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DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

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

KARL T. KLEIN (ISB # 5156)
MICHAEL C. ORR (ISB # 6720)
SHASTA KILMINSTER-HADLEY (ISB # 7889)
Deputy Attorneys General
700 W. State Street – 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400
Attorneys for the State of Idaho

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

In Re SRBA

Case No. 39576

) Consolidated Subcase No. 00-92023 (92-23)

) STATE OF IDAHO'S RESPONSE TO
) IDAHO POWER COMPANY'S
) MOTION TO CONSOLIDATE

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INTRODUCTION

The State of Idaho submits this memorandum in opposition to Idaho Power Company's Motion to Consolidate, filed August 8, 2008. The Motion to Consolidate seeks to consolidate this subcase with subcases 02-0200 and 00-92002GP,¹ asserting that these three proceedings involve common issues of fact and law because of the issues raised by the State of Idaho's Motion for Summary Judgment on Subordination to Ground Water Recharge (May 7, 2008) ("Motion for Summary Judgment"). As explained below, Idaho Power's assertion is incorrect, and its Motion to Consolidate should be denied.

This Court has held that it must resolve the ownership, nature and scope of the water rights at issue here as a matter of party intent under the Swan Falls Agreement, and that such

¹ Idaho Power's Motion to Consolidate incorrectly states that the subcase for General Provision No. 4 is "Subcase 92-0002." The correct subcase number for General Provision No. 4 of Basin 2 is 00-92002GP.

inquiries begin with the Swan Falls Agreement. The Court also has previously observed that it would be unwise for the Court to unnecessarily combine issues of party intent under the Swan Falls Agreement with questions about the scope and validity of legislatively imposed limitations on the vested water rights of non-consenting appropriators. Nevertheless, Idaho Power now seeks to inject such issues into this proceeding by moving to consolidate it with two subcases that focus on a general State water policy and the Idaho Legislature's authority to impose this policy on non-consenting appropriators. The Court should not permit this to occur and should deny Idaho Power's motion.

Contrary to what Idaho Power argues, this subcase does not involve common questions of law and fact with the two subcases that Idaho Power seeks to consolidate. Subcases 02-0200 and 00-92002GP raise issues relating to the general application of the Milner "zero flow" policy or the "two rivers" doctrine on vested water rights of non-consenting appropriators through the exercise of legislative authority.

This subcase, in contrast, focuses on resolving the ownership, nature and scope of the hydropower water rights at issue as a matter of party intent under the Swan Falls Agreement. As the State will demonstrate, the Agreement's "zero flow" provision was not intended simply as a recognition or affirmation of a general State policy, but rather as a specific, agreed-upon limitation on the legal scope and effect of the hydropower water rights at issue. The State's Summary Judgment Motion thus seeks to have this Court determine whether the plain language of the Swan Falls Agreement, and its implementation through State Water Plan amendments and legislation—including the 1986 amendment to Idaho Code § 42-203B(2)—demonstrate that the parties intentionally: (1) limited the legal scope and effect of the hydropower water rights at issue to surface water flows and tributary flows to the Snake

River discharged from ground water (hereinafter, “ground water flows”) downstream from Milner Dam, and (2) protected junior-priority water rights diverting from sources upstream of Milner Dam from curtailment or other administration in favor of these hydropower water rights. Accordingly, the State’s Summary Judgment Motion does not raise issues of fact or law common to subcases 02-0200 and 00-92002GP.

Preserving the status quo by denying Idaho Power’s Motion to Consolidate and keeping this subcase separate from the others does not risk inconsistent rulings. Rather, it avoids a consolidation of dissimilar legal and factual issues that would unnecessarily muddle this proceeding and further delay the Court’s ability to resolve the parties’ intent with respect to the nature and scope of the hydropower water rights as defined by the Swan Falls Agreement.

ARGUMENT

I. LEGAL STANDARDS.

SRBA Administrative Order 1 provides that a motion to consolidate subcases is appropriate when different subcases present common issues of law and resolution of those issues can be most expeditiously and effectively achieved through consolidation. AO1 § 11. Under Rule 42 of the Idaho Rules of Civil Procedure, the question of consolidation is committed to the Court’s discretion. *Hipwell v. Challenger Pallet & Supply*, 124 Idaho 294, 299, 859 P.2d 330, 335 (1993).

II. THE STATE’S MOTION FOR SUMMARY JUDGMENT PRESENTS QUESTIONS OF PARTY INTENT THAT SHOULD NOT BE CONSOLIDATED WITH QUESTIONS CONCERNING THE GENERAL SCOPE OR VALIDITY OF STATE WATER POLICY AND REGULATORY AUTHORITY.

This Court has held that this consolidated subcase “is a consolidation of common issues raised with respect to the meaning and application of the terms of the ‘Swan Falls

Agreement' as applied to twenty-six water right claims filed by Idaho Power Company." Memorandum Decision And Order On Cross-Motions For Summary Judgment ("Summary Judgment Order") at 2. "The very purpose of the Swan Falls Agreement is to define Idaho Power's water rights." *Id.* at 45. The State's Motion for Summary Judgment raises the question of whether the Swan Falls Agreement defines "the water rights at issue in this consolidated subcase [as] subordinate to all water rights diverting from sources upstream from Milner Dam, including ground water recharge water rights." Motion for Summary Judgment at 2.

Idaho Power contends that the State's motion is based on a general State policy of maintaining a "zero flow" at Milner Dam, and a statutory implementation of the "two rivers" doctrine under the 1986 amendment to Idaho Code § 42-203B(2). *See* Motion to Consolidate at 3-4 ("the State raises the issues of zero flow at Milner, and disparate administration of water rights above and below Milner"). Idaho Power argues that consolidation with subcases 02-0200 and 00-92002GP is therefore appropriate because "[i]ssues pertaining to the reach of the State's policy of maintaining a zero flow at Milner, and the State's current legislative directive providing for disparate administration of water rights above versus below Milner, are legally intertwined" with the issues raised by the State's Motion for Summary Judgment. Motion to Consolidate at 6.² While it is true that the Idaho Legislature legislated a "two rivers" policy, the scope and validity of that statutorily-imposed policy need not be decided in this subcase, because the relevant counts of the State's Motion for Summary Judgment

² In subcase 02-0200, the Director recommended a water right for "zero (0) cfs" as measured at the Milner gauging station in the name of the Idaho Water Resource Board, pursuant to the Board's statutory authority to establish minimum stream flows and the Milner "zero flow" policy of the State Water Plan. In subcase 00-92002GP, the Director recommended, under General Provision No. 4 for Basin 2, that "[t]he minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second."

only seek a determination that Idaho Power voluntarily consented as part of the Swan Falls settlement to limit the hydropower water rights at issue to be consistent with that policy.

A. The State's Motion for Summary Judgment Only Seeks A Definitional Ruling On The Water Rights At Issue In This Subcase, Not A Global Determination Regarding The Administration Of All Water Rights Above And Below Milner Dam.

Idaho Power ignores the plain language of the State's Motion for Summary Judgment and mischaracterizes it as requesting a ruling that is different from what the motion actually seeks. The State's motion expressly requests a ruling regarding the scope of subordination of "[t]he water rights at issue in this consolidated subcase" under the Swan Falls Agreement, and the legislative, executive, administrative and judicial actions implementing the Agreement. Motion for Summary Judgment at 2. Idaho Power ignores this plain language and asserts that the State's motion "alleges on its face and seeks a ruling that water rights above Milner may be administered differently than water rights below Milner." Motion to Consolidate at 3. Idaho Power's attempt to re-characterize the State's motion cannot change its plain language or transform it into a request for something different than what the State's motion expressly requests.

As previously discussed, this Court has held that this consolidated subcase is intended to define the ownership, nature and scope of the hydropower water rights at issue, consistent with the Swan Falls Agreement. These narrow and specific questions are legally distinct from, and should not be combined with, broader questions of general State policy and statutory authority to define "the determination and administration" of all water rights above and below Milner Dam. Idaho Code § 42-203B(2).³

³ Idaho Power asserts that the 1986 amendment to Idaho Code § 42-203B(2) is a purely administrative provision. This characterization ignores the plain language of the 1986 amendment, which expressly

Moreover, this proceeding involves definitional issues that plainly have no connection to the State policy of maintaining a “zero flow” at Milner or to Idaho Code § 42-203B(2). For example, in this subcase, Idaho Power has objected to the Director’s recommendations that the partial decrees include remarks stating that the water rights “are subordinate to the water rights of those persons dismissed Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Jud. Dist. Feb. 16, 1990) pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540,” and to “those water rights with a priority date prior to October 1, 1984.”⁴ While Idaho Power waived the substance of its objections on these points in its Complaint, presumably the question of whether the remarks should be included in the partial decrees remains.⁵ These matters have nothing to do with subcases 02-0200 and 00-92002GP.

B. The State’s Motion for Summary Judgment Is Based On The Parties’ Intent Under The Swan Falls Agreement And Idaho Power’s Consent To, And Agreement Not To Challenge, The State’s Regulatory Authority With Respect To The Water Rights At Issue In This Subcase.

encompasses “the determination and administration” of water rights above and below Milner Dam. Idaho Code § 42-203B(2).

⁴ The Director recommended these remarks under paragraphs 3 and 4 of the “Other Provisions Necessary For Definition Or Administration Of This Water Right” for each water right at issue in this proceeding, and Idaho Power filed a corresponding objection for each water right. Paragraphs 3 and 4 of the Director’s recommendations reflect Paragraphs 7(C) and 7(D) of the Swan Falls Agreement.

⁵ In its Complaint in this proceeding, Idaho Power stated that it “does not challenge here” its subordination to existing uses under Paragraphs 7(C) and 7(D) of the Swan Falls Agreement:

As more fully set forth in Paragraphs 7(C) and 7(D) of the Swan Falls Agreement, and also as more fully set forth in the 1180 Contract and the consent judgment entered in Case No. 81375 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Idaho Power also subordinated the water rights identified in Paragraph 22 above to then existing uses—specifically to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the terms of the 1180 Contract, and to those persons who beneficially used water prior to October 1, 1984, and who filed an application or claim for said use by June 30, 1985. Idaho Power does not challenge here this subordination to then existing uses as set forth more fully in Paragraph 7(C) and 7(D) of the Agreement, the 1180 Contract, or the consent judgment entered in Ada Count Case No. 81375 . . .

Complaint and Petition For Declaratory and Injunctive Relief at 9-10 ¶ 25.

Idaho Power is also simply incorrect in asserting that the State's Motion for Summary Judgment is based on the "the State's policy of maintaining a zero flow at Milner, and the State's current legislative directive providing for disparate administration of water rights above versus below Milner." Motion to Consolidate at 6; *see also id.* at 2, 3-4, 5, 7, (similar). This argument is based on speculation as to what the State will argue. In fact, the State's motion will not be based on the State Water Plan, general State policy, or the State's general regulatory authority under the 1986 amendment to Idaho Code § 42-203B(2). Rather, the State's motion will be based on Idaho Power's explicit consent and agreement to subordination of the hydropower water rights at issue to water rights diverting from sources upstream from Milner Dam.

As discussed in subsequent sections of this memorandum, the State will demonstrate that under the Swan Falls Agreement, the parties intended to define the source of the hydropower water rights at issue as limited to surface water and ground water flows downstream from Milner Dam, and to preclude any claim under those water rights for administration of water rights diverting from sources upstream from Milner Dam. Moreover, the State will show that the plain language and legislative history of the 1986 amendment to Idaho Code § 42-203B(2) conclusively confirms that Idaho Power consented to, and agreed not to challenge, the State's authority to so limit and define the hydropower water rights at issue in this case as part of the Swan Falls Agreement.

The Motion to Consolidate seeks to combine questions of consent and party intent with questions of the scope and validity of a State water policy and the Idaho Legislature's authority to statutorily impose that policy on non-consenting appropriators. As discussed in

this Court's Summary Judgment Order, these questions present distinctly different legal issues.

