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IN THE DISTRICT COURT FOR 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)

IDAHO POWER COMPANY,)

Plaintiff,)

v.)

STATE OF IDAHO; C.L. "BUTCH" OTTER,)

Governor of the State of Idaho; LAWRENCE G.)

WASDEN, Attorney General of the State of)

Idaho; IDAHO DEPARTMENT OF WATER)

RESOURCES; and DAVID TUTHILL, Director,)

Idaho Department of Water Resources)

Defendants.)

**IDAHO POWER COMPANY'S
OPENING BRIEF IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
RECHARGE SUBORDINATION**

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Plaintiff Idaho Power Company ("Idaho Power"), by and through its undersigned counsel, hereby submits its Opening Brief in Support of its Motion for Partial Summary Judgment on Recharge Subordination in this action ("Opening Brief"). For the reasons set forth below, the Court should grant Idaho Power's request for partial summary judgment and find that Idaho Power did not subordinate its water rights under the Swan Falls Agreement to the use or management of water for recharge.

INTRODUCTION

A. SUMMARY OF ARGUMENT

The Idaho Power Company did not subordinate its hydropower water rights to aquifer recharge under the Swan Falls Agreement ("Agreement"). The Agreement must be interpreted in accordance with the existing law at the time of the contract. Under recharge authorization legislation in effect when the Agreement was executed, use of water for aquifer recharge was expressly made secondary or subordinate to prior perfected water rights for all other uses including hydropower.

The parties to the Swan Falls Agreement dealt with recharge in executing the Framework for Final Resolution of Snake River Water Rights Controversy, under which recharge was considered a non-depletionary method or management tool that could adversely affect hydropower generation and that should be studied further, not a consumptive beneficial use to which Idaho Power's water rights would be subordinated. Accordingly, in Paragraph 7 of the Agreement, which does not address recharge at all, Idaho Power agreed to make its specified water rights subject to subordination only to subsequent beneficial consumptive upstream uses defined by the law in effect at the time of the Agreement.

The Court need not look beyond the Swan Falls Agreement, construed under existing law at the time of the Agreement, to conclude that the Agreement did not subordinate Idaho Power's hydropower water rights to recharge uses. But even if the Court were to look beyond the Agreement, a review of the historical context leading up to the Swan Falls controversy supports Idaho Power's interpretation of the Agreement's subordination provisions in Paragraph 7. Moreover, in 1994 the Legislature amended the recharge authorization legislation to confirm that recharge was secondary specifically to hydropower water rights otherwise subordinated under the Swan Falls Agreement. The Court should not override the Legislature's enactments consistently providing that recharge is secondary to prior perfected hydropower water rights, including those enumerated in the Swan Falls Agreement.

B. STANDARD OF REVIEW

Pursuant to Idaho Rule of Civil Procedure 56(c), if the depositions, pleadings, admissions and affidavits on file demonstrate that there are no genuine issues of material fact to sustain the action, then judgment as a matter of law is proper. Idaho R. Civ. P. 56(c). All reasonable inferences should be made in favor of the non-moving party. *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 419, 111 P.3d 100, 104 (2005), citing *G M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). In response to a motion for summary judgment, the "non-moving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue." *Blickenstaff v. Clegg*, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004), citing *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). "A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact." *Id.*, citing *Samuel v. Hepworth, Nungster & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

Under Idaho Rule of Civil Procedure 56(d), if a case is not fully adjudicated on summary judgment and a trial is necessary, "the court at the hearing of the motion ... shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." In such event, Rule 56(d) provides that the court "shall thereupon make an order specifying the facts that appear without substantial controversy ... and directing such further proceedings in the action as are just."

C. RECHARGE IS A NON-CONSUMPTIVE AND NON-DEPLETIONARY WATER USE WHICH NEVERTHELESS IMPACTS HYDROPOWER WATER USE.

In order to understand the factual context of subordination of Idaho Power's hydropower water rights, and its relation to recharge, some basic hydrologic facts regarding recharge are helpful. As explained in Section I.B. below, the Framework for Final Resolution of Snake River Water Rights Controversy ("Framework") signed by the parties on October 1, 1984 referred to aquifer recharge as one of a "number of methods ... suggested to enhance streamflows in the Snake River," and acknowledged that such methods deserved further study to determine their impacts.¹ One such study was the Idaho Department of Water Resources' ("IDWR") 1999 report entitled "Feasibility of Large-Scale Managed Recharge of the Eastern Snake Plain Aquifer System" (hereinafter "Feasibility Study").²

As the mechanics of recharge and the relevant hydrology are explained in the Feasibility Study, recharging the ESPA with surface water from the Snake River constitutes non-consumptive and non-depletionary water use or management.³

¹ See Gheleta Aff. at A (Framework at 7).

² See Gheleta Aff. at B (Feasibility Study).

³ *Id.* (Feasibility Study at ix).

Water would percolate to the underlying aquifer, raising ground-water levels and increasing ground-water storage. The increase in water levels would produce increased return flows from the ground-water system back to the Snake River, particularly at spring discharge locations in the Thousand Springs and American Falls reaches. Because of the nature of ground-water flow, periodic diversions of recharge water would result in a steady, sustained increase in spring discharge.⁴

Thus, the Feasibility Study makes clear that while initially all of the Snake River surface water recharged goes into aquifer storage, ultimately recharge in the ESPA is non-consumptive and non-depletionary since, in the absence of subsequent diversion for a consumptive use, all of the recharged water stays in the system and eventually returns to the river.⁵ This impacts downstream surface water users including Idaho Power in two ways. First, with the bulk of the Snake River water used for recharge initially going into aquifer storage, hydropower generation is immediately affected by diminished river flows. Second, although the water recharged into the aquifer eventually returns to the river, the alteration in timing can be substantial, in some instances taking decades for the entirety of the water to return and location of such return flows is at best uncertain and may bypass existing hydropower facilities.⁶

⁴ The Feasibility Study further explains how recharge into the aquifer results in increased surface flows in the river, and the timing of such flows:

River response to aquifer recharge is not instantaneous, in part because some of the water that is recharged is stored (temporarily at least) in the aquifer. ... Initially, all recharge water goes into aquifer storage. Over time, as the water table approaches a new equilibrium, the rate at which water goes into aquifer storage diminishes to near zero, and the annual river response to recharge becomes nearly equivalent to the annual aquifer recharge rate.

See Gheleta Aff. at B (Feasibility Study at 79).

⁵ Under Idaho law, a consumptive use of water “means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” I.C. § 42-202B (emphasis added).

⁶ See Gheleta Aff. at B (Feasibility Study). For example, modeling results in the “Thousand Springs” scenario

ARGUMENT

I. IDAHO POWER DID NOT SUBORDINATE ITS HYDROPOWER WATER RIGHTS UNDER THE SWAN FALLS AGREEMENT TO RECHARGE, AND IN PARAGRAPH 7 OF THE AGREEMENT SUBORDINATED ONLY TO SUBSEQUENT BENEFICIAL UPSTREAM USES TO THE EXTENT CONSISTENT WITH THE LAW AT THE TIME OF THE AGREEMENT

A. The Agreement Must Be Interpreted in Accordance with the Law in Effect at the Time of its Execution.

The Swan Falls Agreement must be interpreted in conjunction with the Idaho recharge authorization statutes in effect at the time of its execution. The rule in Idaho is that the law in existence at the time of contracting becomes part of the contract, as if the contract itself contained an express provision to that effect. *See Fidelity Trust Co. v. State*, 72 Idaho 137, 149, 237 P.2d 1058 (1951) ("[I]t is axiomatic that extant law is written into and made a part of every written contract."); *Robinson v. Joint School Dist. No. 150*, 100 Idaho 263, 265, 596 P.2d 436 (1979) (recognizing that the Idaho rule "appears to be the law in almost every state, if not all").⁷ The existing law that is read into the contract includes not only constitutional and statutory provisions, but valid regulations having the force and effect of laws of general application as well. *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971). Furthermore, the parties to a contract are presumed to have known of and "to have had in mind" those existing

involving recharge above Milner indicate that it takes approximately 58 years for 88 percent of recharged water to return to the river below Milner, with 12 percent of recharged water still in aquifer storage. *Id.* (Feasibility Study at 79). In the "Egin Lakes" recharge scenario, 58 years after the beginning of recharge activities, 32 percent of the recharged water remains in the aquifer and 63 percent has returned to the river, but mainly in the Henry's Fork and South Fork reaches. *Id.* (Feasibility Study at 113). If these model runs were run out to infinity, virtually all of the water recharged would return to the river.

