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

In Re SRBA	)	Consolidated Subcase no. 92-23
	)	
Case No. 39576	)	REPLY IN SUPPORT OF
	)	STATE OF IDAHO'S
	)	MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
	)	

ARGUMENT

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.*

I. THERE IS NO STATUTORY AMBIGUITY; THE TRUST *RES* CONSISTS OF WATER RIGHTS AS A MATTER OF LAW.

When the Swan Falls legislation is examined as a whole, the plain statutory language demonstrates that the statutes collectively create a coherent water right trust and subordination structure. Idaho Power Company ("Idaho Power" or "the Company") ignores this statutory structure and instead examines various statutory components in isolation, erroneously concluding that they are ambiguous and that the Legislature did not understand what it created. This flawed analytical approach subverts the water right trust and subordination structure created by the Legislature and demonstrates that Idaho Power is attempting to inject ambiguity where none exists.

The key point that Idaho Power ignores is that section 42-203B and section 42-203C have quite different though closely related purposes and functions. Idaho Code §

¹ The State's opening brief 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.

42-203B establishes the trust and provides for subordination of the water rights held therein. The trigger for subordination is section 42-203C,² which is not concerned with the trust *res* but rather with existing and proposed uses of the flows that are subject to the *res*, that is, “trust water.” Section 42-203C addresses new applications to appropriate water that is subject to the *res* under standards intended to promote the public interest by weighing the benefits and costs of the proposed use, including potential impacts on hydropower. New appropriations approved under this “public interest” analysis trigger subordination of the *res*—the water rights held in trust under section 42-203B—to the newly approved water right.

Idaho Power’s argument not only ignores this framework but assumes that any reference in either statute to “water” rather than “water rights” constitutes ambiguity, leading the Company to pounce on any occurrence of the term “water” without consideration of the context or statutory structure. The context and statutory structure are important considerations in this case and demonstrate that Idaho Power’s argument is deeply flawed and leads to discord rather than harmony in related and complementary statutory provisions.

Finally, Idaho Power’s ambiguity argument is flawed as a matter of law because it was legally impossible for the Company to place “water” rather than “water rights” in the trust. The trust *res* has to consist of “water rights” because that was all Idaho Power owned under settled Idaho law. The State already held title to the “water” in trust for the people of the State.

² Subsection (3) of section 42-203B provides for water rights held in trust by the State to be subordinated without compliance with section 42-203C. Subsection (3) applies when the State and a hydropower user have not entered into a subordination agreement. Idaho Code § 42-203B(3).

A. A Fundamental Principle Of The Prior Appropriation Doctrine As Established By Idaho law Is That A Water Right Is A Right Of Use, Not Ownership.

This case turns on a foundational principle of Idaho water law. The Company's arguments incorrectly assume that Idaho Power owned "water" to begin with, and that the parties settled their dispute by agreeing that the State would take some of this water and place it in trust. Idaho Power's arguments fail as a matter of law because the Company never owned "water"—only "water rights."

The State owns the water and holds it in trust for the benefit of the people of the State. *See Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 447 (1985) ("The state holds all waters in trust for the benefit of the public"); *see also Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (holding that ownership of Idaho's water is in the State "in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity").

"A water right . . . does not constitute ownership of the water." *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). "Under the Constitution and laws of the state, the ownership of the corpus of the water is in the state." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, ___, 150 P. 336, 338-39 (1915). "An appropriation or rental use gives the appropriator or user no title to the water; his right thus acquired is to the **use** only." *Bd. of Dirs. of Wilder Irrigation Dist. v. Jorgensen*, 64 Idaho 538, 551, 136 P.2d 461, 466-67 (1943) (internal citations omitted) (emphasis in original) (Ailshie, J., concurring). "A water right differs from other species of property, in that the owner does not own the water itself or have any property right in the corpus of

the water; all the right which he has is to use the same.” *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, ___, 231 P. 418, 421 (1924).

This foundational water law principle was as clear and well established in 1984 as it is today. It is against this backdrop that Idaho Power’s argument that the trust *res* consisted of a “block of water” must be measured. As discussed below, Idaho Power’s attempt to confuse the issue of whether the trust *res* consists of “water” or “water rights” must be wholly rejected because it wrongly assumes that Idaho Power owned “water.”

B. The Statutory Trust And Subordination Framework Established By Sections 42-203B And Section 42-203C Contains No Inconsistencies Or Ambiguities With Respect To The Definition Of The *Res*, Which Clearly Consists Of “Water Rights.”

Idaho Power’s ambiguity argument ignores the obvious: that Idaho Code § 42-203B—not 203C or 203D—controls for purposes of defining the nature of the *res*, and it unambiguously defines the *res* as “water rights” at least five times. Subsections (2) and (3) both contain two clear statements defining the *res* as consisting of “water rights”:

Any portion of the **water rights** for power purposes in excess of the level [established by state action] **shall be held in trust** by the state of Idaho, by and through the governor . . . the **rights held in trust** shall be subject to subordination . . .

Idaho Code § 42-203B(2) (emphasis added).

Water rights in excess of such minimum flows [established by state action] **shall be held in trust** by the state of Idaho, by and through the governor . . . The **rights held in trust** shall be subject to subordination . . .

Idaho Code § 42-203B(3) (emphasis added). This language controls what the trust *res* is, because “**the trust [is] established by subsections (2) and (3) of this section.**” Idaho Code § 42-203B(1) (emphasis added). Moreover, under subsection (5), the Swan Falls

Agreement “water rights” in excess of the minimum flows established at the Murphy Gage are defined “as being held in trust by the state:”

The governor or his designee is hereby authorized and empowered to enter into agreements with holders of **water rights for power purposes** to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and **to define such rights** in excess [of the applicable minimum stream flow] **as being held in trust by the state under subsection (2) of this section**. Such agreements shall be subject to ratification by law. **The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement**, and the legislature hereby ratifies the governor’s authority and power to enter into this agreement.

Idaho Code § 42-203B(5) (emphasis added). There is no statutory ambiguity. The trust *res* is “water rights,” not “water.” Idaho Code § 42-203B establishes and defines the trust. Other statutory provisions do not control this point. *See Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004) (“Where two statutes apply to the same subject matter they are to be construed consistent with one another where possible, otherwise the more specific statute will govern”). Even Idaho Power admits that “the Legislation does reference water rights ‘held in trust,’” Idaho Power Brief at 11, and that “references to water rights held in trust occur in certain of the key documents.” *Id.* at 17.

As Idaho Code § 42-203B explicitly provides and as discussed in the Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment (“State’s Opening Brief”), the trigger for subordination of the water rights held in the section 42-203B(2) trust is the approval of a new water right that complies with the section 42-203C “public interest” analysis:³ “The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are

³ State’s Opening Brief at 32-34.

acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” Idaho Code § 42-203B(2).

Thus, sections 42-203B and 42-203C are complementary and interdependent. Section 42-203B establishes and defines the trust as water rights, and requires compliance with the requirements of section 42-203C before the water rights held in trust are subordinated to a new use. Essentially, section 42-203B provides that compliance with the “public interest” requirements of section 42-203C is the trigger for subordination of the water rights held in trust under subsection (2) of section 42-203B. The statutory interplay serves the trust’s dual purposes of “assur[ing] an adequate supply of water for all future beneficial uses” and protecting Idaho Power’s right as a beneficiary of the trust “to continue using the water pending the approval of depletionary future beneficial uses.” Idaho Code § 42-203B(1).

These closely related statutes must be construed harmoniously to effectuate the manifest legislative intent. *Dep’t of Health & Welfare v. Housel*, 140 Idaho 96, 104, 90 P.3d 321, 329 (2004) (holding that “it is the duty of the courts, in construing statutes, to harmonize and reconcile laws whenever possible and to adopt the construction of statutory provisions which harmonize and reconciles them with other statutory provisions”) (internal quotation marks and citation omitted).

Idaho Power argues that Idaho Code § 42-203C creates ambiguity with respect to whether the trust *res* consists of “water” or “water rights” because section 42-203C refers to “water held in trust by the state” and to “trust water.” This argument falls flat for reasons previously discussed: it fails to recognize that as a matter of law, the State

already owned the “water.” The only thing Idaho Power had to bargain with was “water rights,” rights of use, not ownership.

But even beyond this, Idaho Power’s argument fails because section 42-203C does not purport to define the *res*: rather, it establishes the standards for determining if the water rights held in trust will be subordinated to new water rights. Section 42-203C explicitly provides that the terms “water held in trust” and “trust water” are meant to simply incorporate the definition of the trust and the *res* established “pursuant to subsection (5), section 42-203B.” Idaho Code § 42-203C.

Further, these phrases do not function within section 42-203C as definitions of the *res*. The phrase “water held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B” functions as a tributary designation that identifies which water sources—and therefore which appropriation applications, which are the real focus of section 42-203C—will be subject to the “public interest” analysis.

This same reasoning applies to the term “trust water” in section 42-203C. In light of its statutory context, and given section 42-203C’s explicit reliance on the definition of the trust in section 42-203B, the term “trust water” obviously refers to the water flows that are subject to the hydropower water rights held in trust. Under the statutory framework established by sections 42-203B and 42-203C, such flows are available for hydropower generation but are also available for other uses under new appropriations that comply with the “public interest” analysis. Quite naturally, such flows are often referred to as “trust water”—not because the water constitutes the *res* but because it is subject to the *res*: the hydropower water rights held in trust by the State under Idaho Code § 42-203B.

That section 42-203C calls these flows “trust water” instead of using section 42-203B’s long, formal definition— “the water subject to the portion of the water rights for power purposes in excess of the level of a minimum flow established by state action”— does not create ambiguity as to the nature of the trust *res*. The *res*, as defined in section 42-203B, remains “water rights.” “Trust water” is simply a convenient term that is entirely understandable as used in 42-203C, a statute with a different focus and purpose than section 42-203B: providing standards and procedure for evaluating new uses of water under the “public interest” analysis. The term also recognizes the special feature of these flows: although they have already been appropriated under the hydropower water rights held in trust, they are still available for appropriation if the application is found to satisfy that public interest criteria of section 42-203C. The term injects no ambiguity in the statutory structure.

For similar reasons, water appropriation applications for flows that are subject to the water rights held in trust are often referred to as “trust water appropriations.” Again, this is not because the “water” is the *res* but because it is subject to and controlled by the *res*—the water rights held in trust by the State—until an application is approved under the “public interest” criteria, thereby subordinating the water rights held in trust.

In summary, the term “trust water” and occasional phrases such as “water held in trust” simply reflect that the trust’s *res*—water rights—is the source of the legal control over the water that the trust is intended to make available for other future beneficial uses. The trust’s purposes of assuring a water supply for future uses and protecting hydropower uses differ from the statutory means of achieving those purposes— subordination of the water rights held in trust to new water rights acquired in compliance with State law. The

record repeatedly reflects this distinction. Terms like “trust water” or “water held in trust” generally occur more frequently in discussions of new appropriations and development of new uses. This is a product of viewpoint, not of confusion about the nature of the *res*. It reflects the difference in viewing the trust in terms of what it is intended to accomplish (making water available for new uses) rather than from the standpoint of examining the legal mechanism that achieves this objective.

This discussion applies not only to Idaho Code § 42-203C, but to every occurrence of term like “trust water” or “water held in trust” that Idaho Power has so carefully documented.⁴ Idaho Power confuses the statutory means and ends, incorrectly reasoning that because the goal is to assure a “water” supply, the trust *res* must also consist of “water.” This leads Idaho Power to view every occurrence of “trust water” or a similar term as either demonstrating that the *res* is “water” or that there is some ambiguity on the point. Idaho Power’s flawed conclusions arise from a superficial analysis that simply finds no substantive support in the plain statutory language, and in fact are contrary to well-established Idaho law.

C. The 1986 Amendment To Subsection (2) of Section 42-203B Is A Tributary Designation That Does Not Define The Nature Of The *Res*.

The foregoing also demonstrates the fallacy in Idaho Power’s argument that 42-203B(2) is ambiguous because while it provides that “water rights . . . shall be held in trust by the State,” it is also qualified as follows:

⁴ Like Idaho Code § 42-203C, section 42-203D was intended to be harmonious with the provision that defines the trust, section 42-203B, and also with section 42-203C. Section 42-203D does not purport to define or alter the trust, but simply provides for “public interest” review of the backlog of water appropriation permits that were pending at the time of the Swan Falls controversy as a result of the informal moratorium imposed in response to the uncertainty generated by Idaho Power’s lawsuits, especially the “7500 case” (Ada County Case no. 81375). *See* Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment at 7 n.16 (referring to the permit moratorium).

provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam.

Idaho Code § 42-203B(2). Idaho Power argues this phrase justifies a negative inference that the Legislature was intending to “clarify” that the trust *res* consists of water, not water rights. This argument fails as a matter of law because, as previously discussed, the State already owned the water—all Idaho Power owned was “water rights.” “Water rights” were the only thing that could have gone into the trust.

Even when looking past this fatal flaw, the amendment does not support Idaho Power’s argument because it left intact the statute’s express definition of the *res* as “water rights.” The 1986 amendments did not delete or modify the five separate statements in the statute that expressly and unmistakably provide that the *res* of the trust is “water rights.” See Idaho Code § 42-203B(2) (two express statements); *id.* § 42-203B(3) (two express statements); *id.* § 42-203B(5) (one express statement). Indeed, the Legislature’s retention of the provisions expressly identifying the *res* as “water rights” demonstrates that, contrary to Idaho Power’s argument, the Legislature was **confirming** that the *res* consists of “water rights.” See *Webb v. Webb*, 143 Idaho 521, 525, 148 P.3d 1267, 1271 (2006) (“The Court must give every word, clause and sentence effect, if possible.”); see also *Leonard Constr. Co. v. State Tax Comm’n*, 96 Idaho 893, 896, 539 P.2d 246, 249 (1975) (stating that an amendment “indicates not only the intention of the new law but also that of the old.”) The plain language of the amendment expressly reaffirms that the statute applies “to **water rights** for hydropower purposes.” Idaho Code

§ 42-203B(2) (emphasis added). The 1986 amendment to section 42-203B(2) does not support the negative inference Idaho Power seeks to draw from it.

