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

In Re SRBA

Case No. 39576

) Consolidated Subcase no. 92-23
)
) STATE OF IDAHO'S
) MEMORANDUM IN RESPONSE
) TO IDAHO POWER COMPANY'S
) CROSS-MOTION FOR
) SUMMARY JUDGMENT
)

INTRODUCTION

Idaho Power Company's cross-motion for summary judgment argues that the doctrines of *res judicata* and judicial estoppel bar the State from claiming legal ownership of the water rights at issue in this consolidated subcase. For the first time in

this subcase and indeed in any SRBA proceeding or filing, the Company argues that the Consent Judgments entered in 1990 in the two original Swan Falls actions in the Fourth Judicial District Court in Ada County adjudicated the ownership of the water rights. The Company also argues that through the Consent Judgments and its motions for stays in the Ada County cases, the State "expressly agreed" that Idaho Power is the sole owner of the water rights.

The Court should reject Idaho Power's *res judicata* arguments for several reasons. First, the Ada County cases were principally declaratory judgment actions on the questions of priority and subordination and did not present or resolve disputed claims of ownership. Rather, the subordination dispute was resolved and the cases settled by the parties' agreement that the State would take legal ownership of a portion of the water rights through the implementation of the Swan Falls settlement, including the enactment of Idaho Code § 42-203B. This statute was enacted after the commencement of the Ada County cases and was not raised, argued, applied or interpreted in those actions. Moreover, the plain language of the Swan Falls Agreement and the Consent Judgments is fully consistent with the statute, and the Consent Judgments simply terminated the litigation on terms consistent with the statute and the overall settlement.

Second, even if the Consent Judgments had been intended to adjudicate ownership, which they clearly did not and were not intended to do, the Fourth Judicial District Court lacked jurisdiction and lacked legal authority to do so. The SRBA had commenced and this Court acquired exclusive jurisdiction over the adjudication of water rights in the Snake River Basin, and the Legislature had conclusively resolved any ownership question by enacting Idaho Code § 42-203B.

The Court also should reject Idaho Power's judicial estoppel arguments because the express language of the Swan Falls settlement, the Consent Judgments, and the State's representations to the Fourth Judicial District Court are entirely consistent with the State's claim of legal ownership under Idaho Code § 42-203B. Indeed, the Agreement and the Consent Judgments are explicitly conditioned on and ancillary to section 42-203B. The parties jointly drafted and supported this statute in the Legislature, and agreed that the Swan Fall Agreement would not take effect until the statute was enacted.

Clearly, it is Idaho Power—not the State—that has taken a position in this proceeding that contradicts its prior representations and statements, and indeed the undisputed record. The Company has made multiple factual assertions in this Court that are demonstrably false and has taken positions that are entirely inconsistent with the Swan Falls settlement and the Company's previous representations in the Fourth Judicial District Court and the Idaho Legislature.

STATEMENT OF FACTS

The State incorporates herein by this reference the statement of facts in the State's "Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment," filed in this matter on January 11, 2008. Additional facts are also presented in the "Argument" section of this memorandum. As discussed herein, the State disputes Idaho Power's factual assertions on material points, including, but not limited to, issues such as the nature of the Ada County cases, the relief sought thereunder, the parties' intent in the Swan Falls Agreement and the Consent Judgments, the nature and effect of the State's representations to the Fourth Judicial District Court, and Idaho Power's miscellaneous

factual allegations in support of its contention that the State has taken a new position in this consolidated subcase that is contrary to the Swan Falls settlement and the State's previous representations or actions.

ARGUMENT

I. LEGAL STANDARDS.

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Eye & Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005).¹ The fact that both parties moved for summary judgment does not change the applicable standard of review, nor does it necessarily establish that there is no genuine issue of material fact. *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 395 (2007). Each party's motion must be evaluated on its own merits. *Id.*

II. THE DOCTRINE OF *RES JUDICATA* DOES NOT BAR THE STATE'S OWNERSHIP CLAIM.

Idaho Power argues that *res judicata* bars the State's claim to legal title. Whether *res judicata* bars an action is a question of law. *Baird Oil Co., Inc. v. Idaho State Tax*

¹ Both the State's and Idaho Power's opening memoranda in support of their respective summary judgment motions incorrectly cited the legal standard used when a court reviews a summary judgment motion filed in a case to be tried to a jury; i.e., that all facts are to be liberally construed for the non-moving party and any reasonable inferences drawn in that party's favor. As this consolidated subcase will be tried to the Court, the summary judgment standard is that used in non-jury trial cases, cited above.

Comm'n, 144 Idaho 229, 231, 159 P.3d 866, 868 (2007). For *res judicata* to bar a subsequent action, three requirements must be satisfied: (1) same parties; (2) same claim; and (3) final judgment. *Ticor Title Co. v. Stanion*, 14 Idaho 119, 124, 157 P.3d 613, 618 (2007). As discussed below, the Ada County litigation did not involve the “same claim” the State has asserted in this consolidated subcase, the Consent Judgments are consistent with the State’s claim of ownership, and the Fourth Judicial District Court lacked jurisdiction and legal authority to adjudicate sole ownership in Idaho Power. Idaho Power’s *res judicata* arguments thus fail.

A. The Ada County Cases Were Not Actions To Adjudicate Disputed Claims Of Ownership Or To Interpret Idaho Code § 42-203B.

The ‘sameness’ of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 446, 649 P.2d 1197, 1202 (1982). The *res judicata* requirement of “same claim” is not satisfied in this matter because the original Swan Falls lawsuits—Ada County cases 62237 and 81375—did not raise or resolve disputed claims to legal ownership of the water rights in question. The controlling issue in those cases, and indeed the focus of the Swan Falls controversy, was not who owned the water rights but rather the extent to which the water rights—and hydropower uses generally—were subordinate to upstream uses. Further, the Ada County cases did not interpret or apply Idaho Code § 42-203B—a statute that was not even enacted until after the cases had been stayed.

Idaho Power filed the 62237 action after the Idaho Public Utilities Commission (“IPUC”) denied Idaho Power’s motion to dismiss a ratepayer complaint alleging that Idaho Power had wasted assets, overstated capital, and overcharged ratepayers by failing

to preserve and protect its water rights at the Swan Falls dam against depletions under junior water rights.² The ratepayer suit presented a significant risk to the Company of civil liability and/or punitive IPUC action because the Company had failed to protect its water rights for many years.

The Company's risks arose from its historic practice and policy of subordinating its hydropower water rights to other uses. For instance, in public relations publications designed to marshal support for the Company's proposed Hells Canyon project against a competing federal proposal, the Company had emphasized that the federal project would threaten irrigation uses, while "[t]hroughout its entire existence, Idaho Power has followed a strict policy of subordinating its needs of water for power to those of water for irrigation."³ Company executive T.E. Roach gave similar testimony before the Federal Power Commission in 1953: "Well, our company for a period of 37 years or more . . . has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development."⁴ In a written statement to the Federal Power Commission on the Company's Hells Canyon proposal, Idaho Power attorney R.P. Parry stated that "[h]istorically, the [Company] has always conceded that the water rights for future irrigation development shall have precedence over their hydroelectric water rights."⁵

In the years between the Hells Canyon and Swan Falls controversies, the Company continued to represent to Senator Len Jordan, state agencies, banks, other water

² *Idaho Power Co. v. State*, 104 Idaho at 582, 661 P.2d at 744, 748.

³ Second Affidavit of Michael C. Orr ("Second Orr Aff.") at Exhibit 1, p.9 ("The Hells Canyon Issue In Simple Terms," p. 12).

⁴ Second Orr Aff. at Exhibit 2, p.8 (excerpts of "Official Stenographer's Report before the Federal Power Commission," *In the Matter of Idaho Power Company*, Project Nos. 1971, 2132, 2133, p. 1419 (July 8, 1953)).

⁵ Second Orr Aff. at Exhibit 3, p.6 ("Opening Statement by R.P. Parry, Attorney for Idaho Power Company.")

users—essentially to anyone who would listen—that Idaho Power’s Snake River water rights were subordinated.⁶ The Company also actively and enthusiastically encouraged upstream agricultural development, even though it depleted the hydropower flows available to the Company, because such development also created a market for the electricity the Company produced. Indeed, Idaho Power’s attorney stated in a 1990 deposition that “I think there is probably a half a room full of documents that could be produced about the company’s support of new agricultural production.”⁷

Idaho Power initiated the 62237 case in response to the ratepayer action. The Company sought to reduce or eliminate the risks of ratepayer liability and punitive regulatory action by demonstrating it was taking “action to enforce its water rights.”⁸ The case was not conceived of as an adjudication of ownership. Rather, as Idaho Power’s counsel in the Ada County litigation and the Swan Falls negotiations explained in a 1990 deposition, “essentially [the 62237 case] was a declaratory judgment proceeding.”⁹ Idaho Power named as defendants, among others, the ratepayers who had filed the IPUC complaint and alleged that “[a] decision of this court concerning the status of the Company’s Swan Falls water right and other water rights between Milner Dam and Hells Canyon is required for the guidance of the parties hereto, and a justiciable controversy exists between and among the parties hereto.” Davis Aff. at Exhibit D, p. 15. The primary relief sought was a judicial determination that the water rights were “not subject to upstream depletion and the subsequent rights of holders of water rights above

⁶ See, e.g., Second Orr Aff. at Exhibit 4 (Idaho Power Company letters).

⁷ Second Orr Aff. at Exhibit 5 (excerpts of “Deposition of Thomas G. Nelson (*In re SRBA*) (Oct. 31, 1990) (“Nelson Depo.”), p. 16.

⁸ Second Orr Aff. at Exhibit 6 (IPUC Order No. 13376) (*Mullaney v. Idaho Power Co.*, IPUC Case No. U-1006-124) (Aug. 31, 1977), p.2.

⁹ Second Orr Aff. At Exhibit 5 (Nelson Depo., p.19).

Swan Falls and below Milner Dam are subject to the rights of Idaho Power Company.”
Davis Aff. at Exhibit D, p. 16.

Idaho Power fully expected to lose the 62237 case based upon its historic practice of recognizing hydropower uses as secondary to agricultural uses. As Idaho Power’s attorney stated in a legal memorandum to Idaho Power executive James E. Bruce addressing the question of enforcing the Company’s water rights against upstream uses: “the Company probably could not enforce those rights to the detriment of upstream junior pumpers to whom it furnished power . . . the same answer would apply to people who have applied, but not yet diverted.”¹⁰

As expected, the Fourth Judicial District Court ruled that the Swan Falls water rights were implicitly subordinated by the subordination provision of the federal license for the Company’s Hells Canyon complex.¹¹ Even Idaho Power viewed the subordination provisions in the Hells Canyon and C.J. Strike licenses as effectively subordinating the Swan Falls water rights.¹² The Idaho Supreme Court’s reversal of the district court decision, in contrast, was widely unexpected and upset the long-settled understanding that Idaho Power’s water rights were subordinate to upstream uses.¹³

¹⁰ See Second Orr Aff. At Exhibit 7 (“Memorandum” from Thomas G. Nelson to James E. Bruce, “Possibility of Using The Swan Falls Water Right to Stop Upstream Depletion of the Snake River” (June 22, 1976), p.6.

