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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**

	) Consolidated Subcase no. 92-23
In Re SRBA	)
	) MEMORANDUM IN RESPONSE TO
	) IDAHO POWER COMPANY'S MOTION
Case No. 39576	) TO COMPEL
	)

The State of Idaho submits this memorandum in response to "Idaho Power Company's Motion to Compel State Defendants' Responses to Plaintiff's Second Set of Discovery Requests and Memorandum in Support" ("Motion to Compel"), filed one week after the State filed its

initial motion for a protective order regarding the same matters.¹ Idaho Power also served a subpoena and notice of deposition on Tim Luke of the Department of Water Resources after the State filed its motion for a protective order.²

The State then filed a second motion for a protective order and supporting memorandum, requesting an order prohibiting Idaho Power from deposing Mr. Luke on the same grounds as those supporting the first motion.³

These filings occurred because the State and Idaho Power fundamentally disagree about what issues currently are before the Court and the corresponding scope of discovery. The parties have been unable to resolve their disagreement despite several discussions. The State has even suggested a Rule 16(b) conference to address the disagreement. *See* State of Idaho's Memorandum in Response to Idaho Power Company's Motion to Amend Scheduling Order at 4-5 ("The parties are in clear disagreement about the issues currently before the Court and the corresponding scope of discovery") (Feb. 8, 2008).

Idaho Power characterizes the State's position regarding discovery as unreasonable in light of the schedule set by the Court. Precisely the opposite is true. Idaho Power's broad-based discovery requests are a formula for delay and a potentially unnecessary waste of time and

¹ Idaho Power filed its motion to compel on April 1, 2008. The State filed its initial motion for a protective order March 24, 2008, and pursuant to Rule 7 filed a memorandum in support on April 1. *See* State of Idaho's Motion for Protective Order (Mar. 24, 2008); Memorandum in Support of State of Idaho's Motion for Protective Order (Apr. 1, 2008).

State of Idaho's Second Motion for Protective Order and Request for Expedited Hearing (Apr. 4, 2008); Memorandum in Support of State of Idaho's Second Motion for Protective Order and Request for Expedited Hearing (Apr. 4, 2008).

² The subpoena and notice of deposition to Tim Luke were served on March 28, three days after the State filed its protective order motion.

³ *See* State of Idaho's Second Motion for Protective Order and Request for Expedited Hearing (Apr. 4, 2008); Memorandum in Support of State of Idaho's Second Motion for Protective Order and Request for Expedited Hearing (Apr. 4, 2008).

resources. Rather than being reasonably calculated to lead to the discovery of admissible evidence, Idaho Power's requests are improperly calculated to:

- Develop issues and claims that exceed the SRBA's statutory scope and this consolidated subcase's scope as set by the Court's July 23, 2007 Order;
- Circumvent the exhaustion of administrative remedies requirement by seeking judicial relief on the Company's challenges to the Department's permitting and administration of water rights; and
- Seek post-settlement evidence seeking to support Idaho Power's false, revisionist history of the contractual intent leading to the Swan Falls settlement, when as a matter of law the extensive record that the parties developed before the Legislature on the very points is dispositive.

The State seeks to focus the litigation on the issues presented by the Order and properly within the scope of the SRBA, thus avoiding unnecessary discovery delay and expense.

ARGUMENT

I. IDAHO POWER'S JUSTIFICATIONS FAIL TO DEMONSTRATE THAT ITS REQUESTS ARE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

Idaho Power raises two principal arguments in support of its Motion to Compel. The Company first argues that its discovery requests are justified because they are relevant to the question of "how much water exists, if any, above the Swan Falls minimum flows," Motion to Compel at 11, 12, 14, 21, and the question of "the amount and availability of Trust Water."⁴ Motion to Compel at 19. In a related but different approach, the Company argues that its

⁴ As will be discussed, Idaho Power's definition of the term "Trust Water" is contrary to Idaho law, but for purposes of the present discussion the State temporarily overlooks this misstatement of law in order to address the underlying issue Idaho Power seeks to raise: the availability of "water."

discovery requests are relevant to the question of “whether the parties operated under a mutual mistake of fact regarding Trust Water availability at the time the parties entered into the Agreement.” Motion to Compel at 11, 12, 14, 19, 20, 21.

As discussed in detail below, these arguments lack merit because: (1) how much water currently exists above the seasonal minimum flows established at the Murphy Gage is a core administrative determination made by the Director in the first instance, subject to judicial review; and (2) the Company’s mutual mistake of fact theory is limited by law to the parties’ understanding at the time of the Agreement. Thus, requests for documents pertaining to water availability or flow levels after the Agreement was executed are not reasonably calculated to lead to the discovery of admissible evidence as to mutual mistake at the time of the Agreement.

A. The Questions Of Water Availability That Idaho Power Seeks To Develop Are Administrative Determinations That Must First Be Developed In An Administrative Action Before The Director.

Idaho Power argues that its discovery requests are justified because they are relevant to the question of “how much water exists, if any, above the Swan Falls minimum flows,” Motion to Compel at 11, 12, 14, 21. The question of the availability of water, however, is a quintessentially administrative determination that the Director makes in the course of permitting and administering water rights and therefore is not a proper subject for discovery in this proceeding.

Challenges to appropriation permits alleging that the water supply is insufficient or that the proposed use would reduce the quantity of water available under existing water rights—the very claims Idaho Power raises in the Complaint and seeks to develop in discovery requests—must be presented to the Director in the form of a protest during the permitting process. Idaho Code § 42-203A(5). This is true regardless of whether the applications to appropriate water seek

to divert “trust water” as Idaho Power defines it⁵ or any other waters of the State. The Idaho Code and the Department’s rules provide for administrative hearings and appeals on such matters, and the Director’s final determinations with respect to the availability of water are subject to judicial review under the Idaho Administrative Procedures Act. Idaho Code §§ 42-203A(5)-(6); 42-1701A; IDAPA 37.01.01.740.

The Director makes an additional determination with respect to the availability of water for applications to appropriate “trust water”: the Director determines whether uses proposed under new permits or renewed “term” permits “would significantly reduce the amount of trust water that is available to the holder of a water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code.” Idaho Code § 42-203C(1).⁶ This permitting determination is also subject to judicial review under the Administrative Procedures Act. Idaho Code § 42-1701A; IDAPA 37.01.01.740. Even Idaho Power expressly acknowledged the Director’s primary authority in these matters in written testimony to the Senate Resources & Environment Committee in the 1985 legislative session.⁷

The Director’s authority and obligation to make determinations regarding the availability of water for purposes of administering water rights is a core administrative function under Idaho law. One of the Director’s most basic determinations in responding to delivery calls under the Conjunctive Management Rules, for instance, is a consideration of “[t]he amount of water

⁵ As previously noted, Idaho Power’s definition of “Trust Water” is contrary to Idaho law.

⁶ Subsection (5) of section 42-203B provides that the Swan Falls Agreement defines the portion of the subject water rights in excess of the seasonal minimum flows established by State action at the Murphy Gage “as being held in trust by the state under subsection (2) of this section.” Idaho Code § 42-203B(5).

⁷ See Affidavit of Michael C. Orr in Support of State of Idaho’s Motion for Partial Summary Judgment (“Orr Aff.”) at Exhibit 10 (committee minutes and attachments of Jan. 25, 1985), p. 15 (page 2 of attachment entitled “Statement of Idaho Power Company in Support of Senate Bill 1008”) (“Those decisions would be made by the Idaho Department of Water Resources under the criteria set out in § 42-203C”).

available in the source from which the [calling] water right is diverted.” IDAPA 37.03.11.042; *see also* Idaho Code § 42-607 (providing administrative authority to regulate diversions “when in times of scarcity it is necessary to do so in order to supply the prior rights of others in such stream or water supply”).

Dealing with water availability issues is a principle statutory duty of the Director and the Department. Questions of water availability and the sufficiency of the water supply arise in a wide variety of administrative contexts and proceedings in addition to permitting and delivery calls, such as in water right transfers and exchanges, mitigation plan proceedings and water resource planning.

Thus, the fact that Idaho Power’s discovery requests are relevant to claims and allegations the Company has raised regarding the availability of water does not mean that Idaho Power is entitled to develop such allegations or claims through discovery in this action. To the contrary, the Idaho Code mandates that such administrative claims must first be heard by the Director, not in the SRBA. Idaho Code § 42-1401D. Since, Idaho Power has failed to exhaust administrative remedies on the Company’s water availability claims, it is precluded from using judicial procedures to develop the initial record on such claims. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004); *see also generally American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007).