Further, the 1986 amendment obviously has a different meaning when read in context. The second half of the amendment provides as follows: “For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.” Idaho Code § 42-203B(2). Taken as a whole, the 1986 amendment obviously focuses on precluding holders of surface water rights diverting from the Snake River or its tributaries downstream of the Milner dam from seeking administration of water rights diverting from sources upstream of Milner dam. The 1986 amendment was not defining the nature of the *res* but rather clarifying the physical extent or reach of the *res*. Under this amendment, water rights and water sources upstream of the Milner dam are not subject to administration under the trust created by Idaho Code § 42-203B. Thus, the Swan Falls trust—and therefore the “public interest” analysis for new appropriations of water flows that would otherwise be subject to the water rights held in trust (i.e., “trust water”)—only applies to appropriations from water sources tributary to the Snake River below Milner dam and above the Murphy Gage. In essence, the statutory changes implemented through the 1986 amendment to section 42-203B(2) were tributary or source designations, not a redefinition or clarification of the trust *res*.

This view is consistent with the legislative history of the amendment. Senator Crapo explained to the House Resource and Conservation Committee “that this legislation is intended to clarify language in all Sections regarding minimum stream

flows, ground water and tributary waters upstream and downstream from Milner Dam, actions the Director may take to review permits relating to trust waters, etc.”⁵ This understanding of the amendment is consistent with the Swan Falls settlement, which called for retaining the “zero c.f.s.” minimum flow established for the Milner gauging station under the State Water Plan.⁶ The amendment is also consistent with the Idaho Department of Water Resources’ “Water Appropriation Rules,” which govern appropriations of “trust water.”⁷ Rule 30.01 provides that “[s]urface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water.” IDAPA 37.03.08.030.01.b. The statute, the legislative history and the administrative rules all reflect the historic practice and understanding that the Snake River above and below Milner dam is administered as two separate systems, because the river is frequently dry at Milner dam during much of the year.⁸

This understanding of the 1986 amendments also demonstrates why they were viewed as merely “clarifying”⁹ the original legislation: the settlement was not intended to alter the traditional separation of the river at Milner dam. The amendments cannot fairly

⁵ Orr Aff. at Exhibit 63, p.1 (minutes of committee meeting, March 13, 1986) (emphasis added).

⁶ See Exhibit 6 to Swan Falls Agreement (“The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.”); Orr Aff. at Exhibit 30 (Swan Fall Agreement).

⁷ Note that the Water Appropriation Rules define “trust water” not as “600 c.f.s.” or as a “block of water” but as “That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code.” IDAPA 37.03.08.010 (emphasis added). This definition has been effective since 1986.

⁸ See Orr Aff. at Exhibit 42, Track 1, 7:18 – 7:46 (“we were trying to wrestle with how to regulate the river using streamflows at Murphy, you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner”) (statement of Tom Nelson in Idaho Water Resource Board Public Information Meeting, Oct. 25, 1984); see also Orr Aff. at Exhibit 44, p. 41 (transcript of same).

⁹ See Orr Aff. at Exhibit 61, p. 2 (“Clarifications of Swan Falls Legislation”) (minutes of Senate Resources and Environment Committee, Feb. 5, 1986); see also *id.* at Exhibit 62, p.1 (“this is merely clarification”) (statement of Senator Crapo, minutes of Senate Resources and Environment Committee, Feb. 19, 1986).

be viewed as merely clarifying the original legislation if they are understood to define the *res* as “water,” as Idaho Power argues, because the original legislation was (and still is) unambiguous in defining the *res* as “water rights.” Such a change would not constitute a clarification but rather a wholesale revision of one the basic elements of the settlement. The 1986 amendment completely fails to support Idaho Power’s argument.

D. There Is No Substantial Ambiguity In The Legislative Record.

Not only is the Company is incorrect in viewing statutory terms such as “trust water” as creating ambiguity, but the usage of these terms in the record reflects a related and unremarkable fact: : when absolute legal precision is unnecessary, experienced water attorneys and even courts sometimes speak of “water” when they clearly mean “water rights.”

Indeed, one of the principle passages in the legislative record to which Idaho Power cites in alleged support of the its position that the *res* was water actually demonstrates precisely the opposite. In describing the origins and purpose of the trust concept to the Senate Resources and Environment Committee, Idaho Power’s attorney Tom Nelson stated that “the trust provision was suggested to get us around the subordinated versus subordinatable nature of the water above the minimum flow. It remains unsubordinated but it’s held in trust by the state . . .”¹⁰ Idaho Power Company’s Response to State of Idaho’s Motion for Partial Summary Judgment (“Idaho Power Brief”) at 29-30.

This passage makes no sense unless one understands the term “water” to mean “water rights,” because “water” cannot be “subordinated.” Subordination is a legal

¹⁰ See also Orr Aff. at Exhibit 11, p. 5 (Tom Nelson statements in minutes of committee meeting of Feb. 1, 1985). [audio]

principle that negates or diminishes the priority element of a water right: the concept of “subordination” has no meaning or application with respect to “water.” *See, e.g., A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 748, 118 P.3d 78, 80 (2005) (discussing subordination of water rights).¹¹ Water can be diverted, water can be used, but it cannot be “subordinated.” Only “water rights” can be “subordinated.” Mr. Nelson meant “water rights,” even though he said “water,” as the context makes clear.

Similar flaws fatally undermine the Company’s considerable reliance on references in the record to the State taking ownership of or legal title to “water,” “placing water in trust” or “holding water in trust,” for support of the notion that the *res* was water. *See, e.g., Idaho Power Brief* at 30-33. As previously discussed, the State already owned the “water,” all the Company owned was “water rights,” and both of these foundational legal principles were well understood. The use of the term “water” rather than “water rights” in the passages Idaho Power has identified did not introduce any genuine doubt or ambiguity as to the nature of the *res*.

Even courts often refer to an appropriator’s “title to water” rather than “water rights” when absolute legal precision is not necessary, but this technically incorrect usage creates no ambiguity. *See, e.g., U.S. v. Pioneer Irr. Dist.*, ___ Idaho ___, ___, 157 P.3d 600, 609 (2007) (referring to “title to the water”); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999) (referring to “the water held in trust” by a canal company); *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*,

¹¹ *See also* BLACK’S LAW DICTIONARY 1467 (“**subordination**, *n.* 1. The act or an instance of moving something (such as a right or claim) to a lower rank, class or position <subordination of a first lien to a second lien>.”) (8th ed. 2004).

126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994) (referring to “title to the water”); *Sears v. Berryman*, 101 Idaho 843, 846, 623 P.2d 455, 458 (1981) (referring to “prescriptive title to water”); *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 682, 619 P.2d 1130, 1135 (1980) (referring to “senior title to the water”); *Keller v. Magic Water Co.*, 92 Idaho 276, 278, 441 P.2d 725, 727 (1968) (referring to “title to certain waters”); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959) (“water, title to which the trial court, by its decree, quieted in their favor”); *Harsin v. Pioneer Irr. Dist.*, ___ Idaho ___, ___, 263 P. 988, 990 (1927) (“The district holds title in trust to the waters”).

Context and background legal principles are important, and they reveal that Idaho Power’s carefully inventoried “water” references do not create ambiguity or suggest that the *res* is water. Further, the indisputable fact is that Legislature and parties clearly described the *res* as “water rights” where it counted: in the statute that established the trust (Idaho Code § 42-203B), and in the sole reference to the trust in the contractual provisions of the Swan Falls Agreement.

E. Idaho Power’s Right To Beneficially Use Flows Under The Trust Rights And To Protect Such Equitable Use Is Consistent With The State’s Legal Ownership As Trustee And With Idaho Law.

Idaho Power also argues that the State could not have legal ownership of the water rights because Idaho Power is still entitled to use the waters subject to the water rights held in trust and to contest new appropriations of those waters. This argument fails to recognize that section 42-203B expressly recognizes Idaho Power’s right, as a beneficiary of the trust, to continue use flows available under the water rights held in trust and to protect that right of use:

[a] beneficiary of the trust established in subsections (2) and (3) of this section shall be entitled to use water available at its facilities to the extent of the water right, and to protect its right to the use of the water as provided by state law against depletions or claims not in accordance with state law.

Idaho Code § 42-203B(4). There is no inconsistency between the State's claim of legal ownership of the water rights as trustee and Idaho Power's equitable right to make use of the water rights and protect that use in accordance with State law. Such splitting of the legal title and the equitable title to water rights is common. *See, e.g., United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

F. Subsection (1) of Section 42-203B Unambiguously Invokes The State's Constitutional Authority To Regulate And Limit Hydropower Water Rights.

Idaho Power next contends that Idaho Code § 42-203B is ambiguous because subsection (1) states that "it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes." The Company therefore concludes that the statute only applies to "uses," not "water rights," and does not place water rights into trust because it is only "regulating and limiting." Idaho Power Brief at 11.

Idaho Power's argument conveniently ignores the second half of the relevant provision in subsection (1), which provides that besides implementing the State's power to regulate and limit hydropower uses, the statute is intended "to define the relationship between the state and the holder of a **water right for power purposes** to the extent such right exceeds an established minimum flow." Idaho Code § 42-203B(1) (emphasis added). Further, Idaho Power fails to recognize that subsection (1) is not an operative provision but a preamble that recites legislative findings, declarations of purposes and

authority. The subsequent effectuating provisions of the statute expressly provide that “water rights . . . shall be held in trust by the state,” and specifically that the State holds in trust the water rights that are subject to the Swan Falls settlement. Idaho Code § 42-203B(2), (3), (5). Plainly, the statute applies to “water rights,” not just “uses,” provides that the State will hold certain hydropower water rights in a State-controlled trust, and affirmatively places into the trust the portion of the hydropower water rights formerly claimed by Idaho Power for flow in excess of the minimum flows established at the Murphy Gage.

Idaho Power’s “regulate and limit” argument also stumbles on the second half the relevant provision in subsection (1), which states that besides implementing the State’s power to regulate and limit hydropower water rights, the statute is intended “**to define the relationship** between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow.” Idaho Code § 42-203B(1) (emphasis added). Under Idaho law, “**a trust is a relationship** having certain characteristics.” *Dennett v. Kuenzli*, 130 Idaho 21, 30, 936 P.2d 219, 228 (Ct. App. 1997) (emphasis in original). Thus, the statute’s stated intent of “defining” a new “relationship” between the State and hydropower water right holders as to flows in excess of applicable minimum stream flows is consistent with the statutory trust established in subsections (2) and (3). It is also consistent with subsection (5), which specifies that the Swan Falls settlement water rights for flows in excess of the minimum flows established at the Murphy Gage are held in trust by the State. Idaho Code § 42-203B(5).

Finally, Idaho Power is incorrect in arguing that section 42-203B is not intended to place hydropower water rights into trust because subsection (1) only cites the State’s

power to “regulate and limit.” Subsection (1)’s recitation of the State’s power “to regulate and limit the use of water for power purposes” is not a limitation but a clear invocation of the State’s full constitutional authority to “regulate and limit the use [of water] for power purposes.” Idaho Const. art. 15 § 3. Further, Idaho Power’s suggestion that this constitutional authority does not allow the State to impose a trust on the water rights is incorrect, as explained in a section X of this memorandum.

In sum, it is clear as a matter of law and plain language that there is no statutory ambiguity with regard to the nature of the *res* of the trust established under Idaho Code § 42-203B. Idaho Power’s arguments are simply attempts to inject ambiguity where none exists:

[A]mbiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous....
[A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.

BHA Invs., Inc. v. City of Boise, 138 Idaho 356, 358, 63 P.3d 482, 484 (2003) (internal quotation marks and citation omitted). The Court should reject Idaho Power’s attempts to undermine the unmistakable language and legislative intent expressed in Idaho Code § 42-203B.

II. THE STATEMENT OF LEGISLATIVE INTENT CONFIRMS THAT THE TRUST *RES* CONSISTS OF WATER RIGHTS PREVIOUSLY CLAIMED BY IDAHO POWER.

Idaho Power summarily dismisses the 1985 “Statement of Legislative Intent” for Idaho Code § 42-203B because only the Senate formally approved the statement. The Company does not dispute, however, that the Statement of Legislative Intent was drafted by the Senate Resources and Environment Committee with Idaho Power’s review and

comment, was intended for purposes of assisting courts and agencies in interpreting the legislation, that the legislation was held in committee an extra week to allow the Statement of Legislative Intent to be drafted, and that it was approved by the committee and unanimously by the full Senate and published in the Senate Journal.¹² There is no question that the Statement of Legislative Intent is second only to the statute itself for purposes of determining the legislative intent of Idaho Code § 42-203B.

The Statement of Legislative Intent is consistent with the State's position in this matter and confirms that Idaho Code § 42-203B establishes the trust and that the *res* includes water rights formerly claimed by Idaho Power:

- **"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 which are in excess of minimum stream flows established by state action"**
- **"The amount of water or water rights held in 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"**
- **"Any portion of such water rights above the established minimum stream flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho"**
- **"Hydropower rights in excess of such flows will be held in trust by the State subject to subordination to, and to depletion by lawful beneficial uses"**
- **"In addition, if the holder of a hydropower right enters into an agreement with the State defining the extent of its hydropower right, the right will remain unsubordinated to the extent provided by the Agreement. Such agreements must be ratified by law, and ratification of one such agreement is conferred by this section"**

¹² State's Opening Brief at 19-21, 34-36.

- **“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 and Idaho Power Company retains equitable title to those water rights subject to the trust”**

Statement of Legislative Intent – S 1008 (1985 Senate Journal at 58-60).¹³ This language could not be clearer, and is not rendered ambiguous by terms such as “trust water” or “appropriations from the trust,” for reasons previously explained.

The fact that only the Senate took formal action to adopt the Statement of Legislative Intent does not mean that the House rejected the Statement, as Idaho Power suggests.¹⁴ To the contrary, the House surely knew of the Statement and its contents when the House approved the underlying legislation (1985 Senate Bill 1008) because the Senate had approved the legislation and the Statement (including its publication in the Senate Journal) just two weeks earlier.¹⁵ Further, the legislation was explained to the House Resources and Conservation Committee in terms substantially similar to those in the Statement of Legislative Intent:

Mr. Costello said this bill [S 1008] is the centerpiece of the Swan Falls agreement. This Legislation implements the state's authority under the 1928 amendment to limit and regulate the use of water for power purposes. . . . Existing hydropower rights which have not been effectively subordinated shall not be subject to depletion below any applicable minimum flows established by the state. Hydropower rights in excess of

¹³ See Orr Aff. at Exhibit 28.

