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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)
)
) **MEMORANDUM IN SUPPORT OF STATE**
) **OF IDAHO'S AMENDED MOTION FOR**
) **SUMMARY JUDGMENT ON ISSUE OF**
) **RECHARGE SUBORDINATION**
)
)

INTRODUCTION

The State of Idaho seeks summary judgment on three distinct but related issues regarding the use of water for recharge in the Snake River Basin above Murphy. First, the State asserts that Idaho Power Company agreed and/or conceded that the water rights at issue in this consolidated subcase are defined to exclude waters above Milner and carry no right or entitlement to seek

curtailment or administration of water rights above Milner, including ground water recharge water rights.

Second, as to the use of trust water, which is defined as waters tributary to the Snake River below Milner, the State asserts that it has the right to subordinate, to the extent authorized by state law, the water rights held in trust by the State under Idaho Code § 42-203B to any water right diverting from sources downstream from Milner Dam and upstream from the Murphy gauging station, including ground water recharge water rights.

Finally, the State seeks a determination that the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, as finally licensed.

The plain language of the Swan Falls Agreement demonstrates the parties' intent to define the hydropower water rights to exclude the right to seek waters of the Snake River above Milner. Furthermore, any ambiguity on this point was resolved by the 1986 amendments to Idaho Code §42-203B. The parties negotiated and agreed upon this language as a term of the agreement. The parties' intent on this point was confirmed by Idaho Power's chief negotiator, Tom Nelson, who said in a meeting on the Department's proposed rules and regulations for water appropriation: "I don't think that the surface water diversions for recharge above Milner are part of the trust waters. . . . So the surface water diversion above Milner would not be subject to [the public interest] criteria."¹

The second issue likewise turns on a central issue of the Swan Falls dispute—who was to be the Water Master of the river. The parties resolved to protect certain base flows for

¹ Fourth Affidavit of Michael C. Orr ("Fourth Orr Aff."), Exhibit 48 at 7 (pages 23-24 of transcript of Department public information meeting) (May 23, 1985) (Twin Falls); *see also id.*, Exhibit 49 (statement of "Nelson") (same); *see also id.*, Exhibit 50 at 1 (entry for "Tom Nelson" on "Roster of Attendance" for public information meeting). *See also the Affidavit of Norman C. Young and the Affidavit of Gary Spackman*, both filed in this matter October 17, 2008.

hydropower and agreed that water rights for flows above that level would be held in trust by the State. Idaho Code §42-203B states that water rights held in trust by the State “shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” Idaho Code § 42-203B(2).² The settlement gave the Legislature the authority to change the statutory criteria for subordination of water rights held in trust. As described by Tom Nelson,

there is a provision in the agreement that say the agreement remains binding even in the face of changes in state law. If the legislature wants to undo this whole thing next year, that is its prerogative.³

Consistent with Mr. Nelson’s statement, the Statement of Legislative Intent likewise confirmed the parties intent to provide “flexibility to the state in the future to change the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.”⁴ Accordingly, there is no limitation on the beneficial uses to which the rights may be subordinated, so long as they are lawfully acquired.

Finally, as to the third issue, the plain language of paragraph 7(C) of the Swan Falls Agreement provides that the water rights at issue in this consolidated subcase are subordinate to ground water recharge water rights 01-7054 and 37-7842. Furthermore, Idaho Power Company stipulated to this subordination in 2006. The State is therefore entitled to summary judgment that the subject water rights are subordinate to ground water recharge water rights 01-7054 and 37-7842, as finally licensed.

² The Swan Falls Agreement similarly provides that “[t]he rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.” Affidavit of Michael C. Orr in Support of State of Idaho’s Motion for Partial Summary Judgment (Jan. 9, 2008) (“First Orr Aff.”), Exhibit 30 at 29 (Exhibit 7B to Swan Falls Agreement); *see also id.*, Exhibit 30 at 4 (“such rights in excess of the 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”).

³ First Orr Aff., Exhibit 20 at 1 (Minutes of House Resources and Conservation Committee) (Feb. 11, 1985).

⁴ First Orr Aff., Exhibit 28 at 5-6 (pages 60-61 of 1985 Senate Journal) (“Statement of Legislative Intent – S 1008”) (emphasis added).

STATEMENT OF FACTS

I. THE PHYSICAL AND HISTORIC ROOTS OF THE MILNER DIVIDE.

"From Heise to Milner, a distance of 219 river miles, the [Snake] river is not deeply entrenched. It is in this reach that numerous diversions for irrigation are made. At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction."⁵ The canyon intersects and forms the principal outlet for the Eastern Snake Plain Aquifer ("ESPA"), which discharges into the canyon through numerous springs in its walls and floor, significantly increasing the flow of the river.⁶

These defining physical characteristics confined early irrigation development of the Snake River mainly to the area upstream from Milner, and thus the reliable natural summer flow of the river above Milner was fully developed by the turn of the century.⁷ Even when irrigation needs de-watered the river at Milner, however, the springs in the deep canyon below Milner produced substantial flows that were available for uses downstream from Milner Dam.⁸ While the canyon prevented significant irrigation development of the flows downstream from Milner (at least until the advent of high-lift pumping in the 1960s), it provided a number of opportunities

⁵ Fourth Orr Aff., Exhibit 1 at 8 (page 5 of 1982 Idaho State Water Plan).

⁶ See Fourth Orr Aff., Exhibit 1 at 9 (page 7 of 1982 Idaho State Water Plan) ("The dramatic gain in Snake River flow between Milner and King Hill is largely the result of discharge from the Snake Plain aquifer in the Thousand Springs area.").

⁷ See Fourth Orr Aff., Exhibit 2 at 4 (page 2 of State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information, *In the Matter of Petition for Declaratory Order by Idaho Power Company* (FERC Docket no. EL85-38-000) (Jan. 30, 1987); see also Fourth Orr Aff., Exhibit 3 at 4 (page 2 of Idaho Power Company Response to Questions 5 and 6 Completing Response to Request for Information Dated January 30, 1987 (FERC Docket no. EL85-38-000) (May 19, 1987); see also First Orr Aff., Exhibit 44 at 9 (page 27 of transcript of Idaho Water Resource Board public information meeting) (Oct. 25, 1984) (Twin Falls) ("MR. NELSON: 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.").

⁸ See Fourth Orr Aff., Exhibit 2 at 5 (page 3 of State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information, *In the Matter of Petition for Declaratory Order by Idaho Power Company* (FERC Docket no. EL85-38-000) (Jan. 30, 1987)) ("The Snake River regenerates itself below Milner Dam mainly through spring flow fed by the Snake River aquifer"); see also Fourth Orr Aff., Exhibit 3 at 4 (page 2 of Idaho Power Company Response to Questions 5 and 6 Completing Response to Request for Information Dated January 30, 1987 (FERC Docket no. EL85-38-000) (May 19, 1987) (similar).

for hydropower development. Thus, the abrupt change in the physical and hydrologic character of the Snake River at Milner resulted in two distinctly different resources: the reach upstream from Milner that was ideally suited to irrigation and agricultural development, and the reach downstream from Milner, which lent itself to hydropower production.

State and Federal authorities sought to capitalize on this phenomenon from the outset of comprehensive planning for development of the basin's water resources. In a 1920 report, a joint board of State and Federal engineers evaluating future water resource development options in the Snake River Valley⁹ opined "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."¹⁰ While the report recognized that this course would dry up the river below Milner Dam during the irrigation season and "also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season,"¹¹ it observed that the springs provided a source of flows for hydropower development downstream from Milner Dam:

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 which would be susceptible of future development is relatively not very great.¹²

The mayor of Burley made the same points in a 1921 Federal Power Commission hearing in Rupert on Idaho Power's application for a preliminary permit for the Twin Falls project: "[I]t is also generally recognized that the development of [American Falls] reservoir will shut off the

⁹ Fourth Orr. Aff., Exhibit 4 at 10 (page 1 of "Introductory Statement" to "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 Therefor") (Apr. 10, 1920) ("Board of Engineers Report").

¹⁰ Fourth Orr. Aff., Exhibit 4 at 14 (Board of Engineers Report at 5) (emphases added).

¹¹ Id. (Board of Engineers Report at 5) (emphases added).

¹² Id. at 14-15 (Board of Engineers Report at 5-6) (emphases added). The Board of Engineers Report specifically proposed: "all flow stopped at American Falls in non-irrigation season. All flow except waste waters to be diverted at Milner Dam or above in all seasons." Id. at 16 (Board of Engineers Report at 22).

winter flow at that point, which will thereby to a very large extent deprive the remaining power-sites of the winter water which now passes American Falls.”¹³ The mayor added that it was “well understood, however, that accretions from springs and return flow accrue to the stream to a slight extent between Milner Dam and Twin Falls, which is the next lower power site, and to a very large extent below Shoshone Falls and Upper Salmon Falls.”¹⁴

The Idaho State Commissioner of Reclamation’s 1922 “Report and Recommendation to the Federal Power Commission” also contemplated that while Idaho’s “water supply must be conserved for and dedicated to irrigation uses . . . [and] . . . power must necessarily give way to irrigation,”¹⁵ the springs and irrigation returns below Milner would support hydropower development in a reach that was not suitable for gravity irrigation:

Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation use. . . . Immediately below Milner Dam and particularly below Shoshone Falls and extending down river approximately sixty miles, or to the lower end of Hagerman Valley, the inflow to the stream is considerable, amounting to approximately 6,000 cubic feet per second of fairly continuous and uniform discharge. . . . In finally computing or determining the flow available in the lower Snake for power purposes, it should be kept in mind that the return flow from irrigation in these projects may be materially decreased in the future through improvement by concrete lining or otherwise in the canal systems themselves to prevent losses, and through improved methods of irrigation on the farms, which will result in a more uniform and proper use of water. . . .¹⁶

Consistent with these development plans, paragraph 21 of the 1923 contract executed by Idaho Power and the United States in connection with the construction of American Falls Reservoir, which was entitled “Company’s Rights Below Milner Dam,” explicitly limited “[t]he

¹³ Fourth Orr Aff., Exhibit 5 at 5 (page 25 of Minutes of Public Hearing at Rupert, Idaho Oct. 7, 1921, *In the Matter of the Application of the Idaho Power Company for a Preliminary Permit, Twin Falls Power Site*) (Federal Power Commission). The minutes identify the speaker, “Mr. Griswold,” as Mayor of Burley. Id. at 3 (Minutes at 2).

¹⁴ Id. at 5.

¹⁵ Fourth Orr Aff., Exhibit 6 at 4 (page 2 of “Report and Recommendations to Federal Power Commission by W.G. Swendsen, Commissioner of Reclamation, representing the State of Idaho”) (Oct. 28, 1922).

¹⁶ Id. at 5 (“Report and Recommendations to Federal Power Commission . . .” at 3).

company's right to demand the turning out of water from the reservoir for release by and use below Milner Dam . . ."¹⁷ Similarly, Idaho Power's 1922 application for a federal license for the Company's Twin Falls facility recognized that the "[t]he 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."¹⁸ The Company's application also recognized that the construction of the American Falls reservoir would also reduce the winter flows available to the Twin Falls facility.¹⁹

Article 14 of the 1934 federal license for Idaho Power's Twin Falls facility included a stipulation 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 right to call above Milner Dam for flows for hydropower generation below Milner Dam to "the 45,000 acre feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923."²⁰ Article 14 required Idaho Power Company "to execute and acknowledge under authority of a suitable resolution of its board of directors" a contract or deed embodying

¹⁷ Third Affidavit of Michael C. Orr ("Third Orr Aff."), 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").

¹⁸ 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 2 ("Exhibit 'H' - Statement of Effect of Project on Stream Flow to Accompany Application for License under Act of June 10, 1920") (Feb. 6, 1922).

¹⁹ Third Orr Aff., Exhibit 4 at 7 (Exhibit H to "Application for License") (stating that "upon completion of the reservoir to its initial stage" the only natural flow available from the beginning of the irrigation season until the reservoir began to spill, "which in an average year will be about December 1", and in a minimum year not until March or April, will be make-up from Milner to Twin Falls"); *see also id.*, Exhibit 5 at 2 ("Exhibit 'H' - Statement of Effect of Project on Stream Flow . . .") (same).

²⁰ 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").

the provisions, conditions, and limitations of the stipulation.²¹ The Company's Board of Directors adopted resolutions accepting "all the terms and conditions" of the federal 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.²² 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 dry²³ 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."²⁴

When Idaho Power proceeded with further development of power facilities downstream from Milner Dam, federal authorities expressed grave concerns that the 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 D. Lynn Crandall stated that any additional hydropower water rights licenses issued to Idaho Power should re-affirm the stipulation in Article 14 of the Twin Falls license "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."²⁵

²¹ 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).

²² Third Orr Aff., Exhibit 10 at 1-2 ("Idaho Power Company – Minutes of Special Meeting of Board of Directors – May 11, 1934.")

²³ Third Orr Aff., Exhibit 7 at 2 ("Twin Falls Hydroelectric Development," by H.L. Senger of Idaho Power Company) (ELECTRICAL WEST, April 1936).

²⁴ *Id.* at 3.

²⁵ Third Orr Aff., Exhibit 12 (letter from Lynn Crandall to B.E. Stoutemyer, June 18, 1937).

Mr. Stoutemyer communicated these concerns to Idaho State Commissioner of Reclamation R.W. Faris, stating: “[I]t 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.”²⁶ Mr. Stoutemyer stated that all available water above Milner Dam was currently needed for irrigation, that irrigation requirements were increasing, and that additional reservoirs were needed to store waters that would otherwise spill over Milner Dam: “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.”²⁷

Thus, from the earliest days of basin-wide planning, the Snake River was viewed as being divided at Milner Dam into two different resources: an agricultural river above Milner and a hydropower river below Milner. Agricultural development was acknowledged by all, including Idaho Power, to have first call on all waters arising above Milner, including winter and non-irrigation season flows. Hydropower development in the reach below Milner, in contrast, was recognized as being limited to the spring discharges, irrigation returns and surface tributaries downstream from Milner Dam.

II. SUBSEQUENT PLANNING AND DEVELOPMENT BASED ON THE MILNER DIVIDE.

Idaho Power explicitly recognized these principles—and the concept of using excess flows spilling past Milner for ground water recharge purposes—when seeking authorization for the Company’s controversial Hells Canyon project. In Federal Power Commission proceedings in 1954 on Idaho Power Company’s application for its Hells Canyon project, the Company

²⁶ Third Orr Aff., Exhibit 13 at 2 (letter from B.E. Stoutemyer to R.E. Faris) (June 21, 1937).