¹¹ *Idaho Power Co. v. State*, 104 Idaho 575, 583, 661 P.2d 741, 749 (1983).

¹² See Second Orr Aff. At Exhibit 7 (“Memorandum” from Thomas G. Nelson to James E. Bruce, “Possibility of Using Swan Falls Water Right to Stop Upstream Depletion of the Snake River” (June 22, 1976)), p.6 (“In our judgment, the FPC license and state water license [subordination] provisions above referred to would be construed to make the Swan Falls right subject also to depletion”).

¹³ Orr Aff. at Exhibit 45, p.6 (“I guess the traditional view had been that while hydropower had the right to use the water that came down the river, it had always been viewed as being subordinate to any upstream development. And this 1982 Supreme Court decision kind of stood that on its ear.”) (statement of Pat Costello in Idaho Water Resource Board Public Information Meeting, Oct. 31, 1984); see also *id.* at Exhibit 42, track 1, 4:20 – 4:43 (audio recording of same); see also *id.* at Exhibit 45, p.6 p. 13 (“So I think the agreement that we have restores that degree of state control over our water resources that may have been called into question by the 1982 Supreme Court decision.”) (statement of Pat Kole in same meeting); see also *id.* at Exhibit 42, track 1, 13:56 – 14:08 (audio recording of same).

The reversal effectively installed Idaho Power as the "watermaster" of the Snake River, because the Swan Falls water rights were among the most senior water rights and encompassed the entire flow of the river for much of the year.¹⁴ This ruling created an unacceptable situation from the State's perspective, because without subordination Idaho Power had control over the future development and uses of the waters of the Snake River.¹⁵

The Supreme Court's decision was in part a windfall for Idaho Power, but it also presented drawbacks because it increased the Company's potential liability to ratepayers for not defending its water rights in years past. The Company therefore filed the second Ada County action, case no. 81375—also known as the "7500 case," in reference to the estimated number of named defendants.¹⁶ This case put the Company in the uncomfortable position of suing many of its own ratepayers—including those who had developed irrigation uses that depleted hydropower flows, with Idaho Power's knowledge and encouragement—in order to protect itself from liability to those same ratepayers for failing to protect its water rights. The case was a public relations debacle for the

A: The principal issue was who would run the river, whether it would be a private utility or whether it would be public ownership. And the State had always wanted to make it clear that this was their job to be the watermaster and not a private utility. . . .

Q: Why did Idaho Power Company or did Idaho Power Company want to run the river?

A: Well, whether they wanted to or not, they were as a result of the court decision de facto in charge because of the way they could assert their water right or not assert their water right against different uses that would give them the ability to manage the resource. From the State's point of view that was untenable.

Second Orr Aff. at Exhibit 13 (Kole Depo., pp. 32-33).

¹⁵ See *id.*

¹⁶ Second Orr Aff. at Exhibit 5 (Nelson Depo., pp. 24-25).

Company and destroyed its carefully cultivated image of being a staunch ally of Idaho agriculture.¹⁷

As in the 62237 case, the complaint in the 81375 case did not allege a water right adjudication or quiet title action or cite the corresponding statutes, nor did it allege that ownership was a disputed issue or seek an express determination of ownership. Rather, like the earlier litigation, it was a declaratory judgment action on the questions of seniority and subordination, and the primary relief the complaint sought was a judicial determination on those issues.¹⁸ Mr. Nelson testified in his 1990 deposition that the purpose of the action was "[e]ssentially to have the court declare Idaho Power Company's rights prior and senior, and superior to those of the Defendants."¹⁹ He also distinguished the case from "an adjudication, which the state began."²⁰ The Company publicly stated that it had filed the suit "to demonstrate that it is protecting its water rights."²¹

In short, the two Fourth Judicial District Court cases were conceived of, pleaded and litigated to shield the Company from ratepayer liability and punitive IPUC action by demonstrating that the Company was acting to protect its water rights—and, in the 81375 case, for the additional purpose of preserving the windfall of the Supreme Court's holding that the Swan Falls rights were not effectively subordinated by the Hells Canyon license. The Fourth Judicial District Court cases were not actions to adjudicate water rights or quiet title, and did not raise or resolve the dispute between the State and the

¹⁷ See generally Second Orr. Aff. at Exhibit 8 (newspaper advertisement characterizing Idaho Power as a wolf in sheep's clothing).

¹⁸ See generally Davis Aff. at Exhibit E, pp. 11-16 (prayer for relief in the 81375 complaint). The cited page numbers refer to the actual page count in Exhibit E, not the page numbers that appear on the face of the portion of the 81375 complaint included therein. The corresponding page numbers on the complaint itself are pp. 272-77.

¹⁹ Second Orr. Aff. at Exhibit 5 (Nelson Depo., p. 106).

²⁰ Second Orr. Aff. at Exhibit 5 (Nelson Depo., p. 107).

²¹ Second Orr. Aff. at Exhibit 9 (Idaho State Journal (Pocatello), Feb. 19, 1984).

Company as to the legal ownership of the water rights at issue, which hinges on Idaho Code § 42-203B.

Indeed, Idaho Code § 42-203B was not enacted until after the Ada County cases were initiated and stayed to determine whether the Legislature would enact the settlement legislation that the parties had proposed—including, of course, Idaho Code § 42-203B. Thus, neither case attempted to interpret or apply the statute that is the basis of the State's claim of ownership and the focus of the ownership dispute in this consolidated subcase. The Consent Judgments therefore do not have *res judicata* effect, because the Ada County cases did not raise or resolve the same ownership claims presented in this proceeding. *See Ticor Title Co.*, 14 Idaho at 124, 157 P.3d at 618 (stating that "same claim" is an element of claim preclusion).

The circularity of Idaho Power's reasoning on this point approaches the surreal. The parties agreed to amicably terminate the Ada County lawsuits, but only "[u]pon full implementation" of the Swan Falls Agreement, Agreement ¶ 7(F), which included "[e]nactment by the State of Idaho of [the] subordination legislation" proposed in Exhibit 7B. Agreement ¶ 13(A)(vii).²² This legislation went to the "the heart of the bargain"²³

²² Copies of the Swan Falls Agreement are located at Exhibit 30 of the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("Orr Aff.") and Exhibit A of the Davis Affidavit.

²³ The Swan Falls Agreement specifically provided the legislation proposed in Exhibit 7B was to be enacted "as set forth" in the Exhibit. Agreement ¶ 13(A) (vii) (emphasis added). The Agreement's use of the phrase "as set forth" with respect to legislation proposed in the Exhibits was a signal to the Legislature that the proposed legislation "was an item that was the heart of the bargain." Orr Aff. at Exhibit 41, Track 2, 27:00 – 27:39 (Pat Costello statements in recording of Idaho Water Resources Board Public Information Meeting on the Swan Falls Agreement, Oct. 25, 1984); *see also id.* at Exhibit 44, p. 24 (transcript of same).

and had been jointly drafted by the parties,²⁴ who "stood shoulder to shoulder . . . in front of the legislature" in support of it,²⁵ and was enacted as Idaho Code § 42-203B.²⁶

The Swan Falls controversy was resolved, and the Consent Judgments were possible, only because the Legislature exercised its constitutional authority to regulate and limit hydropower water rights and legislatively imposed a State-controlled trust on "all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows."²⁷ Yet, Idaho Power now argues that these same Consent Judgments, which operated as dismissals of declaratory judgment actions on the question of subordination, must be viewed as barring the State from relying on the legislation that allowed the parties to dismiss the cases and this Court from considering what the Legislature intended when it said that the water rights "shall be held in trust by the State."

Applying *res judicata* in these circumstances would not serve the doctrine's principal purpose, which is to prevent repetitious litigation. *Ticor Title Co.*, 14 Idaho at 123, 157 P.3d at 617. Rather, it would have the entirely opposite and perverse effect of preventing the Court from considering crucial provisions of a statute that is central to the resolution of the Swan Falls controversy. Such an outcome makes even less sense under the plain language of the Swan Falls Agreement and the Consent Judgments, as discussed below.

²⁴ Second Orr Aff. at Exhibit 5 (Nelson Depo., pp. 169-70) ("I believe that perhaps [Exhibit] 7(b)-- 7(b) is the statute which creates the trust water concept . . . I think Pat Kole and I sat down and wrote up the basic parts of it. Pat Costello came along, and then we had it typed up someplace.")

²⁵ Second Orr Aff. at Exhibit 5 (Nelson Depo., p.179) ("Q: Let's see, I think Mr. Panter's description was that Idaho Power, the Governor, and the Attorney General stood shoulder to shoulder, I think that was his term, in front of the legislature, and said that this is our package compromise deal. This is the best we can do, and we'd like you to approve it. Is that your sense of how it was presented to the legislature? A: That's exactly right.").

²⁶ See Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment at 15-21.

²⁷ Orr Aff. at Exhibit 28, p. 5 ("Statement of Legislative Intent -- S 1008") (1985 Senate Journal, p. 60).

B. The Swan Falls Settlement And The Consent Judgments Are Entirely Consistent With The State's Claim Of Legal Ownership Of The Water Rights Held In Trust Under Idaho Code § 42-203B.

The plain language of the Consent Judgments and the Swan Falls settlement does not support Idaho Power's argument that it has sole ownership of the water rights. To the contrary, the plain language demonstrates that these provisions have no legal meaning or effect outside of the trust established by Idaho Code § 42-203B, and explicitly reflects the split of legal and equitable title defined by the statute.

1. The Swan Falls Agreement And The Consent Judgments Are Expressly Contingent On Idaho Code § 42-203B.

Idaho Power's "sole ownership" argument is premised on the incorrect assumption that the Swan Falls Agreement resolved the Swan Falls controversy. The Agreement simply proposed a settlement that could be achieved only by State action, via the enactment of the legislation and the passage of State Water Plan amendments proposed by the Agreement and appended to it as Exhibits. *See* Swan Falls Agreement ¶¶ 1, 2, 4, 6, 13 & Exhibits 1-8.²⁸ Indeed, the proposed legislation constituted "the core of the agreement."²⁹ The Agreement, standing alone, resolved nothing. This was made quite clear in the committee hearings held on the proposed legislation months after the Agreement had been signed:

Senator Peavey: What happens to this agreement if nothing gets through and the whole thing blows up? I think there are some misconceptions in certain parts of the state that they are going to be in better shape than they are now.