¹⁴ Idaho Power's dismissive view of the Statement of Legislative History stands in stark contrast to the Company's eagerness to have the Court consider the personal recollections of the 1985 legislative session offered by a Company lobbyist via a recently executed affidavit.

¹⁵ The Senate approved the legislation and the Statement on February 1, 1985. See Orr Aff. at Exhibit 28. The House approved the legislation on February 18, 1985. See Appendix A attached hereto (excerpts of 1985 House Journal).

such flows will be held in trust by the state and are subject to subordination and to depletion by lawful beneficial uses. . . .¹⁶

These undisputed legislative facts refute Idaho Power's suggestion that the House may have had a far different understanding of the legislation. To the contrary, given the Senate's public announcement of its intent for the legislation and Mr. Costello's explanation of the legislation to the House committee, it is unlikely the House would have enacted the bill if the House had a significantly different understanding of it.

III. THE LEGISLATIVE HISTORY CONFIRMS THAT THE TRUST *RES* CONSISTS OF WATER RIGHTS PREVIOUSLY CLAIMED BY IDAHO POWER.

Idaho Power implausibly suggests that the State's summary judgment motion provides the Court with less than a full legislative record. Idaho Power ignores that the State, not Idaho Power, has provided this Court with the complete legislative history of the Swan Falls legislation, including certified copies of the original bills and statements of purpose, the committee minutes and attachments, and also audio recordings and transcripts. *See generally* Orr Affidavit. The State has no fear of the legislative record, has cited to it extensively and quoted from it liberally.¹⁷ Indeed, the hyperlinking feature in the State's electronic briefing and affidavits is designed to facilitate the Court's independent review of the legislative record.

The legislative history is fully consistent with the State's position that the Legislature intended Idaho Code § 42-203B to establish a trust and, by operation of law rather than conveyance, provide the State with legal title to the water rights previously claimed by Idaho Power for flows above the minimums at Murphy:

¹⁶ Orr Aff. at Exhibit 20 (Minutes of the House Resources and Conservation Committee, Feb. 11, 1985); *see also id.* at Exhibit 21 (Minutes of the House Resources and Conservation Committee, Feb. 13, 1985) (similar statements by Pat Costello).

¹⁷ *See* State's Opening Brief at 15-22, 34-39.

- [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 . . .**¹⁸
- [The trust] was simply a mechanism to sever, in lawyer's terms, **to sever the legal and equitable title** to the water immediately so there's some immediate change in position of the parties, that **as soon as this agreement becomes binding and this statute takes effect, legal title will go to the state.**¹⁹
- As [Idaho Code § 42-203B is] drafted, **the State possess[es] legal title** to all waters previously claimed by the Company above 3,900 c.f.s.²⁰
- If the public interest criteria is [sic] not, after trial and error, precisely what the legislature desires, the standards can be changed without affecting this agreement, **state legal ownership of the water rights involved** and the trust arrangement established.²¹

As beneficiary of the trust, Idaho Power retained the equitable right to use—not “own”—the water rights held in trust:

- 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.**²²
- **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

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

¹⁹ Orr Aff. at Exhibit 33, Track 5, 6:36 – 6:59 (recording of Pat Costello statements in committee hearing of Jan. 18, 1985) [audio]; *see also id.* at Exhibit 8, p. 11 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 37, p. 53 (transcripts) (emphasis added).

²⁰ Orr Aff. at Exhibit 8, attachment to committee minutes of Jan. 18, 1985 entitled “Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008,” p. 3 (emphasis added).

²¹ Orr. Aff. at Exhibit 8 (committee minutes of Jan. 18, 1985), attachment entitled. “Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008,” pp. 5-6 (emphasis added).

²² 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 Environment Committee, January 25, 1985,” p.1 (emphasis added). 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).

retain **the right to beneficially use that right** for power generation²³

The trust was proposed to resolve the “loggerhead” that had developed on the question of whether the water rights for the flows above the new minimum flows would be immediately subordinated by the settlement or only be “subordinatable,” as Idaho Power’s attorney Tom Nelson explained to the Senate Resources and Environment Committee.²⁴ Mr. Nelson pointed out that the trust concept “neatly sidestepped” the problem.²⁵ As Pat Kole, the Attorney General’s negotiator explained: “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.”²⁶

From the State’s perspective, the basic issue was control: the State would agree to “subordinatable” water rights only if Idaho Power relinquished control of them. Idaho Power was willing to surrender control if the State had the tools to administer the river:

Part of this was kind of a put up or shut up situation on both sides. The Company said it didn’t want to be watermaster; **the state said OK, then take yourself totally out of any vestige of control over the rights that you have defined. We said alright**, but if you are going to be the watermaster then you get out and you take care of it. So it’s in that context that you find the adjudication requirement of the thought being that it doesn’t make a lot of sense to try and define what’s in the river when you haven’t the foggiest idea, really, of the details of the water uses now going on above Swan Falls. . . . The trust provision was I think an idea of the state. I seized upon it because it filled what I saw as a major problem from our side, which was we can get the state to sign, but how did we get

²³ Orr Aff. at Exhibit 41, Track 1, 7:55-8:10 (Pat Costello statements in recording of meeting) (emphasis added) [audio]; *see also id.* at Exhibit 44, p.7 (transcript of same).

²⁴ Orr Aff. at Exhibit 8, p. 3 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 2 at 9:48-10:40 (recording) [audio]; *see also* Exhibit 37, pp. 21-22 (transcript).

²⁵ Orr Aff. at Exhibit 11, p. 5 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 36, 27:03-27:28 (recording) [audio]; *see also id.* at Exhibit 40, p. 24 (transcript).

²⁶ Orr Aff. at Exhibit 43b, Track 1 at 10:01-10:58 (recording of public information meeting of Nov. 1, 1984) [audio]; *see also id.* at Exhibit 46, pp. 45-46 (transcript).

the state to live up to what they said they would do and that was a major problem from our side.²⁷

Idaho Power's attorney also clarified that the settlement and the trust were not based upon an assumption that there would be a 600 c.f.s "block of water" available for future development. Rather, the 600 c.f.s. figure was simply "a planning standard":

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.²⁸

Mr. Nelson similarly 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 available for appropriation. **That part of the settlement is in the state water plan amendments . . .**"²⁹

These statements of the parties in the legislative record are probative of legislative intent because they were made to the Legislature to explain legislation the parties had

²⁷ Orr. Aff. at Exhibit 11, pp. 4-5 (committee minutes of Feb. 1, 1985) (emphasis added); *see also id.* at Exhibit 36, 25:26 – 27:01 (recording) [audio]; *see also id.* at Exhibit 40, pp. 23-24 (transcript).

²⁸ Orr Aff. at Exhibit 35, Track 2, 5:04 – 6:14 (recording of committee hearing of January 25, 1985) [audio]; *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).

²⁹ 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);

jointly drafted and proposed³⁰ and then presented to the Legislature as a ‘take it or leave it’ proposition. See State’s Opening Brief at 36, 47. The Legislature approved the legislation based on the negotiators’ representations during the legislative hearings.

This fact does not mean that the parties’ intent for the legislation controls, however, as Senator Noh remarked with respect to Senator Crapo’s proposal to draft a formal statement of legislative intent: “I would think this would be more a matter of legislative intent rather than negotiators intent.”³¹ See *Walsh v. Growing*, 494 A.2d 543, 546 (R.I. 1985) (holding that the intent of the organization that sponsored legislation “has no bearing on judicial interpretation of legislative intent”).³² Put another way, the parties’ subjective intent for the legislation is irrelevant to the State’s motion and cannot play a role in establishing legislative intent. When determining the legislative intent of Idaho Code § 42-203B, what matters is the parties’ objective testimony to the Legislature as preserved in the legislative record.

IV. THE AFFIDAVIT OF GREG PANTER DOES NOT CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE STATE’S MOTION FOR SUMMARY JUDGMENT AND SHOULD BE STRICKEN.

³⁰ According to Idaho Power’s attorney and Swan Falls negotiator Tom Nelson, the parties also “stood shoulder to shoulder” in support of the legislation:

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.

Second Affidavit of Michael C. Orr at Exhibit 5 (excerpts of “Deposition of Thomas G. Nelson (*In re SRBA*) (Oct. 31, 1990) (“Nelson Depo.”), p. 179.

³¹ Orr Aff. at Exhibit 39, p. 38 (transcript of committee meeting of Jan. 25, 1985).

³² See also 2A STATUTES AND STATUTORY CONSTRUCTION § 48.02, pp. 419-20 (Norman J. Singer, ed.) (2000 West Group) (“Basing decisions of statutory interpretation on historical events that are, practically speaking, obscured from the awareness of persons not directly involved with the legislative process has the character of enforcing secret laws.”)

The above discussion demonstrates that the recently executed Affidavit of Greg Panter In Support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Panter Affidavit") fails to raise genuine disputes of material fact on the State's motion. Indeed, the Court should strike the Panter Affidavit and the State has so moved.

The State's motion for partial summary judgment is grounded in section 42-203B and raises only legal questions of statutory interpretation. Although Mr. Panter professes to have first-hand knowledge of the Legislature's purpose in enacting Idaho Code § 42-203B, it is well established in Idaho that statutory analysis looks first to the plain language, and, if that language is ambiguous, to the legislative history. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007); *Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 225, 108 P.3d 370, 372 (2005); *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 398-399, 111 P.3d 73, 83-84 (2005).

Post-enactment affidavits of legislators have no place in a legislative history analysis. *See Gillihan v. Gump*, 140 Idaho 264, 268-69, 92 P.3d 514, 518-19 (2004) (holding that post-enactment affidavits of individual legislators are not part of the legislative record and therefore "The Court will not consider the affidavit presented by the Appellants"). This rule applies with even greater force to the affidavit of a Company lobbyist submitted more than twenty years after the enactment of Idaho Code § 42-203B.

As a matter of law, the recollections of the Company's lobbyist are irrelevant to the question of what the Legislature intended when it enacted the Swan Falls legislation. Consequently, the contents of the Panter Affidavit do not create a genuine issue of

material fact on the State's motion. The Panter Affidavit's factual assertions concerning the Swan Falls negotiations, the Agreement, and the intent of the parties are simply attempts to litigate Idaho Power's contractual and equitable theories in the context of the statutory interpretation question posed by the State's motion. The issue is what the Legislature intended and not what a Company lobbyist recalls and presents by way of an affidavit years later. Each party's motion must be evaluated on its own merits, *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 395 (2007), and factual disputes that are not material may not be used to prevent entry of summary judgment. *See Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 801, 623 P.2d 103, 109 (1980) ("the motion should be granted even though factual dispute on some other issue might otherwise prevent the entry of judgment"); *see also Collord v. Cooley*, 92 Idaho 789, 792, 451 P.2d 535, 538 (1969) ("if there is no genuine dispute of material fact as to that defense, even though a dispute of fact may exist as to the merits of the plaintiff's claim, summary judgment should be granted").³³

V. THE FEDERAL ACTIONS DID NOT RECOGNIZE THAT IDAHO POWER OWNED THE WATER RIGHTS HELD IN TRUST AND THE STATE HAS CONSISTENTLY ASSERTED TITLE TO THOSE WATER RIGHTS.

Idaho Power's arguments concerning the orders and findings of Congress and the Federal Energy Regulatory Commission (FERC) are superfluous and legally irrelevant because they fail to address the statutory basis of the State's motion for summary judgment, and because the statutory language and the legislative record conclusively

³³ Mr. Panter's affidavit must also be stricken for non-compliance with I.R.C.P. 56(e) because the affidavit cannot "set forth such facts as would be admissible in evidence" on the State's motion for partial summary judgment. I.R.C.P. 56(e); *see also Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 610, 862 P.2d 299, 302 (1993) (recognizing that affidavits that fail to comply with I.R.C.P. 56(e) may be stricken); *Gillihan*, 140 Idaho at 269, 92 P.3d at 519 (holding that post-enactment affidavits of individual legislators will not be considered for purposes of determining legislative intent).

established that the State obtained legal title to the water rights for flows in excess of the minimum flow established at the Murphy Gage.

Further, the plain language of the statute and the Statement of Legislative Intent as quoted previously herein conclusively demonstrate that Idaho Power is entirely wrong in arguing that Congress and FERC found or declared that Idaho Power was the sole legal owner of the water rights. Rather, Congress and FERC merely provided Idaho Power with legal protection against claims that it had alienated property in violation of applicable law, because it was plain for all to see in the language of the statute, the legislative record, and even the Agreement, that Idaho Power had indeed given up legal ownership of its water rights.

As pointed out in the State of Idaho's Memorandum in Response to Idaho Power Company's Cross-Motion for Summary Judgment to Idaho Power's Cross-Motion for Summary Judgment ("State Response to Cross-Motion for Summary Judgment") at pages 46-48, it was widely reported in the news media that Idaho Power would "relinquish," "give up," "drop" or "reduce" part of its water rights claims under the settlement.³⁴ Even Idaho Power's official history described "Idaho Power water rights **surrendered** by the agreement and placed into trust by the state."³⁵ What Idaho Power sought and obtained from the federal government were not declarations of ownership but legal protection against alienation claims.³⁶ The State supported this effort as required by the Agreement,

³⁴ 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), Oct. 12, 1984; Morning News (Blackfoot), Oct. 8, 1984; Idaho Press-Tribune (Caldwell) Oct. 1, 1984).

³⁵ 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) (excerpts attached hereto as Appendix C).

³⁶ Indeed, it would have made little sense for the Company to obtain declarations of ownership from the federal government if, as Idaho Power claims, it was clear that Idaho Power had retained ownership.

and because the Company retained the equitable right to use water under the water rights held in trust by the State for hydropower purposes.

Just as Idaho Power viewed itself as having surrendered legal title to water rights into the trust, the State viewed itself as legal owner of the water rights and has consistently maintained that position. Idaho Power's arguments that the State's claim of legal ownership is a new development and that the State has never before asserted ownership or acted as the legal owner of the water rights in question are incorrect. This subject is discussed fully in the State Response to Cross-Motion for Summary Judgment, at pages 36-40.