²⁷ Id. at 3.

offered into evidence a 1953 report entitled "Future Upstream Depletion Above Hells Canyon," authored by Lynn Crandall.²⁸ Mr. Crandall had been the watermaster of the upper Snake River since 1930 and was also the District Engineer for the United States Geological Survey of the upper Snake River.²⁹ Mr. Crandall's report stated: "Except 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 . . ."³⁰ The report also explained that "surplus flood flows that would otherwise spill past Milner"³¹ could be used for purposes of recharging the "ground-water reservoir beneath these plains."³²

Mr. Crandall was questioned in some detail on the issue of using surplus Milner flows to recharge the Snake Plain aquifer.³³ He characterized the aquifer as "sort of an equalizing reservoir by which the waters are poured into it from these various sources, principally from irrigation uses. And the outflow is at a relatively uniform rate, with minor variations. . . . you might think of it as a big equalizing reservoir."³⁴ Mr. Crandall reaffirmed that artificial recharge of the aquifer would use surplus waters "that would otherwise spill down the river past Milner into the Columbia":

Q First, as to the physical aspects, under what conditions could this type of diversion for ground water recharging occur?

²⁸ See Fourth Orr Aff., Exhibit 7 at 2 (page 1 of "Future Upstream Depletion Above Hells Canyon," by Lynn Crandall) (Apr. 6, 1953) (Federal Power Commission stamp identifying exhibit); see also Fourth Orr Aff., Exhibit 8 at 16 (page 10146 of transcript of examination of Lynn Crandall in Federal Power Commission proceedings on Idaho Power Company's proposed Hells Canyon project) (Jan. 12-13, 14-15, 1954) ("Crandall Examination") ("This report, which is [Mr. Crandall's] direct testimony, was offered by the applicant.").

²⁹ Fourth Orr Aff., Exhibit 8 at 6 (Crandall Examination at 10136).

³⁰ Fourth Orr Aff., Exhibit 7 at 7 (page 6 of "Future Upstream Depletion Above Hells Canyon" at 6). Mr. Crandall was referring to Idaho Power Company's storage rights at American Falls reservoir.

³¹ Id.

³² Id.

³³ See generally Fourth Orr Aff., Exhibit 8 at 32-38 (Crandall Examination at 10316-10322).

³⁴ Id. at 38 (Crandall Examination at 10322).

A It would occur at times when all prior water rights on the river were being filled, the canals were drawing what they wanted, and the reservoirs were either filled or assured of filling; so that this would be the diversion of waters that would otherwise spill down the river past Milner into the Columbia.³⁵

Mr. Crandall explained that flood waters spilling past Milner were considered “waste . . . which goes down to the Pacific Ocean.”³⁶ While Mr. Crandall recognized that Idaho Power held “certain storage rights which it draws past [Milner],”³⁷ he never suggested that Idaho Power’s hydropower water rights downstream from Milner involved any legal right or entitlement to require delivery of upstream flows past Milner Dam for purposes of hydropower production below Milner Dam. Idaho Power’s attorney did not question or attempt to qualify Mr. Crandall’s assertions that excess flows at Milner were “waste” that could be diverted above Milner for recharge purposes, nor did he suggest that the Company’s water rights authorized it to force deliveries of flows arising above Milner for purposes of hydropower generation at Hells Canyon or any other facility below Milner.³⁸ To the contrary, the Company represented in an aggressive public relations campaign intended to garner support for its Hells Canyon project that “[t]hroughout its entire existence, Idaho Power has followed a strict policy of subordinating its needs of water for power to those of water for irrigation.”³⁹ Moreover, Idaho Power’s attorney

³⁵ *Id.* at 34 (Crandall Examination at 10318).

³⁶ *Id.* at 23 (Crandall Examination at 10200) (“In the early part of the season when the flood waters are on there is plenty of water for everybody, and we are usually spilling water to waste past Milner which goes down to the Pacific Ocean.”).

³⁷ *Id.* at 26 (Crandall Examination at 10203).

³⁸ Idaho Power’s lead attorney in the federal licensing proceedings on the Company’s Hells Canyon application was R.P. Parry. See Fourth Orr Aff., Exhibit 9 at 2 (“Opinion and Order Issuing License (Major), Projects Nos. 1971, 2132, and 2133 (In the Matter of Idaho Power Company) (Aug. 4, 1955) (identifying “R.P. Parry” as counsel for Idaho Power Company); see also Second Affidavit of Michael C. Orr (“Second Orr Aff.”), Exhibit 3 (“Opening Statement by R.P. Parry, Attorney for Idaho Power Company,”) (Idaho Power Co. FPC Hearing) (Hells Canyon). Mr. Parry was present at Mr. Crandall’s examination. See, e.g., Fourth Orr Aff., Exhibit 8 at 3 (Crandall Examination at 10133).

³⁹ Second Orr Aff., Exhibit 1 at 7 (“The Hells Canyon Issue in Simple Terms” at 12); see also State of Idaho’s Memorandum in Response to Idaho Power Company’s Cross-Motion for Summary Judgment at 6 (Feb. 7, 2008).

subsequently stated that one of the two criteria he believed should determine Snake River operations was “[s]pill no water to waste past Milner.”⁴⁰

The *de facto* division of the Snake River into two distinct hydrologic and economic systems—an agricultural river upstream from Milner, and a hydropower canyon fed by spring discharges downstream from Milner—was also reflected in the commonly-held view that the Snake River consisted of two different rivers. An early federal report on the Company’s preliminary permit application observed that “from a power standpoint, the Snake River is divided into two sections, that above and that below Milner dam.”⁴¹ As one Idahoan stated to a congressional subcommittee on reclamation and irrigation:

The Snake River divides itself into units in our area, each one of which is distinctive. Let us take the Upper Snake River first, and call it Snake River No. 1. It starts high in the mountains at the Continental Divide. That is where a great deal of the water in the river originates, from melting snows high in the mountains. . . . A diversion dam at Milner can take out all the water in Snake River No. 1 and spread it on the desert. . . . Thus, we can chop off the Snake River at Milner Dam and not let another drop of it spill over Shoshone Falls near Twin Falls. And then we begin Snake River No. 2. Below Shoshone Falls is a famed Canyon or Gorge into which underground springs pour their waters. Soon there is a full sized river flowing, which Idaho Power is using at Hagerman for power. . . . And we have the phenomenon of having used up all of a river, Snake River No. 1, and within 40 miles we have a new river, a big river, that goes to work again.⁴²

A 1957 letter to then-Senator Henry Dworshak from John M. George on the question of whether the hydropower potential of Hells Canyon should be developed by the federal government or Idaho Power Company made the same point: “As you know we have two Snake Rivers. The upper Snake starts in Yellowstone Park and ends at Milner Dam. . . . The second Snake River begins below Milner Dam. It consists of the underground flow from the Thousand

⁴⁰ Fourth Orr Aff., Exhibit 10 at 1 (Minutes of Meeting of Bureau of Reclamation and Advisory Committee) (Dec. 29, 1960) (Burley, Idaho). The minutes also reflect that Mr. Crandall attended this meeting.

⁴¹ 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”).

⁴² Fourth Orr Aff., Exhibit 11 at 1-2 (pages 1-2 of “Statement of Mr. Edward Ermine, Irrigation and Reclamation Subcommittee, House Interior and Insular Affairs Committee, March 4, 1957”).

Springs, of the irrigation return flow and of the contributions of downstream tributaries.”⁴³ Mr. George also contemplated that all waters arising above Milner, including flood waters and other high flows, would be captured and stored above Milner: “Someday when all the dams are built on the upper Snake the river bed will be dry at the foot of Milner Dam all year round just as it already is dry several months of the year.”⁴⁴

The Bureau of Reclamation and the Army Corps of Engineers also recognized the “two rivers” concept—and the related potential of using high winter or spring flows for recharge purposes—in a 1960 information bulletin on their joint study of water resource development possibilities in the upper Snake River basin: “From a land and water resource development standpoint, the Basin is divided at Milner Dam. Above Milner, all of the surface water in dry cycles is already storable, appropriated and used for the present development.”⁴⁵ The information bulletin further stated that “[t]here are several opportunities for obtaining a new water supply for irrigation use above Milner Dam during dry years. The most promising source is the ground-water resource known to exist beneath the Snake River Plain. In a sense, the ground water is storage. In considering future development it could be used much as a conventional surface storage reservoir.”⁴⁶ The information bulletin pointed out that “surplus surface flows” and “spring-time peak flows” could be used to artificially recharge “the vast underground reservoir beneath the plain.”⁴⁷

⁴³ Fourth Orr Aff., Exhibit 12 at 4 (page 4 of Letter from John M. George to The Honorable Henry Dworshak, U.S. Senate) (Apr. 22, 1957).

⁴⁴ Id.

⁴⁵ Fourth Orr Aff., Exhibit 13 at 6 (page 5 of “Information Bulletin on a Study of Water Resource Development Possibilities – Upper Snake River Basin”) (U.S. Bureau of Reclamation & U.S. Army Corps of Engineers) (Sept. 29, 1960).

⁴⁶ Id.

⁴⁷ Id. at 10 (“Information Bulletin . . .” at 9) (“Associated with the vast underground reservoir beneath the plain is the possibility of artificially recharging it by diverting surplus surface flows, beyond requirements of existing and future developments, from the Snake River during the flood season into highly permeable areas of raw volcanics. . . . from spring-time peak flows.”)

District Engineer Crandall made the same points in his written statement to the Columbia Basin Inter-Agency Committee when it met in Pocatello the following year: "From a water resource standpoint the Basin should be considered as separated into two major parts at Milner Dam."⁴⁸ He identified "two major unused components of the water resource available for future development in the service area above Milner": "the ground waters beneath the Snake River Plain" and "the water spilling at Milner Dam."⁴⁹ Mr. Crandall observed that weather and water use patterns "have led to the combination of the two water supplies,"⁵⁰ and proposed that "[i]n wet years the water that would otherwise spill at Milner would be saved through new storage"⁵¹ or used for aquifer recharge purposes: "Replenishment of the vast underground reservoir is possible by artificially recharging it through the diversion of surplus flows which are in excess of the requirements of future development."⁵²

In 1962, the Assistant Secretary of the Interior provided written comments to the Chairman of the Federal Power Commission in connection with Idaho Power's application for a federal license for the Company's hydropower facilities at American Falls, Shoshone Falls and Upper Salmon Falls.⁵³ The Assistant Secretary's letter pointed out that beginning with the early negotiations concerning the development of stored water for irrigation at American Falls, "[t]he Idaho Power Company officials have been repeatedly advised . . . that the best development of the waters of the Snake River require there be no power developments below Milner Dam which

⁴⁸ Fourth Orr Aff., Exhibit 14 at 5 (page 4 of "Statement by D.L. Crandall, Area Engineer, Snake River Development Office, Bureau of Reclamation – Columbia Basin Inter-Agency Committee Meeting, Pocatello, Idaho – January 11, 1961").

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id. at 8 ("Statement by D.L. Crandall, Area Engineer . . ." at 6).

⁵³ Fourth Orr Aff., Exhibit 15 at 1 (page 1 of Letter from Assistant Secretary of the Interior Kenneth Holum to the Honorable Joseph C. Swidler, Chairman, Federal Power Commission) (Aug. 30, 1962).

rely upon flows of water past Milner Dam for power production.”⁵⁴ The letter explained that the federal reservoir system above Milner “is operated with the objective of conserving the water to minimize spills past Milner Dam. This matter was the subject of extensive negotiations with the Idaho Power Company in connection with the issuance of license under Project No. 18 at the Twin Falls site.”⁵⁵ The Assistant Secretary stated that “[i]n view of this long history of the obvious need for the conservation of water above Milner Dam,” and “the many public statements of the officials of the Idaho Power Company, including those made to your Commission in connection with the issuance of the license in the Hells Canyon reach of the Snake River,”⁵⁶ that the federal license Idaho Power sought “should clearly subordinate the water supply for [the Shoshone Falls plant] to the use of water for development of irrigation areas upstream.”⁵⁷

Governor Smylie also emphasized in a 1966 letter to Secretary of the Interior Udall that future irrigation projects downstream from Milner should not be “dependent upon spills past Milner Dam” because of the potential for further irrigation development above Milner, including “ground water recharge.”⁵⁸ The Assistant Regional Director of the Bureau of Reclamation also discussed using excess or surplus surface flows of the upper Snake River for purposes of recharging the Snake Plain aquifer in a 1967 letter to Idaho Water Board Director Robert Lee: “The ground water resource beneath the Snake River Plain could be benefited by artificial recharge. Artificial recharge would consist of diverting surplus surface flows of wet years from Snake River or Henrys Fork to infiltration areas where this water would enter the porous

⁵⁴ *Id.* at 4 (Letter from Assistant Secretary of the Interior . . .” at 4).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Fourth Orr Aff., Exhibit 16 at 1 (Letter from Robert E. Smylie, Governor of Idaho, to the Honorable Stewart L. Udall, Secretary of the Interior) (Dec. 7, 1966).

materials of the Snake River aquifer.”⁵⁹ The first Idaho State Water Plan also discussed using the Snake Plain aquifer to “store excess surface flows as recharge,”⁶⁰ and formally recognized the divide at Milner by establishing a “0 cfs” flow at Milner Dam.⁶¹

III. THE MILNER DIVIDE, WINTER DIVERSIONS AND RECHARGE IN THE SWAN FALLS DISPUTE.⁶²

The *de facto* division of the river at Milner and the shared State and Federal goal of maximizing the use of the water resources of the Snake River for agricultural development were foundational principles that guided the management of the river in the years preceding the Swan Falls controversy. An important corollary—that excess or surplus flows arising above Milner, such as non-irrigation season flood waters or other high flows, could be entirely used and stored above Milner—was also widely accepted.

Consistent with settled practices and expectations, Idaho Power implicitly conceded in the first Swan Falls lawsuit, Ada County Case No. 62237, that its claimed hydropower water rights below Milner Dam had no legal effect or entitlement above Milner Dam. The only tributary flows the Company identified in its complaint for the claimed water rights were “inflow to the Snake River between Milner Dam and Swan Fall powerplant, whether from surface or subterranean sources . . .”⁶³ Further, while Idaho Power challenged the State Water Plan’s minimum flow of 3,300 cfs at Murphy as a “taking” of the Company’s claimed water rights, the

⁵⁹ Fourth Orr Aff., Exhibit 17 at 2 (page 2 of letter from Norman H. Moore, Assistant Regional Director, United States Bureau of Reclamation, to Dr. Robert E. Lee, Director, Idaho Water Resource Board) (Oct. 27, 1967).

⁶⁰ Fourth Orr Aff., Exhibit 18 at 5 (page 6 of “The Objectives – Part I of the State Water Plan”) (June 1974); see also id. at 12 (page 12 of “The State Water Plan – Part Two”) (Dec. 1976) (“store excess winter surface water flow as recharge”).

⁶¹ Fourth Orr Aff., Exhibit 18 at 14 (page 116 of “The State Water Plan – Part Two”) (Dec. 1976).