B. Idaho Power’s Requests Pertaining to Post-Agreement Matters Are Not Reasonably Calculated To Lead To The Discovery Of Admissible Evidence On The Company’s Claim Of Mutual Mistake.

Idaho Power’s second principal justification for its discovery requests is that they are relevant to the question of “whether the parties operated under a mutual mistake of fact regarding Trust Water availability at the time the parties entered into the Agreement.” Motion to Compel

at 11, 12, 14, 19, 20, 21. This contention fails to support Idaho Power's discovery with respect to any matters occurring after the execution of the Swan Falls Agreement because Idaho law provides that "mutual mistake occurs when both parties, **at the time of contracting**, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." *Hughes v. Fisher*, 142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006) (emphasis added) (internal citation omitted). In other words, a mutual mistake must exist when the parties enter into a contract, and cannot be shown by subsequent events or developments that depart from the parties' expectations. See *Dustin v. Union Pac. R. Co.*, 109 Idaho 361, 362, 707 P.2d 472, 473 (Ct. App. 1985) ("mutual mistake concerning the extent and outcome of known injuries, being a mistake of future facts, is not sufficient to void a release.")

This principle of law is well established. For instance, the Restatement of Contracts provides that "the erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here." Restatement of Contracts 2d § 152 comment a. It is also settled that even when it becomes evident over the passage of time that the parties' expectations were wrong at the time of contracting, there is no basis for a finding of mutual mistake.⁸ This principle applies with particular force with respect to the continuation of inherently variable conditions that are commonly known to be subject to significant or unpredictable changes:

⁸ See also *Northrop Grumman v. United States*, 47 Fed. Cl. 20, 53 (Fed. Cl. 2000) ("A mutual mistake in prophecy or opinion may not be taken as a ground for rescission where such mistake becomes evident through the passage of time. What is today only a conjecture, an opinion, or a guess, might by tomorrow, through the exercise of hind-sight, be regarded then as an absolute fact"); *United States v. Garland*, 122 F.2d 118, 122 (1941) ("In determining whether there has been a mutual mistake of fact, we must examine the facts as they existed at the time of the agreement for the cash-surrender of the policy. A mutual mistake in prophecy or opinion may not be taken as a ground for rescission where such mistake becomes evident through the passage of time.")

Moreover, the term, “basic assumption,” in the *Restatement* provision, as incorporated by Syllabus Point 2 of our opinion in *McGinnis*, does not include the continuation of existing market conditions. In the *Restatement's* discussion of “basic assumption” in its Comment b to § 152, the *Restatement* provides, “market conditions and the financial situation of the parties are ordinarily not such assumptions, and, generally, just as shifts in market conditions or financial ability do not effect discharge [of a contract] under the rules governing impracticability, mistake as to market conditions or financial ability do not justify avoidance under the rules governing mistake.”

Ryan v. Ryan, 640 S.E.2d 64, 69 (W.Va. 2006) (brackets in *Ryan*). For similar reasons, Idaho Power is incorrect in asserting that its discovery requests for post-Agreement documents and information are relevant to demonstrating a mutual mistake of fact at the time of the Agreement. Documents and other materials that might show that in the years after the execution of the Agreement less water was available than the parties allegedly expected are insufficient as a matter of law to support a showing of mutual mistake, and thus requests for such documents are not reasonably calculated to lead to the discovery of admissible evidence.

Stream flows, spring discharges and aquifer levels fluctuate over time, sometimes dramatically. As Commissioner High of the Idaho Public Utility Commission cautioned the members of the Senate Resources & Environment Committee in one of its hearings on the Swan Falls settlement and legislation, “Remember this 3900 second feet was established by negotiation process taking into account historic flows, updated current projected conditions, and that there's nothing more uncertain than stream flows.”⁹ Any expectation that the parties may have had regarding the availability of water supplies above the seasonal minimum flows can no more form the basis for mutual mistake than can expectations that market or financial conditions will continue unchanged. *Ryan*, 640 S.E.2d at 69. Similarly, post-agreement documents showing

⁹ Orr Aff. at Exhibit 37, p. 46 (transcript of committee meeting of Jan, 18, 1985); Exhibit 8, p. 10 (minutes of same).

that might show that the parties' expectations as to future water availability were incorrect cannot support the Company's mutual mistake claim.

Thus, as a matter of law, only the documents existing at the time of the Agreement are legally relevant to Idaho Power's claim of mutual mistake. Idaho Power's discovery requests are reasonably calculated to lead to the discovery of admissible evidence only to the extent they apply to documents and information in existence at the time of the Agreement. The State has produced to Idaho Power all such documents (including those held by the Department and the Director) that the State has located to date. The State is continuing its document review, and will supplement its responses with any additional documents relevant to the negotiation of the settlement.

II. IDAHO POWER MISCHARACTERIZES THE STATE'S POSITIONS REGARDING WATER RIGHTS ADMINISTRATION AND THE LEGISLATIVE RECORD IN THIS PROCEEDING.

Idaho Power also mischaracterizes the State's position regarding its objections to Idaho Power's discovery requests. The Company incorrectly asserts that the State is opposed to addressing any matter that may pertain to water rights administration in this proceeding, and that the State's objection to expanding on the legislative record is simply based in the State's theory of the case. Both of these straw man arguments misrepresent the State's actual positions on these questions.

A. The SRBA Can And Should Address Administration Questions To The Extent Necessary To Define The Water Rights, But Idaho Power's Challenges To The State's Past And Future Permitting And Administration Of Water Rights Should Not Be Heard Or Developed In This Proceeding.

Idaho Power incorrectly asserts that the State objections regarding the scope of the Court's Order of July 23, 2007 ("Order"),¹⁰ the statutory scope of the SRBA, and the exhaustion doctrine are tantamount to arguing that this Court may not reach any matter related to water rights administration. The State has never taken such a position and recognizes that the controlling statutes state that the SRBA can and should resolve, as part of the decree of a water right, such "matters as are necessary for . . . administration of the right by the Director." Idaho Code § 42-1411A(13).

In addition, the Court's succinct observation that "[t]here can be a significant amount of overlap between an administrative provision and the definition of a water right," Order at 10, is certainly true, and in this case applies to issues such as the subordination provisions the Director recommended for the water rights at issue. Subordination provisions can fairly be viewed as definitional, administrative or both, and the State agrees that the SRBA should resolve the question of how the subordination of the water rights should be reflected in the partial decrees.

The State's actual position on these matters, which Idaho Power ignores or mischaracterizes, is that **the Company's challenges to the Director's past and future permitting and administration of water rights may not be developed or heard in the SRBA** under controlling Idaho statutes and Idaho Supreme Court precedent. *See, e.g.*, Idaho Code § 42-1401D (providing that judicial review of Departmental actions that are reviewable under the Idaho Administrative Procedures Act "shall not be heard in any water rights adjudication proceeding commenced under this chapter"); *id.* §§ 42-1401A(3), 42-1401B(3) (providing that the Director and the Department "shall not be a party to an adjudication"); *Twin Falls Canal Co.*

¹⁰ "Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues Into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference."

v. *IDWR*, 127 Idaho 688, 689, 905 P.2d 89, 90 (1995) (“IDWR is not and may not be a party to the SRBA”).

The State’s position is that **Idaho Power’s challenges to past and future permitting and administration of water rights must first be presented and developed before the Director prior to the Company seeking any judicial relief.** *See, e.g.*, Idaho Code § 67-5271; *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007). Under the doctrine of exhaustion of administrative remedies, the Director must be given an opportunity to consider Idaho Power’s administrative challenges, develop the record, correct any alleged errors and issue reviewable final orders before the Company has any basis to argue that the Director or the Department has acted inappropriately or unlawfully.

Idaho Power ignores the distinction between administrative questions that must be considered in order to define a water right on the one hand, and the Company’s quite different claims for judicial relief that challenge the past or alleged future actions of the Department or the Director on the other. The Order recognizes this distinction, and Idaho Power’s assertion that the Court has opened the door to raising any matters of water rights permitting and administration in this consolidated subcase misconstrues the Order.

B. Idaho Power’s Challenges To The State’s Past And Future Permitting And Administration Of Water Rights Should Not Be Heard Or Developed In This Proceeding.

Idaho Power’s argument that the State’s objections are ill-taken also glosses over the fact that the Company is actively pursuing its challenges to the Department’s permitting and administration of water rights. This is demonstrated by the Complaint and the Company’s effort to develop the full range of claims asserted therein.