VI. IDAHO POWER'S ARGUMENTS REGARDING THE SWAN FALLS AGREEMENT CANNOT CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE STATE'S MOTION.

Idaho Power's argument that the Court must consult the Swan Falls Agreement and explore the parties' contractual intent in order to ascertain the legislative intent behind Idaho Code § 42-203B is contrary to established law. Private intent does not control the interpretation of public enactments. *See Walsh*, 494 A.2d at 546 (intent of organization that sponsored legislation "has no bearing on judicial interpretation of legislative intent").³⁷

The question posed by ambiguous statutory language is one of legislative intent, not contractual intent. *See State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999) ("When the Court must engage in statutory construction [because ambiguity exists], it has the duty to ascertain the legislative intent, and give effect to that intent"). "Statutes are

³⁷ *See also* 2A STATUTES AND STATUTORY CONSTRUCTION § 48.02, pp. 419-20 (Norman J. Singer, ed.) (2000 West Group) ("Basing decisions of statutory interpretation on historical events that are, practically speaking, obscured from the awareness of persons not directly involved with the legislative process has the character of enforcing secret laws.")

not contracts and it is the intent of the legislature and not of any other ‘party’ which is decisive in their construction.” *City of Fitzgerald v. Newcomer*, 291 S.E.2d 766, 768 (Ga. Ct. App. 1982). Courts have recognized this principle for many years.

In cases of contract, it is the purpose of courts to ascertain and give effect to the real intent of the parties. . . . In cases resting on statutes there is no mutuality of agreement to be sought out. All the terms of the compact are dictated and accepted by one side, and the only intent which judicial construction can make certain is the intent of the legislative power.

Union Pac. R.R. v. U.S., 10 Ct.Cl. 548, ___, 1800 WL 2267, *19 (Ct.Cl. 1874).

In construing a contract it is the duty of the court to ascertain and give effect to the real intent of the parties. That intent is the mutual understanding and agreement of the parties. But in construing a statute no mutuality of agreement is to be sought out. Rather, the intent to be ascertained is that of the legislative body.

B. & H. Passmore Metal & Roofing Co. v. New Amsterdam Cas. Co., 147 F.2d 536, 538 (10th Cir. 1945); *see also S. Dakota Public Entity Pool for Liab. v. Winger*, 566 N.W.2d 125, 128 (S.D. 1997) (citing and quoting *B. & H. Passmore*).

Idaho Power’s reliance on the Agreement also fails because Idaho Code § 42-203B expressly defines the role of the Swan Falls Agreement in the interpretation and application of the statute. The statute provides that the Agreement is “found and declared” to “define such rights in excess [of the level of the applicable minimum stream flow] as being held in trust by the state under subsection (2) of this section.” Idaho Code § 42-203B(5). Under subsection (2), the only additional role the Agreement has is to define how the water rights **below** the level of the minimum flows— that is, the water rights the State does **not** hold in trust— are unsubordinated to other uses. In short, the ownership and subordination of the water rights for flows up to the level of 3,900 c.f.s. and 5,600 c.f.s. minimum flows established at the Murphy Gage are defined by the Swan Falls Agreement. The ownership and subordination of the water rights for flows in

excess of the minimum flows established at the Murphy Gage are defined by Idaho Code § 42-203B—and pursuant to that statute the State holds the water rights in trust.

There are no remaining questions of contractual interpretation or intent with respect to the role of the Swan Falls Agreement in Idaho Code § 42-203B. The Legislature has conclusively defined what the Agreement means within the statutory trust framework. Any foray into such questions is not only pointless but also contrary to the clearly expressed legislative intent of Idaho Code § 42-203B.

The Agreement's plain language makes this very point. The Agreement, and particularly the definition of the Company's water right in Paragraph 7, have no legal effect outside of or inconsistent with Idaho Code § 42-203B because the prior enactment of Idaho Code § 42-203B was necessary for the Agreement, and in particular Paragraph 7, to become binding and effective. *See* Agreement ¶¶ 13(A)(vii), 1, 10, 16.³⁸

Thus, the trust arose and the State took legal title to the portion of the water rights in excess of the minimum flows established at the Murphy Gage by operation of law, as an express precondition for the Agreement and Paragraph 7 to have any legal meaning or effect. The plain language of the Agreement is consistent with the State's legal ownership of the water rights for flows above the Murphy minimums, and inconsistent with Idaho Power's theory that it has sole ownership of the water rights. These issues are discussed in detail in the State Response to Cross-Motion for Summary Judgment at 13-23.

Idaho Power's reliance on the Agreement as the controlling legal authority is further flawed in that the Agreement contains almost no substance. Except for the

³⁸ Enactment of Idaho Code § 42-203B was also necessary to prevent automatic termination. Agreement ¶ 16.

contractual definition of the Company's water right to seasonal flows of 3,900 c.f.s and 5,600 c.f.s. as measured at the Murphy Gage, the Agreement does not set forth any of the substantive components of the settlement: it was primarily a procedural vehicle for proposing a package settlement that could only be achieved by judicial, legislative and administrative action.

The substantive elements of the Swan Falls settlement are in the legislation and State Water Plan amendments proposed in the Exhibits:³⁹ the "public interest criteria" (Exhibit 1); the general adjudication legislation (Exhibit 2); the hydrologic and economic studies legislation (Exhibit 3); the legislation for the allocation of gains upon sale of a water right (Exhibit 4); the legislation limiting IPUC jurisdiction to protect Idaho Power and declaring the settlement in the public interest (Exhibit 5); the recommendations to the Idaho Water Resource Board to increase the minimum daily flow at the Murphy Gage to 3,900 c.f.s and 5,600 c.f.s., and to retain the zero c.f.s. minimum daily flow at the Milner gauging station (Exhibit 6); the trust and subordination legislation (Exhibits 7A and 7B); and the legislation providing IDWR with rulemaking and moratorium authority (Exhibit 8). The settlement was in the Exhibits, not the contractual provisions of the Agreement.⁴⁰

³⁹ While the Company's unsubordinated water right to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. is defined in the contractual provisions of the Agreement, it was nonetheless contingent on enactment of Exhibit 7B (Idaho Code § 42-203B).

⁴⁰ This is precisely what the parties had envisioned in the Framework for Final Resolution of Snake River Water Rights Controversy: "In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative, and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction." Orr Aff. at Exhibit 29, p. 2. While the six steps the parties identified in the "Framework" can easily be found in the Exhibits, they are nowhere to be found in the text of the Agreement itself. The six actions the parties identified in the "Framework" were: (1) adjusting the State Water Plan's minimum stream flow for the Murphy Gage upwards to 3,900 c.f.s. and 5,600 c.f.s.; (2) implementing "public interest" criteria for new water appropriations; (3) commencement of a general adjudication; (4) encouragement of an effective water marketing system; (5) hydrologic and economic studies; and (6) legislation clarifying that proceeds from utility sales of water rights will benefit ratepayers. The trust was not mentioned in the Framework because the trust had not been conceived of at the time. The trust only entered into the negotiations in the

The negotiators made this clear to the Legislature and the public. In his opening remarks in the Senate Resources and Environment Committee's "Public Hearing" on January 21, 1985, Pat Costello explained:

The piece -- **the five pieces of legislation** that have been introduced so far in the legislature, as well as one additional one which would be introduced in the next week or so, **are the core of the agreement** that was entered into. It's essential, in order to implement the agreement, that all of these pieces of legislation pass.⁴¹

In explaining that pre-enactment changes to the proposed legislation could be problematic during an Idaho Water Resource Board hearing on the day the Agreement was signed, Mr. Costello characterized the proposed legislation as "the heart of the bargain":

MR. COSTELLO: If they mess with it too much, it will destroy the bargain. We'll have to renegotiate the whole deal. But we've got three tiers to the specificity here. If you'll look on pages two and three, items A, B, C, D, E, F, and G, item A for example says "as set forth in Exhibit 1." That means we don't -- this was an item that was **the heart of the bargain** and we don't want to encourage any adjustments there because it really is in the area that a shift one direction or the other could destroy the mutuality of the bargain.⁴²

Mr. Costello was by no means alone in this view. It was common understanding that the substance of the settlement was in the legislation. Sherl Chapman, representative of the Idaho Water Users Association, told the Senate Resources Committee that "Senate Bill 1008 in particular is the real heart, I think, of the negotiated settlement."⁴³ Tom Nelson also explained that "we're tied to this program and we're committed to it, and as

final week before the Agreement was signed, as a means of breaking the impasse on the question of "subordinated" versus "subordinatable" water rights.

⁴¹ Orr Aff. at Exhibit 38, p.7 (transcript of the Senate Resources and Environment Committee meeting of Jan. 21, 1985) (emphasis added); *see also id.* at Exhibit 34a, Track 1, 06:24 – 06:47 (audio recording of same); *see also id.* at Exhibit 9, p. 1 (minutes of same).

⁴² Orr Aff. at Exhibit 41, Track 1, 26:30-28:24 (recording of IWRB public information meeting of Oct. 25, 1984); *see also id.* at Exhibit 44, pp.23-24 (transcript of same).

⁴³ Orr Aff. at Exhibit 38, p.20 (transcript of committee hearing of Jan. 21, 1985). Sections 42-203B and 42-203C were enacted via Senate Bill 1008.

soon as we start amending it we get in a real mess.”⁴⁴ He left no doubt that without the legislation there simply was no settlement:

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.

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.⁴⁵

The only reported Idaho case involving a challenge to the Swan Falls Agreement also demonstrates that the legislation was the settlement's core. In *Miles v. Idaho Power*, 116 Idaho 635, 778 P.2d 757 (1989), the Supreme Court did not engage in any analysis of the text of the Agreement, but considered only the implementing legislation. This was because there was nothing in the text of the Agreement that informed the issue before the Court. The same is true here: aside from the passage in paragraph 4 obligating the State “to assert the existence of water rights held in trust by the State,” there is simply nothing in the text of the Agreement that pertains to the trust.

No one disputes that the legislation and State Water Plan amendments required to implement the settlement proposed under the Swan Falls Agreement have been passed. The Agreement has been fully performed, and it contains no substantive provisions pertaining to the water rights held in trust by the State pursuant to Idaho Code § 42-203B. Idaho Power's insistence that the Court must look to the Swan Falls Agreement for

⁴⁴ Orr Aff. at Exhibit 8, p.6 (minutes of committee meeting of Jan. 18, 1985).

⁴⁵ 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).

purposes of understanding the trust and Idaho Code § 42-203B is legally flawed and pointless. The only thing in the text of the Swan Falls Agreement that would cast any light on the issue is the statement on the first page that “[t]he State shall . . . assert the existence of water rights held in trust by the state.” Agreement ¶ 4. The State is doing just that.

VII. CHANGES IN STATE LAW DO NOT CONSTITUTE CHANGES TO THE SWAN FALLS AGREEMENT.

Idaho Power’s argument that the State is attempting to unilaterally change the terms of the Agreement is flawed for similar reasons. As discussed above, the Agreement has been fully performed, and the settlement has been implemented by legislation and the State Water Plan. There is nothing left to do under the Agreement and nothing to change. The ongoing rights and obligations of the State and Idaho Power are controlled by State law, just as they would be for any other water right holder.

To the extent the Company is mistaken to the extent it contends that the Agreement precludes the Legislature from subsequently amending the Swan Falls statutory provisions. The Agreement did not, and could not, require the State to leave the implementing legislation in place indefinitely, unchanged, nor could it prevent the State from amending the controlling statutes. Indeed, Idaho Power’s attorney was unambiguous on this point in his testimony to the House Resources and Conservation Committee: **“If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have the power to do, would be to change the contractual recognition of the company’s water rights at Murphy gage.”**⁴⁶

⁴⁶ Ott Aff. at Exhibit 20, p.1 (committee minutes of Feb. 11, 1985) (emphasis added).

The Statement of Legislative Intent, drafted with Idaho Power's review and comment, also expressly recognizes that the settlement does not "freeze" State law, and that the State is free to change or amend the "public interest criteria" or any other State law applicable in evaluating applications for new water rights that would trigger subordination of the water rights held in trust:

The legislation also specifically ties the appropriation of water from the trust to conformance with "state law" and not to the new public interest criteria. This provides flexibility to the state in the future to change the law if it becomes necessary, without modifying the trust provisions. Thus, state water policy is not frozen by this legislation.⁴⁷

Idaho Power's argument that the Legislature cannot unilaterally change the terms of the settlement is inapposite. The issue is whether the State may amend or repeal the statutes that govern and analyze applications to appropriate water that is used for hydropower purposes under the hydropower water rights the State holds in trust. The obvious answer is yes: as a matter of general state law, the statutory language of Idaho Code § 42-203B, the legislative history, and even under the Swan Falls Agreement's plain terms. Idaho Power's argument misapprehends the controlling legal authority and the attempts to use the Agreement to trump State law.

VIII. THE QUESTION OF SUBORDINATION OF THE WATER RIGHTS HELD IN TRUST UNDER IDAHO CODE § 42-203B TO USES OF WATER FOR GROUND WATER RECHARGE PURPOSES IS SUBSUMED IN THE STATE'S MOTION FOR SUMMARY JUDGMENT, AND IDAHO POWER HAS CONCEDED THE QUESTION.

The State's motion for partial summary judgment states "[t]hat pursuant to Idaho Code § 42-203B, the water rights for power purposes held in trust by the State under Idaho Code § 42-203B are subject to subordination to and depletion by future upstream

⁴⁷ Orr Aff. at Exhibit 28, pp. 5-6 ("Statement of Legislative Intent – S 1008") (1985 Senate Journal pp. 60-61).

beneficial users whose rights are acquired pursuant to State law.” State of Idaho’s Motion for Partial Summary Judgment at 2. This language, which closely tracks the language of Idaho Code § 42-203B, clearly encompasses the question of subordination of the water rights held in trust to any use, including but not limited to ground water recharge.