²⁸ The Agreement expressly provided that it was to be null and void unless the State enacted the full package of legislation and State Water Plan amendments that the parties proposed in the Exhibits to the Agreement. Agreement ¶ 16 ("This Agreement shall terminate upon the failure to satisfy of any of the conditions stated in paragraph 13"); *see also id.* ¶ 17 ("This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board").

²⁹ *On* Aff. at Exhibit 9, p. 1 (opening remarks of Pat Costello in minutes of the Senate Resources and Environment Committee meeting of Jan. 21, 1985); *see also id.* at Exhibit 34a, Track 1, 06:24 – 06:47 (audio recording of same); *see also id.* at Exhibit 38, p.7 (transcript of same).

Tom Nelson: The lawsuits which precipitated the resolution are still pending. I can't give you an idea of what the time will be. Implementation of the agreement will be scrapped and we will go back to war. So the problems that led to the pressures to develop the agreement still exist.³⁰

The Agreement also specifically provided that the provisions of Paragraph 7 had no effect unless the State enacted the "subordination legislation" proposed in Exhibit 7B to the Agreement—and that the Agreement would be void and terminated if the "subordination legislation" was not enacted:

13. Conditions on Effectiveness

A. The provisions of **paragraphs 7, 8 and 11** shall not be binding and effective until each of the following conditions have been implemented:

...
vii. **Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.**

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall become void.

Swan Falls Agreement ¶ 13³¹ (emphasis added); *see also id.* ¶ 1 ("This Agreement shall take effect upon execution, **except as to paragraphs 7, 8 and 11**") (emphasis added); *see also id.* ¶ 16 ("This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13.")

Exhibit 7B to the Swan Falls Agreement was introduced into the Legislature under section 2 of 1985 Senate Bill 1008, and enacted as Idaho Code § 42-203B under

³⁰ Orr Aff. at Exhibit 11, p.8 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 34a, Track 1, 00:19 – 00:56 ("Because it [the multi-bill package of legislation that accompanies the Swan Falls Agreement] is a package, all of which fits together, and of course all of which need to pass in order for the agreement to be consummated, or basically I guess we're back in court") (Chairman Noh's opening comments in Senate Resource and Environment Committee's "Public Hearing" on the Swan Falls Agreement of Jan. 21, 1985); *see also id.* at Exhibit 38, p.3 (transcript of same).

³¹ Orr Aff., Exhibit 30; Davis Aff., Exhibit A.

chapter 17 of the 1985 Idaho Session Laws.³² The plain statutory language of Idaho Code § 42-203B, and its well documented legislative history and intent, simply leave no doubt that the statute imposed a State-controlled trust on the hydropower water rights previously claimed by Idaho Power for flows in excess of the minimum flows established at Murphy, and the State holds legal title to these water rights by operation of law under the statute.³³

Paragraph 7 of the Agreement became binding and effective only because of and only to the extent that the Legislature placed the hydropower water rights in trust as an exercise of its constitutional authority to regulate and limit hydropower water rights. Paragraph 7 depends on Idaho Code § 42-203B for meaning and effect, and must be interpreted consistently with the State's legal ownership of the water rights for the flows above the minimums at the Murphy Gage under the trust established and defined in that statute.

This is also true of the Consent Judgments because the Agreement required that they describe the water rights "as provided in paragraphs 7(A) through 7(E)." The Agreement made it clear that the judgments were to be entered only "[u]pon implementation of this Agreement,"³⁴ which required enactment of Idaho Code § 42-203B. Indeed, the provision of the Agreement requiring entry of the Consent Judgments was itself a part of Paragraph 7 (Paragraph 7(F)), and therefore expressly contingent upon

³² See Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment at 15-22. Pat Costello, the attorney who represented Governor Evans in the Swan Falls Agreement negotiations, also specifically identified section 2 of Senate Bill 1008 as being Exhibit 7B in his opening remarks in the Senate Resources and Environment Committee's first major hearing on the bill: "section 2 was - all but subparagraph 6 of section 2—was Exhibit 7B to the agreement." Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("Orr Aff."), Exhibit 33, Track 1, 1:44 - 01:58 (Pat Costello testimony on recording of committee hearing of Jan. 18, 1985).

³³ See Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment at 15-22, 27-40.

³⁴ Agreement ¶ 7(F); see Orr Aff., Exhibit 30; Davis Aff., Exhibit A.

the enactment of the legislation that became Idaho Code § 42-203B. See Agreement ¶ 13(A)(vii) (conditioning Paragraph 7 on the enactment of the legislation proposed in Exhibit 7B).

The plain language of the Agreement and the Consent Judgments makes it clear that they are not intended to have any legal effect or meaning outside the ownership regime of the trust established by Idaho Code § 42-203B. This conclusion is consistent with Tom Nelson's 1990 deposition, in which he stated that "[t]he other thing the parties had agreed to do as part of the agreement was upon full implementation, to enter parallel judgments . . . paralleling the agreement as to the description of the company's water rights."³⁵

Contrary to Idaho Power's assertion, Mr. Nelson's deposition statement that "the company's water rights remain intact" does not support the conclusion that the Company is the sole owner of the water rights. Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment at 15 (quoting Exhibit N to Davis Aff.) Idaho Power's argument takes Mr. Nelson's statement completely out of context, as the next two pages of his deposition demonstrate:

Well, the mechanism that was finally developed by the negotiators and accepted by the parties was to have the state place those rights in trust, and the beneficiaries, the power company would be a beneficiary of the trust up to the point where the state approved new uses, which met the statutory criteria, and that seemed to solve the problem of how you actually managed that block of water. . . .

. . .
Basically, what the company got was absolute legal protection to 3,900 insofar as the state's legal framework would allow you to say that, plus the ability to be a major player in presenting facts on the impacts of future development. In other words, it wasn't automatic. So that development would not come all at once. It would be staged and the company and other people would have an opportunity to go in and say, this development is

³⁵ Second Orr Aff. at Exhibit 5 (Nelson Depo., p. 73).

not in the best interest of the state. That was felt to be an adequate compromise for the company to accept the 3,900.³⁶

Mr. Nelson characterized the water rights as "intact" in discussing subordination, not ownership: he stated that while "the water rights up to 3,900 and 5,600 are unsubordinated and unsubordinatable . . . the company's water rights [for flows above these levels] remain intact, but they are subject to subordination." Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment at 15 (quoting Exhibit N to Davis Aff.) The term "intact" refers to the fact that under the trust concept, the water rights were not immediately subordinated by the Agreement.

This understanding of Mr. Nelson's deposition statement is consistent with his prior characterizations of the water rights to the Senate Resources and Environment Committee. For instance, in the Company's written statement to the committee in support of the bill that enacted Idaho Code § 42-203B, Mr. Nelson explained the unsubordinated nature of "the Company's rights" in the flows above the level of the minimum flows established at the Murphy Gage, even while explicitly recognizing that the State is "trustee" and Idaho Power is the "beneficiary" and "user"—not "owner"—of the water rights:

The application of [Idaho Code § 42-203B] to the Idaho Power Company's rights deserves some discussion. Under the agreement of October 25, 1984, the Company's rights in excess of the seasonal minimum flows of 3900 cfs and 5600 cfs at the Murphy gage are unsubordinated but subject to reallocation pursuant to state law. The trust provisions of Section 2 do not change that status. The rights are still unsubordinated and still protectable from uses not in conformance with state law. The state, as trustee, can protect those rights, and so can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right.³⁷

³⁶ Second Orr Aff. at Exhibit 5 (Nelson Depo. at 52-53) (emphasis added).

³⁷ Orr Aff., Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled "Statement of Idaho Power Company In Support Of Senate Bill 1008, Presented to the Senate Resources and

It is evident that Mr. Nelson's reference to "the company's water rights" in his 1990 deposition reflects at most the Company's beneficial use interest in the water rights for flows in excess of the minimum flows established at the Murphy Gage, not "sole ownership."

It is also clear that the Consent Judgments were not intended to adjudicate any issue on the merits. Rather, they were intended to simply terminate litigation that had been mooted by the implementation of the settlement, on terms consistent with the implementation of the settlement. As Pat Costello explained in his 1990 deposition: "I believe that the way the [Swan Falls] legislation was written, it would have basically forced the dismissal of the litigation on the terms set out in the statute."³⁸ This was also the view of the Fourth Judicial District Court: "The agreement also provided that, upon fulfillment of certain requirements, Idaho Power and the State would seek dismissal of this action."³⁹

Idaho Power's argument that the Consent Judgments were the final "product" of the Swan Falls controversy essentially views the negotiations, the Agreement and the enactment of the implementing legislation all as simply a prelude to the real resolution of the controversy: the Consent Judgments, which in Idaho Power's view superseded the negotiated settlement as implemented by the Legislature. This is a truly new and novel view of the Swan Falls settlement, and cannot be squared with anything in the record or the parties' prior positions. It is also inconsistent with the plain language of the Consent

Environment Committee, January 25, 1985," p.1. Mr. Nelson drafted this "Statement." See *id.*, Exhibit 35, Track 1, 00:50 - 1:03 (Tom Nelson statements in recording of committee meeting of Jan. 25, 1985); see also *id.* at Exhibit 39, p. 3 (transcript); see also *id.* at Exhibit 10, p.1 (minutes).

³⁸ Second Orr Aff. at Exhibit 12 (Costello Depo., p. 61).

³⁹ Second Orr Aff. at Exhibit 10 ("Memorandum Decision," *Idaho Power Co. v. State*, Ada County case no. 62237) (June 28, 1990), p.3.

Judgments, which recognize that Idaho Power has only a beneficial use interest in the water rights for flows in excess of the minimum flows established at the Murphy Gage, as discussed below.

2. The Plain Language Of Paragraph 7 Is Consistent With The State's Legal Ownership Of Hydropower Water Rights For Flows That Exceed The Minimum Flows Established At The Murphy Gage.

Idaho Power is also incorrect in asserting that the language of Paragraph 7 of the Agreement and Paragraph 1 of the Consent Judgments demonstrate that Idaho Power has sole ownership of the water rights in question. To the contrary, the most natural reading of the plain language of these paragraphs reflects the ownership interests defined in the trust established by Idaho Code § 42-203B.

Paragraph 7 expressly distinguishes between the seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at the Murphy Gage versus the flows in excess of those levels by addressing them in different subparagraphs, 7(A) and 7(B). Paragraph 7(A) states that the water right licenses and decree enumerated therein collectively entitle the Company to a unitary "unsubordinated right" to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at the Murphy Gage:

[the water right licenses and decree] entitle the Company to an **unsubordinated right** of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls.

