



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 2, 2008

Ms. Julie Murphy
Snake River Basin Adjudication
253 3rd Avenue North
Twin Falls, Idaho 83303

Re: Consolidated Subcase 00-92023

Dear Ms. Murphy:

Please find enclosed for filing in the above-referenced subcase the State of Idaho's Corrected Response to Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment.¹ This corrected memorandum corrects certain inadvertent clerical and scrivener errors in the State of Idaho's Response to Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment, filed in this subcase on July 21, 2008. The corrections are listed in the "Appendix" to the memorandum. No changes were made the than those listed in the Appendix.

The State's briefing on Idaho Power Company's Motion to Consolidate, which the Court will hear on Thursday, references certain portions of the State's memorandum in response to Idaho Power Company's motion to strike. Accordingly, the corrected memorandum enclosed herewith is being filed for the convenience of the Court and counsel.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Michael C. Orr".

MICHAEL C. ORR
Deputy Attorney General

MCO/pb
Enclosures
cc: Counsel

¹ Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment was filed on June 30, 2008.

COPY

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

In Re SRBA

Case No. 39576

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) **STATE OF IDAHO'S CORRECTED**
) **RESPONSE TO IDAHO POWER**
) **COMPANY'S MOTION TO STRIKE,**
) **OR ALTERNATIVELY, MOTION IN**
) **LIMINE RE: SCOPE OF STATE**
) **MOTION FOR SUMMARY JUDGMENT**
)

INTRODUCTION

The State of Idaho submits this corrected* memorandum in response to Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine re: Scope of State Motion

* This memorandum corrects certain inadvertent clerical and scrivener errors in the State Of Idaho's Response To Idaho Power Company's Motion To Strike, Or Alternatively, Motion In Limine Re: Scope Of State Motion For Summary Judgment, filed on July 21, 2008. The corrections made herein are listed in the Appendix. No other changes have been made other than those set forth in the Appendix.

for Summary Judgment (“Motion to Strike”), filed in this matter on June 30, 2008. The Motion to Strike should be dismissed as a matter of law because it is not a legally cognizable motion under Idaho Rules of Civil Procedure.

The Motion to Strike should be dismissed as a matter of law because it is not a legally cognizable motion under Idaho Rules of Civil Procedure. Even if it were, the Motion to Strike would have to be denied because it fails to identify any facial defects in the State’s Motion for Summary Judgment on Subordination to Ground Water Recharge (“Motion for Summary Judgment”), filed in this matter on May 7, 2008. The plain language of the State’s Motion for Summary Judgment expressly asserts that is based on the Swan Falls Agreement and the legislative, executive, administrative and judicial actions implementing the Agreement. Further, the Director’s Reports, the Objections and Responses, Idaho Power’s Complaint, and the Court’s Consolidation Order demonstrate that the matters in the State’s Motion for Summary Judgment are within the scope of the issues that are properly before the Court.

Moreover, the Motion to Strike exceeds the proper scope of a Rule 12(f) motion by directly disputing and denying that the State’s Motion for Summary Judgment is based on the Swan Falls settlement, and improperly relies on documents and materials that are outside the State’s motion and the pleadings. These assertions put the State in precisely the same position that Idaho Power found unfair in opposing the State’s motion to vacate and stay proceedings on the Motion to Strike. Just as Idaho Power argued that granting the State’s motion to stay “would essentially defeat the very purpose of the Motion [to Strike],”¹ granting the Motion to Strike would defeat the very purpose of the State’s Motion for

¹ Idaho Power Company’s Opposition to State’s Motion to Vacate Hearing and Stay Proceedings on Motion to Strike, or in the Alternative, to Reschedule Hearing (“Opposition to Motion to Vacate”) at 1 (July 3, 2008).

Summary Judgment, without providing the State an opportunity to substantively demonstrate in summary judgment briefing that the Motion for Summary Judgment presents questions that are central to the definition and administration of the hydropower water rights at issue under the terms of the Swan Falls settlement.

The Motion to Strike puts the State in the role of the non-movant on its own summary judgment issues, because the State must respond to Idaho Power's challenges without having first had the opportunity to initially lay out the State's theory in an opening brief under Rule 56. This result is contrary to the letter and spirit of the Idaho Rules of Civil Procedure, and defeats the objective of having substantial disputes resolved on the merits rather than through procedural gamesmanship.

Idaho Power argues that under the Motion to Strike the Company "is entitled to the State's explanation" of why the summary judgment issues Idaho Power seeks to strike "are properly encompassed within this consolidated subcase."² The State disagrees that Idaho Power is entitled to any such substantive "explanation" under the Motion to Strike, because Idaho law is clear that the proper focus of such a motion is the facial adequacy of the pleadings, not the ultimate basis for a claim or defense. As the State made clear in its written and oral representations in connection with the State's motion to vacate the hearing on the motion to strike,³ the State cannot present such an "explanation" without briefing a significant portion of the substantive basis for the State's Motion for Summary Judgment,

Idaho Power's improperly presented substantive challenges to the State's Motion for Summary Judgment require the State to provide the substantive explanation sought by Idaho

² Opposition to Motion to Vacate at 3.

³ See State of Idaho's Motion to Vacate Hearing and Stay Proceedings on Idaho Power Company's Motion to Strike, or in the Alternative, to Reschedule Hearing at 2-3 (July 3, 2008). The hearing on this motion was held on July 7, 2008.

Power in order to avoid an inadvertent waiver or an adverse ruling on the Motion to Strike. The Swan Falls Agreement and the historic context in which it arose unequivocally demonstrate that all the issues raised in the State's Motion for Summary Judgment are properly before the Court. In presenting this argument, the State does not intend to waive any of its objections, arguments or positions that Idaho Power's Motion to Strike is a non-cognizable motion and exceeds the proper scope of a motion to strike under Idaho law.⁴

ARGUMENT

I. THE MOTION TO STRIKE SHOULD BE DISMISSED AS A MATTER OF LAW.

The determination of whether to grant a motion to strike is committed to the Court's discretion. *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005). The same standard applies to a motion in limine. *Puckett v. Verska*, 144 Idaho 161, 167, 158 P.3d 937, 943 (2007).

A. IDAHO POWER'S MOTION TO STRIKE IS NOT COGNIZABLE UNDER IDAHO LAW.

Idaho Power's Motion to Strike is not a legally cognizable motion under Idaho law. In *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003), the plaintiff filed a combined objection and motion to strike the defendant's motion for summary judgment, which the district court denied. 138 Idaho at 393, 64 P.3d at 320. On appeal, the plaintiff argued, among other things, that the district court erred in denying the motion to strike. The Idaho Supreme Court rejected this argument as a matter of law: "McPheters' 'motion in objection to and motion to strike' the summary judgment was properly denied **because there is no such cognizable motion.**" 138 Idaho at 396, 64 P.3d at 322 (emphasis added).

⁴ The State expressly reserves all such objections, arguments or positions.

Idaho Power's Motion to Strike falls squarely within the *McPheters* holding. Like the plaintiff in *McPheters*, Idaho Power asserts here that a "proper objection and motion to strike" may be filed in response to a motion for summary judgment. Motion to Strike at 4. In light of *McPheters*, Idaho Power's Motion to Strike should be dismissed as a matter of law.

The Idaho Rules of Civil Procedure compel the same conclusion because they expressly distinguish "pleadings" from "motions," compare I.R.C.P. 7(a) ("Pleadings") with I.R.C.P. 7(b) ("Motions and Other Papers"),⁵ and authorize a motion to strike only as to "pleadings":

(f) Motion to Strike. Upon motion made by a party before responding to a **pleading** or, if no responsive **pleading** is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the **pleading** upon the party or upon the court's own initiative at any time, the court may order stricken **from any pleading** any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

I.R.C.P. 12(f) (emphases added). The plain language of Rules 7 and 12 precludes the filing of a Rule 12(f) motion to strike in response to a motion for summary judgment.

This conclusion is consistent with the different purposes of Rule 12 and Rule 56. See 5B WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE CIVIL § 1343, p.26 (3d ed. 2004)

⁵ Rules 7(a) and 7(b) provide, in relevant part, as follows:

(a) Pleadings Allowed--Form of Motions--Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14 and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b)(1) Motions and Other Papers. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought. A proposed form of order, if included, shall be a separate document. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

("[Federal] Rule 12 also must be interpreted in conjunction with many of the other federal rules, since the rules are intended to complement one another and form an integrated procedural system; they are not to be interpreted in a vacuum.").⁶ Rule 12(f) is concerned only with the facial adequacy of pleadings. *See Rosenberg v. Toetly*, 94 Idaho 413, 417, 489 P.2d 446, 450 (1971) ("A motion to strike will not be granted where the defense pleaded raises on its face genuine questions of law or fact.") "[M]otions to strike do not present occasions to test the sufficiency of facts to support a defense." *Id.*

Rule 56, in contrast, is intended to resolve substantive issues on the merits. "The validity of a complaint is more properly tested by the summary judgment procedure of I.R.C.P. 56." *Stewart v. Arrington Const. Co.*, 92 Idaho 526, 531, 446 P.2d 895, 900 (1968); *see also id.* at 529-32, 446 P.2d at 898-901 (comparing and contrasting Rule 12 motions to strike and to dismiss with Rule 56 motions for summary judgment). Rule 56 provides that a party moving for summary judgment is entitled to "the judgment sought" upon a showing that there is no genuine issue as to any material fact and the moving party is entitled to such a judgment as a matter of law. I.R.C.P. 56(c). The non-movant's proper response to a motion for summary judgment is to "set forth specific facts showing that there is a genuine issue for trial. **If the party does not so respond**, summary judgment, if appropriate, shall be entered against the party." I.R.C.P. 56(e) (emphasis added).⁷ Nothing in Rule 56 contemplates that the non-movant may use a motion to strike or a motion in limine to prevent the summary judgment movant from setting forth the factual and legal basis for the motion.

⁶ "Since our rules of civil procedure are substantially similar to the Federal Rules of Civil Procedure, cases construing the federal rules are persuasive. However, it must be borne in mind that the I.R.C.P. are subject to the interpretation of this court." *Stewart v. Arrington Const. Co.* 92 Idaho 526, 529, 446 P.2d 895, 898 (1968).

⁷ The non-movant can also file a cross-motion for summary judgment, or a Rule 56(f) motion seeking additional time for discovery.

Under the plain language of Rules 7, 12(f) and 56, a motion to strike a summary judgment motion is an unauthorized and improper response to a motion for summary judgment. Contrary to Idaho Power's argument, giving effect to the rules' unequivocal language on this point does not amount to elevating form over substance. Rather, it assures that substantial and disputed issues that have been properly presented for summary judgment under Rule 56 are addressed on the merits, rather than through Rule 12 motions that are intended principally to weed out facial pleading defects and allegations that have no possible relation to the controversy.

Like Idaho courts, federal court decisions dealing with the same question have consistently rejected attempts to use motions to strike to respond to motions for summary judgment, because a motion to strike may only be asserted against a "pleading." *See, e.g., Pilgrim v. Trustees of Tufts College*, 118 F.3d 864, 868 (1st Cir. 1997)⁸ ("As Tufts points out, however, Rule 12(f) applies only to pleadings and has no applicability to motions made in pursuit of or in opposition to summary judgment"); *Burlington Northern & Santa Fe Ry. Corp. v. Dakota Missouri Valley & Western R.R., Inc.*, 347 F.Supp.2d 708, 727 (D.S.D. 2004) ("Courts have consistently held that the various papers submitted in support of or in opposition to summary judgment are not pleadings as contemplated by Rule 12(f))."

The reasoning underpinning the conclusion that a motion to strike may not be used to challenge a summary judgment motion applies with equal force to Idaho Power's alternative motion in limine. Granting a motion in limine that provides precisely the same relief sought by a non-cognizable motion to strike would impermissibly elevate form over substance. The

⁸ *Abrogation on other grounds recognized in Crowley v. L.L. Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002).

Idaho Supreme Court has specifically cautioned against this when evaluating a motion to strike. *See Stewart*, 92 Idaho at 532, 446 P.2d at 901 (“Substance governs, not form.”)⁹

B. IDAHO POWER HAS FAILED TO CITE ANY LEGAL AUTHORITY THAT SUPPORTS THE COMPANY’S MOTION TO STRIKE.

Idaho Power failed to disclose to the Court the *McPheters* decision, which is directly adverse to the Company’s position, and has failed to explain why it and the express language of Rule 12(f) limiting motions to strike to “pleadings” does not dispose of Idaho Power’s Motion to Strike. Idaho Power relies instead on cases dealing with distinctly different questions, such as *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 862 P.2d 299 (1993). The relevant passage from *Tolmie Farms* demonstrates only that a motion to strike is proper as to an affidavit that fails to comply with Rule 56(e):

Idaho Rule of Civil Procedure 56(e) provides in pertinent part that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify about the matters stated therein.” Simplot alleges that Donald Tolmie’s affidavit failed to comply with I.R.C.P. 56(e). Simplot argues that the affidavit contained inadmissible hearsay and that the statements presented in the affidavit lacked adequate foundation and therefore should not be considered. This Court follows *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct.App.1984), where it was held that if noncompliance with Rule 56(e) is not brought to the trial court’s attention by proper objection and motion to strike, it is waived. A review of the record shows no such objection or motion. We therefore will not consider this issue on appeal.