⁶² The State herein incorporates by reference the pages 4-22 (“Statement of Undisputed Facts”) of the “Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment” (filed Jan. 11, 2008).

⁶³ Fourth Orr Aff., Exhibit 19 at 11 (page 30 ¶ XIX of Idaho Power’s “Amended Complaint” in *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Nov. 1, 1977)). The hand edits to the Amended Complaint were apparently made by the Court Clerk after the Court granted Idaho Power’s motion to amend the Amended Complaint by interlineation. See generally id. at 16, 20 (Motion to Amend Amended Complaint by Interlineation (May 8, 1978), Order Granting Plaintiff’s Motion to Amend by Interlineation (Oct. 31, 1978)).

Company expressly recognized in its complaint the Milner “0 cfs” minimum flow without challenging it as a “taking.”⁶⁴ Moreover, the Company sought a judicial determination that it had protectable water rights only in the reach “above Swan Falls and below Milner Dam,”⁶⁵ sought to enjoin the Idaho Department of Water Resources (“Department”) from issuing new water rights only in the reach “between Milner Dam and Hells Canyon,”⁶⁶ and asked the Court to order a “full adjudication” of its water rights, which the Company viewed as limited to “the Snake River and its tributaries between Swan Falls and Milner Dam.”⁶⁷

The first Idaho Power sought to use its claimed hydropower water rights diverting below Milner Dam to curtail waters rights upstream from Milner Dam was after the Idaho Supreme Court unexpectedly reversed the district court’s decision in Ada County Case No. 62237. *See Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).⁶⁸ In Ada County Case No. 81375⁶⁹—the infamous “7500 Case” filed in the wake of the Idaho Supreme Court’s decision—Idaho Power “sought to 1) establish the nature and extent of its rights at its various facilities, and

⁶⁴ Fourth Orr Aff., Exhibit 19 at 9 and 14 (pages 28 and 33 of Amended Complaint, Ada County Case No. 62237).

⁶⁵ Id. at 13 (Amended Complaint at 32).

⁶⁶ Id. at 12-13 (Amended Complaint at 32).

⁶⁷ Id. at 14 (Amended Complaint at 33). The Company also limited its refusals to allow new water diversions and electrical power hookups to “the Snake River and its surface and subterranean tributaries between Milner Dam and Hells Canyon.” Id. at 12 (Amended Complaint at 31); *see also id.*, Exhibit 20 at 1, 2 (examples of Idaho Power notification letters stating “the Company has filed a lawsuit designated as Case No 62237 . . . asking the court to determine whether or not the Company has a protectable right in the waters of the Snake River and its surface and subterranean tributaries between Milner Dam and Hells Canyon”). Idaho Power’s 1979 FERC re-licensing application for Swan Falls also continued to recognize the divide at Milner: “The Snake River in this region is now controlled by storage to the extent that in general no excess flows past the Milner Dam, River Miles 640 (RM 640). . . This discharge of groundwater (about 6,500 cfs) constitutes the largest source of water inflow below the Milner Dam.” Fourth Orr Aff., Exhibit 21 at 5 (page 24 of 49, Application for Licensing-Swan Falls Hydroelectric Project-Exhibit W) (Idaho Power Company) (December 1979).

⁶⁸ “Idaho Power’s rights at Swan Falls and other power plants are senior to many above Milner natural flow rights and most of the storage rights, but the Company never took any action to curtail above-Milner rights to serve those priorities.” Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls In 3D: A New Look At The Historic, Legal And Practical Dimensions Of Idaho’s Biggest Water Right Controversy*, 28 *Idaho L. Rev.* 573, 589 (1992); *see also* Fourth Orr Aff., Exhibit 23 at 2 (page 2 of letter from T.E. Roach, Idaho Power Company, to Ed Ermine, Editor, Idaho Farm Journal) (July 31, 1952) (“in all of its long history Idaho Power Company has never—not even once—protested or filed objection to subsequent water permit filings for the diversion of water for irrigation or reclamation.”)

⁶⁹ Fourth Orr Aff., Exhibit 22 (excerpted pages of “Complaint,” *Idaho Power v. State*, Case No. 81375 (Fourth Jud. Dist., Ada County) (Mar. 30, 1983)).

(2) enforce those rights as against junior upstream users,”⁷⁰ including, for the first time, water rights and users upstream from Milner.⁷¹

Moreover, while Idaho Power did not challenge the use of non-irrigation season flows that would otherwise spill over Milner for ground water recharge purposes in its complaint in Ada County Case No. 62237, the Company moved to amend the District Court’s summary judgment decision to state that the subordination language in the federal Hells Canyon license did not subordinate the Hells Canyon hydropower water rights to the use of winter flows for off-stream storage and ground water recharge.⁷² The Company argued that winter flows passing Milner Dam were “critical to winter power generation within Idaho Power’s service area and for storage at the Hells Canyon project for meeting peak summer demands,”⁷³ and that diversion of winter flows or spring flood waters passing Milner for recharge purposes would take water “that would otherwise be available for power generation.”⁷⁴ The District Court rejected this argument,

⁷⁰ Idaho Power Company’s Reply Memorandum in Support of Cross-Motion for Summary Judgment at 7-8 (Feb. 14, 2008).

⁷¹ Idaho Power attorney Tom Nelson testified in his 1990 deposition that the “7500 Case” included the entire area upstream from Milner Dam:

Q: It excluded the part below the Swan Falls dam, but included everything that was upstream from Swan Falls?

A: That’s correct.

Q: Including Milner?

A: Yes.

Deposition of Thomas G. Nelson, *State v. United States (In re SRBA)* at 105 (Oct. 31, 1990). The full transcript of this deposition is attached as Exhibit O to the Supplemental Affidavit of Shelley M. Davis in Support of Idaho Power Company’s Memorandum in Support of Cross Motion for Summary Judgment.

⁷² See generally Fourth Orr Aff., Exhibit 24 at 3-5 (pages 3-5 of “Plaintiff’s Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment,” *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Feb. 19, 1980)).

⁷³ Id. at 4 (Plaintiff’s Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment at 4).

⁷⁴ Id. The Company also argued—incorrectly—that winter diversions for recharge and storage were not contemplated when Idaho Power agreed to the subordination provisions inserted in the Company’s Hells Canyon license. See id. at 5 (“it is likely that Idaho Power’s position would have been different in the Hells Canyon proceedings had winter diversions for summer irrigation purposes been then contemplated”). As previously discussed, Idaho Power offered in support of its federal license application Lynn Crandall’s report on future depletions above Hells Canyon—which expressly contemplated “the diversion of waters that would otherwise spill down the river past Milner into the Columbia” for purposes of recharging the aquifer. Fourth Orr Aff., Exhibit 7 at 7 (page 6 of “Future Upstream Depletion Above Hells Canyon,” by Lynn Crandall) (Apr. 6, 1953). Mr. Crandall

holding that “diversion to offstream storage, albeit occurring during non-irrigation seasons, if done for the purpose of providing waters for irrigation during the summer months, clearly falls within the subordination provisions.”⁷⁵ The Company did not challenge this ruling in its appeal to the Idaho Supreme Court.⁷⁶

The Legislative Council Committee on Water Rights and its Technical Advisory Committee met in 1983 to consider how to respond to the Idaho Supreme Court’s unexpected decision. In the June 30-July 1 meeting of the Legislative Council Committee on Water Rights—a joint meeting with the Governor’s “Swan Falls Task Force,” and which Idaho Power representatives T. G. Nelson, Greg Panter and Logan Lanham also attended—Dr. Charles Brockway, the chair of the Technical Advisory Committee, stated that “[b]etween Milner and King Hill you have a new river”⁷⁷. . . Essentially, there is no river at Milner, but it is large below Hagerman . . .”⁷⁸ “Mr. Brockway said about 6,000 cfs comes out of the group of springs previously shown on the slide. The available flow at Murphy comes from this group of springs.”⁷⁹ There was also considerable discussion of the incidental recharge benefits of irrigation on the Snake River plain,⁸⁰ and Co-Chairman Vard Chatburn “said that present law enables the establishment of groundwater districts and recharge of the aquifer. If we can

also offered testimony on this very point. See *id.*, Exhibit 8 at 34 (Crandall Examination at 10318) (“this would be the diversion of waters that would otherwise spill down the river past Milner into the Columbia”).

⁷⁵ Fourth Orr Aff., Exhibit 25 at 5 (“Memorandum Decision,” *Idaho Power Co. v. State*, Case no. 62237 (Fourth Jud. Dist., Ada County) (May 16, 1980)).

⁷⁶ Fourth Orr Aff., Exhibit 26 (“Notice of Appeal,” *Idaho Power Co. v. State*, Case no. 62237 (Fourth Jud. Dist., Ada County) (June 14, 1980)). The Idaho Supreme Court affirmed that under the Hells Canyon license “Idaho Power acquired only subordinated water rights at the Hells Canyon complex.” *Idaho Power Co. v. State*, 104 Idaho 575, 589, 661 P.2d 741, 755 (1983). Idaho Power did challenge District Court’s determination that the subordination extended to non-irrigation season diversions for recharge or off-stream storage purposes.

⁷⁷ Fourth Orr Aff., Exhibit 27 at 4 (page 3 of “Minutes of the Legislative Council Committee on Water Rights – Joint Meeting with the Governor’s Task Force on Swan Falls – June 30-July 1, 1983”).

⁷⁸ *Id.* at 5 (page 4 of “Minutes . . .”).

⁷⁹ *Id.* at 6 (page 5 of “Minutes . . .”).

⁸⁰ See, e.g., *id.* at 5 and 18 (pages 4 and 17 of “Minutes . . .”).

implement something like that it should increase the flow at Thousand Springs.”⁸¹ In a subsequent meeting of the Swan Falls Technical Advisory Committee, there was discussion pertaining to “potential groundwater elevation changes due to changes in recharge or pumpage,”⁸² and Idaho Power attorney T. G. Nelson commented that Idaho Power “may need to evaluate recharge benefits. If Jackson Lake storage is lost (dam not built), could it be replaced by recharge and increased canal company efficiency?”⁸³

IV. THE MILNER DIVIDE, WINTER DIVERSIONS AND RECHARGE IN THE SWAN FALLS AGREEMENT AND ITS IMPLEMENTATION.

During the negotiations that led to the Swan Falls Agreement, the parties quickly agreed to a new, higher minimum flow of 3,900 cfs year-round at the Murphy gauging station,⁸⁴ but Idaho Power thereafter sought a higher minimum flow in the non-irrigation season because of the “critical importance” of non-irrigation season and winter flows to the Company.⁸⁵ In grappling with this issue, the parties considered winter minimum flow figures ranging from 8,400 cfs⁸⁶ to 6,200 cfs⁸⁷ to 5,300 cfs,⁸⁸ or linking the winter minimum flow to the water right for the Milner

⁸¹ *Id.* at 18 (page 17 of “Minutes . . .”)

⁸² Fourth Orr Aff., Exhibit 28 at 3 (page 2 of “Minutes of the Third Meeting of the Snake River Technical Advisory Committee, August 4 & 5, 1983”) (underlining omitted).

⁸³ *Id.* at 4 (page 3 of “Minutes of the Third Meeting of the Snake River Technical Advisory Committee . . .”).

⁸⁴ Fourth Orr Aff., Exhibit 30a at 3 (page 2 of draft “Framework” attached to memorandum from Pat Costello to Ken Dunn and Norm Young) (Aug. 30, 1984).

⁸⁵ See First Orr Aff., Exhibit 29 at 3 (page 3 of “Framework”) (“Non-irrigation season flows are of critical importance to the preservation of a low-cost hydro base, and the ability of the Idaho Power Company to meet the needs of its customers. Therefore, the State Water Plan should be amended to recognize a seasonal difference in flows”); see also Fourth Orr Aff., Exhibit 29 at 6 (page 16 of Summer 1985 edition of Western Natural Resource Litigation Digest) (“Commentary on Swan Falls Resolution,” by Patrick D. Costello and Patrick J. Kole) (discussing elements of the agreement intended “[t]o address this [winter flows] problem”). Drafts of the “Framework” and other documents obtained from Idaho Power Company and the Department demonstrate that the “winter flow” issue was the subject of considerable scrutiny during negotiations. See *id.*, Exhibit 30a at 11 (page 3 of draft Framework dated “9/13”) (“[insert winter flows paragraph]”); see also *id.*, Exhibit 30b at 11 (“Winter Flow Paragraph”) (LAR005177); see also *id.* at 35 (same) (IPC018113); see also generally *id.*, Exhibit 30a (Department documents pertaining to winter flow negotiations), Exhibit 30b (Idaho Power documents pertaining to winter flow negotiations).

⁸⁶ Fourth Orr Aff., Exhibit 30b at 41 (“8400 cfs” winter flow reference) (LAR006366).

⁸⁷ *Id.* at 35 (“6,200 cfs in the non-irrigation season”) (IPC018113).

hydropower plant.⁸⁹ They also considered proposals to allocate 200 to 300 cfs of the winter flows below Milner to off-stream storage—which was understood to mean “anything other than storage within the natural channel of the Snake River and its tributaries”⁹⁰—or to entirely bar winter diversions for off-stream storage below Milner altogether unless Idaho Power was “fully mitigated.”⁹¹ The parties also discussed “utilizing the aquifer as an additional upstream storage area for excess and surplus water.”⁹²

Ultimately, in the Framework, the parties agreed to a winter flow of 5,600 cfs at the Murphy gauge,⁹³ which was calculated on the assumption that “no flow[s] were to be released past Milner Dam.”⁹⁴ Rather than allocating a portion of the non-irrigation season flows below Milner to off-stream storage, the parties simply agreed that storage diversions of such flows

⁸⁸ *Id.* at 2 (“5,300 cubic feet per second during the non-irrigation season”) (LAR006347); *see also id.* at 28 (edits to winter minimum flow provision of draft “Framework”) (LAR005176); *see also id.* at 10 (edits to winter minimum flow provision of draft “Framework”) (LAR004322).

⁸⁹ *Id.*, Exhibit 30b at 35 (“A power plant at Milner is in the licensing stage at FERC . . .”) (IPC018113); *see also id.* at 38 (“[Milner] Power Plant Entitlement or 550 cfs, whichever is greater”) (IPC018121); *see also id.* at 11 (similar) (LAR005177).

⁹⁰ *See* Fourth Orr Aff., Exhibit 30b at 25 (memorandum from Patrick J. Kole to Thomas Nelson) (Sept. 18, 1984) (defining “off-stream storage” and proposing to limit it below Milner to 300 cfs) (LAR006345); *see also id.* at 22 (page 3 of memorandum from Patrick J. Kole to Patrick Costello, Thomas Nelson) (Sept. 28, 1984) (proposing rough draft of State Water Plan amendments limiting non-irrigation season offstream storage diversions below Milner to 300 cfs) (LAR006313); *see also id.* at 24 (memorandum from Patrick J. Kole to Norm Young, Pat Costello) (Sept. 20, 1984)) (“Tom – I am working on 200 cfs problem”) (LAR006328).