Agreement ¶ 7(A). Paragraph 7(B), in contrast, states that Idaho Power is only entitled to beneficially use the flows that exceed the minimums established at the Murphy Gage, and further that such right of beneficial use "shall be subordinate" to subsequent beneficial uses approved by the State "in accordance with State law":

The Company is also entitled **to use the flow** of the Snake River to the extent of its actual beneficial use but not to exceed those amounts stated in [the water right licenses and decree] . . . but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A).

This difference in the terminology used to describe the Company's interests in the flows above and below the level of the seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. directly parallels the ownership framework established under Idaho Code § 42-203B. The statutory trust does not apply below the level of the minimum stream flows established at the Murphy Gage, which is reflected in Paragraph 7(A)'s description of Idaho Power's interest in the water rights corresponding to those flows as "an unsubordinated right."⁴⁰ (Paragraph 7(A) also makes it clear that each of the water right licenses and the decree enumerated therein are satisfied whenever the Murphy flows are met.)

In contrast, Paragraph 7(B)'s description of Idaho Power's interest in flows above the minimums established at the Murphy Gage as simply one "**to use the flow** of the Snake River to the extent of [the Company's] actual beneficial use"⁴¹ reflects the statutory trust arrangement, under which Idaho Power only retained the equitable title or right to make beneficial use of such excess flows. See Idaho Code § 42-203B(2)-(5). Paragraph 7(B) expressly recognizes that Idaho Power is only the equitable user of the

⁴⁰ There are significant exceptions to this "unsubordinated" status, as provided in Paragraphs 7(C) and 7(D) of the Agreement (and in Paragraphs 1(C) and 1(D) of the Consent Judgments).

⁴¹ "[B]ut not to exceed those amounts stated" in the licenses and the decree enumerated in Paragraph 7(B). Agreement ¶ 7(B).

water accruing to the water rights for flows above the minimums flows established at the Murphy Gage, not the legal owner.⁴²

The parties also made this quite clear at the time of the settlement. Idaho Power explained to the Senate Resources and Environment Committee that the Company was only a "beneficiary of the trust" and "user of the unsubordinated water right."⁴³ Pat Costello similarly explained in an Idaho Water Resource Board public information meeting that "legal title to the water right will be held in trust by the State of Idaho, by and through the governor. But the power company will retain the right to beneficially use that right for power generation," until the State subordinates the hydropower water rights held in trust to other uses under junior water rights acquired pursuant to State law.⁴⁴

If, as Idaho Power argues, Paragraphs 7(A) and 7(B) were both intended to recognize Idaho Power as the "sole owner" of the water rights to the flows described in each sub-paragraph, both sub-paragraphs would have used the same language to do so—but they do not. Idaho Power's "sole ownership" hinges on a highly selective reading of Paragraph 7 that glosses over the significant textual differences between Paragraph 7(A) and Paragraph 7(B) and entirely ignores the fact that the Agreement expressly makes Paragraph 7 contingent on the enactment of the legislation that became Idaho Code § 42-

⁴² Paragraph 7(B) expressly recognizes that such subordination is dependent on "State law," not contractual obligations, which is another central characteristic of the statutory trust established by Idaho Code § 42-203B. Compare Paragraph 7(B) with Idaho Code § 42-203B(2), (3).

⁴³ OIT Aff. at Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled "Statement of Idaho Power Company In Support Of Senate Bill 1008, Presented To The Senate Resources and Environment Committee, January 25, 1985," p.1 ("The state, as trustee, can protect those rights, and so also can Idaho Power Company, as beneficiary of the trust and user of the unsubordinated water right.").

⁴⁴ OIT Aff. at Exhibit 41, Track 1, 7:55-8:10 (Pat Costello statements in recording of meeting) (emphasis added); see also *id.* at Exhibit 44, p.7 (transcript of same).

203B. Idaho Power's sole ownership argument fails under the plain language of Paragraph 7 and the rest of the Swan Falls Agreement.

Not only does the Swan Falls Agreement affirmatively **require** that Paragraph 7 be interpreted in a manner consistent with the trust established by the legislation proposed under Exhibit 7B to the Agreement, but the most natural reading of the plain language of Paragraph 7 is fully consistent with the split of legal and equitable title that the parties envisioned under the settlement and that was effected by the statutory trust.

These conclusions apply with equal force to Paragraph 1 in the Consent Judgments, the plain language of which is identical to the corresponding provisions of Paragraph 7 of the Swan Falls Agreement. Indeed, the Consent Judgments were also expressly contingent on the State's enactment of Idaho Code § 42-203B.⁴⁵ It makes no sense to view the Consent Judgments as entirely negating the trust arrangement and the split of legal title and equitable title that the parties had agreed was a prerequisite for the Consent Judgments to be entered in the first place—especially when the Consent Judgments merely recited the language of the Agreement. But that is exactly what Idaho Power's sole ownership argument implies.⁴⁶

Conversely, it is entirely reasonable and natural to view the Consent Judgments as simply recognizing the settlement proposed in the Agreement and implemented by the Legislature—even Idaho Power admits that the Consent Judgments were intended to be “in compliance with the agreement in stating the Company's rights as resolved by the

⁴⁵ Paragraph 7(F) of the Agreement was not binding or effective until the State enacted the “subordination legislation” proposed in Exhibit 7B. Agreement ¶ 13(A)(vii).

⁴⁶ As discussed *infra*, it is also unreasonable to think that two sophisticated parties would believe that the Consent Judgments could modify or negate the statutory split of title that the Legislature had imposed under its constitutional authority to regulate and limit hydropower water rights, or that the Ada County court had jurisdiction to adjudicate water right ownership when the SRBA had commenced several years earlier and acquired exclusive jurisdiction over such matters.

Agreement.” Memorandum in Support of Plaintiff’s Cross Motion for Summary Judgment at 4. The Consent Judgments can be “in compliance with the agreement” only if they are consistent with the plain language of the implementing legislation providing that the State holds legal title to the water rights that exceed the minimum stream flows established at the Murphy Gage. Idaho Code § 42-203B(2),(3). Paragraph 7 of the Agreement and Paragraph 1 of the Consent Judgments simply cannot sustain the “sole ownership” interpretation that Idaho Power attempts to extract from them.

3. Idaho Power’s Sole Ownership Argument Ignores The Fact That The Trust Concept Was The Key To Finalizing The Swan Falls Settlement.

Idaho Power’s sole ownership argument is also fundamentally at odds with the fact that there would have been no settlement but for the trust concept, as the negotiators’ own accounts make clear. The proposed settlement was unraveling on the question of whether the water rights for flows above the new minimums to be established at the Murphy Gage would be immediately subordinated or only “subordinatable” at some point in the future.

Pat Kole, the attorney who negotiated the Swan Falls settlement for Attorney General Jim Jones, stated in a 1990 deposition that the parties’ disagreement on the question of “subordinated” versus “subordinatable” water rights was “probably the biggest area of controversy” during the negotiations.⁴⁷ Tom Nelson told the Senate Resources and Environment Committee that the dispute on this point resulted in a

⁴⁷ Second Off. Aff. at Exhibit 13 (Kole Depo., p. 52) (“Probably the biggest area of controversy would have been the difference between a subordinated water right and a subordinatable water right.”)

"loggerhead" in the settlement negotiations.⁴⁸ Pat Costello explained in his 1990 deposition that "we reached basically an impasse over it. Things were falling apart . . ."⁴⁹

The negotiators also explained that the trust proposal was the key compromise that turned the situation around and allowed the parties to finalize the settlement. Tom Nelson told the Senate Resources and Environment Committee that "[t]he trust provision could get us around the subordinated versus the subordinatable nature of the water above the minimum flow. **It remains unsubordinated, but it's held in trust by the state, and**

it neatly sidestepped the problem . . ."⁵⁰ Pat Kole gave a similar explanation in response to a question in an Idaho Water Resources Board public information meeting:

MR. CHAPMAN: . . . Pat, in a meeting that you and the attorney general and I had sometime back, the attorney general's office was adamantly opposed to the language that is now 7B. They were supporting the language that said "subordinated" but with opposed language that referred to "water rights shall be subject to subordination." My question to you is, why the abrupt turnaround?

MR. KOLE: Well, every time you're in negotiations, you end up having to give up on some points. And what we ended up agreeing to was to, in essence, have the water right placed in trust in the ownership of the state in exchange for which we went with the concept of the subordinatable water right.⁵¹

The reason the State agreed to the trust compromise was that it gave the State legal ownership of the water rights and made it clear that Idaho Power would not be able to control the use and future development of the Snake River, as Pat Costello explained:

Well, we reached kind of a middle ground where we split the title between legal and equitable title and created a trust. . . . The power company maintained equitable title and the State took legal title and it preserved our

⁴⁸ Orr Aff. at Exhibit 8, p. 3 (Tom Nelson statements in committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 2 at 9:48-10:40 (recording); *see also* Exhibit 37, pp. 21-22 (transcript).

⁴⁹ Second Orr Aff. at Exhibit 12 (Costello Depo., p. 58).

⁵⁰ Orr Aff. at Exhibit 11, p. 5 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 36, 27:03-27:28 (recording); *see also id.* at Exhibit 40, p. 24 (transcript) (emphasis added).

⁵¹ Orr Aff. at Exhibit 43b, Track 1 at 10:01-10:58 (recording of public information meeting of Nov. 1, 1984); *see also id.* at Exhibit 46, pp. 45-46 (transcript).

ability to argue that the river was fully appropriated, but at the same time assuaged Jim Jones' concern that **the power company was irrevocably giving up this argument that they owned the river.**⁵²

Attorney General Jim Jones had refused to support the settlement when Idaho Power insisted that the water rights for flows above the new minimum flows be "subordinatable" rather than immediately "subordinated."⁵³ The Attorney General also formally advised the Governor not to sign an Agreement that provided for "subordinatable" water rights.⁵⁴

The dispute over control of the water rights reflected the State's view at the time that Idaho Power could not be trusted to honor a promise to subordinate the water rights in the future. As previously discussed, Idaho Power obtained the support of the State and the public for the Company's Hells Canyon project in the late 40s and early 50s in large part because the Company trumpeted that unlike the federal government, the Company always had and always would subordinate its hydropower water rights on the Snake River to upstream development. The Company continued making these representations for years, and profited handsomely from them: agricultural development encouraged by the Company increased demand for electricity, expanded the Company's markets and increased revenue.

