

RECEIVED

AUG 27 2008

DEPARTMENT OF
WATER RESOURCES

Randall C. Budge, ISB No. 1949
Candice M. McHugh, ISB No. 5908
Thomas J. Budge, ISB No. 7465
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
P.O. Box 1391; 201 E. Center Street
Pocatello, Idaho 83204-1391
208-232-6101 - Telephone
208-232-6109 - Fax

Attorneys for the Ground Water Districts and Aberdeen-Springfield Canal Company

Jerry R. Rigby, ISB No. 2470
RIGBY ANDRUS & MOELLER, Chtd.
P.O. Box 250
Rexburg, Idaho 83440
208-356-3633 - Telephone
208-346-0768 - Fax

Attorneys for Fremont Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District and The United Canal Company

**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 00-92023

**UPPER SNAKE WATER USERS'
RESPONSE TO IDAHO POWER'S
MOTION TO CONSOLIDATE**

Aberdeen-American Falls Ground Water District, Bingham Ground Water District,
Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley
Ground Water District, North Snake Ground Water District, Clark-Jefferson Ground Water
District, Aberdeen-Springfield Canal Company, Fremont-Madison Irrigation District, Egin Bench
Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, and United Canal

Company (collectively the “Upper Snake Water Users”), by and through counsel, respectfully submit this response to *Idaho Power Company’s Motion to Consolidate* in compliance with the Court’s *Scheduling Order Re: Motion to Consolidate and Motion for Summary Judgment* dated August 15, 2008. The consolidation requested by Idaho Power would greatly expand the scope of this proceeding, cause substantial delay, and unnecessarily conflate precise contractual interpretation issues with broad state policy issues. The motion should be denied.

ARGUMENT

I. CONSOLIDATION WOULD UNNECESSARILY CONFUSE BROAD STATE POLICY ISSUES WITH PRECISE CONTRACTUAL INTERPRETATION ISSUES.

Idaho Power asks this Court to greatly expand the scope of this subcase via consolidation with subcases 00-92002GP and 02-200. Yet the singular issue before the Court in this subcase is fundamentally distinct from subcases 00-92002GP and 02-200. The purpose of this subcase is to define the extent to which Idaho Power voluntarily subordinated its Swan Falls hydropower right under the Swan Falls Settlement¹. It is solely a question of contract interpretation. In contrast, subcases 00-92002GP and 02-200 concern the State’s regulatory authority to administer the Snake River as two separate sources above and below Milner. Those subcases turn on the State’s authority to make and implement State policies. The policy issues presented in subcases 00-92002GP and 00-200 simply have no bearing on Idaho Power’s contractual obligations under the Swan Falls Settlement.

This subcase has from its beginning focused on the “interpretation and/or application of the *Swan Falls Agreement*” as it defines “the subject hydropower rights and how they are to be

¹ The term “Swan Falls Settlement” (a/k/a “Swan Falls Agreement”) refers to a settlement agreement entered into between Idaho Power and the State of Idaho in settlement of Ada County Case Nos. 62237 and 81375. The settlement produced an Agreement, a Contract to Implement (a/k/a “1180

administered relative to other rights on the same or connected sources.” (*Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference* at 10, 16). Stated differently, the purpose of this subcase is to define the contractually-created limits of Idaho Power’s water right. It is not about defining the State’s ability to make and implement general water policy.

In support of its argument for consolidation, Idaho Power asserts that the Court’s recent *Order Denying Idaho Power’s Motion to Strike/In Limine and Granting State of Idaho’s Motion to Compel* expanded this proceeding beyond contractual interpretation to include “issues concerning the state policy of maintaining a zero flow at Milner Dam.” (*IPC Motion to Consolidate* at 2.) Yet nowhere does the Order refer to issues of “state policy.” In fact, the Order clearly maintains that the focus of this subcase is the subordination of Idaho Power’s hydropower right based on “interpretation or application of the Swan Falls Agreement.” (*Order Denying Idaho Power’s Motion to Strike/In Limine and Granting State of Idaho’s Motion to Compel* at 3-4.) While State water policies certainly influenced negotiation of the Swan Falls Settlement, it is the resulting contract that binds the parties to that Settlement and defines the outcome of this subcase. The Court did not deviate from the contractual focus of this subcase, and it need not deviate now.

The narrow purpose of this subcase is to define the contractual limitations of Idaho Power’s hydropower right at Swan Falls Dam. While the State may have regulatory authority to make and implement policy that would result in the subordination of a water right, those issues

Contract”), amendments to the Idaho State Water Plan, and implementing legislation, which collectively form the “Swan Falls Settlement.”

simply have no bearing on the contractually-created definition of Idaho Power's water right under the Swan Falls Settlement. That definition need not be muddled by conflation with the broad policy issues presented in subcases 00-92002GP and 2-200.

