”). Those Consent Decrees were subsequently executed by the parties and entered by the court. *See* Section II.E.3, *infra*, p. 45.

The effectiveness of the definition of the Swan Falls Agreement Water Rights in Paragraph 7 was subject to several conditions subsequent that would address the broader concerns of the parties. Paragraph 13 of the Agreement specifies these conditions:¹³

- Amendment of the State Water Plan to adopt minimum flows consistent with Idaho Power’s defined water rights in Paragraph 7 of the Agreement.

¹² For ease of reference in this Response, Idaho Power’s water rights as set forth in Paragraph 7 of the Swan Falls Agreement are hereinafter referred to as the “Swan Falls Agreement Water Rights.”

¹³ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 13.

- Enactment of the broad legislative program outlined in Paragraph 6 of the Agreement,¹⁴ and “subordination legislation,” as set forth in Exhibits 7.A and 7.B attached to the Agreement.
- Issuance of an order by the IPUC or the enactment of legislation approving of the Agreement. Significantly, this provision affirmed the desire of the parties that the Agreement would not effectuate or be construed to constitute a conveyance of Company assets.¹⁵
- Issuance of an appropriate order by FERC in accordance with procedures specified in Paragraph 12.B.i of the Agreement.
- Dismissal with prejudice of a pending proceeding before the IPUC and a potential order by the Oregon Public Utility Commissioner.

Thus, the Swan Falls Agreement was the foundation upon which the parties went to the Legislature in 1985 to seek enactment of the package of Swan Falls Legislation to which they had agreed. Despite numerous details in the Agreement and its attachments, the parties did not at any point clearly define the trust arrangement contemplated by them. This was left to implication.¹⁶ The Swan Falls Legislation subsequently adopted in 1985 and amended in 1986 does not lend any further clarity. In fact, as in the Legislation itself, the parties’ negotiations, and the legislative history, the parties used the terms “water” and “water rights” interchangeably and with no clear precision when referring to the trust res.¹⁷ Consistent with Idaho Power’s original rejection of the Governor’s suggestion that it assign its water rights, however, Idaho Power contemplated throughout the negotiations and the development of the Legislation that the trust

¹⁴ See note 10, *supra*.

¹⁵ See Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 12.A.

¹⁶ This critical ambiguity in the establishment and definition of the trust arrangement was recognized by Fereday and Creamer in *Swan Falls in 3-D*, *supra* note 4.

¹⁷ Panter Aff. ¶ 7.

arrangement would consist of a “block of water” subject to appropriation under Idaho Power’s water rights.¹⁸

The subsequent actions of the State and Idaho Power in the implementation of the Agreement and Legislation speak volumes. The actions of both parties clarify and confirm that Idaho Power’s water rights were defined by the Agreement, and were not conveyed or transferred into any trust. As attested to in the attached affidavit by Greg Panter, the State did not assert ownership of the Company’s water rights for over twenty years.¹⁹ When State representatives hinted at such a position in 1999, the Company rejected it.²⁰

More importantly, the State and Idaho Power took affirmative actions that confirm Idaho Power’s ownership of the Swan Falls Agreement Water Rights. As specified by the Agreement, and as described in more detail below, the State and Idaho Power agreed to legislation by which the terms of the Agreement would not constitute “a sale, assignment, conveyance or transfer”²¹ And in satisfaction of the Agreement’s contingency for obtaining approval from FERC, the parties obtained an act of Congress and Order from FERC confirming that the Agreement’s definition of Idaho Power’s rights did not constitute an alienation of project assets, and specifically an alienation of Idaho Power’s water rights. *See* Section II.E.2, *infra*, p. 40-41.

¹⁸ *Id.* at 9. This “block of water” concept is discussed in the article written by the State’s primary negotiators Patrick D. Costello and Patrick J. Kole shortly after the Agreement and Legislation were finalized. Gheleta Aff. Ex. G (Patrick D. Costello & Patrick J. Kole, *Commentary on Swan Falls Resolution*, W. NAT. RES. LITIGATION DIGEST 11 (Summer 1985)) at 11.

¹⁹ Panter Aff. ¶ 10.

²⁰ *Id.*

²¹ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 6.A.F, ex. 5 § 4.

Additionally, as described below and in Idaho Power's Cross Motion for Summary Judgment,²² when all the other contingencies to the Agreement had been satisfied, in 1990, the State and Idaho Power submitted to the Ada County District Court the Consent Decrees, the contents of which were agreed to by both parties, confirming the Company's water rights in accordance with the Agreement. This final act, ending two lawsuits by Idaho Power in which it asserted its full water rights, mentions nothing of any trust arrangement or of title to the Swan Falls Agreement Water Rights being held in the name of the State.

In the meantime, the State has taken numerous actions in the implementation of the Agreement and the Legislation that are inconsistent with its argument that it owns legal title to the Swan Falls Agreement Water Rights, or that the res of any trust consists of these water rights. The State enacted rules and issued permits consistent with the notion that it was reallocating "water" from the trust to new junior water users. The amendments to the State Water Plan refer to "water" being held in trust. And in subsequent dealings with Idaho Power over its water rights over a period of many years, the State has never acted or asserted that it owns legal title to the rights. These actions specifically include the State's reporting and acquiescing in the partial decrees by this Court of Idaho Power's rights in Basin 36, and in a statement in the Joint Motion by Idaho Power and the State in the designation of Basin-Wide Issue No. 13 acknowledging those partial decrees.

In sum, the Swan Falls Agreement incorporates numerous agreements, orders and authorities. Idaho Code § 42-203B and the single phrase within that section relied upon by the State for the wholesale taking of Idaho Power's Swan Falls Agreement Water

²² See Idaho Power's Cross Motion for Summary Judgment ("Cross Motion") and Memorandum in Support of Cross Motion for Summary Judgment ("Mem. in Supp. of Cross Motion").

Rights and the placing of those rights into a trust is but one small piece of this very complex puzzle. It is therefore imperative that the Court consider all of these aspects of the larger Swan Falls settlement. As set forth in greater detail below, consideration of the entirety of the Swan Falls settlement confirms that Idaho Power has retained ownership of its water rights, that those rights are defined by the Agreement and the Consent Decrees, and that the State is barred from now asserting otherwise.

ARGUMENT

I. SUMMARY JUDGMENT IS IMPROPER BECAUSE MATERIAL FACTS ARE IN DISPUTE.

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). The burden is on the moving party to prove an absence of genuine issues of material fact, and the Court should liberally construe all facts and draw all reasonable inferences in favor of the nonmoving party. *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003). The State does not begin to meet this high standard.

A. Idaho Code § 42-203B Is Inherently Ambiguous and Cannot Be Considered in Isolation from Other Provisions in the Legislation or the Legislative Amendments.

Contrary to the State's claim, Idaho Code § 42-203B does not unambiguously provide that Idaho Power must convey its water rights to the State through the trust, or that such rights are transferred into trust by operation of law. For the purpose of statutory interpretation, a statute is ambiguous where the language is capable of more than one reasonable construction. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007) (citing *Carrier v. Lake Pend Oreille Sch. Dist. No. 84*, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006)). That is the case here.

While the Legislation does reference water rights “held in trust” – which the State cites to in its Motion out of context – the Legislation does not provide or even suggest that title to the water rights be transferred to the State. The Legislation also contains references suggesting that the res of the trust was either water or only the right to subordinate the Swan Falls Agreement Water Rights, and not the rights themselves. Indeed, the title of Idaho Code § 42-203B (“Authority to subordinate rights: Nature of subordinated water right and authority to establish a subordination condition . . .”) makes clear that the Legislature intended only to subject Idaho Power’s Swan Falls Agreement Water Rights to later subordination, rather than conveying them in fee to the State.

As set forth in detail in Section II.B, *infra*, p. 23-24, Idaho Code § 42-203B does not place Idaho Power’s water rights into trust:

- In section 42-203B(1), the Legislature states the purpose of the Swan Falls Legislation is not reallocating ownership of Idaho Power’s Swan Falls Agreement Water Rights, but rather regulating and limiting certain uses thereof. *See* Idaho Code § 42-203B(1) (“The legislature finds and declares that it is in the public interest to specifically implement the state’s power to regulate and limit [not reallocate] the use of water [not water rights] for power purposes. . . . The purpose of the trust [is] . . . to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses.”).
- The State relies on the first part of the second sentence in section 42-203B(2), which refers to “water rights . . . held in trust.” The State ignores, however, the second part of the same sentence, which states: “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.” Idaho Code § 42-203B(2) (emphasis added).
- Section 42-203B(2) makes clear that the purpose of the trust is only to subordinate, rather than convey, Idaho Power’s Swan Falls Agreement Water Rights: “The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law” Idaho Code § 42-203B(2).

- And section 42-203B(4) states that Idaho Power “shall be entitled to use water available at its facility to the extent of the water right, and to protect its rights to the use of water as provided by state law against depletion or claims not in accordance with state law.” Idaho Code § 42-203B(4). The Legislation thus explicitly recognizes Idaho Power’s right to use water under the Swan Falls Agreement Water Rights as it is available, and to protect those rights.

Moreover, Idaho Code § 42-203B must be interpreted in conjunction with other provisions of the Legislation and subsequent amendments which the State essentially ignores. *See State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999) (“When interpreting a statute, the Court begins with an examination of the literal words of the statute. . . . A statute is to be construed as a whole without separating one provision from another.”) (citations omitted); *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995) (“A statute should be construed so that effect is given to all its provisions, so that no part will be rendered superfluous or insignificant.”) (citations omitted). As Idaho Code § 42-203B(2) makes clear, the mechanism for the “reallocation” of “trust water” is set forth in Idaho Code § 42-203C. In turn, Idaho Code § 42-203C refers to “water” being held in trust, and available to the “holder of the water right for power production.” Nowhere in this Section does the Legislature suggest that Idaho Power is conveying its water rights to the State:

If an applicant intends to appropriate *water which is held in trust* by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of *trust water available to the holder of the water right used for power production that is defined by agreement* pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.

Idaho Code § 42-203C (emphasis added).

Further implementing section 42-203B, section 42-203D goes on to articulate the standards under which the Director of the Idaho Department of Water Resources (“IDWR”) is to review trust water permits:

The director of the department of water resources shall review all permits issued prior to July 1, 1985, which propose to divert *water held in trust by the state of Idaho* pursuant to subsection (5) of section 42-203B, Idaho Code, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of section 42-203C, Idaho Code.

Idaho Code § 42-203D (emphasis added).

Finally, the 1986 Amendments, enacted for the purpose of “clarifying” the Legislation, refer throughout to the trust consisting of “water,” or “trust water,” and do not suggest anywhere that the trust consisted of Idaho Power’s water rights. *See* Section II.C, *infra*, pp. 25-26.

In sum, the meaning of the Legislation is far from clear. The Legislation refers throughout to “water rights,” “water,” “trust water,” and “water held in trust.” While the State bases its Motion on Idaho Code § 42-203B, this provision, when considered with other sections of the Legislation and its amendments, do not support the State’s position. The Legislation is ambiguous on its face, requiring the Court to further examine the intent of the Legislation, the Agreement, and the subsequent actions of the parties.

B. Because the Legislation Is Ambiguous, The Court Should Examine the Legislative History and Subsequent Acts of the State, All of Which Confirm the Trust Res Is Not Idaho Power’s Water Rights.

Because the Legislation is ambiguous, it cannot be considered in isolation. Where statutory language is ambiguous, a Court must construe the statute to mean what the legislature intended it to mean. *Yzaguirre*, 144 Idaho at 475, 163 P.3d at 1187 (citing *Carrier*, 142 Idaho at 807, 134 P.3d at 658). To determine the legislature’s intent, the

Court examines “not only the literal words of the statute, but also the reasonableness of the proposed constructions, the public policy behind the statute, and its legislative history.” *Id.* See also, e.g., *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003); *Burnight*, 132 Idaho at 659, 978 P.2d at 219 (when construing an ambiguous statute, the Court should attempt to discern the intent of the legislature, and may look to the statute’s legislative history and contemporaneous context at enactment).

Additionally, a Court may look to how parties have interpreted and applied a statute, particularly where the public relies on that application over a long period of time, in interpreting an ambiguous statute. *Pfau v. Comair Holdings, Inc.*, 135 Idaho 152, 154, 15 P.3d 1160, 1162 (2000); *Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 733, 947 P.2d 400, 406 (1997) (“A basic rule of statutory construction is that the application of the statute is an aid to construction, especially where the public relies on that application over a long period of time.”).