1. The Complaint Is Principally A Vehicle For Raising Challenges To The Department’s Permitting And Administration Of Water Rights.

The Company's claims and allegations regarding the Department's permitting and administration of water rights are as central to the Complaint as the Company's ownership claims. Allegations that the State has improperly or unlawfully permitted and administered water rights in the Snake River basin since the time of the Swan Falls Agreement are prominently repeated throughout the Complaint. *See* Complaint at 1-2, 11-13, 20, 23-24. The Complaint requests broad declarations that the State has failed to take reasonable steps and to account for the impacts of ground water pumping in administering water rights in the Snake River basin, and seeks orders instructing the Department to re-evaluate water availability and take "appropriate" action in future permitting actions, and take "reasonable steps in the administration of water rights in the Snake River Basin." Complaint at 23, 25, 26. Idaho Power's tone-setting narrative in the opening allegations of the Complaint's "Introduction" leaves little doubt that in many ways the Company's principle goal in this subcase is to challenge or assert control over the Department's permitting and administration of water rights in the Eastern Snake Plain Aquifer (ESPA). *See* Complaint at 1-2.

As a practical matter, the Complaint serves little purpose other than as a vehicle to pursue the Company's challenges to the Department's permitting and administration of water rights. As the Court's Order recognized, the Director's Reports and conventional SRBA procedures allow the Company to raise and fully litigate all of its claims, arguments and defenses pertaining to the ownership, nature and extent of the water rights at issue, including the interpretation and application of the Swan Falls Agreement as it relates to the definition of the water rights. *See* Order at 15 ("a special proceeding on the *Complaint and Petition* is unnecessary"). The only additional purpose the Complaint serves, then or now, is to raise challenges to the Department's

permitting and administration of water rights. (And to provide a means to seek “repeal” of Attorney General Opinion 06-2, a claim the Court dismissed under Rule 12(b)(6). Order at 15.)¹¹

The Complaint demonstrates that Idaho Power is particularly interested in having the Court oversee the Department’s determination of water availability when it re-evaluates the 20-year “term” permits issued under section 42-203C. *See* Complaint at 26 ¶ G(b). None of the section 42-203C “term” permits have yet expired and the Director has not yet had an opportunity to consider any requests for renewal or re-issuance of the “term” permits, or consider the question of water availability for the permits. Thus, Idaho Power seeks preemptive judicial intervention on a matter for which the Director has primary jurisdiction. *See Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (“The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state”).

2. Idaho Power’s Discovery Requests Seek To Develop The Allegations In The Complaint Regarding The Department’s Permitting And Administration Of Water Rights And Other Purely Administrative Matters.

Idaho Power argues that it recognizes that the Court separated and stayed challenges to actions of the Department and the Director and that the Company’s discovery does not seek to explore or develop such matters. Despite these representations to the Court, Idaho Power has repeatedly asserted in discussions with the State that these claims remain in the case and will be heard in the SRBA because the Complaint was not dismissed. Moreover, the Company’s

¹¹ Idaho Power is no stranger to SRBA practice and procedure, and was certainly aware that the substantive litigation of its arguments regarding the ownership, nature and extent of the water rights and the interpretation of the Swan Falls Agreement would not be limited to a “check the box” format. The Complaint appears to have been an attempt to re-cast the SRBA proceedings as a separate civil lawsuit that Idaho Power filed against the State. For instance, the Complaint incorrectly refers to Idaho Power as the “Plaintiff” when it was the State that initiated the SRBA by suing Idaho Power and all other water rights claimants in the Snake River basin. *See* Petition (In re SRBA) (June 19, 1987). Idaho Power also uses an unauthorized caption crafted by Idaho Power, which contravenes Idaho Code § 42-1406(2) (“Such action shall have no other caption”).

discovery requests and relevancy arguments belie its assertions that it is not attempting to develop its claims against the Department and the Director.

Idaho Power repeatedly argues that its discovery requests are relevant to the questions of “how much water exists, if any, above the Swan Falls minimum flows” and of “the amount and availability of Trust Water.” Motion to Compel at 11, 12, 14, 19 21. As previously discussed, these are quintessentially administrative determinations entrusted in the first instance to the Director. Idaho Power’s assertions that its discovery requests are relevant because they seek to determine the current availability of water simply prove that the Company continues to actively pursue and develop claims that are outside the scope of the Order and the SRBA, and that are subject to the requirement of exhaustion of administrative remedies, for reasons previously discussed. Idaho Power’s attempt to develop questions regarding the current availability of water for purposes of satisfying the rights the Company has claimed, for purposes of permitting new water rights, or for purposes of revisiting the “term” permits, is an undisguised attempt to displace the Director from his role as the officer with “the primary responsibility for a proper distribution of the waters of the state.” *Keller*, 92 Idaho at 283, 441 P.2d at 732.

The proposed deposition of Tim Luke is another example of Idaho Power’s attempts to forge ahead on its challenges to the Department’s permitting and administration actions, despite the Court’s Order. The Department hired Mr. Luke years after the Swan Falls Agreement was signed and the Swan Falls legislation enacted. See Affidavit of Timothy J. Luke in Support of State of Idaho’s Second Motion for Protective Order (“Luke Aff.”) at 2. Mr. Luke had no role in the Swan Falls controversy or the settlement. See Luke Aff. at 2-3. Mr. Luke’s duties related to processing water appropriation applications under Idaho Code § 42-203C and the Department’s

Water Appropriation Rules, and subsequently in the administration of water rights in the Snake River basin. *See* Luke Aff. at 2-3.

Idaho Power is well aware of these facts, as Idaho Power closely followed the permitting process under section 42-203C and the Water Appropriation Rules, and corresponded with Mr. Luke when he was involved in section 42-203C permitting. The fact that Idaho Power has chosen Mr. Luke as its first deponent—as opposed to persons who were deeply involved in the Swan Falls settlement such as Pat Costello, Pat Kole, John Evans or Jim Jones, who are much more likely to have first-hand knowledge of the contractual intent issues that are the heart of Idaho Power’s water rights claims—is no coincidence and speaks volumes about the Company’s true motives. Idaho Power has even informed the State that it intends to depose Mr. Luke as a fact witness, even though Mr. Luke’s personal knowledge with respect to Idaho Power’s claims is limited to the permitting and administration of water rights under state law.

The Company’s broad document requests in the subpoena and notice of deposition served on Mr. Luke also demonstrate that rather than restricting its discovery efforts as required by the Order, Idaho Power seeks essentially all the documents the Department has pertaining to virtually every major action, activity, program or statutory function that the Department has undertaken in the Snake River basin in the past twenty years. *See* Affidavit of David R. Tuthill, Jr. in Support of State of Idaho’s Second Motion for Protective Order (“Tuthill Aff.”) at 2-3. Such broad requests contravene the scope of the Order, the statutory scope of the SRBA, and the exhaustion requirement.

These sweeping document requests are also facially overbroad and responding to them would impose a significant and unreasonable burden on the Department. *See* Tuthill Aff. at 3. Idaho Power’s discovery requests threaten to transform a relatively straightforward proceeding to

define the water rights that are subject to the Swan Falls settlement into an unwieldy, unnecessary and improper inquiry into virtually all of the Department's work since Swan Falls. The document requests are unreasonably overbroad and unduly burdensome, and therefore the State should not be required to respond to them.¹²

Idaho Power's discovery requests also seek explanations for certain provisions of the Department's Water Appropriation Rules, which the Department promulgated after the execution of the Swan Falls Agreement under the authority conferred by Idaho Code § 42-1085. It should be noted that Idaho Power had ample opportunity to raise its concerns regarding the Rules during the rulemaking process when the Company submitted two sets of written comments, and in the Company's declaratory judgment challenge to the Rules,¹³ but did not do so.

In any event, the Water Appropriation Rules do not define the scope of the trust or the water rights in question but rather guide the permitting of new water rights and implement the public interest analysis of section 42-203C. Further, the term "trust water flows" as used in the Rules relates to the tributary designation required under the 1986 amendments to Section 42-203B, which codified the historic practice under which the Snake River system has been administered as two separate rivers, one above Milner Dam and one below it.¹⁴ Thus, Idaho Power's discovery requests as to the Water Appropriation Rules are not calculated to lead to the

¹² As discussed in a subsequent section, it would also be unnecessary and improper to require further document production in light of the fact that legislative history is controlling with respect to any claims regarding contractual intent and has already been produced.