Tolmie Farms, Inc., 124 Idaho at 610, 862 P.2d at 302. Nothing in the *Tolmie Farms* decision authorizes a motion to strike a motion for summary judgment. *McPheters* removed any possible doubt on this point by clarifying that a motion to strike a summary judgment motion is non-cognizable *per se* under Idaho law.

⁹ By providing the remaining briefing in this memorandum, and submitting supporting documentation, the State does not intend to waive, concede or abandon any argument, objection or position it has with respect to the propriety and/or scope of Idaho Power’s Motion to Strike under *McPheters*, and expressly reserves all such arguments, objections and positions.

Idaho Power also incorrectly contends that two Idaho cases authorize the use of a motion in limine to limit or remove issues from a pending summary judgment motion. A review of those cases demonstrates that they not only fail to provide such authority, but do not even deal with the question presented by Idaho Power's motion.

In the first case, *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007),¹⁰ the motion in limine excluded only **testimony** offered in support of a summary judgment motion—not the motion itself—on grounds that an expert witness in a medical malpractice action lacked actual knowledge of the local standard of care. *Id.* at 34, 156 P.2d at 535. Thus, like *Tolmie Farms*, *Ramos* is a Rule 56(e) decision and simply affirms that factual material submitted in support of a summary judgment motion must comply with the requirements of Rule 56(e). *See id.* at 536, 538, 156 P.2d at 536, 538 (“Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).”) Just as *McPheters* demonstrates that *Tolmie Farms* cannot be read to authorize a motion to strike a pending motion for summary judgment, it is equally clear that *Ramos* cannot be understood to authorize the use of a motion in limine to excise disputed issues from a pending summary judgment motion.

The other decision Idaho Power cites, *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (Ct.App. 2004),¹¹ involved a motion in limine directed not to a summary judgment motion but to a “pleading”: the movant sought (and obtained) dismissal of a simple negligence count from the complaint for failure to state a claim. *Id.* at 674-75, 99 P.3d at 627-28. The plaintiff argued on appeal that the motion in limine was essentially a summary judgment motion that came too late in the proceedings, but Court of Appeals rejected this

¹⁰ Motion to Strike at 4.

¹¹ The case name cited in the Motion to Strike is *Galloway v. Lyon*, Motion to Strike at 5, but the reporter volume and page citations are for *Galloway v. Walker*.

contention, reasoning that the motion in limine was appropriately viewed as a Rule 12(b)(6) motion because it had been granted solely on the basis of the pleadings. *Id.* Nothing in *Galloway* remotely authorizes or contemplates use of a motion in limine to expunge disputed issues from a pending summary judgment motion.

Idaho Power's use of a motion in limine to respond to a summary judgment motion is entirely contrary to the purposes of such motions under Idaho law. Motions in limine are intended to determine the admissibility of evidence based on "alleged or anticipated factual scenario," *Kirk v. Ford Motor Co.*,¹⁴¹ Idaho 697, 701-02, 116 P.3d 27, 31-32 (2005) (internal quotation marks and citation omitted), not to be vehicles for attacking summary judgment motions.

In sum, Idaho Power's Motion to Strike is barred by Idaho precedent and the plain language of the Idaho Rules of Civil Procedure. Idaho Power has ignored black letter Idaho law and failed to cite a single case, statute, rule, or authority of any kind from any jurisdiction that authorizes the use of a motion to strike or a motion in limine to eliminate issues from a pending summary judgment motion.

Because there is no legal basis for the Motion to Strike or a good faith argument for the extension, modification or reversal of existing law, and the Motion to Strike should be dismissed as a matter of law.¹² Nonetheless, in order to avoid waiving or conceding Idaho Power's remaining arguments, the State will address them in this memorandum.

II. IDAHO POWER'S MOTION TO STRIKE SHOULD BE DENIED BCEAUSE THE STATE'S MOTION FOR SUMMARY JUDGMENT ALLEGES ON ITS FACE THAT THE IT IS BASED ON THE SWAN FALLS SETTLEMENT.

¹² The State reserves the right to, at an appropriate time, seek an award of attorney fees for defending against the Motion to Strike.

Even assuming, *arguendo*, that the Motion to Strike should be heard on its merits—which it should not, for reasons previously discussed—the motion fails under settled legal standards. Idaho Power’s Motion to Strike ignores and misinterprets the applicable law by contending that a motion to strike may encompass materials outside the pleadings, and preemptively resolve or dismiss issues that have been presented in a pending summary judgment motion. This is not the law in Idaho.

A. A MOTION TO STRIKE LOOKS ONLY TO THE FACE OF THE CHALLENGED PLEADING AND MAY NOT SUBSTITUTE FOR SUMMARY JUDGMENT PROCEEDINGS.

Under Idaho law, a Rule 12(f) motion to strike only tests the facial adequacy of a pleading, and is not intended to address the substance or merits of a claim or defense. “A motion to strike will not be granted where the defense pleaded raises **on its face** genuine questions of law or fact.” *Rosenberg*, 94 Idaho at 417, 489 P.2d at 450 (emphasis added). “[T]here is no provision in I.R.C.P. 12(f) for reliance by the movant upon affidavits in support of the motion” and therefore “motions to strike do not present occasions to test the sufficiency of facts to support a defense.” *Id.*

Consequently, it is not proper to consider material outside the pleadings in ruling on a motion to strike. *Id.* The motion is to be evaluated in the light most favorable to the non-movant, and all doubts are to be resolved in favor of denying the motion. *See generally Stewart*, 92 Idaho at 530-32, 446 P.2d at 899-901. Thus, pleadings that on their face allege or assert legally cognizable rights, claims or defenses are not subject to a motion to strike. *See id.* at 531-32, 446 P.2d at 900-01 (“... it would be improper to summarily dismiss an alleged third party beneficiary right by granting a 12(b)(6) motion, let alone by granting a 12(f)

motion. Such a cause of action is properly tested by Rule 56 summary judgment procedure.”).

A Rule 12(f) motion to strike is even more restrictive in this regard than a Rule 12(b)(6) motion. While the Idaho rules authorize the conversion of the latter into a summary judgment motion by including material outside the pleadings, a motion to strike may not be converted to summary judgment, even if materials outside the pleadings are submitted:

Nor did inclusion of an affidavit transform the motion to strike into a motion for summary judgment or partial summary judgment under rules 56(a) and 56(e). Rules 12(b) and 12(c) do so transform motions for dismissal for failure to state a claim upon which relief can be granted and for judgment on the pleadings; but the Idaho rules, like the federal rules, make no such provision in 12(f).

Rosenberg, 94 Idaho at 417, 489 P.2d at 450. Moreover, a motion to strike may not be used to secure dismissal of a cause of action. *See Stewart*, 92 Idaho at 529, 446 P.2d at 898 (“We conclude that a cause of action cannot be tested by a motion to strike.”)¹³ Rather than Rule 12 motions, summary judgment is the proper procedure “to separate the real issues and facts from the spurious ones; to eliminate the chaff from the wheat.” *Id.* at 531, 446 P.2d at 900.

Idaho Power’s Motion to Strike ignores these standards and the Idaho Supreme Court’s definitions of what constitutes “redundant, immaterial, impertinent, or scandalous matter” for purposes of Rule 12(f).¹⁴ “Immaterial” means “[m]atter having no essential or

¹³ Idaho Power’s argument that a motion to strike is the proper means of dismissing or adjudicating central issues presented in the State’s summary judgment motion relies in part on a misreading of *Stewart*. In that case, the Court observed that “a motion to strike was offered and granted,” but what had actually occurred was a *de facto* “summary dismissal.” *Stewart*, 92 Idaho at 532, 446 P.2d at 901. The Idaho Supreme Court made clear that it was not simply reversing a motion to strike but also the “summary dismissal,” because “[s]ubstance governs, not form.” *Id.* Idaho Power incorrectly argues that this passage authorizes the use of a motion to strike to obtain summary dismissal of portions of the State’s summary judgment motion. This reading stands *Stewart* on its head. *Stewart* is clear that a motion to strike may not be used to decide substantive issues presented in a summary judgment motion. Rather, summary judgment is the proper procedure “to separate the real issues and facts from the spurious ones.” *Stewart*, 92 Idaho at 531, 446 P.2d at 900.

¹⁴ Rule 12(f) authorizes the striking of “any redundant, immaterial, impertinent, or scandalous matter” from a pleading. I.R.C.P. 12(f).

important relationship to the averments or unnecessary particulars, history and description, or allegations which have previously been eliminated by way of summary judgment. *Stewart*, 92 Idaho at 530 n.2, 446 P.2d at 899 n.2. “Impertinent” means “[s]tatements which do not pertain and are not necessary to the issues in question.” *Id.* 92 Idaho at 530 n.3, 446 P.2d at 899 n.3. Contrary to Idaho Power’s argument, the Idaho standards for determining whether issues raised in the Motion for Summary Judgment are “immaterial” or “impertinent” under Rule 12(f) are not the same as the standards for assessing substantive summary judgment arguments. *See* Motion to Strike at 3-4.

Similar standards apply in federal courts. *See Stewart v. Arrington Const. Co.* 92 Idaho 526, 529, 446 P.2d 895, 898 (1968) (“Since our rules of civil procedure are substantially similar to the Federal Rules of Civil Procedure, cases construing the federal rules are persuasive. However, it must be borne in mind that the I.R.C.P. are subject to the interpretation of this court.”) Motions to strike are viewed with disfavor,¹⁵ evaluated on the face of the pleadings,¹⁶ viewed in the light most favorable to the non-movant,¹⁷ and all well-pleaded facts are taken as true.¹⁸ A motion to strike will be denied “unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.” *Nova Hills Villas Condominium Ass’n, Inc. v. Aspen Specialty Ins. Co.*, 2008 WL 179878, *2

¹⁵ *See, e.g., Nova Hills Villas Condominium Ass’n, Inc. v. Aspen Specialty Ins. Co.*, 2008 WL 179878, 2 (S.D.Fla.) (S.D.Fla. Jan. 21, 2008) (“drastic relief . . . generally disfavored”).

¹⁶ *See, e.g., 5C WRIGHT & MILLER* § 1380, pp. 403-05 (“Matter outside the pleadings normally is not considered on a Rule 12(f) motion”) (footnotes omitted).

¹⁷ *See, e.g., See Taylor v. Quall*, 471 F.Supp.2d 1053, 1059 (C.D.Cal. 2007) (“Courts must view the pleadings under attack in the light more favorable to the pleader”) (internal quotation marks and citation omitted).

¹⁸ *See, e.g., Makuch v. F.B.I.*, 2000 WL 915767, *1 (D.D.C. Jan. 7, 2000) (“All averments sought to be stricken are taken as admitted for purposes of a motion to strike”).

(S.D.Fla. Jan. 21, 2008).¹⁹ Also like Idaho courts, federal courts will deny a motion to strike that presents substantial questions of fact or law.²⁰

B. THE STATE'S MOTION FOR SUMMARY JUDGMENT IS EXPRESSLY BASED ON THE SWAN FALLS AGREEMENT AND RAISES ISSUES THAT ARE WITHIN THE SCOPE OF THE PLEADINGS.

1. The State's Motion For Summary Judgment Expressly Asserts That It Is Based On The Swan Falls Agreement.

Assuming for the moment that Idaho Power's Motion to Strike is an authorized response to the State's Motion for Summary Judgment,²¹ the starting point for the analysis—and its ending point as well—is the plain language of the State's motion. “A motion to strike will not be granted where the defense pleaded raises **on its face** genuine questions of law or fact.”²² *Rosenberg*, 94 Idaho at 417, 489 P.2d at 450 (emphasis added); *see also Stewart*, 92 Idaho at 532, 446 P.2d at 901 (“we assume [the contract] was not considered, as it normally would not be in passing on a motion to strike”); *see also* 5C WRIGHT & MILLER § 1380, pp.403-05 (“All well-pleaded facts are taken as admitted on a motion to strike . . . Matter outside the pleadings normally is not considered on a Rule 12(f) motion”) (footnotes omitted).