Accordingly, in considering the State’s Motion, this Court should consider the legislative history supporting the Legislation, as well as actions taken by the State in interpreting and applying the Legislation. As discussed in Section II.D, *infra*, p. 26-35, the legislative history confirms that Idaho Power and the State did not intend for Idaho Power to convey title to its Swan Falls Agreement Water Rights to the State. Similarly, actions taken by the State during the two decades after the Agreement demonstrate the fallacy of the State’s new found-position that it obtained ownership of certain of Idaho Power’s water rights through the Legislation. See Section II.E, *infra*, at 35-48. To the contrary, through the State’s administration of the trust, its filings in state and federal court, and its statements made to FERC and Congress, the State has repeatedly confirmed Idaho Power’s ownership of the Swan Falls Agreement Water Rights. As highly relevant

evidence of the Legislature's intent, the legislative history and the State's actions at the very least reveal the confusion among the parties as to the precise nature of the trust res and raise key factual disputes that should preclude the granting of the State's Motion.

C. The Legislation Cannot Be Interpreted in Isolation from the Swan Falls Agreement.

Finally, the State in its Motion fails to discuss any aspect of the Swan Falls Agreement, despite the fact that the Agreement was the foundation for the Swan Falls Legislation.²³ The State ignores the import of the Agreement at its peril. Where several instruments are executed at the same time as parts of one transaction – as occurred here with respect to the Agreement and Legislation – they are to be construed together as the whole contract between the parties. *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 295, 688 P.2d 1191, 1200 (Ct. App. 1984) (citing *Charpentier v. Welch*, 74 Idaho 242, 259 P.2d 814 (1953)).

The importance of the Agreement is embodied in its language. The Agreement provides that “[t]he parties agree to propose and support the following legislation *to implement this Agreement*,” and then lists the legislative program that includes the

²³ The State's new interpretation of Idaho Code § 42-203B – that it need not be read in conjunction with the Agreement and is unambiguous – contradicts the position of the Attorney General's office shortly after the Legislation was enacted. In 1986, when the State was trying to determine how to implement the Agreement and the Legislation, IDWR Director Ken Dunn asked for advice on the issuance of “trust water permits” from Attorney General Jim Jones. In response, the Attorney General's office opined:

Considerable ambiguity exists in the SB 1180 contract, in the Swan Falls Settlement contract, and in the implementing legislation on this issue. . . . A court in interpreting this provision of law would construe the two contracts and the Swan Falls implementing legislation together and would try to give effect to the intention of the parties, to the contracts, and to the intention of the Legislature in enacting the Swan Falls implementing legislation.

Gheleta Aff. Ex. H (Letter from Clive J. Strong, State of Idaho Office of the Attorney General, to A. Kenneth Dunn, Director, IDWR (Sept. 17, 1986)) at 1.

Legislation.²⁴ Thus, the parties viewed the Legislation as “implementing” rather than nullifying or terminating the Agreement. The parties also expressly agreed that the parties “[would] not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.”²⁵ This provision is not limited as to time and is still in effect today.

Additionally, the parties affirmed in the Agreement that it would remain in effect in perpetuity if certain conditions were satisfied. Under Paragraph 16, the Agreement was to automatically terminate only upon failure to satisfy any of the conditions in Paragraph 13, and the parties agreed to “meet on May 15, 1985, to determine if the contract shall be continued or terminated.”²⁶ As required, the parties met on May 15, 1985, and executed an “Affirmation of Continuation of Agreement” in which the parties affirmed, among other things, that the Agreement had not yet been terminated by its own terms; no party had yet breached the Agreement; and that none of the parties desired or intended the Agreement to be terminated at that time.²⁷ Since this Affirmation of Continuation of Agreement, no party has ever asserted that the Agreement was terminated or is otherwise invalid. To the contrary, the legislature expressly affirmed the validity and continuing effect of the Agreement in the Legislation itself. *See* Idaho Code § 42-203B(5) (“The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be [a valid agreement between the governor and a holder of hydropower rights], and the legislature hereby ratifies the

²⁴ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 6 (emphasis added).

²⁵ *Id.* ¶ 4.

²⁶ *Id.* ¶ 16.

²⁷ Gheleta Aff. Ex. I (Affirmation of Continuation of Agreement (May 15, 1985)).

governor's authority and power to enter into such an agreement."'). There is simply no legal basis to justify the State's decision in the Motion to completely ignore the import of this document.²⁸

II. THE AGREEMENT, THE LEGISLATION, THE LEGISLATIVE HISTORY AND THE STATE'S ACTIONS ALL CONFIRM THAT IDAHO POWER HAS NOT CONVEYED LEGAL TITLE TO ITS WATER RIGHTS TO THE STATE.

The State cannot demonstrate, as it must to prevail here, that either the Legislature or the parties to the Swan Falls Agreement intended to place Idaho Power's Swan Falls Agreement Water Rights into a trust. While references to water rights held in trust occur in certain of the key documents, the parties and the Legislature more frequently, and more clearly, refer to the trust res as consisting solely of water. Indeed, as discussed below, all of the key representatives of Idaho Power and the State during negotiation of the Agreement and the Legislation – including Idaho Power's Greg Panter, Idaho Power's outside counsel Tom Nelson, the State's Pat Kole and Pat Costello, Attorney General Jim Jones, and IDWR's Ken Dunn – state unequivocally that they believe the trust consisted of water subject to appropriation under Idaho Power's water rights, rather than the water rights themselves.

An alternative but equally plausible interpretation of the Agreement and the Legislation is that Idaho Power transferred into the trust only the right to subordinate

²⁸ Significantly, this Court has also opined, albeit indirectly, that the Agreement has continued validity. In the July 24, 2007 Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues Into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; And Notice of Scheduling Conference (the "Court's July 24, 2007 Order"), this Court stated that the "Swan Falls Agreement" included not only the implementation of the legislative program, but also the 1180 Contract, the Consent Decrees, and most significantly here, the Agreement. *See* Court's July 24, 2007 Order at n.2. *Also see* Section II.E.3, *infra*, p. 45 as to the significance of the Consent Decrees, which confirms that the parties intended during and after the Agreement and Legislation that Idaho Power would retain its water rights rather than convey them to the State.

Idaho Power's water rights to certain junior upstream users. This is a right substantially less than legal title. The State's right of subordination of a portion of Idaho Power's Swan Falls Agreement Water Rights did not eliminate or provide for the distribution or transfer of those rights. Instead, it only prevented Idaho Power from exercising its priorities against certain upstream junior water rights as such rights were permitted by the State pursuant to the public interest criteria set forth in the Agreement and the Legislation.²⁹

Both of these explanations – that the trust res consisted only of water or only of the right to subordinate Idaho Power's Swan Falls Agreement Water Rights – are more plausible, and better supported, than the State's claim that the Legislation accomplished a unilateral transfer of these water rights to the State. As explained in detail below, until 2006 when the State sought for the first time to obtain legal title to Idaho Power's subordinated water rights, the State consistently acted as if Idaho Power had retained these rights. Indeed, during the twenty years after the parties entered into the Agreement, the State never indicated any intent to establish the Swan Falls Agreement Water Rights as the res of the trust or to otherwise assert ownership of Idaho Power's water rights, and

²⁹ The Idaho Supreme Court addressed the issue of subordination of water rights in *Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983). The State claimed in that litigation that Idaho Power's water rights at Swan Falls had been subordinated to junior rights as part of the federal licensing of Idaho Power's Hells Canyon Complex, because those licenses included a provision subordinating Idaho Power's water rights to future upstream depletion. Reversing the district court, the Idaho Supreme Court held that Idaho Power's senior rights at Swan Falls were not affected by the subordination provision in the Hells Canyon licenses. *Id.* Of significance here, the Court addressed subordination of water rights and held: "[w]e find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, *e.g.* restrictive covenants and equitable servitudes." *Id.* at 587. Notably, the Court assumed – as did the State – that the subordination provision did not call into question Idaho Power's ownership of its Hells Canyon water rights or otherwise reallocate these subordinated rights to State ownership. To this day, the State has never suggested that it owns these subordinated rights because of the subordination provision in the Hells Canyon license.

to the contrary, repeatedly confirmed Idaho Power's retention of the subordinated water rights.

Most significantly, the notion that the trust res consists either of water or, at most, the right of subordination, is supported by numerous statements in the Agreement, the Legislation and the legislative history.

A. The Swan Falls Agreement

As shown above, any analysis of the trust must begin with the Swan Falls Agreement. During the negotiation of the Agreement, Idaho Power, the Governor, and the Attorney General were collectively considering two general options for a negotiated resolution. Those alternatives included the Governor's initial proposal of assigning Idaho Power's water rights to the State in exchange for higher minimum stream flows, and Idaho Power's responsive proposal of subordination upon payment of just compensation.³⁰ On May 9, 1984, Governor Evans wrote to James Bruce, then Chairman and CEO of Idaho Power, stating: "In 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 stream flow at a level mutually agreeable to the State and the power company."³¹ Idaho Power firmly rejected the notion that it would assign its water rights to the State, because there was no legal justification for it to relinquish its water rights.³² Idaho Power responded: "you mention an assignment as a vehicle for settlement. A better subject of discussion, in the Company's view, would be the approach embodied in HB-574 as amended," which discussed subordination of certain

³⁰ Panter Aff. ¶¶ 4-7.

³¹ Gheleta Aff. Ex. J (Letter from Governor John Evans to James Bruce (May 9, 1984)) at 1.

³² Panter Aff. ¶ 4.

water rights.³³ The State then abandoned the notion that Idaho Power would assign its rights and instead agreed that Idaho Power's water rights would only be subordinated.

Accordingly, the Agreement does not state that Idaho Power was assigning or otherwise conveying its water rights to the State. The operative paragraph of the Agreement, Paragraph 7.B, provides: "State and Company agree that the Company's water rights shall be as follows," and then lists not only Idaho Power's unsubordinated rights, but also Idaho Power's water rights above the unsubordinated amount, which rights are "subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law."³⁴ The Agreement, therefore, makes clear that Idaho Power retains title to its water rights above the unsubordinated amounts, even though the priority of those rights may later be subordinated to "subsequent beneficial upstream uses." While the parties clearly contemplated subordinating the priority of certain of Idaho Power's water rights, nowhere is it suggested that the rights themselves are being reallocated to the State.³⁵

Consistent with Idaho Power's ownership of the full amount of its Swan Falls Agreement Water Rights, the Agreement provides that "Company retains its right to contest any appropriation of water in accordance with State law."³⁶ Because Idaho Power did not transfer ownership of these rights to the State, the Agreement contemplates that Idaho Power could challenge the State's decisions regarding subordination of such rights.

³³ Gheleta Aff. Ex. K (Letter from James Bruce to Governor John Evans (May 23, 1984)) at 2.

³⁴ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 7.B.

³⁵ *Id.* ¶ 7.C (stating that "[t]he Company's rights listed in paragraphs 7(A) [addressing the unsubordinated flows] and 7(B) [addressing the subordinated flows] are also subordinate to those persons who have beneficially used the water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985"). The Agreement could not be more clear that Idaho Power retained the water rights the State now claims it owns.

³⁶ *Id.* ¶ 7.B.

Had these rights indeed been reallocated to the State, as the State now claims, Idaho Power would not have the legal authority granted to it under the Agreement and the Legislation “to contest any appropriation” of the subordinated flows.

Finally, any question that the Agreement did not reallocate Idaho Power’s water rights is put to rest by reviewing negotiation drafts of the Agreement. Earlier drafts specifically provided for the “reallocation” of Idaho Power’s subordinated water rights to third parties.³⁷ Specifically, in earlier drafts:

- Paragraph 7.B stated: “In addition, the licenses and decrees enumerated in the previous sentence are also subordinate *and subject to reallocation* to subsequent beneficial upstream uses approved by the state in accordance with state law, unless the depletion or reallocation causes or will cause a reduction in flow below 3900 c.f.s on an average daily basis from April 1 through October 31 or below 5600 c.f.s. on an average daily basis from November 1 to March 31”³⁸
- Paragraph 7.C stated: “The Company’s subordinated rights listed in paragraph 7(B) shall also be subordinate *and subject to reallocation* to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of Idaho Code §§ 61-539 and 61-540.”³⁹
- And Paragraph 7.D provided: “The Company’s subordinated rights listed in paragraph 7(B) shall also be subordinate *and subject to reallocation* to the uses of those persons who have beneficially used water prior to October 1, 1984, and who file an application or proof of claim for said use prior to June 30, 1985.”⁴⁰

Significantly, every reference to the “reallocation” of Idaho Power’s water rights was removed in the final version of the Agreement. The final version of Paragraph 7.B states only that Idaho Power’s subordinated rights are “subordinate to subsequent

³⁷ Gheleta Aff., Ex. L (Undated Memorandum from Patrick J. Kole to Pat Costello, Tom Nelson, Douglas Grant, and Ben Cavaness incorporating draft settlement agreement).

³⁸ *Id.* at 3-4 (emphasis added).

³⁹ *Id.* at 4 (emphasis added).