The Court explained that the Swan Falls Agreement is the starting point for resolving disputes over the definition of the hydropower water rights at issue: **"to the extent there is an alleged discrepancy or ambiguity between the Agreement and the legislation, the starting point is the Agreement, not the legislation."** Summary Judgment Order at 23 (emphasis added). Further, this Court explained that final determinations as to the ownership and scope of the water rights inevitably hinge on the intent of the parties:

While the State may still be able to enforce the terms of the statute, to the extent its provisions are alleged to vary from the terms of the Agreement it would not be able to do so without implicating claims for breach of contract or takings. The resolution of breach of contract or takings claims would require an examination of the intent of the parties as evidenced by the underlying Agreement. **Simply put, starting with the interpretation of the Agreement avoids 'begging the question' of the intent of the parties which would have to be addressed even if the Court only considered the statute. . . . Clearly, decreeing the rights consistent with the intent of the parties requires an examination of the underlying Agreement.**

Summary Judgment Order at 23 (emphasis added).

This Court further observed that "deciding the issues entirely based on the State's exercise of its regulatory authority over hydropower rights independent from the underlying Agreement raises a number of significant constitutional issues." Summary Judgment Order at 24. *See generally* Summary Judgment Order at 23-26.⁶ Additionally, this Court held that such questions can be avoided when Idaho Power has consented to the regulatory authority at issue:

Therefore, the Court need not decide the issue based on a determination of the scope of the State's regulatory power over Idaho Power's vested hydropower rights. A contractual agreement between the parties to settle a water rights

⁶ The State will demonstrate in the appropriate subcase that the Idaho Legislature acted within its authority when enacting Idaho Code § 42-203B and subsequent amendments.

dispute does not raise the same constitutional issues. As the Supreme Court stated in *Idaho Power v. State*, 104 Idaho 575, 661 P.2d 741 (1983):

We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, e.g. restrictive covenants and equitable servitudes. Whatever merits such an argument may have with regard to subordination clauses forced upon an unwilling appropriator by the FPC or the state, we need not decide. We hold only that a voluntary subordination agreement is not in violation of Idaho's water law, and therefore we find no conflict between our state water law and the language of the subordination clause inserted in the Hells Canyon licenses.

Summary Judgment Order at 25 (quoting 104 Idaho at 587, 661 P.2d at 753) (citation omitted).

This Court reasoned that even if Idaho Power had not “directly agreed” to limitations on the hydropower water rights at issue, “it could still concede to the State’s authority or agree not to challenge the State’s authority to ‘regulate’ its rights in a manner that would achieve the same result. However, Idaho Power’s consent to the State’s authority would not necessarily be binding on unrelated hydropower claims.” Summary Judgment Order at 26. This Court therefore concluded that it would base its decision “on its interpretation of the Swan Falls Agreement, including the agreement between the parties to enact I.C. § 42-203B, as opposed to deciding the matter based solely on the State’s regulatory authority.” Summary Judgment Order at 26.⁷

⁷ Idaho Power attempts to avoid these holdings by incorrectly stating that in the order denying Idaho Power’s motion to strike, the Court determined that “issues concerning the state policy of maintaining a zero flow at Milner Dam, and state legislation concerning disparate administration of water rights above versus below Milner, may be raised in this proceeding.” Motion to Consolidate at 2. The plain language of the order does not contain any such ruling. Rather, the order simply recognized that Idaho Power “believes” the State’s Motion for Summary Judgment motion “expand[ed] the issues beyond that which was originally contemplated”:

In addressing the issues raised by Idaho Power on substantive grounds, the Court finds that the issues raised by the State of Idaho in its motion for summary judgment fall within the scope of the consolidated subcase which includes the interpretation and/or application of the Swan Falls Agreement and the issue of whether the subject hydropower rights are

The Court went on to hold that Idaho Power consented to the State's regulatory authority as a term of the Swan Falls Agreement: **"Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings."** Summary Judgment Order at 45 (emphasis added); *see also id.* at 46 ("as a term of the contract Idaho Power agreed to the State's regulatory authority"); *see also id.* at 31 ("Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority").

In short, the Court held that the Agreement **and** the implementing legislation set forth the parties' intent, and therefore the legislation was binding and enforceable against Idaho Power regardless of whether the legislation was enforceable against other, non-consenting appropriators. The Court therefore did not reach questions regarding the scope or validity of the State's general regulatory authority under the implementing legislation.

The holdings and reasoning in this Court's Summary Judgment Order demonstrate why Idaho Power's Motion to Consolidate should be denied. The relevant counts of the State's Motion for Summary Judgment are based on the parties' intent under the Swan Falls Agreement, which was to define the hydropower water rights as limited to surface water and ground water flows downstream from Milner Dam, and as not including an entitlement or

subordinated to recharge. To the extent there also remains an issue distinguishing between recharge rights located above Milner Dam and recharge rights located below Milner Dam, the issue is within the scope of these proceedings. Although the issue of the minimum flows at Milner Dam is at issue in a different subcase, arguments relative to the subject hydropower rights which implicate the terms of the Swan Falls Agreement need to be raised and addressed in this proceeding. It is not the intent of the Court to have such issues addressed in a separate proceeding before a special master. Ultimately this Court will have to issue partial decrees for each of the subject hydropower rights. As such, any issues regarding the scope of subordination relative to recharge need to be addressed in the context of the SRBA in order to fully define the scope of the hydropower rights. To the extent that Idaho Power believes that this expands the issues beyond that which was originally contemplated the Court will allow for additional time.

Order Denying Idaho Power's Motion to Strike/In Limine and Granting State of Idaho's Motion to Compel at 3-4.

authorization to make delivery calls against junior-priority water rights to flows upstream from Milner Dam. The 1986 amendment to Idaho Code § 42-203B(2) confirmed this intent and further demonstrated that Idaho Power consented to, and agreed not to challenge, the State's regulatory authority to so limit and define the hydropower water rights as a term of the Swan Falls Agreement.

While Idaho Power admits that the 1986 amendment applies to the hydropower water rights at issue in this proceeding, it argues that this question should be combined with an inquiry into the potential effect of the 1986 amendment on other water rights above and below Milner Dam. Motion to Consolidate at 6 (arguing that the 1986 amendments “pertain not just to Idaho Power’s water rights but to all water rights in the Snake River Basin.”) This argument is contrary to this Court’s Summary Judgment Order which, as discussed above, held that questions of regulatory authority need not be addressed for purposes of ascertaining party intent under the Swan Falls Agreement—especially when Idaho Power has consented to the regulatory authority in question as applied to the hydropower water rights as a term of the Swan Falls Agreement.

The scope and validity of the State’s authority to enforce the Milner “zero flow” policy and the 1986 amendment through the State’s general regulatory authority are simply irrelevant to the questions presented by the State’s Motion for Summary Judgment. Because Idaho Power voluntarily agreed to limit the source of the water rights in question to surface water and ground water flows downstream from Milner Dam, the validity of the State’s regulatory authority has no bearing on the State’s Motion for Summary Judgment, or this subcase. Questions of the parties’ intent and Idaho Power’s consent under the Swan Falls Agreement need not be combined with legally distinct questions of the scope and validity of

a general Milner “zero flow” policy or the State’s general regulatory authority to statutorily impose the “two rivers” doctrine on non-consenting appropriators.⁸

Accordingly, Idaho Power’s repeated contention that consolidation is warranted merely because all three subcases generically raise “issues associated with the zero flow at Milner,” Motion to Consolidate at 4, is insufficient to support consolidation. The “issues associated with the zero flow at Milner” in this proceeding pertain to the intent of the parties under the Swan Falls Agreement, while in the other two subcases such issues pertain to general State policy and regulatory authority. The mere fact that the term “zero flow at Milner” arises in all three subcases is insufficient to support consolidation when the meaning and significance of that term is different in this proceeding than in the other two subcases. *See generally* Order Deconsolidating Subcase 00-92026 And Order Of Recommitment To Special Masters (July 1, 2008) (deconsolidating the “historic practices” subcases).

The State respectfully submits that the Motion to Consolidate should be denied because the State’s Motion for Summary Judgment rests upon Idaho Power’s consent under the Swan Falls Agreement and its implementing legislation—including the 1986 amendment to Idaho Code § 42-203B(2)—to limit the hydropower water rights at issue to surface water and ground water flows downstream from Milner Dam. Although the State contends that to defeat the Motion to Consolidate it need not affirmatively demonstrate that Idaho Power consented under the Agreement and the legislation to limit the hydropower water rights at issue to surface water and ground water flows downstream from Milner Dam, the State will provide the Court with evidence that Idaho Power did exactly that. The State is providing the

⁸ For similar reasons, denying the Motion to Consolidate will not prejudice Idaho Power. The Company will still have ample opportunity to raise and litigate any constitutional challenges to the State’s regulatory authority in subcases 02-0200 and 00-92002GP with respect to any other water rights it may hold.

Court with this evidence in order to preserve its arguments regarding those issues should there be an appeal.⁹

III. UNDER THE SWAN FALLS AGREEMENT, THE PARTIES INTENDED TO DEFINE THE SOURCE OF THE HYDROPOWER WATER RIGHTS AT ISSUE SO AS TO LIMIT THEIR LEGAL SCOPE AND EFFECT TO SURFACE WATER AND GROUND WATER FLOWS DOWNSTREAM OF MILNER DAM.

The litigation Idaho Power initiated in the wake of the Idaho Supreme Court's 1983 Swan Falls decision required the parties to grapple with the question of whether the claimed water rights would be defined to extend to flows upstream from Milner Dam. The parties intended to resolve this issue by making the "zero flow" provision of the Agreement the definition of the source of the hydropower water rights that are the subject of the Agreement. This intent is demonstrated by the plain language of the "Framework for Resolution of Snake River Water Rights Controversy,"¹⁰ the Agreement, the implementing amendments to the State Water Plan, and the statements of the parties and the public during the Agreement's ratification and implementation proceedings.

Most tellingly, this party intent is explicitly set forth in the plain language and legislative history of the 1986 amendment to Idaho Code § 42-203B(2). The amendment was precipitated by the Department of Water Resources' erroneous interpretation of the trust and public interest provisions of the settlement. In 1985, the Department proposed administrative

⁹ To demonstrate that the State's pending Motion for Summary Judgment hinges on questions of consent and party intent and not on general State policy or regulatory authority, this memorandum summarizes some of the State's anticipated summary judgment arguments. The State acknowledges this Court's decisions to proceed on Idaho Power's motion to strike and motion to consolidate, respects the Court's determinations and has proceeded in accordance with the Court's orders. In order to preserve its rights on appeal, however, the State must note for the record its objection to proceeding on Idaho Power's motions prior to deciding the State's Motion for Summary Judgment, which was filed several months prior to the motion to strike and motion to consolidate. The effect has been to deprive the State of its opportunity to fully and fairly present its legal arguments for summary judgment as contemplated by the Idaho Rules of Civil Procedure.

¹⁰ Hereinafter, "Framework." A copy of the Framework is attached to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("First Orr Aff.") at Exhibit 29.

rules rejecting the view that the “zero flow” provision of the Agreement was intended to limit the legal scope and effect of the hydropower water rights, based on the fact no such limitation was set forth in Idaho Code § 42-203B(2). The parties immediately rejected the Department’s interpretation and proposed the 1986 amendment to section 42-203B(2) to remove any doubt that the parties’ original intent was to limit the source of the hydropower water rights at issue to surface water and ground water flows downstream from Milner Dam. Thus, as a term of the Swan Falls Agreement, Idaho Power consented to and agreed not to challenge the application of the 1986 amendment to the hydropower water rights at issue in this subcase.

In short, the parties intended the “zero flow” provision of the Agreement to have a specific contractual meaning with respect to the definition of the water rights at issue. The “zero flow” provision of the Agreement is a term of the parties’ bargained-for exchange and an element of the definition of the hydropower water rights that were at the center of the controversy, as the following sections demonstrate.