The second page of the State's Motion for Summary Judgment plainly states that it is based on the Swan Falls Agreement and the various actions implementing it:

¹⁹ *See also* 5C WRIGHT & MILLER § 1382 pp. 433-36 (“[Motions to strike] should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice to one or more of the parties to the action”) (footnotes omitted).

²⁰ *See, e.g., Augustus v. Bd. of Public Instruction of Escambia County, Fla.*, 306 F.2d 862, 868 (5th Cir. 1962) (“A disputed question of fact cannot be decided on motion to strike”); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017, *10 (S.D.N.Y. Sept. 8, 2005) (“But even when the defense seems to present a purely legal question, federal courts are very reluctant to determine disputed or substantial issues of law on a motion to strike”).

²¹ As previously discussed, the State reserves its objections that Idaho Power's Motion to Strike is an improper and non-cognizable motion as a matter of law.

²² The language of the applicable Idaho Supreme Court decisions—which refer to striking “pleadings,” “allegations” and “defenses,” rather than “issues” in “motions”—demonstrates the inappropriateness of responding to a summary judgment motion with a Rule 12(f) motion to strike.

This motion is based on the Swan Falls Agreement and the legislative, executive, administrative and judicial actions implementing the Agreement. These grounds will be detailed in a supporting memorandum to be filed in accordance with the briefing schedule established by the Court.²³

The State's Motion for Summary Judgment also quotes the 1986 amendments to Idaho Code § 42-203B(2) that limit the trust to waters tributary to the Snake River downstream from Milner Dam, provide for the "determination and administration" of water rights downstream from Milner Dam, and cites paragraph 7(C) of the Swan Falls Agreement. Motion for Summary Judgment at 2-3. The statute and paragraph 7(C) are indisputable parts of the Swan Falls settlement. Thus, Idaho Power is flatly incorrect in asserting that the first and third issues in the Motion for Summary are "completely unrelated" to the Swan Falls Agreement for purposes of a Rule 12(f) motion.

The face of the Motion for Summary Judgment conclusively disproves Idaho Power's contentions that the motion is "immaterial" or "impertinent" under Rule 12(f). *See Stewart*, 92 Idaho at 530 n.2, 446 P.2d at 899 n.2-3 (defining "immaterial" as "having no essential or important relationship to the averments or unnecessary particulars, history and description, or allegations" and "impertinent" as "[s]tatements which do not pertain and are not necessary to the issues in question.").

The Motion to Strike seeks to dispute the express assertions in the State's Motion and calls on the State to demonstrate, as a factual and legal matter, that the first and third issues in the Motion for Summary Judgment actually are based in the Swan Falls settlement. Idaho Power asserts that it "is entitled to the State's explanation" of why the summary judgment issues Idaho Power seeks to strike "are properly encompassed within this consolidated

²³ Motion for Summary Judgment at 2 (emphasis added).

subcase.” Opposition to Motion to Vacate at 3. The Motion to Strike thus hinges on substantive rather than procedural arguments.

Idaho Power also ignores the summary judgment issues as the State has formulated them, re-defines and re-states the issues, and then goes on to argue that such issues are beyond the scope of this proceeding, are purely administrative, or barred by a separate stipulation. *See generally* Motion to Strike at 2, 6-14, 16-18. Such substantive disputes are properly resolved through summary judgment, not a motion to strike. *See Rosenberg*, 94 Idaho at 417, 489 P.2d at 450 (“it would be improper to summarily dismiss an alleged third party beneficiary right by granting a 12(b)(6) motion, let alone by granting a 12(f) motion. Such a cause of action is properly tested by Rule 56 summary judgment procedure”); *Stewart*, 92 Idaho at 531, 446 P.2d at 900 (holding that summary judgment is the proper procedure “to separate the real issues and facts from the spurious ones; to eliminate the chaff from the wheat”). Striking the first and third issues in the State’s Motion for Summary Judgment would be analogous to dismissing a cause of action, which may not be done through a motion to strike. *See id.* at 529, 446 P.2d at 898 (“We conclude that a cause of action cannot be tested by a motion to strike.”) The motion to strike must be denied under the standards established by Idaho law.

2. The Issues Presented For Resolution In The State’s Motion For Summary Judgment Are Within The Scope Of The Director’s Reports, The Objections The Responses, The Complaint And The Consolidation Order.

a. **The Director’s Reports, Objections and Responses.**

Idaho Power is also incorrect in asserting that the Motion for Summary Judgment raises issues that are beyond the scope of the pleadings and this consolidated subcase. The Director’s Report and the subsequent pleadings filed in this proceedings—including those

filed by Idaho Power—explicitly identified the source and tributary issues raised by the first count of the State’s Motion for Summary Judgment, and the direct contractual subordination issues raised by the third count in the State’s motion.

The first issue in the State’s Motion for Summary Judgment is based on the 1986 amendments to Idaho Code § 42-203B(2), which are quoted on page 2 of the Motion for Summary Judgment. The third issue is based on the paragraph 7(C) of the Swan Falls Agreement, which is quoted in part on page 3 of the Motion for Summary Judgment.

The Director’s recommendations for each of the Basin 02 hydropower water rights in this consolidated subcase raised these same issues, in the sections entitled “Other Provisions Necessary for Definition/Administration of this Water Right.” Paragraph no. 6 of the “Other Provisions” for each water right states that “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” for purposes of administration, and that “[t]he required minimum daily flows at the Milner gauging station shall remain as zero CFS for purposes of administration.”²⁴ Thus, the Director explicitly recognized and incorporated the 1986 amendment to section 42-203B(2) into his recommendations for the partial decrees for each of the Basin 02 water rights.²⁵

Similarly, paragraph no. 3 of the “Other Provisions” for each water right states that the hydropower water rights at issue “are subordinate to the water rights of those persons dismissed from Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990) pursuant to the contract executed between the State and Company

²⁴ See Director’s Reports for 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B and 02-10135 (“Director’s Reports”).

²⁵ Compare Director’s Reports with 1986 Idaho Session Laws 309 (1986 amendments to Idaho Code § 42-203B(2)) and Motion for Summary Judgment at 2 (quoting part of Idaho Code § 42-203B(2)).

implementing the terms of I.C. sections 61-539 and 61-540.”²⁶ The Director thus explicitly recognized and incorporated Paragraph 7(C) of the Swan Falls Agreement into his recommendations for each of the water rights.²⁷

Idaho Power specifically objected to these recommendations in SF-1 Objections it filed for the each of the water rights, asserting that **“Other Provisions Necessary for Definition or Administration of this Water Right should not be included in this decree.”**²⁸ The State filed SF-2 Responses to Idaho Power’s objections, and specifically identified therein Idaho Power’s objections to the “Other Provisions” section of the recommendations.²⁹ Under Idaho Code § 42-1412(3), these SRBA pleadings “identify the issues to be heard for water rights acquired under state law.” Idaho Power specifically put at issue precisely the same matters that the Company now seeks to have stricken from the State’s Motion for Summary Judgment.

Idaho Power attempts to avoid this fact by focusing instead on the Complaint and essentially dismissing the legal significance of conventional SRBA procedures and pleadings. *See generally* Motion to Strike at 8-9. This argument fails to recognize that under the Idaho Code, the remarks in the “Other Provisions” section of the Director’s Report are a required **element** of the Director’s water right recommendations to the SRBA Court under Idaho law: “The director shall determine the following **elements . . . (j) such remarks and other matters as are necessary for definition of the right, for clarification of any**

²⁶ See Director’s Reports.

²⁷ Compare Director’s Reports with Swan Falls Agreement ¶ 7(C) (Exhibit 30 to Affidavit of Michael C. Orr in Support of State of Idaho’s Motion for Partial Summary Judgment) and Motion for Summary Judgment at 3 (quoting part of Paragraph 7(C) of the Swan Falls Agreement).

²⁸ See Idaho Power Company’s “Standard Form 1 Objection” in subcases 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B and 02-10135 (“Idaho Power’s Objections”).

²⁹ See State of Idaho’s “Standard Form 1 Response To Objection” in subcases 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B and 02-10135.

element of a right, or for administration of the right . . . ” Idaho Code § 42-1411(2)(j) (emphasis added). “Objections” and “Responses” to the Director’s Report are also statutorily authorized filings. Idaho Code § 42-1412(1)-(2). Under Administrative Order 1 (“AO1”), parties must use court-authorized standard pleading to file Objections and Responses. AO1 § 4; *see also id.* § 2(r) (defining objections and responses as pleadings). These pleadings “identify the issues to be heard for water rights acquired under state law.” Idaho Code § 42-1412(3).

Idaho Power apparently views the Director’s Reports, Objections and Responses as empty formalities that are inadequate to raise issues and provide notice. The Idaho Supreme Court has flatly rejected this view. *See LU Ranching Co. v. United States*, 138 Idaho 606, 610, 67 P.3d 85, 89 (2003) (“The method of notice given [under Administrative Order 1] was reasonably calculated to give LU Ranching and all other claimants the information to pursue and protect their rights.”) Moreover, this Court determined last year that the “special proceeding on the *Complaint and Petition*” Idaho Power sought was unnecessary because the Director’s Reports had been filed and the matter could proceed under conventional objection-response procedures:

The Court finds that the issues raised in the *Complaint and Petition* and the *Counterclaim*, which are within the jurisdiction of the SRBA, can be resolved in conjunction with the objection and response resolution process set forth in *AO1* and therefore a special proceeding on the *Complaint and Petition* is unnecessary because the *Director’s Reports* have been filed for all of the subject hydropower claims.

Consolidation Order at 15. This ruling came long before Objections were due in Basin 02, and further provided Idaho Power and all potentially interested parties with clear notice that

Swan Falls issues would be identified by conventional SRBA objection-response procedures.³⁰

b. The Complaint.

The State's Motion for Summary Judgment is also well within the scope of Idaho Power's "Complaint and Petition for Declaratory and Injunctive Relief" (May 10, 2007) ("Complaint"). Idaho Power sought broad declaratory relief "regarding the status and nature of Idaho Power's water rights, as well as the respective rights, duties and responsibilities of the parties under the Swan Falls Settlement," Complaint at 3 ¶ 3, and that the "Swan Falls Settlement" included not only the Agreement, but also the "subsequent implementing legislation, rules regulations and administrative practices by the State of Idaho." *Id.* at 7 ¶ 20. The State's motion seeks summary judgment pertaining to the "status and nature" of the water rights at issue, and expressly relies on the same "Settlement" alleged in the Complaint: "the Swan Falls Agreement and the legislative, executive, administrative and judicial actions implementing the Agreement." Motion for Summary Judgment at 2.

The Complaint also specifically recognizes that the 1986 amendments to section 42-203B(2) were part of the "Settlement," alleging that the Swan Falls Agreement "contemplated enactment of a legislative program to implement the Agreement . . . Legislation was subsequently enacted in 1985, and amended in 1986." Complaint at 7 ¶ 21 (emphasis added). In addition, both the State's summary judgment motion and the

³⁰ As the Court observed, notice and participation problems would be much more likely to arise as a result of departing from the SRBA's familiar and constitutionally adequate procedures than by adhering to them. See Consolidation Order at 8 (observing that adjudicating a single water right in advance of the rest of the basin "raises notice problems for claimants in the SRBA.")

Complaint expressly raise the issue of subordination under Paragraph 7(C) of the Swan Falls Agreement. *See* Motion for Summary Judgment at 3; Complaint at 9 ¶ 25; *id.* at 17 ¶ 49.

Finally, the Complaint seeks a global declaration as to recharge subordination, not simply an order limited to the Swan Falls Agreement: “Idaho Power seeks declarations that: Idaho Power’s water rights for hydropower generation are not, through the Swan Falls Settlement **or otherwise**, subordinate to the use of water for ground water recharge. Complaint at 23 ¶ 69 (emphasis added). Thus, even if the State’s summary judgment motion went beyond the Swan Falls Agreement (which it does not), it would still be well within the scope of the Complaint under notice pleading standards.

c. The Consolidation Order.

The plain language of the Consolidation Order and the State’s Motion for Summary Judgment also demonstrate the issues the State has presented for resolution are well within the scope of this consolidated subcase. The Consolidation Order provides that the proceeding encompasses “issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement*” for purposes of defining the water rights in question. Consolidation Order at 16. The Consolidation Order also states that the Swan Falls Agreement “in part defines the ownership, nature and extent of the subject hydropower rights and how they are to be administered relative to other rights on the same or connected sources.” Consolidation Order at 10. The Consolidation Order further recognizes that the Swan Falls Agreement encompasses the “1180 Contract,” the Consent Judgments entered in the original Swan Falls litigation, and “includes the implementation of a legislative

program,” which in turn was “implemented with rules, regulations and administrative practices.” Consolidation Order at 2 n.2.³¹

As previously discussed, the State’s Motion for Summary Judgment expressly states that it “is based on the Swan Falls Agreement and the legislative, executive, administrative and judicial actions implementing the Agreement.” Motion for Summary Judgment at 2. Thus, by its plain and clear language, the State’s summary judgment motion falls squarely within the scope of this consolidated subcase as defined by the Consolidation Order.