⁴⁰ *Id.* (emphasis added).

beneficial upstream uses upon approval of such uses by the State in accordance with State law”⁴¹ No mention is made that these rights are “reallocated” to these junior users or to a trust. And Paragraphs 7.C. and 7.D. of the Agreement remained virtually the same in the final version except that the references to Idaho Power’s subordinated rights being reallocated to other parties were omitted. When the concept of the reallocation of Idaho Power’s subordinated rights is removed four times in Paragraph 7, it simply cannot be a mistake or oversight – the parties intended that these rights would not be reallocated, and that Idaho Power would retain these rights even as they were subordinated to certain junior users.

B. The Legislation

The Legislation and, in particular, Idaho Code § 42-203B, is ambiguous. While the Legislation references water rights “held in trust,” the Legislation is far from clear on this issue. The Legislation also (even in the same sentence as the reference to water rights) refers to “water” and “trustwater” as being held in trust.

As an initial matter, in Idaho Code § 42-203B(1), the Legislature states the purpose of the Legislation is not reallocating ownership of water rights, but rather regulating and limiting certain uses. The Legislation also provides that Idaho Power’s rights are only subject to subordination, and not subordinated or reallocated or conveyed into a trust. The Legislation thus mirrors the Agreement by explicitly recognizing Idaho Power’s right to use water under its rights as it is available, and to protect those rights.

Finally, Idaho Code § 42-203C, which establishes the framework for implementing the parties’ understanding about requiring a review of impacts on hydropower, refers only to the appropriation of water rather than the reallocation of water

⁴¹ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 7.B; *see also supra* p. 21.

rights. Consistent with the language of Idaho Code § 42-203B, this section also emphasizes Idaho Power's continued right to use the water placed in the trust.

In sum, the import of the Legislation is far from clear. A balanced reading of the Legislation – and a reading that comports with the Agreement and the legislative history – confirms that the Legislature contemplated that water, and not water rights, would be placed in trust, and that Idaho Power would surrender none of its water rights to the State.⁴²

C. The 1986 Amendments

The Legislature amended the Legislation in 1986 for the purpose of “clarifying” ambiguities in the original Legislation.⁴³ The amending legislation was introduced as RS 12018 in the House on January 21, 1986, with the title referencing “water” and “trust water”: “To expedite consideration of water rights filings by clarifying the location and nature of water considered as trust water subject to the public interest review criteria and by limiting the review of undeveloped exiting permits to the public interest criteria for those permits seeking to develop trust water.”⁴⁴

⁴² The State's position that the Legislation placed Idaho Power's rights into a trust also does not find any support under the law of trusts. The concept of placing Idaho Power's water rights into trust, and then allowing Idaho Power to exercise independent rights with respect to such property, as the Agreement and Legislation plainly allow, is inconsistent with trust law. *See Jones v. State*, 91 Idaho 823, 827, 432 P.2d 420, 424 (1967) (Trustee, not beneficiary, has powers of administration over trust; as a general rule, causes of action for wrongs against trust vest in the trustee, not the beneficiary). Moreover, it is a fundamental principle of trust law that the trustee generally takes only such an estate as is necessary to enable them to perform the trust. *See* Am. Jur. 2d Trusts § 255; Restatement of Trusts § 40. *See also Eychaner v. Gross*, 747 N.E.2d 969 (Ill. App. 2001) (right to restore, maintain, and operate a theater for an indefinite period was trust property, even without the theater property itself). To exercise the subordination authority granted to it, the State only needed to take this right of subordination, not fee ownership of the entire water right.

⁴³ Gheleta Aff. Ex. M (Minutes, Feb. 19, 1986, Senate Resources and Environment Committee) at 1 (“Senator Crapo explained that the bill contained revisions of the Swan Falls legislation passed last year and is intended to merely clarify the agreement. . . . Mr. Nelson . . . agreed with Senator Crapo on the legislation and said they too supported the bill and the change.”).

⁴⁴ Gheleta Aff. Ex. N (Minutes, Jan. 21, 1986, House Resources and Conservation Committee) at 1.

Consistent with its title, the 1986 Amendments refer throughout to the trust consisting of “water” or “trust water.” The statement of purpose provides:

The purpose of the trust [is] . . . to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, *or by an agreement*, to continue using the water pending approval of depletionary future beneficial uses.

Idaho Code § 42-203 (emphasis added). There is no reference anywhere to Idaho Power’s water rights being reallocated or assigned to the State.

The Legislature also amended Idaho Code § 42-203B to make it explicit that the trust res consisted of water, adding, as italicized below:

The 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 tributaries to the Snake river upstream from Milner dam. For the purposes of the determination of administration of rights to the use of the waters of the Snake river or its tributaries downstream from Miner 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.

Under this provision, the Legislature states the trust consists of water and not water rights. To the extent the nature of the res is unclear in the original 1984 Legislation, this Amendment puts the issue to rest.

Finally, the Legislature amended Idaho Code § 42-203C to make explicit that the trust res consisted of water:

If an applicant intends to appropriate water which is ~~or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B,~~ Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho

Code, and whether the proposed use ~~would significantly reduce~~ individually or cumulatively with other existing uses or uses reasonably likely to exist within twelve months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production. . . .”

(Deletions in strikethrough, additions underlined.) Thus, the Legislature changed the language twice in this provision to refer to “water which may be held in trust by the State of Idaho” and to refer to “trust water.” Enacting this telling change twice in the same clarifying legislation cannot be viewed as a mistake or oversight, given the explicit nature of these changes. The Legislature could not have been clearer in making these changes that only water was being placed in trust.

D. Legislative History

To the extent there is any doubt from the statutory language, the legislative history confirms that Idaho Power and the State did not intend that Idaho Power convey title to any of its water rights to the State. While there are several scattered references to the “reallocation” of Idaho Power’s water rights, the weight of the legislative history belies the State’s claim to have legal title to Idaho Power’s water rights.

1. Statement of Legislative Intent

The State relies heavily upon the Statement of Legislative Intent for SB 1008, prepared by Senator Crapo and dated February 1, 1985 (the “Statement”).⁴⁵ As an initial matter, this Statement should be given little weight as it was adopted only by the Idaho Senate and not by the House. *See Scalise v. Thornburgh*, 891 F.2d 640, 644-45 (7th Cir. 1989) (a statement by one committee does not establish the intent of Congress); *People v. Chicago RYS. Co.*, 270 Ill. 87, 106, 110 N.E. 386 (1915) (statements of members of a

⁴⁵ Gheleta Aff. Ex. O (Senate Journal, Feb. 6, 1985, Statement of Legislative Intent re S. 1008) (hereinafter “Statement”).

congressional body should be given little weight because "those who did not speak may not have agreed with those who did"). *C.f. Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir. 1986) ("Inasmuch as the conference report represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent behind the enactment of a statute."). Indeed, as Senator Peavy stated on February 1, 1985, when the Senate was considering the Statement: "I just wonder how much effect a statement of intent will have when passed by one body and not the other and if this is really isn't an exercise in futility. The case law pretty well defines what the law means. That is my problem. I feel this is extra baggage that I'm not sure is needed."⁴⁶

Moreover, as with the Legislation itself, the Statement refers repeatedly to the trust res consisting only of water, with the State possessing only a limited right of subordination. For example, Senator Crapo emphasizes that the purpose of the Legislation involves reallocating water, and not water rights:

[The Legislation] is also intended to assure that *water* is available for development in Idaho and to provide a *basis for reallocation of water* for future development. It recognizes that Idaho's population and commercial and industrial expansion as well as Idaho's agricultural needs will require an assured amount of water.⁴⁷

Senator Crapo also states that the Legislation provides protection to Idaho Power "to the continued use of water available above the minimum flow subject to reallocation to future uses acquired pursuant to state law."⁴⁸ Finally, Senator

⁴⁶ Gheleta Aff. Ex. P (Minutes, Feb. 1, 1985, Senate Resources and Environment Committee) at 2.

⁴⁷ Gheleta Aff. Ex. O (Statement) at 2 (emphasis added).

⁴⁸ *Id.* at 3.

Crapo refers numerous times in the Statement to the trust res consisting of “trust waters” and “water”:

- IDWR “is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with State law.”⁴⁹
- “Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate trust waters in conformance with State law.”⁵⁰
- “Section 42-203C specifies the criteria which must be met to appropriate waters which are subject to the trust established in Section 2. This section contemplates a three-step analysis as to appropriations of water from the trust established in Section 2”⁵¹
- “The finding of a significant reduction [by a proposed use] does not infer that any portion of the trust waters should not be developed.”⁵²
- “None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust water.”⁵³
- “The legislation also specifically ties the appropriation of water from the trust to conformance with ‘state law’ and not to the new public interest criteria.”⁵⁴

Aside from these references to the trust res being “water” or “trust water,” Senator Crapo also emphasized that the State was acquiring only the right to subordinate Idaho Power’s Swan Falls Agreement Water Rights, rather than the rights themselves. The

⁴⁹ *Id.*

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Statement of Purpose section in the Statement provides: “The legislation is intended to resolve conflicts of whether an existing water right for power is subordinated. . . . The legislation also clarifies the authority of the Idaho Department of Water Resources to subordinate future hydropower water rights.”⁵⁵ Finally, Senator Crapo is clear that Idaho Power does not lose its rights by virtue of the State’s subordination decisions: “At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company’s rights in such appropriated water become subordinated.”⁵⁶

Thus, although Senator Crapo does, at times, state that Idaho Power’s water rights will be held in trust under the Agreement, he also states, as does the Legislation itself, that the trust consists only of water and that the State’s authority as trustee involves only the right of subordination. This confusion is explicit when Senator Crapo states that “the amount of water or water rights held in trust is thus keyed to the maintenance of the established minimum stream flows”⁵⁷ Under any standard, let alone the elevated standard of clarity the State must meet to prevail on its Motion, the Statement of Legislative Intent is at best equivocal as to the nature and substance of the trust.

2. *Statements before the Legislative Committees*

The State only touches upon several statements made by parties before the Idaho Legislative Committees during the drafting of the Agreement and the Legislation. A broader view of the relevant legislative history reveals that neither Idaho Power nor the State intended that the Agreement and the Legislation would result in Idaho Power conveying title to its Swan Falls Agreement Water Rights. Indeed, all of the key

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

participants – including Idaho Power’s Greg Panter and Tom Nelson, the State’s Pat Kole and Pat Costello, Attorney General Jim Jones, and IDWR’s Ken Dunn – stated on numerous occasions that they believed the trust consisted of water.

For example, Greg Panter, Idaho Power’s Director of Governmental Affairs who was responsible for Idaho Power’s legislative efforts, and Tom Nelson, outside counsel for Idaho Power, clearly intended that Idaho Power was retaining ownership of its Swan Falls Agreement Water Rights, and that the trust res consisted only of water. Mr. Panter attests in the attached affidavit that he worked closely with Mr. Nelson in the negotiations leading up to the Agreement and Settlement.⁵⁸ He also attended most, if not all, of the meetings of the Natural Resources and Environment Committees of the House and Senate during 1985, during which the Legislation was discussed.⁵⁹ Mr. Panter states that Mr. Nelson and he believed that only “a block of water” was in the trust – hence the term “trust water,” which everyone used during this period.⁶⁰ At no time during the negotiations between the Governor, the Attorney General, and Idaho Power, according to Mr. Panter, was it ever suggested that Idaho Power’s water rights would be transferred by name to the State of Idaho, and if this had been a requirement, Idaho Power would not have entered into the Agreement.⁶¹

Mr. Nelson also believed that only water was held in the trust. Mr. Nelson stated on January 18, 1985, before the Senate Resources and Environment Committee:

The trust concept was adopted to get around it so that water was placed in trust. The agreement clearly says it is unsubordinated so

⁵⁸ Panter Aff. ¶ 5.

⁵⁹ *Id.* ¶¶ 8.

⁶⁰ *Id.* ¶¶ 6-7.

⁶¹ *Id.* ¶ 7.

as far as the agreement goes, it is an unsubordinated block of water. The state then takes that water and places it in trust, subject to reallocation. This does two things; it makes clear the state's control of the allocation of the water and it left the water unsubordinated. . . . The state then does not have to allow the water to go to the first guy who comes down the pike.⁶²

Mr. Nelson also made clear that Idaho Power retained ownership of its water rights. He emphasized that Idaho Power's rights were to be subject to subordination by the State, not presently subordinated.⁶³

Each of the State's representatives to the negotiations of the Agreement and Legislation at times echoed Mr. Panter's and Mr. Nelson's statements. Jim Jones, the State Attorney General at the time of the Agreement and a key participant in the Agreement negotiations, stated in his prepared testimony that the trust consists of "water" or "trust water," rather than water rights.⁶⁴ Specifically, Mr. Jones stated:

- "From the outset of negotiations with Idaho Power Company, the State insisted that it have ownership over those waters made available for future users as part of any settlement."⁶⁵

⁶² Gheleta Aff., Ex. Q (Minutes, Jan. 18, 1985, Senate Resources and Environment Committee) at 3.