A. The Question Of Whether The Water Rights At Issue Would Be Defined As Subordinate To Water Rights Diverting Upstream From Milner Dam Was A Significant Issue In The Swan Falls Controversy.

The question of whether Idaho Power’s claimed water rights had any legal effect upstream from Milner Dam did not arise in the first Swan Falls lawsuit in 1977 because Idaho Power had conceded that it had no rights above Milner Dam. Idaho Power’s complaint in Ada County case no. 62237¹¹ only identified the waters below Milner Dam as tributary to its hydropower water rights: “All inflow to the Snake River between Milner Dam and Swan Fall powerplant, whether from surface or subterranean sources, is tributary to the Snake

¹¹ *Idaho Power Co. v. State*, Case no. 62237 (Fourth Jud. Dist., Ada County) (Nov. 1, 1977). A true and correct copy of the “Amended Complaint” for this case is attached hereto as “Exhibit A.”

River and the water right or rights of plaintiff . . .”¹² The Company sought a judicial determination that it had “a protectable right in the reach of the Snake River between Milner Dam and Hells Canyon,” sought to enjoin depletionary uses “between Milner Dam and the Swan Falls project,” and informed the Court that until the case was decided, the Company would not make power hook-ups for persons or entities planning depletionary water diversions “from the Snake River and its surface and subterranean tributaries between Milner Dam and Hells Canyon.”¹³ The Company asked the Court to order a “full adjudication” of its water rights, which the Company viewed as limited to “the Snake River and its tributaries between Swan Falls and Milner Dam.”¹⁴

The Milner question only became an issue in the litigation after the Idaho Supreme Court unexpectedly reversed the district court’s decision in Ada County case no. 62237. *See Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). In response to the Supreme Court decision, Idaho Power filed its second lawsuit—Ada County case no. 81375,¹⁵ the infamous “7500 case”—to address “ratepayer concerns that Idaho Power was not protecting its assets. The complaint sought to (1) establish the nature and extent of its rights at its various facilities, and (2) enforce those rights as against junior upstream users.” Idaho Power Company’s Reply Memorandum in Support of Cross-Motion for Summary Judgment at 7-8. Thus, Idaho Power for the first time expressly sought to assert and enforce its claimed water rights against water rights and flows upstream of Milner Dam.¹⁶

¹² Exhibit A (“Amended Complaint”) at 30 ¶ XIX.

¹³ Amended Complaint at 31 ¶¶ XX, XIX.

¹⁴ Amended Complaint at 33.

¹⁵ *Idaho Power v. State*, Case no. 81375 (Fourth Jud. Dist., Ada County) (Mar. 30, 1983). *See* Exhibit B attached hereto (true and correct copies of excerpted pages of the “Complaint” filed in Ada County Case No. 81375).

¹⁶ Idaho Power attorney Tom Nelson testified in his 1990 deposition that the “7500 case” included the entire area upstream from Milner Dam:

Q: What were the geographical boundaries of that lawsuit?

The relief Idaho Power sought in the 7500 case thus threatened a principle that had been one of the pillars of Snake River water rights administration and settled property rights expectations for decades.¹⁷ One of the State's primary goals in the Swan Falls negotiations was to confirm that the priority of Idaho Power's claimed hydropower water rights could not be asserted against nominally junior natural flow and storage rights upstream from Milner Dam. Attorney General Jim Jones believed that the "Framework" confirmed this limitation. He stated in an October 1, 1984, press release announcing the signing of the "Framework" that "[t]he parties have agreed to a zero flow at Milner, which would allow for the filling of present upstream storage facilities, as well as additional new water storage projects."¹⁸

-
- A: Swan Falls, the portion of the Snake River Basin tributary to the Snake above Swan Falls Dam.
 Q: All the way to the Wyoming border?
 A: Yes, we went clear to the Wyoming border, and Nevada on the south.
 ...
 Q: It excluded the part below the Swan Falls dam, but included everything that was upstream from Swan Falls?
 A: That's correct.
 Q: Including Milner?
 A: Yes.

Deposition of Thomas G. Nelson, *State v. United States (In re SRBA)* Oct. 31, 1990), at 104-05. The full transcript of this deposition is attached as Exhibit O to the Supplemental Affidavit of Shelley M. Davis in Support of Idaho Power Company's Memorandum in Support of Cross Motion for Summary Judgment.

¹⁷ Idaho Power had made numerous representations over the years that its water rights were subordinate to upstream uses. See State of Idaho's Memorandum in Response to Idaho Power Company's Cross-Motion for Summary Judgment at 5-7 (discussing Idaho Power statements that it had subordinated its water rights); see also Second Affidavit of Michael C. Orr, Exhibits 1-4 (Idaho Power statements that it had subordinated its water rights). Further, the subordination provisions and stipulations in Idaho Power's federal contracts and power licenses had led many to believe that Idaho Power had specifically subordinated its water rights downstream from Milner Dam to existing and future uses diverting upstream from Milner Dam. See generally State of Idaho's Response to Idaho Power Company's Motion to Strike, or Alternatively, in Limine at 26-33 (historic discussion); see also Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls In 3D: A New Look At The Historic, Legal And Practical Dimensions Of Idaho's Biggest Water Right Controversy*, 28 Idaho L. Rev. 573, 589 (1992) ("Idaho Power's rights at Swan Falls and other power plants are senior to many above Milner natural flow rights and most of the storage rights, but the Company never took any action to curtail above-Milner rights to serve those priorities.")

¹⁸ Third Affidavit of Michael C. Orr ("Third Orr Aff."), Exhibit 19 at 2 ("News Release," Idaho Office of the Attorney, General, Oct. 1, 1984).

B. The Framework, The Agreement And The Implementing State Water Plan Amendments Confirm That Parties Intended To Define The Hydropower Water Rights At Issue To Be Consistent With And To Support The Development Policies Of The State Water Plan As Amended Under The Agreement, Including The Milner "Zero Flow" Policy.

The parties resolved the Milner issue by agreeing to define the hydropower water rights to be consistent with and to support the Snake River basin water development policies of the State Water Plan as amended under the Swan Falls Agreement. The Agreement was intended to create a "comprehensive plan" for management of the Snake River watershed, and contemplated that the hydropower water rights as defined by the Agreement would play an important role in the comprehensive plan: **"State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed."** Swan Falls Agreement ¶ 11 (emphasis added).¹⁹

Accordingly, the parties intended to define the hydropower water rights to support and be consistent with the development policies of the State Water Plan:

the settlement of the pending Swan Falls litigation should be structured in a way which will allow the State to utilize Idaho Power's asserted water right to augment the existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest.²⁰

...
The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as part of the settlement.

¹⁹ See also Framework at 8 ("The focus of the discussion of settlement of the 'Swan Falls Controversy' has necessarily been on the claims of right and authority at that site. However, the settlement of those issues necessarily involve putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also.")

²⁰ First Orr Aff., Exhibit 15 at 3 (page 2 of Water Board resolution attached to minutes adopting proposed Policy 32 amendments, attached to minutes of Senate Resources & Environment Committee, March 4, 1985); see also *id.*, Exhibit 66 at 2 ("Currents," Jan. 1985); see also Third Orr Aff., Exhibit 21 at 7 (page 2 of resolution attached to Water Board meeting minutes of March 1, 1985).

Framework at 5, 7.

The implementing amendments to the State Water Plan similarly explained that the “zero flow” policy at Milner Dam was intended to allow for new development upstream from Milner, stating that the “zero flow” policy meant that the Murphy minimum flows would be supplied principally by spring flows into the Snake River below Milner Dam, and that the Snake River Plain aquifer would have to be managed as part of the Snake River system:

The establishment of a zero minimum flow at the Milner gaging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner means that rivers flows downstream from that point to Swan Falls Dam may consist almost entirely of ground water discharges during portions of low water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

...

The impacts of groundwater use within the basin on the timing of aquifer discharge to the river [are] such that at some time stored surface water may be necessary to maintain the designated minimum flows.

A Resolution, *In The Matter Of Policy 32 Of The State Water Plan* (Idaho Water Resource Board) (Mar. 1, 1985) (“State Water Plan Amendments”) at 2, 7.²¹

Thus, a key element of the settlement required the hydropower water rights at issue to be defined consistently with, and to support, a development and management policy to protect existing uses upstream of Milner Dam and to allow for new uses upstream of Milner Dam. This policy explicitly contemplated that the new seasonal minimum streamflows established at the Murphy gauging station—and therefore Idaho Power’s overlapping water right—would be primarily supplied by spring flows into the Snake River downstream from

²¹ Copies of the State Water Plan Amendments implementing the Swan Falls Agreement can be located in the following exhibits the State has previously submitted: First Orr Aff., Exhibit 15 (minutes of Senate Resources & Environment Committee, March 4, 1985, with copy of the State Water Plan Amendments attached); First Orr Aff., Exhibit 66 (“Currents,” Jan. 1985) (setting forth in full the State Water Plan Amendments); Third Orr Aff., Exhibit 21 (minutes of the Idaho Water Resource Board, March 1, 1985, with copy of the State Water Plan Amendments attached).

Milner Dam. In other words, the settlement contemplated that the hydropower water rights would be limited to surface water and ground water flows downstream from Milner Dam.

This conclusion finds support in other relevant provisions of the Framework, the Agreement and the State Water Plan amendments. All of these limited Idaho Power's right to "mitigation" for the depletive effects of winter storage diversions on hydropower production to that portion of the Snake River **downstream** from Milner Dam:

- "new non-irrigation season storage **in the reach below Milner dam and above Murphy Gage** should be authorized only if coupled with provisions which mitigate depletions such storage would cause in hydropower generation." Framework at 3.
- "There should be express recognition of the adverse effect of diversions for storage from the mainstream of the Snake River **between Milner and Murphy** on hydropower production from November 1 to March 31. . . . approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River **between Milner Dam and Murphy Gauge** should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower." Swan Falls Agreement, Exhibit 6(5) (emphasis added).
- "New storage projects that would divert water from the Snake River **between the Milner and Murphy gauging stations** during the November 1 to March 31 period are subject to the requirement that the impact such depletions have on hydropower generation is mitigated." State Water Plan Amendments at 7.

The agreement to limit the "mitigation" requirement to storage diversions downstream from Milner Dam confirms the parties' intent that Idaho Power would have no legal interest in the surface water and ground water flows upstream from Milner Dam under the water rights as defined by the settlement. This intent is also confirmed in subparagraph E of Paragraph 7 – the paragraph of the Agreement that defines the Company's water right –

which provides that Idaho Power's "ability to purchase, lease, own or otherwise acquire water from sources upstream of its power plant and convey it to and past its power plants below Milner Dam shall not be limited by this agreement." This provision was necessary to clarify that while Idaho Power had no entitlement under the hydropower water rights defined by the Agreement to demand that waters upstream from Milner Dam be conveyed past the dam to the power plants downstream, it would not violate the Agreement for Idaho Power to acquire water upstream from Milner Dam via other means, and to convey such water past Milner Dam for the benefit of the Company's downstream power plants.²²

C. The Agreement's Ratification And Implementation Record Demonstrates That The Parties And The Public Understood The Agreement's "Zero Flow" Provision To Mean That The Hydropower Water Rights Would be Defined As Limited To Surface Water And Ground Water Flows Downstream From Milner Dam.

The negotiators reinforced these points in explaining the settlement in the Idaho Water Resource Board's public information meetings on the settlement. During the Twin Falls meeting on the day the agreement was signed, Idaho Power attorney Tom Nelson explained that "we were trying to wrestle with how to regulate the river using streamflows at

²² Paragraph 7(E) thus demonstrates that the Milner "zero flow" agreement was not intended to entirely bar any flow of water in the riverbed at the Milner gauging station, but only to preclude the use of the hydropower water rights at issue from calling for water from surface water or ground water flows upstream from Milner Dam. This principle was (and is) consistent with the general "zero flow" policy, which was not intended to prevent any flows from ever being spilled past Milner Dam. As Tom Nelson explained in a 1989 article in *The Advocate*, the State Water Plan's minimum flow of zero c.f.s at Milner "was not a goal or a target, but a planning tool to indicate that development upstream of that site would not be hampered by a minimum flow there." Third Orr Aff., Exhibit 1 at 4 (Thomas G. Nelson, *Between Rock Creek And A Hard Place: Who Will Control Idaho's Water?*, THE ADVOCATE, September 1989, p.14).