⁷ Secondary legal sources support the *Robinson* court's assertion that these contract principles are widely regarded as the general rule in other jurisdictions. *See, e.g.*, 17A Am. Jur. 2d *Contracts* §§ 371-72 (2004). As stated by the Supreme Judicial Court of Massachusetts, "laws enacted after the execution of an agreement are not commonly considered to become part of the agreement unless its provisions clearly establish that the parties intended to incorporate subsequent enactments into their agreement." *Feakes v. Bozyczko*, 373 Mass. 633, 636 (1977).

laws and regulations that were in existence at the time of contracting. *See Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 378 (1982).⁸

As discussed in Section I.C. below, the statutory law in effect at the time the parties entered into the Swan Falls Agreement limited recharge projects to a specific geographic area, limited application for recharge project permits to aquifer recharge districts, and subordinated all water appropriated for such limited purposes to downstream hydropower water rights. *See* I.C. §§ 42-234, 42-4201, 42-4201A. The provisions of the 1984 Agreement regarding the scope of Idaho Power's subordination must be viewed in light of the limited scope of recharge and its secondary status to other uses including hydropower when the Agreement was executed.

While a contract must be interpreted under existing law, the law governing the interpretation of contracts requires that the Court look first and foremost to the terms of the contract to ascertain its meaning and the contracting parties' intent. *Meir-Nandorf v. Milner*, 34 Idaho 396, 400 (1921). "If the expressed meaning is plain on the face of the instrument, it will control." *Id.* Only when the court has determined that the intent and meaning of the contract cannot be ascertained from the face of the document will the court allow the factfinder to look outside the contract to determine the intent and meaning. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2007). If the Court determines to look outside the four corners of the contract the inquiry is then confined to "the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and

⁸ A court will consider and apply subsequent legislative amendments or enactments only if the language of the contract discloses an intent to depart from the general rule that extant law is written into the contract. *Robinson*, 100 Idaho at 265; *see also Florida East Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1130 (7th Cir. 1994) (holding that "a subsequent change in the law cannot retrospectively alter the parties' intent"); *Alvin Ltd. v. U.S. Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987) ("[I]n ascertaining whether such a [future] change may be accommodated, the original intention of the parties must be considered.").

purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings." *Id.*, citing *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 794 P.d 1381 (1990) (*add'l citations omitted*).

For purposes of the present inquiry, the Court need not look outside the plain language of the contract construed under the law existing at the time to determine that Idaho Power did not subordinate its water rights pursuant to the Swan Falls Agreement to recharge as the State now contends. However, even if the Court does inquire outside the four corners of the contract construed under the existing law, facts and circumstances discussed in Section II further below confirm that Idaho Power did not subordinate its water rights to recharge.

B. Idaho Power Did Not subordinate to Subsequent Recharge in the Agreement.

The Agreement arose out of a political and legal impasse between Idaho Power and the State. In its 1955 federal hydropower license for the Hells Canyon Complex, Idaho Power agreed that the project would operate "in such a manner as will not conflict with the future *depletion* in flow of the waters of Snake River or its tributaries, or prevent or interfere with the future upstream *diversion and use* of such water . . . for the *irrigation* of lands and *other beneficial consumptive uses* in the Snake River watershed."⁹ In 1982, the Idaho Supreme Court held that this license condition for the Hells Canyon Complex did not apply to other Company facilities upstream from Hells Canyon, including Swan Falls, since the licenses at these other facilities did not contain similar license provisions. *Idaho Power Co. v. State*, 104 Idaho at 586, 661 P.2d 752 (1982). After this decision, the Company filed suit against some 7500 upstream water users to assert its priority at Swan Falls. Thus began the controversy

⁹ See *Gheleta Aff. at C* (Hells Canyon License, Article 41) (*emphasis added*).

leading up to the Swan Falls Agreement, as has already been extensively briefed before this Court.

The Agreement was a culmination of over two years of political and legal wrangling and negotiation that followed the Supreme Court decision and the 7500 lawsuit. In this process, the State and Idaho Power executed three interrelated contracts – the Framework, the 1180 Contract and the Swan Falls Agreement, each of which will be discussed below.

The controversy was played out in the 1983 session of the Idaho Legislature, where some eight bills were introduced in an attempt to impose stringent subordination provisions on Idaho Power's hydropower rights.¹⁰ Idaho Power bitterly fought these legislative proposals, and none of them passed. Idaho Power did support SB 1180, however, which sanctioned the subordination of the Company's hydropower rights to consumptive uses existing at the time. Specifically, this legislation removed PUC jurisdiction over the failure of the Company to protect its hydropower rights from depletion due to consumptive water uses existing as of November 19, 1982. SB 1180 also authorized the Governor to negotiate a contract with Idaho Power to dismiss from the pending litigation:

all consumptive water users who have beneficially used water for any consumptive purpose prior to November 19, 1982, or any person or persons who have previously made substantial investments in irrigation wells and irrigation equipment and have pending a water permit or application, even though such irrigation wells and irrigation equipment were not in operation prior to November 19, 1982¹¹

The Company and the Governor proceeded with the negotiation of an agreement (the "1180 Contract") pursuant to SB 1180. Its execution was stymied by extensive public

¹⁰ See Jeffery C. Fereday and Michael C. Creamer, *Swan Falls in 3-D: A New Look At The Historical, Legal And Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 IDAHO L. REV. 573, 597-8 (1991-1992).

¹¹ See *Gheleta Aff. at D* (SB 1180) (emphasis added).

comment and concerns by the Governor and Attorney General as to its constitutionality.

Moreover, the Governor wanted a more comprehensive solution to the issue of the relationship between hydropower development and upstream irrigation and other consumptive uses.¹²

Given this impasse, the Company and the State began to negotiate a more comprehensive settlement, which culminated in the Framework, which was signed by the Governor, Attorney General, and CEO of the Company.¹³ The document set forth six "judicial, legislative and administrative actions" which the parties agreed would be taken in the public interest:

1. Amendment of the State Water Plan to adjust the minimum stream flow at the Murphy Gage to 3,900 c.f.s. in the irrigation season and 5,600 c.f.s. during the non-irrigation season;
2. Establishment of public interest criteria against which new development could be weighed (significantly, this new development did not include any mention of recharge);
3. Commencement of the Snake River Basin Adjudication;
4. Establishment of an effective water marketing system;
5. Hydrologic and economic studies to implement the State Water Plan and augment flows in the Snake River (which studies could focus on measures specifically including in-stream storage and recharge projects to "enhance stream-flows in the Snake River, which would benefit both agricultural development and hydro-power generation"); and
6. Legislation to clarify that proceeds from utility sales of hydropower water rights will benefit rate-payers.¹⁴

¹² See Gheleta Aff. at E (Letter Governor Evans to James Bruce, May 9, 1984) (emphasis added).