⁶³ In a deposition dated October 31, 1990, Mr. Nelson reiterated his understanding that Idaho Power retained ownership of the subordinated rights. In discussing the Agreement, Mr. Nelson stated:

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 right, which does not meet the statutory criteria, or even a 1980 undeveloped filing which does not meet the statutory criteria."

Gheleta Aff. Ex. R (Excerpt from Deposition of Thomas G. Nelson in *Idaho v. United States*, Case No. 39576, Oct. 31, 1990) at 51.

⁶⁴ Gheleta Aff. Ex. S (Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008 (Jan. 9, 1985)).

⁶⁵ *Id.* at 2.

- “The State’s position that it must have ownership of water allocated to future use was based on the premise that if the Company retained ownership, it would be required to protest every application for the water, thus frustrating the objective of making additional Snake River water available for appropriation.”⁶⁶
- “[T]he State proposes to treat water that is placed in trust by an agreement negotiated pursuant to the authority of proposed subsection (5) of § 42-203B differently from other waters. In addition to meeting existing statutory criteria, a person contemplating the appropriation of trust waters must also satisfy the criteria of proposed section 42-203C.”⁶⁷
- “The criteria in 42-203(c)(2)(a) identify those factors that are critical to the determination of whether the proposed use is preferable to the continued allocation of the trust water to hydropower.”⁶⁸

Mr. Jones concludes his remarks by stating: “[i]t is very important to note that the water held in trust by the State subject to reallocation is tied to state law and not the public interest criteria.”⁶⁹

Additionally, Mr. Pat Kole, the Idaho Attorney General’s negotiator for the Swan Falls Agreement, made statements confirming the trust consisted of water. On March 4, 1985, Mr. Kole spoke to the Senate Resources and Environment Committee with respect to Policy 32A of the State Water Plan, entitled “Water Held in Trust by the State.”⁷⁰

Policy 32A provided, in part:

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in

⁶⁶ *Id.*

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.*

⁷⁰ Gheleta Aff. Ex. T (Minutes, Mar. 4, 1985, Senate Resources and Environment Committee) at 1.

accordance with the criteria established by Idaho Code 42-203A and 42-203C. . . . The claimed water right of 8400 cfs is deemed appropriated and the amount above the minimum flow established in Policy 32 up to the 8400 cfs is held in trust by the state. . . . Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law⁷¹

Mr. Kole told the Committee that the term “deemed appropriated” in Policy 32A referred to “the state recognizing Idaho Power had a valid water right up to 8400 cfs.”⁷²

Mr. Pat Costello, who represented the Governor’s office in the negotiations, also characterized the Legislation contrary to the State’s position here. On January 18, 1985, Mr. Costello told the Senate Resources and Environment Committee, “[the trust] simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. As soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the water as long as the trust lasts.”⁷³

⁷¹ Gheleta Aff. Ex. U (A Resolution in the Matter of Policy 32 of the State Water Plan, Idaho Water Resources Board (Mar. 1, 1985)) (hereinafter the “Resolution”) at 2-3.

⁷² Gheleta Aff. Ex. T at 1.

⁷³ Gheleta Aff. Ex. Q (Minutes, Jan. 18, 1985, Senate Resources and Environment Committee) at 11. Messrs. Kole and Costello continued this characterization of the trust in an article about the Agreement shortly after it was executed: “The purpose of placing water reserved for future development in trust was to assure state ownership and control over this vital resource. Thus, the state will hold ownership of the water until such time as future depletionary uses meeting the requirements of state law are approved.” Gheleta Aff. Ex. G (Commentary) at 17 (footnotes omitted). In the same article, the authors explained the theory of maintaining Idaho Power’s water right in place so as to keep the Snake River over-appropriated, thus avoiding the problem of limiting the Constitutional right to appropriate unappropriated waters:

The state constitutional provision establishing the appropriation doctrine guarantees only the right to appropriate the ‘unappropriated’ waters of the state. While the Idaho Supreme Court has upheld regulations governing the exercise of the right to appropriate water, any deviation from the first in time, first in right principle will likely be challenged as constitutionally infirm. Because the agreement recognizes the validity of the company’s water rights, the Snake River is fully appropriated as to proposed users not meeting the requirements of state law.

Id. at 27.

Finally, Mr. Ken Dunn, then head of IDWR and another State official involved in negotiating the Agreement, also characterized the Agreement and Legislation as only subjecting Idaho Power's water right to subordination. As stated in the minutes for the January 21, 1986 Senate Resources and Environment Committee meeting: "Mr. Jones asked for the definition of trust water and Mr. Dunn replied it was that water which becomes available for appropriation as a result of an agreement reached between the State and a utility that has a water right to make available for appropriation."⁷⁴ Tellingly, Mr. Dunn characterized the thrust of the Agreement in a deposition taken in 1990 in *State of Idaho v. United States* as mandating "[t]he minimum flows required at Swan Falls and the agreement that the remaining water, which is referred to as trust water, would be available for further appropriation."⁷⁵ During that deposition, Mr. Dunn also defined the term "subordination" in the water rights context as meaning "the holder of the water right cannot retain his right to adversely affect future upstream appropriators."⁷⁶ Nowhere in this deposition does Mr. Dunn suggest that Idaho Power somehow lost its title to the subordinated rights to the State, but only that Idaho Power could not assert priority of its subordinated rights over certain junior appropriators.⁷⁷

These statements by the key negotiators to the Agreement and the Legislation demonstrate that the State and Idaho Power intended that the trust consist only of water. At the very least, these comments reveal the confusion among the parties as to the precise nature of the trust res, and raise a key factual dispute that should preclude the granting of the State's Motion.

⁷⁴ Gheleta Aff. Ex. N (Minutes, Jan. 21, 1986, House Resources and Environment Committee) at 1.

⁷⁵ Gheleta Aff. Ex. V (Excerpts from Nov. 7, 1990 Deposition of A. Kenneth Dunn) at 78.

⁷⁶ *Id.* at 33.

⁷⁷ *Id.* at 33-34.

E. Subsequent Actions by the State

Perhaps more than any other evidence, actions taken by the State during the two decades after the Agreement demonstrate the fallacy of the State's new found-position that it owns Idaho Power's subordinated water rights. On numerous occasions, and in judicial contexts, the State repeatedly has confirmed Idaho Power's ownership of these rights. As highly relevant evidence of the parties' intent, the State's affirmance of Idaho Power's ownership requires denial of the State's Motion.

1. The State's Administration of the Trust

For twenty years after the Agreement and Legislation, the State issued water right permits assuming that Idaho Power owned the subordinated rights. If Idaho Power's water rights were indeed reallocated to other users, as the State now claims, those users would have received the benefit of Idaho Power's priority date. This has not been the case. In fact, the State admits to issuing countless water permits for the subordinated rights to users with new priority dates, not the priorities of Idaho Power.⁷⁸

Moreover, in one action after another the State has confirmed Idaho Power's ownership and the fact that the trust res is water. Shortly after passage of the Legislation, IDWR announced its intent to promulgate regulations to reflect the Legislation's changes to water allocation provisions (the "Request for Comment").⁷⁹ The Request for Comment stated:

Effective on July 1, 1985 are the changes to the water allocation provisions (Section 42-203, Idaho Code) enacted in Senate Bill

⁷⁸ See Ex. 1, Response to Idaho Power Company's First Set of Discovery Requests at 39-40 ("The Department has subordinated the water rights held in trust by . . . 42-203C, and the other statutes and administrative rule that implement the Swan Falls settlement. The State admits that such permits have different priority dates than those of the water rights held in trust by the State.").

⁷⁹ Gheleta Aff. Ex. W (Request for Comment and Notice of Intent to Write and Adopt Rules & Regulations for Water Appropriation, Idaho Dept. of Water Resources (circulated May 6, 1985)).

1008 which place in trust some waters previously appropriated for hydropower generation purposes and authorize reallocation of this trust water to consumptive purposes found to be in the public interest. The director believes that rules and regulations are needed to provide a uniform and orderly procedure for processing pending and future applications for the trust water made available and for reprocessing existing undeveloped permits⁸⁰

The Request for Comment asks “[s]hould applications and permits for reallocation of trust water be processed in order of priority or should the order of processing be determined by other criteria . . . ?”⁸¹ In sum, the document specifies the trust as consisting of “trust water” or “water” no fewer than seven times, and nowhere suggests that the trust consists of water rights.

Moreover, the State, through the Idaho Water Resources Board (the “Board” or “IWRB”), adopted the 1986 State Water Plan, which repeatedly refers to “water” held in trust by the State pursuant to the Legislation. Specifically, the Board states in Policy 5B: “It is the policy of Idaho that water held in trust by the State pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.”⁸² The Board further states that “[a]ny remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law.”⁸³ And in Policy 5D, the Board provides: “[i]t is the policy of Idaho that appropriated water held in trust by the State pursuant to Policy 5B . .

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 3.

⁸² *See* Gheleta Aff. Ex. X (Excerpts from 1986 State Water Plan) at 36.

⁸³ *Id.* at 36.

. shall be available for reallocation to meet new and supplemental irrigation requirements

. . . .⁸⁴

In the 1986 Plan, the Board heard testimony, took comments, and passed a resolution amending Policy 32 (later changed to Policy 5A), entitled “Snake River Basin,” to bring the Policy in accord with the Agreement and the Legislation.⁸⁵ Under the Resolution, Policy 32 was modified to state: “Waters held in trust by the State in accordance with Policy 32A shall be allocated according to the criteria established by Idaho Code 42-203A and 42-203C.”⁸⁶ The Resolution also modifies Policy 32A (later Policy 5B), entitled “Water Held in Trust by the State,” to provide: “It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.”⁸⁷ These excerpts confirm that the Board thought at the time of the Agreement the trust pertained only to water, and that in implementing the trust the State would be subordinating Idaho Power’s Swan Falls Agreement Water Rights to new uses under the public interest criteria by reallocating trust water subject to appropriation under Idaho Power’s rights to appropriation by new users.⁸⁸

⁸⁴ *Id.* at 37.

⁸⁵ Gheleta Aff. Ex. U (Resolution) at 1.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.* at 2.

⁸⁸ IDWR itself shared this belief. On January 15, 1987, Ken Dunn submitted recommendations on behalf of IDWR in response to a request by FERC for information on the proper scoping of environmental impact statements for certain hydropower permit applications. In IDWR’s recommendations, Mr. Dunn stated that the State held water in trust from the Agreement and Legislation:

Under Idaho law, the water available for the projects is subject to the trust water and subordination provisions resulting from the Swan Falls Agreement. In recognizing the agreement, the legislature enacted Idaho Code § 42-203B, C, and D (Supp. 1986), which

The State has continued to affirm Idaho Power's ownership of its rights subject to subordination. In 1989, Idaho Power expanded the capacity of the Swan Falls power plant and consulted with IDWR concerning how to address the Agreement in the new license. Instead of taking the position that the new right should be titled in the name of the State, IDWR, with a copy sent to the Governor, responded only that it would "propose to condition the right to be subordinate to all future upstream uses."⁸⁹ Without objection from the State, Idaho Power listed itself as owner of the subordinated rights in the new license and included the subordination provision in the license.

And more recently, Karl Dreher, Director of IDWR, wrote to Idaho Power's Jim Tucker on July 25, 2003 to discuss administration of Idaho Power's rights.⁹⁰ After summarizing his review of the Agreement, the Legislation and other relevant documents, Mr. Dreher concluded that "Idaho Power Company's water rights are subordinated to all water rights having a priority date prior to July 1, 1985, provided the right holder beneficially used the water prior to October 1, 1984 . . ." and that "Idaho Power Company's water rights above 3,900 cfs are also subordinate to water rights for 'subsequent beneficial upstream uses' occurring on or after October 1, 1984"⁹¹

place certain flows of the Snake River, and surface and ground water tributary between Swan Falls and Milner dams, in trust to the state of Idaho. Flows in excess of those needed to maintain a minimum flow of 3900 cfs from April 1 to October 31, and 5600 cfs from November 1 to March 31 at the Swan Falls Dam, are subject to reallocation to future upstream consumptive users.

Gheleta Aff. Ex. Y (Recommendations of the Idaho Department of Water Resources (Jan. 15, 1987)) at 2-3.

⁸⁹ Gheleta Aff. Ex. Z (March 15, 1989 letter from R. Keith Higginson, Dir., IDWR to Robert J. O'Connor, Chair. and CEO, Idaho Power) at 1.

⁹⁰ Gheleta Aff. Ex. AA (Correspondence from Karl Dreher to James Tucker (July 25, 2003)).