⁹¹ Fourth Orr Aff., Exhibit 30b at 33 (memorandum from Thomas G. Nelson to Pat Costello, Pat Kole) (Sept. 18, 1984) (“new off-stream storage should proceed only if lost hydro generation is fully mitigated”) (BRS030062); *see also id.* at 24 (memorandum from Patrick J. Kole to Norm Young, Pat Costello (Sept. 20, 1984) (“fully” inserted before “mitigate”) (LAR006328).

⁹² Fourth Orr Aff., Exhibit 31 at 1, 3 (page 1 of letter from Attorney General Jim Jones to the Honorable John V. Evans, Governor of Idaho (Aug. 16, 1984), and page 1 of an identical letter from Attorney General Jim Jones to Mr. James Bruce, Idaho Power Company (Aug. 16, 1984)).

⁹³ *See* First Orr Aff., Exhibit 30 at 3 (page 3, paragraph 7.A of the Swan Falls Agreement) (providing for a winter flow of 5,600 cfs); *see also id.*, Exhibit 29 at 3 (page 3 of Framework) (same); *see also* Fourth Orr Aff., Exhibit 30b at 33 (memorandum from Thomas G. Nelson to Pat Costello, Pat Kole) (Sept. 18, 1984) (“5,600 cfs winter minimum is acceptable. There is enough ‘slop’ in that number to suffice”) (BRS030062); *see also id.* at 19 (“Unless the IDWR has a defensible study showing a case for lower flows in March, 5,600 cfs seems like a good enough number to stand on . . . T G Nelson”) (LAR01413); *see also id.*, Exhibit 30a at 59 (same) (IDWR copy of same document).

⁹⁴ Fourth Orr Aff., Exhibit 30b at 29 (“ . . . producing a worst case low flow of 5600 cfs average daily flow if no flow were to be released past Milner Dam”) (LAR005376); *see also id.*, Exhibit 30a at 19 (same) (IDWR copy of same document); *see also id.* at 61 (same document); *see also id.* at 60 (“If releases from above Milner were not made, the worst case average daily March flow would then be 5600 cfs”) (IDWR document); *see also* First Orr Aff., Exhibit 44 at 13 (Tom Nelson statement on page 41 of transcript of Idaho Water Resource Board public information meeting) (Oct. 25, 1985) (Twin Falls) (“ . . . the numbers were based on zero flow at Milner”) (emphasis added).

would be allowed only if “coupled with provisions that mitigate the impact such depletions would have on generation of hydropower.”⁹⁵ The parties also identified “aquifer recharge projects” as a method for enhancing stream flows for the benefit of both agricultural development and hydropower generation.⁹⁶ The parties signed the “Framework for Final Resolution of Snake River Water Rights Controversy” on October 1, 1984, and the Swan Falls Agreement on October 24, 1984. In a press release on the same day, Attorney General Jim Jones said 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.”⁹⁷

The parties signed the Swan Falls Agreement on October 24, 1984.⁹⁸ Among other things, the Agreement called for the State Water Plan to be amended to establish the new seasonal minimum flows of 3,900 cfs and 5,600 cfs at Murphy, and to retain the “zero flow” at Milner.⁹⁹ The Idaho Water Resource Board held a series of “public information meetings” on the settlement during October and November 1984, at which the negotiators for the Governor, the Attorney General and Idaho Power—Pat Costello, Pat Kole and Tom Nelson, respectively—explained the settlement and answered questions.¹⁰⁰ In 1985 the Legislature considered and enacted the legislation proposed by the Agreement, as required to fully implement the settlement and to make the Agreement binding and effective.¹⁰¹

⁹⁵ First Orr Aff., Exhibit 30 at 26 (Exhibit 6 to the Swan Falls Agreement); *see also id.*, Exhibit 29 at 3 (page 3 of Framework) (similar).

⁹⁶ First Orr Aff., Exhibit 29 at 7 (page 7 of Framework).

⁹⁷ Third Orr Aff., Exhibit 19 at 2 (“News Release,” Idaho Office of the Attorney General) (Oct. 1, 1984).

⁹⁸ *See* First Orr Aff., Exhibit 30 (Swan Falls Agreement.) The parties signed the “1180 Contract” the same day. *See id.*, Exhibit 31 (“1180 Contract”).

⁹⁹ *See* First Orr Aff., Exhibit 30 at 26 (Exhibit 6 to the Swan Falls Agreement.)

¹⁰⁰ *See generally* First Orr Aff., Exhibits 41-46 (recordings and transcripts of Idaho Water Resource Board public information meetings on the Swan Falls Agreement) (Oct.-Nov. 1984).

¹⁰¹ *See generally* First Orr Aff., Exhibits 5-29, 33-40 (minutes, recordings and transcripts of legislative hearings on the Swan Falls settlement); *see also* 1985 Idaho Session Laws chapters 14-18, 204 (implementing legislation). In early 1985, the Idaho Water Resource Board held public hearings on the amendments to the State Water Plan necessary to implement the Swan Falls settlement, and adopted the amendments on March 1, 1985. *See generally* Fourth Orr Aff., Exhibits 32-46 (recordings of Idaho Water Resource Board public hearings on proposed

The legislation implementing the settlement authorized the Idaho Department of Water Resources to promulgate administrative rules to implement the "public interest criteria" of Exhibit 1 to the Agreement.¹⁰² The Department held a series of public information meetings in May 1985 to obtain public comment on the seven principle issues the Department anticipated would arise in drafting the rules.¹⁰³ The issues of recharge and the Milner divide arose in the Twin Falls meeting, and Idaho Power's attorney Tom Nelson stated: "I don't think that the surface water diversions for recharge above Milner are part of the trust waters. . . . So the surface water diversion above Milner would not be subject to those criteria."¹⁰⁴

In October and December 1985, the Department published the proposed "text of draft rules and regulations" in a "Special Water Allocation Rules Edition" of "Currents," a Department publication, and the Department held hearings on the proposed rules in October 1985 and January 1986.¹⁰⁵ Despite the Agreement's Milner "zero flow" provision, statements by Idaho Power's attorney that the Agreement did not extend above Milner, and public objections to the Department's interpretation, the rules as proposed in both the October and December "Currents" defined flows upstream from Milner Dam as part of the "trust water flows" that

amendments to Policy 32 of the State Water plan); *see also generally* Third Orr Aff., Exhibits 23-28 (transcripts of same); *see also* First Orr Aff., Exhibit 15 at 3-10 ("A Resolution," *In the Matter of Policy 32 of the State Water Plan*) (Idaho Water Resource Board, Mar. 1, 1985) (attachment to minutes of Senate Resources & Environment Committee, Mar. 4, 1985).

¹⁰² *See* 1985 Idaho Sess. Laws 22 (amendment to Idaho Code § 42-1805 authorizing the Director of the Department "to promulgate, adopt, modify, repeal, and enforce rules and regulations"); *see also* First Orr Aff., Exhibit 30 at 31 (Exhibit 8 to Swan Falls Agreement) (same); *see also id.*, Exhibit 39 at 4 (page 6 of transcript of Senate Resources & Environment Committee meeting, Jan. 25, 1985) (statement by Pat Kole that "[the Director's] got to promulgate rules and regulations that will come back to you for your review. And those will set forth the criterion under which subordination will take place").

¹⁰³ *See* First Orr Aff., Exhibit 48 at 7 ("The Idaho Department of Water Resources (IDWR) will conduct four public information meetings this month to get citizen comments on suggested content of rules and regulations to be drafted dealing the allocation of water resources in Idaho"); *see also id.* at 5-6 (identifying the "seven issues").

¹⁰⁴ Fourth Orr Aff., Exhibit 48 at 7 (pages 23-24 of transcript of Department public information meeting) (May 23, 1985) (Twin Falls); *see also id.*, Exhibit 49 (statement of "Nelson") (same); *see also id.*, Exhibit 50 at 1 (entry for "Tom Nelson" on "Roster of Attendance" for public information meeting).

¹⁰⁵ First Orr Aff., Exhibit 52 at 1 (page 1 of "Currents") (Oct. 1985); *id.*, Exhibit 54 at 1 (page 1 of "Currents") (Dec. 1985). The Department made some revisions to the proposed rules after the October 1985 public hearings.

would be subject to the water rights held in trust by the State pursuant to Idaho Code § 42-203B.¹⁰⁶

Before the rules became final and effective, the Legislature responded to the public outcry and parties' objection to the proposed rules by amending Idaho Code §§ 42-203B and 42-203C¹⁰⁷ to clarify that "trust waters do not extend to the Snake River or tributary ground or surface water above Milner."¹⁰⁸ The Department responded by revising the proposed rules to conform to the clarifying amendments and adopting the revised rules on April 8, 1986.¹⁰⁹ While Idaho Power filed a declaratory judgment action in the District Court for the Fifth Judicial District later that month challenging certain provisions of the rules, it did not challenge the provisions limiting the water rights held in trust by the State to flows downstream from Milner.¹¹⁰ The Company dismissed the action later that year.¹¹¹

ARGUMENT

I. LEGAL STANDARDS FOR SUMMARY JUDGMENT.

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Eye*

¹⁰⁶ First Orr Aff., Exhibit 52 at 2 (page 2 of Oct. 1985 "Currents") (rule 1,5. & Fig. 1); *id.*, Exhibit 54 at 2 (page 2 of Dec. 1985 "Currents") (rule 1,5. & Fig. 1).

¹⁰⁷ 1986 Sess. Laws 309-11.

¹⁰⁸ First Orr Aff., Exhibit 60 at 6 ("Statement of Purpose" for 1986 Senate Bill 1358).

¹⁰⁹ First Orr Aff., Exhibit 56 at 54 (revised rules as adopted April 8, 1986); *id.* at 59-62 (revised rule 1,5 ("Location and Nature of Trust Water")).

¹¹⁰ See generally First Orr Aff., Exhibit 56 ("Petition for Declaratory Judgment," *Idaho Power Co. v. Idaho Dept. of Water Resources*, Case No. 38526 (Twin Falls County Dist. Ct.) (Apr. 28, 1986)).

¹¹¹ See First Orr Aff., Exhibit 57 ("Notice of Dismissal," *Idaho Power Co. v. Idaho Dept. of Water Resources*, Case No. 38526 (Twin Falls County Dist. Ct.) (Dec. 18, 1986)).

& Laser Centers, P.L.L.C. v. Miller, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005). The fact that both parties moved for summary judgment does not change the applicable standard of review, nor does it necessarily establish that there is no genuine issue of material fact. Cannon v. Perry, 144 Idaho 728, 731, 170 P.3d 393, 395 (2007). Each party's motion must be evaluated on its own merits. *Id.*

II. IDAHO POWER AGREED TO AND/OR CONCEDED AS PART OF THE SWAN FALLS AGREEMENT THAT THE HYDROPOWER WATER RIGHTS AT ISSUE IN THIS SUBCASE DO NOT EXTEND TO THE WATERS OF THE SNAKE RIVER OR SURFACE WATER OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER UPSTREAM FROM MILNER DAM, AND CARRY NO ENTITLEMENT TO SEEK CURTAILMENT OR ADMINISTRATION OF ANY USES OF WATER UPSTREAM FROM MILNER DAM, INCLUDING THE USE OF WATER FOR GROUND WATER RECHARGE.

The Swan Falls Agreement and its implementing legislation and State Water Plan amendments were intended to preserve, not upset or re-structure, the settled state of affairs upstream from Milner Dam. By attempting in the "7500 Case" to use its claimed hydropower water rights below Milner to curtail water rights above Milner, Idaho Power had directly challenged a foundational principle of Snake River water rights administration and threatened to unsettle property rights expectations based on this decades-old principle. One of the State's primary goals in the litigation following the Supreme Court's remand, and in the Swan Falls negotiations, was to preserve the settled principle that the hydropower water rights in question carried no entitlement to call for flows upstream from Milner Dam to be wasted over the dam, or to otherwise seek administration or curtailment of junior water rights diverting upstream from Milner Dam. Idaho Power consented to this term, and the parties memorialized their understanding in the Agreement by re-affirming the "zero flow" at Milner.

The parties intended the "zero flow" provision of the Agreement to have a specific contractual meaning with respect to the definition of the water rights. The "zero flow" provision

of the Agreement was a term of the parties' bargained-for exchange and an element of the definition of the hydropower water rights that were at the center of the controversy. This is demonstrated by the plain language of the Framework and the Agreement, and is confirmed by the parties' explanations of the settlement to the public and the Legislature. Most tellingly, this party intent is explicitly set forth in the plain language and history of the 1986 amendment to Idaho Code § 42-203B(2), which provided that waters upstream of Milner are not to be considered a source of flows for the water rights held in trust by the State, or for Idaho Power's water right to seasonal flows of 3,900 cfs and 5,600 cfs as measured at the Murphy gauging station.

A. The Plain Language Of The Swan Falls Agreement Demonstrates That The Parties Intended To Define The Hydropower Water Rights To Exclude Flows Above Milner Dam And To Preclude Curtailment Of Water Rights Upstream From Milner Dam.

The Swan Falls Agreement expressly required that the Milner "zero flow" policy be retained in the State Water Plan 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."**¹¹² The Milner minimum flow of "0 c.f.s." had been a part of the State Water Plan since its inception and was the official recognition of the settled understanding that all flows arising above Milner could be used for upstream development without injuring water rights below Milner.¹¹³ By making retention of the Milner divide a necessary part of the settlement, the parties signaled their

¹¹² First Orr Aff., Exhibit 30 at 26 (Exhibit 6 to the Swan Falls Agreement) (emphases added); *see also id.*, Exhibit 30 at 7 (Paragraph 13(A)(i) of the Swan Falls Agreement) ("Conditions on Effectiveness"); *see also id.* Exhibit 30 at 8 (Paragraph 16 of the Swan Falls Agreement) ("Termination of Contract"); *cf. id.* Exhibit 30 at 1, 5 (Paragraphs 1 and 10 of the Swan Falls Agreement).