¹³ See Gheleta Aff. at A (Framework).

¹⁴ *Id.*

Notably, the Framework makes a distinction between new development to which public interest criteria would be applied in Section 2 that did *not* include recharge, and future studies in Section 6 of a "number of methods ... suggested to enhance stream-flows in the Snake River" that explicitly *did* include recharge. Specifically, in Section 6, the parties acknowledged that methods such as recharge to enhance stream flows deserved further study "to determine their economic potential, their impact on the environment, and their impact on hydro-power generation," and in doing so expressly recognized that the Company's water rights were not subordinated to recharge.¹⁵ To the contrary, the parties recognized that recharge could impact hydropower generation, and that impact needed to be studied before recharge could be implemented.

The Agreement follows the Framework on which it was based in not subordinating Idaho Power's water rights to recharge. With respect to subordination, the Agreement provides:

The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers [recitation of the applicable water right license numbers], but such rights in excess of the [minimum flow] amounts stated in 7(A) *shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A).* The Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. . . . This paragraph shall constitute a subordination condition.¹⁶

¹⁵ *Id.*

¹⁶ *See Gheleta Aff. at F (Agreement, ¶ 7(B) (emphasis added)).*

The plain language of the Agreement cannot be interpreted to include a subordination of Idaho Power's hydropower rights to recharge. The Agreement does not provide for Idaho Power's subordination to recharge, does not describe the recharge concept, and does not even mention the term "recharge" at all. Rather, under the plain reading of this provision, Idaho Power subordinated its water rights to "subsequent beneficial upstream uses" -- that is, uses that were later in time -- upon "approval of such uses by the State in accordance with State law."

The interpretation of "subsequent" uses as a reference to specific uses made later in time is consistent with the overall structure of the Swan Falls Agreement. Paragraph 7(D) of the Agreement provides for subordination of Idaho Power's rights to *existing* users, stating: "The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984 [the date the parties signed the Framework], and who have filed an application or claim for said use by June 30, 1985."¹⁷ Accordingly, the purpose of Paragraph 7(B) was to provide for subordination to *future* users, *i.e.*, those making "subsequent beneficial upstream uses."¹⁸

The State has argued that "subsequent" uses means not uses made later in time, but new types of uses which the State decides to designate as beneficial uses in the future. But there is no indication that Idaho Power agreed to subject itself to the radical step of binding the delineation of its property rights in the Agreement to subsequent changes in the law which could not be anticipated at the time of the Agreement. In fact, as discussed in Section I.C. below, the Idaho recharge statutes at the time protected Idaho Power's rights by explicitly making any "beneficial use" of water for recharge "secondary" to all prior perfected water

¹⁷ *Id.* (Agreement, ¶ 7(D)).

¹⁸ *Id.* (Agreement, ¶ 7(B)).

rights including those for hydropower purposes. The Agreement contains no explicit provision that existing State law making recharge secondary to hydropower water rights would be rendered inapplicable to Idaho Power's water rights or otherwise superseded by the Agreement.¹⁹

While Paragraph 7 of the Agreement defines the Company's water right and the Company's subordination, Paragraphs 6 and 13 of the Agreement describe the actions to be taken by the State in furtherance of the initiatives described by the parties in the Framework.²⁰ Paragraph 6 of the Swan Falls Agreement refers to Exhibits to the Agreement setting forth legislative proposals the parties agreed to "propose and support," which proposals correspond to each of the six elements set forth in the Framework.²¹ Paragraph 6(D) and Exhibit 3 to the

¹⁹ The intent to omit recharge from the scope of the subordination provision is further evidenced by the Statement of Legislative Intent authored by Senator Crapo and dated February 1, 1985. *See Gheleta Aff. at G* (Statement of Legislative Intent, February 1, 1985). In discussing proposed legislation, Senator Crapo paid particular attention to the public interest factors set forth in subsection 42-203C, which specifies the criteria which had to be met to appropriate waters subject to the trust established under the Agreement. *Id.* Of particular note, Senator Crapo stated:

None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust waters. This provision represents legislative intent that the consideration of the family farming tradition, hydropower use, domestic, commercial, municipal and industrial uses, or other multiple use developments are each to be given equal consideration in the reallocation process. It is the intent that otherwise qualified water uses which promote the family farming tradition or create jobs should be recognized as essential to the economy of the State of Idaho.

Id. Notably, recharge does not appear in this list of potential beneficial uses to which the trust water could be allocated under the Agreement. While the Legislature plainly intended to subordinate Idaho Power's water rights, where appropriate, to agricultural, municipal and industrial uses, it did not intend to subordinate those rights to recharge. *Id.*

²⁰ *See Gheleta Aff. at F* (Agreement, ¶¶ 6 and 13).

²¹ *See Gheleta Aff. at F* (Agreement, ¶ 6). Each of the subparagraphs of Paragraph 6 corresponds to a section of the Framework. Paragraph 6(A) and Exhibit 1 to the Agreement describes enactment of public interest criteria, as described in section 5 of the Framework. Paragraph 6(B) and Exhibit 2 to the Agreement describes funding for the adjudication of the Snake River Basin, as described in section 3 of the Framework. Paragraph 6(C) of the Agreement describes an "effective water marketing program" as described in section 4 of the Framework. Paragraph 6(E) and (F) and Exhibits 4 and 5 to the Agreement describe allocation of gains on the sale of a utility

Agreement describe funding for hydrologic and economic studies, as also described in Section 5 of the Framework, which references recharge studies in particular.²² Significantly, this is the only mention of recharge in the Swan Falls Agreement and its underlying Framework – as a management tool subject to further study of possible augmentation of flows in the river.

As explained by the State and Idaho Power in testimony in support of the Swan Falls implementing legislation, the parties had a difficult time negotiating the mechanism by which they would implement the subordination effectuated by Paragraph 7(B), and the "reallocation" of water previously appropriated under Idaho Power's water rights to subsequent beneficial uses pursuant to the public interest criteria.²³ Late in the negotiations they came up with the trust concept, which they proposed in the legislation attached to the Agreement as Exhibits 7A and 7B.²⁴ This subordination and reallocation mechanism was expressly relating to depletionary uses, not recharge.

Exhibit 7A, eventually enacted as I.C. § 42-203B(6), confers on the Director the authority to subordinate hydropower rights to "subsequent upstream beneficial *depletionary* uses."²⁵ Exhibit 7B, Section 1.1, enacted as I.C. § 42-203B(1), assures the holder of a subordinatable water right the ability to keep using that right "pending approval of *depletionary* future beneficial uses."²⁶ Exhibit 7B, Section 1.2, enacted as I.C. § 42-203B(2),

and limitations to the Public Utility Commission ("PUC") jurisdiction as contemplated by section 6 of the Framework. Section 1 of the Framework is implemented by Paragraph 13.A.i. and Exhibit 6.

²² See Gheleta Aff. at F (Agreement, ¶ 6(D)).

²³ See Gheleta Aff. at H (Minutes, Senate Resources & Envy's Comm., at 3 (Jan. 18, 1985)).

²⁴ See Gheleta Aff. at F (Agreement, Exhibits 7A and 7B).