⁹¹ *Id.* at 3.

Mr. Dreher repeated this assertion in a June 23, 2004 memorandum provided to a legislative committee in response to questions regarding the effect of the Agreement on conjunctive administration of certain groundwater rights.⁹² In this memorandum, he stated that “the Agreement subordinated the hydropower rights held by the Idaho Power Company to depletion under certain future upstream beneficial uses under future rights acquired pursuant to state law.”⁹³ Mr. Dreher also stated “the plain language of the Swan Falls Agreement determines the priority relationship between Idaho Power Company’s hydropower water rights for its facilities above Swan Falls Dam as against all other water rights above Swan Falls Dam”⁹⁴ These statements by the Director of IDWR conflict with the State’s new position and, together with the foregoing, reflect that the State’s consistent position until December of 2006 was that Idaho Power retained ownership of the subordinated rights, and that the import of the Agreement was only to subordinate the priority of these rights to certain junior uses as such uses developed.

2. Proceedings Before FERC and Congress

While the State focuses on proceedings before the Idaho legislature, the Swan Falls Agreement also required approval by FERC through issuance of an order regarding the effect of the settlement. *See* State’s Mem. in Supp. at 13, 43. The process leading to the final FERC order established a key point relevant to the current dispute. Idaho Power was concerned that an alienation of its water rights would violate the terms of the FERC licenses for its hydropower facilities, and based on the representations of the parties, Congress and FERC believed there was no such alienation.

⁹² Gheleta Aff. Ex. BB (Memorandum from Karl Dreher to Senator Laird Noh and Representative Dell Raybould (June 23, 2004)).

⁹³ *Id.* at 2.

⁹⁴ *Id.*

In Paragraph 12.B.i of the Swan Falls Agreement, the parties agreed that Idaho Power would file with FERC a request for a declaratory ruling that implementation of the Agreement assured a sufficient supply of water for the Idaho Power projects specified.⁹⁵ The Agreement provides that its subordination provisions would not be binding and effective until, among other conditions, FERC issued an appropriate order pursuant to Paragraph 12.B.i.⁹⁶ The Agreement also provides that in FERC relicensing proceedings on the Idaho Power projects, the State and Idaho Power would request that FERC recognize the Agreement as a definition of Idaho Power's water rights.⁹⁷

As required by the Swan Falls Agreement, Idaho Power proceeded to file a Petition for Declaratory Order with FERC on November 26, 1984.⁹⁸ The Petition provided that the Agreement, if implemented, would "define Licensee's water rights."⁹⁹ The Petition also requested a declaratory order that implementation of the Agreement, as provided therein, would assure a sufficient supply of water for the licensee's projects and would be in the public interest.¹⁰⁰ Idaho Power submitted a copy of the Agreement to FERC with the Petition in order to inform FERC's determinations regarding the definition of Idaho Power's water rights, sufficiency of project water supplies, and the public interest. On December 21, 1984, the State filed a motion to intervene in the FERC proceeding which supported Idaho Power's Petition for Declaratory Order.¹⁰¹ In its

⁹⁵ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 12.B.i.

⁹⁶ *Id.* ¶ 13.A.iv.

⁹⁷ *Id.* ¶¶ 12.B.ii and 12.B.iii.

⁹⁸ Gheleta Aff. Ex. CC (Petition for Declaratory Order (Nov. 26, 1984)).

⁹⁹ *Id.* at 3.

¹⁰⁰ *Id.* at 3.

¹⁰¹ Gheleta Aff. Ex. DD (Motion to Intervene by State of Idaho (Dec. 21, 1984)).

supportive motion, the State did not raise any issue regarding Idaho Power's representations to FERC. To the contrary, the State defined the Agreement as a reconciliation of the parties' dispute as to "whether [Idaho Power] has in fact subordinated its hydropower water rights to upstream consumptive uses."¹⁰²

Following a three-year delay in the issuance of the necessary FERC order, Congress ultimately had to take up the matter, and on December 29, 1987 enacted Public Law 100-216.¹⁰³ In Public Law 100-216, Congress directed FERC, in lieu of the petition request, to issue an order providing that FERC would not consider the Swan Falls Agreement to be either (1) inconsistent with the terms and conditions of Idaho Power's FERC licenses concerning the retention of project property; or (2) imprudent for purposes of section 205 of the Federal Power Act.¹⁰⁴

The congressional provision regarding retention of project property is particularly relevant to the current dispute. The U.S. Senate Report on the legislation explained that Idaho Power had not transferred its water rights in contravention of its FERC license provisions:

Issuance of such an order is necessary to protect Idaho Power against allegations that by entering into the agreement it has (1) alienated property (i.e., *the disputed water rights*) which is part of its Snake River hydroelectric projects in violation of standard license conditions. . . .¹⁰⁵

The House Report on the legislation expressed the same concern:

The purpose of the order is to afford protection to the Idaho Power Company from a future challenge at FERC on the basis that the

¹⁰² *Id.* at 2.

¹⁰³ Ex. 2, Pub. L. No. 100-216 (Dec. 29, 1987).

¹⁰⁴ *Id.* at Section 1(a).

¹⁰⁵ Ex. 3, S. Rep. No. 100-8 (1987) at 2 (emphasis added).

Company was allowing some of project property assets to be dissipated or to otherwise act imprudently in agreeing to the Settlement Agreement. As FERC notes in commenting on the companion bill, S. 214, the intent of the order is deemed necessary to protect against possible charges that the Company has “alienated property” which are an asset of the project.¹⁰⁶

A letter and report on the legislation from FERC Chairman Martha Hesse to House Committee Chairman John Dingell reiterated the concern in the Senate proceedings that “the settlement agreement was understood as necessary to ‘protect Idaho Power against allegations that it has . . . alienated property, that is, *the disputed water rights* – which is part of its hydroelectric projects in violation of standard license terms and conditions.’”¹⁰⁷ Chairman Dingell concurred in a letter to the U.S. Fish and Wildlife Service: “I agree with FERC’s interpretation of section 1 of the bill. It is intended solely to protect the power company from possible challenges that ‘it had failed to protect its rights to water for its hydroelectric projects and by doing so, had caused overcharges to its ratepayers.’”¹⁰⁸

On March 25, 1988, FERC issued an Order consistent with Congress’s directive in Public Law 100-216.¹⁰⁹ FERC ordered that “[d]uring the remainder of the current license terms for Project Nos. 18, 503, 1975, 2055, 2061, 2726, 2777, and 2778 [*i.e.*, the Idaho Power federal projects listed in the Swan Falls Agreement], in no proceeding before the Commission shall the Commission consider the settlement agreement between

¹⁰⁶ Ex. 4, H.R. Rep. No. 100-418 (1987) at 13.

¹⁰⁷ *Id.* at 28-29 (quoting Statement of Sen. J. Bennett Johnston, 133 Cong. Rec. S2207) (Feb. 19, 1987)). (emphasis added).

¹⁰⁸ *Id.* at 33.

¹⁰⁹ Gheleta Aff. Ex. EE (Order Pursuant to an Act of Congress, Dismissing Petition for Declaratory Order, and Granting Interventions, 42 FERC 61,375 (Mar. 25, 1988)).

Idaho Power Company and the State of Idaho, dated October 25, 1984, to be either (1) inconsistent with the terms and conditions of the licenses identified above *concerning the retention of project property*, or (2) imprudent for purposes of section 205 of the Federal Power Act.”¹¹⁰

The Swan Falls Agreement further provides in Paragraph 12.B.iii that when the Idaho Power projects specified and subject to the Agreement are due for relicensing, Idaho Power “shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company’s water right in those proceedings.”¹¹¹ Accordingly, on January 11, 2000, Idaho Power sent a letter to FERC, attaching the Agreement, and providing that “[p]ursuant to Paragraph 12(B)(iii) of the Agreement, Idaho Power Company requests that FERC recognize the Agreement as a definition of Idaho Power Company’s water rights” for the facilities concerned.¹¹² The State cannot now argue, directly contrary to this provision of the Agreement, that the water rights in question are not defined by the Agreement and are not even Idaho Power’s water rights.

In sum, the parties’ submissions to the federal government included representations by the parties that: (1) the Swan Falls Agreement defined *Idaho Power’s* water rights; (2) Idaho Power’s federal project water supplies were sufficient given this definition; and (3) the settlement was in the public interest. The U.S. Senate and House concurred with these representations and they provided the basis for Public Law 100-216 and FERC’s subsequent Order. Moreover, Congress understood the Swan Falls

¹¹⁰ *Id.* at 378-79 (emphasis added)

¹¹¹ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 12.B.iii.

¹¹² Gheleta Aff. Ex. FF (Letter from Nathan F. Gardiner to J. Mark Robinson (Jan. 11, 2000)) at 2.

Agreement and the settlement as not resulting in the alienation or transfer of water rights associated with the Idaho Power projects. The State's position in this litigation is directly contrary to representations of the parties to the federal government, as well as federal law, and should be dismissed accordingly.

3. *Consent Decrees Between the State and Idaho Power*

After satisfying all the contingencies to the Agreement, such as obtaining enactment of the proposed Swan Falls legislation, amendments to the State Water Plan, and an order from FERC confirming that Idaho Power had not conveyed away its water rights, the final step in the finalization of the Agreement was to obtain court orders in the still pending lawsuits that Idaho Power had filed against upstream junior water users in Ada County cases *Idaho Power Company v. State of Idaho, et al.*, Case No. 62237, and *Idaho Power Co. v. Idaho Department of Water Resources, et al.*, Case No. 81375. The State and Idaho Power accomplished this by obtaining the two Consent Decrees in these cases, which expressly provide that the water rights of Idaho Power that are the subject of the Agreement are owned solely by Idaho Power.¹¹³ Idaho Power has filed a Cross Motion in this lawsuit on the ground that the State is barred by the Consent Decrees from now asserting that Idaho Power's water rights should be titled in the name of the State.¹¹⁴ As discussed more fully in those papers, the Consent Decrees provide that "Idaho Power Company's water rights shall be as follows," and then list all of Idaho Power's rights that

¹¹³ The Agreement addressed these pending lawsuits by requiring Idaho Power and the State to "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)." Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 7.F.

¹¹⁴ See generally Cross Motion and Mem. in Supp. of Cross Motion.

the State now seeks to have titled in its name.¹¹⁵ These Decrees bar the State from taking a new and inconsistent position before this Court.

4. *The State's Admissions in the SRBA*

Finally, this Court has recognized – with the acquiescence of the State – that Idaho Power owns the water rights already partially decreed in the Basin 36, which are subject to the Swan Falls Agreement.¹¹⁶ Indeed, three partial decrees in the name of Idaho Power have been entered in the SRBA.¹¹⁷ The State, through IDWR, reported those rights in the name of Idaho Power, filed no objections to them, and never raised the issue of ownership of those water rights until the December 2006 filing seeking a change in the ownership of the Swan Falls water rights.¹¹⁸ The State attempts to gloss over this fact by claiming that “this omission has been recognized as an oversight.” State’s Mem. in Supp. at 23, n. 105. The State cites for support this Court’s reference to the Basin 36 Partial Decrees in its Order Designating Basin-Wide Issue Re: To What Extent, If Any, Should the Swan Falls Agreement be Addressed in the SRBA or Memorialized in a Decree? (In re SRBA, Basin-Wide Issue 13) (Aug. 23, 2004) (the “Order”).¹¹⁹ But the State mischaracterizes that Order. The “oversight” this Court found in its Order was that “Idaho Power’s rights in Basin 36 covered by the Swan Falls Agreement were reported and ultimately decreed without reference to the Swan Falls Agreement.”¹²⁰ The Court

¹¹⁵ See Mem. in Supp. of Cross Motion at 3.

¹¹⁶ See Ex. 1, Response to Idaho Power Company’s First Set of Discovery Requests, No. 46, at 40-41.

¹¹⁷ Affidavit of Sharon Strickland (“Strickland Aff.”) ¶ 3.

¹¹⁸ *Id.* ¶ 4.

¹¹⁹ See State’s Mem. in Supp. at n.105.