The Company's lawsuits and its position on the subordination question after the Idaho Supreme Court decision were viewed as economically convenient repudiations of the Company's longstanding subordination promises. Indeed, the Company was viewed

⁵² Second Orr Aff. at Exhibit 12 (Costello Depo., p. 59) (emphasis added).

⁵³ Second Orr Aff. at Exhibit 9 (Idaho State Journal (Pocatello), Oct. 24, 1984 and Oct. 26, 1984; South Idaho Press (Burley), Oct. 24, 1984 and Oct. 26, 1984; Post-Register (Idaho Falls), Oct. 25-26, 1984; Idaho Statesman (Boise), Oct. 26, 1984; Morning News (Blackfoot), Oct. 26, 1984; Times-News (Twin Falls), Oct. 26, 1984).

⁵⁴ Orr Aff. at Exhibit 69 (Letter from Attorney General Jim Jones to Governor John V. Evans, Oct. 17, 1984).

as trying to leverage a windfall ruling from the Idaho Supreme Court to regain what the Company had bargained away in exchange for the State's support of the Company in the Hells Canyon controversy.⁵⁵ The Company's representation that it would subordinate its water rights in the future to new water rights that the State approved under the "public interest" criteria was seen as another hollow promise that would be abandoned when it was expedient for the Company to do so.

Contemporaneous news reporting on the controversy also demonstrated that the trust proposal was the key to the settlement because it insured State ownership of "subordinatable" water rights—therefore putting the State, rather than Idaho Power, in control of subordination. The Attorney General explained that the "subordinatable" concept "appeared to give the utility continued control over its massive water right at Swan Falls for years into the future, possibly permitting Idaho Power to undermine the pact through more legal action."⁵⁶ He also said that if the Company retained ownership of the water rights, "you can bet Idaho Power would be in there protesting when applications [for new water rights] are made."⁵⁷ "I strongly object to leaving ownership of that water with Idaho Power . . . I never intended on Idaho Power retaining control over the water."⁵⁸

The trust proposal was the key to regaining the Attorney General's support for the settlement because, under the trust, the State had control of the subordination of the water rights. "Creation of the trust, Jones said, makes it possible for Idaho Power to

⁵⁵ See Second Orr Aff. at Exhibit 9 (Times-News (Twin Falls), June 3, 1984 (op-ed referring to Idaho Power's Hells Canyon subordination agreement); Idaho Statesman (Boise), Oct. 1, 1984) ("The state contends that Idaho Power bargained away its rights years ago.")).

⁵⁶ Second Orr Aff. at Exhibit 9 (Post-Register (Idaho Falls), Oct. 25, 1984).

⁵⁷ Second Orr Aff. at Exhibit 9 (South Idaho Press (Burley), Oct. 24, 1984).

⁵⁸ Second Orr Aff. at Exhibit 9 (Idaho State Journal (Pocatello), Oct. 24, 1984).

continue to use the unappropriated water until other users obtain rights to it under the proscribed guidelines but leaves actual control over that water in the state's hands."⁵⁹ It was reported that "[t]he key to securing [Attorney General Jim] Jones' participation in the agreement was a suggestion by Rexburg attorney Ray Rigby that the water rights Idaho Power will give up in the agreement be held in trust by the state . . ."⁶⁰ Indeed, newspapers across southern Idaho reported that the question of "who would have control over water above the minimum flow [had been] hotly contested between the state and Idaho Power for two weeks,"⁶¹ that the agreement called for "a state-controlled trust," and quoted Attorney General Jim Jones as explaining that "[t]he whole difference in making the agreement acceptable is who owns the water above the minimum streamflow."⁶² The same articles quoted an Idaho Power representative as saying "We think we've got a good compromise going."⁶³

Clearly, the trust was the key to finalizing the settlement, because under the trust the State had legal ownership of the water rights—and therefore control over the subordination of the water rights. In the face of the Company's insistence that the water rights for flows above the new minimum flows be merely "subordinatable," and given the Company's repudiation of its earlier positions on subordination, the only way to ensure that the hydropower water rights actually would be subordinated when the time came was

⁵⁹ Second Orr Aff. at Exhibit 9 (Post-Register (Idaho Falls), Oct. 25, 1984).

⁶⁰ Second Orr Aff. at Exhibit 9 (Idaho Statesman (Boise), Oct. 26, 1984).

⁶¹ Second Orr Aff. at Exhibit 9 (Morning News (Blackfoot), Oct. 26, 1984; Post-Register (Idaho Falls), Oct. 26, 1984; Idaho State Journal (Pocatello), Oct. 26, 1984; Time-News (Twin Falls), Oct. 26, 1984).

⁶² Second Orr Aff. at Exhibit 9 (Morning News (Blackfoot), Oct. 26, 1984; Post-Register (Idaho Falls), Oct. 26, 1984; Idaho State Journal (Pocatello), Oct. 26, 1984; Time-News (Twin Falls), Oct. 26, 1984; South Idaho Press (Burley), Oct. 26, 1984).

⁶³ Second Orr Aff. at Exhibit 9 (Morning News (Blackfoot), Oct. 26, 1984; Post-Register (Idaho Falls), Oct. 26, 1984; Idaho State Journal (Pocatello), Oct. 26, 1984; Time-News (Twin Falls), Oct. 26, 1984).

to put control of the subordination decision in the State's hands. The trust accomplished this by making the State the legal owner of the water rights. In short, the trust was the mechanism to ensure that "subordinatable" hydropower water rights would eventually be subordinated in accordance with State law, and the linchpin of the trust was State ownership and control of the water rights. Idaho Power's argument that the Consent Judgments did not recognize this pivotal compromise, or that they entirely negated it by simply returning legal ownership to the Company, is entirely implausible.

C. The Consent Judgments Cannot Have Preclusive Effect Because The Fourth Judicial District Court Lacked Jurisdiction And Authority To Adjudicate Ownership Of The Water Rights.

Even assuming, *arguendo*, that the Ada County cases and the Consent Judgment were intended to "adjudicate" the ownership of the water rights (which they were not, as previously discussed), the Fourth Judicial District Court lacked jurisdiction to do so after the SRBA had commenced. In addition, the court lacked authority to abrogate or alter the ownership regime the Legislature had established by statute under its constitutional authority to regulate and limit hydropower water rights.⁶⁴

1. The Fourth Judicial District Court Was Not A Court Of Competent Jurisdiction For Purposes Of The Doctrine Of Res Judicata.

It is well established in Idaho that *res judicata* applies only when "a court of competent jurisdiction" renders a valid final judgment on the merits. *Baird Oil Co., Inc.*

⁶⁴ Idaho Power's argument presumes that the State, Idaho Power and the Fourth Judicial District Court did not realize that it was beyond the court's jurisdiction and legal authority to enter judgments adjudicating Idaho Power as the sole owner of the water rights. The notion that two sophisticated parties and the court did not understand the jurisdictional and legal limitations on the court's authority to adjudicate ownership of the water rights—especially when those limitations arose directly out of the very legislation that the parties had proposed to implement the Agreement by operation of law—is just as implausible as Idaho Power's contention that Consent Judgments do not recognize the legal and equitable division of title that was the key to the settlement.

v. Idaho State Tax Comm'n, 144 Idaho 229, 230, 159 P.3d 866, 868 (2007).⁶⁵ Thus, *res judicata* does not apply when a court enters an order or decree in a case over which it lacks subject matter jurisdiction. See *Sys. Assocs., Inc. v. Motorola Communications & Elecs., Inc.*, 116 Idaho 615, 617, 778 P.2d 737, 739 (1989) ("the federal district court's decision to retain the case on its calendar cannot have a *res judicata* effect since the federal district court, when it entered that order, was without subject matter jurisdiction over the case"); *McBride v. McBride*, 112 Idaho 959, 968, 739 P.2d 258, 267 (1987) ("In the case at bar *res judicata* does not apply because: (1) due to *McCarty* the court, at the time of decree, did not have competent jurisdiction to divide military retirement in a divorce;").

"All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA." *Bray v. Pioneer Irrigation Dist.*, 144 Idaho 116, 118, 157 P.3d 610, 612 (2007) (internal quotation marks and citation omitted). Indeed, the Idaho Supreme Court has made it clear that "once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only":

It is clear from the Idaho statutes governing general adjudications and SRBA that the legislature contemplated a single adjudication of claims within the scope of a general adjudication. This is evidenced in particular by I.C. § 42-1404(1), which regulates the filing of private adjudications and prevents a claimant from filing a private adjudication when a general adjudication has been commenced. Thus, **once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only.** Jurisdiction remains with the SRBA district court until it issues a final order concerning the particular water right at issue.

⁶⁵ See also *Lohman v. Flynn*, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003) (same); *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 783, 69 P.3d 1035, 1044 (2003) (same); *Hindmarsh v. Mock*, 138 Idaho 92, 95, 57 P.3d 803, 806 (2002) (same).

Walker v. Big Lost River Irrigation Dist., 124 Idaho 78, 81, 856 P.2d 868, 871 (1993) (emphasis added); see also *Sagewillow, Inc. v. Idaho Dep't. of Water Res.*, 135 Idaho 24, 26, 13 P.3d 855, 857 (2000) ("In 1987, the SRBA was commenced, precluding all private actions for adjudication of water rights within the Snake River Basin water system. See I.C. § 42-1404(1); *Walker*, 124 Idaho at 81, 856 P.2d at 871.")

It is undisputed that the Fourth Judicial District Court entered the Consent Judgments long after the commencement of the SRBA. The SRBA commenced in 1987. See *Sagewillow*, 135 Idaho at 26; 13 P.3d at 857 (stating that the SRBA commenced in 1987). The court entered the Consent Judgments several years later, in 1990. See Affidavit of Shelley M. Davis in Support of Idaho Power Company's Memorandum in Support of Cross Motion for Summary Judgment ("Davis Aff.") at Exhibits B and C (Consent Judgments in Ada County cases 62237 and 81375). Even Idaho Power concedes that the SRBA had been underway for years prior to the entry of the Consent Judgments: See Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment at 6 ("The Snake River Basin Adjudication had been adjudicating water rights, including the element of ownership, for four years by the time the [Ada County District] Court entered the Consent Judgments)."

The Fourth Judicial District Court therefore lacked jurisdiction to adjudicate the water rights in question when it entered the Consent Judgments. See *Walker*, 124 Idaho at 81, 856 P.2d at 871 ("once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only"); see also *Sagewillow*, 135 Idaho at 26, 13 P.3d at (stating that the commencement of the SRBA "preclude[d] all private actions for adjudication of water

rights within the Snake River Basin water system"). Accordingly, the Fourth Judicial District Court was not "a court of competent jurisdiction" for purposes of adjudicating ownership (or any other element) of the water rights when it entered the Consent Judgments. *Baird Oil Co. Inc.*, 144 Idaho at 230, 159 P.3d at 868. The Consent Judgments therefore lack any preclusive effect in this proceeding as a matter of law. *See Sys. Assocs., Inc.*, 116 Idaho at 617, 778 P.2d at 739 (stating that a federal court's decision did not have *res judicata* effect "since the federal district court, when it entered that order, was without subject matter jurisdiction over the case"); *see also McBride*, 112 Idaho at 968, 739 P.2d at 267 (1987) (holding that *res judicata* did not apply because "the court, at the time of decree, did not have competent jurisdiction").