The State also asserted in its opening brief that section 42-203B subordinates the water rights held in trust to **any** use of water under a water right acquired pursuant to State law, that the question of subordination is not governed by the nature of the proposed new use but instead whether the new use is made under a lawfully approved water right, and that Idaho Code § 42-203B requires that the water rights held in trust be decreed without subordination limitations beyond the requirement that new water rights be acquired pursuant to State law. State’s Opening Brief at 32, 33, 34.

The State also pointed out testimony of Idaho Power’s counsel to the Senate Resources Committee demonstrating that subordination is governed by applicable state law rather than a laundry list of favored and disfavored uses:

The statute and the contract don’t prohibit development. They’re not intended to and they don’t. They simply say, look, you may have an adverse impact on hydropower generation. That element of the public interest has to be addressed before you have further development. And if it’s addressed and it’s found to be in the public interest that you have that impact on hydropower, that it’s in your state’s overall best interest to proceed with development, you proceed with development.⁴⁸

The State pointed out similar written testimony the Attorney General gave to the Senate Resources Committee:

⁴⁸ State’s Opening Brief at 39; Orr Aff. at Exhibit 33, Track 2, 1:24 – 1:59; (recording of committee hearing of Jan. 18, 1985); *see also id.* at Exhibit 8, p. 2 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 37, p. 15 (transcript).

It is very important to note that the water held in trust by the State subject to reallocation is tied to state law and not the public interest criteria. This is very important because it gives the State flexibility into the future. If the public interest criteria is [sic] not, after trial and error, precisely what the legislature desires, the standards can be changed without affecting this agreement, **state legal ownership of the water rights involved** and the trust arrangement established.⁴⁹

The State's motion and briefing allowed for no categorical exceptions to subordination based on the nature of the use. The entire point of the motion and the briefing was that the water rights held in trust under Idaho Code § 42-203B are subordinated to any lawful use of water under a water right approved pursuant to applicable State law.

Idaho Power has no credible basis to now assert that the State's summary judgment motion does not encompass all uses, including but not limited to recharge. The State's interest is in seeing the water rights held in trust decreed with subordination language that gives effect to the Legislature's intent. The State had no reason to target recharge or any other particular use for purposes of a summary judgment decision. Indeed, a limited motion that did not encompass all uses would have been contrary to the Legislative intent of having each proposal evaluated under its individual merits via the public interest analysis.

Idaho Power evidently recognized the question was broad enough to encompass recharge but simply chose to ignore it. The State also informed the Court and counsel, during the December 18, 2007 status conference, that the State viewed its motion as

⁴⁹ State's Opening Brief at 39; Orr. Aff. at Exhibit 8 (committee minutes of Jan. 18, 1985), attachment entitled. "Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008," pp. 5-6 (emphasis added).

dispositive with respect to the recharge question.⁵⁰ Idaho Power has knowingly waived the issue and should not be heard to complain that it did not have an opportunity to present its views.

Idaho Power's protest is little more than an attempt to defeat the State's motion by failing to argue it. The applicable statutory language is clear that the water rights held in trust shall be subordinate to any new use of water authorized under applicable State law.⁵¹ This obviously includes uses of water for ground water recharge purposes and, as previously discussed, the contractual provisions of the Swan Falls Agreement control subordination questions only with respect to the water rights for seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. Idaho Code § 42-203B controls the subordination of the water rights for flows in excess of those levels and provides that State law, including the "public interest" analysis of section 42-203C, governs the question of the uses to which the water rights held in trust will be subordinated.

Idaho Power's assertion that the contractual provisions of the Agreement control subordination of the water rights for flows in excess of the seasonal minimum flows finds no support in the applicable statutes or the implementing administrative rules. There is no mention of a recharge limitation or exception for purposes of subordination, or any corresponding contractual limitations imposed by the Agreement, in sections 42-203B or 42-203C, or in the "Water Appropriation Rules." *See generally* IDAPA 37.03.080.000-.999.

⁵⁰ Idaho Power Company's Scheduling and Status Conference Report listed seven issues, labeled A – G, on page 3. The recharge issue was item E. The State informed the Court and counsel that the State viewed its motion as dispositive as to issues A – E.

⁵¹ The Office of the Idaho Attorney General has issued an opinion addressing certain provisions of State law applicable to uses of water for ground water recharge purposes. *See* Idaho Attorney General Opinion 06-2A, available from the website of the Idaho Office of the Attorney General (http://www2.state.id.us/ag/ops_guide_cert/2006/Opinion06-2A.pdf).

Idaho Power's current assertion that the contractual provisions of the Agreement control subordination of the water rights for flows in excess of the seasonal minimum flows is also belied by its past actions. In the Idaho Water Resource Board Public Information Meeting of October 31, 1984, the negotiators for the Governor and Idaho Power spoke with one voice in explaining that the water rights for flows above the minimums are subordinated by operation of law upon issuance of a new water right:

MR. COSTELLO: . . . The right becomes subordinate to each new right automatically by operation of law. If you acquire a permit from the Department of Water Resources and develop it into a license, it -- you -- the power company's right is subordinate to yours immediately upon the issuance of the license, if this all is enacted by the legislature.

MR. NELSON: It doesn't take a separate proceeding. It's done as part of the licensing process.⁵²

Idaho Power closely monitored IDWR's development of the Water Appropriation Rules shortly after the enactment of sections 42-203B and 42-203C,⁵³ submitted detailed formal comments and even challenged the rules in a declaratory judgment action in 1986.⁵⁴ The Company never asserted in its filings with IDWR or the Court that the water rights held in trust could not be subordinated to recharge or any other particular use, or that the contractual provisions of the Agreement control subordination. To the contrary, the Company's comments and court pleadings consistently relied on the standards established by sections 42-203B and 42-203C as the controlling subordination authority.⁵⁵

⁵² Orr Aff. at Exhibit 42, Track 1, 42:22 – Track 2, 00:16 (recording of IWRB public information meeting, Oct. 31, 1984); *see also id.* at Exhibit 45, pp. 36-37 (transcript of same).

⁵³ At the time, they were also sometimes called the "Water Allocation Rules." *See* Orr Aff. at Exhibit 54 ("Currents," Dec. 1984 (IDWR)).

⁵⁴ *See generally* Orr Aff. at Exhibits 48-51, 53, 55-59.

⁵⁵ *See generally* Orr Aff. at Exhibits 50, 53, 57-59.

The Company alleged in its declaratory judgment petition challenging the rules that the Company was “the beneficiary of the trust established by § 42-203B, Idaho Code.”⁵⁶ Moreover, the Water Appropriation Rules defined “Trust Water” not as a “block of water” or as “600 c.f.s.,” but as “[t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action . . .” IDAPA 37.03.08.010. Despite its scrutiny of the rules, the Company did not challenge this definition in the declaratory judgment petition, and the definition remains effective.

The State is entitled to summary judgment that the water rights held in trust by the State are subordinated to any use of water rights as provided by State law. The Company should not be allowed to defeat the State’s properly presented motion on the ground that the Company disagrees with the State’s legal theory and saw no need to address it.

IX. THE STATE IS NOT BARRED BY THE CONSENT JUDGMENTS FROM ASSERTING LEGAL TITLE TO THE WATER RIGHTS AT ISSUE

Idaho Power argues that “the State is barred by the Consent Decrees from now asserting that Idaho Power’s water rights should be titled in the name of the State.” Idaho Power Brief at 43. The State has addressed this argument at length in the State Response to Cross-Motion for Summary Judgment, and hereby incorporates those arguments herein by reference. *See* State’s Response at 12-33.

Idaho Power’s assertion that the Consent Judgments indicate that legal title to the water rights at issue is held by Idaho Power is inconsistent with the plain language of the Consent Judgments, the Swan Falls Agreement, and the implementing legislation, as well

⁵⁶ Orr Aff. at Exhibit 56, p.3 (“Petition for Declaratory Judgment”) (*Idaho Power Co. v. IDWR*, Fifth Jud. Dist., case no. 38526) (Apr. 28, 1986).

as the admissions of Idaho Power's own representatives. *Id.* at 15-23. Notably, the plain language of Idaho Code § 42-203B(5) expressly provides that, pursuant to the Swan Falls Agreement, the State holds water rights above the established minimum flows in trust. Idaho Power's interpretation of the Consent Judgments would render the trust concept completely meaningless, particularly as the State agreed to the trust compromise only because it provided the State legal ownership of the water rights, thus ensuring that the State, rather than Idaho Power, would be able to regulate the use and future development of the Snake River. *See id.* at 23-28. Regardless, the Fourth Judicial District Court lacked the jurisdiction and legal authority to adjudicate the question of legal ownership of the water rights at issue, as "[a]ll 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); *see* State Response to Cross-Motion for Summary Judgment at 28-31.

X. THE STATE HAD THE CONSTITUTIONAL AND STATUTORY AUTHORITY, AS WELL AS IDAHO POWER'S CONSENT, TO AFFECT IDAHO POWER'S WATER RIGHTS.

In its Response, Idaho Power asserts that neither the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution ("the 1928 Amendment") nor Idaho Code § 42-203B provided the State with the authority "to eliminate or adversely affect pre-existing vested water rights including Idaho Power's rights at Swan Falls." Idaho Power Brief at 46 (capitalization omitted). The 1928 Amendment provided the following: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, **except that the state may regulate and limit the use thereof for power purposes.**" Idaho Const. art. XV § 3 (emphasis added). Idaho Code § 42-203B

provided the specific means for the State's regulation and limitation of the appropriation of water for power purposes. I.C. § 42-203B. Idaho Power argues, however, that because its water rights vested before 1928, neither the Amendment nor the Legislation provided the authority to affect those rights.

Idaho Power's argument fails on several fronts. The State has the general constitutional authority to take measures that affect vested property rights. Furthermore, in this specific instance, the State has statutory authority, under Idaho Code § 42-203B, to regulate and limit vested water rights. In addition, Idaho Power specifically consented to any alleged "taking" by the State of Idaho Power's water rights.

A. The State has the Authority to Affect Vested Property Rights.

The Idaho State Constitution confirms the State's power of eminent domain, providing that "[p]rivate property may be taken for public use" Idaho Const. art. I § 14; *see also Washington Water Power Co. v. Waters*, 186 F. 572, 575 (C.C.Idaho 1910) ("It is well understood that the power of eminent domain is an incident of sovereignty, and may therefore be exercised either by the federal government, or by a state, by virtue of its sovereignty," subject only to any limitations imposed by the Legislature or judiciary.) When exercising its power of eminent domain, the State is generally "obligated to [pay] a just compensation, to be ascertained in the manner prescribed by law" Idaho Const. art. I § 14. A "taking" by the State necessarily affects a vested right; otherwise, there would be no need for the requirement that the State provide "just compensation" to the holder of that property right.

Nothing in the 1928 Amendment or in Idaho Code § 42-203B eliminates the State's general authority to take or affect a vested right, including a vested water right,

under its power of eminent domain. To the contrary, the 1928 Amendment grants further, specific authority to the State to “limit or regulate the use of [of water] for power purposes,” while Section 42-203B delineates the procedures for carrying out that authority. Idaho Const. art. XV § 3; I.C. § 42-203B.

B. The Legislature Exercised its Authority to Limit and Regulate Appropriation of Water for Power Purposes Through Idaho Code § 42-203B.

Idaho Power first argues that the 1928 Amendment was not self-executing “and clearly contemplates some further action by the State.” Idaho Power Brief at 47. As Idaho Power itself has acknowledged, however, the Swan Falls Legislation was just such an action by the State, “setting forth the ‘rules or means’ by which the State could subordinate hydropower water rights.” *Id.* at 48. Thus, despite whether the 1928 Amendment was self-executing, the Legislature has exercised its authority under the Amendment by implementing specific legislation. *See* I.C. § 42-203B. Idaho Code § 42-203B(1) specifically invokes the State’s authority under the 1928 Amendment, noting: “The legislature finds and declares that it is in the public interest to specifically implement the state’s power to regulate and limit the use of water for power purposes.” I.C. § 42-203B(1); *see also* Orr Aff., Exhibit 10, p. 16 (Statement of Idaho Power Co.) (noting that the authority for the Swan Falls Legislation stemmed from “the State’s power to ‘regulate and limit’ the use of water for hydropower purposes.”).

C. Idaho Code § 42-203B is Applicable to Pre-existing Water Rights.

Idaho Power next argues that its pre-existing water rights could not be subject to the provisions of Idaho Code § 42-203B. Idaho Power Brief at 48. The language and

substance of Idaho Code § 42-203B, however, contradicts Idaho Power's assertion that the statute was not intended to apply to pre-existing rights.

In fact, Sections 42-203B(2) and (3) were specifically crafted to address pre-existing water rights by creating the means to establish a trust and the application of a set of public interest criteria. I.C. § 42-203B(2), (3). The trust provisions are unnecessary with respect to future water rights, as the State has the express authority under the statute to subordinate all future water rights for power purposes to subsequent upstream beneficial users, without need for the establishment of a trust or reference to public interest criteria. I.C. § 42-203B(6). If the statute had been intended to apply only to future water rights, then there would have been no need at all for including the trust provisions contained in Sections 42-203B(2) and (3) or the public interest criteria set forth in Idaho Code § 42-203C. In recognition of the State's need to subordinate pre-existing water rights for power purposes in order to provide for future uses and development of Idaho's waterways – and consistent with the negotiated compromise reached by the parties to the Swan Falls Agreement – the Legislature enabled the State to subordinate existing rights by using a trust and, in the case of agreements such as the Swan Falls Agreement, by applying public interest criteria when assessing subsequent beneficial uses. I.C. § 42-203B(2), (3); I.C. § 42-203C.

The fact that subsections (2) and (3) are applicable to pre-existing water rights was specifically addressed during the public discussions leading up to the implementation of the Legislation. During a public information meeting held before the Water Resources Board on November 1, 1984, Pat Costello provided the following explanation of the application of 42-203B:

UNKNOWN SPEAKER: . . . Under the subordination deal, the language, is it going to cover all rivers?

MR. COSTELLO: Well, it would—yeah. Prospective subordination, right.^[57] Yeah. . . .

UNKNOWN SPEAKER: New water; not old water.

MR. COSTELLO: Right. **Except that it would cover old water to the extent that if there are unsubordinated 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 recognizing an unsubordinated 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.**

Orr Aff., Exhibit 46 at 62-63 (emphasis added).