²⁵ *Id.*

²⁶ *Id.*

provides that the rights held in trust are subject to subordination to "and *depletion* by future upstream beneficial *users*" acquiring rights under state law.²⁷ Exhibit 7B, Section 1.3, enacted as I.C. §42-203B(3), provides for the subordination of water rights for power purposes not defined by agreement to "*depletion* by future upstream beneficial users."²⁸

In contrast to traditional depletionary uses such as irrigation, domestic, municipal and industrial, the diversion of water for aquifer recharge, particularly in the Eastern Snake Plain Aquifer (ESPA), is non-depletionary because the surface water recharged into the aquifer eventually returns to the river. *See* Introduction, Section C, above. As such, recharge is simply moving water from one part of the hydrologic cycle to another, and back again (albeit at a different time and location), and thus is not "depletionary." However, as recognized by the parties, recharge could have significant effects on hydropower generation. This is why the parties agreed in the Framework to simply study recharge (subject to the impact of recharge on hydropower generation), and in the Agreement agreed to fund the studies. The parties clearly and by the express terms of the Agreement did not intend or contemplate that the Company's rights as described in Paragraph 7 would be either subordinate or subordinatable to recharge.

At the same time they executed the Swan Falls Agreement, the parties also executed the agreement they had negotiated pursuant to SB 1180 – the 1180 Contract.²⁹ In the 1180 Contract, the Company agreed to dismiss its claims against the defendants in the pending litigation.³⁰ The Company also agreed to not assert claims against holders of "*consumptive*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See* Gheleta Aff. at I (1180 Contract).

³⁰ *Id.*

water uses for domestic, *nonconsumptive* commercial, *nonconsumptive* industrial, or *nonconsumptive* municipal uses . . . occurring from and after November 19, 1982 . . . unless such uses would result in a violation of the Company's water right as defined in paragraph 7(A) of the [Swan Falls Agreement]." ³¹ Thus, the parties were careful not only to clarify uses as "consumptive," but also to distinguish those uses from "nonconsumptive" or de minimis uses. Clearly, the parties knew the meaning of the terms "consumptive" and "depletionary," and had they intended to include recharge in the suite of uses to which the Company's rights would be subordinated, they would have so specified.

In short, the language of the Framework, the Agreement, and the 1180 Contract – all executed by the parties as components of the overall Swan Falls Agreement – is consistent. The Swan Falls Agreement did not subordinate Idaho Power's water rights to recharge.

C. The Recharge Authorization Statutes in Existence at the Time of the Agreement Did Not Subordinate Idaho Power's Rights to Recharge.

When the 1984 Swan Falls Agreement was executed, statutory recognition of aquifer recharge as a beneficial use was subject to significant – and explicit – limitations, *including non-interference with existing water rights expressly including hydropower rights*. As the statutes demonstrate, neither party to the Agreement in 1984 had any reason to believe that Idaho Power was subordinating its rights to recharge, which was a sharply limited creature of statute and not a recognized beneficial use for which individuals could apply and obtain a permit.

The Idaho Constitution specifies only the following beneficial uses: agriculture, domestic, manufacturing, mining and hydropower. Idaho Const. art. XV, § 3. The Legislature

³¹ *Id.* (1180 Contract, ¶ 2(e)).

has defined a limited number of additional beneficial uses. It has declared the preservation of minimum instream flow for specified instream uses to be a beneficial use pursuant to I.C. § 42-1501. In addition, it has provided in I.C. § 42-223(2) that "[a] water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial uses" for purposes of avoiding forfeiture problems.

In contrast to these unrestricted constitutional and statutory beneficial uses, in 1978 the Legislature adopted legislation that authorized recharge on a limited basis, with express restrictions protecting existing water rights holders making recognized beneficial uses, and hydropower beneficial uses in particular. I.C. § 42-4201 provided for formation of aquifer recharge districts in Jerome, Lincoln and Gooding counties as a "pilot effort," authorized the IDWR to issue permits and licenses to such districts, and declared that the appropriation and underground storage of water for aquifer recharge by these districts shall constitute a beneficial use. I.C. § 42-4201(1). Additionally – and most significantly here – the legislation expressly provided:

The rights acquired by the aquifer recharge district pursuant to any permit and license obtained as herein authorized shall be *secondary to all prior perfected water rights, including those held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation.*

I.C. § 42-4201(2) (emphasis added).

Thus, this initial authorizing legislation explicitly provided that any recharge water rights acquired by aquifer recharge districts could not impinge upon any prior water rights held for hydroelectric power generation purposes – including all of Idaho Power's senior prior perfected rights. *See Idaho Power Co. v. State*, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983) ("Here Swan Falls water rights were vested, having been acquired in the early part of this

century"). Indeed, part of the "multiple use water policy" that the pilot recharge project was designed to serve was "increasing and sustaining the flow of the Snake River ... when additional flow is needed for the generation of hydroelectric power." I.C.

§ 4201(1)(e)(emphasis added). Providing further protection for existing users, in order "to insure that other water rights are not injured by the operations of the aquifer recharge district," the statute provided that the Director must order the cessation of operations in the event of adverse effects on beneficial use of existing water rights. I.C. § 42-4201(4).³²

In 1982, the Legislature enacted I.C. § 42-4201A, which broadened the 1978 legislation to authorize IDWR to issue to either an aquifer recharge district or an irrigation district a permit or license recognizing the right to appropriate water for aquifer recharge. I.C. § 42-4201A(2). While this 1982 statute was not limited to discrete geographic areas of the state as was the 1978 legislation, the statute contained limitations similar to the earlier legislation. The appropriation and underground storage of water by an irrigation district or aquifer recharge district was declared to be a beneficial use. *Id.* However, once again such use was deemed secondary to all others:

The rights acquired by an aquifer recharge district, or an irrigation district, pursuant to any permit and license obtained as herein authorized *shall be secondary to all prior perfected water rights, including those held by any privately owned electrical generating company to appropriate waters in the reaches downstream from a recharge project diversion for purposes of hydroelectric power generation.*

³² The Idaho Legislature also enacted in 1978 I.C. § 42-234, granting IDWR the authority to issue a permit(s) for ground water recharge in St. Anthony and Rexburg, Idaho. That legislation authorized IDWR to issue a permit for the appropriation and underground storage of unappropriated waters to implement these recharge programs. It also provided that in issuing a permit for the appropriation of groundwater in excess of 10,000 acre-feet per year from a single or several diversion points, IDWR may require an applicant to recharge the groundwater basin to offset this withdrawal if it is determined that withdrawal of the water will adversely affect existing pumping levels or existing water rights.

I.C. § 42-4201A(2) (emphasis added). The 1982 statute also provided that where a district's methods of operation adversely affect existing water rights or create conditions adverse to beneficial use of existing water rights, the Director must order the cessation of operations until the adverse effects are corrected. I.C. § 42-4201A(4).

Thus, when the Swan Falls Agreement was executed in 1984, statutory recognition of aquifer recharge as a beneficial use was subject to significant limitations, including non-interference with existing water rights expressly including hydropower rights. Under I.C. § 42-4201A, enacted in 1982, appropriation of water for aquifer recharge by an aquifer recharge district or any irrigation district (but not individual appropriators) had been declared a beneficial use, but an appropriation of water for this beneficial use was expressly made secondary to prior perfected water rights for hydropower. This express statutory "secondary" status of recharge makes it unique among beneficial uses in Idaho.

Accordingly, aquifer recharge was subordinated to downstream private hydropower generation covered by prior perfected rights at the time of the Swan Falls Agreement, and only considered a beneficial use when conducted by aquifer recharge districts and irrigation districts. The plain language of the Swan Falls Agreement must be read in light of this existing legal framework. Given the existing law at the time of the 1984 Agreement, including the express statutory subordination of aquifer recharge to hydropower, there was no need to specifically include, exclude or address subordination of hydropower uses to aquifer recharge in the Swan Falls Agreement. The subordination provision of Paragraph 7(B) of the Agreement did not address recharge, with the result that it did not affect the applicability of existing law making recharge secondary to prior perfected water rights for hydropower purposes. Rather, consistent with existing law, the parties addressed recharge in the

Framework and in the Exhibits to the Agreement as a management tool requiring further study, recognizing that recharge could have adverse effects to hydropower.