¹²⁰ Gheleta Aff. Ex. GG (Order Designating Basin-Wide Issue Re: To What Extent, If Any, Should the *Swan Falls Agreement* be Addressed in the SRBA or Memorialized in a Decree? (Aug. 23, 2004)) (hereinafter “In re SRBA, Basin-Wide Issue 13”)) at 6, n.6.

did *not* characterize the naming of Idaho Power as owner of the rights in the Partial Decrees as an oversight. In fact, the Court referenced the water rights as “Idaho Power’s rights.”¹²¹

The State’s acknowledgment of Idaho Power’s ownership of its rights in Basin 36 is underscored by language in the Joint Motion for Designation of Basin-Wide Issue and for a Stay of the Proceedings, In re SRBA, Case No. 39576, Subcase No. 92-00037 (the “Joint Motion”), which was extensively negotiated between Idaho Power and the State and was filed by both parties in 2004. The Joint Motion proposes that the Court designate Basin Wide Issue No. 13 as “[w]hether, and if so how, the Snake River Basin Adjudication decree and the respective water rights decreed there under should address the Swan Falls settlement?”¹²² With regard to the earlier partial decrees, the Joint Motion states at page 4:

The Moving Parties further advise the Court, however, that the Court has previously entered partial decrees for two hydropower water rights of Idaho Power Company. While neither of these partial decrees references the Swan Falls Agreement, these two hydropower water rights, among others, were specifically referenced in the Swan Falls Agreement. Although these water rights have been partially decreed, the Moving Parties anticipate that one of the matters to be presented to the Court in the basin-wide proceeding for resolution will be how to incorporate any resolution of this issue in the partial decrees.¹²³

Again, the State having the opportunity to assert and declare its claim to an ownership interest in water rights subject to the Swan Falls Agreement failed to do so, and in fact admitted that the partial decrees were “for two hydropower water rights of

¹²¹ *Id.*

¹²² Gheleta Aff. Ex. HH (Joint Motion for Designation of Basin-Wide Issue and for a Stay of the Proceedings, In re SRBA, Case No. 39576, Subcase No. 92-00037) at 2.

¹²³ *Id.* at 4.

Idaho Power Company.” In light of this admission, and the other actions of the State over 20-plus years that are inconsistent with the State’s 2006 ownership claims, the State should be precluded from asking this Court to revisit the issue of ownership.

III. THE 1928 AMENDMENT OF THE CONSTITUTION, AND LEGISLATION PURPORTING TO IMPLEMENT SUCH AUTHORITY, CANNOT BE APPLIED TO ELIMINATE OR ADVERSELY AFFECT PRE-EXISTING VESTED WATER RIGHTS INCLUDING IDAHO POWER’S RIGHTS AT SWAN FALLS.

The State argues its authority to take Idaho Power’s water rights under Idaho Code § 42-203B is grounded in the State’s power to “regulate and limit the use [of water] for power purposes” under Article XV, Section 3 of the Idaho Constitution. *See* State’s Mem. in Supp. at 27-32. The State is wrong for at least three reasons. First, the 1928 amendment to Article XV, Section 3 (the “1928 Amendment”) is not self-executing, and provides no independent source of authority to regulate or limit Idaho Power’s, or any other, hydropower rights in existence at the time of its enactment. Second, even to the extent that the 1928 Amendment is implemented via the Swan Falls Legislation, Idaho Power’s Swan Falls Agreement Water Rights vested prior to 1928, and are therefore unaffected by the forward-looking 1928 Amendment and certainly the much later 1985 Legislation implementing the Amendment. And correspondingly, third, the relevant provisions of Idaho Code § 42-203B that govern this dispute are entirely dependent on the State’s agreement with Idaho Power, and are thus not based on the State’s constitutional authority.

A. The 1928 Amendment Provides No Independent Authority to Limit Idaho Power’s Swan Falls Agreement Water Rights.

The State appears to be operating under the misguided assumption that the 1928 Amendment, without more, supports its assertion of unfettered discretion to regulate and limit Idaho Power’s Swan Falls Agreement Water Rights. But the 1928 Amendment is

not self-executing. The first sentence of Section 3 was amended by the addition of the italicized language to read as follows:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the state may regulate and limit the use thereof for power purposes.*

Idaho Const. art. XV, § 3. This amended language, providing that the State “may” regulate hydropower rights, is discretionary, and clearly contemplates some further action by the State. *See Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 708 P.2d 147 (1985) (a constitutional provision providing that the legislature “may” give cities and counties the authority to assess and collect taxes was not self-executing and required further action by the legislature to effectuate). Moreover, the language cannot be self-executing as it is devoid of any “sufficient rule” by which the right to regulate given under the Amendment may be exercised or enforced. *See Davis v. Burke*, 179 U.S. 399, 403 (1900); *see also Cleary v. Kincaid*, 23 Idaho 789, 792, 131 P. 1117, 1120 (1913) (the clause “the state may regulate” is not only expressly directed to the legislature and not to the court, but it also fails to set forth a “rule or means by which the right given may be enforced and protected”). Accordingly, absent subsequent legislation or contractual action by the State, the 1928 Amendment provides no independent authority for the State to regulate or limit Idaho Power’s or any other hydropower rights and the Court should disregard the State’s assertion of broad constitutional authority to unilaterally limit Idaho Power’s Swan Falls water rights.¹²⁴

¹²⁴ Even if the State could point to the 1928 Amendment as an independent constitutional basis for authority to regulate hydropower rights prior to the enactment of the Swan Falls Legislation, the authority granted by the Amendment does not apply to rights vested prior to 1928. Although not specifically addressed by the Idaho courts, many other states recognize that, like a statute, a constitutional provision – including a constitutional amendment – cannot retroactively limit or otherwise affect vested property rights absent an express intent to do so on the face of the amendment. *See C.J.S. Constitutional Law* § 77 (citing numerous cases adopting the general rule that “a constitutional provision has a prospective effect only,

B. To the Extent the 1928 Constitutional Amendment Is Implemented through Legislation, It Cannot Affect Vested Water Rights Pre-Dating Such Legislation, Including Those Encompassed by the Swan Falls Settlement.

In fact, the State took no action to effectuate the authority granted by the 1928 Amendment to regulate and limit hydropower rights for nearly sixty years. Not until 1985 did it pass the Swan Falls Legislation, setting forth the “rules or means” by which the State could subordinate hydropower water rights going forward.¹²⁵ As a matter of well-established law, the Swan Falls Legislation can only regulate and limit hydropower rights licensed after July 1, 1985, the effective date of the Legislation, and cannot apply to retroactively limit hydropower rights existing before this date. As shown below, Idaho Power’s Swan Falls Agreement Water Rights vested well before 1928, and thus neither the Legislation nor the 1928 Amendment can have an independent effect on these rights.

The Idaho Code specifically provides that no Idaho statute may be applied retroactively to affect vested rights unless expressly declared in the statute. Idaho Code § 73-101. Subsequent case law further supports this prohibition against retroactive or retrospective application of a statute. *See State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 105, 106 P.3d 428, 431 (2005) (“[I]n Idaho, a statute is not applied retroactively unless there is clear legislative intent to that effect.”) (internal citations omitted); *Myers v. Vermass*, 114 Idaho 85, 87, 753 P.2d 296, 298 (1988) (“Unless a contrary legislative intent appears on the face of a statute, retrospective application is disfavored.”) (citing Idaho Code § 73-101). An application of a statute is deemed “retroactive” or “retrospective,” and thus improper, if it affects substantive rights. *Myers*,

unless its language clearly indicates an intent to apply the provision retroactively, and this rule is also applicable to constitutional amendments”).

¹²⁵ *See* Gheleta Aff. Ex. O (Statement of Legislative Intent, SB 1008) at 2 (“This legislation is an exercise of the State’s authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution....”).

114 Idaho at 87, 753 P.2d at 298 (citing *City of Garden City v. City of Boise*, 104 Idaho 512, 660 P.2d 1355 (1983)). Rights considered substantive “are those which are ‘contractual or vested’ in nature.” *Id.*

It is firmly established that Idaho Power’s Swan Falls Agreement Water Rights are vested rights. Indeed, these rights vested long before the enactment of either the Swan Falls Legislation or the 1928 Amendment.¹²⁶ The Idaho Supreme Court further acknowledged the vested nature of these water rights in 1983, when the Court questioned whether the federal government would have authority to subordinate Idaho Power’s water rights at the Swan Falls dam:

[W]e deem it questionable whether the [federal government] would have the authority to subordinate then-existing water rights, even assuming such had been the intent in the Hells Canyon licenses. Section 27 of the Federal Power Act . . . provides that the Act does not intend to interfere with any vested rights acquired under state water law. . . . *Here Swan Falls Water rights were vested, having been acquired in the early part of this century.*

Idaho Power Co. v. State, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983) (emphasis added). Thus, Section 42-203B may not be applied retroactively to affect these rights unless the intent of the legislature to do so is expressly stated on the face of the statute.

The Swan Falls Legislation contains no such express declaration of legislative intent to retroactively limit or regulate hydropower rights vested prior to 1985. To the contrary, Section 42-203B specifically applies to hydropower water rights “subordinated by a permit issued after July 1, 1985, or by an agreement.” Idaho Code § 42-203B(1); *see also* Idaho Code § 42-203B(6) (“The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream

¹²⁶ Strickland Aff. ¶ 2; *see also* Gheleta Aff. Ex. II (Minutes of Natural Resources Interim Committee, Statement by The Honorable Thomas Nelson (Sept. 2, 2004)) at 7 (noting that Idaho Power’s rights at Swan Falls were in place before 1928 and questioning whether the state could apply the 1928 provision to those pre-existing rights).

beneficial depletionary uses Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.”). Thus, the State cannot legitimately rely on the Swan Falls Legislation for authority to unilaterally limit Idaho Power’s Swan Falls Water Rights.

C. The Relevant Provisions of Idaho Code Section 42-203B and the Corresponding Swan Falls Legislation Are Wholly Dependent on an Agreement with the Holder of the Hydropower Right, and Are Thus Not Based on or Grounded in the Constitutional Authority of the State.

Even if the 1928 Amendment and section 42-203B applied to Idaho Power’s Swan Falls Agreement Water Rights, these provisions do not support the State’s assertion that it can unilaterally change or diminish Idaho Power’s vested water rights. To the contrary, the language of the 1928 Amendment only allows the State to “regulate and limit” hydropower rights, and it cannot be construed, as the State contends, to authorize the state to take ownership of or otherwise diminish hydropower rights that vested prior to the date of the Amendment, without agreement with the owner of those rights. It is precisely for this reason that Section 42-203B, implementing the State’s authority pursuant to the 1928 Amendment, establishes two mechanisms by which the State may “regulate and limit” the use of water for power purposes: (1) through an agreement between the State and the holder of the water rights and (2) through the State’s constitutional authority, for hydropower permits and licenses issued after July 1, 1985. These methods are separate and distinct and, as discussed below, are derived from separate sources of authority in the statute. *See* Idaho Code § 42-203B(1)-(7).

This distinction is initially laid out in subsection (1) of 42-203B:

The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and *to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after*

July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.

Idaho Code § 42-203B(1) (emphasis added). This subsection clearly distinguishes (1) the right of a hydropower user subordinated by a permit issued after July 1, 1985 and (2) the right of a hydropower user subordinated by an agreement. The remainder of section 42-203B explains the State's sources of authority in detail.

Subsections (2) and (5) of 42-203(B) give the State authority to enter into an agreement with the holder of water rights. Most notably, subsection (5) gives the State the authority to “enter into agreements with holders of water rights for power purposes” to establish minimum stream flows below and define the terms by which such rights in excess thereof as being held in trust by the state. Idaho Code § 42-203B(5). Subsection 5 then recognizes and ratifies the October 25, 1984 agreement between the State and Idaho Power as being an agreement properly executed under this subsection. *Id.* Subsection (2), correspondingly, describes the extent of the trust as created by an agreement between the State and the holder of the water rights. Idaho Code § 42-203B.

In contrast, subsections (3), (6), and (7) address the unilateral right of the State to subordinate hydropower rights in the future under the constitutional authority of the 1928 Amendment:

- Subsection (3) specifically applies to “[w]ater rights for power purposes *not defined by agreement with the state.*” Idaho Code § 42-203B(3) (emphasis added). Under this section, water rights above the minimum flows established by *state action* – in contrast to minimum flows established by agreement – “shall be held in trust by the state of Idaho” and “shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law.” *Id.* These water rights are specifically distinguished from water rights that *are* defined by agreement with the state under Section 42-303B(2).
- Subsection (6) gives the director of IDWR authority to subordinate the rights granted in a hydropower permit or license to subsequent

upstream beneficial depletionary uses and to limit a permit or license for power purposes to a specific term. *Id.* This subsection specifically states that it applies prospectively and “*shall not apply to licenses which have already been issued as of the effective date of this act.*” *Id.* (emphasis added).

- Lastly, subsection (7) sets forth the factors the director of IDWR should consider in limiting hydropower permit or license to a specific term, in accordance with the director’s authority under Section 6. Idaho Code § 42-203B(7). Like subsection (6), subsection 7 is also prospective in its application, stating: “*The term of years shall be determined at the time of issuance of the permit. . . .*” *Id.* (emphasis added).