Similarly, during the November 1, 1984 public information meeting, Pat Kole commented on the potential application of the proposed Swan Falls Legislation to rights already held by Washington Water Power on the Spokane River:

MR. KOLE: Well, those rights **at the present time** are unsubordinated. It's our intent, in looking at Exhibit 7B, to provide a voluntary mechanism by which Washington Water Power will come in and negotiate with the state, much the same as Idaho Power has, and enter into a similar arrangement so that they would get the benefit of [the public interest criteria.] And at the same time, the state would be able to protect people who are currently using water.

As you might know, the facility on the Spokane River really is very analogous to the Swan Falls situation, and because if they were to assert their water right, current water users would have to shut their water use off.

Orr Aff., Exhibit 46 at 21 (emphasis added). Mr. Kole also addressed the issue during a public information meeting of October 31, 1984:

MR. KOLE: . . . You folks up there [in Post Falls] have got the exact same problem that we've got on the Snake River. I don't know if you've read about it, but the dam at Post Falls owned by Washington Water Power **has an earlier water right than most of the irrigation water**

⁵⁷ While the subordination itself would be prospective, occurring in the future, the subordination was intended to be applicable to existing water rights.

rights up there. And any time that they wanted to, they could throw your system into jeopardy by calling all that water down.

Now, what we have got in this package is a piece of legislation that will encourage other utilities like Washington Water Power to come in and voluntarily negotiate with the state to get the same kind of protection that Idaho Power is getting in exchange for which they would **give up their priority** to all of you folks.

Orr Aff., Exhibit 45 at. 20 (emphasis added).

These comments highlight a primary purpose of the Swan Falls Legislation: to ensure that the State could better regulate and limit the use of water for power purposes so power companies like Idaho Power and Washington Water Power would not monopolize Idaho's rivers to the detriment of other beneficial users. The statute would have failed to address this significant goal if it only pertained to future water rights, rather than the substantial pre-existing rights held by companies such as Washington Water Power and Idaho Power. *See id.*

In contrast to the rest of the statute, Idaho Code § 42-203B(6) is the **only** subsection to note that **subsection (6) alone** does not apply to pre-existing water rights. I.C. § 42-203B(6). This is because subsection (6) is the subsection intended to address future hydropower rights, while subsections (2) and (3) pertain to existing hydropower rights. Idaho Power mistakenly relies upon subsection (6) to insinuate that the entire statute does not apply to preexisting water rights, despite the clear language in subsection (6) that it is applicable to only that particular subsection. *Id.*

Idaho Power additionally relies on the language of Section 42-203B(1), which provides:

The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a use of water for power purposes **subordinated by a permit issued after July 1, 1985**, or by an

agreement, to continue using the water pending approval of depletionary future beneficial uses.

I.C. § 42-203B(1) (emphasis added). Significantly, however, this provision does not state that the statute applies only to water permits for power purposes issued after July 1, 1985. Rather, it states that the statute applies to water permits for power purposes that are **subordinated by** later permits issued after July 1, 1985. Neither does the provision limit the date of a qualifying agreement. To the contrary, Section 42-203B(5) even expressly incorporates the preexisting Swan Falls Agreement and thus the preexisting water permits for power purposes subject to the Agreement. I.C. § 42-203B(5).

In short, Idaho Power's incorrect assumption that Idaho Code § 42-203B is inapplicable to preexisting hydropower rights directly contradicts the language and underlying intent of the legislation.

D. The Swan Falls Legislation Does Not Depend Upon the Swan Falls Agreement.

Idaho Power suggests that the 1928 Amendment and Idaho Code § 42-203B did not authorize the State to take actions affecting Idaho Power's pre-existing water rights because, according to Idaho Power, the Swan Falls Legislation is "wholly dependent on an agreement with the holder of the hydropower right, and [is] thus not based on or grounded in the constitutional authority of the State." Idaho Power Brief at 50 (capitalization omitted). Idaho Power construes the Swan Falls Legislation much too narrowly. Idaho Code § 42-203B(2) and (5) provide for the State to negotiate agreements with holders of hydropower rights. While section 42-203B(5) specifically recognizes the Swan Falls Agreement as one such agreement, sections (2) and (5) were not drafted to address **only** the Swan Falls Agreement. As demonstrated by Mr. Kole's testimony,

above, the State explicitly recognized the potential for additional future agreements with holders of pre-existing hydropower rights, such as Washington Water Power. *See* Orr Aff., Exhibit 45 at 20; Exhibit 46 at 21. The Swan Falls legislation was implemented as a comprehensive resolution to the broad issue of hydropower versus alternative beneficial uses of Idaho's water.

Idaho Power's argument rests on the unsupported insinuation that merely because agreements are addressed in a separate subsection of the statute, the State's statutory and constitutional authority suddenly disappears in the event of an agreement. No language in the statute – or in the Swan Falls Agreement itself – supports such a conclusion. In fact, holders of hydropower rights are treated similarly under the statute, regardless of whether they enter into an agreement with the State. Had Idaho Power refused to enter into an agreement with the State, the Company would now nevertheless be subject to the same provisions of section 42-203B – including implementation of a trust – except the Company would be denied the protection of the public interest criteria set forth in section 42-203C. *See* I.C. § 42-203B(3). The difference between subsection (2), which relates to situations involving agreements, and subsection (3), which relates to situations lacking an agreement, is that holders of hydropower rights who volunteer to enter into an agreement gain the protection of the public interest criteria of Section 42-203C, while those who refuse an agreement do not. I.C. § 42-203B(2), (3). Thus, the public interest criteria serve as an incentive for holders of water rights to negotiate with the State. This distinction is the reason for the separate treatment under the statute of those who enter into agreements with the State.

Nothing in the statute suggests that, besides the protection of the public interest criteria, a party entering into an agreement is also entitled to full immunity from the State's statutory and constitutional authority to regulate and limit water used for power purposes. Neither is such a waiver of the State's statutory or constitutional authority set forth in the Swan Falls Agreement itself.

E. Idaho Power Consented to the Exercise of the State's Authority to Affect Vested Water Rights

As discussed in the preceding subsections of this memorandum, the State has the constitutional and statutory authority to take steps that may impact a vested water right. In the event the State does so, the only remaining issue is whether the State is obligated to pay "just compensation" to the holder of the water right. Idaho Const. art. I §14. This question need not be addressed in the present case for the following reasons.

First, there is a significant question of whether the State's actions could even be construed as a "taking," given that Idaho Power has retained the use of the water. Even in the event of future subordination to subsequent upstream users, Idaho Power's current water usage will not necessarily be reduced. If, for example, Idaho Power must subordinate its use of water in excess of the minimum flows at the Murphy Gage to several upstream users, but the flow in the river remains sufficient to accommodate everyone, then Idaho Power will still have the right to use the same amount of water. Significantly, where a deprivation of one's property or use of the property is less than permanent or only intermittent, such deprivation does not constitute a "taking" requiring compensation from the State. *Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004).

Regardless, however, Idaho Power has waived any “taking” that may have occurred by entering into the Swan Falls Agreement. Through the Swan Falls Agreement, Idaho Power explicitly agreed to subordination pursuant to State law. In addition, through the Swan Falls Agreement, Idaho Power explicitly waived its right to any compensation:

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with Paragraph 7B[, which pertains to subordination.]

Orr Aff., Exhibit 29 at 5 (Swan Falls Agreement ¶ 8). A waiver of compensation would not have been necessary, if, as Idaho Power now asserts, there was no change of legal title. Neither would Idaho Power have been obligated by the Swan Falls Agreement to seek an order from the Public Utilities Commission indicating that Idaho Power had not abandoned, relinquished, or transferred utility property (and thus protecting Idaho Power from future ratepayer claims that the Company failed to protect its interests) if there had not been a material change to the *status quo*. *Id.* at 6, ¶ 12(A); *see also* Orr. Aff., Exhibit 10 at 16 (Statement of Idaho Power Co.) (acknowledging that Idaho Power’s support of certain provisions of the proposed legislation “could raise implications of a voluntary **transfer of its water rights**”) (emphasis added); Orr Aff., Exhibit 46 at 51 (Pat Costello stating: “[S]ince this is to an extent a consensual transaction in settling the lawsuit, it would expose the company to a claim that they had arguably given something up. And the only way for us to **induce them to give something up** is to negate the possibility that they would be penalized for that.”) (emphasis added).

Significantly, by entering into the Swan Falls settlement, Idaho Power ensured that it would avoid the risk of relinquishing its water rights to a much greater extent in the pending litigation, which had been remanded for a determination of whether Idaho Power had lost its water rights pursuant to various equitable theories. As Pat Costello stated during the November 1, 1984 public information meeting:

[H]ad the suit gone full-course, there is a very real possibility that [Idaho Power] would have ended up, in essence, giving up or having taken away from them much more than they have in this settlement.

. . . [H]ad the state won the suit, as they very well might have done, we actually are arriving in this settlement at a position where more water is devoted to hydropower and other in-stream uses than would have been the case had it run its full course.

Orr Aff., Exhibit 46 at 51-52. Idaho Power's own attorney acknowledged, at the October 31, 1984 public information meeting, that it was "probably unlikely" that the Company would have won the litigation, while Mr. Costello again emphasized that the Company "may have lost the whole suit." Orr Aff., Exhibit 45 at 17. Pat Kole added: "[W]e all sat down and we all felt that there was a serious risk on both sides." *Id.* at 29. Thus, Idaho Power benefited from the settlement by significantly decreasing its risk of having to surrender its rights to the use of the waters of the Snake River to a much greater extent than occurred through the settlement and subsequent legislation. It is therefore logical that Idaho Power consented to place its water rights in a trust held by the State and further consented to a waiver of compensation.

Idaho Power's own actions in the Swan Falls Agreement confirm that, to the extent the State exercised its authority to "take" vested water rights from the Company, the Company explicitly consented to and waived compensation for the "taking."

XI. THE EQUITABLE DOCTRINES OF REFORMATION, MUTUAL MISTAKE OF FACT, ESTOPPEL, WAIVER, AND LACHES ARE INAPPLICABLE.

In its Response, Idaho Power argues that the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches apply here because Idaho Power has focused its claims on the Swan Falls Agreement and not on the subsequent Legislation. Idaho Power Brief at 61. Idaho Power argues that “it is the Agreement, not the Swan Falls Legislation, that controls the rights and responsibilities of Idaho Power and the State.” *Id.* at 62. Idaho Power’s argument ignores the crucial relationship between the Agreement and the subsequent Legislation. One of the requirements for the Swan Falls Agreement to have any validity or effect was that the Swan Falls Legislation be passed into law.⁵⁸ The Agreement did not create or define the trust at issue. Neither did the Agreement specify how the State evaluates subsequent upstream beneficial uses in comparison to Idaho Power’s use of water for hydropower purposes. Instead, those pivotal issues are governed by the Legislation. I.C. § 42-203B; I.C. § 42-203C. It is the Legislation, not the Agreement, that controls the very rights and responsibilities of the parties with respect to the water rights defined by Idaho Code § 42-203B.

Accordingly, the equitable doctrines raised by Idaho Power do not apply here. As the Idaho courts have long recognized: “[W]herever the rights or the situation of parties

⁵⁸ Idaho Power’s suggestion that separation of powers concerns are raised if the Legislature is allowed “to dictate the scope of a court’s equitable authority to review, interpret, and fashion equitable remedies if the subject of the contract was also addressed by subsequent legislation” ignores the distinction that, in this case, the parties to the initial contract explicitly agreed upon the subsequent legislation as a condition of the Agreement. Thus, the parties to the Agreement had direct and integral involvement in the implementation of the Legislation. Regardless, where a clear statutory provision governs a particular situation, the application of equitable doctrines is inappropriate, as the Idaho judiciary has long recognized. *Allen*, 16 Idaho at ___, 100 P. at 1056. It is part and parcel of the judicial doctrine of “equity following the law” that laws created by the legislature inevitably “dictate the scope of a court’s equitable authority to review, interpret and fashion equitable remedies.” This creates no more of a separation of powers concern than does the more general fact that the courts are obligated to apply and interpret laws created by the legislature.

are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation . . .” *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052, 1056 (1909). Ownership and subordination of the water rights are issues directly controlled by established law and are therefore not appropriate subjects for equitable claims. *See id.*

CONCLUSION

For the reasons set forth herein, the State respectfully requests that the Court grant the State’s motion for partial summary judgment in its entirety.

DATED this 15th day of February 2008.