¹¹³ As Idaho Power attorney Tom Nelson explained in a 1989 article in *The Advocate*, the State Water Plan's minimum flow of zero c.f.s. at Milner "was not a goal or a target, but a planning tool to indicate that development upstream of that site would not be hampered by a minimum flow there." Third Orr Aff., Exhibit 1 at 4 (Thomas G. Nelson, *Between Rock Creek And A Hard Place: Who Will Control Idaho's Water?*, THE ADVOCATE, September 1989, p.14); *see also* Fourth Orr Aff., Exhibit 90 at 4 (Memorandum from Norman C. Young to R. Keith Higginson) (Nov. 2, 1988) ("The water plan policy provides that flow is not required to be maintained at Milner but does not require it to be zero").

intention that, consistent with established practice and settled property right expectations, flows above Milner Dam would be reserved for use and storage above Milner, and the hydropower water rights diverting below Milner would have no right to force water delivery or spills past Milner Dam.¹¹⁴

This intent is further demonstrated by the Agreement's limitation of "mitigation" for new storage projects that reduced the winter flows available for hydropower production to only those diversions "**between Milner Dam and Murphy Gauge**":

There should be an express recognition of the adverse effect of diversions for storage from the mainstream of the Snake River **between Milner and Murphy** on hydropower production from November 1 to March 31. . . . approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River **between Milner Dam and Murphy Gauge** should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.¹¹⁵

By agreeing that mitigation was not due for winter flow depletions occurring at or above Milner, Idaho Power acknowledged that the hydropower water rights in question carried no legal right or interest in such flows. Thus, the Agreement expressly provided for high non-irrigation seasons flows and flood waters to be retained and used upstream from Milner Dam regardless of the impact on the hydropower water rights and minimum flows downstream from Milner Dam.

¹¹⁴ While the State will contend in the appropriate proceedings that the 1986 amendment to Idaho Code § 42-203B(2) applies to all water rights diverting downstream from Milner Dam, the State seeks no such determination in this proceeding. Rather, in this proceeding the State only seeks a determination that under the Swan Falls Agreement, the hydropower water rights that are the subject of the Agreement are defined to exclude flows upstream from Milner Dam, and therefore the water rights in question carry no entitlement or authorization to call for flows upstream from Milner Dam, or to preclude subordination of the water rights held in trust by the State to any water right acquired pursuant to State law.

¹¹⁵ First Orr Aff., Exhibit 30 at 26 (Exhibit 6 to Swan Falls Agreement) (emphasis added). The Framework and the State Water Plan amendments adopted to implement the settlement also limited Idaho Power's right to "mitigation" for non-irrigation season depletions to the reach below Milner. "[N]ew non-irrigation season storage in the reach below Milner dam and above Murphy Gage should be authorized only if it can be coupled with provisions which mitigate depletions such storage would cause in hydropower generation." First Orr Aff., Exhibit 29 at 3 (Framework at 3) (emphasis added). "New storage projects that would divert water from the Snake River between the Milner and Murphy gauging stations during the November 1 to March 31 period are subject to the requirement that the impact such depletions have on hydropower generation is mitigated." First Orr Aff., Exhibit 15 at 9 (State Water Plan Amendments at 7) (emphasis added).

Paragraph 7(E) of the Agreement also demonstrates that the parties did not intend to allow the water rights at issue to be used to call for flows to be spilled past Milner Dam. This provision states that Idaho Power's "ability to purchase, lease, own or otherwise acquire water from sources upstream of its power plant and convey it to and past its power plants below Milner Dam shall not be limited by this agreement." This qualification was necessary to clarify that while Idaho Power had no entitlement under the hydropower water rights defined by the Agreement to demand that waters upstream from Milner Dam be conveyed past the dam to the power plants downstream, it would not violate the Agreement for Idaho Power to acquire water upstream from Milner Dam via other means, and to convey such water past Milner Dam for the benefit of the Company's downstream power plants.¹¹⁶

This conclusion is consistent with the parties' intent to lay the foundation for "a sound comprehensive plan" for future management of the water resources of the Snake River basin: **"State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed."**¹¹⁷ The parties intended to define the hydropower water rights to support and be consistent with the water resource development policies of the State Water Plan as amended pursuant to the Agreement, which retained the well-established Milner divide:

the settlement of the pending Swan Falls litigation should be structured in a way which will allow the State to utilize Idaho Power's asserted water right to augment the existing and proposed legal authority to promote beneficial

¹¹⁶ Paragraph 7(E) further demonstrates that the Milner "zero flow" was not intended to entirely bar any flow of water in the riverbed at the Milner gauging station, but only to preclude the use of the hydropower water rights at issue from calling for water from surface water or ground water flows upstream from Milner Dam.

¹¹⁷ First Orr Aff., Exhibit 30 at 5 (Swan Falls Agreement at 5); *see also id.* Exhibit 29 at 8 ("Framework" at 8) ("The focus of the discussion of settlement of the 'Swan Falls Controversy' has necessarily been on the claims of right and authority at that site. However, the settlement of those issues necessarily involve putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also.")

development and to reject proposed development which it deems to be detrimental to the public interest.¹¹⁸

* * *

The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as part of the settlement.¹¹⁹

The water resource development policies of the State Water Plan as amended under the Agreement included the Milner "zero flow," which was intended: (1) to allow for new development upstream from Milner, (2) to confirm that the hydropower water rights in question were to be supplied principally by the spring flows into the Snake River below Milner Dam, and (3) to require the Snake River Plain aquifer to be managed as part of the Snake River system to protect the new minimum flows at Murphy:

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.¹²⁰

...

The impacts of groundwater use within the basin on the timing of aquifer discharge to the river [are] such that at some time stored surface water may be necessary to maintain the designated minimum flows.¹²¹

Thus, a key element of the settlement required the hydropower water rights at issue to be defined consistently with, and to support, the Milner "zero flow" policy, including its ramifications and role in the overall management of the Snake River. As Idaho Power's attorney

¹¹⁸ First Orr Aff., Exhibit 29 at 5 (Framework at 5).

¹¹⁹ Id. at 7.

¹²⁰ First Orr Aff., Exhibit 15 at 4 (page 2 of "A Resolution," *In The Matter Of Policy 32 Of The State Water Plan*) (Idaho Water Resource Board) (Mar. 1, 1985) (attachment to Minutes of Senate Resources & Environment Committee, Mar. 4, 1985); *see also* First Orr Aff., Exhibit 66 at 2 (page 2 of "Currents," Jan. 1985) (same); *see also* Third Orr Aff., Exhibit 21 at 7 (page 2 of "A Resolution," *In The Matter Of Policy 32 Of The State Water Plan* (Idaho Water Resource Board) (Mar. 1, 1985) (attachment to Minutes of the Idaho Water Resource Board, Mar. 1, 1985).

¹²¹ First Orr Aff., Exhibit 15 at 9 (page 7 of "A Resolution" . . .); *see also* First Orr Aff., Exhibit 66 at 3 (page 3 of "Currents," Jan. 1985); *see also* Third Orr Aff., Exhibit 21 at 12 (page 7 of "A Resolution" . . .).

Tom Nelson subsequently explained, the Milner “zero flow” was intended to confirm that “development upstream of that site would not be hampered by a minimum flow there.”¹²² Thus, consistent with historic practice and understanding, and the water resource development and management policies contemplated by the Agreement, waters upstream from Milner Dam are not a source of flows for the hydropower water rights diverting downstream from Milner Dam.

B. The Ratification And Implementation Proceedings Confirm That The Parties Intended To Define The Hydropower Water Rights To Exclude Flows Above Milner Dam And To Preclude Curtailment Of Water Rights Upstream From Milner Dam.

1. The Idaho Water Resource Board Public Information Meetings.

In explaining the settlement in the Idaho Water Resource Board’s public information meetings, the negotiators confirmed that waters above Milner were not affected by the Agreement. During the Twin Falls meeting on the day the Agreement was signed, Idaho Power attorney Tom Nelson explained that “we were trying to wrestle with how to regulate the river using streamflows at Murphy, **you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner.**”¹²³ Mr. Nelson also explained that the Agreement’s “zero flow” provision meant that “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.¹²⁴

¹²² 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.)

¹²³ First Orr Aff., Exhibit 44 at 13 (page 41 of transcript of Idaho Water Resource Board public information meeting) (Oct. 25, 1984) (Twin Falls) (emphases added).

¹²⁴ First Orr Aff., Exhibit 44 at 9 (page 27 of transcript of Idaho Water Resource Board public information meeting) (Oct. 25, 1984) (Twin Falls) (emphases added).

At the public information meeting in Boise a few days later, Pat Costello, the Governor's counsel and negotiator, pointed out that the "zero flow" provision meant that the settlement provided for future storage projects upstream of Milner Dam: "And on the up-stream storage, I guess it's in here by omission, **because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner.**"¹²⁵ Mr. Nelson did not disagree with or attempt to qualify Mr. Costello's statement.

2. The Legislative Implementation.

The Agreement's "zero flow" provision was also key to the legislative implementation of the settlement. As Senator Mike Crapo, the primary architect of the "Statement of Legislative Intent" for the acknowledged "centerpiece" of the Swan Falls legislation,¹²⁶ subsequently explained: "[Z]ero flow at Milner was very heavily discussed and was the basis upon which the legislation was passed."¹²⁷ Upper Snake River water users—whose support was crucial for legislative and executive implementation of the settlement—made it clear to the Legislature that they understood the retention of the "zero flow" provision to mean that the hydropower water rights at issue would not be allowed to force any water to be spilled over Milner Dam, and conditioned their support of the settlement on maintaining this established regime. The Committee of Nine adopted and sent to the members of the Legislature a resolution supporting the settlement, provided "[t]hat there is, and will continue to be, no obligation to provide surface

¹²⁵ First Orr Aff., Exhibit 46 at 19 (page 66 of transcript of Idaho Water Resource Board public information meeting) (Nov. 1, 1984) (Boise) (emphasis added).

¹²⁶ First Orr Aff., Exhibit 28 at 4 (1985 Journal of the State Senate at 59) ("This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the Agreement.")

¹²⁷ Fourth Orr Aff., Exhibit 58 at 4 (page 8 of transcript of public hearing on proposed rules and regulations for water appropriation) (Jan. 16, 1986, 2:17 p.m.)

flows for water rights established below Milner Dam and that the 'zero' flow at Milner Dam be reaffirmed."¹²⁸

The Great Feeder Canal Company also sent the members of the Legislature a letter stating that "the agreement is based on a zero flow in the Snake River at Milner," and even objecting to the settlement's provision conditioning future storage above Milner on a determination that existing storage was "fully utilized."¹²⁹ In a letter to the Governor and Attorney General just before the Framework was finalized, Idaho Water Rights Defense, Inc.—a group composed of defendants in Idaho Power's "7500 Case" that had been invited to review a draft of the Framework—also emphasized the importance of the "zero flow" at Milner: "One of the most important points to us is that there must be no minimum flow requirements at Milner. We were assured this had been agreed upon, but we find no such assurance in the draft."¹³⁰

3. The Policy 32 Amendments Hearings.

The discussion and testimony during the Idaho Water Resource Board's public hearings on the proposed State Water Plan amendments also demonstrate that the "zero flow" provision of the Agreement was understood to be an affirmative limitation on the source of flows for hydropower water rights at issue. In explaining the "zero flow" policy, Idaho Water Resource Board representative Frank Sherman explained that "[t]he negotiators agreed that above Milner there is a requirement for zero flow back to the dam."¹³¹ "They're going to continue the zero flow at Milner Dam. All the water in the Upper Snake in low water years can be

¹²⁸ Fourth Orr Aff., Exhibit 60 at 2 ("Resolution" attached to letter from Ronald D. Carlson, Snake River Watermaster, to all Senators and Representatives, and Ken Dunn) (underlining in original).

¹²⁹ Fourth Orr Aff., Exhibit 61 at 1 (page 1 of letter from Edwin E. Hansen and Eldred Lee of Great Feeder Canal Co., Ltd., to Members of the Senate and House of Representatives) (Feb. 4, 1985).

¹³⁰ Fourth Orr Aff., Exhibit 62 at 4 (page 4 of letter from Kent Foster, attorney for Idaho Water Rights Defense, Inc., to Governor John V. Evans and Attorney General Jim Jones) (Sept. 26, 1984).

¹³¹ Third Orr Aff., Exhibit 24 at 24 (page 15 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Jan. 29, 1985, 7:00 p.m.) (Pocatello) (emphasis added).

appropriated; therefore, **there is no requirement for the water to be dumped past Milner Dam.**¹³²

Eldred Lee, Secretary of Great Feeder Canal Company—who co-authored the company's above-referenced letter to the members of the Legislature—made similar comments regarding the Milner minimum flow in his testimony on the proposed amendments:

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

...
And if Idaho Power is content to have a minimum flow at Milner, it's my opinion that the State of Idaho is not responsible, if that should fall below that particular point, they are not responsible to make that flow up.¹³³

Mr. Sherman also repeatedly pointed out in the Policy 32 meetings that under the policies proposed by Exhibit 6 to the Swan Falls Agreement, the summertime minimum flows needed to satisfy the new minimum flows at Murphy, and the overlapping 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."¹³⁴

"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."¹³⁵

¹³² Third Orr Aff., Exhibit 28 at 21 (page 65 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Feb. 6, 1985, 7:00pm) (Lewiston) (emphasis added). An Idaho Power representative was in attendance at all the Policy 32 hearings except the two in Lewiston. *See, e.g.*, Fourth Orr Aff., Exhibit 63 at 1 (attendance sheet listing "Richard Hahn IPC"); *see also generally id.*, Exhibits 63-68 (attendance sheets, written testimony and exhibits for Idaho Water Resource Board public hearings on proposed amendments to Policy 32 of the State Water Plan) (Jan.-Feb. 1985).

¹³³ Third Orr Aff., Exhibit 23 at 28, 30 (pages 28 and 30 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Jan. 28, 1985, 2:00 p.m.) (Idaho Falls) (emphasis added).

¹³⁴ Third Orr Aff., Exhibit 24 at 7 (page 12 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Jan. 29, 1985, 2:00 p.m.) (Pocatello).

¹³⁵ Third Orr Aff., Exhibit 24 at 9 (page 19 transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Jan. 29, 1985, 2:00 p.m.) (Pocatello).

“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.”¹³⁶

“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.”¹³⁷

Governor Evans' statements to the Water Board on the Swan Falls amendments to the State Water Plan also emphasized the importance of the “zero flow” at Milner to the overall settlement framework: “The new flows at the – the Murphy gage, **coupled with the retention of a zero flow at Milner dam**, will allow for significant new agricultural development without threatening minimum flows.”¹³⁸

Thus, the settlement's “sound comprehensive plan” was based in large part on the Milner “zero flow,” and the hydropower water rights at issue were understood to be defined consistently with that minimum flow. Accordingly, the source for the hydropower water rights was limited to flows arising below Milner, and the water rights would have no legal effect on flows or water rights upstream from Milner. Idaho Power publicly supported and endorsed the minimum flows and development policies set forth in the implementing amendments to the State Water Plan, including the Milner “zero flow,” as specifically required under the Agreement.¹³⁹

¹³⁶ Third Orr Aff., Exhibit 25 at 5 (page 12 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Jan. 30, 1985, 2:00 p.m.) (Burley) (parenthetical in transcript).

¹³⁷ Third Orr Aff., Exhibit 25 at 36 (page 16 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Jan. 30, 1985, 7:00 p.m.) (Burley) (parenthetical in transcript).