¹³ See Orr Aff. at Exhibits 50, 53 and 56; see also Exhibits A and C attached hereto. Idaho Power also filed an "Objection" and a "Petition" on the Rules with the Department the same day that the Company filed its declaratory judgment action. See Orr Aff. at Exhibits 58, 59. In none of these comments or filings did the Company express any disagreement with the Rules definition of "trust water" as consisting of "water rights" rather than "water," nor did the Company seek any explanation of the term "trust water flows" as used in the Rules. To the contrary, in Idaho Power's written comments to the Department on the Rules, Idaho Power's attorney Tom Nelson expressly recognized that under section 42-203B, "trust water" consists of "water rights" for flows above minimum flows established by the State. See Orr Aff. at Exhibit 53, also attached hereto as Exhibit C.

¹⁴ See Reply in Support of State of Idaho's Motion for Partial Summary Judgment at 10-14.

discovery of admissible evidence on any claims other than Idaho Power's challenges to the Department's permitting and administration of water rights in the Snake River basin. The same is true of the Company's discovery requests pertaining to the Director's permitting moratorium order of April 30, 1993.

Idaho Power's discovery requests regarding how the State calculates and measures the minimum flows at the Murphy Gage likewise are outside the permissible scope of discovery for similar reasons. Idaho Power argues that these requests are relevant because they "would shed further light" on the Company's allegation that the flows of the Snake River as measured at the Murphy Gage dropped below 3,900 c.f.s. in 2003. Motion to Compel at 11-12.

Idaho Power's allegation does not *ipso facto* make the issue relevant or proper for consideration in the SRBA. The Order is clear that the Complaint is not the basis for this subcase, that the preliminary issues of the ownership and scope of the water rights must be resolved prior to addressing claims of compliance and enforcement with the resulting partial decrees, and further that such claims will be transferred to an administrative body or court of appropriate jurisdiction. The State's past measurement and calculation of the flows at the Murphy Gage is a purely administrative matter and not proper for consideration in a proceeding to define the water rights in question.

C. The Parties Contractual Intent On Idaho Power's Claims Is Fully Developed In The Legislative Record And Idaho Power's Discovery Impermissibly Seeks To Develop A Contrary Record.

Idaho Power also mischaracterizes the State's objection to departing from the legislative record as being simply based on the State's theory of the case. This argument is incorrect, as the State's briefing in pages 13-18 of its "Memorandum in Support of State of Idaho's Motion for Protective Order" (Apr. 1, 2008) demonstrates. As discussed therein, Idaho law requires that

even if Idaho Power is correct that contractual rather than legislative intent controls, the questions of contractual intent that Idaho Power has raised must be resolved solely on the basis of the existing legislative record. There are several reasons for this.

1. Idaho Power's Claims And Discovery Requests Are Irreconcilably In Conflict With The Parties' Representations To The Legislature.

First and foremost, the parties fully explained to the Legislature their contractual intent with respect to the very claims and assertions Idaho Power now raises in this consolidated subcase. The Legislature enacted legislation that Idaho Power sought and the Company continues to benefit from the parties' original representations to the Legislature. The legislation ratified the elevated minimum flows at Murphy for purposes of protecting hydropower uses, provided the Company with statutory protection against ratepayer claims such as those that originally triggered the Swan Falls controversy and those that later arose in *Miles v. Idaho Power Company* *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989), and enacted the "public interest" criteria of section 42-203C, which also protect hydropower uses. The legislation also allowed the Company to settle contentious litigation, including a lawsuit that had devastated the Company's public image and its relationships with many of its former supporters.

Having obtained these considerable benefits based on the parties detailed explanations of their contractual intent to the Legislature, Idaho Power should not be allowed to develop an alternative, revisionist record of contractual intent that irreconcilably conflicts with the legislative record. For instance, Idaho Power contends in this case that the parties' intended the settlement and the trust to be based on the assumed existence of a "600 cfs block of water," Motion to Compel at 20, but the Company told the Senate Resources and Environment Committee exactly the opposite in 1985: **"the agreement isn't written around 600 c.f.s. being**

available for development. It's written around the minimum flow. So if there's more than 600 c.f.s. available for development, it's available. And the contrary, likewise, is true."¹⁵

The Company also represented that the trust is keyed to the minimum flows "**rather than any estimates of how much water may be available above such minimum flows.**"¹⁶ Consistent with these repeated representations, the Company frankly admitted to the Senate committee 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."¹⁷

Idaho Power contends in this case that the parties intended that the trust would be established "by the Swan Falls Agreement," but the parties told the Senate Resources and Environment Committee exactly the opposite in 1985: Pat Costello explained to committee members that the trust was "**being imposed by operation of law through this [Exhibit 7B – Idaho Code 42-203B] rather than the power company agreeing to it by contract.**"¹⁸ Tom Nelson stood shoulder to shoulder with Mr. Costello when he made this statement, and in a subsequent written statement to the committee on the same legislation explained that rather than providing for "a voluntary transfer of [the Company's] water rights," that "the basis for [Idaho

¹⁵ Orr Aff., Exhibit 35, Track 2, 5:04-6:14 (recording of committee hearing of Jan. 25, 21985); *see also id.* at Exhibit 10, p.7 (minutes of same hearing); *id.* at Exhibit 39, pp. 31-32 (transcript).

¹⁶ Orr Aff., Exhibit 28, p. 4 (Senate Journal p. 59) ("Statement of Legislative Intent -- S 1008"). As discussed in the State's briefing on its motion for partial summary judgment, Idaho Power assisted Senator Crapo in drafting and revising the Statement of Legislative Intent. *See, e.g.,* Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment at 18-21, 34-36.

¹⁷ 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; *see also id.* at Exhibit 40, pp. 23-24 (transcript).

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

Code § 42-203B] is the State's power to 'regulate and limit' the use of water for power purposes.”¹⁹

Idaho Power contends in this case that the parties did not intend for the State to hold legal title to the water rights in excess of the new seasonal minimum flows established at the Murphy Gage, but told the Senate committee exactly the opposite in 1985: Pat Costello explained to the Senate committee that 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.**”²⁰ Idaho Power's attorney Tom Nelson stood shoulder to shoulder with Mr. Costello before the Senate committee on this point. The parties also assisted in drafting the Statement of Legislative Intent's language that section 42-203B “**establishes a trust in which title to certain specified water rights will be held. . . . 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.**”²¹

Idaho Power contends in this case that the parties intended that the Company would retain full legal rights to the full amount of all of the water rights at issue in the controversy, but Mr. Nelson made it clear to the Senate committee that the Agreement re-defined the Company's water rights down to the level of the new seasonal minimum flows at the Murphy Gage:

If the state wanted to reduce that minimum flow below the seasonal 3,900 and 5,600, it certainly is at liberty to do that. However, **the contractual recognition**

¹⁹ Orr Aff. At Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled “Statement of Idaho Power Company in Support of Senate Bill 1008,” p. 1.

²⁰ Orr Aff. at Exhibit 33, Track 5, 6:36 – 6:59 (recording of committee hearing of Jan. 18, 1985); *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).

²¹ Orr Aff. at Exhibit 28, p. 4-5 (Senate Journal p. 59-60) (“Statement of Legislative Intent – S 1008”).

of the company's water rights at that level, would remain at those levels. And therefore the company's rights would not follow the minimum flow down in that substance. The contract would still define it as the seasonal 3,900 and 5,600.²²

Idaho Power's current claims and allegations are a collateral attack on the legislative record and an attempt to re-structure the legislatively authorized and implemented settlement by developing a revisionist record of the parties' contractual intent. Having fully explained to the Legislature the parties' contractual intent on precisely the same points the Company raises in this litigation, and having reaped the considerable benefits of the resulting legislation for more than twenty years, the Company may not now develop an alternative, contrary record of contractual intent. Even assuming, *arguendo*, the Company's current contention's as to the parties "actual" intent are correct (which they are not), the fact is that the parties told the Legislature something entirely different and the Legislature enacted sweeping legislation in reliance on those representations. It is far too late to revise the record now.²³

²² Orr Aff. at Exhibit 11, p. 3 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 40, pp. 18-19 (transcript of same).

²³ Idaho Power's argument that *Gillingham v. Gump*, 140 Idaho 264 (2004) does not stand for the proposition that a complete legislative record should not be supplemented with post-enactment affidavits for purposes of establishing legislative intent is incorrect, because this is precisely what the opinion holds. Further, Idaho Power's argument that this interpretation of *Gillingham* has the effect of removing the Legislature from subsequent action or oversight with respect to the implementation of legislation is simply wrong. The Legislature can amend or revisit legislation at any time, and review an administrative agency's implementation of the legislation.