Murphy, you have to keep the split personality of the river involved, **and the numbers were based on zero flow at Milner.**²³ Mr. Nelson also explained that the Agreement's "zero flow" provision meant "what goes on above Milner is not affected by this agreement":

The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.²⁴

At the public information meeting in Boise a few days later, Pat Costello, the Governor's counsel and negotiator, pointed out that the "zero flow" provision meant that the settlement provided for future storage projects upstream of Milner Dam: "And on the up-stream storage, I guess it's in here by omission, **because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner.**"²⁵ Mr. Nelson did not disagree with or qualify Mr. Costello's statement in any way.

The discussion and testimony during the Idaho Water Resource Board's public hearings on the proposed State Water Plan amendments also demonstrate that the "zero flow" provision of the Agreement was understood to be an affirmative limitation on the hydropower water rights at issue. In explaining the "zero flow" policy, Idaho Water Resource Board representative Frank Sherman explained that "[t]he negotiators agreed that **above Milner there is a requirement for zero flow back to the dam.**"²⁶ "They're going to continue the zero flow at Milner Dam. All the water in the Upper Snake in low water years

²³ First Orr Aff., Exhibit 44 at 41 (Nelson statements in transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls)) (emphases added).

²⁴ First Orr Aff., Exhibit 44 at 27 (Nelson statements in transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls)).

²⁵ First Orr Aff., Exhibit 46 at 66 (Costello statements in transcript of Idaho Water Resource Board public information meeting of Nov. 1, 1984 (Boise)) (emphasis added).

²⁶ Third Orr Aff., Exhibit 24 at 24 (p. 15 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Jan. 29, 1985, 7:00 p.m. (Pocatello)) (emphasis added).

can be appropriated; therefore, **there is no requirement for the water to be dumped past Milner Dam.**"²⁷

Eldred Lee, Secretary of Great Feeder Canal Co., made similar comments regarding the "zero flow" policy in his testimony on the proposed amendments:

It appears to me that since the minimum flows, and it says back here in some of this material in the back **that this entire policy is based on a minimum flow at Milner that anything that can develop or anything that's affected above Milner should not be affected by this agreement.**

...
And if Idaho Power is content to have a minimum flow at Milner, it's my opinion that the State of Idaho is not responsible, if that should fall below that particular point, they are not responsible to make that flow up."²⁸

Mr. Sherman also repeatedly pointed out in the Policy 32 meetings that under the policies proposed by Exhibit 6 to the Swan Falls Agreement, the summertime minimum flows needed to satisfy the new minimum flows at Murphy and Idaho Power's overlapping water right would consist mainly of spring flows, not spills over Milner Dam:

"[t]he policy points out that this agreement will insure that some discharges continue to occur at Thousand Springs because that's basically where the river gets its water below Milner Dam to insure a flow to Murphy."²⁹

"The problem is that a zero flow allowable at Milner Dam during most of the irrigation and low flow periods of the year, the water in the Snake River is discharged from Thousand Springs."³⁰

"And then says that the minimum flows established by the plan should supply water to the trout farming industry. That's because the water in the river below Milner Dam, at least in the low-flow periods of the year, is frequently mostly (unintelligible) Mountain [Thousand?] Springs."³¹

²⁷ Third Orr Aff., Exhibit 28 at 21 (page 65 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Feb. 6, 1985, 7:00pm (Lewiston) (emphasis added).

²⁸ Third Orr Aff., Exhibit 23 at 28, 30 (pages 28 and 30 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Jan. 28, 1985, 2:00 p.m. (Idaho Falls) (emphasis added).

²⁹ Third Orr Aff., Exhibit 24 at 7 (page 12 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Jan. 29, 1985, 2:00 p.m. (Pocatello).

³⁰ Third Orr Aff., Exhibit 24 at 9 (page 19 transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Jan. 29, 1985, 2:00 p.m. (Pocatello).

³¹ Third Orr Aff., Exhibit 25 at 5 (page 12 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Jan. 30, 1985, 2:00 p.m. (Burley) (parenthetical in transcript).

"With a zero flow set for Milner Dam during the summertime, conceivably, most of the water in the river by the time it gets to Murphy Gage is going to be water that came out of Thousand Springs. We have to keep 3900 going down there for the Murphy Gage. It's going to be a fair block of water coming out of Thousand Springs because (unintelligible) gage."³²

"It says that as long as you are going to have flows in the river, and most of that water in the summertime probably comes out of the thousand springs, these trout farmers are probably going to be okay."³³

Governor Evans' statements to the Water Board on the Swan Falls amendments to the State Water Plan also emphasized the importance of the "zero flow" at Milner to the overall settlement framework: "The new flows at the -- the Murphy gage, **coupled with the retention of a zero flow at Milner dam**, will allow for significant new agricultural development without threatening minimum flows."³⁴

Idaho Power publicly supported and endorsed the minimum flows and development policies set forth in the implementing amendments to the State Water Plan, including the Milner "zero flow" policy, as specifically required under the Agreement.³⁵ Thus, as a term of the Agreement and its implementation, Idaho Power voluntarily agreed to limit the legal scope and effect of the hydropower water rights at issue to surface water and ground water flows downstream from Milner Dam.

In sum, the plain language of the Framework and the Swan Falls Agreement, and the Agreement's ratification and implementation, demonstrate that the parties and the public

³² Third Orr Aff., Exhibit 25 at 36 (page 16 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Jan. 30, 1985, 7:00 p.m. (Burley) (parenthetical in transcript).

³³ Third Orr Aff., Exhibit 23 at 14 (page 14 of transcript of Water Board meeting on proposed Policy 32 amendments of Jan. 28, 1985, 2:00 p.m. (Idaho Falls).

³⁴ Third Orr Aff., Exhibit 27 at 6 (page 7 of transcript of Water Board meeting on proposed Policy 32 amendments of Feb. 5, 1985, 2:00 p.m. (Boise) (emphasis added).

³⁵ "When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action." Swan Falls Agreement ¶ 4 ("Good Faith").

understood the “zero flow” provision of the Agreement to limit the legal scope and effect of the hydropower water rights at issue to the surface water and ground water flows downstream from Milner Dam. The “zero flow” provision of the Agreement was not simply a perfunctory re-affirmation of a State Water Plan policy—it was intended and understood to be an affirmative agreement by Idaho Power that, consistent with historic practice and settled property rights expectations, the hydropower water rights downstream from Milner Dam would not entitle Idaho Power to seek curtailment of junior-priority surface water or ground water rights to flows above Milner Dam.³⁶

It could not be otherwise, because the Agreement’s “comprehensive plan” contemplated that the hydropower water rights at issue would be defined to be consistent with, and to support, the development and management policies incorporated into the State Water Plan under the implementing amendments. The hydropower water rights at issue had

³⁶ The parties’ subsequent statements further demonstrate that the Agreement’s “zero flow” provision was specifically intended to limit the source and scope of the water rights in question. Idaho Power attorney Tom Nelson explained in a 1989 article in *The Advocate*, the Idaho State Bar’s monthly journal, that while the Milner “zero flow” provision of the State Water Plan was by itself only a “planning tool,” its incorporation into the Swan Falls Agreement meant that the public interest criteria of section 42-203C would not apply upstream from Milner Dam:

When the first Idaho State Water Plan was developed in the mid-1970’s, it provided a minimum flow of 0 cfs at Milner. This was not a goal or a target, but a planning tool to indicate that development upstream of that site would not be hampered by a minimum flow there.

The Swan Falls Settlement Agreement recognized the 0 cfs flow at Milner Dam, and imposed controls on development of water tributary downstream of Milner Dam by use of minimum flows at the Murphy U.S.G.S. gaging station below Swan Falls Dam. The settlement and the approving legislation also imposed new criteria on development which would impact river flows below Milner Dam. (I.C. § 42-203(c)) Areas using water which would otherwise be tributary above Milner Dam were specifically excluded from the new criteria.

Third Orr Aff., Exhibit 1 at 4 (Thomas G. Nelson, *Between Rock Creek And A Hard Place: Who Will Control Idaho’s Water?*, THE ADVOCATE, September 1989, p.14). Former Attorney General Jim Jones made similar comments in a meeting of the Expanded Natural Resources Interim Committee Meeting in 2004: “If the water right was above Milner Dam, it was assumed that the special new criteria did not have to be met. . . . everyone assumed that the flows would be there and that choking off the river would provide the necessary flows plus about an additional 600 cfs during the summer.” Third Orr Aff., Exhibit 48 at 4 (minutes of Expanded Natural Resources Interim Committee, July 7, 2004).

to be limited to the surface water and ground water flows downstream from Milner Dam to be consistent with and support the State Water Plan as amended under the Agreement.

Defining the hydropower water rights at issue to authorize Idaho Power to demand that water be conveyed past Milner Dam to satisfy hydropower water rights located below Milner Dam would have resulted in a direct conflict between the definition of the water rights and a critical element of the State Water Plan development policies required under the Agreement. As Idaho Power's attorney Tom Nelson recognized in the Idaho Water Resource Board hearings on the State Water Plan amendments proposed to implement the Agreement, it would be a violation of the Agreement's "good faith" provision for Idaho Power to "chip away" at the State Water Plan by taking inconsistent positions in other forums.³⁷

³⁷ During the evening meeting of the Idaho Water Resource Board meeting on the proposed amendments on February 5, 1985, in Boise, Idaho Power attorney Tom Nelson responded to a concern voiced during the afternoon meeting that Idaho Power would "chip away" at the State Water Plan:

The other comment I would make would be relative to goof faith. And there was a comment made this afternoon that you need to—you need to put your paranoid hat on, because the Idaho Power Company's going to be over at the legislator—legislature chipping away at everything you do here relative to the State Water Plan.

I'd like to refer you to paragraph 4 of the October agreement. The bullet, or caption, is entitled Good Faith. And the second paragraph says, the State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court, board, or agency which is inconsistent with the term of this agreement.

And so far as I know, and I think I'm in a position to know, the State of Idaho, through the Governor and the Attorney General, have been consistently in support of the agreement, as written, and so has the Idaho Power Company. So I suggest that that paranoia is badly misplaced. That without the good faith support of the parties, I don't think we would be as far as we are in the legislature, and probably wouldn't have a — a chance of getting it passed. So the parties have arrived at the agreement. To my knowledge, they are—are in total good faith in trying to get it implemented.

Third Orr Aff., Exhibit 27 at 23 (pages 74-75 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments of Feb. 5, 1985, 7:00 p.m. (Boise) (emphases added). Unfortunately, Idaho Power has made it clear in this proceeding that it indeed intends to "chip away" at the Swan Falls Agreement. It is the State's position that Idaho Power has breached the Swan Falls Agreement, and continues to do so, by submitting to this Court arguments and requests for relief that are indisputably at odds with the plain language and manifest intent of the Swan Falls Agreement and the implementing legislation. See Summary Judgment Order at 32 ("Finally, this Court finds it

In short, the Swan Falls Agreement was intended to define the hydropower water rights in a manner consistent with the State Water Plan as amended under the Agreement. By including the “zero flow” provision in the Agreement the parties intended and represented to the public that the source of the hydropower water rights at issue would be limited to surface water and ground water flows downstream from Milner Dam, consistent with the development policies of the State Water Plan as amended under the Agreement.