¹³⁸ Third Orr Aff., Exhibit 27 at 6 (page 7 of transcript of Water Board meeting on proposed Policy 32 amendments) (Feb. 5, 1985, 2:00 p.m.) (Boise) (emphasis added); *see also* Fourth Orr Aff., Exhibit 67 at 16 (page 2 of written testimony of Governor John V. Evans) (same).

¹³⁹ “When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.” First Orr Aff., Exhibit 30 at 1 (Swan Falls Agreement ¶ 4) (“Good Faith”).

It could not be otherwise, because defining the hydropower water rights at issue to authorize Idaho Power to demand that water be conveyed past Milner Dam to satisfy hydropower water rights located below Milner Dam would have resulted in a direct conflict between the definition of the water rights and a critical element of the State Water Plan development policies required under the Agreement. This would have opened the door for Idaho Power to take positions inconsistent with the Milner "zero flow" policy of the State Water Plan by submitting a delivery call for waters above Milner to the Department of Water Resources, or by asserting rights to flows above Milner in a judicial forum. It would violate the Agreement's "good faith" provision for Idaho Power to "chip away" at the State Water Plan by taking such inconsistent positions in other forums, as Idaho Power's attorney Tom Nelson recognized in the Idaho Water Resource Board hearings on the State Water Plan amendments proposed to implement the Agreement.¹⁴⁰

¹⁴⁰ During the evening meeting of the Idaho Water Resource Board meeting on the proposed amendments on February 5, 1985, in Boise, Idaho Power attorney Tom Nelson responded to a concern voiced during the afternoon meeting that Idaho Power would "chip away" at the State Water Plan:

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

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

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

Third Orr Aff., Exhibit 27 at 23 (pages 74-75 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Feb. 5, 1985, 7:00 p.m.) (Boise) (emphases added). Unfortunately, Idaho Power has made

In sum, the plain language of the Framework and the Swan Falls Agreement, and the Agreement's ratification and implementation, demonstrate that the parties and the public understood the "zero flow" provision of the Agreement to limit the legal scope and effect of the hydropower water rights at issue to the surface water and ground water flows downstream from Milner Dam. The "zero flow" provision of the Agreement was not simply a perfunctory re-affirmation of a State Water Plan policy—it was intended and understood to be an affirmative agreement by Idaho Power that, consistent with historic practice and settled property rights expectations, the hydropower water rights downstream from Milner Dam would not encumber or encompass any of the surface water or ground water flows upstream from Milner Dam.¹⁴¹ Thus, as a term of the Agreement and its implementation, Idaho Power voluntarily agreed to limit the

it clear in this proceeding that it indeed intends to "chip away" at the Swan Falls Agreement. It is the State's position that Idaho Power has breached the Swan Falls Agreement, and continues to do so, by submitting to this Court arguments and requests for relief that are indisputably at odds with the plain language and manifest intent of the Swan Falls Agreement and the implementing legislation.

¹⁴¹ The parties' subsequent statements further demonstrate that the Agreement's "zero flow" provision was specifically intended to limit the source and scope of the water rights in question. Idaho Power attorney Tom Nelson explained in a 1989 article in *The Advocate*, the Idaho State Bar's monthly journal, that while the Milner "zero flow" provision of the State Water Plan was by itself only a "planning tool," its incorporation into the Swan Falls Agreement meant that the public interest criteria of section 42-203C would not apply upstream from Milner Dam:

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

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

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

source of flows and legal effect of the hydropower water rights at issue to the surface water and ground water flows downstream from Milner Dam.

C. The 1986 Amendment To Idaho Code § 42-203B(2) Confirms That The Parties Intended To Define The Hydropower Water Rights To Exclude Flows Above Milner Dam And To Preclude Curtailment Of Water Rights Upstream From Milner Dam.

The plain language and legislative history of the 1986 amendment to Idaho Code § 42-203B(2) conclusively confirms the parties intended to exclude flows arising above Milner from the source and scope of the hydropower water rights at issue. Indeed, the 1986 amendment was precipitated by the Department's proposed administrative rules and regulations for water appropriation, which mistakenly defined flows arising above Milner as subject to the water rights held in trust by the State. The parties publicly rejected this interpretation, and affirmatively sought enactment of the 1986 amendment to clarify the parties' original intent under the Swan Falls Agreement.

1. The Parties And The Public Rejected The Department's Proposed Rules As Contrary To The Swan Falls Agreement.

The Department held a series of public information meetings in May 1985 to obtain public comment and suggestions to assist the Department in drafting the administrative rules necessary to fully implement the trust and public interest criteria legislation. In the Twin Falls meeting on May 23, 1985, there was considerable discussion of the issues of ground water recharge and the Milner divide. Idaho Power's attorney Tom Nelson stated unequivocally that surface water diversions above Milner for recharge purposes "are not part of the trust waters" because of the "zero flow" provision:

MR. NELSON: One thing, Norm, on this gentleman's example. **I don't think that the surface water diversions for recharge above Milner are part of the trust waters.** To be part of the trust waters, the water has to be made available by reason of a subordination condition, and there's no water right at Milner. That's a

zero flow under the state water plan. So the surface water diversion above Milner would not be subject to those criteria. . . .

MR. YOUNG: Good. I'm glad it's on tape. That makes it easy.¹⁴²

While the Department acknowledged that the "zero flow" requirement had been interpreted "by some" to mean the trust did not extend above Milner Dam, it nonetheless rejected this view because section 42-203B(2) contained no such limitation:

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. This interpretation would mean that the flows of the Thousand Springs and other sources entering below Milner would have to be relied upon to supply the flow in the main stem Snake River hydropower facilities. A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters . . .¹⁴³

Thus, 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."¹⁴⁴ The parties to the Agreement rejected the Department's erroneous interpretation of the settlement and sought enactment of the 1986 amendment to section 42-203B(2) to remove any doubt as to the parties' intent with respect to the meaning of the "zero flow" provision of the Agreement.

In his written comments on the rules as proposed in the October 1985 "Currents," attorney John Rosholt of Idaho Power's law firm¹⁴⁵ explained: "**Trust Water: Under the Swan**

¹⁴² Fourth Orr Aff., Exhibit 48 at 7 (page 23-24 of transcript of public information meeting) (May 23, 1985) (Twin Falls) (emphasis added); *see also id.*, Exhibit 49 (statement of "Nelson") (similar).

¹⁴³ Fourth Orr Aff., Exhibit 91 at 2 (Memorandum from Norm Young to Ken Dunn, "Legal Issues Associated With Senate Bill 1008") (June 14, 1985).

¹⁴⁴ First Orr Aff., Exhibit 52 at 2 ("Currents," Oct. 1985) (Rule 1.5 and Figure 1).

¹⁴⁵ Nelson, Rosholt, Robertson, Tolman & Tucker, Chtd. Mr. Rosholt had represented Idaho Power in Ada County Case No. 62237, and signed the Company's brief arguing that the subordination condition in the federal license for the Company's Hells Canyon project did not include subordination to ground water recharge. *See* Fourth

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 . . . for the reason that the minimum stream flow at Milner is zero.”¹⁴⁶ In his January 1986 comments on the revisions proposed in the December “Currents,” Mr. Rosholt again suggested “that Rule 1,5,1,1. defining trust water flows . . . be amended to just those flows that exist only between Swan Falls and Milner.” While he conceded that “the statute is susceptible of two interpretations,” he also stated that “certainly it was the perception of those who participated in the Swan Falls Settlement Agreement and the resulting legislation that trust water does not exist above Milner.”¹⁴⁷

Idaho Power’s attorney Tom Nelson also stated in the Company’s written comments on the rules that it was contrary to the Agreement to consider flows above Milner to be “trust waters”:

Rule 1,5,1,1, by implication, provides that trust waters are located in the Snake River above Milner Dam. As pointed out above, the trust was technically created by the statute, not by the agreement.^[148] However, if the intent of the rules is to

Orr Aff., Exhibit 24 at 5 (page 5 of “Plaintiff’s Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment,” *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Feb. 19, 1980)).

¹⁴⁶ Fourth Orr Aff., Exhibit 69 at 1 (page 1 of 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).

¹⁴⁷ Fourth Orr Aff., Exhibit 70 at 2 (page 2 of letter from John A. Rosholt to A. Kenneth Dunn, Director, Idaho Department of Water Resources, Re: Proposed Rules – Water Allocation) (Jan. 15, 1986).

¹⁴⁸ Mr. Nelson had previously pointed out in his written comments that the trust was created by statute, not by the Agreement:

Rule 1,5,1. states that the October, 1984 agreement places certain water in trust. This is not correct. The agreement did not place any waters in trust. The trust was created by an act of the Legislature. This is more than a technical distinction, since the agreement itself defines the extent of the Company’s water rights above the Murphy Gage and below Milner Dam, as unsubordinated, subject to subordination. The legislation has the effect of placing these ‘subordinatable’ water rights in trust pending their actual subordination to other uses. However, only the statute has that effect, not the agreement.

Fourth Orr Aff., Exhibit 71 at 2 (page 1 of “Idaho Power’s Comments on Proposed Water Allocation Rules”) (enclosed with letter from Thomas G. Nelson to A. Kenneth Dunn, Idaho Department of Water Resources) (Jan. 27, 1985).

implement the Swan Falls agreement, then the surface water flows above Milner should be considered not to be trust waters. The agreement is clear in its limitations on its impact above Milner. The only effect which the agreement was intended to have on development of surface waters above Milner was to be the review of uses of existing storage before new storage is authorized. Therefore, the regulations should be limited if the intent really is to implement the agreement.¹⁴⁹

Attorney General Jim Jones also emphasized that the Agreement's "zero flow" provision was intended to exclude surface waters and ground waters upstream of Milner Dam from the definition of the trust: **"[T]he parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows . . . The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero."**¹⁵⁰ The Attorney General further stated that "one of the critical points of the negotiations was that water above Milner Dam should not be subject to the new allocation criteria. **To include water above Milner as trust water is directly contrary to the intent of the negotiating parties.**"¹⁵¹

The Idaho Water Users Association's comments, submitted by Sherl Chapman, registered a similar objection: "At the outset, it is important that the Department understand that the position of the Association is that there are no trust waters above Milner Dam on the Snake River. This understanding was included in the discussions before the Legislature in 1985 and is the subject of presently proposed legislation."¹⁵² The United States Bureau of Reclamation's

¹⁴⁹ *Id.* (emphasis added).

¹⁵⁰ Third Orr Aff., Exhibit 41 at 2 ("News Release," Idaho Office of the Attorney General) (Jan. 29, 1986) (emphases added).

¹⁵¹ *Id.* The Attorney General's made similar statements in his formal comments to the Department. Fourth Orr Aff., Exhibit 72 at 4 (page 3 of "Comments of The Attorney General on the Proposed Water Allocation Rules of the Idaho Department of Water Resources") (enclosed with letter from Attorney General Jim Jones to Mr. A. Kenneth Dunn, Director, Idaho Department of Water Resources) (Jan. 27, 1986).

¹⁵² Fourth Orr Aff., Exhibit 73 at 1 (page 1 of letter from Sherl L. Chapman, Executive Director, Idaho Water Users Association to Mr. Ken Dunn, Director, Idaho Department of Water Resources) (Jan. 27, 1986); *see also id. at 2* ("As earlier stated, it is our position that trust waters do not exist above Milner Dam and therefore, ground waters specifically tributary to the Snake River above Milner should not be considered trust waters nor should they fall

comments acknowledged that while Idaho Code § 42-203B “may be interpreted in two ways,” the “zero flow” provision was intended to limit the trust to flows downstream from Milner: “[S]ince it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner.”¹⁵³ Other written comments on the Rules also took issue with the proposal to classify flows upstream from Milner as subject to the trust.¹⁵⁴

These views were emphatically confirmed in the hearings the Department held on the proposed rules in January 1986. In the hearing on January 14, 1986, an attorney representing the Protective Union—an organization of upper Snake River valley canal companies—said the group “wants to be on record of opposing application of these rules above Milner.”¹⁵⁵ “It’s my understanding that several of Eastern Idaho legislators believed, when the legislation was passed, that they were not passing it for application above Milner. And perhaps legislative effort should be made to clarify the legislation so that it does not apply above Milner.”¹⁵⁶

under the allocation rules for such.”). Presumably, the “presently proposed legislation” to which Mr. Chapman referred was 1986 Senate Bill 1358, which among other things proposed to amend section 42-203B(2) to clarify that “trust waters do not extend to the Snake River or tributary ground or surface water above Milner.” First Orr Aff., Exhibit 60 at 6 (“Statement of Purpose” for 1986 Senate Bill 1358) (RS 12550).

¹⁵³ Fourth Orr Aff., Exhibit 74 at 1 (page 1 of Letter from John W. Keyes III, Assistant Regional Director, United States Department of the Interior, Bureau of Reclamation, A. Kenneth Dunn, Director, Idaho Department of Water Resources) (Jan. 27, 1986). Mr. Keyes had expressed similar misgivings in an memorandum dated “10/23” to “John”: “When you have had a chance to look over and discuss with Tom Nelson, please give me a call. Our concern is that ‘trust water’ is now extended above Milner when we understood before that it would cut off at Milner . . .” Fourth Orr Aff., Exhibit 75 at 1 (memorandum from John Keyes to “John”) (“10/23”).

¹⁵⁴ Fourth Orr Aff., Exhibit 76 at 3 (page 3 of a letter from Roger D. Ling to Director, Idaho Department of Water Resources) (Jan. 15, 1986) (“Such a determination [that all flows in the Snake River and its tributaries above Milner Dam which would pass Milner Dam are trust waters] was not contemplated by the Swan Falls Agreement or any legislative enactments”); *see also id.*, Exhibit 77 at 3 (page 3 of letter from Donald D. Suchan to Idaho Department of Water Resources, Attention: Water Allocation Rules) (Jan. 24, 1986) (“It was the understanding of the general public in the State of Idaho that only those waters between Milner Dam and Swan Falls would be considered trust waters in the Snake River. . .”).

¹⁵⁵ Fourth Orr Aff., Exhibit 55 at 4 (page 7 of transcript of public hearing on proposed rules and regulations for water appropriation) (Jan. 14, 1986, 2:20 p.m.) (Idaho Falls).

¹⁵⁶ *Id.* (pages 7-8 of transcript).

In the same hearing, the water manager for several other canal companies pointed out that by subjecting flows above Milner to the trust, the rules threatened to interfere with the established practice of reserving flood waters for uses upstream from Milner:

I'm wishing for more of a clarification of whether flood waters is what – or relationship flood waters has with trust waters. Now, in the past, when we have been having flood waters, we use those flood waters, we could use all we could take care of in the canal system. Now, then, if it was changed to the point where flood waters was – instead of using flood waters over any decreed water we have, if there is any change in that, then we would be using stored water at the time when the Bureau of Reclamation or the Water Resource Board was advertising on the radio there is flooding down around Shelley, Blackfoot, and so forth, use all the water you can. . . .