C. THE STATE IS ENTITLED TO BE HEARD ON ITS THEORY OF RECHARGE SUBORDINATION WITH RESPECT TO WATERS ARISING UPSTREAM FROM MILNER DAM.

Idaho Power argues that the first issue or count identified in the Motion for Summary Judgment exceeds the scope of the issues properly before the Court because it seeks a determination that the hydropower water rights at issue in this consolidated subcase are subordinate to all recharge water rights diverting the Snake River upstream from Milner Dam or from water sources tributary to the Snake River upstream from Milner Dam (the “Non-Trust Area”). This contention would deny the State the opportunity to seek summary judgment on an important aspect of the recharge issue under the State’s theory of the case, and presumes that the State must adhere to Idaho Power’s theory.

Idaho Power’s theory of the case assumes the Swan Falls settlement imposed the trust provisions of the implementing legislation on all waters and hydrologically connected water sources upstream of Murphy. The State’s theory is fundamentally different on this point and involves a showing that the parties and the Legislature intended the Swan Falls settlement to preserve and incorporate into the definition of the hydropower water rights at issue in this

³¹ See also Memorandum Decision and Order on Cross-Motions for Summary Judgment at 26 (Apr. 18, 2008) (similar).

proceeding the settled understanding that they could not be used to seek curtailment of junior water rights diverting from water sources in the Non-Trust Area upstream from Milner Dam.

The State is entitled to pursue its theory of the recharge issue, especially in light of the fact that Idaho Power has specifically alleged a claim for an unqualified categorical declaration that the hydropower water rights at issue are not subordinated to any recharge water rights, regardless of point of diversion. The State will demonstrate that Idaho Power's sweeping recharge claim is foreclosed as a matter of law as to water rights diverting from water sources in the Non-Trust Area upstream from Milner Dam. *See Intermountain Eye & Laser Centers v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005) (holding that on cross-motions for summary judgment, "this Court must evaluate each party's motion on its own merits").

D. THE STATE'S MOTION FOR SUMMARY JUDGMENT DOES NOT SEEK OR REQUIRE RESOLUTION OF THE ISSUES PRESENTED BY THE DIRECTOR'S RECOMMENDATIONS FOR GENERAL PROVISION NO. 4 AND SUBCASE 02-0200.

Idaho Power argues that notice to potentially interested parties is inadequate because the State's Motion for Summary Judgment is a "stealth approach" that "seeks to inject" new issues into this proceeding by requesting a ruling on the so-called "two rivers" questions raised in General Provision No. 4 and Subcase 02-200. Motion to Strike at 8-10. This argument fails because it does not challenge the State's actual formulation of the first issue on the face of the Motion for Summary Judgment, but rather attacks Idaho Power re-definition of the issue as broadly seeking a basin-wide determination of administration "in accordance with a concept of 'two rivers' or 'two sources.'" Motion to Strike at 8; *see also id.* at 2, 6-11. This is simply not the issue expressly presented on the face of the State's Motion for Summary Judgment.

Moreover, the State's first summary judgment claim is legally and substantively distinct from the "two rivers" doctrine as presented in the Director's recommendations for General Provision No. 4 and Subcase 02-200, which implicates **all** water rights in Basin 02.³² The State's summary judgment motion expressly applies only to "the water rights at issue in this consolidated subcase," and seeks to resolve important definitional and administrative elements of those water rights as established by the Swan Falls Agreement and the 1986 amendments to Idaho Code § 42-203B(2). *See* Motion for Summary Judgment at 2-3 (quoting Idaho Code § 42-203B(2)). Resolution of the source element and administration of the water rights at issue in conformance with the Swan Falls Agreement and its implementing measures is a necessary part of the SRBA and within the scope of this consolidated subcase.

Idaho Power's protest that the 1986 amendments and the Milner issue have never been a part of or relevant to defining the hydropower water rights at issue in this proceeding is flatly contrary to the record, including Idaho Power's own briefing³³ and discovery requests. The question of the application and effect of the 1986 amendments to section 42-203B(2) in this consolidated subcase was a sharply disputed point in the parties' briefing on the State's previous motion for summary judgment. Both parties agreed that the 1986 amendments were intended to clarify the original intent of the Agreement, but had quite different views of what was being "clarified." Idaho Power argued that the 1986

³² The Director's recommendation for General Provision No. 4 provides, in relevant part: "The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second." In Subcase 02-0200, the Director recommended a statutory minimum in-stream flow water right of zero c.f.s. at the Milner gauging station in the name of the Idaho Water Resource Board.

³³ In opposing the State's previous motion for partial summary judgment, Idaho Power pointed out that the 1986 amendments were part of the "Swan Falls Legislation" and enacted for purposes of "clarifying" it. Idaho Power Company's Response To State Of Idaho's Motion For Partial Summary Judgment at 7, 13, 23 (Feb. 7, 2008). The Company argued that the Court "should consider the legislative history" of the amendments, *id.* at 14, and quoted Idaho Power attorney Tom Nelson's and Senator Crapo's representation to the Senate Resources and Environment Committee that the 1986 amendments were "intended merely to clarify the agreement." *Id.* at 23 n.43. The Company's brief quoted and relied heavily on the 1986 amendments to section 42-203B(2), *id.* at 11, 24, argued that the amendments "cannot be viewed as mistake or oversight," *id.* at 25, and asserted that the current version of section 42-203B(2) "describes the extent of the trust." *Id.* at 52.

amendments demonstrated that the *res* was water rather than water rights, while the State argued that the amendments were largely “a tributary designation that does not define the nature of the *res*.”³⁴

Moreover, Idaho Power’s own discovery requests in this case belie its assertions that the 1986 amendments and the Milner “zero flow” issue are outside the issue properly before the Court. In its latest round of discovery, Idaho Power requested that the State “produce all materials in the State’s possession relating to the initial adoption, and the continuation, of the State policy concerning a flow of zero c.f.s at Milner as described in various versions of the State Water Plan.”³⁵ The Company also sought all materials in the State’s possession “which relate to the proposal and legislative adoption” of the 1986 amendments to Idaho Code § 42-203B(2).³⁶

Idaho Power cannot have it both ways. Idaho Power’s discovery requests and prior briefing demonstrate that the Company viewed the 1986 amendments and the “zero flow” policy as relevant to defining the nature and scope of the hydropower water rights at issue in this consolidated subcase. Idaho Power has no good faith basis to now argue the State is attempting to “inject” new issues via a “stealth approach.”

Thus, the face of the Motion for Summary Judgment raises issues that are distinct from General Provision No. 4 and Subcase 02-200, and therefore Idaho Power’s arguments on this point are unavailing as a matter of law. As discussed below, the undisputed Swan Falls record also demonstrates that the parties intended for the Swan Falls Agreement to

³⁴ Reply In Support Of State Of Idaho’s Motion For Partial Summary Judgment at 10 (Feb. 15, 2008).

³⁵ Third Orr Aff., Exhibit 50 at 10 (page 10 of Idaho Power Company’s Third Set of Discovery Requests to State Defendants (May 23, 2008)).

³⁶ Third Orr Aff., Exhibit 50 at 10 (page 10 of Idaho Power Company’s Third Set of Discovery Requests to State Defendants (May 23, 2008)).

reconfirm the settled understanding that the hydropower water rights that are the subject of the Swan Falls Agreement do not include an entitlement to call for curtailment of water rights diverting from water sources in the Non-Trust Area upstream from Milner Dam.

III. THE FACTUAL RECORD SHOWS THAT THE ISSUES RAISED BY THE FIRST COUNT OF THE STATE'S SUMMARY JUDGMENT MOTION ARE PROPERLY BEFORE THE COURT.

As set forth above, a court should not consider matters outside the pleadings when deciding a motion to strike. Nevertheless, Idaho Power is asserting that the Court should go beyond the pleadings³⁷ and that the State must provide Idaho Power with a factual explanation demonstrating “why the issues [the State] seeks to raise are properly within this consolidated subcase.”³⁸ In order to avoid waiving or conceding any substantive arguments, the State feels compelled to respond with such a factual explanation that is supported by materials outside the pleadings. Even if the Court considers such information, as Idaho Power urges, the Motion to Strike should be denied because it is clear that the questions raised by the first count of the State's motion are within the scope of the issues properly before the Court.³⁹

A. THE HISTORIC CONTEXT OF THE SWAN FALLS AGREEMENT'S INCORPORATION OF THE MILNER “ZERO FLOW” POLICY AS AN ELEMENT OF THE HYDROPOWER WATER RIGHTS THAT ARE THE SUBJECT OF THE AGREEMENT.

The Swan Falls controversy and settlement did not take place in a vacuum, but rather in the context of historic practices, understandings and settled expectations reaching back to the earliest days of the State. *See Idaho Power Co. v. State*, 104 Idaho 575, 578, 661 P.2d

³⁷ Motion to Strike at 4.

³⁸ Idaho Power Company's Opposition to State's Motion to Vacate Hearing and Stay Proceedings on Motion to Strike, or in the Alternative, to Reschedule Hearing at 3 (July 3, 2008).

³⁹ The State is not waiving its objections to Idaho Power's insistence that this Court consider matters outside the pleadings, but is only providing this information should the Court conclude that matters outside the pleadings are properly before the Court under the Motion to Strike.

741, 744 (1983) (“The roots of this litigation stretch back to the early days of the state and the background must be set out in some considerable detail”); *see also generally* Memorandum Decision And Order On Cross-Motions For Summary Judgment (Apr. 18, 2008) (“Order on Summary Judgment”) at 5-6. These matters are properly before the Court in this consolidated subcase, as Idaho Power has itself argued:

Under Idaho law, the factual circumstances surrounding formation of the contract constitute one of the elements the Court may consider to determine the parties’ intent. [*J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 167 P.3d 748, 751 (2006)]; *see also Transamerica Leasing Corp. v. Van’s Realty Co.*, 91 Idaho 510, 519, 427 P.2d 284, 294 (1967); *Rudeen v. Howell*, 76 Idaho 365, 368, 283 P.2d 587, 589 (1955).

It is essential that the Court consider the full set of facts and legislative history that bear on the important issue of the scope of the Swan Falls subordination, and in particular whether the parties intended to subject Idaho Power’s Swan Falls Agreement Water Rights to subordination to recharge, or any other unanticipated use that the State might choose to recognize in the future.

Idaho Power Company’s Response To State Of Idaho’s Motion For Partial Summary Judgment (Feb. 7, 2008) at 60.

An important element of the Swan Falls settlement is that it specifically defined the water rights in question so as to continue and retain the settled understanding that the “zero flow” policy at Milner meant that Idaho Power’s hydropower water rights diverting below Milner Dam did not and do not now include an entitlement to call for waters arising above Milner Dam, as Idaho Power attorney Tom Nelson affirmed in a 1989 article in *The Advocate*, the Idaho State Bar’s monthly journal:

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.⁴⁰

The "zero flow" policy that was incorporated into the definition of the hydropower water rights by the Swan Falls settlement had deep roots in the history of the tension between reclamation development above Milner Dam and Idaho Power's development of hydropower facilities below Milner Dam. In 1920, a joint board of State and Federal engineers tasked with evaluating water projects in the Snake River Valley prepared a report as the Federal government was contemplating construction of the American Falls Reservoir and how Idaho Power's proposed power developments downstream might affect that project.⁴¹

The Board expresses the opinion that the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated. . . . **The net effect of this condition will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season. . . . The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam.** To a moderate extent these interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource would be susceptible of future development is relatively not very great.⁴²

The Board of Engineers Report also concluded that winter flows past Milner Dam would also be largely curtailed with the United States' construction of the American Falls Reservoir.⁴³

⁴⁰ Third Affidavit of Michael C. Orr ("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).

⁴¹ Third Orr Aff., Exhibit 2 at 10-11 ("REPORT OF BOARD OF ENGINEERS to consider Projects in Snake River Valley which may affect the proposed AMERICAN FALLS RESERVOIR and the Available Water supply therefore" ("Board of Engineers Report") at cover sheet, 1 ¶ 1) (Apr. 10, 1920)).