IV. THE 1986 AMENDMENT TO IDAHO CODE § 42-203B(2) CONFIRMED THE ORIGINAL INTENT OF THE PARTIES THAT THE SWAN FALLS AGREEMENT DEFINED THE HYDROPOWER WATER RIGHTS AT ISSUE SO AS TO LIMIT THEIR LEGAL SCOPE AND EFFECT TO SURFACE WATER AND GROUND WATER FLOWS DOWNSTREAM OF MILNER DAM, AND THAT IDAHO POWER CONSENTED TO THE AMENDMENT AS APPLIED TO THE WATER RIGHTS AT ISSUE.

The original intent and understanding of the parties that the hydropower water rights were limited to water sources downstream from Milner Dam is conclusively confirmed by the plain language and legislative history of the 1986 amendment to Idaho Code § 42-203B(2). As previously discussed, the 1986 amendment was precipitated by the Department’s mistaken view that the “zero flow” provision of the Agreement did not limit the legal scope or effect of the water rights at issue. The parties publicly rejected this interpretation, and affirmatively sought enactment of the 1986 amendment to clarify the parties’ original intent under the Swan Falls Agreement.

A. The Events That Precipitated The 1986 Amendment To Idaho Code § 42-203B(2) Demonstrate That The Parties Intended The Agreement’s Milner “Zero Flow” Provision To Limit The Water Rights To Surface Water And Ground Water Flows Downstream From Milner Dam.

inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract and the intent of the parties.”).

The events that precipitated the 1986 amendment to Idaho Code § 42-203B(2) demonstrate the parties intended the “zero flow” provision of the Agreement to define the legal source and scope of the hydropower water rights at issue. While preparing to draft proposed administrative rules to implement the trust and public interest criteria provisions of the settlement, the Department explicitly acknowledged that some people interpreted the “zero flow” requirement to mean the trust did not extend above Milner Dam. Nonetheless, the Department rejected this view because section 42-203B(2) contained no such limitation:

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. This interpretation would mean that the flows of the Thousand Springs and other sources entering below Milner would have to be relied upon to supply the flow in the main stem Snake River hydropower facilities. A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters . . . ³⁸

Thus, the Department proposed administrative “rules for water allocation” providing that the entire Snake River drainage above Swan Falls, including the area upstream from Milner Dam, contained “flows subject to the trust water provisions as a result of the agreement and the legislation which implemented it.”³⁹ The draft rules were published for public comment in the October 1985 and December 1985 editions of “Currents,” a Department publication,⁴⁰ and caused an outcry among water users upstream from Milner. The Department’s erroneous interpretation of the settlement led the parties to seek enactment of the 1986 amendment to section 42-203B(2), to remove any doubt as to the parties’ intent with respect to the meaning of the “zero flow” provision of the Agreement.

³⁸ Third Orr Aff., Exhibit 36 at 2 (Memorandum from Norm Young to Ken Dunn, “Legal Issues Associated With Senate Bill 1008” (June 14, 1985)).

³⁹ First Orr Aff., Exhibit 52 at 2 (“Currents,” Oct. 1985) (Rule 1.5 and Figure 1).

⁴⁰ First Orr Aff., Exhibits 52, 54 (“Currents,” October and December 1985 editions).

In his written comments on the rules to the Department, attorney John Rosholt of Idaho Power's law firm⁴¹ explained that he had understood "all along" that the Milner "zero flow" provision meant that "trust water flows can only exist between Swan Falls Dam and Milner Dam":

Trust Water. Under the Swan Falls Agreement, and the statutes and regulations, its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam. We have always thought that subterranean flows which come to the surface and surface flows above Milner which are tributary to the river above Milner cannot be within the definition of trust water for the reason that the minimum stream flow at Milner is zero. Subterranean flows above Milner, which are tributary to the river below Milner are within the definition of trust water. Reflecting this limitation in the definition of trust water flows found in [Rule] 1,5,1,1. would clear up 90% of the present questions about trust water.⁴²

In a January 1986 press release regarding the rules, Attorney General Jim Jones also emphasized that parties had intended the Agreement's "zero flow" provision to mean that surface waters and ground waters upstream of Milner Dam were not "trust water flows," and that the rules' proposal to subject flows upstream of Milner Dam to the trust was "directly contrary" to the intent of the parties:

A review of the Swan Falls Agreement indicates that the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows . . . The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero . . . one of the critical points of the negotiations was that water above Milner Dam should not be subject to the new allocation criteria. To include water above Milner as trust water is directly contrary to the intent of the negotiating parties.⁴³

⁴¹ Nelson, Rosholt, Robertson, Tolman & Tucker, Chtd.

⁴² Third Orr Aff., Exhibit 38 at 1 (Letter from John A. Rosholt to Mr. Kenneth Dunn re: Proposed Rules at 1 (Oct. 30, 1985) (emphasis added)). Mr. Rosholt also commented that re-valuation of pending permit applications for storage projects upstream of Milner Dam: "becomes totally unnecessary . . . since there can be no surface trust water above Milner Dam." *Id.* at 3-4 (emphasis added).

⁴³ Third Orr Aff., Exhibit 41 at 2 ("News Release," Idaho Office of the Attorney General (Jan. 29, 1986)) (emphases added).

The parties' rejection of the Department's view that the "zero flow" provision of the Agreement did not define the source element of the hydropower water rights at issue led directly to the 1986 amendment to Idaho Code § 42-203B(2).

B. The Plain Language And Legislative History Of The 1986 Amendment To Idaho Code § 42-203B(2) Demonstrate That The Parties Intended The Agreement's Milner "Zero Flow" Provision To Limit the Water Rights To Surface Water And Ground Water Flows Downstream From Milner Dam.

The 1986 amendment to Idaho Code § 42-203B(2) was introduced into the Legislature under Senate Bill 1358.⁴⁴ The Statement of Purpose for the bill stated that the proposed rules had raised interpretation issues and that the legislation was intended to clarify the scope and extent of the trust: "IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning interpretation of the legislation. Some of the important aspects of this proposed bill include: (1) clarification that trust waters do not extend to the Snake River or tributary ground or surface water above Milner . . ."⁴⁵

The 1986 amendment added two provisions to Idaho Code § 42-203B(2). The first defines the geographic and hydrologic scope of the trust, and the second bars consideration of surface water and ground water flows upstream from Milner Dam for purposes of determining and administering water rights diverting downstream from Milner Dam:

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. 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.

⁴⁴ First Orr. Aff., Exhibit 60 (1986 Senate Bill 1358 and Statement of Purpose).

⁴⁵ First Orr Aff., Exhibit 60 at 6 ("Statement of Purpose" for 1986 Senate Bill 1358 (RS 12550)).

1986 Idaho Session Laws 309; *see also* Idaho Code § 42-203B.⁴⁶

In explaining the amendment to the Senate Resources and Environment Committee on February 19, 1986, Senator Crapo, the primary architect of the “Statement of Legislative Intent” for the bill that had enacted section 42-203B during the previous legislative session, explained that the amendment had been negotiated by the interested parties, was intended to merely clarify the Agreement, and changed nothing in it:

Senator Crapo explained the bill contained revisions of the Swan Falls legislation passed last year and **is intended to merely clarify the agreement**. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. As a result, **negotiations were entered into by all interested parties and this bill is the result and seems to be acceptable to the concerned parties. He again pointed out, nothing was changed in the agreement, but this is merely clarification.** . . . ⁴⁷

As the minutes further reflect, Idaho Power agreed with Senator Crapo’s explanation:

Tom Nelson, attorney for Idaho Power, agreed with Senator Crapo on the legislation and said they too supported the bill and the change.⁴⁸

The plain language and legislative history of the 1986 amendment to Idaho Code § 42-203B(2) demonstrate that the parties had always intended, as part of the Swan Falls Agreement, to define the hydropower water rights at issue as limited to surface water and ground water flows downstream from Milner Dam, and believed this point important enough

⁴⁶ See also First Orr Aff., Exhibit 60 at 2 (1986 Senate Bill 1358).

⁴⁷ First Orr Aff., Exhibit 62 at 1 (Minutes of the Senate Resources & Environment Committee, Feb. 12, 1986) (boldface added). Senator Crapo also explained to the House Resources and Conservation Committee that the amendments were 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.” First Orr Aff., Exhibit 63 at 1 (Minutes of the House Resources & Conservation Committee, Mar. 13, 1986).

⁴⁸ First Orr Aff., Exhibit 62 at 1 (Minutes of the Senate Resources & Environment Committee, Feb. 12, 1986) (boldface added; underlining in original). Sherl Chapman, representative for the Idaho Water Users Association, was also present and told the committee that his organization “supported the legislation and concur in the proposed amendment.” *Id.* Mr. Chapman also “told the [House Resources and Conservation] Committee of his group’s support of the legislation.” First Orr Aff., Exhibit 63 at 1 (Minutes of the House Resources & Conservation Committee, Mar. 13, 1986).

to make it unambiguously clear via a statutory amendment that they negotiated and supported.

The plain terms of the 1986 amendment encompass and apply to both types of hydropower water rights defined by the Swan Falls Agreement: the water rights held in trust by the State pursuant to section 42-203B, and the Company's contractually defined water right to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at the Murphy Gauge. The 1986 amendment as a matter of law limits the source element of the hydropower water rights defined by the Swan Falls Agreement and its implementing legislation to surface water and ground water flows downstream of Milner Dam, regardless of whether surface water and ground water flows upstream of Milner Dam are tributary in the hydrologic or hydraulic sense. It follows that the hydropower water rights at issue in this consolidated subcase do not include an entitlement or authorization to seek curtailment of junior-priority rights to surface water or ground water flows upstream from Milner Dam.

In effect, the 1986 amendments to section 42-203B(2) clarified that the regulatory scheme the parties had devised and proposed under Exhibit 7B—the “subordination legislation” that was enacted as a precondition for the Agreement to become binding and effective⁴⁹—had been originally intended to limit the legal definition and effect of hydropower water rights held in trust by the State to the surface water and ground water flows downstream from Milner Dam. The 1986 amendments further clarified that the parties had also intended to limit Idaho Power's water right to seasonal flows of 3,900 c.f.s. and

⁴⁹ Summary Judgment Order at 29 (“Exhibit 7B to the Agreement sets forth the language of Senate Bill 1008 which was a condition of the Agreement pursuant to paragraph 13.A.vii.”); *see also id.* at 22 (quoting Paragraph 13 of the Swan Falls Agreement).

5,600 c.f.s. as measured at the Murphy gauging station to the surface water and ground water flows downstream from Milner Dam.

By negotiating and supporting the amendment, and representing to the Senate committee that the amendment clarified the original intent of the Swan Falls Agreement, the parties removed any possible doubt as to the intended meaning and effect of the Agreement's "zero flow" provision: it defined the source of the flows for the hydropower water rights at issue to be surface water and ground water flows downstream from Milner Dam, and it clarified that the water rights did not include an entitlement or authorization to seek curtailment of junior-priority rights to surface water or ground water flows upstream from Milner Dam for hydropower generation downstream from Milner Dam.⁵⁰

Moreover, by supporting the amendment and representing that it clarified the parties' original intent, Idaho Power consented to application of the 1986 amendments to the hydropower water rights at issue in this proceeding, and agreed not to challenge the State's exercise of its regulatory authority under the 1986 amendments with respect to those water rights. *See* Summary Judgment Order at 45 ("Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings"); *id.* at 46 ("as a term of the contract Idaho Power agreed to the State's regulatory authority"); *id.* at 31 ("Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority").

⁵⁰ As previously noted, the parties' agreement to define the hydropower water rights at issue as carrying no entitlement to call for waters upstream from Milner Dam was consistent with longstanding practice and settled property rights expectations. *See supra* Part III.A. In contrast, the proposed rules subjecting water upstream from Milner Dam hydropower water rights located downstream from Milner Dam represented a stark departure from a settled principle of water rights administration on the Snake River.