II. THE UPPER SNAKE WATER USERS SUPPORTED THE SWAN FALLS SETTLEMENT IN RELIANCE UPON IDAHO POWER'S REPRESENTATIONS THAT IT HAD SUBORDINATED ITS HYDROPOWER RIGHTS TO WATER USE ABOVE MILNER DAM.

Idaho Power Company has repeatedly agreed to limit the source of its hydropower water rights to those waters of the Snake River arising below Milner Dam (excepting certain storage releases from American Falls Reservoir). Such representations were made by Idaho Power to facilitate the Swan Falls Settlement, and they reflect a long history of statements by Idaho Power that it had limited its hydropower rights to water use above Milner. The Upper Snake Water Users have relied on this critical limitation of Idaho Power's water rights for nearly a century, and would not have supported the Swan Falls Settlement or any other agreement, legislation, rule, or policy that ran contrary to the limitation.

In a 1922 federal hydropower application for the Twin Falls project Idaho Power stated that once American Falls Reservoir was completed,

...the only natural flow available at the [Twin Falls] site from the beginning of the irrigation season in April until the reservoir begins to spill, which in an average year will be about December 1st, and in a minimum year not until March or April, will be make-up from Milner to Twin Falls.²

This statement reflects Idaho Power's recognition that it had no right to curtail water use above Milner Dam in order to supply its hydropower rights. A stipulation in the federal power license for the Twin Falls project expressly confirmed that Idaho Power's rights to call for water above

² Third Affidavit of Michael C. Orr ("Third Orr Aff."), Exhibit 4 at 7 (Exhibit H to "Application for License" to the Federal Power Commission for the Twin Falls Project (Feb. 1, 1922); *see also id.*, Exhibit 5 at 1 ("Exhibit 'H' – Statement of Effect of Project on Stream Flow to Accompany Application for License under Act of June 10, 1920." (Feb. 6, 1922))).

Milner Dam for hydropower generation below Milner Dam was limited to “the 45,000 acre feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923.”³ The limitation was further confirmed by the “Contract Between the United States and the Idaho Power Company Relative To Power Rights at American Falls, Idaho, Dated June 15, 1923.”⁴

In its bid for hydropower generating facilities in Hells Canyon in the early 1950’s, Idaho Power represented to federal agencies and the press that its longstanding policy was the subordination of its hydropower water rights to uses for irrigation. In his testimony before the Federal Power Commission in 1953, Idaho Power executive T.E. Roach stated: “Well, our company for a period of 37 years or more ...has followed the policy of always placing the use of water for irrigation in a prior position to the use of water for hydroelectric development.”⁵ Similarly, in a written statement to the Federal Power Commission, company attorney R.P. Parry stated that “[h]istorically, the [Company] has always conceded that the water rights for future irrigation development shall have precedence over their hydroelectric water rights.”⁶

Again in 1966, in a statement made to the Irrigation and Reclamation Subcommittee of the House Interior and Insular Affairs Committee, Idaho Power emphasized its commitment to the future development of the Snake River Valley, citing the provision “voluntarily included” by

³ Third Orr Aff., Exhibit 9 at 7 (Article 14 on page 11 of “License on Government Lands, Project No. 18, Idaho, Idaho Power Company” (Federal Power Commission, May 11, 1934)); *see also id.*, Exhibit 8 (“Proposed Stipulation for inserting into Federal Power commission license No. 18, to Idaho Power Co.”) (May 7, 1934); *see also id.*, Exhibit at 3-4 (Paragraph 21 on pages 21-22 of the “Contract Between the United States and the Idaho Power Company Relative To Power Rights at American Falls, Idaho, Dated June 15, 1923”) (“Company’s Rights below Milner Dam”).

⁴ *See* Third Orr Aff., Exhibit 6 (excerpts from the “Contract Between the United States and the Idaho Power Company Relative To Power Rights at American Falls, Idaho, Dated June 15, 1923”).

⁵ Second Affidavit of Michael C. Orr (“Second Orr Aff.”), at Exhibit 2 p.8.

the Company in its CJ Strike and Hells Canyon licenses, “which makes the use of water for power generation at these projects subject to the depletion of the river flow by upstream diversions and use of the water for irrigation in the Snake River Basin.”⁷ Idaho Power made similar representations in 1968 to the Technical Advisory Committee of the Idaho Water Resource Board, stating:

These rights of Idaho Power Company have been voluntarily subordinated by the Company to present and future irrigation and other consumptive uses in the Snake River watershed. Therefore, the licensed rights of Idaho Power and their subordination for the benefit of present and future irrigation needs in the Snake River Valley provide the only real legal protection against threats of out-of-state diversion.⁸