⁴² Third Orr Aff., Exhibit 2 at 10-11 (Board of Engineers Report at 5 ¶ 11 (Apr. 10, 1920)) (emphases added).

⁴³ Third Orr Aff., Exhibit 2 at 16 (Board of Engineers Report at 22).

Idaho Power explicitly recognized these eventualities in its 1922 application for a federal license for the Twin Falls facility and ordered its affairs accordingly:

The project covered by this application is located approximately 16 miles below Milner, Idaho. . . . The effect of the Milner diversion is to completely stop the natural flow of water at Milner during a part of the irrigation season so that the only water available at Twin Falls is the make-up which amounts to about 400 sec.ft. . . . In the near future the flow will be further affected by the construction of a storage reservoir at American Falls by the U.S. Reclamation Service, to have an initial capacity of 1,500,000 acre feet and an ultimate capacity of 3,000,000 acre feet. Therefore, upon completion of the reservoir to its initial stage the only natural flow available at the 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.⁴⁴

A federal report on the Company's application for a preliminary permit for the Twin Falls site stated that "from a power standpoint, the Snake River is divided into two sections, that above and that below Milner dam. . . . During the irrigation season . . . the Snake River is turned dry at the Milner dam."⁴⁵ Article 14 of the federal power license for the Twin Falls facility included a stipulation by Idaho Power that hydropower water rights for the Twin Falls facility "heretofore or hereafter acquired" were to be "subordinate to all rights, heretofore or hereafter acquired by the United States or other parties for irrigation purposes," and limited the Company's rights to call for water above Milner Dam for hydropower generation below Milner Dam to "the 45,000 acre feet of primary storage capacity which the

⁴⁴ 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))).

⁴⁵ Third Orr Aff., Exhibit 3 at 1 ("Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, for Preliminary Permit Covering Twin Falls site, on Snake River").

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.”⁴⁶

The Article 14 stipulation required Idaho Power Company “to execute and acknowledge under authority of a suitable resolution of its board of directors, a reasonable contract or deed embodying the provisions, conditions, and limitations set out in the forgoing stipulation and agreement.”⁴⁷ On the day the federal license was issued, the Company’s board adopted resolutions accepting “all the terms and conditions” of the license, and authorizing the Company’s officers “to execute and acknowledge a recordable contract or deed embodying the provisions, conditions and limitations set out in the stipulation and agreement contained in Article 14” of the license.⁴⁸

In a subsequent engineering journal article an Idaho Power representative summarized the water supply for the Twin Falls plant. “The Snake River immediately below Milner Dam for the greater part of the time is practically dry. . . below this dam the Snake River plunges into a canyon . . .”⁴⁹ “The Twin Falls plant, therefore may be said to be dependent for its water supply upon that water returning to, or arising within, the 22 miles of river bed between Milner Dam and that plant, with the addition of such limited amounts of water permitted under contract to flow by Milner Dam.”⁵⁰ A 1935 federal report on upper

⁴⁶ Third Orr Aff., Exhibit 9 at 12 (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 6 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”).

⁴⁷ Third Orr Aff., Exhibit 9 at 12 (Article 14 on page 11 of “License on Government Lands, Project No. 18, Idaho, Idaho Power Company” (Federal Power Commission, May 11, 1934)).

⁴⁸ Third Orr Aff., Exhibit 10 at 2 (“Idaho Power Company – Minutes of Special Meeting of Board of Directors – May 11, 1934.”)

⁴⁹ Third Orr Aff., Exhibit 7 at 1-2 (“Twin Falls Hydroelectric Development,” by H.L. Senger of Idaho Power Company (ELECTRICAL WEST, April 1936)).

⁵⁰ Third Orr Aff., Exhibit 7 at 2 (“Twin Falls Hydroelectric Development,” by H.L. Senger of Idaho Power Company (ELECTRICAL WEST, April 1936)).

Snake River water storage issues stated that in view of the federal policy "of requiring that power interests, in securing licenses from the Federal Power Commission, execute a stipulation subordinating power uses to upstream irrigation uses, it is contemplated that no water in excess of the requirements of the Shoshone Falls plant will be released past Milner Dam for any contemplated future downstream power developments."⁵¹

When Idaho Power proceeded with further development of power facilities downstream from Milner Dam, federal authorities expressed grave concerns that such expansion would undermine development of the Snake River upstream from Milner Dam. In a letter to the Bureau of Reclamation's District Counsel B.E. Stoutemyer regarding Idaho Power's applications for additional hydropower water rights at the Twin Falls and Lower Salmon sites, District Engineer Lynn Crandall referred to the Twin Falls stipulation and stated that "it would be desirable to have it reaffirmed in the State water rights licenses [for Idaho Power's new applications] so that it will be clearly evident that the date of priority applies only to rights below Milner and is not adverse to subsequent developments above Milner."⁵²

Mr. Stoutemyer expressed the same concerns in a detailed letter to Idaho State Commissioner of Reclamation R.W. Faris, stating "it would be contrary to sound policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam" and quoting Article 14 of the Twin Falls license in its entirety.⁵³ Mr. Stoutemyer stated that all available water above Milner Dam was currently needed for irrigation, irrigation requirements were increasing and

⁵¹ Third Orr Aff., Exhibit 11 at 7 (page 155 of "Report on Upper Snake River Storage Investigations" (United States Department of the Interior, Bureau of Reclamation) (June 1935).

⁵² Third Orr Aff., Exhibit 12 (letter from Lynn Crandall to B.E. Stoutemyer, June 18, 1937).

⁵³ Third Orr Aff., Exhibit 13 at 1-2 (letter from B.E. Stoutemyer to R.E. Faris, June 21, 1937).

that additional reservoirs were needed to conserve and carryover flood waters: "Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions and any other reservoirs which may be built in future years to conserve water for irrigation purposes in the Snake River Valley above the Milner Dam."⁵⁴

District Engineer Crandall wrote in his 1953 report on future depletions upstream Hells Canyon that "[e]xcept in years of well above normal runoff it is quite likely that future years will see the flow of upper Snake River controlled so as to practically eliminate spills past Milner except for storage rights owned by the Idaho Power Company . . ."⁵⁵ The report also stated that the development of additional storage would allow "surplus flows that would otherwise spill past Milner" to "be diverted . . . onto the Snake River plains, allowed to spread over as large an area as possible, and be dissipated by percolation and recharge wells into the lavas, thereby replacing in part the water consumed by groundwater pumping."⁵⁶

Mr. Crandall had been the District Engineer for the United States Geological Survey and the Watermaster for the upper Snake River for over twenty years when he was examined on these matters in the Federal Power Commission proceedings on Idaho Power's Hells Canyon complex.⁵⁷ Mr. Crandall characterized flows spilling past Milner as "waste,"⁵⁸ discussed the potential for artificial recharge of the Snake River aquifer at length,⁵⁹ viewed

⁵⁴ Third Orr Aff., Exhibit 13 at 2-3 (letter from B.E. Stoutemyer to R.E. Faris, June 21, 1937).

⁵⁵ Third Orr Aff., Exhibit 53 at 6 (page 6 of "Future Upstream Depletion Above Hells Canyon," by Lynn Crandall, April 28, 1953).

⁵⁶ Third Orr Aff., Exhibit 53 at 6 (page 6 of "Future Upstream Depletion Above Hells Canyon," by Lynn Crandall, April 28, 1953).

⁵⁷ Third Orr Aff., Exhibit 14 at 4 (page 10137 of the transcript of the examination of Lynn Crandall on January 12-13, 1954 in Federal Power Commission proceedings on Project no. 1971 (Idaho Power Company's Hells Canyon complex)). Idaho Power's attorney R.P. Parry was present for Mr. Crandall's examination. See *generally id.*

⁵⁸ Third Orr Aff., Exhibit 14 at 6 (page 10200 of transcript of Crandall examination).

⁵⁹ Third Orr Aff., Exhibit 14 at 8-13 (pages 10316-21 of transcript of Crandall examination).

recharge as providing for "greater storage,"⁶⁰ and stated that recharge flows would consist of "waters that would otherwise spill down the river past Milner into the Columbia."⁶¹

In a 1962 letter to the Chairman of the Federal Power Commission, the United States Secretary of the Interior cited the 1923 American Falls Reservoir contract between Idaho Power and the United States and the federal license for the Company's Twin Falls facility in advocating for subordination provisions in the federal licenses for the Company's Shoshone Falls and Upper Salmon facilities.⁶² The Secretary pointed out that

The Idaho Power Company officials have been repeatedly advised, beginning with the early negotiations concerning the development of stored water for irrigation at American Falls, that the best development of the waters of the Snake River require that there be no power developments below Milner Dam which rely upon flows of water past Milner Dam for power production.⁶³

Idaho Power continued to explicitly recognize the Milner restrictions of the 1923 American Falls contract in filings with the Federal Power Commission (later the Federal Energy Regulatory Commission) over the years.⁶⁴

B. THE SWAN FALLS SETTLEMENT DEFINED THE HYDROPOWER WATER RIGHTS AT ISSUE TO INCLUDE THE SETTLED UNDERSTANDING THAT THEY NEVER INCLUDED AN ENTITLEMENT TO CALL FOR WATERS ARISING UPSTREAM FROM MILNER DAM.

The parties and the Legislature intended the Swan Falls settlement to incorporate and preserve the settled understanding that the Idaho Power's hydropower water rights diverting

⁶⁰ Third Orr Aff., Exhibit 14 at 9 (page 10317 of transcript of Crandall examination).

⁶¹ Third Orr Aff., Exhibit 14 at 10 (page 10318 of transcript of Crandall examination).

⁶² Third Orr Aff., Exhibit 15 at 4-5 (letter from the Secretary of the United States Department of the Interior to Joseph C. Swindler, Chairman of the Federal Power Commission, August 30, 1962).

⁶³ Third Orr Aff., Exhibit 15 at 4 (letter from the Secretary of the United States Department of the Interior to Joseph C. Swindler, Chairman of the Federal Power Commission, August 30, 1962).

⁶⁴ See, e.g., Third Orr Aff., Exhibit 16 at 4 (Exhibit H to Idaho Power Company's "Application for License" to the Federal Power Commission of February 13, 1959); *id.*, Exhibit 17 at 3-5 (Exhibit H to Idaho Power Company's "Application for License" to the Federal Power Commission of September 21, 1973); *id.*, Exhibit 18 at 2 ("Answer in Opposition to Motion To Intervene" filed with the Federal Energy Regulatory Commission ("FERC") on November 17, 1983).

downstream from Milner Dam did not include an entitlement to call on waters arising above Milner Dam, or to seek administration or curtailment of junior water rights diverting upstream from Milner Dam. The Agreement was presented and explained to the public as incorporating and recognizing these principles.

1. The Swan Falls Agreement.

Attorney General Jim Jones issued a press release on October 1, 1984, announcing the signing of the "Framework for Final Resolution of Snake River Water Rights Controversy" ("Framework"), and stating, among other things, 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."⁶⁵ The Framework identified "new in-stream storage and aquifer recharge projects" as suggested methods of enhancing streamflows for the benefit of both agricultural development and hydropower generation.⁶⁶

The Swan Falls Agreement required retention of the "zero flow" policy at the Milner gauging station in order for the Agreement to become fully binding and effective: "**The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.**"⁶⁷ In stark contrast, Exhibit 6 only required "mitigation" to Idaho Power for new storage projects that reduced the winter flows available for hydropower production if the storage facilities were constructed downstream of Milner Dam. The Agreement thus provided for high winter flows to be retained and used upstream from Milner Dam regardless of the impact on hydropower production downstream from Milner Dam:

⁶⁵ Third Orr Aff., Exhibit 19 at 2 ("News Release," Idaho Office of the Attorney, General, Oct. 1, 1984).

⁶⁶ Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("First Orr Aff."), Exhibit 29 at 7 (Framework for Final Resolution of Snake River Water Rights Controversy, Oct. 1, 1984)

⁶⁷ First Orr Aff., Exhibit 30 at Exhibit 6 (Exhibit 6 to the Swan Falls Agreement) (emphases added); *see also id.*, Exhibit 30 ¶ 13(A)(i) (Paragraph 13(A)(i) of the Swan Falls Agreement) ("Conditions on Effectiveness"); *see also id.* Exhibit 30 ¶ 16 (Paragraph 16 of the Swan Falls Agreement) ("Termination of Contract"); *cf. id.* Exhibit 30 ¶¶ 1, 10 (Paragraphs 1 and 10 of the Swan Falls Agreement).