Following the enactment of the 1986 amendments, the Department promptly amended the rules to limit the definition of “trust water flows” to surface water and ground water flows downstream from Milner Dam. State of Idaho’s Response to Idaho Power Company’s Motion to Strike, or Alternatively, In Limine (July 21, 2008) at 44-45. Idaho Power subsequently challenged certain provisions of the revised rules in a declaratory judgment action filed in the Fifth Judicial District Court. That action did not, however, challenge the revisions limiting the effect of the settlement to flows downstream from Milner Dam. *Id.* at 45.

Thus, Idaho Power is incorrect in arguing that the Milner “zero flow” issue only raises matters of general state water policy and regulatory authority. The parties specifically intended the “zero flow” provision of the Agreement to operate as a limitation on the source element of the hydropower water rights as defined by the Agreement and the implementing legislation. Idaho Power consented to, and agreed not to challenge, the application of the 1986 amendment to the hydropower water rights at issue in this subcase. As this Court has found, “it [is] inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract and the intent of the parties.” Summary Judgment Order at 32.

Thus, any “zero flow” and “two rivers” issues raised by the State’s Motion for Summary Judgment are solely issues of party intent and Idaho Power’s consent. Issues of party intent and consent are legally distinct from issues of the scope and validity of the State’s general “zero flow” policy at Milner and the State’s statutory authority to impose the 1986 amendment on other, non-consenting appropriators. This Court has held that such

issues need not be addressed in order to resolve the party intent and consent issues raised by the State's Motion for Summary Judgment. *See* Summary Judgment Order at 25-26.

V. THERE IS NO RISK OF INCONSISTENT RULINGS BECAUSE SUBCASES 02-0200 AND 00-92002GP DO NOT IMPLICATE ISSUES OF IDAHO POWER'S CONSENT OR OF THE DEFINITION OF THE WATER RIGHTS AT ISSUE IN THIS SUBCASE.

There is no risk of inconsistent rulings between this subcase and subcases 02-0200 and 00-92002GP because the issues of the scope and validity of the State's authority to statutorily impose a general "zero flow" policy or the "two rivers" doctrine on the vested water rights of non-consenting appropriators does not implicate the question of Idaho Power's consent to define the source of the water rights at issue as limited to surface water and ground water flows downstream from Milner Dam. *See* Summary Judgment Order at 26 ("However, Idaho Power's consent to the State's authority would not necessarily be binding on unrelated hydropower claims.")

Further, the issues raised in subcases 02-0200 and 00-92002GP do not implicate the definition of the water rights at issue in this subcase. While the Agreement linked the hydropower water rights to the minimum flows and development policies of the State Water Plan for purposes of defining the water rights and resolving the litigation, the definition of the water rights vested upon implementation of the Agreement. *See* Summary Judgment Order at 16 ("It is undisputed that the parties have satisfied the contingencies set forth in the Agreement.") Thus, subsequent state actions with respect to the minimum flows have no effect on the definition of the water rights, as Paragraph 17 of the Agreement demonstrates:

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction,

legislative enactment or administrative ruling shall not affect the validity of this Agreement.

Swan Falls Agreement ¶ 17.

Members of the Senate Resources and Environment Committee questioned Idaho Power attorney Tom Nelson closely on this point on February 1, 1985. Mr. Nelson made it clear that under the Agreement the State remains free to raise or lower the minimum flows, but that doing so does not change the definition of the water rights:

SENATOR CRAPO: With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract, would you clarify for me, just a little bit, what subsequent legislative changes would do to the status of Idaho Power's water right with regard to the changes in the minimum flow if the legislature were to do that?

CHAIRMAN NOH: Mr. Nelson,

MR. NELSON: Mr. Chairman, Senator Crapo, as the contract and the statute work together, the state could obviously increase the minimum flow at Murphy at any time they wanted. The company would have no rights involved in that decision. 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 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 5,600.⁵¹

...

SENATOR PEAVEY: Mr. Chairman, Mr. Nelson, why don't you give us the flip side of Senator Tominaga's scenario in case the state wanted to raise the minimum flow? How would that work and would there be any problems?

MR. NELSON: Mr. Chairman, Senator Peavey, in that -- in the situation where the state raised the minimum flow, the company's subordinated rights would remain at 3,900 and 5,600. However, that increase, then, would make the company a beneficiary of that increase flow. And as I read both what we have and as those minimum flows operate, the company would be a beneficiary of the higher flow and would be entitled to protect it, or to try to make the state enforce it if it raised the flow but at the same time didn't put mechanisms in place to really make it work.

⁵¹ First Orr Aff., Exhibit 40 at 18-19 (transcript of Senate Resources & Environment Committee meeting, Feb. 1, 1985).

CHAIRMAN NOH: Senator Peavey.

SENATOR PEAVEY: Mr. Chairman, when you say protect the new higher minimum flow, you are not saying the state, then, couldn't ten years after it had done that come back and relower the 3,900? That would be the state's option, would it not?

MR. NELSON: Mr. Chairman, you would be right, Senator. In other words, anything above the minimum flow, the state is free to do as it likes.⁵²

There is no dispute that the Agreement has been fully implemented and all contingencies satisfied. Thus, any changes to the Milner "zero flow" policy, and the resolution of questions of the scope or validity of the State's authority to statutorily impose a general "zero flow" policy or the "two rivers" doctrine on the vested water rights of non-consenting appropriators in subcases 02-0200 and 00-92002GP, will have no effect on the definition of the hydropower water rights at issue in this proceeding. Paragraph 17 of the Swan Falls Agreement, and Idaho Power's representations to the Senate committee, demonstrate that the agreed-upon definition of the hydropower water rights at issue vested and remains binding on the parties, regardless of whether the Milner "zero flow" policy is changed, affirmed or rejected as to other water rights potentially affected by subcases 02-0200 and 00-92002GP. Accordingly, there is no risk of inconsistent rulings between this subcase and subcases 02-0200 and 00-92002GP, and this subcase raises no issues of fact or law in common with those subcases.

CONCLUSION

For the reasons discussed herein, the State respectfully requests that this Court deny Idaho Power Company's Motion to Consolidate, and set a summary judgment briefing

⁵² First Orr Aff., Exhibit 40 at 31-32 (transcript of Senate Resources & Environment Committee meeting, Feb. 1, 1985).

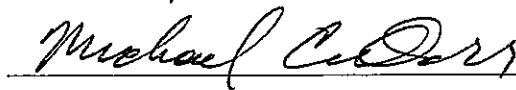
schedule so that the State may be heard on its Motion for Summary Judgment, which has been pending since May 7, 2008.

DATED this 25th day of August 2008.

LAWRENCE G. WASDEN
Attorney General

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

KARL T. KLEIN
MICHAEL C. ORR
SHASTA KILMINSTER-HADLEY
Deputy Attorneys General



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August 2008, I caused a true and correct copy of the foregoing to be served on the following parties by the indicated methods:

Original to 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: 208.388.6935
- ☒ E-mail: jtucker2@idahopower.com

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

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 303.223.0904
- ☒ E-mail: mgheleta@bhfs.com
- ☒ E-mail: jlochhead@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: 208.344.6034
- ☒ E-mail: smd@idahowaters.com

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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
- ☐ Overnight Mail
- ☐ Facsimile: _____

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey,
Chartered
P.O. Box 1391
Pocatello, Idaho 83204-1391

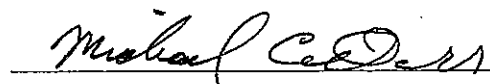
- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: cmm@racinelaw.net

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, Idaho 83702

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

Jerry R. Rigby
Rigby Andrus & Moeller, CHTD.
P.O. Box 250
Rexburg, ID 83440

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ E-mail: jrigby@rex-law.com



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WATER RESOURCES

EXHIBIT A

to

**State of Idaho's Response to Idaho Power
Company's Motion to Consolidate**

"Amended Complaint," *Idaho Power Co. v. State*,
Case no. 62237 (Fourth Jud. Dist., Ada County) (Nov.8, 1977)

1 PARRY, ROBERTSON, DALY & LARSON
2 P. O. Box 525
3 Twin Falls, Idaho 83301
4 Telephone: 733-3722
5 Attorneys for Plaintiff

FILED
1977
Phyllis M. Leigh

6
7
8
9 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
10 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

11 * * * * *

12 IDAHO POWER COMPANY,)
13 Plaintiff,)

Case No. 62237

14 vs.)

AMENDED COMPLAINT

15 THE STATE OF IDAHO, acting)
16 by and through the DEPARTMENT)
17 OF WATER RESOURCES, the IDAHO)
18 WATER RESOURCE BOARD, and)
19 its Executive Director,)
20 C. Stephen Allred, in his)
21 official capacity; The State)
22 of Idaho, acting by and)
23 through the IDAHO PUBLIC)
24 UTILITIES COMMISSION, and)
25 Commissioners Robert)
26 Lenaghan, Conley Ward, and)
27 Ralph Wickberg in their)
28 official capacities; and)
29 Matthew Mullaney, John Peavey,)
30 Charles Hisaw, Diane Plastino,)
31 Jeff Fereday, Billie Thompson,)
32 L.N. "Bud" Purdy, John)
Faulkner, Bill Arkoosh, Elsie)
Heinz, Harold Ingram, Ralph)
Ingram, Harold Huyser, Mary)
Mech, Gerald Tews, John)
Bryngelson, Clive Schell,)
David Mickelsen, A. W.)
Molyneux, Morgan & Shilling-)
ton, a partnership, Fred)
Tiede, Gary Tiede, Otto Tiede,)
James Tiede, Ferdinand)
Gehring, Melvin Funk, Sid)
Allen, Jim Pahl, Lenard)
Schritter, Alfred Fothergill,)
Marcia Pursley and J.W. Swan,)
as Complainants in P.U.C.)

1 Complaint, Case No. U-1006-124)

2 Murphy Water Company, Crane)
3 Falls Mutual Irrigation Co.,)
4 Nelda E. McAndrew, Pilgram)
5 Irrigation Company, and)
6 Enterprize Acres;)

7 Upper Grand View Canal)
8 Company, Martin K. Slane, and)
9 Mountain View Irrigation)
10 Company, aka Yahoo Company,)
11 Inc.,)

12 Ronald H. Warrick, Cottonwood)
13 Canal Company, John Doe,)
14 and The State of Idaho,)
15 acting by and through the)
16 Department of Fish & Game,)
17 acting through its Executive)
18 Director Joseph Greenley, in)
19 his official capacity;)

20 John Peavey, Picabo Livestock,)
21 Inc., Faulkner Land & Live-)
22 stock, Bill Arkoosh, Ralph)
23 Ingram, Harold Huyser,)
24 Mickelsen Farms, Inc., A. W.)
25 Molyneux, Morgan & Shilling-)
26 ton Farm Co., a partnership,)
27 Fred Tiede, Gary Tiede, Otto)
28 Tiede, Melvin Funk, Jim Pahl,)
29 and Lenard Schritter)

30 ~~Mud Flat Canal Company;~~)

31 Defendants,)

32 * * * * *

33 Plaintiff alleges:

34 I.

35 Plaintiff is a corporation organized and existing
36 under the laws of the State of Maine, qualified to do business in
37 the State of Idaho, with principal offices at 1220 Idaho Street,
38 Boise, Idaho 83721.

39 II.

40 Plaintiff holds certain decreed and licensed water
41 rights on the Snake River in the State of Idaho for power
42 production at its Swan Falls hydro-electric plant. Such rights
43 can be summarized as follows:

1 2150 cfs priority January 17, 1900 (decreed)
2 1840 cfs priority January 17, 1900 (license)
3 1460 cfs priority April 17, 1900 (license)
4 4000 cfs priority July 29, 1919 (license)

5 III.

6 Plaintiff obtained a license from the Federal Power
7 Commission for the Swan Falls project (Project No. 503) which
8 was issued effective January 1, 1928, for a period ending June
9 30, 1970. In 1969 the Company applied for a new license
10 including several alternatives for development. Since the
11 original date of expiration, the project has been under annual
12 license to plaintiff under Section 15 of the Federal Power Act
13 until the issuance of the new license for the project. The
14 continued operation and maintenance of Swan Falls Project No.
15 503 is subject to the terms and conditions of its original
16 license.