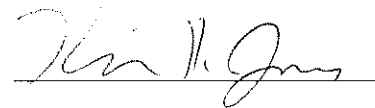
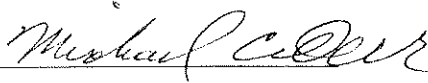
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Civil Litigation Division

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Deputy Attorney General
Natural Resources Division

KARIN D. JONES
Deputy Attorney General
Civil Litigation Division



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February 2008, I caused to be served a true and correct copy of the foregoing REPLY IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT to the following parties by the indicated methods:

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

- ☐ U.S. Mail
- ☒ Hand Delivery
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1221 W. Idaho
Boise, ID 83707

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Idaho Power Company
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IDWR Document Depository
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Boise, ID 83720-0098

- ☐ U.S. Mail
- ☐ Hand Delivery
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- ☒ Statehouse Mail

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Office of the Attorney General
State of Idaho
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- ☒ Not Applicable

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

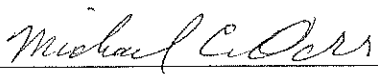
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MICHAEL C. ORR

APPENDIX A

JOURNAL
of the
**HOUSE OF
REPRESENTATIVES**



ORGANIZATIONAL SESSION
and
FIRST REGULAR SESSION

of the
FORTY-EIGHTH LEGISLATURE

of the
STATE OF IDAHO

1985

PROPERTY OF THE LEGISLATIVE COUNCIL
BOISE, IDAHO

ALTER TERMS AND CONDITIONS IN APPROVING THE PLAN AND TO PROVIDE FOR JUDICIAL REVIEW; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-222B, IDAHO CODE, TO PROVIDE FOR THE DESIGNATION OF AREAS WITHIN THE STATE WHERE A PLAN FOR AUGMENTATION IS REQUIRED, TO PROVIDE FOR A HEARING TO REQUIRE CERTAIN FINDINGS AND TO PROVIDE JUDICIAL REVIEW; REPEALING SECTIONS 42-240 AND 42-311, IDAHO CODE; AMENDING CHAPTER 3, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-311, IDAHO CODE, TO PROVIDE THE DIRECTOR THE AUTHORITY TO ISSUE ORDERS PRIOR TO LICENSURE, TO PROVIDE GROUNDS FOR THE ORDER, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING, TO PROVIDE FOR JUDICIAL REVIEW AND TO DEFINE PERMITTEE; AMENDING CHAPTER 3, TITLE 42, IDAHO CODE, BY THE ADDITION OF NEW SECTIONS 42-350, 42-351 AND 42-352, IDAHO CODE, TO PROVIDE THE DIRECTOR THE AUTHORITY TO ISSUE ORDERS AFTER LICENSURE, TO PROVIDE GROUNDS, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING AND JUDICIAL REVIEW, TO DEFINE LICENSEE, TO PROVIDE THE DIRECTOR AUTHORITY TO ISSUE ORDERS FOR ILLEGAL DIVERSION OR USE OF WATER, TO PROVIDE GROUNDS, TO PROVIDE THAT THE ORDER BE SERVED, TO PROVIDE FOR A HEARING AND JUDICIAL REVIEW AND TO PROVIDE CIVIL PENALTIES; AMENDING SECTION 42-1410, IDAHO CODE, TO PROVIDE FOR A DECREE OF ANNUAL VOLUME OF CONSUMPTIVE USE FOR WATER RIGHTS IF THE RIGHTS ARE FOR COMMERCIAL, INDUSTRIAL, MANUFACTURING, MUNICIPAL OR AGRICULTURAL PURPOSES; AMENDING SECTION 42-1734, IDAHO CODE, TO PROVIDE THE WATER RESOURCE BOARD WITH THE POWER AND DUTY TO DEVELOP AND IMPLEMENT A PLAN FOR AUGMENTATION TO ASSURE MAINTENANCE OF ANY MINIMUM STREAM FLOW ESTABLISHED IN THE STATE WATER PLAN OR IN ACCORDANCE WITH APPLICABLE LAW; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1778, IDAHO CODE, TO CREATE THE WATER RIGHTS ENFORCEMENT ACCOUNT IN THE AGENCY ASSET FUND AND TO PROVIDE USES FOR WHICH MONEYS IN THE ACCOUNT MAY BE EXPENDED; AND AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THE DIRECTOR SHALL HAVE THE POWER AND DUTY TO SEEK AN INJUNCTION OR RESTRAINING ORDER REGARDING CERTAIN VIOLATIONS OR ATTEMPTED VIOLATIONS REGARDING WATER LAW, AND TO PROVIDE GROUNDS FOR THE ISSUANCE OF AN INJUNCTION OR TEMPORARY RESTRAINING ORDER.

HOUSE BILL NO. 234

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

RELATING TO PARTICIPATION BY LOCAL GOVERNMENTS IN LOCAL PLANNING AND ZONING; AMENDING SECTION 67-6503, IDAHO CODE, TO PROVIDE FOR THE QUESTION OF PLANNING AND ZONING AT AN ELECTION, PROVIDING THAT A MAJORITY VOTE IS REQUIRED FOR SUCH ELECTION, PROVIDING FOR A PETITION TO REQUIRE AN ELECTION BY THE GOVERNING BOARD ON THE QUESTION OF PLANNING AND ZONING, AND PROVIDING SUCH PETITION SHALL CONTAIN THE SIGNATURES OF AT LEAST FIFTEEN PER CENT OF THE QUALIFIED VOTERS VOTING IN THE LAST GENERAL ELECTION.

H 223, H 224, H 225, H 226, H 227, H 228, H 229, H 230, H 231, H 232, H 233 and H 234 were introduced, read the first time by title and referred to the Judiciary, Rules and Administration Committee for printing.

S 1077, by Education Committee, was introduced, read the first time by title and referred to the Education Committee.

S 1118, by Transportation Committee, was introduced, read the first time by title and referred to the Transportation and Defense Committee.

There being no objection, the House advanced to the Tenth Order of Business.

Second Reading of Bills and Joint Resolutions

H 201, by Appropriations Committee, was read the second time by title and filed for third reading.

H 170, by Agricultural Affairs Committee, was read the second time by title and filed for third reading.

H 110, by Transportation and Defense Committee, was read the second time by title and filed for third reading.

H 65, by Health and Welfare Committee, was read the second time by title and filed for third reading.

Third Reading of Bills and Joint Resolutions

Mr. Stucki asked unanimous consent that H 53 be held on the Third Reading Calendar until Friday, February 22, 1985. There being no objection, it was so ordered.

H 60 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall H 60 pass?"

Roll call resulted as follows:

AYES -- Adams, Antone, Bengson, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Edwards, Field, Forrey, Fry, Givens, Gurnsey, Haagenson, Hansen, Harris, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Johnson (27), Judd, Keeton, Kellogg, Kenneville, Knigge, Linford, Little, Loveland, Lucas, Martens, McCann, McDermott, Mitchell, Montgomery, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Stucki, Sutton, Tucker, Mr. Speaker. Total -- 70.

NAYS -- Allan, Bateman, Bayer, Geddes, Hale, Hawkins, Infanger, Jones, Neibaur, Parks, Strasser, Winchester. Total -- 12.

Absent and excused -- Chadband, Wood. Total -- 2.

Total -- 84.

Whereupon the Speaker declared H 60 passed the House. Title was approved and the bill ordered transmitted to the Senate.

Mr. Stoicheff asked unanimous consent that H 105 be placed on General Orders for consideration. There being no objection, it was so ordered.

S 1005 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall S 1005 pass?"

Roll call resulted as follows:

AYES -- Adams, Allan, Antone, Bateman, Bayer, Bengson, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Field, Forrey, Fry, Geddes,

Givens, Gurnsey, Haagenson, Hale, Hansen, Harris, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Infanger, Johnson (27), Jones, Judd, Keeton, Kellogg, Kenneviak, Knigge, Linford, Little, Loveland, Lucas, Martens, McCann, McDermott, Mitchell, Montgomery, Neibaur, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Strasser, Stucki, Sutton, Tucker, Winchester, Wood, Mr. Speaker. Total -- 82.

NAYS -- Edwards. Total -- 1.

Absent and excused -- Chadband. Total -- 1.

Total -- 84.

Whereupon the Speaker declared S 1005 passed the House. Title was approved and the bill ordered returned to the Senate.

S 1006 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall S 1006 pass?"

Roll call resulted as follows:

AYES -- Adams, Antone, Bateman, Bayer, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Field, Forrey, Fry, Geddes, Givens, Hale, Hansen, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Johnson (27), Jones, Judd, Keeton, Kellogg, Kenneviak, Knigge, Linford, Loveland, Martens, McCann, McDermott, Mitchell, Montgomery, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Strasser, Stucki, Tucker, Winchester, Wood, Mr. Speaker. Total -- 70.

NAYS -- Allan, Bengson, Edwards, Gurnsey, Haagenson, Harris, Infanger, Little, Lucas, Neibaur, Parks, Simpson, Sutton. Total -- 13.

Absent and excused -- Chadband. Total -- 1.

Total -- 84.

Whereupon the Speaker declared S 1006 passed the House. Title was approved and the bill ordered returned to the Senate.

S 1007 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall S 1007 pass?"

Roll call resulted as follows:

AYES -- Adams, Antone, Bateman, Bayer, Bengson, Black, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chadband, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Edwards, Field, Forrey, Fry, Geddes, Givens, Gurnsey, Haagenson, Hale, Hansen, Harris, Hawkins, Hay, Herndon, Hoagland, Hooper, Horvath, Johnson (27), Jones, Judd, Keeton, Kellogg, Kenneviak, Linford, Little, Loveland, Martens, McCann, McDermott, Mitchell, Montgomery, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Strasser, Stucki, Sutton, Tucker, Winchester, Wood, Mr. Speaker. Total -- 76.

NAYS -- Allan, Boyd, Brackett, Hill, Infanger, Knigge, Lucas, Neibaur. Total -- 8.

Absent and excused -- none.

Total -- 84.

Whereupon the Speaker declared S 1007 passed the House. Title was approved and the bill ordered returned to the Senate.

S 1008 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall S 1008 pass?"

Roll call resulted as follows:

AYES -- Adams, Allan, Antone, Bateman, Bayer, Bengson, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Field, Forrey, Fry, Geddes, Givens, Haagenson, Hale, Hansen, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Infanger, Johnson (27), Jones, Keeton, Kellogg, Kenneviak, Knigge, Linford, Loveland, Lucas, Martens, McCann, McDermott, Mitchell, Montgomery, Neibaur, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Strasser, Stucki, Tucker, Winchester, Wood, Mr. Speaker. Total -- 77.

NAYS -- Edwards, Gurnsey, Harris, Judd, Little, Sutton. Total -- 6.

Absent and excused -- Chadband. Total -- 1.

Total -- 84.

Whereupon the Speaker declared S 1008 passed the House. Title was approved and the bill ordered returned to the Senate.

S 1018 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall S 1018 pass?"

Roll call resulted as follows:

AYES -- Adams, Allan, Antone, Bateman, Bayer, Bengson, Black, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chadband, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Edwards, Field, Forrey, Fry, Geddes, Givens, Gurnsey, Haagenson, Hale, Hansen, Harris, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Infanger, Johnson (27), Jones, Judd, Keeton, Kellogg, Kenneviak, Knigge, Linford, Little, Loveland, Lucas, Martens, McCann, McDermott, Mitchell, Montgomery, Neibaur, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Strasser, Stucki, Sutton, Tucker, Winchester, Wood, Mr. Speaker. Total -- 84.

NAYS -- none.

Absent and excused -- none.

Total -- 84.

Whereupon the Speaker declared S 1018 passed the House. Title was approved and the bill ordered returned to the Senate.

H 104 was read the third time at length, section by section, and placed before the House for final consideration.

The question being, "Shall H 104 pass?"

Roll call resulted as follows:

AYES -- Adams, Allan, Antone, Bateman, Bayer, Bengson, Boyd, Brackett, Braun, Brimhall, Brocksome, Brown, Burt, Callen, Chadband, Chatburn, Childers, Crane, Crow, Davis, Dewey, Duffin, EchoHawk, Edwards, Field, Forrey, Fry, Geddes, Givens, Gurnsey, Haagenson, Hale, Hansen, Harris, Hawkins, Hay, Herndon, Hill, Hoagland, Hooper, Horvath, Infanger, Johnson (27), Jones, Judd, Keeton, Kellogg, Kenneviak, Knigge, Linford, Little, Loveland, Lucas, Martens, McCann, McDermott, Mitchell, Montgomery, Parks, Reid, Reynolds, Robbins, Scates, Schaefer, Scott, Sessions, Simpson, Slater, Smock, Sorensen, Speck, Stanger, Stoicheff, Stoker, Stone, Strasser, Stucki, Sutton, Tucker, Winchester, Wood, Mr. Speaker. Total -- 82.

NAYS -- none.

Absent and excused -- Black, Neibaur. Total -- 2.

Total -- 84.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho.

Done at Boise, the Capital of Idaho, this 20th day of February in the year of our Lord one thousand nine hundred and eighty-five and of the Independence of the United States of America the two hundred and ninth year.

/s/ JOHN V. EVANS
Governor

/s/ PETE T. CENARRUSA
Secretary of State

The Certificate of Appointment was ordered filed in the office of the Chief Clerk.

The Speaker announced the oath of office had previously been administered to Debra C. Croshaw, temporarily performing the duties of Larry EchoHawk.

THE OFFICE OF THE GOVERNOR
EXECUTIVE DEPARTMENT
BOISE, IDAHO

CERTIFICATE OF APPOINTMENT

KNOW ALL MEN, by these presents that Dieter Bayer, State Representative, District 18, Ada County, State of Idaho, pursuant to the provisions of Section 59-917, Idaho Code, has nominated Regina M. Bayer to perform the duties of this office temporarily as Acting State Representative.

NOW, THEREFORE, I, JOHN V. EVANS, Governor of the State of Idaho, by virtue of the authority vested in me by Section 59-917, Idaho Code, do hereby appoint Regina M. Bayer, Acting State Representative, District 18, Ada County, State of Idaho, for a term commencing on February 21, 1985, and continuing until the incumbent shall resume the performance of the duties or a vacancy occurs in such office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho.

Done at Boise, the Capital of Idaho, this 21st day of February in the year of our Lord one thousand nine hundred and eighty-five and of the Independence of the United States of America the two hundred and ninth year.

/s/ JOHN V. EVANS
Governor

/s/ PETE T. CENARRUSA
Secretary of State

The Certificate of Appointment was ordered filed in the office of the Chief Clerk.

The Speaker announced the oath of office had previously been administered to Regina M. Bayer, temporarily performing the duties of Dieter Bayer.

February 20, 1985

Mr. Speaker:

I transmit herewith enrolled S 1005, S 1006, S 1007, S 1008 and S 1018 for the signature of the Speaker and I return herewith enrolled H 19 which has been signed by the President.

BAXTER, Secretary

The Speaker announced he was about to sign enrolled S 1005, S 1006, S 1007, S 1008 and S 1018 and, when so signed, ordered them returned to the Senate.

Enrolled H 19 was referred to the Judiciary, Rules and Administration Committee for delivery to the Governor.

February 20, 1985

Mr. Speaker:

I return herewith H 70 which has passed the Senate.

BAXTER, Secretary
H 70 was referred to the Judiciary, Rules and Administration Committee for enrolling.

Report of Standing Committees

February 21, 1985

Mr. Speaker:

We, your COMMITTEE ON JUDICIARY, RULES AND ADMINISTRATION, report that we have had correctly printed HJM 11, HJM 12, HCR 27, HCR 28, HCR 29, HCR 30, HCR 31, H 255, H 256, H 257, H 258, H 259, H 260, H 261, H 262, H 263, H 264, H 266, H 267, H 268, H 269, H 270, H 271, H 272, H 273, H 274, H 275, H 276, H 277, H 278, H 279, H 280 and H 281.

HARRIS, Chairman
HJM 11 was referred to the Commerce, Industry and Tourism Committee.