The State conveniently ignores the distinction made in Section 42-203B between subordination by agreement and subordination by legislation or other State action. *See* State’s Mem. in Supp. at 29 (claiming it has “constitutional authority to regulate and limit hydropower water rights . . . regardless of whether the State and the hydropower user have entered into an agreement”). But it is clear from the language set forth above that the State’s attempted power grab far exceeds both its constitutional authority and the authority granted the State under section 42-203B. As specifically set forth in Section 42-203B(5), the State’s authority to regulate Idaho Power’s water rights is rooted in the October 25, 1984 Agreement and is not grounded in the State’s inherent constitutional authority.

IV. THE STATE DOES NOT HAVE UNFETTERED DISCRETION TO UNILATERALLY MODIFY THE TERMS OF THE SWAN FALLS AGREEMENT THROUGH CHANGES TO STATE LAW.

In addition to arguing that it has broad constitutional authority to regulate and limit Idaho Power’s Swan Falls Agreement Water Rights, the State also claims that it has broad discretion to modify the terms under which Idaho Power agreed to subordinate these rights in the Swan Falls settlement. The State argues erroneously that the trust was not established by contract under the Swan Falls Agreement agreed to by Idaho Power

and the State, but rather solely by legislative action on the part of the State Legislature. State's Mem. in Supp. at 3, 37. The State asserts that such an arrangement gives the State essentially unfettered discretion to change the terms of the Swan Falls settlement: "This statutory framework *allows the State to modify the standards for approving new water rights and subordinating the water rights* held in trust – such as the public interest criteria or *any other applicable provisions of state law*" *Id.* at 33 (emphasis added).

The State's overreaching argument, however, ignores the fundamental fact that Idaho Power's water rights are subject to subordination only because Idaho Power agreed to the terms of such subordination as a matter of contract in executing the Swan Falls Agreement. The enactment of legislation implementing some aspects of the Swan Falls Agreement did not render the contract itself a legal nullity. And as discussed above, Idaho Power's water rights subject to the Swan Falls Agreement are vested water rights that cannot be modified or eliminated absent Idaho Power's agreement to do so. In short, the State does not have the broad authority and unfettered discretion it now asserts to subordinate Idaho Power's water rights, or to approve new water rights, under standards different than those agreed upon in the Swan Falls Agreement.

A. The Minimum Daily Flows at the Murphy Gage That Define Idaho Power's Unsubordinated Water Rights Were Established As a Matter of Contract by the Swan Falls Agreement and the Consent Decrees, and Not by the State Water Plan or the Implementing Legislation.

The State's argument that the Legislation defines the terms of Idaho Power's water rights and the trust suffers a major shortcoming. The Legislation does not contain any quantification of Idaho Power's unsubordinated water right, which is instead provided for in the Swan Falls Agreement itself and the Consent Decrees entered pursuant thereto. In its quest to minimize or eliminate the legal effect of the Swan Falls Agreement, however, the State argues that the minimum flows related to the

subordination terms are provided for not in the Agreement between the parties, but rather in the State Water Plan, a policy document over which the State itself has exclusive control. *See* State's Mem. in Supp. at 30. The State cannot escape the fact that it is the Swan Falls Agreement and the Consent Decrees which establish that Idaho Power is entitled to an unsubordinated water right as quantified in the Agreement:

State Water License Numbers [numbers specified] 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 Gage]. These flows are not subject to depletion.¹²⁷

Since a quantification of Idaho Power's unsubordinated water rights cannot be found in Idaho Code § 42-203B, or anywhere else in the legislation implementing the Swan Falls Agreement, it is evident that the Agreement was the part of the overall settlement that established this quantification. And the Consent Decrees were entered by the Ada County Court pursuant to that Agreement. The State essentially admits that the Agreement was the source of quantification of the unsubordinated water rights in stating that the State Water Plan amendments were "proposed by the settlement." State's Mem. in Supp. at 14. Indeed, even IDWR acknowledged in developing the State Water Plan that the Swan Falls Agreement required revision of the Plan.¹²⁸

The State Water Plan cannot set minimum flows that conflict with vested water rights under Idaho's prior appropriation doctrine, including those of Idaho Power. State water plans are policy pronouncements which do not and cannot supplant Idaho water law or the prior appropriation doctrine. Such plans are intended to set forth "statewide

¹²⁷ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 7.A.

¹²⁸ Gheleta Aff. Ex. JJ (Currents, Special Swan Falls Ed. II (Jan. 1985)) (hereinafter "Currents") at 3 ("Policy 32 of this plan ... is currently being brought under review for revision in accordance with the October 25, 1984 Swan Falls Agreement signed by the State of Idaho and Idaho Power Company."); *id.* at 1 (the State Water Plan amendments "would be required in Policy 32 of the State Water Plan by the October 25, 1984 Swan Falls Agreement.").

policies, goals and objectives” seeking to promote the “conservation, development, management and optimum use of *all unappropriated* water resources and waterways of this state in the public interest.” Idaho Code § 42-1734A(1) (emphasis added). As articulations of policy, state water plans do not give rise to any additional regulatory power or alter the legal authority of the Board or any other state agency. *See* Idaho Code § 42-1730(9) (“The comprehensive state water plan . . . shall not alter any existing responsibilities, jurisdiction or planning functions of state agencies.”).

Indeed, the Legislature has mandated that in formulating such plans, the Board must “protect[] and preserve[]” “[e]xisting rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho.” Idaho Code § 42-1734A(1)(a). Article XV, Section 3 of the Idaho Constitution provides that “[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . .” and “[p]riority of appropriation shall give the better right as between those using the water.” Further, the Board “shall have no power or authority” and “is prohibited” from doing anything which would “modify, set aside or alter any existing right or rights to the use of or the priority of such use as established under existing laws” except pursuant to the owner’s consent or eminent domain. Idaho Code § 42-1738.

The State deems significant a 1985 legislative act which supposedly “ratified” the State Water Plan amendments referencing the minimum flows derived from the Swan Falls Agreement. State’s Mem, in Supp. at 30 (citing 1985 Idaho Session Laws 514). However, legislative approval of action taken by the Board, including amendments to a state water plan, does not transform the Board’s state water plan policy document into a mandate that can be used to override vested water rights. Indeed, in *Idaho Power Co. v.*

State, 104 Idaho at 590, 661 P.2d at 756, the Idaho Supreme Court struck down as unconstitutional a requirement in Idaho Code § 42-1736 that the Legislature approve the State Water Plan on the grounds that such a requirement purports to authorize the Legislature to perform state water planning functions constitutionally assigned to the Board. Following this ruling, a 1984 amendment to Article XV, Section 7 provided that “any change in the state water plan ... shall become effective unless amended or rejected” by the Legislature within sixty days of being presented to the Legislature. Therefore, while the Legislature may amend or reject amendments to the State Water Plan, there is no legal authority providing for legislative approval or “ratification” of state water plans or amendments. Consequently, any purported legislative ratification is not supported by constitutional authority and without legal effect.

Finally, it is significant that the State Water Plan is subject to review and revision at least every five years by statute,¹²⁹ and indeed is undergoing a revision process at the present time. The State’s argument that the quantification of Idaho Power’s unsubordinated water rights is established not by the Swan Falls Agreement, but by the State Water Plan’s minimum flows, could enable the State’s attempt to change those minimum flows, given the changeable nature of the State Water Plan. Indeed, the State suggests that it has unfettered discretion to make such changes to the State Water Plan, and to Idaho Power’s water rights. State’s Mem. in Supp. at 31. The Court should reject this argument and find that the minimum flows at the Murphy Gage that define Idaho Power’s unsubordinated water rights were established as a matter of contract by the Swan Falls Agreement, and not by the State Water Plan or the implementing legislation.

¹²⁹ See *Gheleta Aff. Ex. JJ (Currents)* at 3.

B. The Subordination in the Swan Falls Agreement Applies to Beneficial Uses Under State Law in Existence at the Time of the Agreement, and Is a Matter of Contract Between the State and Idaho Power.

The second ground of the State’s motion for partial summary judgment seeks a ruling that the water rights in question “*are subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to State law.*” See State’s Mot. at 2; State’s Mem. in Supp. at 25 (emphasis added). There is no dispute regarding the language of the Swan Falls Agreement, which similarly provides in Paragraph 7.B that the water rights in excess of the unsubordinated right of 3900 and 5600 cfs “*shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law*” unless the depletion violates the unsubordinated water right.¹³⁰ Idaho Power agrees that the Agreement includes this language, and does not dispute its applicability to the subject water rights. Given the limited scope of the State’s Motion itself, Idaho Power suggests that the Court simply adopt the language of the Agreement, rather than the State’s rewording of a concept with respect to which the parties agreed upon relevant language.

In its brief, however, the State seeks to impermissibly expand the issue beyond the limited scope of its motion, arguing that the Court should find the water rights subordinate to “*any use of water authorized under a water right acquired pursuant to state law.*” State’s Mem. in Supp. at 32 (emphasis added). The State argues that the water encompassed by the Idaho Power water rights can be re-allocated to “alternative uses,” and that the State is empowered to “modify the standards for approving new water rights and subordinating the water rights held in trust – such as the ‘public interest’ criteria or any other applicable provisions of state law . . .” *Id.* at 32, 33.

¹³⁰ Gheleta Aff. Ex. A (Swan Falls Agreement) ¶ 7.B (emphasis added).

The Court should deny the State's Motion as to its second ground for a number of reasons. First, as discussed immediately above, the State's argument in its Memorandum in Support goes beyond the scope of its Motion, and is thus procedurally improper. Second, in wording its Motion, and expanding the issue in its brief seeking a ruling that Idaho Power's rights may be subordinated to "any use" of water under state law, the State seeks to have the Court address only part of one of the key issues in this case – whether trust water utilized for hydropower generation by Idaho Power may instead be used for aquifer recharge pursuant to the Swan Falls subordination. Idaho Power's Complaint includes a Claim for Relief on this very point, seeking a declaration that "Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to use of water for ground water recharge," and seeking a declaration as to the correctness of Attorney General Opinion 06-2 concerning this issue.¹³¹ Idaho Power maintains that the Court should address the issue of the uses to which the Swan Falls subordination applies in its full context as raised by the Complaint, rather than through the State's back door approach seeking to obtain a favorable ruling by sidestepping the real dispute between the parties. If the Court is inclined to reach this issue as improperly broadened in the State's Memorandum in Support, Idaho Power respectfully requests the opportunity to file a cross motion with supporting briefing which addresses the issue fully and concretely.¹³²

¹³¹ See Complaint and Petition for Declaratory and Injunctive Relief ¶ 69. The Attorney General Opinion relies upon the allegation that the State holds "legal title" to water rights licensed to Idaho Power in support of its erroneous conclusion that Idaho Power's water rights are subordinate to recharge. This raises the question of whether the Court can determine who holds "legal title" to the water rights without also determining what this means or for what purposes legal title may be asserted.

¹³² Idaho Power will demonstrate, when the Court reaches this issue in the litigation, that aquifer recharge was not generally recognized as a beneficial use at the time of the 1984 Swan Falls Agreement, and that other state legislation beyond the Swan Falls implementing legislation bears directly on the issue of

Third, the State's argument that the Swan Falls Agreement should be interpreted in accordance with unknown future changes in the law is contrary to well established case law, under which contract provisions are interpreted according to the law in existence at the time of contract formation. It is a long-standing principle of contract law that laws in existence at the time of contract formation become part of the contract, barring an express provision in the contract to the contrary. *Idaho Aids Found., Inc. v. Idaho Housing & Fin. Assoc.*, 422 F. Supp. 2d 1193, 1206 (D. Idaho 2006) ("Under Idaho law, contracts impliedly incorporate extant laws as well as policies of administrative agencies."); *see also Primary Health Network, Inc. v. State*, 137 Idaho 663, 666, 52 P.3d 307, 310 (2002) ("Existing law becomes part of a contract, just as though the contract contains an express provision to that effect, unless a contrary intent is disclosed."); *Fidelity State Bank v. North Fork Highway Dist.*, 35 Idaho 797, 209 P. 449, 452 (1922) ("It is also settled that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.") (internal citations and quotations omitted). For purposes of statutory construction, the Court must construe a statute under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed. *D&M Country Estates Homeowners Assoc. v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002).

Moreover, contract provisions are interpreted according to the circumstances in existence at the time of contract formation.¹³³ If the provisions of a contract are

whether use of water for hydropower generation is subordinate to use of water for aquifer recharge. *See* Idaho Code §§ 42-234 and 42-4201A.