II. FACTS AND CIRCUMSTANCES OUTSIDE THE FOUR CORNERS OF THE AGREEMENT CONFIRM THAT IDAHO POWER DID NOT SUBORDINATE ITS WATER RIGHTS UNDER THE AGREEMENT TO RECHARGE

As demonstrated above, the Court does not need to look beyond the Swan Falls Agreement, construed under existing law at the time of the Agreement, to conclude that the Agreement did not subordinate Idaho Power's hydropower water rights to recharge uses. But even if the Court were to look outside the four corners of the Agreement, a review of the facts, circumstances and policies that make up the historical context leading up to the Swan Falls controversy supports Idaho Power's interpretation of the Agreement's subordination provisions in Paragraph 7.

A. The Historical Context Leading Up to the Agreement Establishes that Idaho Power's Use of Water for Hydropower Generation Was Subordinated Only to Irrigation and Other Upstream Consumptive and Depletory Uses, But Not to Recharge.

Since the beginning of Idaho Power's development of water rights for hydropower generation on the Snake River, Idaho Power has consistently taken the position that it would not deprive irrigators and other consumptive water users of adequate water supplies.³³ This policy is memorialized in the provisions of several of the licenses issued by the United States for the Company's hydropower facilities on the Snake River. However, at no time did Idaho Power agree to a blanket subordination of its hydropower water rights for any of its Snake River facilities.

³³ See *Gheleta Aff. at J* (Statement of Mr. C.J. Strike, President of Idaho Power Company, at a hearing before the Hydroelectric Commission of Oregon on September 15, 1947 ("I wish to state that at no place on the Snake River have we ever taken the position that where our water rights for power were developed have we in any way deprived irrigation people of what we believe to be the first and most important use of water"))).

In fact, the subordination provisions in each of the Company's licenses or approvals, as discussed in more detail below, were hard fought and specifically negotiated by the Company based on the facts and circumstances at the time. *See Idaho Power v. State*, 104 Idaho 575, 661 P.2d 741 (1983). For instance, in the early 1950s, Idaho Power applied for and received a Federal Power Commission ("FPC") license for its C.J. Strike facility above Swan Falls. *Id.* at 746. By that time, it had become apparent that the Snake River was no longer capable of providing an unlimited water supply for upstream development, and as a result, the FPC attempted to insert a subordination provision in the Company's license for the C.J. Strike facility to address this concern. *Id.* Idaho Power initially resisted inclusion of any subordination clause in the C.J. Strike license, and only consented to subordination upon agreement by the FPC to either pay damages or acquire the C.J. Strike facility if federal irrigation projects reduced power output at the facility. *Id.*

Similarly, Idaho Power only agreed to subordinate the water rights for its Hells Canyon Complex project because the subordination to upstream irrigation interests was necessary to secure support for the project from the State and the State's irrigation water users, a powerful political force in the State at that time. *Id.* at 746-47. That subordination provision, like the ones that had come before it, was limited in scope to upstream irrigation and consumptive uses. And as the Supreme Court held in *Idaho Power v. State*, the subordination provision in the Hells Canyon Complex license applied only to the water rights for that facility, and did not apply to the Swan Falls or any other Idaho Power facility previously unsubordinated. *Id.* at 756.

Idaho Power later negotiated for and agreed to a very specific and limited subordination of its Swan Falls water rights. This did not include subordination to recharge. In fact, none of

the license provisions for Idaho Power's Snake River facilities with subordination provisions contain any reference to recharge as a use to which Idaho Power's right is secondary or subordinate. To the contrary, each of these licenses, as illustrated by the examples discussed below, specifically limits Idaho Power's use of water for hydropower purposes only to irrigation or other similar consumptive and depletionary uses, and it is in the context of this subordination history that the Court should construe the Swan Falls Agreement.

1. 1934 Federal Power Commission License for Twin Falls Project.

In its application for a federal license for its Twin Falls facility, Idaho Power recognized the importance and impact of upstream irrigation diversions on the Snake River in negotiating for approval to construct and operate that facility. For that reason, Idaho Power agreed, as a condition of its FPC license for the Twin Falls Project, that "all rights for the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior, and subordinate to all rights heretofore or hereinafter acquired by the United States or other parties *for irrigation purposes, . . .*"³⁴

2. C.J. Strike State Water Right License.

By the late 1940s and early 1950s, when Idaho Power sought federal and state approvals for its C.J. Strike facility on the Snake River, it was clear that protection of upstream

³⁴ See Gheleta Aff. at K (1934 FPC License for Twin Falls Facility at Article 14 (emphasis added)). In subsequent discussions between BOR and the State of Idaho regarding Idaho Power's application for additional hydropower rights of the Twin Falls and Lower Salmon sites, then Commissioner of BOR, B.E. Stoutemyer, recognizing the need for more water upstream of Milner Dam for *irrigation* purposes, cautioned the State that any additional power rights for downstream hydropower facilities should include a subordination provision consistent with Article 14 of the Twin Falls FPC license to protect upstream irrigation development. See Gheleta Aff. at L (Letter from Stoutemyer to Faris, June 21, 1937).

irrigation interests was critical to economic development in the State of Idaho.³⁵ Idaho Power resisted the insertion of a subordination clause into its federal hydropower license. However, because of proposed federal upstream irrigation development, a compromise was reached whereby the 1951 FPC license contained a clause giving the federal government a choice of paying damages or acquiring the C.J. Strike project if federal irrigation projects caused a reduction of power output. *See Idaho Power*, 661 P.2d at 746. However, the subordination in the State water license, issued on April 9, 1953, applied to any upstream irrigation or consumptive uses.³⁶ The specific language of the water right license stated that "the rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with the future depletion and flow for the waters of the Snake River and its tributaries, or prevent or interfere with *future upstream diversions and use of such waters, for the irrigation of lands and other beneficial consumptive uses* in the Snake River Watershed."³⁷ Again, in negotiating for the inclusion of this subordination provision in the water rights license, the State made no mention of the need to protect or enable future protection of upstream recharge or other non-consumptive water uses.

3. 1955 FPC License for Hells Canyon Complex.

During the same timeframe that the C.J. Strike facility was under construction, Idaho Power also submitted an application to the FPC for a license to construct the Hells Canyon Complex – a facility consisting of three low-head dams on the lower Snake River. In the early

³⁵ *See Gheleta Aff. at M* (March 20, 1952 Letter from Assistant Idaho Attorney General to State Engineer Mark Kulp, dated March 20, 1952 (requesting an opinion as to whether the State may limit the use in a power permit or license by restricting the future exercise of the right to the "amount left after depletions due to future irrigation,")).

³⁶ *See Gheleta Aff. at N* (State Water License No. 21671) (emphasis added).