There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River **between Milner and Murphy** on hydropower production from November 1 to March 31. In this regard, 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.⁶⁸

Id. (emphasis added). Ground water recharge had long been viewed as a form of storage,⁶⁹ and the Framework explicitly linked aquifer recharge and storage as means of enhancing future streamflows.⁷⁰

Enforcement of the State Water Plan was an important part of the Agreement: “[t]he State shall enforce the State Water Plan. . .”⁷¹ The Agreement further stated that “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 management of the Snake River watershed.”⁷² The express language of the Agreement demonstrates that its definition of the water rights at issue was based, in large part, on retaining the “zero flow” policy at the Milner gauging station.

2. The Public Information Meetings On The Swan Falls Agreement.

Idaho Power attorney Tom Nelson also made this point during the Idaho Water Resource Water Board (“Water Board” or “IWRB”) public information meeting on the Agreement in Twin Falls, on the day the Agreement was signed: “we were trying to wrestle

⁶⁸ First Orr Aff., Exhibit 30 at Exhibit 6 (emphasis added). The Framework also expressly contemplated that any requirement for mitigation of the adverse hydropower effects of new storage projects would be limited facilities constructed downstream from Milner Dam. *Id.*, Exhibit 29 at 3 (“Framework”).

⁶⁹ See Third Orr Aff., Exhibit 14 at 9 (page 10317 of transcript of Crandall examination) (“greater storage”).

⁷⁰ Orr Aff., Exhibit 29 at 7 (“Framework”).

⁷¹ First Orr Aff., Exhibit 30 at 1 ¶ 4 (Swan Falls Agreement ¶ 4) (emphases added).

⁷² First Orr Aff., Exhibit 30 at 5 ¶ 11 (Swan Falls Agreement ¶ 11) (emphasis added).

with how to regulate the river using streamflows at Murphy, you have to keep the split personality of the river involved, **and the numbers were based on zero flow at Milner.**"⁷³

Mr. Nelson further explained that retention of the "zero flow" policy 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.⁷⁴

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" policy 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.**"⁷⁵ Mr. Nelson did not voice any disagreement or qualification with respect to Mr. Costello's statement.

3. The Swan Falls Amendments To Policy 32 Of The State Water Plan.

The Water Board prepared proposed amendments to Policy 32 of the State Water Plan to implement Exhibit 6 of the Swan Falls Agreement, which were published in the January 1985 edition of the Department's publication entitled "Currents."⁷⁶ The first provision of the proposed amendments stated:

⁷³ First Orr Aff., Exhibit 44 at 13 (Nelson statements in page 41 of transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls)) (emphases added).

⁷⁴ First Orr Aff., Exhibit 44 at 9 (Nelson statements in page 27 of transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls)).

⁷⁵ First Orr Aff., Exhibit 46 at 19 (Costello statements in page 66 of transcript of Water Board public information meeting of Nov. 1, 1984 (Boise)) (emphasis added).

⁷⁶ See generally First Orr Aff., Exhibit 66 ("Currents," Jan. 1985); see also *id.*, Exhibit 15 at 3-4 (minutes of Senate Resources & Environment Committee) (Mar. 4, 1985) (pages 1-2 of Water Board resolution adopting proposed Policy 32 amendments (attachment to minutes)).

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station . . . 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 river 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.⁷⁷

The proposed amendments also limited "mitigation" to Idaho Power for winter flow reductions resulting from new storage to projects located **downstream** from Milner Dam.⁷⁸

The Water Board held a series of public information meetings on the Policy 32 amendments proposed to implement the Swan Falls Agreement during late January and early February 1985.⁷⁹ The meetings generally opened with Water Board representative Frank Sherman explaining the proposed amendments, after which members of the public would provide testimony or comments.⁸⁰ The meetings closed with a question and answer period. An Idaho Power representative was present to observe at each meeting, except the meetings in Lewiston.⁸¹

At most meetings, the first point Mr. Sherman made was that the settlement and the amendments retained the zero c.f.s. minimum flow at Milner: "[t]he negotiators agreed that

⁷⁷ First Orr Aff., Exhibit 66 at 2 ("Currents," Jan. 1985) (emphasis added); *see also id.*, Exhibit 15 at 3-4 (minutes of Senate Resources & Environment Committee) (Mar. 4, 1985) (pages 1-2 of Water Board resolution attached to minutes adopting proposed Policy 32 amendments); Third Orr Aff., Exhibit 21 at 6-7 (attachment no. 2 to Water Board meeting minutes of March 1, 1985).

⁷⁸ First Orr Aff., Exhibit 66 at 3 ("Currents," Jan. 1985) ("Policy 32I"); *see also id.*, Exhibit 15 at 8-9 (minutes of Senate Resources & Environment Committee) (Mar. 4, 1985) (pages 6-7 of Water Board resolution attached to minutes adopting proposed Policy 32 amendments, at Policy 32I); Third Orr Aff., Exhibit 21 at 11 (attachment no. 2 to Water Board meeting minutes of March 1, 1985).

⁷⁹ First Orr Aff., Exhibit 66 at 1 ("Currents," Jan. 1985).

⁸⁰ *See generally* Third Orr Aff., Exhibits 23-28 (transcripts of Water Board meetings on Policy 32 amendments proposed to implement the Swan Falls Agreement).

⁸¹ The Water Board held two meetings in each city, one in the afternoon and one in the evening. The attendance sheets for these meetings show that Idaho Power representative Richard L. Hahn was present at most of the meetings. Idaho Power attorney Tom Nelson was also present at the Boise meetings. *See* Third Orr Aff., Exhibits 29-30 (attendance sheets, written testimony and exhibits for Water Board meetings on Policy 32 amendments proposed to implement the Swan Falls Agreement).

above Milner there is a requirement for zero flow back to the dam.”⁸² “They’re going to continue the zero flow at Milner Dam. All the water in the Upper Snake in low water years can be appropriated; therefore, **there is no requirement for the water to be dumped past Milner Dam.**”⁸³ Public testimony reflected a similar understanding of the purpose and effect of retaining the zero c.f.s. minimum flow at Milner:

[ELDRED LEE, Secretary of Great Feeder Canal Co.]: 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.⁸⁴

Mr. Sherman 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 Idaho Power’s hydropower 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.”⁸⁵

“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.”⁸⁶

⁸² Third Orr Aff., Exhibit 24 at 24 (p. 15 of transcript of Water Board meeting on proposed Policy 32 amendments in Pocatello, 7:00pm) (emphasis added).

⁸³ Third Orr Aff., Exhibit 28 at 21 (page 65 of transcript of Water Board meeting on proposed Policy 32 amendments in Lewiston, 7:00pm) (emphasis added).

⁸⁴ Third Orr Aff., Exhibit 23 at 28, 30 (pages 28 and 30 of transcript of Water Board meeting on proposed Policy 32 amendments in Idaho Falls, 2:00pm) (emphasis added).

⁸⁵ Third Orr Aff., Exhibit 24 at 7 (page 12 of transcript of Water Board meeting on proposed Policy 32 amendments in Pocatello, 2:00pm).

⁸⁶ Third Orr Aff., Exhibit 24 at 9 (page 19 transcript of Water Board meeting on proposed Policy 32 amendments in Pocatello, 2:00pm)

"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."⁸⁷

"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."⁸⁸

"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."⁸⁹

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 the minimum flows."⁹⁰ The Water Board adopted the

⁸⁷ Third Orr Aff., Exhibit 25 at 5 (page 12 of transcript of Water Board meeting on proposed Policy 32 amendments in Burley, 2:00pm).

⁸⁸ Third Orr Aff., Exhibit 25 at 36 (page 16 of transcript of Water Board meeting on proposed Policy 32 amendments in Burley, 7:00pm).

⁸⁹ Third Orr Aff., Exhibit 23 at 14 (page 14 of transcript of Water Board meeting on proposed Policy 32 amendments in Idaho Falls, 2:00pm).

⁹⁰ Third Orr Aff., Exhibit 27 at 6 (page 7 of transcript of Water Board meeting on proposed Policy 32 amendments in Boise, 2:00pm) (emphasis added). During the same hearing, a member of the audience expressed the following concerns:

You and I both know that when your plan goes in front of this legislature, the lobbyists will chip away at it just as hard as they can. And what lobbyists am I talking about? Idaho Power's lobbyists.

Id. at 17 (page 50 of transcript of Water Board meeting on proposed Policy 32 amendments in Boise, 2:00pm). Idaho Power's attorney Tom Nelson responded to these concerns a few hours later, during the evening hearing:

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.**

proposed amendments by resolution on March 1, 1985, and the Legislature ratified the amendments shortly thereafter.⁹¹

4. The Department's Proposed Administrative Rules Implementing The Swan Falls Trust And Subordination Legislation.

While the settlement expressly reaffirmed the "zero flow" at Milner policy, the administrative rules the Department drafted in 1985 to implement the settlement created confusion as to whether the settlement extended to water sources tributary to the Snake River upstream from Milner Dam. In June 1985, Norm Young of the Department sent a memorandum to Director Ken Dunn that described issues expected to arise in drafting the administrative rules implementing the trust provisions of the settlement, and made recommendations.⁹² The memorandum recognized that the retention of the zero c.f.s. minimum flow at the Milner gauging station had been interpreted to mean flows upstream of Milner Dam were not subject to the settlement, and that spring discharges below Milner would be the primary source of water for the minimum flows at Murphy.⁹³ The

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.

Id. at 24 (pages 74-75 of transcript of Water Board meeting on proposed Policy 32 amendments in Boise, 7:00pm).

⁹¹ Third Orr Aff., Exhibit 21 (Water Board meeting minutes of March 1, 1985, including attachment no.2); 1985 Idaho Sess. Laws ch. 204; *see also* First Orr Aff., Exhibit 15 at 3 (Senate Resources & Environment Committee minutes of Mar. 4, 1985); *id.*, Exhibit 25 at 4 (House Resources & Environment Committee minutes of Mar. 7, 1985).

⁹² Third Orr Aff., Exhibit 36 at 1 (Memorandum from Norm Young to Ken Dunn, "Legal Issues Associated With Senate Bill 1008" (June 14, 1985)).

⁹³ Third Orr Aff., Exhibit 36 at 2 (Memorandum from Norm Young to Ken Dunn, "Legal Issues Associated With Senate Bill 1008" at 2).

memorandum concluded that such views were contrary to the plain language of Idaho Code § 42-203B as enacted under Senate Bill 1008, and therefore recommended that the rules be drafted so that “all flows tributary to Snake River above Swan Falls including water passing Milner” would be subject to the trust provisions of the Swan Falls legislation.⁹⁴

Thus, the first draft of the “proposed rules for water allocation” provided 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.”⁹⁵ The draft rules were published for public comment in the October 1985 edition of “Currents,” a Department publication.⁹⁶ The rules’ assumption that waters arising above Milner Dam would be subject the hydropower water rights immediately drew negative reactions.

In written comments to the Department regarding the “Proposed Rules,” attorney John Rosholt, a partner in Idaho Power’s law firm,⁹⁷ objected to the proposal to include flows upstream of Milner Dam as contrary to the Agreement, the legislation and the Milner “zero flow” policy:

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

⁹⁴ Third Orr Aff., Exhibit 36 at 2 (Memorandum from Norm Young to Ken Dunn, “Legal Issues Associated With Senate Bill 1008” at 2).

⁹⁵ First Orr Aff., Exhibit 52 at 2 (“Currents,” Oct. 1985) (Rule 1.5 and Figure 1).

⁹⁶ First Orr Aff., Exhibit 52 at 2 (“Currents,” Oct. 1985) (Rule 1.5 and Figure 1).

⁹⁷ Nelson, Rosholt, Robertson, Tolman & Tucker, Chtd.

found in [Rule] 1,5,1,1. would clear up 90% of the present questions about trust water.⁹⁸

Nonetheless, the rules as revised for promulgation in December 1985 still defined the basin upstream from Milner Dam as subject to the trust water provisions,⁹⁹ and the Department held a series of public hearings on the revised rules in January 1986.¹⁰⁰ The number one issue raised in these meetings was that “[t]rust water should not extend above Milner, especially surface water. Concern that high water use above Milner could be affected by trust water determination.”¹⁰¹ Another issue was that “[g]round water above Milner should not be tributary.”¹⁰² In a contemporaneous press release, Attorney General Jim Jones stated that he had asked the Department to revise the rules, in part because “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 [because] the parties retained the minimum streamflow at Milner Dam at zero.”¹⁰³ “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 negotiation parties.”¹⁰⁴

5. The 1986 Amendments To Idaho Code § 42-203B(2).

⁹⁸ 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).

⁹⁹ First Orr Aff., Exhibit 54 at 2 (page 2 of Currents, Dec. 1985, (Rule 1,5, 1, and Figure 1)).