¹³³ Idaho Power expects to show that aquifer recharge activities were extremely limited, and essentially involved a handful of pilot projects, at the time of the 1984 Swan Falls Agreement, in contrast to the desire

ambiguous, the interpretation of those provisions is a question of fact that focuses upon the intent of the parties. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 167 P.3d 748, 751 (2006) (internal citations omitted). Under Idaho law, the factual circumstances surrounding formation of the contract constitutes one of the elements the Court may consider to determine the parties' intent. *Id.*; see also *Transamerica Leasing Corp. v. Van's Realty Co.*, 91 Idaho 510, 519, 427 P.2d 284, 294 (1967); *Rudeen v. Howell*, 76 Idaho 365, 368, 283 P.2d 587, 589 (1955).¹³⁴

It is essential that the Court consider the full set of facts and legislative history that bear on the important issue of the scope of the Swan Falls subordination, and in particular whether the parties intended to subject Idaho Power's Swan Falls Agreement Water Rights to subordination to recharge, or any other unanticipated use that the State might choose to recognize in the future.¹³⁵ Accordingly, Idaho Power submits that the

of some today to undertake large scale aquifer recharge projects to shore up the declining Eastern Snake Plain Aquifer.

¹³⁴ Other state courts have examined this issue in the specific context of water contracts and have universally determined that contracts for the provision of water must be interpreted in light of factual circumstances as they existed at the time of the contract. *E.g.*, *Town of Skiatook v. Brummett*, 387 P.2d 115, 117 (Okla. 1963) (plaintiff's right to receive water under contract with municipality was determined by conditions at the time of the contract); *City of Iola v. Lytle*, 187 P.2d 378, 381 (Kan. 1948) (definition of "premises" in water contract determined as of the date of the contract); see also C.J.S. Waters § 651 (a water contract between a municipality and a private consumer will be interpreted in light of the conditions as they existed at the time of the contract's formation).

¹³⁵ In this regard, Idaho Power must point out that the State has taken out of context, and arguably misrepresented, a statement made by Idaho Power's chief negotiator in the Swan Falls proceedings, Tom Nelson. According to the State's Memorandum in Support, "Mr. Nelson made it clear to the Senate Resources Committee that the legislation would not bar the State from any particular action or decision with respect to the water right held in trust: 'Anything above the minimum flow the state is free to do as it likes.'" State's Brief at 38-39. In fact, in making this statement Mr. Nelson was simply responding to questioning regarding whether the State, if it chose to voluntarily raise the minimum flow above 3900 cfs, could then lower that flow back down to the original 3900 cfs level. In that sense, the State was "free to do as it likes." See *Gheleta Aff. Ex. P* (Minutes, Feb. 1, 1985, Senate Resources and Environment Committee) at 7. Attorney General Opinion 06-2 relies upon this same distortion of the context of Mr. Nelson's remarks in reaching its erroneous conclusion.

Court should deny the State's Motion as impermissibly expanded and improperly argued in its Brief.

V. THE COURT IS NOT PRECLUDED FROM EXERCISING ITS JUDICIAL FUNCTION AND APPLYING THE EQUITABLE DOCTRINES OF REFORMATION, MUTUAL MISTAKE OF FACT, ESTOPPEL, WAIVER AND LACHES.

In the final section of its Brief, the State argues that the Court has no authority to reform the settlement entered into between the parties or to apply the equitable doctrines of mutual mistake of fact, estoppel, waiver or laches. *See* State's Mem. in Supp. at 40-50. Each of the State's arguments arises from the same fundamental misunderstanding, or misstatement, of Idaho Power's equitable claims in this action – *i.e.*, that Idaho Power is, through its equitable claims, asking the Court to amend the Swan Falls Legislation. Idaho Power has not asked the Court to encroach on the authority of the Legislature and amend the Swan Falls Legislation. Instead, Idaho Power's equitable claims focus on one very important piece of the larger settlement between the parties – the Swan Falls Agreement. And Idaho Power asks the Court both to interpret the rights and responsibilities of the parties under that Agreement in light of the State's prior actions, and to reform the Agreement if, as Idaho Power believes, the parties operated under a mutual mistake of fact as to the existence of trust water in the Snake River. As set forth below, the Court has the authority to grant Idaho Power the equitable relief it seeks in this action.

A. The Court Has Already Determined It Has the Authority to Reform the Swan Falls Agreement..

The State's first argument against Idaho Power's equitable claims is that "equitable doctrines cannot be invoked to defeat legislative enactments." *See* State's Mem. in Supp. at 41. In support of this argument, the State cites numerous cases for the

proposition that “equity follows the law” and the Court cannot disregard statutory requirements applicable to the parties. But as argued previously, it is the Agreement, not the Swan Falls Legislation, that controls the rights and responsibilities of Idaho Power and the State with respect to Idaho Power’s Swan Falls hydropower water rights (*see supra* at Sections II, III and IV), and that Idaho Power asks this Court to interpret and reform.

To the extent that the State is also claiming the Court has no equitable authority to reform the Agreement because to do so would defeat the Swan Falls Legislation, the law of this case establishes otherwise. In its previous Motion to Strike or Alternatively Dismiss the Complaint (the “Motion to Dismiss”), the State made a similar argument, claiming that if the Court were to reform the Agreement based on mutual mistake of fact, it would effectively “amend” the Swan Falls Legislation. *See* State’s Motion to Dismiss at 14-15. Under the State’s theory of impermissible legislative amendment through contract modification, however, the legislature’s enactment of legislation pertaining to a contract would even prevent the parties to the contract from voluntarily amending the terms of the contract to reflect a mutual mistake of fact acknowledged by both parties. The Court rejected this argument, finding that it has jurisdiction to reform the Swan Falls Agreement “[t]o the extent [the] agreement inaccurately reflects actual conditions on the ground making definition or administration of the right impossible or unclear.” *See* Court’s July 23, 2006 Order at 12.

The State did not seek reconsideration of the Court’s prior ruling on this issue nor does the State present any legitimate basis for the Court to limit the scope of its authority now. And as argued extensively by Idaho Power in its Memorandum in Response to the State’s Motion to Dismiss, numerous Idaho court decisions support this Court’s equitable

authority to reform the Agreement if it finds that the parties, in fact, operated under a mutual mistake of fact as to the existence of trust water. *See Hughes v. Fisher, LLC*, 142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006); *Mutual of Enumclaw Ins. Co. v. Wood By-Products*, 107 Idaho 1024, 1027, 695 P.2d 409, 412 (Ct. App. 1984); *Thieme v. Worst*, 113 Idaho 455, 459, 745 P.2d 1076, 1080 (Ct. App. 1987). Accordingly, the Court should reject the State's attempt to reargue the scope of its equitable jurisdiction in its Motion for Summary Judgment.

B. The Legislature May Not Preclude the Judiciary from Applying Equitable Doctrines Regarding Contract Interpretation Without Violating the Separation of Powers Principle.

The State next claims that Idaho Power's equitable arguments violate the constitutional establishment of separation of powers because the parties' settlement was achieved, in part, by legislative action and any changes to the settlement would impermissibly encroach on the role of the legislature. *See State's Mem. in Supp.* at 42-45. Again, the State's argument is based entirely on its misguided assumption that Idaho Power is asking the Court to reform the Swan Falls Legislation, as opposed to the Agreement. The State acknowledges that "[t]he equitable doctrines of 'reformation' and 'mutual mistake' authorize courts to modify contracts between private parties" *Id.* at 43. Nevertheless, the State appears to advocate a position that would effectively allow the legislature to dictate the scope of a court's equitable authority to review, interpret and fashion equitable remedies if the subject of the contract was also addressed by subsequent legislation. Thus, it is the State's argument to make the Agreement immune from any judicial review, not Idaho Power's reformation claim, that raises serious separation of powers concerns. *See Idaho Const. Art. II, § 1* ("No person or department charged with

exercise of powers belonging to one department shall exercise any powers properly belonging to either of the others.”).

The case of *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989), cited by the State for the proposition that the Court cannot now restructure the Swan Falls settlement, does not in any way limit the Court’s equitable authority in this action. In *Miles*, the Idaho Supreme Court rejected the plaintiff’s request to amend the Swan Falls Agreement because the plaintiff (who was not a party to the Agreement) was essentially asking the Court to second-guess the State’s “initial policy determination” that the Agreement was in the public’s interest. *See Miles*, 778 P.2d at 762 (“The advisability of the agreement is not a proper subject for judicial deliberation.”). In making this ruling, the Court did not, as the State implies, determine that it had no authority, under any circumstances, to amend or reform the Swan Falls Agreement nor did it make any finding that an amendment to the Agreement would encroach on the authority of the legislature.

Here, unlike in *Miles*, Idaho Power is not asking the Court to rule on the “advisability” of the Agreement or determine whether the Agreement involved sound public policy. Instead, Idaho Power seeks reformation of the Swan Falls Agreement based on a mutual mistake of fact with regard to whether there is, or ever was, any water available that was subject to the trust provision of the Agreement. The Court has already ruled that it has the jurisdiction to grant Idaho Power the relief it requests, and the ruling in *Miles* in no way limits the Court’s equitable authority in this regard.

C. The Parties’ Legitimate Dispute Regarding the Interpretation and Application of the Swan Falls Agreement Does Not Give One Party “Unclean Hands.”

The State’s final argument – that Idaho Power has “unclean hands” and thus cannot assert the equitable doctrines of mutual mistake, laches, waiver and reformation –

is entirely irrelevant to the State's Motion and appears to be nothing more than a not so subtle attempt to malign Idaho Power before the Court.

As an initial matter, the State completely misstates and misapplies the doctrine of "unclean hands." Unclean hands, as applied by the Idaho Supreme Court, "stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." *Kirkman v. Stoker*, 134 Idaho 541, 544-45, 6 P.3d 397, 400 (2000). The doctrine "is not favored," and as such, courts must apply it "with reluctance and scrutiny." *See Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004). Thus, to properly raise the doctrine of unclean hands in this action, the State would need to show that Idaho Power has somehow acted dishonestly or deceitfully with regard to its obligations under the Agreement and that such behavior now warrants denying Idaho Power the otherwise available equitable relief it seeks. The State has not made, nor could it make, any such assertions in this action.

In fact, the State does not complain of any conduct or action by Idaho Power outside of this lawsuit. Instead, the State claims that the factual and legal positions taken by Idaho Power in this lawsuit somehow demonstrate that Idaho Power has unclean hands. Regardless of how the Court ultimately rules on the disputed issues, Idaho Power has not sullied its hands simply because it has asserted an interpretation of the Agreement contrary to that asserted by the State. If that were the case, every litigant in a contract dispute would risk voiding its contractual rights simply by bringing a lawsuit to interpret

or enforce the terms of the agreement in a manner contrary to the interpretation asserted by its opponent.¹³⁶

As set forth above, none of the State's arguments defeat Idaho Power's Second Claim for Relief requesting reformation of the Swan Falls Agreement based on mutual mistake of fact. Thus, irrespective of its ruling on the remainder of the State's Motion for Summary Judgment, this claim remains viable. The Court, therefore, can proceed with the determination of whether any trust water existed in 1984 at the time the parties entered into the Swan Falls Agreement and fashion an appropriate equitable remedy if it finds, as Idaho Power believes, that no trust water and thus no trust res existed at that time.

CONCLUSION

While the State would like to reduce this whole dispute down to a single phrase in a single statute, as demonstrated in this Response Brief the matter is more complex. The Legislation implementing the Swan Falls Agreement must be read together with the Agreement itself, which proposed that very Legislation. The ambiguity in the Legislation regarding whether the trust consists of water or water rights requires examining not only the Legislation and Agreement, but the legislative history and subsequent actions by the State. When this examination is done, it becomes apparent that material facts are in dispute and that summary judgment on the issue of legal title must be denied. The Court

¹³⁶ The State also claims that Idaho Power's request for reformation of the Agreement conflicts with statements made by Tom Nelson to the legislature in 1985 at the time the legislature was considering the Swan Falls Legislation. Specifically, the State quotes Mr. Nelson as acknowledging that the Swan Falls Legislation "should be accepted or rejected as a package," and argues that Idaho Power's request for reformation constitutes a bad faith attempt to unravel the same settlement package. State's Mem. in Supp. at 47. This and other similar statements by Mr. Nelson, however, demonstrate nothing more than the fact that the parties clearly intended that the *legislative package* submitted to the legislature, not the Agreement, be passed as written and any modifications made to the *legislation* could interfere with the parties' larger settlement.

should also deny summary judgment on the issue of the terms of subordination, which are stated in the Agreement and Legislation and do not need to be rephrased or broadened by the State or the Court. Finally, the Court should proceed to exercise its judicial function and apply the well-established equitable doctrines raised by Idaho Power, denying summary judgment to the State on this ground as well.

For all the reasons stated herein, Idaho Power requests that the Court deny the State's Motion and grant summary judgment for Idaho Power in accordance with its Cross Motion, adjudging Idaho Power to be the sole and lawful owner of the Swan Falls Agreement Water Rights, and quieting title thereto in Idaho Power.

Dated this 7th day of February, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2008, a true and correct copy of the foregoing **IDAHO POWER COMPANY'S RESPONSE TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed with the SRBA via facsimile and served by the methods indicated below, and addressed to each of the following:

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