In fact this is precisely what occurred with respect to the Swan Fall legislation in 1986, when the Legislature enacted clarifying amendments as a result of concerns raised by the Department's newly proposed Water Appropriation Rules, which implemented the "public interest" analysis of Section 42-203C. It should be noted that then Rules defined "trust water" (and still do) not as Idaho Power defines it but rather 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 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." ID ADC 37.03.08.010.17 (emphasis added). The fact that the Legislature included the term "trust water" in the 1986 statutory amendments when the Department had already proposed its definition of "trust water" demonstrates that the Legislature viewed the Department's definition of "trust water" as fully consistent with sections 42-203B and 42-203C. Idaho Power apparently had the same view, because the Company did not challenge the definition of "trust water" in its 1986 petition in this Court seeking a declaratory judgment on the Water Appropriation Rules. *See* Exhibit A attached hereto ("Petition for Declaratory Judgment," *Idaho Power Company v. IDWR* (Fifth Jud. Dist. Case no. 38526) (Apr. 28, 1986). A certified copy of this petition is appended to the Orr Aff. at Exhibit 56. Exhibits 58 and 59 to the Orr Aff. are similar contemporaneous filings the Company made with the Department.

2. As A Matter of Idaho Law, The Court May Not Give Effect To An Alleged Contractual Intent That Is Contrary To Section 42-203B Because The Agreement Must Be Interpreted Consistently With The Statute.

Even if Idaho Power is correct that the Swan Falls Agreement established and defined the trust, the Court may not simply ignore section 42-203B. Section 42-203B expressly provided the statutory authority for the Governor to enter into the Swan Falls Agreement and ratified the Agreement. Idaho Code § 42-203B(5). Moreover, the parties expressly made the Agreement contingent on the enactment of section 42-203B. Thus, Idaho law provides that section 42-203B is itself an integral part of the Agreement. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 666, 52 P.3d 307, 310 (2002) (“Existing law becomes part of a contract, just as though the contract contains an express provision to that effect, unless a contrary intent is disclosed”).

Idaho law also provides that a contract authorized and regulated by a statutory regime may not be given an effect that conflicts with the statute, even if the parties unambiguously intend such a result. *See Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 94, 73 P.3d 102, 107 (2003) (refusing to enforce an insurance policy’s unambiguous exclusion of coverage because exclusion would have resulted in less coverage than that required under the “standard” policy of Idaho Code § 41-2401).²⁴ Thus, even assuming, *arguendo*, that Idaho Power is correct that the parties intended the trust to be established by the Agreement rather than by statute, or that the parties intended that the trust *res* to consist of “water” rather than “water rights,” or that the parties intended the trust to be keyed to a “600 c.f.s. block of water” rather the State’s establishment of new minimum flows at the Murphy Gage, any such intent would directly

²⁴ These principles are consistent with the law of other jurisdictions, as discussed in the State’s memorandum in support of the State’s first protective order, at pages 15-18, which are incorporated herein by this reference. Memorandum in Support of State of Idaho’s Motion for Protective Order (Apr. 1, 2008).

conflict with the plain language and legislative history of the statute that authorizes and regulates contracts such as the Swan Falls Agreement (Idaho Code § 42-203B).

Thus, Idaho law bars the Court from giving legal effect to any such alleged contractual intent in any event. *Trinity Universal Ins. Co.*, 139 Idaho at 94, 73 P.3d at 102. It follows that any discovery on such matters is futile, unnecessary and not reasonably calculated to lead to the discovery of admissible evidence.

D. Judicial Estoppel Principles Bar Idaho Power From Using Judicial Discovery Processes To Develop A Record That Is Contrary To The Company's Previous Representations To This Court And The Idaho Supreme Court.

Idaho Power's discovery requests are also improper under judicial estoppel principles. "The doctrine of judicial estoppel prohibits a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding." *Riley v. W.R. Holdings, LLC*, 138 P.3d 316, 321-22 (2006) (internal quotation marks and citation omitted).

Idaho Power's contentions in this proceeding that the trust was established by the Swan Falls Agreement rather than Idaho Code § 42-203B, and that under the Agreement the Company retained full legal title to the water rights for flows above the level of the seasonal minimum flows established at the Murphy Gage, are inconsistent with positions the Company's has previously taken in this Court (in a proceeding other than the SRBA) and in the Idaho Supreme Court.

In 1986 Idaho Power filed a petition for a declaratory judgment on certain provisions of the Department's newly promulgated "Water Appropriation Rules." In that petition, the Company represented that "Idaho Power Company is both the holder of senior water rights and

the beneficiary of the trust established by § 42-203B, Idaho Code.” “Petition for Declaratory Judgment” (*Idaho Power Co. v. IDWR*, Fifth Jud. Dist. case no. 38526) (Apr. 28, 1986), at 3.²⁵

Further, in its briefing to the Idaho Supreme Court in the *Miles* case, Idaho Power represented the Agreement “[d]efined Idaho Power Company’s water rights below Milner Dam in terms of a summer flow of 3900 cfs, and a winter flow of 5600 cfs, both measured at the Murphy USGS gaging station.” “Brief of Respondent Idaho Power Company,” (*Miles v. Idaho Power Co.*, Idaho Sup. Ct. case no. 16614) (Jan. 21, 1989).²⁶

Idaho Power’s prior representations to this Court and the Idaho Supreme Court on the establishment of the trust and the extent of the Company’s water rights are fundamentally inconsistent with the representations the Company has made in this proceeding. Under principles of judicial estoppel, the Court should bar Idaho Power from using judicial discovery processes to pursue its revisionist claims in this proceeding.

CONCLUSION

For the reasons discussed herein, the State requests that the Court deny Idaho Power Company’s Motion to Compel and grant the State’s motions for protective orders.

Dated this 8th day of April, 2008.

LAWRENCE G. WASDEN
Attorney General

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

KARL T. KLEIN
Deputy Attorney General
Civil Litigation Division

²⁵ Attached hereto as Exhibit A, and to the Orr Aff. as Exhibit 56 (certified copy).

²⁶ Excerpts of a clerk -certified copy of the brief are attached hereto as Exhibit B.


For: MICHAEL C. ORR
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 8th day of April, 2008, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S SECOND MOTION FOR PROTECTIVE ORDER AND REQUEST FOR EXPEDITED HEARING, 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
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208-736-2121

Idaho Power Company
Represented by:
James C. Tucker
P.O. Box 70
1221 W. Idaho
Boise, ID 83707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

Idaho Power Company
Represented by:
James S. Lochhead
Adam T. DeVoe
Mark J. Mathews
Michael A. Gheleta
Michelle C. Kales
Brownstein Hyatt Farber Shreck
410 17th Street, Ste. 2200
Denver, CO 80202-4432

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- ☐ Hand Delivery
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- ☐ Overnight Mail
- ☐ Facsimile: 303-223-0904
- ☒ E-mail: MGheleta@BHFS.com

Idaho Power Company
Represented by
John K. Simpson
Shelley M. Davis
1010 W. Jefferson, Suite 102
Boise, ID 83701-2139

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83720-4449

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Not Applicable

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

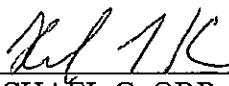
- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
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Randall C. Budge
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- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: jo.beeman@beemanlaw.com

For 
MICHAEL C. ORR
Deputy Attorney General

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APR 10 2008

DEPARTMENT OF
WATER RESOURCES

EXHIBIT A

**ORR AFFIDAVIT
EXHIBIT 56**

IPCO Dec Action
Petition re Rules

EXHIBIT 56

1 Thomas G. Nelson
2 NELSON, ROEHOLT, ROBERTSON,
3 TOLMAN & TUCKER
4 P. O. Box 1906
5 Twin Falls, Idaho 83303-1906
6 Telephone: (208) 734-0700
7 4698p/tpk/4-26-86

26 APR 28 AM 1 43

BY *[Signature]* CLERK
DEPUTY CLERK

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

10 * * * * *

11 IDAHO POWER COMPANY,
12 a corporation,

13 Plaintiff,

14 v.