¹⁰⁰ First Orr Aff., Exhibit 54 at 1 (page 1 of Currents, Dec. 1985); *see also generally* Third Orr Aff., Exhibits 40, 42 (memoranda from Norm Young to Ken Dunn regarding issues raised in public hearings).

¹⁰¹ Third Orr Aff., Exhibits 40 at 1 (Memorandum from Norm Young to Ken Dunn, Jan. 21, 1986) (emphasis added).

¹⁰² Third Orr Aff., Exhibits 40 at 1 (Memorandum from Norm Young to Ken Dunn, Jan. 21, 1986).

¹⁰³ Third Orr Aff., Exhibit 41 at 2 (“News Release,” Idaho Office of the Attorney Jan. 29, 1986).

¹⁰⁴ Third Orr Aff., Exhibit 41 at 2 (“News Release,” Idaho Office of the Attorney Jan. 29, 1986).

The Legislature determined that the confusion over the Milner issue warranted legislative action clarifying that "trust waters do not extend to the Snake River or tributary ground or surface water above Milner."¹⁰⁵ Thus, 1986 Senate Bill 1358 proposed to insert the following language into section 42-203B(2):

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.¹⁰⁶

The bill was considered in two meetings of the Senate Resources & Environment Committee (February 5 and 19, 1986) and in a meeting of the House Resources & Conservation Committee (March 13, 1986). Senator Crapo explained to the committees that the amendments were intended to clarify issues raised by the proposed administrative rules, had been negotiated by the interested parties, and clarified the original intent of the settlement.¹⁰⁷ Idaho Power attorney Tom Nelson and Sherl Chapman of the Idaho Water Users Association agreed with Senator Crapo's explanations and stated that their clients also supported the amendments.¹⁰⁸ Water District No. 1, which encompasses the main stem of the Snake River and several tributaries upstream from Milner Dam, passed a resolution encouraging the Legislature to enact Senate Bill 1358:

¹⁰⁵ First Orr Aff., Exhibit 60 at 6 ("Statement of Purpose" for 1986 Senate Bill 1358 (RS 12550)).

¹⁰⁶ First Orr Aff., Exhibit 60 at 2 (Section 1 of Senate Bill 1358) (underlining omitted).

¹⁰⁷ First Orr Aff., Exhibit 61 at 2 (minutes of Senate Resources & Environment Committee meeting, Feb. 5, 1985); *see also id.*, 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).

¹⁰⁸ 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).

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 1358.¹⁰⁹

The Milner amendments to Section 42-203B(2) became effective on March 24, 1986, when Senate Bill 1358 was approved and enacted under chapter 117 of the 1986 Idaho Session Laws. The legislation included an emergency clause providing for the amendments to become effective immediately.

6. The Revised Administrative Rules Implementing The 1986 Amendments to Section 42-203B(2).

The Department promptly adopted a revised version of the "Water Appropriation Rules and Regulations" that limited the definition of "trust water flows" to "the Snake River between Swan Falls Dam . . . and Milner Dam . . . and all surface and groundwater sources tributary to the Snake River in that reach."¹¹⁰ The revised rules also provided that "the Snake River upstream from Milner Dam" and "[s]urface water and groundwater tributary to the

¹⁰⁹ Third Orr Aff., Exhibit 43 at 2 (resolution attached to minutes of Water District No. 1 Annual Meeting, Mar. 4, 1986).

¹¹⁰ First Orr Aff., Exhibit 56 at 61 (page 6 of the "Water Appropriation Rules and Regulations" (Rule 1,5,1,1) (Apr. 8, 1986), attached as Exhibit 5 to Idaho Power's "Petition for Declaratory Judgment" (Fifth Jud. Dist. Case. No. 38526, Apr. 28, 1986)).

SNAKE RIVER upstream from Milner Dam is not trust water.”¹¹¹ The revisions further provided that “[f]lows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach . . . are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam.”¹¹²

Idaho Power challenged certain provisions of the revised rules as promulgated by the Department in a declaratory judgment action filed in the Fifth Judicial District Court. That action did not, however, challenge the most revisions limiting the effect of the settlement to flows downstream from Milner Dam.¹¹³

7. The Parties’ Responses To FERC’s Requests For Information Regarding The Settlement.

In responding to requests for further information on the settlement from the Federal Energy Regulatory Commission (“FERC”) in connection with Idaho Power’s petition to FERC to approve the Swan Falls settlement, Idaho Power represented to FERC that the primary source of the flows for its facilities below Milner Dam, especially in the summer, had been spring discharges and other inflows occurring below Milner Dam: “The Snake River regenerates itself below Milner Dam from inflows to the river from springs representing the outlet of the Snake River Plain Aquifer. It is primarily this spring flow which has furnished the summertime water in the Snake River between Milner and Swan

¹¹¹ First Orr Aff., Exhibit 56 at 61 (page 6 of the “Water Appropriation Rules and Regulations” (Rule 1,5,1,2) (Apr. 8, 1986) attached as Exhibit 5 to Idaho Power’s “Petition for Declaratory Judgment” (Fifth Jud. Dist. Case. No. 38526, Apr. 28, 1986)).

¹¹² First Orr Aff., Exhibit 56 at 63 (page 8 of the “Water Appropriation Rules and Regulations” (Rule 1,5,3,5) (Apr. 8, 1986) attached as Exhibit 5 to Idaho Power’s “Petition for Declaratory Judgment” (Fifth Jud. Dist. Case. No. 38526, Apr. 28, 1986)).

¹¹³ See generally First Orr Aff., Exhibit 56 (Idaho Power’s “Petition for Declaratory Judgment” (Fifth Jud. Dist. Case. No. 38526, Apr. 28, 1986)).

Falls.”¹¹⁴ The State made the same statements in its responses to FERC’s information requests.¹¹⁵

In sum, Idaho Power’s contention that the first count of the State’s Motion for Summary Judgment is “completely unrelated” to the Swan Falls Agreement and subordination to recharge water rights diverting upstream from Milner Dam is contradicted by the undisputed Swan Falls record. For similar reasons, it is evident that the State is not engaging in “stealth” litigation and does not “seek to inject” new issues.

III. THE STATE’S FIRST COUNT FOR SUMMARY JUDGMENT IS NOT PURELY ADMINISTRATIVE AND IS CONSISTENT WITH THE STATE’S PRIOR ARGUMENTS IN THIS PROCEEDING.

Idaho Power next argues that the State’s first summary judgment count is improper because the 1986 amendments to Idaho Code § 42-203B(2) are not definitional but purely administrative, and because the State has previously argued that Idaho Power should be required to exhaust its administrative remedies prior to obtaining judicial review of its challenges to how the Department permits and administers water rights. Motion to Strike at 10-11. These contentions simply contradict and challenge the statements on the face of the State’s Motion for Summary Judgment, and therefore exceed the scope of a motion to strike as a matter of law. The State will address them nonetheless in order to avoid waiver, as previously discussed.

The Court’s Consolidation Order recognized that the difference between definitional and administrative provisions is not always obvious, and further that administrative

¹¹⁴ Third Orr Aff., Exhibit 45 at 4 (page 2 of Idaho Power’s “Response To Questions 5 And 6 Completing Response To Request For Information Dated January 30, 1987) (FERC Docket no. EL85-38-000) (May 18, 1987).

¹¹⁵ Third Orr Aff., Exhibit 46 at 5 (page 3 of “State Of Idaho Response To Federal Energy Regulatory Commission Request For Additional Information”) (FERC Docket no. EL85-38-000) (May 18, 1987).

provisions can in fact be integral to the definition of water rights, particularly water rights “on the same source”:

Although arguably the provisions pertain solely to how water rights are to be administered, they can also be integral to the nature and extent of the water right and they may impact the tabulation of priorities on the same source. Frequently, disputes over water rights are settled by the incorporation of an agreement into a decree specifying how the respective rights are to be administered. The argument that the remark or conditions go solely to the issue of administration and are therefore outside the scope of the jurisdiction of the SRBA oversimplifies the issue. There can be a significant amount of overlap between an administrative provision and the definition of a water right. Furthermore, simply including a provision from a former decree or referencing an agreement into a partial decree and requiring the parties to litigate its meaning, operation or validity in another forum results in the Court issuing unsettled partial decrees and ultimately not performing its essential function. Additionally, any Court other than the SRBA which would otherwise rule on the dispute would lack jurisdiction to amend the elements of the affected water rights in the event it becomes necessary as a result of the outcome of the proceedings.

The *Swan Falls Agreement* in part defines the ownership, nature and extent of the subject water rights and how they are to be administered relative to other rights on the same or interconnected sources. Additionally, to the extent that there is a dispute over the meaning, operation or validity of the *Swan Falls Agreement*, the dispute, at least in part, is properly under the jurisdiction of the SRBA Court.

Consolidation Order at 20 (*italics in original; boldface added*). The Consolidation Order defines the “Swan Falls Agreement” as including the legislation enacted to implement it, *id.* at 2 n.2, and it is undisputed that the 1986 amendments to section 42-203B(2) clarified the original intent of the Agreement.¹¹⁶ Further, as the preceding sections of this memorandum demonstrate, the 1986 amendments are not simply administrative as applied to the Swan Falls settlement: they clarified the source element of the hydropower water rights that were the subject of the Agreement. It would therefore be improper to strike the State’s first

¹¹⁶ See generally Idaho Power Company’s Response To State Of Idaho’s Motion For Partial Summary Judgment (Feb. 7, 2008) at 7, 13-14, 23-25; see also Reply In Support Of State Of Idaho’s Motion For Partial Summary Judgment (Feb. 15, 2008) at 10-14.

summary judgment count simply because Idaho Power's Motion to Strike asserts that the 1986 amendments are "purely administrative." Idaho Power is entitled to argue this point in proceedings on the State's Motion for Summary Judgment, but not to prevent the State from having the first count of the motion from being heard altogether.

Moreover, Idaho Power is incorrect in contending that the State has previously argued that this Court may not consider any questions pertaining to the administration of the water rights at issue. The State's consistent position throughout this litigation has only been that Idaho Power's claims that the Department has improperly administered or permitted water rights are subject to the exhaustion requirement. The State has argued, therefore, that such claims must be presented to the Department before they Idaho Power can seek judicial review.¹¹⁷ The State has recognized that the Court can and should hear questions of administration that must be resolved for purposes of defining water rights, or that must be resolved to provide for the efficient administration of water rights.¹¹⁸

IV. THE STATE'S THIRD COUNT FOR SUMMARY JUDGMENT PRESENTS A JUSTICIABLE CLAIM REGARDING SUBORDINATION UNDER PARAGRAPH 7(C) OF THE SWAN FALLS AGREEMENT.

The third issue stated in the Motion for Summary Judgment pertains to subordination under Paragraph 7(C) of the Swan Falls Agreement, which provides that Idaho Power's water right and its beneficiary interest in the water rights held in trust by the State are subordinated to two recharge water rights the Company dismissed from Ada County Case No. 81375 (the

¹¹⁷ The string citations and parenthetical quotations in footnote 6 on page 10 of the Motion to Strike support the State's position on this point rather than Idaho Power's.

¹¹⁸ See, e.g., Memorandum in Response to Idaho Power Company's Motion To Compel at 9-14 (Apr. 8, 2008).

“7500 Case”). These two water rights permits are now owned by the Idaho Water Resource Board.¹¹⁹

Idaho Power has not asserted that the third count is unrelated to the Swan Falls Agreement, and certainly could not because the Company expressly dismissed the two recharge water rights identified in the third count from its “7500 Case.”¹²⁰ Thus, there is no dispute that the third issue presented for summary judgment satisfies the facial validity standard of Rule 12(f). Instead, Idaho Power contends that the third issue is non-justiciable, and also barred by the parties’ stipulation of April 11, 2006. *See* Motion to Strike at 16-17.

A. THERE IS A LIVE, JUSTICIABLE DISPUTE BETWEEN THE PARTIES REGARDING SUBORDINATION TO THE TWO STATE-OWNED RECHARGE WATER RIGHT PERMITS IDENTIFIED IN THE STATE’S MOTION FOR SUMMARY JUDGMENT.

Idaho Power contends that the third summary judgment issue is a non-justiciable claim because the two recharge water rights in question have not yet been licensed. Motion to Strike at 16.¹²¹ This argument is meaningless because the State does not seek to determine the terms of the licenses. Rather, the State simply seeks a ruling from this Court—the only Court that has jurisdiction over the question—that the hydropower water rights in question are subordinate to the two recharge permits pursuant to the Swan Falls Agreement; and recognizes that licensing has not yet taken place.