³⁷ *Id.*

1950s, following preliminary hearings on Idaho Power's proposal to build a private facility, the U.S. Department of Interior through the Bureau of Reclamation also proposed the construction of a federal facility along the same reach called the High Hells Canyon Project. The pros and cons of a private versus public hydropower project were hotly debated and the protection of upstream irrigation interests was a key factor in these debates.³⁸

Governor Robert E. Smylie articulated the feeling of the majority of Idahoans at the time in a statement made during the May 1955 hearing on Senate Bill 1333, the federal Hells Canyon legislation, stating:

Briefly, what I want for Idaho from the Snake River can be summed up in this fashion. First, our existing agricultural water rights must have iron-clad protection. Second, our right to later overriding appropriation of the water that rises on Idaho's watersheds for *beneficial agricultural consumptive use* must never be drawn into question. Third, in the field of hydroelectric generation of power, I want immediate development of these resources under plans that are irrevocably consistent with my first two stated objections.³⁹

Idaho Power echoed this sentiment in testimony before the FPC. In response to a question as to whether Idaho Power had adopted a policy for joint use of the Snake River for irrigation and hydroelectric development both in the past and with respect to the future, Idaho

³⁸ For example, in a hearing before the House Committee on Interior and Insular Affairs on H.R. 5743 (a bill to authorize the federal High Hells Canyon Project) in April 1952, then Governor of Idaho, Len B. Jordan, testified emphatically against the federal project because of his concern that the project would restrict the State's ability to further develop upstream irrigation:

I think this bill is a violation of States rights. The Snake River is the life-blood of my state. Imagine, if you will, the vast desert area, those thirsty fertile acres, no food for grazing without water, made to bloom under the waters of the great Snake River. We are concerned in Idaho about the stated purpose of the bill, for the federal government to control and utilize the waters of the great Snake River.

The Governor went on to describe irrigation uses in Idaho, saying that in excess of one million more acres may be developed for irrigation in the State. See Gheleta Aff. at O (Statement of Governor Len B. Jordan to House Committee on Interior and Insular Affairs dated April 1, 1952).

³⁹ See Gheleta Aff. at P (Testimony of Governor Robert E. Smylie at the May 1955 hearing on S. 1333 before the House Committee for Interior and Insular Affairs) (emphasis added).

Power Chairman and President, Thomas Roach, stated that ". . . our Company for a period of 37 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters the development of hydroelectric power for the needs of that water for *irrigation* and has followed the policy of always placing the use of that *water for irrigation* in a priority position for the use of the water for hydroelectric development."⁴⁰

After a decade of debate, Idaho Power's application for a private hydropower facility in Hells Canyon was approved by the FPC in 1955. The federal license for this facility contained a subordination provision very similar to the provision in the C.J. Strike license, making Idaho Power's use of water under the license subject to upstream diversion "for the *irrigation* of lands and other *beneficial consumptive uses* in the Snake River [watershed]."⁴¹ Idaho Power recognized that a subordination of the Hells Canyon Complex water rights to upstream irrigation and other consumptive uses, as well as the subordination of the C.J. Strike water rights, was a political price that Idaho Power had to pay to proceed with the development of the Hells Canyon Complex to assure a power supply for Idaho customers in the future. As was the case with its other facilities, however, Idaho Power did not agree to subordinate its Hells Canyon Complex water rights to recharge.

4. Oregon State Water Right Licenses for Brownlee and Oxbow Projects in 1961 and for Hells Canyon Complex Project in 1968.

Additionally, Idaho Power sought water rights licenses issued by the State of Oregon for Idaho Power's Brownlee and Oxbow Projects in 1961 and for the Hells Canyon Complex in 1968. These licenses contain identical language, stating that "the water right granted under this

⁴⁰ See Gheleta Aff. at Q (Testimony of Thomas E. Roach at July 8, 1953 FPC Hearing at 1417-20) (emphasis added).

⁴¹ See Gheleta Aff. at R (Federal license for C.J. Strike facility) (emphasis added).

license shall be subject and inferior and in point of right to use to any permits granted by the state engineer or his successor having jurisdiction in the matter to the use of the waters of the Snake River and its tributaries for *domestic municipal irrigation or other beneficial consumptive uses*."⁴² Once again, there was no reference to subordination to any non-consumptive or non-depletionary uses.

This history illustrates that the Company was very careful in its subordinations, and only agreed to subordinate its hydropower development to upstream development for irrigation and other consumptive uses. The Swan Falls subordination provision was no different, and Idaho Power's historic attitude towards subordination undoubtedly informed the parties' intent when they entered into the Swan Falls Agreement.⁴³ Accordingly, the Swan Falls subordination provision must be narrowly construed in light of the relevant subordination history. Given its historical pattern of subordinating only to irrigation and consumptive uses, and absent express language providing for subordination to other uses, the parties to the Swan Falls Agreement plainly intended the subordination provision of that Agreement to ensure that the generation of hydropower on the Snake River would not jeopardize upstream irrigation and other consumptive and depletionary uses. No other interpretation of the Swan Falls Agreement can be squared with the subordination provisions the parties negotiated in the Twin Falls, C.J. Strike and Hells Canyon Complex approvals.

⁴² See Gheleta Aff. at S (Oregon State Water Licenses for Brownlee, Oxbow and Hells Canyon Complex facilities) (emphasis added).

⁴³ In fact, history demonstrates that the State's attitude toward subordination in 1984 was the same as Idaho Power's. In a news release in January 1984, then Attorney General Jim Jones, stated: "Jones noted that official state policy called for subordination of non-consumptive power generating purposes to consumptive water uses such as irrigation and industry." See Gheleta Aff. at T (State of Idaho News Release, January 11, 1984).

B. The Extent of Recharge Was Limited at the Time of the Agreement, in Contrast to Later State Proposals for Large-Scale Recharge.

In the years leading up to the Swan Falls Agreement, authorized use of water for recharge was limited both legally and factually. As discussed in Section I.C above, existing legislation authorized recharge but made it secondary to perfected water rights for other uses including hydropower, referred to the undertaking of recharge as a "pilot effort" and confined it to limited geographic areas. *See, e.g.*, I.C. §§ 42-4201, 42-234 (1978). Consistent with the limited extent and legal status of recharge, in the Framework, the signatory parties regarded recharge as a flow enhancement method or management tool to be considered and studied in the future, not as a beneficial use through which water could be developed and put to consumptive use.⁴⁴ The scope of actual recharge efforts prior to the Swan Falls Agreement was relatively limited. IDWR's 1999 Feasibility Study indicates that during 1973 and 1974, a two-year aquifer recharge demonstration project at the Egin Lakes reportedly recharged 20,000 acre-feet of water.⁴⁵ The IDWR Feasibility Study further explains that following the 1978 recharge authorization legislation and establishment of the Lower Snake River Recharge District, "[s]everal relatively small recharge projects were initiated."⁴⁶ Even as of 1993, when the Legislative Council Aquifer Recharge Interim Study Committee ("Interim Committee") convened, actual recharge was still limited. In opening the July 1, 1993 meeting of the Interim Committee, Co-Chair Senator Mark Ricks stated that "the concept of recharge is not new, although little has been done to date in the state of Idaho to implement recharge projects."⁴⁷

⁴⁴ *See* Gheleta Aff. at A (Framework, § 5).

⁴⁵ *See* Gheleta Aff. at B (Feasibility Study at 14).

⁴⁶ *Id.* (Feasibility Study at 15).

⁴⁷ *See* Gheleta Aff. at U (Minutes from July 1, 1993 meeting of the Interim Committee).