15 IDAHO DEPARTMENT OF WATER
16 RESOURCES and A. KENNETH DUNN,
17 in his official capacity as
18 Director of the Department
19 of Water Resources,

20 Defendants.

CASE NO. 38526
PETITION FOR
DECLARATORY JUDGMENT

45.00 Pd.

21 * * * * *

22 Petitioner (Plaintiff) alleges:

23 1. Plaintiff is a corporation authorized to do and
24 doing business in the State of Idaho as a public utility,
25 engaged in the business of generation, transmission and sale of
26 electric energy to customers within and without the State of
27 Idaho.

28 2. Defendant Idaho Department of Water Resources is
an executive agency of the State of Idaho, and defendant A.
Kenneth Dunn is the duly appointed, qualified and acting

1 Director of said Department. The Department and its Director
2 are charged with the duty and responsibility of administering
3 the provisions of Chapter 2 of Title 42 of the Idaho Code, and
4 particularly the provisions of Section 42-203.

5 3. Venue of this action is in this court pursuant to
6 §67-5207 since petitioner's lawyer resides in Twin Falls County.

7 4. In October of 1984, the State of Idaho, acting
8 through the Governor and the Attorney General, and Idaho Power
9 Company executed an agreement intended to settle and compromise
10 the disputes then existing concerning the water rights of Idaho
11 Power Company on its projects on the main stem of the Snake
12 River below Milner Dam. A copy of that agreement is submitted
13 herewith as Exhibit 1, and by this reference made a part hereof
14 as though set out in full herein. Following execution of the
15 agreement, the parties approached the Legislature of the State
16 of Idaho to implement the agreement by the passage of
17 appropriate legislation. This was done in the 1985 and 1986
18 sessions of the Idaho Legislature. Idaho Code §42-203 as it
19 existed after its amendment in 1985 is submitted herewith as
20 Exhibit 2, and by this reference made a part hereof as though
21 set out in full herein. Section 42-203 was again amended in
22 1986 by Senate Bill 1358, Ch. 117 of the 1986 Session Laws,
23 which is submitted herewith as Exhibit 3, and by this reference
24 made a part hereof as though set out in full herein.

25 5. In December of 1985, and prior to the second
26 amendment to §42-203, Exhibit 3 hereto, defendant Dunn, in his
27 official capacity, issued a Notice of Proposed Rule Making
28 concerning certain rules governing water appropriation,

1 including appropriation of trust water as created and defined
2 by §42-203B, Idaho Code. After the passage of Senate Bill
3 1358, defendant Dunn issued "Water Appropriation Rules and
4 Regulations" dated April 8, 1986, a copy of which is submitted
5 herewith as Exhibit 4, and by this reference made a part hereof
6 as though set out in full herein.

7 6. Rule 5,2. of said rules deals with the question of
8 when a proposed use of trust water causes a significant
9 reduction within the terms of §42-203C. (Exhibit 4, page 48,
10 49 and 50)

11 7. The rules were issued after the 1986 amendment to
12 §42-203, and without the opportunity for public comment
13 concerning the rules. Rule 5,2. is substantially changed from
14 the version of that rule as included in the December 1985 draft
15 of the rules which accompanied the Notice of Proposed Rule
16 Making. Rule 5,2. as proposed in December of 1985 is submitted
17 herewith as Exhibit 5, and by this reference made a part hereof
18 as though set out in full herein.

19 8. The water rights of the Idaho Power Company at its
20 Swan Falls, Bliss, Upper and Lower Salmon, Twin Falls, and
21 Shoshone Falls power plants are prior in time and superior in
22 right to any and all of the applications and permits to be
23 processed pursuant to §42-203, Idaho Code. Idaho Power Company
24 is both the holder of senior water rights, and the beneficiary
25 of the trust established by §42-203B, Idaho Code.

26 9. Rule 5,2. of the rules dated April 8, 1986, is
27 arbitrary, capricious, not supported by any record before the
28 Department, and contrary to the letter and intent of the

1 provisions of Idaho Code §42-203. The rule as it is written
2 interferes with or impairs, or threatens to interfere with or
3 impair the legal rights and privileges of the plaintiff as the
4 holder of the water rights as above described and as the
5 beneficiary of the trust created by statute. Application of
6 the rule as written will permit development to proceed which is
7 not in conformance with the statutes of the State of Idaho and
8 is not in the best interests of the State or its citizens.

9 10. The rule as written is contrary to the statute,
10 and processing of applications and permits pursuant to the rule
11 would result in the approval of applications and permits
12 contrary to the statutes of the State of Idaho, and require the
13 expenditure of a great deal of time and effort by plaintiff and
14 the applicants and permittees themselves in pursuing an
15 unnecessary course of protest and hearing in the event the rule
16 was later declared invalid. A preliminary injunction should be
17 issued to restrain defendants from enforcing or applying said
18 rules until final order of this Court.

19 10. The jurisdiction of this Court is invoked
20 pursuant to the Declaratory Judgment Act, Chapter 12 of Title
21 10 of the Idaho Code. A real and subsisting controversy exists
22 between plaintiff and defendants, and a declaratory judgment is
23 an appropriate method of resolving said dispute.

24 WHEREFORE, plaintiff prays as follows:

25 1. For issuance of a preliminary injunction,
26 restraining and preventing defendants from enforcing or
27 applying rule 5,2. of the "Water Appropriation Rules and
28 Regulations" dated April 8, 1986, until final order of the

1 Court.

2 2. For entry of a declaratory judgment ordering,
3 adjudging and decreeing that rule 5,2. as written is invalid,
4 unenforceable, void and of no force and effect as being
5 contrary to the letter and spirit of the statutes of the State
6 of Idaho.

7 3. For entry of a permanent injunction prohibiting
8 and restraining defendants from applying or using Rule 5,2. of
9 the rules and regulations in the processing of permits or
10 applications which propose to appropriate trust waters.

11 4. For costs of suit.

12 5. For such other and further relief as the court may
13 deem proper.

14
15 DATED this 29th day of April, 1986.

16 NELSON, RSHOLT, ROBERTSON,
17 TOLMAN & TUCKER

18
19 By: 

20 Thomas G. Nelson
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APR 10 2008

DEPARTMENT OF
WATER RESOURCES

EXHIBIT B

STATE OF IDAHO
SUPREME COURT COURT OF APPEALS



Stephen W. Kenyon
Clerk of the Court
Karel A. Lehrman
Chief Deputy Clerk

Supreme Court Building
P.O. Box 83720
Boise, Idaho 83720-0101
(208) 334-2210

Supreme Court file on Appeal in:

Supreme Court Docket No. 16614
Harold C. Miles v. Idaho Power Company, et al

I, Stephen W. Kenyon, Clerk of the Supreme Court
of the State of Idaho, do hereby certify that the
above is a true and correct copy of the court file
entered in the above entitled cause and now on
record in my office.
WITNESS my hand and the Seal of this Court. 8/8/07

STEPHEN W. KENYON

Clerk

By: Kimberly Francis Deputy

FR
7-21
NY
N.Y.

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

HAROLD C. MILES individually
and on behalf of all ratepayers
of the IDAHO POWER COMPANY,

Supreme Court No. 16614

Plaintiff/Appellant,

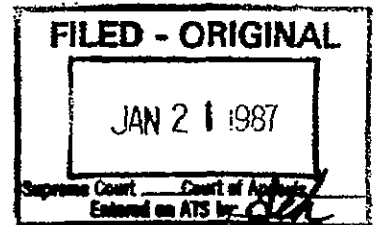
VS.

IDAHO POWER COMPANY, a Maine corporation,

and

THE STATE OF IDAHO, et al,

Defendants/Respondents.



* * * * *

BRIEF OF RESPONDENT IDAHO POWER COMPANY

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DEBORAH BAIL, District Judge, Presiding

* * * * *

BRECK SEINIGER
Residing at Boise ID
Attorney for Plaintiff/
Appellant

THOMAS G. NELSON
Residing at Twin Falls ID
PAUL L. JAUREGUI
Residing at Boise ID
Attorneys for Defendant/
Respondent Idaho Power Company

JIM JONES
P. MARK THOMPSON
Office of the Attorney General
Residing at Boise ID
Attorneys for State Defendants/Respondents

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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

HAROLD C. MILES individually)
and on behalf of all ratepayers) Supreme Court No. 16614
of the IDAHO POWER COMPANY,)
Plaintiff/Appellant,)
vs.)
IDAHO POWER COMPANY, a Maine)
corporation, THE STATE OF IDAHO,)
acting and through the HONORABLE)
JOHN V. EVANS, Governor, and)
acting by and through the)
LEGISLATORS of the STATE OF IDAHO,)
THAT STATE OF IDAHO, acting by)
and through the IDAHO PUBLIC)
UTILITIES COMMISSION, and)
Commissioners RICHARD HIGH, PERRY)
SWISHER and CONLEY WARD in their)
official capacities, THE STATE OF)
IDAHO, acting by and through the)
IDAHO DEPARTMENT OF WATER)
RESOURCES, the IDAHO WATER)
RESOURCES BOARD, and its)
Executive Director, KEN DUNN, in)
his official capacity,)
Defendants/Respondents.)