Idaho Power’s long-standing agreement that its hydropower rights were subordinate to water use upstream from Milner Dam provides the backdrop for the Swan Falls Settlement. In their article on the Swan Falls controversy, Jeffrey C. Fereday and Michael C. Creamer explained the historical subordination of hydropower rights in this way:

One of the institutional barriers to below-Milner deliveries arose out of an arrangement that Idaho Power entered into with the federal government in the 1920s... Although the 1923 contract did not purport to affect the Company’s rights and priorities at Swan Falls, it undoubtedly helped give rise to the view that, except for its rights under the 1923 contract, Idaho Power had no claim on any flows in the Snake River above Milner Dam.⁹

During negotiation of the Swan Falls Settlement, Idaho Power attorney Tom Nelson repeatedly manifested the Company’s intent to confirm its policy of not enforcing the Company’s water rights above Milner. Mr. Nelson emphasized this commitment at the Idaho Water Resource Water Board public information meeting held on October 25, 1984, the day before the signing of

⁶ Second Orr Aff., at Exhibit 3, p.6.

⁷ Second Orr Aff., at Exhibit 4, pp. 2-3.

⁸ Second Orr Aff., at Exhibit 4, p. 8.

⁹ Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho’s Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573, 591 (1992).

the Swan Falls Agreement: "we were trying to wrestle with how to regulate the river using stream flows at Murphy, you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner."¹⁰ Mr. Nelson further stated that "what goes on above Milner is not affected by this agreement."¹¹ Similarly, Idaho Power lobbyist Gregory Panter stated:

You know, our discussions with the Committee of Nine were fairly acrimonious throughout the legislative debates. They obviously were totally in support of full subordination of the water rights.

I can recall myself personally giving assurances to various members of that committee that, when the ultimate agreement was struck, that Idaho Power Company would do their part. And we would abide by the terms of that agreement and in all ways work to make sure it was implemented.¹²

These assurances were of great importance to water users above Milner.

In 1985, when the Idaho Department of Water Resources submitted its "Proposed Water Allocation Rules" for public comment, water users above Milner expressed concern that the rules as drafted were contrary to the express intent of the Swan Falls Settlement that the Company's right to seek administration was limited to the trust water area. Attorney General Jim Jones asked IDWR to revise the Rules, in part because "[o]ne 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 negotiation parties."¹³ In written comments on the rules, an attorney in Tom Nelson's firm expressed concern with the rules as written, saying that "its been my understanding all along that trust water flows can only

¹⁰ First Affidavit of Michael C. Orr ("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).

¹¹ First Orr Aff., Exhibit 44 at 27 (Nelson statements in transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls)).

¹² Affidavit of Thomas J. Budge, at Exhibit A, pp. 98-99.

¹³ Third Orr Aff., Exhibit 41 at 2 ("News Release," Idaho Office of the Attorney Jan. 29, 1986).

exist between the Swan Falls Dam and the Milner Dam.”¹⁴

In 1986, amendments to Idaho Code 42-203B were proposed to clarify the original intent of the parties with regard to the Milner issue. In Senate committee meetings at the time, Tom Nelson and Sherl Chapman of the Idaho Water Users Association agreed with Senator Crapo’s explanations that the amendments clarified the original intent of the parties to the settlement and stated that their clients supported the amendments.¹⁵ Additionally, the members of Water District No. 1 passed the following resolution in support of the amendments:

WHEREAS, it has been agreed by all parties involved in the Swan Falls negotiations that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights; and

WHEREAS, the upper Snake has always been managed separately from the lower Snake; and

WHEREAS, the trust water provisions of the Swan Falls settlement would adversely affect both natural flow and storage supplies of existing users and could actually reduce the amount of water available for hydropower generation below Milner Dam during the summer months.

NOW, THEREFORE, BE IT RESOLVED by the Committee of Nine and the water users of Water District 1 meeting in regular annual session on the 4th day of March, 1986, that the Idaho State Legislature be encouraged to enact into law Senate Bill 1358.¹⁶

Idaho Power’s commitment to limit the source of its water rights to the waters of the Snake River formed a critical element of the Swan Falls Settlement. It is a contractual obligation entirely independent of State water policies that may likewise provide for a zero flow at Milner Dam. The Company’s motion to merge this subcase with subcases

¹⁴ 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)).

¹⁵ First Orr Aff., Exhibit 62 at 1 (minutes of Senate Resource & Environment Committee meeting, Feb. 19, 1986); *see also id.*, Exhibit 62 at 1 (minutes of Senate Resource & Environment Committee meeting, Feb. 19, 1986).