At a December 1, 1993 meeting of the Interim Committee IDWR Director Keith Higginson testified that the Shoshone artificial recharge district was the only "purposeful"⁴⁸ recharge right operating at the time.⁴⁹

By contrast, the State more recently has developed large-scale recharge schemes which are considerably more extensive than these limited pilot efforts at the time of the Swan Falls Agreement, and which could not have been envisioned by the negotiating parties at that time. IDWR's 1999 Feasibility Study demonstrates the State's intent to undertake aquifer recharge on a scale vastly exceeding that of the earlier limited efforts. For example, in 1998 the Idaho Water Resources Board filed applications to establish 19 water rights for recharge use or management.⁵⁰ The IDWR Feasibility Study, while focusing on use of existing facilities, discussed the possible construction of new conveyance facilities enabling conveyance of 500,000 acre-feet of water per year from the Snake River for recharge purposes, including an Egin Bench recharge canal with a capacity of 3,700 cfs, and a new canal in the Milner-Gooding area with a capacity of 7,000 cfs.⁵¹ The study further reveals the following high-end estimates of expected recharge for various scenarios: (a) "Thousand Springs" scenario – 648,000 acre-feet annually (AFA); (b) "Hells Half Acre" scenario – 334,000 AFA; (c) "Egin Lakes" scenario – 201,000 AFA; and (d) "Lake Walcott" scenario – 176,000 AFA.⁵² Clearly,

⁴⁸ To the extent that water used for other beneficial uses also provided "incidental" recharge, I.C. § 42-234(3) mandates that "such incidental recharge may not be used as the basis for claim of a separate or expanded water right."

⁴⁹ See *Gheleta Aff.* at V (Minutes from December 1, 1993 meeting of the Interim Committee).

⁵⁰ See *Gheleta Aff.* at B (Feasibility Study at 41).

⁵¹ *Id.* (Feasibility Study at 120-21).

⁵² *Id.* (Feasibility Study at 171).

and as recognized by the State and Idaho Power in the Framework and the Agreement, recharge at a large scale could have significant impacts on hydropower generation.

The parties to the Swan Falls Agreement agreed that recharge should be the subject of further study in the future, as evidenced by the Framework and the Agreement, and not the subject of subordination under the Agreement. It cannot be disputed, and is confirmed by IDWR's 1999 Feasibility Study, that recharge in the ESPA above Idaho Power's Snake River facilities is a non-consumptive and non-depletionary use. As such, subordination to recharge would be inconsistent with Idaho Power historically limiting subordination of its water rights to irrigation and other consumptive and depletionary uses, as discussed in Section II.A above. The parties did not agree in the Swan Falls Agreement that Idaho Power's water rights would be subordinate to future recharge at all, much less recharge scenarios along the lines of the large-scale recharge projects evaluated by the State subsequent to the Agreement.

C. The 1994 Amendments to the Recharge Authorization Legislation Confirmed that Recharge Was Secondary to Hydropower Water Rights Otherwise Subordinated under the Swan Falls Agreement.

In 1994, the Legislature amended I.C. §§ 42-234(2) and 42-4201A(2) to broaden statutory authorization for aquifer recharge, while also updating the provision to confirm that recharge would be secondary to prior perfected hydropower water rights otherwise subordinated under the 1984 Swan Falls Agreement. Specifically, the legislation broadened the original authorization for "pilot" projects by authorizing recharge projects state-wide. *See* SB 1575, § 1; 1994 Idaho Sess. Laws ch. 433. Thus, as set forth in the Statement of Purpose, the legislation allows individuals, aquifer recharge districts, irrigation districts, and canal companies the ability to conduct artificial recharge and obtain a water right for that water. I.C. § 42-4201A(2).

Significantly, the 1994 legislation also confirms, in the most explicit terms possible, that Idaho Power's rights under the Swan Falls Agreement are not subordinate to recharge. It replaces the original provision that since 1982 had made recharge secondary to hydropower water rights "to appropriate waters in the reaches downstream from a recharge project diversion," with the following language subordinating recharge rights:

The rights acquired pursuant to any permit and license obtained as herein authorized shall be *secondary* to all prior perfected rights, *including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho Power Company on October 25, 1984,* and ratified by the legislature pursuant to section 42-203B, Idaho Code.

I.C. § 42-4201A(2) (emphasis added). Under this provision, there can be no question that Idaho Power's rights under the Agreement are not subordinate to recharge. The Legislature directly answered this question by amending subordination language in the previous statute generally making recharge subordinate to hydropower rights to specifically refer to Idaho Power's rights under the Agreement.

The legislative history leading up to the 1994 recharge authorization legislation confirms the plain language of the statute that recharge is a statutorily limited tool that was always subordinate to Idaho Power's rights. Notably, the language specifically subordinating recharge to hydropower rights was removed in an early version of the legislation and replaced in a later version with the specific language subordinating recharge to Idaho Power's rights under the Agreement. At a November 1993 Legislative Council Committee on Aquifer Recharge ("Committee") meeting, Sherl Chapman, Executive Director of the Idaho Water Users Association, presented a draft policy statement and proposed statutory amendments to the Committee to assist in amending the recharge policy of the State. While cautioning that drafters had not had the opportunity to "confer with privately owned electrical generating

companies," Mr. Chapman noted that the draft deleted the phrase from the existing statute that recognizes the priority of hydropower water rights over water rights issued for recharge purposes.⁵³

In response to the draft, IDWR submitted written comments to the Committee.⁵⁴

Addressing the deletion of the subordination language, Mr. Norm Young, on behalf of IDWR, stated:

The purpose for striking the subordination to existing hydropower rights is not clear. If the intent is to subordinate hydropower to recharge, a definite statement of that intent needs to be made. If that is not the purpose, the existing language needs to be retained to avoid confusion with the subordination of hydropower rights in Section 42-203B, Idaho Code.⁵⁵

Mr. Young also expressed concern regarding the "blanket recognition of recharge as a beneficial use under any conditions," noting that such recognition "could seriously impact the

⁵³ See Gheleta Aff. at W (Minutes from November 10, 1993 meeting of the Interim Committee).

⁵⁴ Mr. Chapman's and IDWR's comments also raise uncertainty as to whether recharge was considered a recognized beneficial use prior to 1994, because of the substantial limitations upon who could obtain a recharge permit and where it could be implemented. According to Mr. Chapman, the draft policy he provided modified I.C. § 42-4201A "to define recharge as a beneficial use of Idaho's waters." *Id.* Additionally, Phil Rassier, counsel for IDWR, responded: "The legislature in enacting chapter 42, title 42, Idaho Code, providing for the establishment of aquifer recharge districts purposefully limited the recognition of artificial recharge as a beneficial use of water under our water appropriation statutes. The apparent rationale for this limitation was to make it easier to ensure that other water rights are not injured by the operations of an aquifer recharge project." See Gheleta Aff. at X (November 30, 1993 Memorandum from Phil Rassier to Wayne Haas).

⁵⁵ See Gheleta Aff. at X (November 30, 1993 Memorandum from Norm Young to Wayne Haas). Idaho Power echoed Mr. Young's concerns in a Memorandum to the Committee dated January 19, 1994, in which Larry Taylor stated: "In paragraph (2) of the proposed amendments to S 42-4201A, the committee has suggested deletion of the reference to hydropower rights. The reason for the deletion is unclear. As originally enacted, S. 42-4201A provided that any water rights to recharge acquired by a recharge district would be secondary to *all* prior perfected rights including downstream hydropower rights. The Company agrees with Norm Young's comments (dated November 30, 1993), unless the intent is to subordinate hydropower rights to recharge rights, the provision should be retained. If that is the intent of the deletion, the Company objects [to] the deletion and cautions the Committee that any such subordination provision would raise due process and compensable taking issues." See Gheleta Aff. at Y (Idaho Power's Comments to Interim Committee on Aquifer dated January 19, 1994).

adjudication of existing water rights in the SRBA and the allocation of new water rights under state law."⁵⁶

Subsequently, in March 1994, two bills were introduced in the Senate R&B Committee. As discussed above, SB 1574, amending I.C. § 42-4201A, provided: "The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho Power on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code." In testifying regarding SB 1574, Sherl Chapman "noted language was added, referring to privately owned electrical generating companies, *to protect and verify the agreement on Swan Falls*."⁵⁷ This statement is telling because Sherl Chapman was the Executive Director of the Idaho Water Users Association in 1994, and in 1984 when the Swan Falls Agreement was entered into. He also was a member of the State's Swan Falls Task Force, or "kitchen cabinet," and in that context can be presumed to be familiar with not only the Agreement, but the negotiations leading up to it.⁵⁸

Senate Bill 1575, which also amended the existing recharge statute, included the same subordination provision as SB 1574. As Norm Young testified, SB 1575 "amends the statute

⁵⁶ See Gheleta Aff. at Z (November 30, 1993 Memorandum from Norm Young to Wayne Haas).