* * * * *

BRIEF OF RESPONDENT IDAHO POWER COMPANY

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DEBORAH BAIL, District Judge, Presiding

* * * * *

BRECK SEINIGER	THOMAS G. NELSON
Residing at Boise ID	Residing at Twin Falls ID
Attorney for Plaintiff/	PAUL L. JAUREGUI
Appellant	Residing at Boise ID
	Attorneys for Defendant/
	Respondent Idaho Power Company
JIM JONES	
P. MARK THOMPSON	
Office of the Attorney General	
Residing at Boise ID	
Attorneys for State Defendants/Respondents	

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Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 46 S. Ct. 363, 70 L.Ed. 808 (1926), cited at page 23.

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 348 (1972), cited at page 21.

Boise Water Corporation v IPUC, 97 Idaho 832, 555 P 2d 163 (1976), cited at page 25.

Bopp v. City of Sandpoint, 110 Idaho 488, 716 P.2d 1260 (1986), cited at page 12.

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City of Houston v. PUC, 618 SW2d 428 (Tex. App. 1981), cited at page 13.

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Greer v. Lewiston Golf & Country Club, Inc., 81 Idaho 393, 342 P.2d 719 (1959), cited at pages 12, 16.

Harris v. Cassia County, 106 Idaho 513, 681 P.2d 988 (1984), cited at pages 8, 18.

Hayes v Missouri, 120 US 68, 7 S Ct 350, 30 L Ed 578 (1887), cited at page 32.

1 Home Telephone & Telegraph Co. v Los Angeles, 211 US
265, 29 S Ct 50, 53 L Ed 176 (1908), cited at page 33.

2 Idaho Power Company v. IPUC, 108 Idaho 943, 703 P.2d
3 707 (1985), cited at page 25.

4 Idaho Power Company v. State, 104 Idaho 575, 661 P.2d
741 (1983), cited at page 1.

5 Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d
6 1129 (1986), cited at pages 9, 11.

7 Idaho State Homebuilders v. Washington Water Power
8 Co., 107 Idaho 415, 690 P.2d 350 (1984), cited at page 25.

9 Lenaghan v. Smith, 97 Idaho 383, 545 P.2d 471 (1976),
cited at pages 14, 17.

10 Midland Realty Co. v. Kansas City Power and Light Co.,
11 300 U.S. 109, 57 S. Ct. 345, 81 L.Ed. 540 (1936), cited at page
21.

12 Missouri v. Public Ser. Comm., 262 U.S. 276, 43 S. Ct.
13 544, 67 L.Ed. 981 (1922), cited at page 23.

14 Natatorium Co. v. Erb, 34 Idaho 209, 200 Pac. 348
(1921), cited at page 17.

15 O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401
16 (1949), cited at page 21.

17 Ocampo v US, 234 US 91, 34 S Ct 712, 58 L Ed 1231
(1914), cited at page 32.

18 Parham v Hughes, 441 US 347, 99 S Ct 1742, 60 L Ed 2d
19 269 (1979), cited at page 31.

20 Pittsburgh v. Pennsylvania Public Utility Commission,
187 Pa. Super. 341, 144 A.2d 648 (Pa. Super. 1958), cited at
21 page 23.

22 Schlesinger v. Reservists to Stop the War, 418 U.S.
208, 94 S. Ct. 2925, 41 L.Ed.2d 706 (1974), cited at page 12.

23 Southern Pacific Co. v. Arizona Corporation Com'n.,
24 404 P.2d 692 (Ariz. 1965), cited at page 23.

25 Urban League of Rochester, N.Y. v. County of Monroe,
404 NE 2d 715 (NY, 1980), cited at page 16.

26 Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45
27 L.Ed.2d 343 (1975), cited at page 12.

1 (R. pp. 16, 17). All actions necessary to fully implement the
2 Agreement have now been accomplished, with the exception of an
3 order from the Federal Energy Regulatory Commission.

4 The Settlement Agreement resolved the issues by:

- 5 1. Defining Idaho Power Company's water
6 rights below Milner Dam in terms of a
7 summer flow of 3900 cfs, and a winter
8 flow of 5600 cfs, both measured at the
9 Murphy USGS gaging station just below
10 Swan Falls Dam. (R. 12 - 13, para. 7)
- 11 2. Requiring the amendment of the State
12 Water Plan from a year round flow of
13 3300 cfs at the Murphy Gage to the
14 flows set out above. (R. 16;
15 para. 13 A i; R. 35, Ex. 6)
- 16 3. Requiring new appropriations above Swan
17 Falls Dam to meet new public interest
18 criteria, to be set out in a new
19 section 42-203(c) I.C. (R. 24 - 25)
- 20 4. Requiring an adjudication of the Snake
21 River. (R. 12, para. 6 B; R. 27 - 30,
22 Ex. 2)
- 23 5. Requiring legislation to limit the
24 jurisdiction of the IPUC to consider
25 the merits of the settlement. (R.
26 33 - 34, Ex. 5)

27 There are other elements to the Settlement Agreement,
28 but the major points are as stated above. Appellant is here
29 challenging the validity of the limitation on IPUC
30 jurisdiction, Exhibit 5 to the Complaint, enacted as Chapter
31 14, S.L. 1985, pp. 20 - 21. (Attached hereto as Exhibit 1 in
32 the Appendix.)

33 In the Court below, the Defendants (Respondents here)
34 moved to dismiss the Complaint. By Order filed April 22, 1986,
35 (R. 234 - 261) the District Judge dismissed the Complaint.
36 Plaintiff (Appellant here) then moved to amend by

1 interlineation to add an equal protection claim (R. 264). He
2 also moved to alter or amend the Order of filed April 22, 1986
3 (R. 262). That motion was denied by Order filed on August 12,
4 1986. This appeal followed.

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APR 10 2008

DEPARTMENT OF
WATER RESOURCES

EXHIBIT C

**ORR AFFIDAVIT
EXHIBIT 53**

Idaho Power
Company
Comments 11/5/85

EXHIBIT 53

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered

ATTORNEYS AT LAW
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NOV 6 1985

Department of Water Resources

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LAIRD B. STONE
CARY D. SLETTE

November 5, 1985

Mr. Ken Dunn, Director
Idaho Department of Water Resources
Statehouse
Boise, Idaho 83720

RE: Proposed Rules and Regulations

Dear Mr. Dunn:

Enclosed are Idaho Power Company's Comments on the proposed Rules for water allocation.

Feel free to give me a call if you would like to discuss the matter further.

Yours very truly,

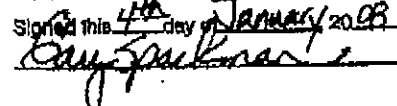

Thomas G. Nelson

TGN:tpk

cc: Mr. Paul L. Jauregui

Enclosure

The foregoing is a true and certified copy of
the document on file at the department of
Water Resources.

Signed this 4th day of January, 2008


SCANNED

JAN 04 2008

5FEB

COMMENTS OF IDAHO POWER COMPANY ON
RULES AND REGULATIONS ON WATER ALLOCATION
(As published in October, 1985 "Currents")

These comments are keyed to the numbering system as published in Currents. The subject matter of the section commented on will be paraphrased solely to put the reader in context for purposes of understanding the comment.

Rule 1,5. Location and nature of trust water.

The lower end of the trust water reach on the main stem of the Snake River below Milner Dam is stated to be Swan Falls. This is incorrect, as can be demonstrated by a reading of Section 42-203(B).

Section 42-203(B), Idaho Code, creates two separate types of trust water:

(1) Trust water encompassing "a water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action." This trust water is the type covered by the Swan Falls Settlement Agreement. The existence of the agreement between the utility and the state prevents the state from reducing the minimum flow to the detriment of the utility's water right. In executing the agreement, the state has agreed, as a practical matter, not to change the minimum flow downward from the agreed level.