And so I'd like to make my formal protest or clarification of what flood waters is in relation to the trust waters. And if it was going to change anything that we have been doing in the past 30 or 40 years, it would be detrimental to our canal systems.¹⁵⁷

The issue was framed in even starker terms by Eldred Lee of the Great Feeder Canal Company, who had previously emphasized his company's understanding of the meaning and significance of the Milner "zero flow" provision at in a Water Board hearing and in a letter sent to the members of the Legislature.¹⁵⁸

. . . I've been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water under any circumstances above Milner."¹⁵⁹

* * *

The water users that I have talked to feel as if they have been deceived by action – and I don't know who is responsible. . . . you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy – or some of them, at least – or that new development may be minimized

¹⁵⁷ *Id.* at 5 (pages 10-12 of transcript) (emphasis added).

¹⁵⁸ Third Orr Aff., Exhibit 23 at 28, 30 (pages 28 and 30 of transcript of Idaho Water Resource Board) (Jan. 28, 1985, 2:00 p.m.) (Idaho Falls); *see also* Fourth Orr Aff., Exhibit 61 (letter from Edwin E. Hanson and Eldred Lee of the Great Feeder Canal Company to Members of the Idaho State Senate and House of Representatives) (Feb. 4, 1985).

¹⁵⁹ Fourth Orr Aff., Exhibit 55 at 6-7 (pages 16-17 of transcript of public hearing on proposed rules and regulations for water appropriation) (Jan. 14, 1986, 2:20 p.m.) (Idaho Falls).

because of the rules and regulations and the laws that are now made, **it appears to us that it's pure deception.** . . . I don't think you realize how the farmers feel, how the people feel, about that very principle.¹⁶⁰

Mr. Lee called for legislation to clarify that the trust had not been intended to affect any flows upstream from Milner: "And I'd like to see the department propose legislation that would clarify that principle. Because if not, then there is going to be a lot of fault-finding, unrest, dissatisfaction with the whole procedure that we are now attempting to set up and clarify."¹⁶¹

At the hearing held on January 15, 1986, 2:15 p.m., attorney Roger Ling represented "numerous water entities"¹⁶² and stated: "[W]e object to the understanding in the proposal that all waters above Milner, and particularly surface waters, are, in fact, and will be considered trust waters if they have not been previously appropriated."¹⁶³ Mr. Ling explained that "[u]nder the Swan Falls agreement, **it is our understanding and I believe the understanding of many in that agreement, that all waters – surface waters, at least – and instream waters above Milner were, in fact, not trust waters; were, in fact, not subject to any water rights of Idaho Power Company.**"¹⁶⁴ Mr. Ling added: "[W]e think that it was the intent of all parties that that water would not, in fact, be trust water."¹⁶⁵

Finally, in the hearing in Boise on January 16, 1986, Senator Mike Crapo, the primary architect of the "Statement of Legislative Intent" for the legislation that established the trust, also made it clear that the parties and the Legislature had never intended flows upstream from Milner to be subject to the trust:

I don't believe that it can be presumed that every use, when coupled with all other uses, therefore constitutes a significant impact. I think that particularly is true

¹⁶⁰ Id. at 7 (pages 17-18 of transcript) (emphasis added).

¹⁶¹ Id. at 7.

¹⁶² Fourth Orr Aff., Exhibit 56 at 3 (pages 3-4 of transcript of public hearing on proposed rules and regulations for water appropriation) (Jan. 15, 1986, 2:15 p.m.) (Twin Falls).

¹⁶³ Id. at 8-9 (pages 24-25 of transcript).

¹⁶⁴ Id. at 9 (page 25 of transcript) (emphasis added).

¹⁶⁵ Id.

above Milner given the fact that zero flow at Milner was very heavily discussed and was the basis upon which the legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes. . . .¹⁶⁶

Because it was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner. And I don't even think that Idaho Power would take the position that above Milner they are entitled to any trust water in the flow of the river.¹⁶⁷

The widespread rejection of the Department's interpretation of section 42-203B(2) and the overall settlement led directly to the 1986 amendment.

2. The Plain Language And Legislative History Of The 1986 Amendment To Idaho Code § 42-203B(2) Demonstrate That The Parties Intended The Agreement's Milner "Zero Flow" To Exclude Flows Above Milner From The Definition Of The Source Of The Hydropower Water Rights.

The 1986 amendment to Idaho Code § 42-203B(2) was introduced into the Legislature under Senate Bill 1358.¹⁶⁸ The Statement of Purpose for the bill stated that the proposed rules had raised interpretation issues and that the legislation was intended to clarify the scope and extent of the trust: "IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning interpretation of the legislation. Some of the important aspects of this proposed bill include: (1) clarification that trust waters do not extend to the Snake River or tributary ground or surface water above Milner . . ."¹⁶⁹

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

¹⁶⁶ *Id.*, Exhibit 58 at 4 (page 8 of transcript of public hearing on proposed rules and regulations for water appropriation) (Jan. 16, 1986, 2:17 p.m.) (Boise) (emphasis added).

¹⁶⁷ *Id.* at 5 (page 11 of transcript) (emphasis added).

¹⁶⁸ First Off. Aff., Exhibit 60 (1986 Senate Bill 1358 and Statement of Purpose).

¹⁶⁹ *Id.* at 6 ("Statement of Purpose" for 1986 Senate Bill 1358) (RS 12550).

[P]rovided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

1986 Idaho Session Laws 309; see also Idaho Code § 42-203B.¹⁷⁰

In explaining the amendment to the Senate Resources and Environment Committee on February 19, 1986, Senator Crapo explained that the amendment had been negotiated by the interested parties, was intended to merely clarify the Agreement, and changed nothing in it:

Senator Crapo explained the bill contained revisions of the Swan Falls legislation passed last year and **is intended to merely clarify the agreement**. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. As a result, **negotiations were entered into by all interested parties and this bill is the result and seems to be acceptable to the concerned parties**. He again pointed out, **nothing was changed in the agreement, but this is merely clarification.** . . .¹⁷¹

As the minutes further reflect, **"Tom Nelson, attorney for Idaho Power, agreed with Senator Crapo on the legislation and said [Idaho Power] too supported the bill and the change."**¹⁷²

The plain terms of the 1986 amendment encompass and apply to both types of hydropower water rights defined by the Swan Falls Agreement: the water rights held in trust by the State pursuant to Section 42-203B, and the Company's water right to seasonal flows of 3,900

¹⁷⁰ See also First Orr Aff., Exhibit 60 at 2 (1986 Senate Bill 1358).

¹⁷¹ First Orr Aff., Exhibit 62 at 1 (Minutes of the Senate Resources & Environment Committee) (Feb. 12, 1986) (emphasis added). Senator Crapo also explained to the House Resources and Conservation Committee that the amendments were intended "to clarify language in all Sections regarding minimum stream flows, ground water and tributary waters upstream and downstream from Milner Dam, actions the Director may take to review permits relating to trust waters, etc." First Orr Aff., Exhibit 63 at 1 (Minutes of the House Resources & Conservation Committee) (Mar. 13, 1986).

¹⁷² First Orr Aff., Exhibit 62 at 1 (Minutes of the Senate Resources & Environment Committee) (Feb. 12, 1986) (boldface added; underlining in original). Sherl Chapman, representative for the Idaho Water Users Association, was also present and told the committee that his organization "supported the legislation and concur in the proposed amendment." *Id.* Mr. Chapman also "told the [House Resources and Conservation] Committee of his group's support of the legislation." First Orr Aff., Exhibit 63 at 1 (Minutes of the House Resources & Conservation Committee) (Mar. 13, 1986).

c.f.s. and 5,600 c.f.s. as measured at the Murphy Gauge. The 1986 amendment expressly limits the source of flows for the water rights held in trust by the State to flows downstream from Milner Dam. The amendment also expressly excludes flows arising above Milner for purposes of the “determination”—definition¹⁷³—of **any** water right below Milner, which necessarily includes Idaho Power’s water right to the seasonal minimum flows as measured at the Murphy gauging station. Thus, under the plain language of the 1986 amendment, all of the hydropower water rights at issue in this consolidated subcase are defined to limit their source to flows downstream from Milner Dam and to exclude flows upstream from Milner Dam.

The legislative history of the 1986 amendment to Idaho Code § 42-203B(2), and the administrative record on the Department’s proposed “rules and regulations for water appropriation,” demonstrate that the parties always intended, as part of the Swan Falls Agreement, that the hydropower water rights at issue be so defined. The parties believed this point so important to make it unambiguously clear via a statutory amendment that they negotiated and supported.¹⁷⁴ By doing so, and by representing to the Senate committee that the amendment clarified the original intent of the Swan Falls Agreement, the parties removed any possible doubt as to the intended meaning and effect of the Agreement’s “zero flow” provision. It defined the source of the flows for the hydropower water rights at issue as consisting only of surface water and ground water flows downstream from Milner Dam and as excluding flows upstream from Milner Dam. Thus, under the Swan Falls Agreement, the hydropower water

¹⁷³ See Black’s Law Dictionary 480 (8th ed. 2004) (“determination, *n.* 1. A final decision by a court or administrative agency <the court’s determination of the issue>”).

¹⁷⁴ In effect, the 1986 amendments to Section 42-203B(2) clarified that the regulatory scheme the parties had devised and proposed under Exhibit 7B—the “subordination legislation” that was enacted as a precondition for the Agreement to become binding and effective—had been originally intended to limit the legal definition and effect of hydropower water rights held in trust by the State to the surface water and ground water flows downstream from Milner Dam. The 1986 amendments further clarified that the parties had also intended to limit Idaho Power’s water right to seasonal flows of 3,900 c.f.s and 5,600 c.f.s. as measured at the Murphy gauging station to the surface water and ground water flows downstream from Milner Dam.

rights at issue in this subcase carry no entitlement or authorization to seek curtailment of junior-priority rights to surface water or ground water flows upstream from Milner Dam, including recharge water rights.¹⁷⁵

For the same reasons, Idaho Power conceded to, and agreed not to challenge, the State's exercise of its regulatory authority under the 1986 amendments with respect to the hydropower water rights at issue in this subcase. *See* Summary Judgment Order at 45 ("Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings"); *id.* at 46 ("as a term of the contract Idaho Power agreed to the State's regulatory authority"); *id.* at 31 ("Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority").¹⁷⁶

3. **The 1994 Amendments To Idaho Code §§ 42-234(2) and 42-4201A(2) Confirm That The Parties Intended The Agreement's Milner "Zero Flow" Provision To Exclude Flows Above Milner From The Definition Of The Source Of The Hydropower Water Rights.**

In earlier proceedings in this subcase, Idaho Power has suggested that the parties' agreement to define the source of the water rights as being limited to flows downstream from the Milner divide was erased by amendments made to Idaho Code §§ 42-234(2) and 42-4201A(2) in 1994. These amendments provide that certain recharge water rights are secondary to hydropower water rights "that may otherwise be subordinated by contract entered into by the

¹⁷⁵ As previously noted, the parties' agreement to define the hydropower water rights at issue as carrying no entitlement to call for waters upstream from Milner Dam was consistent with longstanding practice and settled property rights expectations. *See supra* "Statement of Facts" Parts I-II. In contrast, the rules' proposal to subject water upstream from Milner Dam to hydropower water rights located downstream from Milner Dam represented a stark departure from a settled principle of defining and administering water rights on the Snake River.

¹⁷⁶ Following the enactment of the 1986 amendments, the Department promptly amended the rules to limit the definition of "trust water flows" to surface water and ground water flows downstream from Milner Dam. *See* First Orr Aff., Exhibit 56 at 59-62 (revised Rule 1,5 as adopted Apr. 8, 1986) (exhibit to Petition for Declaratory Judgment, *Idaho Power Co. v. State*, Case No. 38526 (Fifth Jud. Dist., Twin Falls County) (Apr. 28, 1986)). While Idaho Power subsequently challenged certain provisions of the revised rules in a declaratory judgment action filed in the Fifth Judicial District Court, that action did not challenge the revisions limiting the effect of the settlement to flows downstream from Milner Dam. *See generally* First Orr Aff., Exhibit 56 (Petition for Declaratory Judgment, *Idaho Power Co. v. State*, Case No. 38526 (Fifth Jud. Dist., Twin Falls County) (Apr. 28, 1986)).

governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42- 203B, Idaho Code.” 1994 Idaho Session Laws 852, 1398.

Idaho Power’s contention is incorrect both under the statutory language and as a matter of legislative history. The plain statutory language demonstrates that the 1994 amendments were not intended to apply to flows upstream of the Milner Dam, because the hydropower water rights that are the subject of the Swan Falls Agreement were not “subordinated by contract” to recharge water rights diverting upstream from Milner Dam. Rather, consistent with established practices and settled property rights expectations, the Agreement **defined** the hydropower water rights as having no legal effect on any flows or water rights diverting upstream from Milner.

The “subordination” provisions of the Agreement and its implementing legislation, in contrast, apply to water rights diverting from surface and ground water flows in the “trust area” downstream from Milner Dam. It is only in the “trust area” that the priority dates of the hydropower water rights have any legal effect, and thus it is only in this reach that their priority is “subordinated” by the Swan Falls Agreement and its implementing legislation. The priorities of the hydropower water rights that are the subject of the Swan Falls Agreement could not be “subordinated by contract” uses above Milner unless their priorities had some legal effect or meaning above Milner under the Agreement—and it is quite clear they never did, for reasons previously discussed. None of the flows upstream from Milner Dam are encumbered by the Swan Falls Agreement. Thus, the 1994 amendments have no effect with respect to recharge water rights diverting upstream from Milner Dam.

The legislative history of the 1994 amendments supports this conclusion. The only mention of the Swan Falls Agreement in the legislative record for the 1994 amendments is a comment by Sherl Chapman of the Idaho Water Users Association that the amendments were

intended to “protect and verify” the Agreement.¹⁷⁷ As previously discussed, a pivotal term of the Agreement was that the hydropower water rights would be defined so that flows above Milner were not part of the source for these water rights. Thus, the 1994 amendments must be interpreted to “protect and verify,” not reverse, this pivotal element of the settlement.

The Swan Falls record for the administrative rules and the 1986 amendments underscores this conclusion. The monolithic, and at times heated, resistance to the Department’s view that the trust extended above Milner demonstrates that preserving the Milner divide was essential to the overall structure of the settlement, and to obtaining the support for the legislative implementation of the Agreement among water users above Milner. The suggestion that this pivotal aspect of the settlement was unraveled with essentially no legislative consideration—and without any objection from upper Snake River water users—is simply implausible.

III. THE STATE RETAINS THE RIGHT TO SUBORDINATE, PURSUANT TO STATE LAW, THE WATER RIGHTS HELD IN TRUST BY THE STATE UNDER IDAHO CODE § 42-203B TO RECHARGE WATER RIGHTS DIVERTING DOWNSTREAM FROM MILNER AND UPSTREAM FROM MURPHY.