¹⁶ Third Orr Aff., Exhibit 43 at 2 (resolution attached to minutes of Water District No. 1 Annual

00-92002GP and 02-200 appears to reflect an attempt to confuse its contractual obligations with the much broader question of whether the State has the regulatory authority to administer the Snake River in accordance with its “two rivers” policy.

III. CONSOLIDATION WILL GROSSLY EXPAND THE SCOPE OF THIS SUBCASE, CAUSE SUBSTANTIAL DELAY, AND CREATE UNNECESSARY RISK OF CONFUSING DISTINCTLY SEPARATE ISSUES OF STATE POLICY AND CONTRACTUAL INTERPRETATION.

Consolidated Subcase 00-92023 is nearing trial scheduled to begin February 2, 2009. The contested issues have been significantly narrowed, leaving only the issue of whether Idaho Power contractually subordinated its water right held in trust to groundwater recharge upstream from Milner Dam. The State of Idaho has moved for summary judgment on that issue and has stated that it is ready to provide the necessary briefing within a month. As a consequence of motions filed by Idaho Power Company, there is every indication that this case is headed for resolution at or before the current trial date.

In contrast, subcase numbers 00-92002GP and 02-200 are in their initial stages. Initial hearings have yet to be scheduled in those cases. Further, as described above, the issue before the Court in this litigation is distinct from the larger issue to be addressed in the subcases referenced above, in that it deals with the contractual obligations of the parties to the Swan Falls Agreement, rather than with the regulatory and administrative issues of the two rivers concept and the zero flow at Milner Dam.

Consolidating these three subcases would prevent the effective and expedient resolution of this subcase by causing great delay. Additionally, consolidation would create unreasonable delay and expense for those parties in Subcases 00-92002GP and 02-200 that are not involved in subcase 00-92023 by forcing those parties to litigate matters that do not pertain to the elements of

Meeting, Mar. 4, 1986).

their water rights. If these subcases are consolidated, they will likely require de-consolidation once the parties begin litigating the intent of the signatories to the Swan Falls Agreement.

CONCLUSION

The precise purpose of this subcase is to define the extent to which Idaho Power voluntarily subordinated its Swan Falls hydropower right under the Swan Falls Settlement. It presents a focused question of contract interpretation. By contrast, subcases 00-92002GP and 02-200 concern the State's regulatory authority to administer the Snake River as two separate sources above and below Milner. To consolidate this discrete issue with the more general questions to be decided in Subcase Nos. 00-92002 and 02-200 would allow Idaho Power to further camouflage contractual obligations to which it voluntarily agreed. Further, consolidation would greatly and unnecessarily expand the scope of this proceeding, cause substantial delay and confuse precise contractual interpretation issues with broad state policy issues. The contractual issue presented in this subcase is distinct from the issues arising in Subcase Nos. 00-92002 and 02-200. Thus, the motion to consolidate should be denied.

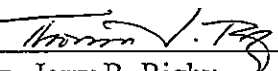
RESPECTFULLY SUBMITTED.

DATED this 25th day of August, 2008.

**RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED**

By: 
Thomas J. Budge

RIGBY, ANDRUS & MOELLER, CHTD.

By: 
FOR Jerry R. Rigby

CERTIFICATE OF MAILING

I certify that on this ^{25th} day of August, 2008, I caused to be served a true and correct copy of the foregoing document entitled *Upper Snake Water Users' Response to Idaho Power's Motion to Consolidate* to each the following persons via the method(s) indicated:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☒ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

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

☒ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Chief, Natural Resources Division
Office of Attorney General
P.O. Box 44449
Boise, ID 83711-4449

☒ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ Electronic Mail

Lawrence Wasden
Steven Olsen
Karl T. Klein
Michael C. Orr
700 W. Jefferson, Rm 210
P.O. Box 44449
Boise, ID 83711-4449

☐ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ Electronic Mail: michael.orr@ag.idaho.gov
☒ Electronic Mail: steven.olsen@ag.idaho.gov
☒ Electronic Mail: Shasta.k-hadley@ag.idaho.gov

United States Department of Justice
Environment & Nat'l Resources Div
550 W. Fort Street, MSC 033
Boise, ID 83724

☒ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☐ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ Electronic Mail: jo.beeman@beemanlaw.com

James S. Lockhead
Michael A. Gheleta
Mark J. Matthews
Michelle C Kales
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202

☐ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ Electronic Mail: mgheleta@bhfs.com
☒ Electronic Mail: jlockhead@bhfs.com

John K. Simpson
Shelley M. Davis
Barker Rosholt & Simpson, LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139

☐ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ Electronic Mail: smd@idahowaters.com

James C. Tucker
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83702-5627

☐ U.S. Mail, Postage Paid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ Electronic Mail: jtucker2@idahopower.com


THOMAS J. BUDGE