17 IV.

18 In 1971, following a joint-venture proposal by Idaho
19 Power Company and the Idaho Water Resource Board, the Idaho
20 State Legislature adopted the Swan Falls enabling legislation
21 (S.L. 1971, CH. 265 p. 1064). Section 3 of that legislation
22 provides, in pertinent part:

23 "Provided that the state or the state and the joint
24 venturer shall petition the Federal Power Commission
25 for insertion of a license condition subordinating the
26 project power right to future upstream depletionary
27 use."

28 The joint venture contract executed by Plaintiff and the Idaho
29 Water Resource Board contains the following provision:

30 "Section 14.2. Balance Between Irrigation and
31 Power. The parties hereto recognize that the act
32 requires that the board, or the board and the company,
shall petition the Federal Power Commission for
insertion of a license condition subordinating the
Swan Falls - Guffey project ~~power~~ right to future
upstream depletionary use. The parties agree to
comply with this requirement."

33 V.

The license issued by the Federal Power Commission for

1 the Hells Canyon Project (No. 1971) contained the following
2 language:

3 "Article 41. The project shall be operated in such
4 manner as will not conflict with the future depletion
5 and flow of the waters of Snake River and its tribu-
6 taries, or prevent or interfere with the future
7 upstream diversion and use of such water above the
8 back water created by the project, for the irrigation
9 of lands and other beneficial consumptive uses in the
10 Snake River watershed."

11 VI.

12 The Idaho Power Company by agreement with the Governor
13 and the State Reclamation Engineer in 1952 authorized the
14 subordination of the water license to be issued for the C. J.
15 Strike project to upstream depletionary uses. Proof of
16 beneficial use was made on the Strike project on the 9th day of
17 December, 1952, and the license issued on the 9th day of April,
18 1953 as Water License No. 21671 was conditioned as follows:

19 "The rights herein granted are subject to the con-
20 dition that the project shall be operated in such a
21 manner as will not conflict with future depletion and
22 flow of the waters of Snake River and its tributaries,
23 or prevent or interfere with the future upstream
24 diversion and use of such waters, for the irrigation
25 of lands and other beneficial consumptive uses in the
26 Snake River watershed."

27 VII.

28 The Idaho Power Company constructed the Hells Canyon
29 project which approximately doubled its then generating
30 capacity.

31 VIII.

32 The Columbia Interstate Compact was ratified by the
Idaho Legislature when it enacted Chapter 310 of the Idaho
Session Laws of 1963. While Idaho's approval of the compact
draft was repealed in 1975 because the states of Washington and
Oregon had not ratified said compact, Article 7 of the draft
approved by the Idaho Legislature dealt with apportionment of
water and related matters, pertinent parts of which section
reads as follows:

1 "A. So far as the states are concerned, all
2 waters of the Columbia River System shall be available
3 for appropriation for beneficial purposes under and to
4 the extent permitted by the laws of the states
5 involved, but, except for the provisions in this
6 subdivision A relating to certain relationships
7 between consumptive and nonconsumptive uses, no
8 apportionment of waters or determination of rights to
9 the use thereof is made by this Compact.

10 So far as the states are concerned, rights to
11 beneficial consumptive uses of water within the
12 upstream area, whether established heretofore or
13 hereafter under the laws of the states involved, shall
14 be recognized up to the average annual depletions
15 shown in Plat 7 of the Report of the North Pacific
16 Division, U.S. Army Engineers dated 1 June, 1958, as
17 against, and shall not be limited by, any rights,
18 existing or future, to the quantity of such waters for
19 nonconsumptive uses.

20 In the case of a stream situated wholly within a
21 downstream state and tributary to the Snake River or
22 to the Columbia River, however, the relationships as
23 between nonconsumptive use rights appurtenant to a
24 development located thereon and consumptive use rights
25 as to the waters of such a tributary upstream from
26 that development shall be governed by the laws of that
27 state without regard to the foregoing limitations of
28 this subdivision."

29 IX.

30 On January 19, 1970, Representative John Saylor of
31 Pennsylvania submitted to the U.S. House of Representatives
32 legislation to establish a Hells Canyon - Snake River National
River in the states of Oregon, Idaho and Washington, providing
among other things that no new dams be constructed on the Snake,
Imnaha, Salmon or Grand Rhonde rivers. On January 23, 1970,
Senator Robert Packwood of Oregon introduced an identical bill in
the Senate. Neither bill contained a protection for continued
upstream diversion for irrigation and other consumptive
purposes. In Idaho the Bills were met with unified opposition.
Congress passed neither bill.

33 X.

34 In 1964, Pacific Northwest Power Company was granted
35 an FPC license to construct the High Mountain Sheep Dam in the
36 reaches of the Lower Snake River below the Hells Canyon complex

1 To date Washington has not adopted such minimum flow criteria.

2 XII.

3 In 1975, the Congress of the United States enacted
4 legislation establishing a portion of the lower Snake River
5 basin as a National Recreation Area. The National Recreation
6 Area legislation was conditioned as follows in 16 U.S.C.A.
7 Section 460gg-3 and reads as follows:

8 §460gg-3. Present and future use of Snake River; flow
9 requirements

10 (a) No provision of the Wild and Scenic Rivers
11 Act, nor of sections 460gg to 460gg-13 of this title,
12 nor any guidelines, rules, or regulations issued here-
13 under, shall in any way limit, restrict, or conflict
14 with present and future use of the waters of the Snake
15 River and its tributaries upstream from the boundaries
16 of the Hells Canyon National Recreation Area created
17 hereby, for beneficial uses, whether consumptive or
18 nonconsumptive, now or hereafter existing, including,
19 but not limited to, domestic, municipal, stockwater,
20 irrigation, mining, power, or industrial uses.

21 (b) No flow requirements of any kind may be im-
22 posed on the waters of the Snake River below Hells
23 Canyon Dam under the provisions of the Wild and Scenic
24 Rivers Act, of sections 460gg to 460gg-13 of this
25 title, or any guidelines, rules, or regulations
26 adopted pursuant thereto. Pub. L. 94-199, §6, Dec.
27 31, 1975, 89 Stat. 1118."

28 XIII.

29 On January 7, 1977, the Idaho Water Resource Board
30 filed an application for permit with the Idaho Department of
31 Water Resources to construct the Shoestring Dam with the point
32 of diversion in the NW¼ of the SW¼ of Section 9, Township 6
South, Range 11 E., B.M., Elmore County, Idaho, on the Snake
River. Said dam would be 395 feet in height with a total
reservoir capacity of 1.2 million acre feet. Beneficial use of
the water would be for power production, fish and wildlife and
recreation on a year around basis. The Board described
"instream flow augmentation" as an additional beneficial use of
the water. Application No. 02-7238 on file with the Idaho
Department of Water Resources, specifies an additional 360,000

1 acre feet of water would be withdrawn for irrigation purposes
2 from March 15th to October 15th of each irrigation season.

3 The proposed project would flood plaintiff's Bliss,
4 Lower Malad, Lower Salmon, and Upper Salmon projects consisting
5 of dams, powerplants, and related facilities, said powerplants
6 having a total name plate generating capacity of 182,900
7 kilowatts, rendering said plants unusable, and destroying
8 plaintiff's means of utilizing its water rights at those sites.

9 While the Idaho Resource Board has apparent authority
10 to construct a water project and to generate and wholesale
11 hydro-electric power at the site of production in accordance
12 with Article 15, Section 7 of the Constitution, Idaho Code
13 Section 42-1734(f) limits the power of the Idaho Water Resource
14 Board in generating and wholesaling hydro-electric power at the
15 site of production, to the condition that such power production
16 is connected with another purpose for such project.

17 The construction of the Shoestring Dam by the Idaho
18 Water Resource Board would constitute a taking of the company's
19 facilities at Bliss, Lower Malad, Lower Salmon, and Upper Salmon
20 projects and would require payment in accordance with Article 1,
21 Section 14 of the Idaho Constitution.

22 Plaintiff further alleges that Idaho Code Section 42-
23 1734(g) limits the Idaho Water Resource Board to filing
24 applications and obtaining permits "to appropriate, store, or
25 use the unappropriated waters" Plaintiff further
26 alleges that pursuing a completion of the Shoestring project may
27 result in a taking of its private property in perfected water
28 rights for public and private use and that if the Shoestring
29 Project is within the Board's powers, the plaintiff is entitled
30 to compensation in accordance with Article 1, Section 14 of the
31 Idaho Constitution for the taking of such water rights, and is
32 further entitled to a determination that its rights at the Swan

1 Falls and C. J. Strike projects may not in any way be jeopardized
2 by the construction or operation of said project by the Idaho
3 Water Resource Board.

4 XIV.

5 By constitutional amendment adopted in 1964, Article
6 15, Section 7 of the Idaho Constitution was added which provided
7 for the establishment of a water resource agency "which shall
8 have the power to formulate and implement a State Water Plan for
9 optimum development of water resources in the public interest;"

10 . . . Pursuant to the constitutional dictate, in 1965 the Idaho
11 Legislature enacted Idaho Code Section 42-1731, et seq. In Idaho
12 Code Section 42-1734(b) the Idaho Water Resource Board was given
13 the following charge:

14 "To progressively formulate an integrated,
15 coordinated program for conservation, development and
16 use of all unappropriated water resources of this
17 state, based upon studies and after public hearings in
18 affected areas at which all interested parties shall
19 be given an opportunity to appear. . ."

20 In December of 1976, the Idaho Water Resource Board
21 finalized and adopted the State Water Plan. Appropriate
22 portions of that plan call for the irrigation development of
23 additional acres upstream from the Swan Falls project which
24 would cause the further depletion of the flows of the Snake
25 River to a minimum of 3,300 cfs at Murphy in August. In Policy
26 No. 32 of the State Water Plan as adopted by the Idaho Water
27 Resource Board on December 29, 1976, the following language
28 appears at page 116 of the plan:

29 "A flow of 3,300 cfs at Swan Falls is about one-
30 third of the flow necessary to meet the entitlement of
31 hydro-generation at that power plant if the recorded
32 water filings are valid. It is also less than the
amount identified as needed for fish, wildlife and
recreation purposes at Swan Falls or downstream. The
potential uses of water in the main stem Snake River
have been identified in sufficient detail to determine
that remaining water supplies cannot fulfill all
identified needs.

1 The Idaho Water Resource Board concluded, after
2 considering all current and potential uses of water on
3 the main stem Snake River, that depletion of flows
4 below that currently available in the low flow months
5 to maintain water for production of hydropower and
6 other main stem water uses is not in the public
7 interest.

8 Therefore, main stem Snake River flows will be
9 protected against further appropriations and
10 preserved to provide the following average daily
11 flows at the following U.S. Geological Survey
12 stream gaging stations.

13 Gaging 14 Station	Protected Flow (Average Daily)
15 Milner	0 cfs
16 Murphy	3,300 cfs
17 Weiser	4,750 cfs

18 Studies indicate that sufficient water exists in
19 excess of these flows to provide for additional uses
20 if water conserving and storage facilities are
21 constructed."

22 In early 1977, the first regular session of the Forty-
23 fourth Idaho Legislature enacted H.B. 14, which added Idaho Code
24 Section 42-1736. That section reads as follows:

25 "42-1736. LEGISLATIVE REVIEW. - The State Water
26 Plan adopted by the Idaho Water Resource Board
27 pursuant to authority of Section 42-1734, Idaho Code,
28 shall not become effective until it has been submitted
29 to the Legislature of the State of Idaho and has been
30 affirmatively acted upon in the form of a concurrent
31 resolution which may adopt, reject, amend or modify
32 the same. Thereafter, any change in the State Water
33 Plan shall be submitted in the same manner to the
34 legislature prior to becoming effective. (1977
35 Session Laws, Chapter 117, Section 1, p. 252)."