The 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) relate to the question of whether the State retains the right to subordinate the water rights held in trust by the State under Idaho Code § 42-203B to recharge water rights diverting below Milner and above Murphy. The plain language of the amendments recognizes that hydropower water rights held in trust by the State “**may otherwise be subordinated**” under the Swan Falls Agreement and its implementing legislation. Idaho Code §§ 42-234(2), 42-4201A(2) (emphasis added).¹⁷⁸

¹⁷⁷ Fourth Orr Aff., Exhibit 78 at 23 (page 1 of Minutes of Senate Resources & Environment Committee) (Mar. 11, 1994).

¹⁷⁸ The full text of the 1994 amendments to is as follows:

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

This is consistent with the Framework, which expressly contemplated “aquifer recharge projects,”¹⁷⁹ and with the Swan Falls Agreement and its implementing legislation, which expressly provide for subordination of the water rights held in trust by the State to **any** lawfully acquired water right: “The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” Idaho Code § 42-203B(2).¹⁸⁰ Nothing in the Swan Falls Agreement or the implementing legislation and State Water Plan amendments suggests that the water rights held in trust by the State may not be subordinated to lawfully acquired water rights for ground water recharge.

Moreover, the structure of Swan Falls settlement, and in particular the higher minimum flow in the non-irrigation season, demonstrates that the subordination provisions were intended to encompass, rather than exclude, recharge uses. Like surface storage, recharge involves the diversion of non-irrigation season flows, flood waters, and other “excess” or “surplus” flows.¹⁸¹ Idaho Power pointedly argued this fact in Ada County Case No. 62237, asserting that winter flows passing Milner Dam were “critical to winter power generation within Idaho Power’s

company on October 25, 1984, and ratified by the legislature pursuant to section 42- 203B, Idaho Code.

1994 Idaho Session Laws 852, 1397-98.

¹⁷⁹ First Orr Aff., Exhibit 29 at 7 (“Framework” at 7).

¹⁸⁰ The Swan Falls Agreement similarly provides that “[t]he rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.” First Orr Aff., Exhibit 30 at 29 (Exhibit 7B to Swan Falls Agreement); *see also id.*, Exhibit 30 at 4 (“such rights in excess of the 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”).

¹⁸¹ *See, e.g.*, Fourth Orr Aff., Exhibit 17 at 2 (“Artificial recharge would consist of diverting surplus surface flows of wet years . . .”); *id.*, Exhibit 18 at 5 (“store excess surface flows as recharge”); *id.* at 12 (“store excess winter surface water flow as recharge”); *id.*, Exhibit 31 at 1, 3 (“utilizing the aquifer as an additional upstream storage area for excess and surplus water”); *id.*, Exhibit 13 at 10 (“the possibility of artificially recharging it by diverting surplus surface flows”); *id.*, Exhibit 14 at 8 (“artificially recharging it through the diversion of surplus flows”). As also previously discussed, State and Federal planners—and Idaho Power—had long supported the diversion and storage of high flows for uses above Milner rather than spilling them past Milner Dam. Idaho Power’s attorney R.P. Parry said in a 1961 meeting with the Bureau of Reclamation that one of two foundational principles for managing the Snake River was “[s]pill no water to waste past Milner.” Fourth Orr Aff., Exhibit 10 at 1.

service area and for storage at the Hells Canyon project for meeting peak summer demands,” and that diversion of winter flows or spring flood waters passing Milner for recharge purposes would take water “that would otherwise be available for power generation.”¹⁸²

Thus, Idaho Power demanded—and obtained—generous protections for higher winter flows in the Swan Falls settlement: a winter flow minimum of 5,600 c.f.s. rather than 3,900 c.f.s., “mitigation” for winter diversions below Milner, and conditioning new storage above Murphy on a determination that existing storage was “fully utilized.”¹⁸³ These provisions—not a categorical ban on subordination to recharge water rights—gave Idaho Power the security it sought with respect to winter flows.

The ratification and implementation record for the Swan Falls Agreement further demonstrates that the Swan Falls settlement contemplated subordination of the water rights held in trust by the State to recharge water rights. Recharge was discussed at several times in the public hearings on the proposed amendments to Policy 32 of the State Water Plan necessary to

¹⁸² Fourth Orr Aff., Exhibit 24 at 4 (page 4 “Plaintiff’s Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment,” *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Feb. 19, 1980)). The Company also argued—incorrectly—that recharge diversions were not contemplated when Idaho Power agreed to the subordination provisions inserted in the Company’s Hells Canyon License. As previously discussed, Lynn Crandall’s 1953 report on future depletions above Hells Canyon—a report that Idaho Power offered into evidence in support of its application for a federal license in the Hells Canyon proceedings—expressly contemplated that spills at Miler would be “practically eliminated” and used, in part, for recharge:

it is quite likely that future years will see the flow of the upper Snake River controlled so as to practically eliminate spills past Milner . . . surplus flood flows that would otherwise spill past Milner can be diverted . . . and be dissipated by percolation and recharge wells into the lavas, thereby replacing in part the water consumed by ground-water pumping.

Fourth Orr Aff., Exhibit 7 at 7 (page 6 of “Future Upstream Depletion Above Hells Canyon,” by Lynn Crandall) (Apr. 6, 1953); *see also id.*, Exhibit 8 at 34 (page 10318 of Crandall Examination) (discussing “the diversion of waters that would otherwise spill down the river past Milner into the Columbia” for purposes of recharging the aquifer).

¹⁸³ First Orr Aff., Exhibit 30 at 26 (Swan Falls Agreement at Exhibit 6); *see also* Fourth Orr Aff., Exhibit 29 at 6 (page 16 of Summer 1985 edition of Western Natural Resource Litigation Digest) (“Commentary on Swan Falls Resolution,” by Patrick D. Costello and Patrick J. Kole) (discussing elements of the agreement intended “[t]o address this [winter flows] problem”).

implement the settlement.¹⁸⁴ Idaho Power representatives were in attendance but offered no objection, qualification or comment with respect to the status of recharge water rights under the settlement.¹⁸⁵ For instance, during the Idaho Water Resource Board's public information meeting a few days after the Agreement was signed, Board representative Frank Sherman explained that in one area of the state (the Little Lost River Valley), "[i]n a year of high flood flows, the surface water users don't need it, and it goes to recharge the groundwater system. I think that's what we're going to see happening all over the state."¹⁸⁶ Attorney Tom Nelson was present to explain the settlement on behalf of Idaho Power and made no objection, qualification or comment with respect to Mr. Sherman's statement.

Mr. Nelson was also present at the Department's public information meeting on the Department's anticipated rules and regulations for water appropriation, May 23, 1985, in Twin Falls. One speaker specifically asked: "How does this affect any proposed offstream recharge of the aquifer. It appears to be a conflict. Does that affect it?"¹⁸⁷ Later during the hearing, another speaker addressed "this recharge situation and the flow of the Snake River" at some length.¹⁸⁸ Mr. Nelson never suggested that the water rights held in trust by the State could not be subordinated to recharge water rights, or that recharge uses had any special or disfavored status

¹⁸⁴ See Third Orr Aff., Exhibit 25 at 19 (pages 65-68 of transcript of Idaho Water Resources Board public hearing on proposed amendments to Policy 32 of the State Water Plan) (Jan. 30, 1985, 2:00 p.m.) (Burley) (recharge discussion); see also id. at 46-48 (pages 53-61 of transcript of Idaho Water Resources Board public hearing on proposed amendments to Policy 32 of the State Water Plan) (Jan. 30, 1985, 7:00 p.m.) (Burley) (recharge discussion).

¹⁸⁵ See generally Fourth Orr Aff., Exhibits 63-68 (attendance sheets, written testimony and exhibits for Idaho Water Resources Board public hearing on proposed amendments to Policy 32 of the State Water Plan) (Jan.-Feb. 1985).

¹⁸⁶ First Orr Aff., Exhibit 45 at 9 (page 25 of transcript of Idaho Water Resources Board public information meeting on Swan Falls Agreement) (Oct. 31, 1984) (Lewiston) (emphasis added).

¹⁸⁷ Fourth Orr Aff., Exhibit 48 at 7 (page 21 of transcript of public information meeting) (May 23, 1985) (Twin Falls).

¹⁸⁸ Id. at 8-9 (pages 28-32 of transcript).

under the settlement, even though he did specifically comment on recharge uses under the trust arrangement.¹⁸⁹

The Agreement and its implementing legislation, rules and State Water Plan amendments thus contemplated that the water rights held in trust would be subordinated to lawfully acquired recharge water rights. The settlement also gave the Legislature the authority to change the statutory criteria for subordination of water rights held in trust:

The legislation also specifically ties the appropriation of water from the trust to conformance with “state law” and not to the new public interest criteria. This provides flexibility to the state in the future to change the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.¹⁹⁰

The Legislature exercised this authority in 1994 by enacting amendments to Idaho Code §§ 42-234(2) and 42-4201A(2), that limited the extent to which the water rights held in trust could be subordinated to ground water recharge water rights:

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 company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

1994 Idaho Sessions Laws 852, 1398. The Legislature may amend or repeal this provision at any time, and thereby allow the water rights held in trust to once again be subordinated to recharge water rights. The Legislature’s exercise of this type of policy flexibility does not cause Idaho Power any legally cognizable harm because subordination of the water rights held in trust by the State is tied to “State law” rather than particular types of uses or subordination criteria, and the State retains the prerogative change the subordination criteria in state law at any time. Indeed,

¹⁸⁹ *Id.* at 7 (page 23 of transcript) (“I don’t think that the surface water diversions for recharge above Milner are part of the trust waters.”)

¹⁹⁰ First Orr Aff., Exhibit 28 at 5-6 (pages 60-61 of 1985 Senate Journal) (“Statement of Legislative Intent – S 1008”).

Tom Nelson on behalf of Idaho Power acknowledged in response to a question from Representative Little that “there is a provision in the agreement that says the agreement remains binding even in the face of changes in state law. If the legislature wants to undo this whole thing next year, that is its prerogative.”¹⁹¹ **“This provides flexibility to the state in the future to change the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.”**¹⁹²

Accordingly, under the Agreement, its implementing legislation, and general State law, the State retains the right to subordinate the water rights held in trust by the State to ground water recharge water rights. Idaho Power is free to oppose the exercise of this legislative prerogative, as it did vigorously (and successfully) in the 2006 legislative session,¹⁹³ but it may not use judicial processes or “takings” claims to bar or otherwise limit or qualify the State’s right to change the law so as to allow lawfully acquired recharge water rights to subordinate the water rights held in trust within the trust water area downstream from Milner Dam. The State is therefore entitled to summary judgment on the second issue in the State’s Motion for Summary Judgment.

IV. THE HYDROPOWER WATER RIGHTS AT ISSUE IN THIS SUBCASE ARE SUBORDINATE TO RECHARGE WATER RIGHTS 01-7054 AND 37-7842, AS FINALLY LICENSED.

The third point in the State’s Motion for Summary Judgment requests a ruling that the water rights at issue in this consolidated subcase are subordinate to ground water recharge water

¹⁹¹ First Orr Aff., Exhibit 20 at 1 (Minutes of House Resources and Conservation Committee) (Feb. 11, 1985).

¹⁹² First Orr Aff., Exhibit 28 at 5-6 (pages 60-61 of 1985 Senate Journal) (“Statement of Legislative Intent – S 1008”) (emphasis added).

¹⁹³ See generally Fourth Orr Aff., Exhibit 79 at 11-26 (pages 11-26 of Minutes of Senate Resources & Environment Committee) (Mar. 27, 2006) (Idaho Power representatives Greg Panter and Jim Tucker speaking in opposition to 2006 House Bill 800).

rights 01-7054 and 37-7842, as finally licensed. These two water right permits are owned by the Idaho Water Resource Board.¹⁹⁴

Paragraph 7(C) of the Swan Falls Agreement provides: "The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 610540."¹⁹⁵ Idaho Power dismissed water rights nos. 01-7054 and 37-7842 from Ada County Case. No. 81375 on October 24, 1984, in the first of several "Notices of Dismissal" the Company ultimately filed in that case.¹⁹⁶

During the Senate Resource and Environment Committee hearings on the Swan Falls settlement, Senator Ricks asked Idaho Power's attorney Tom Nelson about the "1180 beneficiaries": "The group that you referred to as being dismissed, they were dismissed with prejudice, right?" Mr. Nelson replied: "Sure."¹⁹⁷ Mr. Nelson also characterized the dismissals from Ada County Case No. 81375 as meaning that "the power company is barred from ever challenging their water right."¹⁹⁸ In 2006, the State and Idaho Power Company reaffirmed in a "Stipulation" that the water rights that are the subject of the Swan Falls Agreement "are subordinated to 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement and neither party will contest nor otherwise oppose the exercise of those

¹⁹⁴ See Fourth Orr Aff., Exhibit 80 at 2 ("Stipulation" at 1¶ 1(c)).

¹⁹⁵ First Orr Aff., Exhibit 30 at 4 ¶ 7(C). The "contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540" is the "1180 Contract." See First Orr Aff., Exhibit 31 at 1 ("Contract to Implement -- Chapter 259, Sess. Laws, 1983").

¹⁹⁶ Fourth Orr Aff., Exhibit 81 at 3 (page 30 of "Notice of Dismissal of Certain Defendants," *Idaho power Co. V. State*, Case No. 81375 (Fourth Jud. Dist., Ada County) (Oct. 24, 1984) (listing water rights 01-7054 and 37-7842)).

¹⁹⁷ First Orr Aff., Exhibit 40 at 12 (pages 38-39 of transcript of Senate Resources and Environment Committee meeting) (Feb. 1, 1985).

¹⁹⁸ *Id.* (page 39 of transcript).

water rights on the basis of priority, the Swan Falls Agreement, or I.C. §§ 42-234, 42-4201 and 42-4201A.”¹⁹⁹

Given these clear statements of subordination in the undisputed record, the State is entitled to summary judgment that the hydropower water rights at issue in this consolidated subcase are subordinate to ground water recharge water rights 01-7054 and 37-7842, as finally licensed.

CONCLUSION

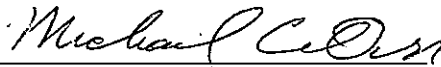
For the reasons set forth herein, the State of Idaho respectfully requests that the Court grant the State’s Motion for Summary Judgment.

DATED this 17th day of October 2008.

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STEVEN L. OLSEN
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¹⁹⁹ Fourth Orr Aff., Exhibit 80 at 2 (page 1 of “Stipulation”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2008, I caused a true and correct copy of the MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S AMENDED MOTION FOR SUMMARY JUDGMENT ON ISSUE OF RECHARGE SUBORDINATION to be served on the following parties by the indicated methods:

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