Idaho Power attempts to avoid this insurmountable legal barrier by asserting—incorrectly—that the State "expressly agreed" in the Consent Judgments that Idaho Power is the legal owner of the water rights at issue. This assertion is incorrect for reasons previously discussed but even assuming, *arguendo*, that the assertion were true, it would not cure the jurisdictional defect. A court's lack of subject matter jurisdiction cannot be remedied by agreement or waiver. *State v. Rhoades*, 121 Idaho 63, 70, 822 P.2d 960, 967 (1991) ("It is axiomatic that a lack of jurisdiction may not be cured by means of stipulation or waiver by the parties.")

The undisputed facts and settled Idaho law conclusively demonstrate that the Consent Judgments cannot have *res judicata* effect in this consolidated subcase even if Idaho Power intended them to be adjudications of the ownership of the water rights. Idaho Power's cross-motion for summary judgment therefore fails as a matter of law to the extent it relies on the doctrine of *res judicata*.

2. The Consent Judgments Do Not Have Preclusive Effect Because The Principle Of Separation Of Powers Barred The Fourth Judicial District Court From Awarding Idaho Power Company Sole Ownership Of The Water Rights Held In Trust By The State Under Idaho Code § 42-203B.

The Fourth Judicial District Court also lacked legal authority to enter judgments adjudicating ownership contrary to Idaho Code § 42-203B under the separation of powers doctrine, because the Legislature had already conclusively resolved the question of ownership by enacting that statute. As previously discussed herein and in the State's Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment, under Section 42-203B, the State holds legal title to the hydropower water rights previously claimed by Idaho Power for flows in excess of the levels of the minimum flow established under the 1985 amendments to the State Water Plan.

The Fourth Judicial District Court had no authority to modify, negate or review this aspect of the Legislature's resolution of the Swan Falls controversy:

[T]he advisability of the agreement is not a proper subject for judicial deliberation. The question involves an initial policy determination of a kind clearly for nonjudicial discretion. Determining how our scarce water resources will best serve the state, whether by increased agricultural use or increased power generation use, is a matter peculiarly within the legislative and executive branches. The executive branch, by entering into the agreement, and the legislative branch, by enacting implementing legislation, have each given approval to the water rights subordination plan. . . . Clearly then, it would be inappropriate for this Court to second-guess the merits of the agreement.

Miles v. Idaho Power Co., 116 Idaho 635, 640, 778 P.2d 757, 762 (1989). This holding carries particular force in this case because the Idaho Supreme Court specifically recognized in *Miles* that Idaho Code § 42-203B is a central component of the subordination scheme proposed by the parties and implemented by the Legislature: "The purpose of the agreement concerning subordination was to make available more water for

future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River. *See* I.C. § 42-203B (Supp.1988).” *Miles*, 116 Idaho at 637, 778 P.2d at 759 (emphasis added).

Thus, even if the Consent Judgments had been intended to adjudicate sole ownership in Idaho Power, the Fourth Judicial District Court had no legal authority to enter such judgments. *See Miles*, 116 Idaho at 640, 778 P.2d at 762 (discussing separation of powers with respect to judicial review of the merits of the Swan Falls settlement).

III. JUDICIAL ESTOPPEL DOES NOT BAR THE STATE’S CLAIM OF OWNERSHIP.

In Idaho, the doctrine of judicial estoppel bars a litigant who has obtained a judgment, advantage or consideration by means of sworn statements from relying on inconsistent or contrary allegations or testimony in a subsequent proceeding on the same transaction or subject matter. *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997).⁶⁶ The doctrine protects the integrity of the judicial system and is intended to prevent parties from “playing fast and loose” with the courts. *A & J Consrt. Co., Inc. v. Wood*, 141 Idaho 682, 685, 116 P.3d 12, 15 (2005).

A review of the State’s prior representations to the Fourth Judicial District Court demonstrates that they are fully consistent with the State’s position in this consolidated subcase. Indeed, even Idaho Power’s prior representations to the Fourth Judicial District Court are consistent with the State’s position that it holds legal title to the portion of the

⁶⁶ Idaho Power’s judicial estoppel argument relies primarily on *New Hampshire v. Maine*, 532 U.S. 742 (2001). This memorandum does not explicitly discuss *New Hampshire* because the Idaho Supreme Court recently indicated (in an opinion that remains subject to revision or withdrawal) that the Idaho cases developed under the standards first articulated in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954), are controlling to the extent they may differ from the *New Hampshire* analysis. *See Heirze v. Bauer*, 2008 WL 204271,*9 (Jan. 25, 2008) (preliminary). Idaho Power’s judicial estoppel arguments also fail under the *New Hampshire* analysis, however, for the reasons discussed herein.

hydropower water rights for flow in excess of the minimums established at the Murphy Gage. Idaho Power's current position, however, is entirely contrary to its prior representations and the record.

A. **The State's Ownership Claim Is Consistent With The State's Earlier Positions On Ownership Of The Water Rights And The Settlement.**

1. The State's Representations To The Fourth Judicial District Court Are Consistent With The State's Current Position.

Idaho Power argues that the State expressly agreed that Idaho Power is the sole owner of the water rights at issue in this consolidated subcase by agreeing to entry of the Consent Judgments. The plain language of the Consent Judgments (and the Swan Falls Agreement) simply does not support this argument. As previously explained, the Consent Judgments and the Agreement explicitly reflect the State's legal ownership of the hydropower water rights for flows in excess of the minimum flows established at the Murphy Gage and depend upon Idaho Code § 42-203B for legal meaning and effect.

The State's motions for stay in the Ada County litigation also fail to support Idaho Power's judicial estoppel arguments. Indeed, both parties filed motions for stay in the Fourth Judicial District Court that made it clear that the **implementation** of the Agreement was the key to resolving the controversy and would be the basis of a stipulated judgment:

The grounds of this motion [for stay] are that the Company, and the State of Idaho . . . signed an agreement on October 26, 1984 (Exhibit "A"), that **if and when implemented according to its terms** may resolve most of the controversy to the extent that a stipulated judgment can be entered as to the parties who consent, and the action dismissed as to the balance. It is the intent of the defendant . . . to acquire a stay . . . until after the legislative session in order to allow an evaluation of by the parties and the Court of the probabilities and success in **implementing the agreement**. Since **implementation of the agreement** would offer a means of avoiding the expenses and expenditure of effort attendant upon trial, it appears

reasonable to grant a stay to allow reasonable opportunity for the parties to seek approval of the agreement by the legislature and the agencies whose approval is required **for implementation of the agreement.**

Davis Aff. At Exhibit F (State's Motion for Stay in the 62237 case) (emphasis added).⁶⁷

The motions for stay provided the Fourth Judicial District Court with complete copies of the Agreement, including the Exhibits setting forth the implementing legislation, so the court could see for itself what the Agreement provided and what implementation of the Agreement entailed.⁶⁸ The Agreement plainly states on its first

page that "[t]he State . . . shall assert the existence of water rights held in trust by the State," Agreement ¶ 4, and that the contractual description of the Company's interest in

the water rights listed in Paragraph 7 was contingent on the enactment of the legislation proposed in Exhibit 7B to be binding and effective. Agreement ¶ 13(A)(vii). The legislation in Exhibit 7B stated that it "would implement the state's power to regulate and limit the use of water for power purposes," under which "[a]ny portion of the water rights for power purposes in excess of the level [of a minimum flow established by state action] shall be held in trust by the State of Idaho" and specifically found and declared the Swan Falls Agreement to be an agreement "defin[ing] such rights in excess thereof as being held in trust by the State." Agreement at Exhibit 7B.

Thus, the State—and also Idaho Power—specifically represented to the Fourth Judicial District Court that implementation of the Agreement would resolve the

⁶⁷ The State's motion for stay in the 81375 case was identical. The Company's motions for stay in both cases also represented that the resolution of the controversy and the lawsuits depended upon the Agreement being "**implemented according to its terms**" and requested a stay so the parties would have an opportunity "to approach the legislature and the other agencies involved to obtain implementation." Davis Aff. At Exhibit F (emphasis added).

⁶⁸ Although the motions for stay appended to the Davis Affidavit (as Exhibit F) do not include copies of the Swan Falls Agreement and the Exhibits setting forth the implementing legislation and State Water Plan amendments, the certified copies of these filings that the State has obtained from the Fourth Judicial District Court include the Agreement and the Exhibits.

controversy and the litigation, that implementation required the enactment of a comprehensive legislative program that would result in the State holding a portion of the water rights in trust, and sought stays for the purpose of obtaining implementation of the Agreement. This included enactment of the legislation that would establish the trust. These representations are fully consistent with the State's position in this consolidated subcase that pursuant to Idaho Code § 42-203B, the State is the legal owner of the portion of the hydropower water rights previously claimed by Idaho Power that exceed the minimum flows established at the Murphy Gage.

2. The State's Claim Of Legal Title Is Consistent With The Settlement And The Record.

Idaho Power's other claims that the State has never before asserted ownership do not involve allegations of prior inconsistent representations made to a court, and therefore would not support application of judicial estoppel even if they were true. See *McKay*, 130 Idaho at 152, 937 P.2d at 1226 (setting forth the elements of the doctrine of judicial estoppel).⁶⁹ Of equal importance, however, is that Idaho Power's other allegations simply are not true.

a. The State Took Legal Title By Operation Of Law Under Idaho Code § 42-203B, As The Parties Intended And Agreed.

Idaho Power claims that the State has not previously asserted ownership because the State has not asked Idaho Power to formally convey title from the Company to the State. This argument incorrectly assumes that the trust was established by contract rather

⁶⁹ These allegations can only support laches and waiver arguments, and Idaho Power's reliance on these equitable doctrines also fails as a matter of law because equity may not be invoked or applied to restructure or alter the ownership scheme the Legislature imposed by enactment of Idaho Code § 42-203B. See generally Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment at 40-48; see also *Allen v. Kitchen*, 16 Idaho 33, 146, 100 P. 1052, 1056 (1909) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law.")

than imposed by the Legislature through a statutory enactment. As previously discussed, the trust was established and defined by the Legislature through Idaho Code § 42-203B, which implemented the Legislature's constitutional authority to regulate and limit hydropower water rights. No formal "conveyance" of title was necessary or contemplated because the State obtained legal title by operation of law.