36 Article 15, Section 3 of the Idaho Constitution
37 provides in part the right to divert and appropriate the
38 unappropriated waters of any natural stream to beneficial uses,
39 shall never be denied, "except that the State may regulate and
40 limit the use thereof for power purposes." If Idaho Code
41 Section 42-1736 is in conflict with the provisions of Article
42 15, Section 7 of the Idaho Constitution, and if this court
43 determines that the State Water Plan as officially adopted by
44 the Idaho Water Resource Board is in all respects effective,
45 although plaintiff recognizes the right of the state to regulate

1 the use of water for power purposes in accordance with Article
2 XV, Section 3, plaintiff alleges that pursuing the policy of the
3 State Water Plan will result in a taking of its private property
4 for public and private use, rather than a regulation for power
5 purposes under Idaho Constitution, Article 15, Section 3, and
6 that the plaintiff is entitled to compensation in accordance
7 with Article I, Section 14 of the Idaho Constitution.

8 XV.

9 Defendants Murphy Water Company, Crane Falls Mutual
10 Irrigation Company, Nelda E. McAndrew, Pilgrim Irrigation
11 Company, and Enterprize Acres have filed applications with the
12 Department of Water Resources to appropriate the flows of Snake
13 River at various locations above Swan Falls. Said diversions
14 will cause the diminution of flows at the Swan Falls plant of the
15 Company if said applications are approved and permits issued
16 pursuant thereto.

17 XVI.

18 Defendants Upper Grand View Canal Company, Idaho Water
19 Resource Board, Martin K. Slane, and the Mountain View
20 Irrigation Company (aka Yahoo Company, Inc.), have obtained
21 permits from the Department of Water Resources to appropriate
22 the waters from various reaches of Snake River above Swan Falls
23 for the purpose of irrigation. Said diversions will cause the
24 diminution of flows at the ^{Swan Falls Plant} ~~C. J. Strike~~ plant of the Company.

25 XVII.

26 Defendants Ronald H. Warrick, Cottonwood Canal
27 Company, John Doe, and the Idaho Department of Fish & Game, have
28 either obtained licensed rights from the Department of Water
29 Resources or decreed water rights for the purpose of irrigation
30 of certain lands with the waters of Snake River between Swan
31 Falls and Milner Dam. Continued diversion causes diminution of
32 flows at the Swan Falls plant of the Company.

XVIII.

Defendants John Peavey, Picabo Livestock, Inc., Faulkner Land & Livestock, Bill Arkoosh, Ralph Ingram, Harold Huyser, Mickelsen Farms, Inc., A. W. Molyneux, Morgan & Shillington Farm Co., a partnership, ~~Fred Tiede, Gary Tiede, Otto Tiede~~, Melvin Funk, ~~Jim Pahl~~, and Lenard Schritter, have filed applications to divert, have been issued permits to divert, or hold licenses to divert and appropriate certain subterranean waters of the Snake plain aquifer for irrigation purposes. Said diversions have caused or will cause the diminution of flows of the Snake plain aquifer through the springs in the Hagerman Valley and will reduce the flows available at the Swan Falls plant of the Company.

XIX.

All inflow to the Snake River between Milner Dam and Swan Falls powerplant, whether from surface or subterranean sources, is tributary to the Snake River and the water right or rights of plaintiff herein be determined to include flows from the tributaries of Snake River.

XX.

A complaint has been filed by Matthew Mullaney, John Peavey, Charles Hisaw, Diane Plastino, ~~Jeff Pereday~~, Billie Thompson, L.N. "Bud" Purdy, John Faulkner, Bill Arkoosh, Elsie Heinz, Harold Ingram, Ralph Ingram, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell, ~~David Mickelsen, A. W. Molyneux, Morgan & Shillington, a partnership~~, Fred Tiede, Gary Tiede, Otto Tiede, James Tiede, Ferdinand Gehring, Melvin Funk, Sid Allen, Jim Pahl, Lenard Schritter, Alfred Fothergill, Marcia Pursley and J.W. Swan with the defendant Idaho Public Utilities Commission alleging the licensed right of the plaintiff at Swan Falls should be used as the basis for the Idaho Power Company to protest all present and future water rights,

1 above and below Swan Falls. A decision of this court concerning
2 the status of the Company's Swan Falls water right and other
3 water rights between Milner Dam and Hells Canyon is required for
4 the guidance of the parties hereto, and a justicable controversy
5 exists between and among the parties hereto. If it is
6 determined by this court that Idaho Power Company has a
7 protectable right in the reach of the Snake River between Milner
8 Dam and Hells Canyon by reason of its Swan Falls water licenses
9 and other licenses (whether approved by the Department of Water
10 Resources or the Federal Power Commission), the State of Idaho
11 Department of Water Resources should be permanently enjoined
12 from granting further applications for permits for any
13 consumptive purpose for the reach of the river between Milner
14 Dam and the Swan Falls project.

15 XXI.

16 As a result of the complaint filed with the P.U.C., in
17 Case No. U-1006-124 discussed in paragraph XX immediately above,
18 plaintiff has notified or will notify by letter all persons,
19 corporations or other entities including the defendant ~~Mud Flat~~
20 ~~Canal Company~~, who plan depletionary water diversions from the
21 Snake River and its surface and subterranean tributaries between
22 Milner Dam and Hells Canyon in plaintiff's electrical service
23 area, that power hook-ups cannot be made by plaintiff pending a
24 disposition of this case, and P.U.C. Case No. U-1006-124,
25 creating a justicable controversy between the plaintiff and
26 defendant ~~Mud Flat Canal Company~~ and others similarly situated.
27 If it is determined by this court that plaintiff has a right
28 protectible as set out in paragraph XX above, the Department of
29 Water Resources should be permanently enjoined from granting
30 further water applications or permits for any consumptive
31 purpose for said reach of the river and its tributaries and the
32 defendant ~~Mud Flat Canal Company~~, and others who would divert

1 water to diminish such protectible water rights, should be
2 permanently enjoined by this court from forcing plaintiff by
3 court action to supply the electrical service necessary to
4 effect such depletionary diversions and the Idaho Public
5 Utilities Commission should be permanently enjoined from forcing
6 plaintiff by administrative order to supply electrical service
7 for those who would use such electricity to effect such
8 depletionary diversions.

9 WHEREFORE Plaintiff prays judgment as follows:

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

16 2. That it be determined by this court that the
17 plaintiff's water license at Swan Falls is not subject to
18 depletion for upstream consumptive uses including irrigation and
19 other beneficial purposes; declaring and determining the rights
20 of the plaintiff as to its relationship with the various
21 defendants specifically identified in paragraphs XV, XVI, XVII,
22 XVIII, and XXI.

23 3. Determining whether Idaho Code Section 42-1736 is
24 constitutional in accordance with the Idaho Attorney General's
25 opinion No. 77-26 of April 12, 1977, and if Policy No. 32 of the
26 State Water Plan is subsequently adopted by the Idaho
27 Legislature; or in the alternative if this court determines
28 Idaho Code Section 42-1736 unconstitutional and that the Idaho
29 State Water Plan is now formally adopted and in effect, as
30 adopted by the Idaho Water Resource Board in December of 1976,
31 thus effectuating the Idaho State Water Plan; that in either
32 event, when the Idaho State Water Plan is declared the legally

1 effective State Water Policy for the State of Idaho, that this
2 court adjudge and decree that all subsequent actions of the
3 Department of Water Resources shall be henceforth consistent
4 with the provisions of the Idaho State Water Plan.

5 4. Determining whether the construction of the
6 Shoestring Dam project is within the constitutional and
7 statutory power of the Idaho Water Resource Board, and if it is,
8 adjudging and decreeing that the construction of the Shoestring
9 Dam project by the Idaho Water Resource Board necessitates the
10 payment of just compensation for the taking of the Bliss, Lower
11 Salmon, Upper Salmon, and Lower Malad projects of the plaintiff
12 and that plaintiff is entitled to a determination that its
13 rights at its Swan Falls and C.J. Strike projects may not in any
14 way be jeopardized by the construction or operation of said
15 project by the Idaho Water Resource Board.

16 5. Adjudging and decreeing that the implementation
17 of the State Water Plan by the Idaho Water Resource Board or its
18 subsequent approval by the Idaho Legislature specifying certain
19 minimum flows at Murphy, Idaho, below the Swan Falls project,
20 which contemplated diversions above Swan Falls would constitute
21 a taking of the property of plaintiff without compensation.

22 6. If the Court determines that the Swan Falls
23 rights of plaintiff are protectable and not subject to upstream
24 depletion, that the court identify the specific reach of Snake
25 River and its tributaries where such right is protectable, and
26 order the institution of a judicial proceeding by an appropriate
27 party or parties for a full adjudication of the respective water
28 rights within said specific stretch of the Snake River and its
29 tributaries between Swan Falls and Milner Dam as the court shall
30 determine in accordance with Idaho Code Section 42-1406 and that
31 a survey and determination of water uses be made by the Director
32 of the Department of Water Resources and supplied to the court
in accordance with Idaho Code Section 42-1401.

1 7. For such other and further relief as this court
2 deems just.

3 PARRY, ROBERTSON, DALY & LARSON

4
5 By: John A. Rosholt
6 John A. Rosholt

7 AND

8 Thomas G. Nelson
9 Thomas G. Nelson

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STATE OF IDAHO
COUNTY OF ADA
I, J. David Navarro, Clerk of the District Court of the Fourth
Judicial District of the State of Idaho, in and for the County
of Ada, do hereby certify that the foregoing is a true and
correct copy of the original on file in this office. In witness
whereof, I have hereunto set my hand and affixed my offi-
cial seal this _____ day
of _____
J. DAVID NAVARRO, Clerk
By _____ Deputy

AMENDED
COMPLAINT

EXHIBIT B

to

**State of Idaho's Response to Idaho Power
Company's Motion to Consolidate**

Pages 1 and 270 of "Complaint," *Idaho Power Co. v. State*,
Case no. 81375 (Fourth Jud. Dist., Ada County) (Mar. 30, 1983)

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Thomas G. Nelson
NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER
P. O. Box 1906
Twin Falls, Idaho 83301
Telephone: (208) 734-0700

Paul L. Jauregui
James R. Thompson
P. O. Box 70
Boise, Idaho 83707
Telephone: (208) 334-2678

Attorneys for Plaintiff

NO. _____ FILED 130
AM. _____ P.M.

MAR 30 1983

JOHN SANTIDA, CLERK
BY *Mary Ann Smith*
DEPUTY

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

* * * * *

81375 •

IDAHO POWER COMPANY, a)
corporation,)
)
Plaintiff,)
)
vs.)
)
IDAHO DEPARTMENT OF WATER)
RESOURCES, an executive)
agency of the State of Idaho;)
IDAHO WATER RESOURCE BOARD,)
an executive agency of the)
State of Idaho; IDAHO PUBLIC)
UTILITIES COMMISSION, an)
executive agency of the State)
of Idaho; TWIN FALLS NORTH)
SIDE LAND & WATER COMPANY;)
COOK, LAMOND; PRESTON, TIMOTHY;)
PARKINSON, TIM; COVINGTON,)
BRENT E.; COVINGTON, E. BLAIR;)
WADSWORTH, DONALD C.;)

Case No. _____

COMPLAINT

Category: A-1
FEE: \$41.00

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DATED this 29th day of MARCH, 1983.

NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER

By: Thomas G. Nelson
Thomas G. Nelson

STATE OF IDAHO }
COUNTY OF ADA } ss.
I, J. David Henderson, Clerk of the District Court of the Fourth
Judicial District of the State of Idaho, in and for the County
of Ada, do hereby certify that the foregoing is a true and
correct copy of the original on file in this office. In witness
whereof, I have hereunto set my hand and added my offi-
cial seal this 30th day of March, 1983.
J. DAVID HENDERSON, Clerk
By: [Signature]

COMPLAINT