⁵⁷ See Gheleta Aff. at AA (Minutes, Senate Resources and Environment Committee, March 11, 1994 at 1 (emphasis added)).

⁵⁸ "...the state involved a number of outside interests in a group call the kitchen cabinet or Swan Falls task force ... as part of a major effort to involve other people to keep them informed of what was going on." Representatives on the task force included: "Cheryl (sic - Sherl) Chapman, who is executive director of the Idaho Water Users, was consulted. Roger Lange (sic - Ling) a lawyer from Rupert who represents a number or irrigation interests in that area and upriver too. Senator Leonard (sic - Laird) Noh from Twin Falls." See Gheleta Aff. at BB (Deposition of Thomas Nelson dated October, 31, 1990 at 38, 66, 113-116). Notably, Senator Noh remained in the Senate after Swan Falls, was Chairman of the Senate Resources and Environment Committee in 1994 and chaired the March 11, 1994, see footnote 58 above.

for a specific project, makes the application statewide, realizes the value of artificial recharge, recognizes artificial recharge, for DOWRY to recognize artificial recharge as a beneficial use and to issue a water right, permit and license to any entity after meeting the requirements."⁵⁹ He also stated, "[t]he language subordinating recharge to any water right, including hydropower, is included."⁶⁰

SB 1574 and SB 1575 passed both Houses unanimously without amendment and were subsequently signed by the Governor. Both houses of the Legislature stressed the secondary nature of recharge water right permits by adopting an identical statement of legislative intent, expressing that SB 1575 reflected an "appropriate balance" between allowing diversions for recharge while providing that "such diversions do not injure other rights."⁶¹

The 1994 recharge authorization legislation should be the starting and ending point of the controversy here since it remains in effect to this day. In light of the fact that the 1994 statute – consistent with the 1978 and 1982 legislation – explicitly makes recharge subordinate to Idaho Power's water rights, there should be no question as to the primacy of Idaho Power's rights. This must be considered the "best evidence" of how Idaho and its legislature views recharge with respect to Idaho Power's rights under the Swan Falls Agreement, as well as how the parties viewed the issue during the negotiations on the Agreement. This Court need not consider any other evidence, or argument, in determining this issue – the Idaho Legislature has plainly spoken to it. *See also* Section III below.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See Gheleta Aff. at CC* (Statement of Legislative Intent, S. 1575, Senate Journal, 52d Leg., 2d Sess. 269 (Mar. 17, 1994), House Journal, 52d Leg., 2d Sess. 413 (Mar. 28, 1994)).

III. THE COURT SHOULD NOT OVERRIDE THE LEGISLATURE'S ENACTMENTS CONSISTENTLY PROVIDING THAT RECHARGE IS SECONDARY TO PRIOR PERFECTED HYDROPOWER WATER RIGHTS

As shown in Sections I.C and I.A. above, the Legislature, when authorizing use of water for aquifer recharge, has been consistently and unwavering in mandating that recharge is secondary to vested water rights for other purposes, including hydropower purposes.

In 1978, when the Legislature originally adopted legislation authorizing recharge on a limited basis – providing for the formation of aquifer recharge districts in a limited geographical area, authorizing IDWR to issue permits and licenses to such districts, and declaring such recharge to be a beneficial use – the Legislature limited or qualified the rights it was authorizing aquifer recharge districts to obtain. It did so by providing that those rights "shall be *secondary* to all prior perfected water rights, including those held by any privately-owned electrical generating company" to appropriate water downstream from Milner for hydropower generation. I.C. § 42-4201 (1978) (emphasis added).

In 1982, when the Legislature adopted I.C. § 42-4201A – broadening the 1978 legislation by authorizing IDWR to issue to an aquifer recharge district or an irrigation district a permit or license to appropriate water for aquifer recharge – that legislative enactment continued to designate recharge a limited or qualified beneficial use. Once again, the statute provided that the rights acquired "shall be *secondary* to all prior perfected water rights, including those held by any privately-owned electrical generating company" to appropriate water downstream from any recharge project for hydropower generation. (Emphasis added).

It was in this context of recharge being declared a beneficial use which was explicitly "secondary" to hydropower water rights that the parties negotiated and executed the 1984 Framework and Swan Falls Agreement. The Framework specifically references recharge as a

management tool that could affect recharge, but which should be studied. The Agreement provided for funding for such studies, but made no other reference to recharge, or to the existing statutes expressly making recharge secondary to hydropower. Consistent with the Agreement itself, the Swan Falls implementing legislation enacted in 1985 made no reference to recharge or to the existing statutes. Nor did the 1986 amendments to I.C. § 42-203B reference recharge or otherwise disturb the existing statutory framework making recharge secondary to all other uses including hydropower.

More recently, in 1994 when the Legislature amended I.C. §§ 42-234(2) and 42-4201A(2) to allow any person to claim a water right for recharge, it confirmed its intent that not only were recharge water rights secondary to hydropower water rights generally, but they specifically "*shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.*" (Emphasis added). Thus, the Legislature has reconfirmed that recharge is subordinate not just to hydropower water rights generally, but to the Idaho Power hydropower water rights that might otherwise be subordinated under the Swan Falls Agreement which the Legislature itself ratified. This leaves no room for the State's arguments that Idaho Power's hydropower water rights are subordinate to recharge under the Swan Falls Agreement, the original implementing legislation, or the 1986 amendments regarding Milner administration. Nor is there any room for the argument that by virtue of the State possessing "legal title" to the Swan Falls Agreement water rights held in trust by the State, Idaho Power's water rights are subordinated to recharge. The Legislature has consistently mandated in 1978, 1982 and 1994, both before and after the Swan Falls

Agreement and its implementing legislation, that use of water for recharge is secondary to perfected water rights for hydropower and other uses. These statutory mandates continue to apply.

In short, in this litigation the Attorney General is essentially asking the Court to disregard or to overturn the Legislature's clear mandates making recharge secondary or subordinate to hydropower. The Attorney General's Office may choose to attempt to modify applicable state policy in appropriate forums through the political process. However, this Court should reject the State's attempt in this case to obtain a desired result in the judicial forum by ignoring applicable enactments of the Idaho Legislature.

CONCLUSION

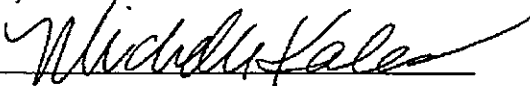
For all of the foregoing reasons, Idaho Power respectfully requests that the Court grant its Motion for Partial Summary Judgment, and hold that Idaho Power did not subordinate its water rights under the Swan Falls Agreement to the use or management of water for recharge.

Dated this 17th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S OPENING BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON RECHARGE SUBORDINATION** via the method indicated below, and addressed to each of the following:

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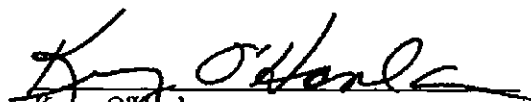
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