As Pat Costello explained to the Senate Resources and Environment Committee

in his opening remarks in the first major hearing on Senate Bill 1008:

[Exhibit] 7B is the one that would impose this new trust concept on the portion of the hydropower right that is in excess of the minimum flow, and we wanted to keep this as far from being a transfer as we could. **So it's being imposed by operation of law through this rather than the power company agreeing to it by contract . . .**⁷⁰

Idaho Power's attorney Tom Nelson "stood shoulder to shoulder" with Mr. Costello on this point.⁷¹ Indeed, even Idaho Power expressly represented to the committee that rather than providing for "a voluntary transfer of [the Company's] water rights," that "the basis for [Idaho Code § 42-203B] is the State's power to 'regulate and limit' the use of water for power purposes."⁷² Further, Idaho Power's counsel assisted Senator Crapo in drafting the Senate's "Statement of Legislative Intent" for the statute,⁷³ which states that "this section establishes a trust . . . this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows."⁷⁴

⁷⁰ See Orr Aff. at Exhibit 33, Track 1, 2:19 – 2:47 (recording of committee hearing of Jan. 18, 1985); see also *id.* at Exhibit 37, pp. 4-5 (transcripts) (emphasis added).

⁷¹ Second Off Aff. at Exhibit 5 (Nelson Depo., p. 179).

⁷² Orr Aff. At Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled "Statement of Idaho Power Company in Support of Senate Bill 1008," p. 1.

⁷³ See Orr Aff. at Exhibit 36, 00:10 – 1:03 (recording of committee hearing of Feb. 1, 1985); see also *id.* Exhibit 40, pp. 3-4 (transcript); see also *id.* at Exhibit 11, p. 1 (minutes).

⁷⁴ Orr Aff. at Exhibit 28, pp. 4-5 ("Statement of Legislative Intent – S 1008") (1985 Senate Journal pages 59-60) (emphasis added).

Both parties had good reasons for preferring that the trust be imposed by the Legislature through a statutory enactment rather than be created by the parties through a contractual arrangement. As previously discussed, the State had no faith in the Company's subordination promises, and thus a contractual trust did not offer sufficient security. From the State's perspective, the only way to ensure that the trust would put control of subordination firmly and permanently in the State's hands was to make the trust a statutory rather than contractual arrangement, under the constitutional provision authorizing the State to "regulate and limit the use [of water] for power purposes." Idaho Const. art. XV § 3.

A statutory trust also served Idaho Power's purposes better than a contractual arrangement. A statutory trust imposed by the State allowed Idaho Power to avoid the appearance of having voluntarily relinquished valuable water rights, which would have increased the Company's risk of liability to ratepayers or shareholders, and the risk of punitive regulatory action by IPUC or FERC. Such risks were not merely hypothetical, as demonstrated by the original ratepayer complaint filed with the IPUC and the post-settlement litigation that gave rise to *Miles v. Idaho Power Company*, 116 Idaho 635, 640, 778 P.2d 757, 762 (1989). Indeed, the fear of a ratepayer action led Idaho Power to insist that legislation to protect the Company from ratepayer actions be part of the legislative package necessary to implement the Agreement.⁷⁵

In sum, the parties expressly agreed that the State would hold in trust the portion of the hydropower water rights for flows in excess of the minimum flows established at the Murphy Gage by operation of law under constitutionally-authorized legislation that

⁷⁵ Agreement at Exhibit 5 (legislation as proposed) (enacted under chapter 14, 1985 Idaho Session Laws); see also Orr Aff. at Exhibit 11, p. 9 (discussing the implementing legislation "to protect Idaho Power from claims for failure to defend their water rights").

the parties drafted and supported. The Legislature enacted this legislation as proposed by the parties in Exhibit 7B of the Swan Falls Agreement. No formal conveyance instrument was contemplated or required under the Agreement or the implementing legislation, because the trust would arise, and the State would hold legal title, by operation of the law under the implementing legislation rather than by contract or deed. Further, Idaho Power made clear that it agreed to the State placing a portion of the water rights formerly claimed by the Company into a statutory trust by signing the Agreement and supporting its implementation.⁷⁶

b. The State Has Asserted Ownership Continuously Since The Enactment Of Idaho Code § 42-203B.

Idaho Power's argument that the State has never acted to assert ownership of the water rights in question is also false. Indeed, the State asserted legal ownership—and obtained it by operation of law—via the enactment of Idaho Code § 42-203B in 1985. This was unambiguously clear from the plain statutory language, the Statement of Legislative Intent, and the legislative history, as previously discussed. Idaho Power acquiesced to the State's ownership by entering into the Agreement, helping draft the implementing trust legislation and its Statement of Legislative Intent, and explaining to the Senate Resources and Environment Committee that the statute established a trust in which the State would hold legal title to the water rights for flows in excess of the new minimum flows established at the Murphy Gage.

The Company's assertions that it has never before heard the State assert legal ownership of the water rights in question are in plain conflict with the legislative record. The legislative record is replete with statements by all three negotiators explaining that

⁷⁶ Idaho Power also made it clear that it agreed to the State's imposition of a statutory trust by waiving any claim for damages or compensation. See Agreement ¶ 9.

that under the implementing legislation the State would hold legal title to the hydropower water rights previously claimed by Idaho Power for flows above the minimum flows established at the Murphy Gage. The negotiators were competent attorneys who understood the meaning and ramifications of the legal terms and concepts of the settlement they spent months negotiating, explaining and implementing. It is simply impossible to believe that the Company's assertion that it was not on notice of the fact that the settlement provided for the State to hold in trust a portion of the water rights previously claimed by Idaho Power in a statutory trust or did not understand the legal effect of the settlement.

The Company simply cannot credibly claim that the State has never asserted that it holds legal title to the water rights in question. Indeed, the very enactment of the statute was a conclusive assertion of the State's ownership of hydropower water rights the Company had previously claimed. Further, the continued existence and effectiveness of the statute has been a continuing assertion of the State's legal ownership, to Idaho Power and all others, since the enactment of the legislation. The State has also exercised its legal ownership by subordinating the hydropower water rights held in trust to new water rights for other uses approved under the "public interest" criteria of Idaho Code § 42-203C, precisely as contemplated by Idaho Code § 42-203B. This was the fundamental reason for the State's insistence on legal ownership: to ensure that it was the State, not Idaho Power, that had legal control of whether the "subordinatable" water rights would be subordinated to a new use when the time for the decision arrived.

Finally, the State has asserted its legal ownership directly to Idaho Power in discussions with the Company numerous times since the enactment of the trust

legislation, both in connection with the oversight resulting in the Basin 36 water rights being decreed without reference to the Swan Falls settlement,⁷⁷ and in Court-ordered discussions in connection with Basin-Wide Issue no. 13. Even if the State had not asserted legal title, however, such would not affect the State's legal ownership, because that ownership derives from Idaho Code § 42-203B. The statute's continuing legal effectiveness does not depend on the State giving notice to Idaho Power that the State holds legal title under the statute.

c. The Imposition Of A Subordination Condition On Water Right 02-379 Is Consistent With The State's Claim Of Ownership Of Other Water Rights.

Idaho Power incorrectly contends that the Department of Water Resources' imposition of a subordination condition on water right 02-7379 in 1989 was inconsistent with the State's claim of legal ownership. See Idaho Power Company's Memorandum in Support of Cross-Motion for Summary Judgment at 6-7. This argument misconstrues Idaho Code § 42-203B, as the trust provisions of the statute were only intended to apply to unsubordinated hydropower water rights existing when the statute was enacted:

if there are un-subordinated rights out there, as there do appear to be, they would also be invited to come into this same kind of arrangement whereby in exchange for us recognizing an un-subordinated right to the level of a minimum stream flow, they would agree to place their rights above that in trust with the state to be subordinated over time.⁷⁸

⁷⁷ See "Order Designating Basin-Wide Issue" (Basin-Wide Issue 91-13) at 6 n.6 ("The Court acknowledges that some of Idaho Power Co.'s rights in Basin 36 covered by the *Swan Falls Agreement* were reported and ultimately decreed without reference the *Swan Falls Agreement*. This has subsequently been acknowledged as an oversight.")

⁷⁸ Orr Aff. at Exhibit 43b, Track 1, 30:29 – 30:59 (statement of Pat Costello in Idaho Water Resource Board public information meeting, Nov. 1, 1984); see also *id.* at Exhibit 46, p. 62-63 (transcript of same).

No such mechanism was needed or contemplated for subordinating future hydropower water rights licenses, such as the water right in question (02-7379)⁷⁹ which had not yet been licensed when the statute was enacted. Rather, subsection (6) authorizes the Director to directly subordinate such water rights by simply imposing a subordination condition at the permitting or licensing stage. Idaho Code § 42-203B(6). This provision empowered the Director to impose subordination conditions on "all future licenses" for hydropower water rights.⁸⁰

The ultimate goal of the trust arrangement, after all, is subordination—ownership is simply a means of ensuring future subordination in accordance with State law. There is no need for a trust when the Director in issuing a new water right can directly subordinate the water rights pursuant to his authority under subsection (6). The State's claim of legal ownership under the trust provisions of Idaho Code § 42-203B is therefore consistent with the Director's imposition of a subsection (6) subordination condition on 02-7379. The statute provides different tools for different situations.

B. Idaho Power's Principal Contentions In This Proceeding Are Wholly Inconsistent With The Undisputed Record.

The record reveals that Idaho Power, rather than the State, is now raising arguments that contradict the Company's previous representations. Prior to its motion for summary judgment, Idaho Power had never asserted that the Ada County Consent Judgments constituted water rights decrees or adjudicated sole ownership of the water rights in the Company. Idaho Power's SRBA claims do not rely on the Consent

⁷⁹ Davis Aff. at Exhibit J.

⁸⁰ Orr Aff. at Exhibit 28, p. 5 ("Statement of Legislative Intent -- S 1008") (1985 Senate Journal p. 60).

Judgments, nor does the Company's "Complaint" allege that the Consent Judgments established ownership.

Further, in its motion for stay and the Consent Judgments in the Ada County cases, Idaho Power unambiguously represented to the Fourth Judicial District Court that the judgments simply reflected the implementation of the Agreement, including the enactment of the trust legislation that would result in the State holding legal title to certain water rights previously claimed by Idaho Power. It should be noted that the Consent Judgments were offered to the court and filed only after the Agreement had been fully implemented—several years after the trust legislation had been enacted as Idaho Code § 42-203B and the corresponding "Statement of Legislative Intent" had been published in the Senate Journal, announcing the legislative intent that under Section 42-203B, "this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows."⁸¹

The parties and the Fourth Judicial District Court were well aware of these facts and events, yet Idaho Power now ignores Idaho Code § 42-203B and claims the Consent Judgments establish ownership. Idaho Power's *res judicata* contentions in this Court are entirely contrary to what the Company represented to the Fourth Judicial District Court.