A water user is required to put water to beneficial use in order to obtain a license, and the Water Board’s ability to divert and use water for recharge for purposes of licensing is dependent, in part, on resolution of the subordination issue presented by the State’s third

¹¹⁹ See Exhibit 3 to Motion to Strike at 1 (Stipulation” at 1 ¶ 1(c) (Apr. 11, 2006)).

¹²⁰ See Third Orr Aff., Exhibit 47 at 2 (page 30 of “Notice of Dismissal of Certain Defendants”) (listing water rights numbers 01-7054 and 37-7842) (Ada County Case no. 81375, Oct. 24, 1984).

¹²¹ The third issue presented for resolution in the Motion for Summary Judgment is formulated as follows: “That the water rights at issue in this consolidated subcase are subordinate to ground water recharge right permit nos. 01-7054 and 37-7842, as finally licensed.” Motion for Summary Judgment at 2.

claim for summary judgment. Thus, the Water Board's present use presents a live controversy regarding the legal relations between these recharge permits and the hydropower water rights at issue in this proceeding.

Moreover, there is no doubt that an actual and substantial dispute exists between the parties as to whether the hydropower water rights at issue are subordinate to the two Water Board recharge water rights identified in the third count. Idaho Power made this quite clear when it denied the State's requests that the Company admit the subordination.

The stipulation states in relevant part that:

The Company agrees that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement . . . [and] The parties agree that all provisions of the Swan Falls Agreement and the implementing legislation will continue to apply to Water Right Permit Nos. 01—7054 and 37-7842 . . .¹²²

The State propounded a Request for Admission to Idaho Power that recited this language, and requested that Idaho Power to admit the subordination. Despite the clear language of the stipulation, the Company refused to admit the hydropower water rights at issue are subordinate to the two recharge water right permits identified in the third issue of the State's Motion for Summary Judgment.¹²³ The Company's denial of the State's Request for Admission demonstrates beyond any doubt there is a live and justiciable dispute between the parties as to whether the hydropower water rights at issue in this matter are subordinated to the two recharge water right permits identified in the State's third claim.

Finally, the mere fact that licensing will take place in the future does not render the question of subordination under the terms of the Swan Falls Agreement hypothetical or

¹²² See Exhibit 3 to Motion to Strike at 1 ("Stipulation" at 1 ¶ 1(a)-(b)).

¹²³ Third Orr Aff., Exhibit 52 at 22-25 (Idaho Power Company's Response to State of Idaho's First Set of Requests for Admission and Requests for Production of Documents at 22-25 (Nov. 19, 2007) (Responses to Requests for Admission Nos. 52 and 55)).

uncertain. To the contrary, this Court's resolution of the question will afford the parties "relief from uncertainty and controversy in the future." *Schneider v. Howe*, 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006). Thus, the issue is ripe for adjudication even though licensing has yet to occur. *See generally id.* (determining that a claim for declaration that an easement existed was justiciable even though the claimant had not filed the re-zoning application necessary to construct the subdivision for which the easement was sought); *see also In re Pintlar Corp.*, 180 B.R. 594, 597 (Bkrtcy.D.Idaho 1995) (rejecting the contention that a claim to adjudicate insurance liability was hypothetical and not ripe).

B. THE STIPULATION DOES NOT BAR THE THIRD COUNT OF THE STATE'S MOTION FOR SUMMARY JUDGMENT.

Idaho Power's argument that the stipulation bars the State's third summary judgment claim stands the stipulation on its head. The stipulation affirms the parties' legal relations and the subordination of the hydropower water rights at issue pursuant to paragraph 7(C) of the Swan Falls Agreement. Idaho Power's contention that the stipulation bars the parties from seeking judicial interpretation and enforcement of the stipulation, or from litigating their legitimate disagreements as to its meaning and effect, is nonsensical and contrary to the manifest purpose of the stipulation. The stipulation was intended to resolve a subordination question, not bury it. The notion that the parties entered into a subordination agreement that bars the parties from enforcing its terms or litigating a legitimate dispute over the stipulation's legal meaning and effect is untenable.

The plain language of the stipulation underscores this conclusion. The stipulation also expressly provides that the parties "agree to submit this Stipulation in all administrative and judicial proceedings involving the recognition of Water Right Permit Nos. 01-7054 and

37-7842,”¹²⁴ that the parties “will jointly support and defend the terms of the Stipulation against any and all objections or other challenges that may arise against the terms of the Stipulation in any administrative or judicial proceeding,”¹²⁵ and contemplates the “interpretation” and “enforcement” of the Stipulation in judicial proceedings.¹²⁶ Nothing in the plain language of the stipulation supports Idaho Power’ claim that the stipulation bars the third claim of the State’s Motion for Summary Judgment.

IV. DISCOVERY ISSUES.

Idaho Power’s contentions that the State’s discovery requests exceed the scope of this consolidated subcase and the Court’s instruction that the parties direct their discovery to the recharge issue fail because, as previous sections of this memorandum demonstrate, the issues on which the State has sought discovery are entirely germane to the State’s theory of the recharge question. Moreover, the State’s discovery requests are intended not merely to support the State’s Motion for Summary Judgment, but also to prepare for trial and to defend against Idaho Power’s cross-motion for summary judgment. Idaho Power has not yet filed a cross-motion that formulates the issues as the Company sees them, and therefore the State must propound discovery sufficiently broad to allow the State to adequately defend against whatever recharge issues and theories Idaho Power may present.

Finally, Idaho Power’s contention that it is entitled to obtain additional time for further discovery without making the showing required under Rule 56(f) is contrary to Idaho law, and indeed the Company cited no authority for its position. Rule 56(f) is the controlling provision when a party asserts that it needs additional discovery in order to defend against a

¹²⁴ Exhibit 3 to Motion to Strike at 2 (“Stipulation” at 2 ¶ 3).

¹²⁵ Exhibit 3 to Motion to Strike at 2 (“Stipulation” at 2 ¶ 4).

¹²⁶ Exhibit 3 to Motion to Strike at 2 (“Stipulation” at 2 ¶ 6).

pending summary judgment motion, and makes unambiguously clear that bare assertions, such as those Idaho Power has offered, are insufficient.¹²⁷

Under Rule 56(f), a party “must articulate what additional discovery is necessary and how it is relevant to the pending [summary judgment] motion.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005).

It has been noted that a party who invokes the protection of Rule 56(f) must “do so in good faith by affirmatively demonstrating why he cannot respond to a movant’s affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant’s showing of the absence of a genuine issue of fact.” *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir.1996). Further, in order to grant a motion for additional discovery before hearing a motion on summary judgment, the plaintiff has the burden of setting out “what further discovery would reveal that is essential to justify their opposition,” making clear “what information is sought and how it would preclude summary judgment.” *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir.2001).

Id. Idaho Power has submitted no Rule 56(f) affidavits, nor has it demonstrated why it cannot respond to the State’s summary judgment motion—for the obvious reason that the State has not yet submitted its summary judgment brief and affidavits. This fact further demonstrates that Idaho Power’s attempt to forestall the State’s Motion for Summary Judgment through a Rule 12(f) motion and unsupported appeals for more discovery are improper. As one federal court observed when faced with the same inappropriate procedural gambits and arguments Idaho Power has presented in its Motion to Strike:

We deny the plaintiff’s motion to “strike” Bank One’s summary judgment motion. Although Federal Rule of Civil Procedure 12(f) authorizes the strike pleadings containing “immaterial, impertinent or scandalous matter,” there

¹²⁷

Rule 56(f) provides as follows:

When Affidavits Are Unavailable in Summary Judgment Proceedings. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

exists no express authority for "striking" a summary judgment motion. . . . We also deny the plaintiff's self-styled motion for a continuance to obtain additional discovery. Rule 56(f) provides the means by which a nonmovant may seek a continuance of a summary judgment motion in order to obtain additional discovery or affidavits. However, the plaintiff does not move under Rule 56(f), and indeed fails to attach the required affidavit explaining why she needs additional discovery to respond to the summary judgment motion. *Chambers v. American Trans Air*, 17 F.3d 998, 1002 (7th), *cert. denied*, 513 U.S. 1001, 115 S.Ct. 512, 130 L.Ed.2d 419 (1994). Accordingly, we deny the plaintiff's motion to delay briefing on the summary judgment motion.

Cobb v. Monarch Finance Corp., 913 F.Supp. 1164, 1181 (N.D.Ill. 1995).

CONCLUSION

For the reasons discussed herein, the State respectfully submits that the Court should dismiss or deny Idaho Power's Motion to Strike in its entirety.

DATED this 2nd day of September 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September 2008, I caused a true and correct copy of the foregoing to be served on the following parties by the indicated methods:

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APPENDIX

The following is a list of the corrections contained in this memorandum for purposes of correcting certain inadvertent clerical and scrivener errors in the State of Idaho's Response to Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment, filed in this consolidated subcase on July 21, 2008.

No changes were made other than those listed below.

- Page 28, footnotes 41 and 42: "Exhibit 6 at 10-11" changed to "Exhibit 2 at 10-11."
- Page 28, footnote 43: "Exhibit 6 at 16" changed to "Exhibit 2 at 15." Also, the citations following the first parenthetical were deleted.
- Page 30, footnote 46: "Exhibit 9 at 7" changed to "Exhibit 9 at 12"; also, "Exhibit at 3-4" changed to "Exhibit 6 at 3-4."
- Page 30, footnote 47: "Exhibit 9 at 7" changed to "Exhibit 9 at 12."
- Page 30, footnote 48: "Exhibit 10" changed to "Exhibit 10 at 2."
- Page 31: An inadvertent omission from a quote in the first line of the page was corrected so that it now reads: "... in view of the federal policy 'of requiring that power interests, in securing licenses from the Federal Power Commission, execute a stipulation subordinating power uses to upstream irrigation uses ...'"
- Page 32, footnote 57: "Exhibit 14 at 5" changed to "Exhibit 14 at 4."
- Page 32, footnote 58: "Exhibit 14 at 7" changed to "Exhibit 14 at 6."
- Page 33, footnote 64: "Exhibit at 3-5" changed to "Exhibit 17 at 3-5."
- Page 35: A quote in the third line of the paragraph in the middle of the page was corrected by inserting "the" between "that" and "resolution."

- Page 36, footnote 73: “Exhibit 44 at 41 (Nelson statements in transcript of Water Board public information meeting . . .)” changed to “Exhibit 44 at 13 (Nelson statements in page 41 of transcript of Water Board public information meeting . . .)”
- Page 36, footnote 74: “Exhibit 44 at 27 (Nelson statements in transcript of Water Board public information meeting . . .)” changed to “Exhibit 44 at 9 (Nelson statements in page 27 of transcript of Water Board public information meeting . . .)”
- Page 36, footnote 75: “Exhibit 46 at 66 (Costello statements in transcript of Water Board public information meeting . . .)” changed to “Exhibit 44 at 19 (Costello statements in page 66 of transcript of Water Board public information meeting . . .)”
- Page 37: the word “rivers” in the sixth line of the indented block quote was changed to “river.”
- Page 37, footnote 77: “Exhibit 21 at 6” changed to “Exhibit 21 at 6-7.”
- Page 38, footnote 85: “Exhibit 24 at 8” changed to “Exhibit 24 at 7.”
- Page 40-41, footnotes 93 and 94: “Exhibit 36 at 21” changed to “Exhibit 36 at 2.”
- Page 41, footnotes 95 and 96: “(Rule 1.5 and Figure)” changed to “(Rule 1.5 and Figure 1).”
- Page 42: the phrase “would clear up about 90%” of the indented block quote at the top of the page was corrected to read “would clear up 90%.”
- Page 43, footnote 106: “(underlining in original)” changed to “(underlining omitted).”
- Pages 44-45, footnotes 110-112: “attached as Exhibit 4” changed to “attached as Exhibit 5.”
- Page 49, footnote 120: “(page 80 of ‘Notice of Dismissal of Certain Defendants’)” changed to “(page 30 of ‘Notice of Dismissal of Certain Defendants’).”

- The word “corrected” was inserted into the title of this memorandum in the caption on the first page, the first paragraph of the “Introduction” section, and in the footers on all pages.
- A footnote was added on page 1 (footnote *) to explain that this memorandum contains corrections to inadvertent clerical and scrivener errors in the State Of Idaho’s Response To Idaho Power Company’s Motion To Strike, Or Alternatively, Motion In Limine Re: Scope Of State Motion For Summary Judgment, filed on July 21, 2008. The addition of this explanatory footnote has resulted in a minor difference in pagination between this corrected memorandum in response to Idaho Power’s Motion to Strike and the State’s original memorandum, of July 21, 2008.
- An “Appendix” was added to this corrected memorandum in response to Idaho Power’s Motion to Strike.