(2) Trust water encompassing "water rights for power purposes not defined by agreement with the state." This covers the situation where a minimum flow exists at or near a power site. The water in the river above that minimum flow is held in trust by the state, in the same manner as those involved in the first type discussed above. However, if no agreement exists between the state and the utility, the state is free to reduce the minimum flow and the utility's protectable water flow will diminish down to the new minimum flow. (The statute assumes the state has the power to control the utility's right to force delivery of the water.)

The difference between the two types of trust water is illustrated by the Swan Falls Agreement compared to the Hell's Canyon development. The Swan Falls Agreement specifically calls for creation of a minimum flow at the Murphy Gage at the levels required by the Agreement. Once the state creates that minimum flow, that becomes the definition of the water right and later downward changes in the minimum flow will not change that defined and agreed water right. In the Hell's Canyon

example, a minimum flow exists and water in excess of that flow is trust water, under § 42-203(B)(3), but if the state decided to change the minimum flow downward, the definition of trust water would likewise follow it downward and the utility would not be in a position to complain that its rights had thereby been diminished. Therefore, Rule 1,5 needs to be amended to make it clear that it recognizes that the entirety of the reach from Hell's Canyon Dam to Milner Dam contains trust water as defined in Section 42-203(B) Idaho Code.

One further comment needs to be made concerning Rule 1,5,4,3. That rule states that certain flows are not trust waters, using as an example the Snake River downstream from the Murphy Gauging Station. As pointed out above, this is technically not true. However, the last sentence of that section says "such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203(A) Idaho Code." Care needs to be taken in administering the statutory scheme resulting from the Swan Falls settlement to distinguish between trust waters as discussed above, and "water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes" under § 42-203(C). If a subordination condition applies to the water rights for a hydro project, then Section 42-203(C) applies, whether or not a minimum flow exists at a point which would control water use at the site. If no minimum flow existed, then the water would be "subordination condition" water pursuant to § 42-203(C), but would not be "trust water" pursuant to § 42-203(B). While this situation does not exist on the main stem of the Snake below Milner Dam, the regulations should be amended to be technically correct to avoid confusion in their application to other streams.

For the reasons discussed above, Rule 2,1,7 needs to be amended to eliminate the restriction that trust water arises only because of subordination conditions in water rights, permits or licenses issued after July 1, 1985. There are no time limitations in § 42-203(B) and the trust created by that section would apply to water for hydropower rights affected by a minimum stream flow, regardless of when the subordination condition, if any, was imposed.

Rule 4 concerns processing applications for permit and reprocessing certain existing permits. Rule 4,2,3,1 requires review of existing permits, except those exempted. 4,2,3,2,3 creates an exemption for "permits named in but dismissed from the legal action entitled Idaho Power Company vs. Idaho Department of Water Resources, et al., Ada County Civil No. 81375". Dismissal from the case of Idaho Power Company vs. IDWR is not a valid ground for exemption of a permit from the review process. Dismissal of a permit under the 1180 Contract

was based on actual water use or substantial investment in irrigation wells or equipment pursuant to a valid water right or filing with the Department, whether permit or application, as of November 19, 1982. The substantial investment required was defined by the Contract to be \$15,000.00 or 25% of the estimated cost of the project, whichever was less. It is apparent that the holder of a permit could have expended \$15,000.00 and not have been developed.

Section 42-203(D) provides, in pertinent part:

"The Department shall review all permits issued prior to the effective date of this Section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of Chapter 2, Title 42, Idaho Code." The purpose of the review of existing permits was to apply the public interest standards to all undeveloped proposals for water usage which could impact existing hydropower rights. An exemption for permits dismissed from Idaho Power Company vs. IDWR is contrary to the letter and spirit of the law, and would favor those permittees over others who have projects equally as valid.

Rule 4,3,1,3 states that the Director will not consider blanket protests to be valid. If the Department is prepared for the blizzard of paper which will result from implementation of this rule, consideration should be given to covering the existing situation. The Department, Idaho Power Company, and the applicants involved have avoided creation of several trees worth of paper by the use of blanket protest procedures. A savings provision should be inserted to provide that existing blanket protests (which had been recognized by the Director) will remain recognized.

Rule 4,5,1 requires applicants to submit additional information requested by the Director within thirty days of notification. This is as to uncontested applicants and reprocessed permits.

Rule 4,5,2 relates to contested filings, but contains no deadline. It merely requires the information to be available in accordance with prehearing discovery procedures. There appears to be no reason not to require submission of information under Rule 4,5,2 within thirty days also, rather than wait until prehearing procedures have been started to set the deadline. A thirty day provision in the rule would eliminate a lot of wasted time.

Rule 4,5,3,7 exempts applications appropriating 10 cfs or less or 1,000 acre feet or less from the additional information requirements. Applications and permits of this

size constitute the majority of the proposals for diverting water affecting the reach upstream of Swan Falls Dam. Attached is a list showing the remaining applications and permits in Idaho Power Company vs. Idaho Department of Water Resources after the fourth dismissal. 89% of those filings involve less than 10 cfs. Exemption of those filings from the review process, which is the effect of the rule, would effectively eliminate the State's control of the process.

Rule 5,314 pertains to the treatment to be given to the analysis of indirect project costs. The increased costs of "replacing reduced hydropower generation from hydropower generating facilities located in Idaho from the least costly source" is one of the factors to be considered. However, cost is only one factor in considering replacement generation. The factor of long-term reliability of the substitute source should also be considered.

The next sentence precludes the consideration of the cost of foregoing other potential projects. This is a standard analysis in looking at the true cost of a particular project, particularly in a public interest setting, where the best project should be constructed. This restriction does not appear warranted and should be stricken.

Rule 5,3,2 concerns analysis of the impact of a proposed use on electrical utility rates. However, 5,3,2,1 and 5,3,2,2 concern only the supply side of the equation. No provision is made to consider the cost of alternatives, or the resulting impact on electrical rates, which is the analysis required by the statute. The guidelines are inadequate in failing to address the supply side and ultimately the cost of replacement.

Rule 5,3,3 relates to the family farming tradition. In 5,3,3,1, the analysis is to be directed toward an inquiry of whether the applicant currently owns and leases or proposes to lease irrigated land in excess of 960 acres. This is obviously taken from the Bureau of Reclamation Regulations which replace the so-called 160 acre rules. The USBR Rules are based on a nationwide analysis. 960 acres is too large to represent a family farming tradition in Idaho. For example, the Twin Falls Canal Company was exempted from application of the 160 acre regulations due to the fact that an existing pattern of family farms which met the 160 acre limitation was found to exist by the Secretary of the Interior. Very few irrigating entities in Southern Idaho had any problem with the 160 acre limitation. Therefore, 960 acres is far too large to be applied to a particular applicant. A more realistic figure would be 240 acres since this would be 480 acres for a husband and wife,

which is large enough to encompass almost all true family farming operations in Idaho.

Rule 5,3,9 provides that applications or permits which propose a use within four miles of the river are not in the public interest. It is obvious that this rule attempts to address the problem of the pumper who is so close to the river as to directly impact river flows. Since his use is not spread out over the entire year, this limits the amount of development which can be obtained within the minimum stream flow restrictions at the Murphy Gage. It is not clear how factually based the four mile restriction is.

The four miles seems somewhat narrow in view of some of the observed phenomena occurring along the river. The distance may also vary with location, in that the transmissivity of the formations along the river may vary from area to area. If there is a range of distances which would encompass the possible variations, one approach would be to create an area such as the four miles in the proposed rules within which the finding would be automatic that the proposed use is not in the public interest. There would then be a second range within which there would be a presumption that the proposed use was not within the public interest. An applicant believing that his situation was different than the general condition embodied in the regulation would be free to try to prove his case.

TGN:tpk

<u>BASIN</u>	<u>APPLICATIONS PERMITS</u>	<u>PERMITS/APP 10 CFS OR LESS</u>	<u>TOTAL CFS</u>
01	17	11	72.81
02	171	65	9169.94
21	58	57	84.55
22	109	104	301.40
23	13	13	8.52
24	8	8	10.90
25	101	86	84.74
27	76	76	109.65
29	208	199	335.86
31	89	78	545.23
32	30	24	322.04
33	16	15	75.54
34	97	89	471.88
35	334	321	1088.20
36	236	210	1261.85
37	223	211	760.06
41	38	34	204.79
43	60	54	525.59
45	115	107	695.28
47	252	235	915.47
51	44	39	297.54
57	46	43	206.47
61	118	113	507.61
Totals	2459	2192	18056.02

This document is a true and certified copy of
the document on file at the department of
Natural Resources
Signed this 4th day of January 2008
Cory Mackinnon