The Company's Complaint also contains obvious misrepresentations and factual errors that contradict the Company's prior positions. The Company contends, for instance, that the *res* of the Swan Falls trust is water, not "water rights," even though:

⁸¹ Off Aff. at Exhibit 28, p.4 ("Statement of Legislative Intent – S 1008") (1985 Senate Journal p. 60).

- the Agreement expressly provides that "the State . . . assert the existence of **water rights held in trust by the State**",⁸²
- the "subordination legislation" of Exhibit 7B, which Idaho Power helped draft and supported in the Legislature provides that the Company's "**water rights for power purposes** in excess of [the Murphy minimum flows] **shall be held in trust by the state**",⁸³
- the corresponding Statement of Legislative Intent, which Idaho Power also helped to draft, expressly provides that Idaho Code § 42-203B states that "**this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes** . . . As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, **this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows** . . ."⁸⁴
- The Company's written statement to the Senate Resources and Environment Committee in support of Senate Bill 1008 stated that "[t]he State, as **trustee**, can protect **those rights**, and so also can Idaho Power Company, as **beneficiary of the trust** and as user of the **unsubordinated right**",⁸⁵
- Idaho Power's attorney stood shoulder to shoulder with the other negotiators when they represented to the Idaho Water Resources Board, the Senate Resources and Environment Committee and the public that "[i]n this agreement we did not immediately subordinate the hydropower rights above the minimum stream flow . . . **the water right is there and it's recognized, but it's held in trust by the state**,"⁸⁶ that "what we ended up agreeing to was to, in essence, **have the water right placed in trust in the ownership of the state** in exchange for which we went with the concept of the subordinatable water right,"⁸⁷ and that the trust

⁸² Agreement ¶ 4 (emphasis added).

⁸³ Idaho Code § 42-203B (emphasis added).

⁸⁴ Orr Aff. at Exhibit 28, pp. 4-5 ("Statement of Legislative Intent - S 1008") (1985 Senate Journal pages 59-60) (emphasis added).

⁸⁵ Orr Aff. at Exhibit 11, attachment to committee minutes of Jan. 25, 1985 entitled, "Statement of Idaho Power Company in Support of Senate Bill 1008" (emphasis added).

⁸⁶ Orr Aff. at Exhibit 42, Track 1, 43:33 - 44:13 (Pat Costello statement in Idaho Water Resource Board public information meeting, Oct. 31, 1984); see also *id.* at Exhibit 45, p.36 (transcript of same) (emphasis added).

⁸⁷ Orr Aff. at Exhibit 43b, Track 1 at 10:01-10:58 (recording of public information meeting of Nov. 1, 1984); see also *id.* at Exhibit 46, pp. 45-46 (transcript) (emphasis added).

legislation "would impose this new trust concept on the portion of the hydropower right that is in excess of the minimum flow";⁸⁸

- Idaho Power's attorney stated in his 1990 deposition that "[w]ell, the mechanism that was finally developed by the negotiators and accepted by the parties was to have the state place those rights in trust . . ."⁸⁹

Idaho Power also alleges in its Complaint that "[f]undamental to the establishment of the purported trust arrangement was the mutual assumption that there was some amount of water in the Snake River basin . . . available for use by new appropriations."⁹⁰ Idaho Power's attorney Tom Nelson clarified that the trust was not based on any such assumption or belief when Senator Crapo queried him on this very point:

MR. NELSON: . . . And the agreement isn't written around 600 CFS being available for development. It's written around the minimum flow. So if there's more than 600 CFS available for development, it's available. And the contrary, likewise, is true. (Unintelligible) our best estimate of existing conditions.

SENATOR CRAPO: So if I understand correctly, then, what we passed here today doesn't say that there's 600 CFS available. It says there may be 600, there may be 500, and there may be a thousand. Whatever it is, the minimum flow cannot drop below the established point at different times of the year.

MR. NELSON: Mr. Chairman, Senator, that's exactly right. All this is is a planning standard against which the state measures new uses.⁹¹

Mr. Nelson also clarified in another committee hearing that the 600 c.f.s. estimate was embodied in the new minimum flow established by the amendments to the State Water Plan, rather than being part of the trust: "600 or half remain instream, 600 to be

⁸⁸ See Orr Aff. at Exhibit 33, Track 1, 2:19 – 2:47 (recording of committee hearing of Jan. 18, 1985); see also *id.* at Exhibit 37, pp. 4-5 (transcripts) (emphasis added).

⁸⁹ Second Orr Aff. at Exhibit 5 (Nelson Depo., p. 52) (emphasis added).

⁹⁰ Complaint at 10-11 ¶ 29.

⁹¹ Orr Aff. at Exhibit 35, Track 2, 5:04 – 6:14 (recording of committee hearing of January 25, 1985); see also *id.* at Exhibit 10, p.7 (minutes of same) see also *id.* at Exhibit 39, pp. 31-32 (transcript of same) (emphasis added).

available for appropriation. That part of the settlement is in the state water plan amendments . . .⁹² Similarly, the Statement of Legislative Intent for Section 42-203B, which Idaho Power helped Senator Crapo draft, clearly states that "the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows."⁹³

Idaho Power now alleges that the Swan Falls Agreement was the "centerpiece" of the Swan Falls settlement,⁹⁴ even though the Company "stood shoulder to shoulder"⁹⁵ with the State in representing that the proposed legislation constituted "the core of the agreement,"⁹⁶ enactment of which was essential to implement the negotiated settlement and avoid going "back to war" in the courtroom.⁹⁷ The Agreement simply proposed a settlement that has been fully implemented: nothing remains to be done under the Agreement but to decree the water rights in accordance with the plain terms of Idaho Code § 42-203B and Paragraph 7 of the Swan Falls Agreement, as applicable. Any further matters as between the State and Idaho Power are controlled by the legislation enacted to implement the Agreement and other applicable state law, which is precisely what the parties intended and represented to the Legislature.

Idaho Power also asserts that the State has taken an entirely new and novel position in this matter, asserting that the Company never agreed to relinquish or give up

⁹² Orr Aff. at Exhibit 33, Track 1 (13:19 - 15:24) (recording of committee hearing of Jan, 18, 1985); see also *id.* at Exhibit 37, p. 14 (transcript of same);

⁹³ Orr. Aff. at Exhibit 28, p. 4 ("Statement of Legislative Intent - S 1008") (Senate Journal page 59) (emphasis added).

⁹⁴ Complaint at 7 ¶ 20.

⁹⁵ Second Orr Aff. at Exhibit 5 (Nelson Depo., p. 179).

⁹⁶ Orr Aff. at Exhibit 9, p. 1 (opening remarks of Pat Costello in minutes of the Senate Resources and Environment Committee meeting of Jan. 21, 1985); see also *id.* at Exhibit 34a, Track 1, 06:24 - 06:47 (audio recording of same); see also *id.* at Exhibit 38, p.7 (transcript of same).

⁹⁷ Orr Aff. at Exhibit 311, p.8 (committee minutes of Feb. 1, 1985); see also *id.* at Exhibit 34a, Track 1, 00:19 - 00:56.

any of its water rights. This is flatly contradicted by Idaho Power's official history, which described elements of the settlement, including **"Idaho Power water rights surrendered by the agreement and placed into trust by the state."**⁹⁸

This view, expressed by the Company shortly after the Consent Judgments were entered, is entirely consistent with how the settlement was described in contemporaneous newspapers articles across southern Idaho, in which it was commonly reported that Idaho Power would "relinquish," "give up," "drop" or "reduce" part of its water rights claims under the settlement.⁹⁹ It is also consistent with Tom Nelson's repeated assertions to the Legislature that the Company's water rights were limited to the level of the seasonal minimum flows of 3,900 c.f.s. and 5,600 c.f.s.¹⁰⁰ Indeed, Mr. Nelson stated that under the settlement, "[t]he only thing that gets fixed is the minimum flow and the power company's rights up to that . . ."¹⁰¹ Pat Costello also described the Company's "vested right" as "3900 and 5600."¹⁰²

It is Idaho Power that is taking an entirely new and novel position in this case by asserting that the settlement provided for the Company to retain sole ownership of all the water rights it had originally claimed. This position is entirely contrary to the undisputed legislative record and the common understanding at the time of the settlement that the Company had agreed to relinquish water rights in exchange for the protection of

⁹⁸ Second Orr Aff. at Exhibit 11 (Legacy of Light: A History of Idaho Power Company, by Susan M. Stacy (Idaho Power Company 1991), p. 201).

⁹⁹ Second Orr Aff. at Exhibit 9 (Idaho Statesman (Boise), Oct. 26, 1984; Post-Register (Idaho Falls), Oct. 1, 14, & 25, 1984; Idaho State Journal (Pocatello), 10/12/84; Morning News (Blackfoot), Oct. 8, 1984; Idaho Press-Tribune (Caldwell) Oct. 1, 1984).

¹⁰⁰ Orr Aff. at Exhibit 36, Track 1, 19:20 - 19:59 (recording of committee meeting on Feb. 1, 1985); see also *id.* at Exhibit 11, p.3, 7 (minutes of same); see also *id.* at Exhibit 40, pp. 18-19, 31 (transcript of same);

¹⁰¹ Orr Aff. at Exhibit 42, Track 1, 37:21 - 37:32 (recording of Idaho Water Resource Board meeting of Oct. 31, 1984); see also *id.* at Exhibit 45, pp. 30-31 (transcript of same).

¹⁰² Orr Aff. at Exhibit 42, Track 1, 36:29 - 36:47 (recording of Idaho Water Resource Board meeting of Oct. 31, 1984); see also *id.* at Exhibit 45, pp. 30-31 (transcript of same).

increased minimum flows, the implementation of the "public interest" analysis in the subordination of the water rights held in trust by the State, and statutory protection from civil liability to ratepayers and punitive regulatory actions by the IPUC for the Company's failure to protect its water rights in years past.

It is Idaho Power, not the State, that has taken a position in this litigation that is clearly contrary to its prior representations.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that the Court deny Idaho Power Company's cross-motion for summary judgment in its entirety.

DATED this 7th day of February 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2008, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN RESPONSE TO IDAHO POWER COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT to the following parties by the indicated methods:

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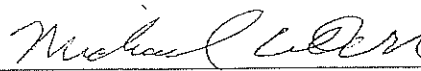
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