HJM 12, HCR 27, HCR 28, HCR 30 and H 259 were referred to the State Affairs Committee.

HCR 31, H 279, H 280 and H 281 were referred to the Environmental Affairs Committee.

H 257 was referred to the Transportation and Defense Committee.

H 258 was referred to the Revenue and Taxation Committee.

H 260, H 261, H 262 and H 275 were referred to the Business Committee.

H 263 was referred to the Education Committee.

H 264 was referred to the Agricultural Affairs Committee.

H 266, H 267, H 268, H 269, H 270, H 271, H 272, H 273 and H 274 were referred to the Resources and Conservation Committee.

H 276, H 277 and H 278 were referred to the Judiciary, Rules and Administration Committee.

HCR 29, H 255 and H 256 were filed for second reading.

February 20, 1985

Mr. Speaker:

We, your COMMITTEE ON JUDICIARY, RULES AND ADMINISTRATION, report that we have correctly enrolled HCR 13 and HCR 16.

HARRIS, Chairman
The Speaker announced he was about to sign enrolled HCR 13 and HCR 16 and, when so signed, ordered them transmitted to the Senate for the signature of the President.

February 20, 1985

Mr. Speaker:

We, your COMMITTEE ON JUDICIARY, RULES AND ADMINISTRATION, report that we have transmitted enrolled H 63 to the Governor at 2:46 p.m., February 20, 1985.

HARRIS, Chairman

February 20, 1985

Mr. Speaker:

We, your COMMITTEE ON AGRICULTURAL AFFAIRS, report that we have had under consideration H 156, H 248 and S 1033, as amended, and recommend that they do pass.

STUCKI, Chairman
H 156, H 248 and S 1033, as amended, were filed for second reading.

February 20, 1985

Mr. Speaker:

We, your COMMITTEE ON LOCAL GOVERNMENT, report that we have had under consideration H 159, H 183, H 221 and H 222 and recommend that they do pass.

LUCAS, Chairman

APENDIX B

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

3

4 THE STATE OF IDAHO, ex rel,)
5 R. KEITH HIGGINSON in his)
6 official capacity as director)
7 of the Idaho Department of)
8 Water Resources,)

9 Plaintiff,)

10 vs.)

Case No. 39576

11 THE UNITED STATES; THE STATE)
12 OF IDAHO; and all claimants to)
13 the use of water from the)
14 Snake River Basin Water)
15 System,)

16 Defendants.)

MAIL



17

18

Boise, Idaho
October 23, 1990
9:00 a.m.

19

20

21

DEPOSITION OF GREGORY W. PANTER

22

23

Reported by:
LINDA TERPIN

24

CAPITOL REPORTERS
Certified Shorthand Reporters
3350 Americana Terrace
Suite 245
Boise, Idaho 83706
(208) 344-8880

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Prepared for:
CLIVE J. STRONG
Attorney at Law
(Copy)

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For United States: Peter C. Monson, Esq.
U.S. DEPARTMENT OF JUSTICE
P.O. Box 44378
Washington, D.C. 20026

For State of Idaho: Clive J. Strong, Esq.
and Steven Strack, Esq.
OFFICE OF ATTORNEY GENERAL
Statehouse, Room 210
Boise, Idaho 83720

For Idaho Power Co: Thomas Nelson, Esq.
NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER
1020 Main Street, Suite 400
Boise, Idaho 83702

For Boise River Albert Barker, Esq.
HAWLEY TROXELL ENNIS & HAWLEY
877 Main Street, Suite 1000
Boise, Idaho 83702

Also Present: Jack Hockberger
Field Solicitors Office

A P P E A R A N C E S

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I N D E X

<u>WITNESS</u>	<u>EXAMINATION BY</u>	<u>PAGE</u>
MR. PANTER	Mr. Monson	5
	Mr. Barker	84
	Mr. Strong	117
	Mr. Monson	122
	Mr. Barker	127

E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1	Recommended Adjudication Cost Sharing for Snake River above Lewiston	55
2	Section 42-1414 of the Idaho Code	71

1 BOISE, IDAHO, TUESDAY, OCTOBER 23, 1990, 9:00 A.M.

2

3

4 GREGORY W. PANTER,

5 a witness produced at the instance of the United States,

6 having been first duly sworn, was examined as follows:

7

8

9 MR. MONSON: This is the deposition of

10 Mr. Greg Panter that is being taken for purposes of the case

11 of In Re the General Adjudication of Rights to the Use of

12 Water from the Snake River Basin Water System, also known as

13 State of Idaho versus United States, case No. 39576, pending

14 before the District Court of the State of Idaho, Fifth

15 Judicial District, in and for the County of Twin Falls.

16 This deposition is being held in room 429,

17 Federal Building and Courthouse, 550 West Fort Street,

18 Boise, Idaho. Today's date is October 23rd. This

19 deposition is being taken for all purposes permitted by the

20 Idaho Rules of Civil Procedure.

21 Present, in addition to Mr. Panter, are

22 myself, Peter C. Monson, attorney for the defendant United

23 States; Mr. Thomas Nelson, attorney for Idaho Power Company;

24 Mr. Clive Strong, attorney for the State of Idaho;

25 Mr. Steven Strack, attorney for the State of Idaho; Mr. Al

1 I do know that he appeared on at least one
2 occasion where we requested him -- "we," meaning Idaho Power
3 Company -- to come and appear before the legislature. He
4 appears more often than that. He has a good relationship
5 with the chairman of the Senate Resources Committee. He
6 could have very well been there at his request on occasion
7 too.

8 Q Did he attend any of the negotiations sessions
9 between Idaho Power and the State to resolve the Swan Falls
10 controversy? Do you know?

11 A I do not know. I did not attend those
12 sessions myself. So I don't know who was present.

13 Q Did he ever attend any of the meetings of the
14 adjudication cost sharing committee?

15 A Not to my knowledge, he did not.

16 Q I may have already asked you. But let me ask
17 it again just to make sure the record is clear. Let me ask
18 you about a man by the name of J. S. Church.

19 A Yes.

20 Q You mentioned before you were familiar with
21 him and that he's employed by Idaho Power Company. Do you
22 know his profession?

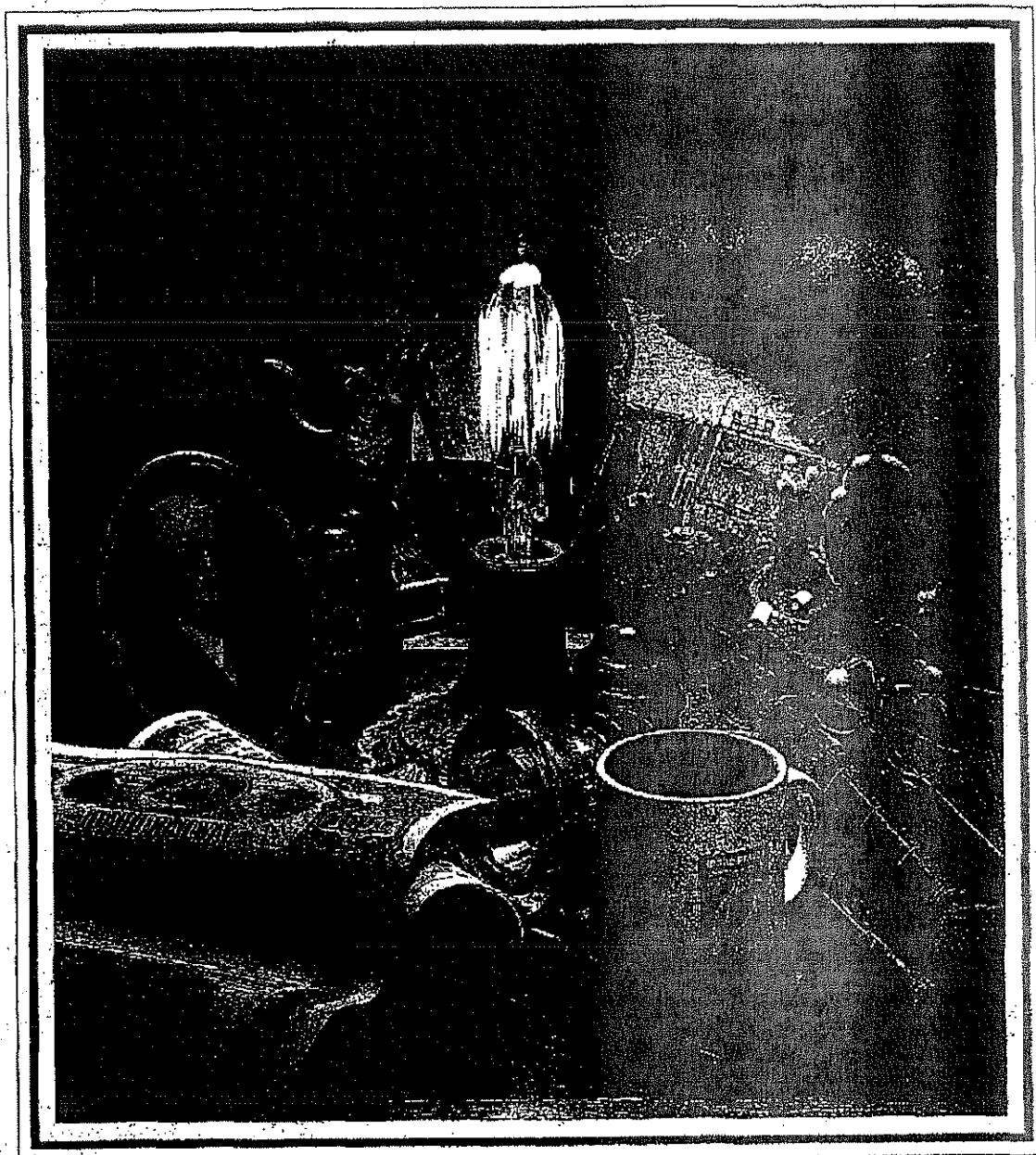
23 A He is an economist, as I recall. And my
24 association with Mr. Church was more in the nature of
25 providing the legislature with economic forecasts in terms

APENDIX C

EXHIBIT II
TO SECOND AFFIDAVIT OF
MICHAEL C. ORR

Legacy of Light

A History of Idaho Power Company



Susan M. Stacy

irrigators and protecting it from ratepayer claims passed, but Governor Evans vetoed it.

The legislature adjourned and Idaho Power's deal had fallen through. The company was as exposed as it had been in 1982 right after the Supreme Court decision. It had to consider advancing its pending suit against the 7,500 irrigators. More than that, it had to work out another deal, and it had to do it in the climate of an election year.

The company spent a large chunk of its institutional advertising budget on a campaign to win public support of its position. It took a poll of its customers and found that 72 percent were in support of "no subordination without compensation."²⁹ Despite this, several key Idaho Power legislative supporters lost their races in the primary election in May.

Governor Evans was anxious to get something settled. Idaho Power sent its outside attorney Tom Nelson to negotiate a settlement with the attorney general's representative, Pat Kole, and the governor's representative, Pat Costello. The company would consider subordinating some of its water rights (without compensation) to existing irrigators, but not to future ones. "We wanted as much as we could get," said Jim Bruce. "Public protection of our low rates was one of our biggest arguments. Low rates are one of



Jim Bruce

the strongest features of the company."³⁰ After months of "shuttle diplomacy" between the Statehouse and the General Office of Idaho Power, the parties concluded a deal. The magic number turned out to be 3,900 cfs. This number was halfway between the *State Water Plan* proposal of 3,300 cfs at Swan Falls and the 4,500 cfs that the Water Resources analysts said would remain at the dam in a dry year if all permit holders actually developed their lands. It was also about what would remain in a *good* year with some additional development. The number was also close to the lowest average daily flow ever recorded at Swan Falls, which happened to be 4,530 on June 18, 1981. Further, it was the amount that most of the negotiators felt that the court would grant Idaho Power if Idaho Power's lawsuit was litigated. Splitting the difference between 4,500 cfs and 3,300 cfs was the compromise.

But the numbers were a framework, a rational surface,

upon which rested the real discussion about what mixture of future development could bestow peace on the competing interests. Idaho Power, on behalf of its consumers, agreed to a future in which rates would rise, but rise gradually. Nelson's traditional ties to the irrigators and their leadership committees helped them accept a changed future, but one where at least a modest amount of expansion in the farming lifestyle might be possible. The representatives of the state, Pat Costello and Pat Kole, felt that the solution opened up and unclogged the state water-use decision process to a broader definition of the public interest. "We could live with it," said Jim Bruce. "It stopped the bleeding of the river and gave us and everyone else a basis for future planning."³¹

The deal had other features besides the water flows. Along with the several ratifying actions by various institutions, it became known as the "Swan Falls Agreement":

- Idaho Power would not insist via lawsuits on its rights to 8,400 cfs at Swan Falls Dam, but accept a minimum guaranteed flow of 3,900 cfs in the summer and 5,600 cfs in the winter.
- The state agreed that in studying any new requests for irrigation projects it would evaluate their impact on hydroelectric generation downstream.



Photo Courtesy of Pat Costello

*The great moment:
The signing of the
Swan Falls
Agreement in
Governor John
Evans' office.
From left to
right, standing:
Thomas Nelson,
Pat Costello,
Pat Kolt; seated:
Jim Bruce,
John Evans,
Jim Jones.*

- Idaho Power would drop its suit against upstream irrigators.
- Idaho Power water rights surrendered by the agreement would be placed in trust by the state for the near term and would be subject to subordination to new upstream rights that met certain criteria.
- Idaho Power, the state of Idaho, and federal wildlife agencies would collaborate on a series of studies to evaluate the impact of the assigned minimum flows below Swan Falls on fish and wildlife. (This was added by Congress.)
- Idaho's Congressional delegation sponsored a bill that would require the Federal Energy Regulatory Commission (FERC, formerly the Federal Power Commission) to accept the agreement in its licensing and other activities on the Snake. This bill was signed by President Reagan in 1987.
- The state would initiate an adjudication process in which all the claims for water in the entire Snake River basin, including those of the federal government and the Indian tribes, would be evaluated for validity and extent, registered, and placed in an orderly relationship to one another. The outcome would not be known for at least ten years, late in the 1990s, but would, it was hoped, eliminate stale